Law Reports

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION

M NO 216/84

WELLINGTON REGISTRY

3/8

848

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under Section 69 of the Act

BETWEEN CRAIG KINNIBURGH LIMITED

(Appeal No. 823/82)

Appellant

AND PALMERSTON NORTH CITY COUNCIL

Respondent

Hearing: 29 June 1984

Counsel: R A McGechan for Appellant
JCA Thomson for Respondent

Judgment: 5 July 1984

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JUDGMENT OF JEFFRIES J

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This is an appeal to this court on a case stated from the No. 2 Planning Tribunal pursuant to s 162 of the Town and Country Planning Act 1977. The facts are as follows. Appellant operates a service station at 283 Fitzherbert Avenue, Palmerston North, pursuant to a planning consent by the respondent Council, dated 25 August 1980, as varied by an order of the Tribunal dated 19 December 1980. The original application by appellant to respondent to establish the service station was for a conditional use and there were very many objectors drawn from the residential area around the then proposed service station. The respondent granted consent to a conditional use imposing many conditions, but for the purposes of this appeal the court need only mention

the hours of operation of the repairing of motor vehicles were limited to between 7.30 a.m. to 7.30 p.m., Monday to Saturday, and the retailing of LPG was excluded. The objectors lodged an appeal against that decision of the Council dated 25 August 1980 but the appeal did not proceed to a hearing because there was a consent order of the Tribunal dated 19 December 1980 which added two conditions to the decision of the respondent, namely:-

(t) That no CNG refilling station be erected and no CNG sold from or stored on the site.

(u) That the hours of operation of the service station including the sale of motor spirits be restricted to between the hours of 7.00 a.m. and 10.00 p.m. each day.

In all other respects the decision of the respondent was confirmed.

Appellant subsequently applied to the respondent, pursuant to sections 71 and 74 of the Town and Country Planning Act, for planning consent to (inter alia) -

(a) Vary the hours of operation to allow the premises to be open for business at such times as the applicant shall desire.

(b) To install a dispensing unit for CNG fuel for motorists and to sell such fuel.

The application was declined by the respondent. The appellant appealed to the Planning Tribunal upon the grounds (inter alia):-

(a) Since the granting of the original consent and the establishment of the service station, the circumstances have now changed and it is apparent that a service station on the appellant's site providing flexible hours of service would be in the public interest.

(b) Since the granting of the original consent, the technical knowledge relating to the safety of CNG has gained a wider understanding and as a result of the policy of Central Government relating to the use of alternative fuel, the provision of a CNG dispensing facility at the service station would be in the public interest.

The appeal to the Planning Tribunal was dismissed and the reasons for dismissing the appeal will become clear from the following questions of law which are stated for the opinion of this court:-

(a) Did the Tribunal in taking into account consent by the appellant to the order of the Planning Tribunal dated 19 December 1980 take into account an irrelevant consideration, namely the consent of the appellant thereto?

(b) (This was a question mainly of fact and abandoned by appellant in this court.)

(c) Was the Planning Tribunal right in law in the circumstances in finding that it had no

jurisdiction to delete or amend the relevant conditions (t) and (u) added to the Council consent by the order of 19 December 1980?

(d) Was the Tribunal right in law in not considering or if considering not stating its determination upon the appeal pursuant to s 74 Town and Country Planning Act 1977?

As can be deduced from questions (a) and (c) above the Planning Tribunal laid considerable emphasis on the fact that appellant had consented to the order of 19 December 1980 and should not seek to vary that order by an application under s 71 of the Act. I do not think a consent order precludes an application to vary at a future date if the criteria of s 71(1) of the Act are available to an applicant, but nevertheless any Tribunal acting reasonably would give weight to a consent order as being likely to carry more influence than if the previous decision had been arrived at following a fully opposed hearing. The argument advanced to the court on behalf of the respondent by Mr Thomson was in accord with that view. It is true that the Tribunal, by some language used in its decision, seemed to indicate that if a consent order was made it did not have jurisdiction at a future time to vary it. If the Tribunal did decide it had no jurisdiction because of a consent order then it was wrong. For myself I am inclined to the view that in saying "We can thus find no basis for holding we have jurisdiction ...." the Tribunal was simply saying there were no grounds that a change in circumstances had caused the conditions to become inappropriate or unnecessary, but this sentence is subject to the effect of

actually using the word "unreasonable" instead of "unnecessary" which issue is dealt with hereafter. If an application to vary is brought so soon after a consent order as to suggest vexatiousness or contumaciousness, then the Tribunal should say so, and perhaps impose costs.

Question (d) of the case stated relates really to the omission by the Planning Tribunal to make any reference other than at the commencement of its decision on the application under s 74, which was for a specified departure and dismissed by the respondent. Counsel for appellant in this court simply wanted a statement from the court to the effect that the Tribunal should have dealt with that application so that there is no impediment in the future through the possibility of a previous one existing without final disposition. So that there can be no misunderstanding the Tribunal should formally have disposed of the application under s 74 by dismissing it and this court does. The court adds it considers this omission de minimis, and if this were the only error it would not have declared the decision wrong.

Arising out of the questions in the case stated attention was drawn to the following passage from the judgment:-

> "The appeal relating to CNG and the hours of operation can be shortly disposed of. The appellant has obtained planning consent and has taken advantage of the consent so granted. Opposition to the service station was withdrawn by objectors on the basis of the acceptance by the appellant of the two conditions.

> There has been no change in circumstance with in the meaning of s.71 of the Town and Country Planning Act 1977 which has caused the conditions to be either inappropriate or unreasonable".

The relevant words of s 71 of the Act are as follows:-

> "... a change in circumstances has caused the condition, restriction, or prohibition to become inappropriate or unnecessary."

No explanation was proffered to the court why this particular wrong use of a word in the decision was not made a question in the case stated. However, this court is of the opinion it cannot be overlooked in an argument on the law and regrettably the court must find an error, and say so explicitly. The court has not the slightest doubt that the Tribunal understands that the word used in s 71 is "unnecessary" and not "unreasonable" for it has published several previous decisions using the correct statutory language. However the word used in this decision is "unreasonable" and that clearly is not the test. If the word appearing in the decision had been say "unseasonable" it might have been written off as a typographical error but the word used is "unreasonable" and there are just sufficient shades and overtones in the language used elsewhere in the decision to make the argument tenable that the word "unreasonable" did influence the Tribunal in this particular hearing rather than the word "unnecessary".

The specific questions of the case stated are answered as follows:-

(a) "No".

(c) The exact question is ambiguously phrased. The court's answer is "No" if the no jurisdiction finding was based on existence of a consent order, which is not this court's view of the finding of the Tribunal, as set out in the body of this judgment.

(d) The Tribunal should have formally stated its determination upon the appeal of the s 74 application which was before it.

The answers to the questions contained in the case stated are that there were two errors of law (with qualifications) but in addition there was the error concerning the wrong use of the word "unreasonable" and together they must bring about the result the decision on these issues of the Planning Tribunal in law cannot stand.

Solicitors for Appellant: Jacobs Florentine & Partners, Palmerston North

Solicitors for Respondent: Cooper Rapley & Co., Palmerston North