IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY M.329/83

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under section 162 of the Act

BETWEEN THE CHRISTCHURCH CITY COUNCIL
Appellant

AND RILEY and another
First Respondents

AND T & G MUTUAL LIFE SOCIETY LIMITED
Second Respondent

Hearing 13 March 1984 (at Christchurch)

Counsel J G Fogarty and Heather Hodgson for appellant
G H Gould for first respondents
D J Clark for second respondent

Judgment 16 March 1984

JUDGMENT OF DAVISON C.J.

This is a case stated posing five questions of law for the determination of this Court. Although there are five questions, the answer to question (a) really leads to the answers to the other four.

THE FACTS

In its 2nd Review of the Christchurch District Planning Scheme the appellant placed emphasis on revitalising the central commercial district. The scheme statement, especially in Chapter 9, refers to the Central Commercial District as the hub of social business life in Christchurch. It comments upon the large capital investment in the area; the threat posed by the growth of suburban shopping areas and the need to strengthen the Central Commercial District as the main retail and social focus of the region and the

establishment of an amenity linkage between the Art Gallery and Museum - Town Hall - Victoria Square - Cathedral Square and the Cashel and High Street Malls.

As some of the policies and proposals directed towards revitalising the Central Commercial District, the statement refers under the heading of "Amenity Proposals" to the inclusion of the Cashel-High Street Malls indicating that such, along with other proposals referred to, would form part of the total city traffic, pedestrian and amenity plan.

Chapter 14 of the Scheme Statement refers to the Performance Elements and Standards to be adopted, and under Nos. 16 and 17 deals with "Daylight admission to roads" and "Sunlight admission to special pedestrian areas" respectively. No 17 referring to "Sunlight Admission" states:

> " The objective is to ensure that buildings do not cast shadows for unreasonable periods over special areas of high pedestrian activity such as Cathedral Square and the proposed Cashel and High Street malls. "

Elements 16 and 17 led to appropriate provisions being included in the Code of Ordinances; Ordinance No 6 for Commercial Zone 5 which embraces the core of the Central Commercial District. The zone statement notes:

> " Buildings fronting special pedestrian areas such as the proposed Cashel Street Mall and Cathedral Square need to comply with special recession planes the objective being to encourage buildings which will admit sunlight to those areas. "

Ordinance 6(2)(vi) "Daylight admission to roads" imposes a 65° recession plane on buildings except tower blocks. Ordinance 6(2)(vii)"Sunlight admission to special pedestrian areas" provides in relation to the Cashel Street and High Street Malls:

> " No building which has frontage to, or is in the vicinity of the proposed Cashel and High Street Pedestrian Malls, shall be constructed or extended so that it casts a shadow on the ground

at 12 noon (Local Mean Time) on
22nd March and 22nd September,
beyond the lines AB, CD and EF,
as shown in appendix P. "

The result of those Ordinances is that the Daylight Admission Ordinance imposes a 65^{o} recession plane: the Sunlight Admission Ordinance imposes a 47^{o} recession plane.

The respondents both own properties in the Cashel Street-High Street Malls (which I shall hereafter refer to as "the malls"). The first respondents ("Rileys") own a property at the north-west corner of Cashel and Colombo Streets. There is a new building on the site which has been built to three floors but has been designed to be extended to six. It could be erected to that height if it were not for the restriction imposed by the Sunlight Admission Ordinance No 6(2)(vii).

The second respondent ("T & G") owns all the land bounded by High Street, Colombo Street and Cashel Street except for one property at the corner of Cashel and High Streets. It intends to redevelop its whole property. It has already commenced by erecting a building two storeys high fronting Cashel Street. The sunlight ordinance will, however, restrict later building construction.

Both respondents objected to the appellant against the Sunlight Admission Ordinance. Their objections were disallowed. They appealed to the Tribunal. The Tribunal allowed their appeals and directed that the ordinance shall not apply to either of the respondents' properties.

The reasons for the Tribunal's decision may be best summarised by quoting several passages from the decision itself, bearing in mind the rival contentions of the appellant and the respondents. The appellant contended that the Sunlight Admission Restriction was imposed as a normal part of the building performance standards of its District Scheme and accepted that, imposed as it is as a zoning control, the restriction would not give rise to any entitlement to compensation in the way that it would if it had been imposed by designation.

The respondents, on the other hand, contended that the Sunlight Admission restriction is being imposed as part of a public amenity provided by a public work - the provision of the pedestrian mall - that it would be fair and reasonable to the appellant that restriction be imposed by way of designation so that the respondents would be able to seek compensation. The passages from the decision are these:

> " We find that the imposition of the restriction is an integral part of the setting up of the pedestrian malls. We agree with Mr Clark's submission that it is a component of that work in the same way as the provision of paving, seating and trees. "

> " The question is whether they should be expected to endure that diminution (in value of their properties) without compensation as part of the general body of building controls which may affect some properties more severely than others, or whether the restrictions should not be imposed except in such a way that they are entitled to compensation from the public authority responsible for the undertaking of the public work. "

> " We have concluded that we should answer it by reference to whether the restriction can fairly and reasonably be seen as part of the general body of restrictions on building for the benefit of the general purposes of the district scheme, or whether it is more truly seen as part of a public work which is undertaken by a public authority. "

> " We have concluded therefore that the sunlight admission control cannot fairly and reasonably be seen as part of the general restrictions on building for the benefit of the general purposes of the district scheme, but rather that it is more truly seen as part of the pedestrian malls which are a public work which is being undertaken by the respondent as a public authority. Its effect is to limit and restrict the private property rights of the appellants beyond the extent to which they would be limited and restricted without that

> public work. In our judgment it would be inequitable and unreasonable for the restriction to be imposed for the benefit of that public work without the owners of those rights being recompensed on behalf of the public for bearing that limitation or restriction. "

THE QUESTIONS IN THE CASE

The five questions for the opinion of this Court are:

(a) Was the Tribunal right in law, particularly at page 7, 3rd paragraph, to draw a distinction between restrictions for the benefit of the general purposes of the District Scheme and restrictions for the benefit of a public work which is furthering the general purposes of the District Scheme?

(b) If the answer to question (a) is 'Yes', was the Tribunal right in law to use this distinction as the standard for assessing the reasonableness of imposing the sunlight admission restrictions as a zoning control without entitlement to compensation, in these particular cases?

(c) Was the Tribunal right in law in determining at page 8 of its decision that the sunlight admission control cannot fairly and reasonably be seen as part of the general restrictions on building for the benefit of the general purposes of the District Scheme?

(d) Was the Tribunal right in law in determining at page 8 of its decision that the sunlight admission control is part of the pedestrian mall?

(e) If the answer to any of the above questions is 'No' then what is the consequence of such a finding?

DECISION

Before answering those questions I propose to deal with several general matters relating to the power of the appellant to impose sunlight admission restrictions.

Under the Town and Country Planning Act 1977 the appellant is empowered to impose such restrictions as part of its District Scheme. Section 36(1) "Contents of District Scheme" provides that:

> " Every district scheme shall ... make provision for such matters referred to in the Second Schedule to this Act as are appropriate to the circumstances or as are necessary to promote the purposes and objectives of district planning set out in section 4 of this Act."

The Second Schedule "Matters to be dealt with in District Schemes" includes in clause 7(g) "access to daylight and sunlight".

It was pursuant to those provisions that the appellant dealt with access to daylight and sunlight in its Scheme Statement and imposed the controls found in Ordinance No 6(2)(vi) and (vii).

The construction of the malls was a public work. That work was carried out by the appellant under the authority of s 238(c) of the Local Government Act 1974 and in accordance with the provisions of the Public Works Act 1981. There is, however, no power or authority in the Public Works Act enabling the appellant to impose any restrictions on adjoining properties as part of a public work, so that the appellant in carrying out the public work of constructing the mall was not entitled under the Public Works Act as part of that work to impose any sunlight admission restrictions on the respondents' properties or any other properties. The only power the appellant has to impose sunlight admission restrictions on properties adjoining a public work is to be found in the Town and Country Planning Act, s 36(1) Second Schedule. That section gives power to impose provisions relating to access to daylight and sunlight

generally and s 36(8) gives specific power in relation to public works which are essential works. Such restrictions, however, are included in its District Scheme as part of the Planning Scheme. Section 36(1) has already been referred to. Section 36(8)(c) provides:

> " A Council shall include in its district scheme such provision as it thinks necessary in respect of -
>
> (c) Other land, or any water, subsoil, or air space, in respect of which a restriction is necessary to ensure the safe or efficient functioning or operation of any public work which is an essential work ... "

It will be noted that that subsection refers only to "restrictions" which may be imposed. The Sunlight A restrictions are not themselves a public work or part of a public work. They are controls incorporated in the District Planning Scheme as part of the planning process to enable the public work - the pedestrian mall - to function more efficiently, i.e. attract the public to a greater use of the mall. The authority to impose such restrictions comes from the Town and Country Planning Act not from the Public Works Act and I think it is wrong to regard them as part of a public work. At best they are planning controls acting in support of a public work.

In the present case it should be noted that the Sunlight Admission controls are not limited to the malls. They also apply to properties fronting on to and in the vicinity of the northern side of Cathedral Square. They are some distance to the north of the malls. It cannot be said therefore that they are restrictive of the properties fronting onto or in the vicinity of the malls alone and that they are imposed specifically as part of that public work. The Tribunal appears to have overlooked this aspect of the matter when it said in page 8 of its decision:

> " We have concluded therefore that the sunlight admission control cannot fairly and reasonably be seen as part of the general restrictions on building

> for the benefit of the general purposes of the district scheme, but rather that it is more truly seen as part of the pedestrian malls which are a public work which is being undertaken by the respondent as a public authority. "

The Tribunal has apparently approached these appeals on the basis that it was unreasonable for the appellant to have imposed sunlight admission controls by way of planning restraints which could not enable compensation to be sought by the respondents and it considered it would have been more reasonable for it to have imposed them by a method entitling the respondents to claim compensation.

It did not deal at any length with how this could be done except to find that the controls were part of the public work - the construction of the malls - and then suggest that possible techniques may be -

(a) Acquiring the air space above the appellant's sites.

(b) Acquiring some lesser estate or interest in that air space.

(c) By imposing a restriction under s 36(8) of the Town and Country Planning Act by designation.

There is little doubt that the appellant was entitled to impose sunlight admission restrictions by way of zoning restrictions. The method adopted was for the appellant to decide: see s 36(1) and (8) of the Town and Country Planning Act. It chose planning zone controls.

The Tribunal has said that was unreasonable; that the controls were part of a public work and that they should have been applied by adopting one of the three techniques above referred to. But the control of sunlight admission is not part of a public work. The Tribunal cannot make it a part by just saying it is unless it also falls within the definition of "public work" as contained in the Public Works Act 1981.

"Public work" which has the same meaning in both the Public Works Act 1981 and the Town and Country Planning Act 1977, does not include restrictions on adjacent properties. A "public work" as defined in the Public Works Act 1981 is:

> " Every work which the Crown or any local authority is authorised to construct, undertake, establish, operate, or maintain, and every use of land which the Crown or any local authority is authorised to establish and continue, by or under this or any other Act; and includes any thing required directly or indirectly for any such work or use. "

Restrictions on bulk and location requirements such as imposed by Ordinance 6(2)(vi) and (vii) affecting daylight and sunlight admissions are not in terms of that definition -

(i) a work;

nor (ii) any use of land by the Council authorised by statute;

nor(iii) anything required directly or indirectly for such work or use.

There does not appear to be any power to acquire air space or some lesser interest in air space as being a public work or part of it and there is no authority to acquire such as simply providing additional benefits for a public work, i.e. the malls. The Legislature appeared to recognise that by enacting s 36(8) which permits a local authority to impose "restrictions".

Problems would appear to arise also in attempting to impose a restriction under s 36(8) by way of designation. Although s 36(8) refers to restrictions on air space they must be in relation to a public work which is an "essential work" as defined in the Public Works Act and there may well be some doubt as to whether a pedestrian mall falls within that definition in s 2. There are included in that definition clause (f) "Any road, motorway, access way, service lane, railway or aerodrome".

The only works which may be considered as including a pedestrian mall are - a road, access way, service lane - all of which are defined in s 315 of the Local Government Act 1974. By definition "access ways" and "service lanes" do not appear to include a pedestrian mall. A comparison of the definition of "road" in s 315 and reference to "pedestrian mall" in s 336 may lead to the conclusion that a road or part of a road may be a pedestrian mall. This may be so even though the work being carried out is not the construction of a road as such but the construction of the mall.

It would seem, however, that a road is included in the definition of "essential" work for the very good reason that roads are necessary to enable movement of the public, but pedestrian malls are hardly necessary although they may for various reasons be very desirable. However, in the view that I take of this case, it is not necessary for me to decide that issue and it is undesirable that I attempt to do so unless I have the benefit of argument upon the point. Suffice it to say that, in my view, the sunlight admission controls are not a public work or part of a public work but are properly part of the zoning controls imposed for the purposes of the District Scheme and that whether the appellant can act in any of the three ways that the Tribunal suggests is open to question.

I now answer the five questions of the case:

QUESTION (a)

The Tribunal was wrong in law in drawing the distinction between restrictions for the benefit of the general purposes of the District Scheme and restrictions for the benefit of the public work. It has, I think, misinterpreted the Reviewed District Scheme in reaching the conclusion that it did. The public work was carried out in furtherance of the general purposes of the District Scheme. The District Scheme Statement itself refers to

the establishment of amenities of which the malls are only one example.

(p 22) " Amenities

The protection and enhancement of the amenities and the visual qualities of the Central Commercial District was an important planning objective of the 1972 Scheme. The Council's 1967 planning document 'Christchurch Development' set out the proposal for an 'amenity linkage' from Victoria Street through Cathedral Square to High and Cashel Streets and back via the Avon River to Victoria Square. "

(p 24) " Amenity proposals

Public amenity proposals include the Cashel and High Street Malls, remodelling of Victoria Square, and tree planting. The possibility of introducing pedestrian amenity features into New Regent Street will also be considered. Reserve contributions received from Developments within the Central Commercial District shall be used where possible, to assist in the financing of works on reserves. All of these works form part of the total City traffic, pedestrian and amenity plan and in the case of Malls, the only unresolved details are local management details of servicing and architectural design.

Development controls include mandatory requirements which are applicable to certain development proposals, whether public or private such as building setbacks, landscaping, shadow and outlook protection, compulsory shopping frontages, verandahs, tree protection, preservation of historic buildings and building design and appearance. "

And the malls are only one area affected by Sunlight Admission Regulations - Cathedral Square also!

The Tribunal asked itself the wrong question when it said :

" The question is whether they should be expected to endure that diminution without compensation as part of the general body of building controls which may affect some properties more severely than others, or whether the restrictions

> should not be imposed except in such a way that they are entitled to compensation from the public authority responsible for the undertaking of the public work. "

The Tribunal should have directed its attention to the reasonableness of the sunlight admission restrictions imposed by the appellant as a zoning control and not to have considered some other suggested methods of imposing restrictions which the appellant did not see fit to adopt. Whether or not the respondents will be entitled to compensation must be decided on the basis of the statutory provisions as they apply to persons affected by the zoning proposals. The Legislature has authorised sunlight admission restrictions by way of zoning controls. If it considers that such controls justify compensation then that is a matter for which statutory provision can be made. See Laing v Waimiri County /1979/ 1 NZLR 321.

The answer to Question (a) must be NO.

QUESTION (b)

In view of the answer to Question (a), the answer to this question must be NO.

QUESTION (c)

In view of the previous answers, the answer to this question is NO.

QUESTION (d)

The answer is NO.

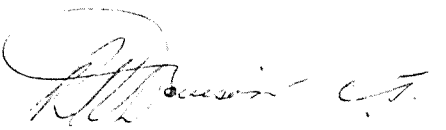
QUESTION (e)

The consequences of the findings relating to Questions (a) - (d) above are that the Tribunal asked itself the wrong questions. The Tribunal should now reconsider the matter on the basis -

(a) That the sunlight admission controls are for the general purposes of the scheme relating to the Central Commercial District.

(b) The controls are not part of a public work - the malls.

(c) The sunlight admission controls should be considered as planning controls without reference to questions of compensation.



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