11/10

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)

WELLINGTON REGISTRY

Special Consideration

1249

M NO 128/84

IN THE MATTER	of the Town and Country Planning Act 1977
AND	
IN THE MATTER	of two appeals under section 162 of the Act
BETWEEN	KENNETH LAWRENCE BLOUNT AND OTHERS First Appellants
AND	THE WAITAKERE RANGES PROTECTION SOCIETY Second Appellant
AND	THE WAITEMATA CITY COUNCIL Third Appellant
AND	GORDON ERIC SUTHERLAND Respondent

A NO 125/84

IN THE MATTER	of Part 1 of the Judicature Amendment Act 1972
BETWEEN	WAITEMATA CITY COUNCIL a body corporate duly constituted under the Local Government Act 1974 and its amendments having its office at Auckland Applicant
AND	GORDON ERIC SUTHERLAND of Auckland, Farmer First Respondent

AND — DAVID FERGUS GEORGE SHEPHERD, PAUL ALLAN CATCHPOLE, KENNETH ARTHUR EARLES, all of Auckland and NEDRA JULIA JOHNSON of Christchurch being Chairman and Members respectively of the Planning Tribunal sitting as the No. 4 division

Second Respondent

AND — KENNETH LAWRENCE BLOUNT AND OTHERS

Third Respondents

AND — WAITAKERE RANGES PROTECTION SOCIETY INCORPORATED a duly incorporated society having its office at Auckland

Fourth Respondent

Hearing: 1 - 2 August 1984

Counsel: W.M.J. Marsh for Waitemata City Council
P.M. Salmon, QC, and W.M. Condon for Gordon Eric Sutherland
Mrs M.S. Hinde for Planning Tribunal (following appearance withdrew)
K.W. Berman and N. Browne for Kenneth Lawrence Blount and Others
Ms S. Elias for Waitakere Ranges Protection Society

Judgment: 20 SEP 1984

JUDGMENT OF JEFFRIES J

I open the judgment with a very brief outline of the subject of the litigation. Gordon Eric Sutherland is the owner of a block of land comprising 10.9568 ha fronting the west side of Parker Road, Oratia in the Waitakere Ranges. The block is about 1.5 kilometres south

from the junction of Parker Road and West Coast Road. Mr Sutherland has owned the land for about 30 years and in that time has contemplated several uses for it. On 30 September 1982 he applied to the territorial local authority, namely, the Waitemata City Council, for planning consent to permit the erection of a cluster housing development of nine dwelling units on the land. Following a hearing the Council declined the application in a written decision dated 16 December 1982. Mr Sutherland then appealed to the Planning Tribunal which appeal was heard by the Number Four Division comprising District Court Judge Sheppard, as Chairman, sitting with three other members. The appeal hearing took place on 25 and 26 August 1983 and in a reserved decision delivered on 16 November 1983 the appeal was allowed and the Waitemata City's decision cancelled. The Tribunal reduced the residential buildings (sic) to eight and imposed conditions, which amendments Mr Sutherland accepts.

I now deal with the procedures that occurred between publication of the Tribunal's decision and the hearing before me in Auckland sitting in the Administrative Division. The parties at the hearing of the appeal before the Tribunal who opposed Mr Sutherland comprised the City, a group of residents starting with the name Kenneth Lawrence Blount, numbering approximately 66, and the Waitakere Ranges Protection Society Inc. All three parties were dissatisfied with the Tribunal's decision and the following events took place.

All three respondents to Mr Sutherland's appeal decided to lodge an appeal to this court pursuant to s 162

of the Town and Country Planning Act 1977. In the case stated at paragraph 7 the following questions of law are posed for determination by this court:-

"(1) Did the Tribunal err in point of law in the interpretation which it gave to the term "cluster housing"?

(2) Did the Tribunal err in point of law in holding that the respondent's proposal was for "residential buildings" as the term is used in the definition of "cluster housing"?

(3) Did the Tribunal err in point of law in the interpretation which it gave to the phrase "grouped so as to lessen the impact of development on the environment" as the term is used in the definition of "cluster housing"?

(4) Did the Tribunal err in point of law in the determination which it gave to the phrase "grouped ... so as to provide an opportunity for the sharing of services and facilities" as the term is used in the definition of "cluster housing"?

(5) Was the Tribunal obliged by law in the circumstances of the case to apply section 72 of the Town and Country Planning Act 1977?

(6) If the answer to question (5) is Yes, did the Tribunal correctly apply section 72(2)(a) of the Town and Country Planning Act 1977?

(7) If the answer to question (5) is No, then was the Tribunal entitled to have regard to the criteria in section 72(2) of the Act?

(8) If the answer to question (7) is Yes, did the Tribunal consider those criteria in a manner which was correct in law?

(9) Was there any evidence before the Tribunal which was reasonably capable of supporting the following findings of fact:

(a) That the "cluster housing" proposed by the Respondent would be less disruptive to the environment than traditional subdivision of the land?

(b) That the property was physically suitable for the proposed development?

(c) That the proposed development would be in harmony with the natural character, the landscape and area in which it was located?"

Counsel had to consult with the Planning Tribunal in finalising the questions for this court and Judge Sheppard was of the view that question (9) did not ask a question of law which may properly be admitted in a case stated under s 162 of the Town and Country Planning Act. In a memorandum attached to the case stated he gave that as his decision, after hearing argument. Counsel for the

third appellant, namely the City, intimated that if it were excluded his client would seek judicial review of the decision. Question (9) was included in the case stated but Judge Sheppard further indicated it was at the express request of all counsel and his opinion was that it should not have been included in the case because it was not a question of law. The case stated was filed in March 1984.

In May 1984 the Waitemata City Council nevertheless applied for a review of the Planning Tribunal's decision pursuant to Part 1 of Judicature Amendment Act 1972 naming Mr Sutherland as first respondent, the individual members of the Tribunal as second respondent, the Blount group as third respondents and the Waitakere Ranges Protection Society as fourth respondent. The application for review is supported by a lengthy affidavit from the City's Town Planner, Henry Lewis Bussey, and there was, of course, filed a statement of claim. The application for judicial review in a doctrinaire way may have some justification in that it seeks to widen this court's enquiry into the validity of the Planning Tribunal's decision by challenging that Tribunal's analysis of the evidence. The purpose of the application was in effect to put the whole decision, law and facts, before this court. Perhaps there was no alternative but in the application to name the Blount group and the Waitakere Ranges Protection Society as respondents along with Mr Sutherland and the Tribunal itself, is somewhat Gilbertian. It suggests not all of Mr Sutherland's opponents were at one with this review procedure and, indeed, Mr Berman for the Blount group specifically confined his submissions to the first five questions of the case stated.

For reasons which by this point of the judgment are obvious the usual shortened way of identifying parties by use of such terms as "applicant", "appellant", "respondent" are simply unavailable. The following shortened terms will therefore be used:-

Gordon Eric Sutherland as "Sutherland"
Waitemata City Council as "the City"
Kenneth Lawrence Blount and others as "Blount"
Waitakere Ranges Protection Society (Inc) as "the Society"

Judicial conferences to solve procedures, and other problems, were unavoidable. The first conference was held before Mr Justice Casey on 30 May 1980 when Mr W.M.J. Marsh for the City sought an order directing the Tribunal to state the evidence on which findings detailed in the statement of claim were based. Mr McGuire, appearing for the Tribunal, indicated it would provide a transcript, and the judge left the question of relevancy for the hearing. At this conference the Tribunal, Blount group and the Society were relieved of filing statements of defence. It was also agreed the application and the case stated be heard together. Because of matters raised at that conference it was necessary to hold another, again before Mr Justice Casey, on 21 June 1984. By then it was discovered that tapes from the hearing before the Tribunal had been destroyed. I need not explore that further but Mr Justice Casey made an order that the Chairman of the Planning Tribunal state the evidence relevant to the issues in paragraphs 10 and 11(e) of the statement of claim additional to that already recorded and available.

I remark here that in the period between the second conference and the hearing Judge Sheppard did supply a document concerning evidence to fill the gap created by the destruction of the tapes. Overall the document was accepted by all parties as adequate in the circumstances. Another conference was held apparently before Mr Justice Casey on 4 July 1984 when urgency was given to the case which was ultimately set down before me sitting in Auckland on 1 August 1984. It seems there was another such conference on 18 July 1984.

In the argument before me Mr Marsh for the City opened the case, and in the end conducted it primarily on the case stated. Overall the Society, which supported the City's case, also approached the argument in effect adopting the case stated procedure. As remarked Mr Berman for the Blount group confined his submissions to a part of the case stated. In view of the foregoing as a policy of this judgment the court states it is able to reach its decision on the issues raised by the case stated, more particularly questions 1-4, which themselves are somewhat repetitive and over compartmentalised. The other legal questions of the case stated, namely, questions 5, 6, 7 and 8 received reduced prominence in the argument. I am in agreement with Judge Sheppard's view question 9 has no place in the case stated.

Before proceeding further the status of the City's town plan must be examined. The City publicly notified its Review to its District Scheme in August 1980 and by the time the appeal was heard before the Tribunal in August 1983 there were no objections or appeals

outstanding in respect of the provisions of the Review which were relevant, or would have affected the provisions of the Review as it applied to the uses for which Sutherland sought planning consent had the Review been operative. Under the Operative District Scheme the proposal would have had to have been treated as a specified departure but under the Review it was probably a conditional use. In fact in September 1982 Sutherland's application was for a conditional use under the Review. The City by its decision declining the application stated it did so under sections 74 (specified departure) and 75 (works contrary to a proposed change). Overall the body of its decision indicates it reached that decision principally by application of the specified departure criteria of s 74 but also made reference to conditional use criteria. The wording also strongly suggests, without precisely saying so, the City had in mind the Reviewed Scheme not the Operative Scheme. In effect to treat the proposal as a specified departure under either the Operative Scheme or the Review was probably justified caution. It is that decision on that basis which is restored by this judgment.

I turn back to an examination in greater detail of the proposal for which planning consent was sought. On 30 September 1982 Sutherland applied to the City for consent to enable him to use the subject land for the erection of nine dwellings as a cluster housing development as provided for in Landscape Protection 2 Zone of the Reviewed District Scheme. Under the Reviewed Scheme such is a conditional use. I move more precisely to details of Sutherland's application referring to the

Scheme Statement and Code of Ordinances of the Reviewed Scheme. Sutherland's application was for permission to erect nine dwellings at Parkers Road. The land had a Rural A zoning under the Operative Scheme with no such uses as of right, but a Landscape Protection 2 zoning under the Reviewed Scheme allowed for cluster housing as a conditional use. It will now be necessary to zig-zag between the Scheme Statement and the Code of Ordinances. We start with the Code, which defines cluster housing in the following way:-

> "Cluster Housing" means residential buildings grouped so as to lessen the impact of development on the environment and to provide an opportunity for the sharing of services and facilities."

I will need to return to that definition for its true meaning in the Code is the most important aspect of this case. At 11.2.4 of the Code under the heading "Conditions Relating To Cluster Housing" is contained the following:-

> "Criteria relating to the erection of cluster housing are contained in the Scheme Statement Sections 11.1(e) and 11.2(b). Although not to be regarded as final or complete, they provide guidelines for acceptable development."

Section 11 of the Statement is concerned with Non-Urban and Rural Residential Development. Section 11.1 is the Overview and 11.1(e) under that heading concerns Uses. Under Uses with a further sub-heading of Policies is the following, inter alia:-

> "That cluster housing be permitted as a conditional use in areas where the environment requires more sympathetic development than is provided by traditional subdivision and to allow for flexibility in housing form and lifestyle."

Perhaps moving downwards in particularity s 11.2 of the Statement then purports to deal with the non urban and rural residential zonings. Under s 11.2(b) there are contained further loosely worded descriptions of what the planners see as the objective of the zoning. Possibly the Scheme Statement is not to be regarded as part of the legislative provisions of the operative scheme having the force and effect of a regulation in force under the Act. See s 62(1) of the Act. However, it is still an influential part of the Scheme. The buzz word "sympathetic" is over used and generally the language is descriptive lacking precision and clarity to such an extent that the objective itself is blurred. Framers of Codes should remember they are writing legislation and should use language appropriate to that task. The goals are clarity, certainty and communication. Much the same strictures apply to Scheme Statements.

I return to the definition of cluster housing under that heading in the Code. The definition section itself is quite lengthy and predominantly uses the word "means" following the word or phrase to be defined, but there are odd exceptions such as "household" and "marae" which both use "includes" rather than "means" and "medical auxiliaries" which uses neither. Use of the word "means" indicates a narrower and more exclusive definition. I do not think the usual rules of statutory construction about

"means" or "includes" can be used to much effect here. The definition section of any statutory instrument yields to no other section in importance and it is here the greatest emphasis should be placed on precision in use of language.

In my view the purported definition of cluster housing is in reality not a true definition but a description. In the Concise Oxford Dictionary definition is defined as "stating the precise nature of a thing or meaning of a word; form of words in which this is done". A description in the same dictionary is defined as "describing, verbal portrait(ure) of person, object, or event". I think that the framer of the so-called definition of cluster housing has not defined a phrase but described an image in his mind of what he thought cluster housing would look like. It is a verbal portrait, and inadequate at that. I would have thought in any attempted definition of cluster housing some effort would have been made to define accurately the true meaning of the adjective "cluster" in the phrase. Again from the same dictionary the word is defined as "group of similar things, especially such as grow together, bunch; swarm, group, of persons, animals, etc." I would also think the term residential buildings is far too vague. A residential building could fairly include either single or multiple units. The reductio ad absurdum might be two eight storey blocks of flats standing next door to each other. The short point is that the inadequacies of the so-called definition are massive.

The court's task is not simply to criticise, although that necessarily must be done so that the assumption the definition is capable of yielding a

sensible meaning is challenged. Insofar as this court can extract a sensible meaning from the definition it is that cluster housing should comprise a group of residential buildings (the units limited in some fashion) sharing services and facilities so as to reduce the effect on the environment which occurs with a conventional sub-division (the phrase "traditional sub-division" occurs in the Code but conventional is perhaps sharper in this context) where each separate residence requires shared and individualised services such as legal streets, footpaths, power, water, sewer, storm water, telephone, etc. Perhaps the thought behind cluster housing is to attain by grouping a sharing of services and facilities which when individualised for conventional single residences normally impact forcefully and detrimentally on an environment itself requiring careful handling. Immediately it is obvious the court has gone outside the actual words of the so-called definition for the reason the definition is a description which requires the importation of further ideas in an endeavour to extract a meaning from the words used. The backdrop to analysing the term cluster housing in the Code is that the City is attempting to introduce flexibility into its Scheme so as to allow in a careful and controlled way some residential development in non urban areas because it sensibly recognises a significant group of people in the community want to live like that. It is a sine qua non the environment, of which we are speaking, has a fragility which requires special protection.

It is appropriate here to mention the provisions contained in the Code which might allow a conventional sub-division for I think in this case an important aspect

of the definition is a contrast between cluster housing and such a conventional sub-division. The sub-division of land in the Landscape Protection 2 Zone is subject to the requirements of the Code as set forth in Ordinance 11.2:5. The minimum area for sub-division is 4 ha. per allotment with a minimum road frontage of 50 metres. As the property has a road frontage of 94.88 metres, which is less than the required minimum frontage of 50 metres per lot to a formed road, the property could not be sub-divided as of right, but would require a dispensation from the City.

The point has now been reached in the judgment making it necessary to examine even more closely details of the scheme advanced by Sutherland and then to make the decision whether the Tribunal correctly applied the legislative definition of cluster housing to this scheme thereby allowing it to proceed. The broad outlines of the scheme are contained on a coloured plan prepared by Sutherland's development consultants, M.G. Easton & Partners. Very approximately the site is oblong in shape running broadly east to west. At the rear runs the Oratia Stream and near to the front of the land it about halves its width to reduce to a road frontage of 94.88 metres. Roughly half of the land at the front of the block, about 5.3 ha, is devoted to the nine building sites and the remaining half is to be left in its natural state. There is provided a central carriageway onto the residential block and from this carriageway further smaller driveways branch off to the building sites ranging from 2,300 to 6,700 square metres each. These would be protected for individual owners by leases and negative covenants.

Towards the rear of the residential block is an area designated "common area" and about the middle nearer to the southern boundary is an area marked lake. The building sites are distributed (to choose at this point a neutral word) evenly about the 5.3 ha. residential block. By evenly is meant the building sites occupy the whole residential block with ample space between each although as would be expected some are nearer to others. For example five is a long way from six which itself, on the plan, is very much closer to seven. Within the confines of the total area of 5.3 ha. the fairest words I would use to describe the distribution is that the building sites are generally an even scatter or spread, and by contrast I would not describe them as a group or a cluster.

To return again to the true meaning of cluster housing. I think it signifies a group of residential buildings (somehow limited as to units) so sited in proximity to each other on a block of land that they are able conveniently to use in common with each other services and facilities normally used by residential buildings with intent that such proximity and consequential use of common services will reduce the detrimental impact of development on the environment.

Perhaps the first step on the final path to this judgment is to ask whether the Tribunal in its decision correctly interpreted the definiton of cluster housing in the Code. Enough has already been said about the glaring inadequacy of the definition, but granting that, this court's view is the Tribunal did not give to the definition its correct construction. Where then did it go

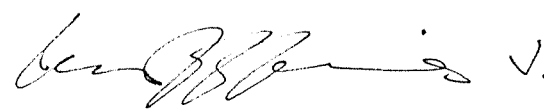
wrong? Certainly not in the importance it gave to the definition in its decision. The Tribunal fully understood the definition was the central matter of law it had to decide. It spent about a sixth of the whole decision on it. Mr Berman, in his argument, conducted a close critical analysis of the reasoning of the Tribunal submitting to the court it was in error. This judgment does not intend to examine that part of the Tribunal's decision with a spider's eye, but rather contents itself with the following observations. First, the Tribunal broke the definition down into three parts and examined each separately. As I said earlier in this judgment the central point is the true meaning of cluster and the definition does not assist much with that word and the Tribunal did not wrestle with it. In terms of buildings, one to another in proximity, I think cluster is a much stronger word than group, and conveys greater nearness, approaching almost contiguity without achieving it. Probably the best synonym for the noun cluster is bunch. Secondly, I do not think the Tribunal confined itself to the 5.3 ha. which was the residential block and looked at the actual distribution of the building sites on that block. Instead the approach to the cluster, or group, aspect of the housing was to try to reach the meaning by using dictionary definitions which, at best, are of limited value in this field. This would not be the first judgment to recall Humpty Dumpty's stricture about which is the master on the meanings of words. Again I repeat concentrating on the plan the building sites are anything but a group, or a cluster, for they are a scatter, or spread, on that block. The only sense in which one could say they are grouped is that they are located on less than one half of the total area of 10.9568 ha.

I can now conclude fairly briefly on the proposal. Isolating the proposal from any previous decision such as the Tribunal's, or any contrast, to which I will return in a moment, the placing of the building sites on the residential block does not, in my view, attain the central goal of the definition which is for there to be first a cluster or group of houses so that the group uses in common the services and facilities required for dwellings. It must be admitted to some extent the definition is met, for example, the part of the land devoted to the central carriageway and accessways to the building sites is very much reduced and thereby the impact on the environment is reduced. Also by placing eight or nine sites on an area as large as 5.3 ha. is not intense use of the land and to that extent the impact of the development is lessened on the environment. However I return to the central point, which is the group or cluster, and that is not evident for reasons I have already stated.

Finally, I think the aforementioned conclusion can be tested by contrasting it with the conventional sub-division. For myself applying what judgment I can to the proposal it does not seem to be anything other than a traditional, or conventional, sub-division absenting, of course, title and property ownership aspects and street formations. The plan to which I have referred, and on which this judgment is based, appears simply as nine sites distributed around a large block of land allowing a great deal of space to each building site. That, in this court's view, is not cluster housing but in practical terms a location of sites as would be found on a familiar sub-division of land for residential purposes.

I return to questions 5, 6, 7 and 8 of the case stated. This judgment has decided the Tribunal erred in law in construing the phrase cluster housing and in concluding Mr Sutherland's proposal came within the Code definition. In effect answers to questions 5, 6, 7 and 8 are therefore not necessary. Perhaps something should be said. The disposal of procedural matters over the Review have been completed and one assumes it is about to become operative. In those circumstances the sensible, and probably the legal, approach was to examine the proposal as a conditional use which it was under the Review. However it failed because it did not come within the Code definition.

The appeal succeeds with the answer 'yes' to question 1 in the case stated. The other questions in the case stated do not require answers and I apprehend I need make no order pursuant to the motion for review. If counsel have other views they may be covered in memoranda to the court as I ask for submissions in that form on the question of costs. To avoid misunderstanding the decision of the City to decline the proposal is restored.



Solicitors for Waitemata City Council	Earl Kent & Co.
Solicitors for Gordon Eric Sutherland	Wynyard Wilson
Solicitors for Kenneth Lawrence Blount and Others	Kensington Haynes & White
Solicitors for Waitakere Ranges Protection Society	Ms S. Elias