Set I

IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

M.475/83

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal pursuant to Section 162 of the Act

BETWEEN DONALD DESIGN LIMITED
First Appellant

AND WELLINGTON CITY COUNCIL
Second Appellant

AND HELEN MARY BLACK, BRUCE MEARNS MACKIE and BARBARA ANN TAYLOR
Respondents

Hearing 4 April 1984

Counsel C Anastasiou and Ms S E Kenderdine for first appellant

M A Ray for second appellant
S S Williams and B Walworth for respondents

Judgment 13 June 1984

JUDGMENT OF DAVISON C.J.

A case stated by the Planning Tribunal (Number Two Division) contains twelve questions for determination by this Court. They arise out of the grant by the Wellington City Council ("the Council") to Donald Design Limited ("Donald Design") of a height dispensation in respect of an apartment block proposed to be constructed at 166-168 Oriental Parade Wellington.

THE DISTRICT SCHEME AND RELEVANT FACTS

Under the Wellington City Council Operative District Scheme the land is zoned Residential D. There are no predominant uses in the Residential D zone which

generally allows buildings up to 30 metres in height with a 4.57 metre front yard and a 3.5 metre side yard.

In the Wellington City Council Scheme Review as publicly notified in July 1979 and which is not yet operative, the Donald Design site is zoned Residential D1 which is a special high rise zone applying to most properties fronting Oriental Parade.

On 7 July 1982 Donald Design lodged with the Wellington City Council an application for a building permit to allow it to erect a five storey apartment block above a ground floor parking area. At that time the proposed building fully complied with the requirements of the Residential D1 Code of Ordinances as contained in the Wellington City Council District Scheme Review as publicly notified in July 1979.

On 9 July 1982 the Wellington City Council issued a decision allowing objections to its review. This decision had the effect of lowering the minimum height of buildings permitted as of right on most sites in the Residential D1 zone from 34 metres above mean sea level to 16 metres above mean sea level. No appeals against that decision in relation to the height provisions were lodged. As a consequence of that decision the Wellington City Council took the view that the Donald Design proposals which exceeded 16 metres in height now required a dispensation from the height ordinance and in the absence of consents from adjoining landowners, a notified application would need to be made. The application was duly made and a number of objections were received.

The application and the objections thereto were heard by the Wellington City Council on 21 September 1982 and in a decision dated 13 October 1982 the Wellington City Council allowed the Donald Design application for a dispensation and disallowed the objections.

Dispensation was granted to allow the building to extend to a maximum height of 24.3 metres above mean sea

level subject to restrictions relating to excavation of the hillside, the height of the lift tower, landscaping and compliance with by-laws.

The objectors appealed to the Tribunal. The Tribunal in a written decision dated 2 May 1983 allowed the appeals thus revoking the dispensation previously granted by the Wellington City Council.

RELEVANT STATUTORY PROVISIONS AND PROVISIONS OF THE CODE

Authority for the inclusion of dispensing powers in District Schemes is given by the Town and Country Planning Act 1977 ("the Act").

Section 36(6) provides:

> " Any district scheme may provide for the circumstances under which, the manner in which, and the conditions subject to which, the Council may grant an application for the dispensation wholly or partly from, or waiver of, any provision of the district scheme relating to -
>
> (a) The subdivision of land permitted to be used for any urban purpose;
>
> (b) The height, bulk, and location of buildings permitted on site;
>
> (c) The provision of parking and loading spaces;
>
> (d) The design and appearance of buildings and signs and the provision, design, and appearance of verandahs;
>
> (e) Landscaping; and
>
> (f) Such other matters as may be specified in that behalf by any regulations in force under this Act. "

Pursuant to the power so granted the Wellington City Council included in its Code of Ordinances:

> "2.4 Dispensations and Waivers
>
> 2.4.1 1. Whether or not any ordinance expressly provides for Council to dispense with any provision of the Scheme, the Council may grant an

application for the dispensation wholly or partly from, or waiver of, any provision of the district scheme relating to:-

1. the subdivision of land permitted to be used for any urban purpose;
2. the height, bulk and location of buildings permitted on site;
3. the provision of parking and loading spaces;
4. the design and appearance of buildings and signs and the provision, design and appearance of verandahs.
5. landscaping; and
6. such other matters as may be specified in that behalf by any regulations in force under the Act.

2. Unless otherwise specified in this Scheme or required by Council, all applications for dispensation or waiver may be made without notice.
The Council may grant its consent if it is satisfied that:-

1. the dispensation or waiver would encourage better development of the site or that it is not reasonable or practicable to enforce the provision in respect of the particular site; and
2. the dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought.

2.4.3. The Council shall not exercise its powers under this section on an application which is not a notified application unless the written consent of everybody or person whose interests might in the Council's opinion be prejudiced by the proposed dispensation or waiver has first been lodged with the Council unless, in the Council's opinion, it is unreasonable in the circumstances existing to require such consent to be obtained.

2.4.4. If such consents have not been lodged and the Council has not found it unreasonable to require them to be obtained, such powers may be exercised only on a notified application.

2.4.5. In any particular case when an application may be made without notice, the Council may, if it thinks fit, require the application to be made with notice pursuant to Section 65 of the Act.

2.4.6. In allowing any application for a dispensation from or waiver of any provision of the District Scheme Council may impose such conditions as it thinks fit to achieve the purpose of the Scheme and meet the requirements of the Act. Where any development is subject to the control of Council under this Ordinance, consent of Council shall be obtained and, subject to Ordinance 3, Council may require such plans and information as necessary to come to a decision."

It will be noted that apart from several minor deviations, the ordinance 2.4.1 is a transcript of s 36(6) of the Act. Ordinances 2.4.2., 2.4.3., 2.4.4. are respectively a transcript of s 76(2)(3) and (4) of the Act which provides:

" (1) An application may be made for the Council's consent to a dispensation from or waiver of any provision of a district scheme to the extent that it is provided for in the district scheme pursuant to section 36(6) of this Act.

(2) The Council may grant its consent if it is satisfied that -

(a) The dispensation or waiver would encourage better development of the site or that it is not reasonable or practicable to enforce the provision in respect of the particular site; and

(b) The dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought.

(3) The Council shall not exercise its powers under this section on an application which is not a notified application unless the written consent of every body

> or person whose interests might in the Council's opinion be prejudiced by the proposed dispensation or waiver has first been lodged with the Council unless, in the Council's opinion, it is unreasonable in the circumstances existing to require such consent to be obtained.
>
> (4) If such consents have not been lodged and the Council has not found it unreasonable to require them to be obtained, such powers may be exercised only on a notified application. "

Ordinance 2.4.6 allowing the Wellington City Council to impose conditions on the grant of a dispensation has been incorporated by virtue of the authority of s 67 of the Act which provides:

> " (1) After any application for the consent of the Council and any objections to it have been considered, the Council may grant or refuse its consent; and in granting consent may impose such conditions, restrictions, and prohibitions as it thinks fit.
>
> (2) The Council shall give reasons for every decision made in accordance with subsection (1) of this section. "

THE TWO MAIN ISSUES

The two principal issues raised in the decision of the Tribunal may be stated in this way:

1. Is the Wellington City Council dispensing Ordinance No 2.4 a valid ordinance taking into account the requirements of s 36(6) and s 76 of the Act?

2. If it is a valid Ordinance, could the Wellington City Council grant a dispensation in this case having regard to the extent of the dispensation sought?

Once those questions have been considered then I propose to deal specifically with the twelve questions posed in the case.

DECISION

1. IS ORDINANCE 2.4 VALID?

The power of the Council to grant a dispensation from or waiver of any provision of a District Scheme is conferred upon it by s 76 of the Act. But in accordance with subs (1) an application for dispensation or waiver can only be made "to the extent" that it is provided for pursuant to s 36(6) of the Act.

The District Scheme must therefore provide for such matters if a valid dispensing power is to be adopted. Section 36(6) allows a District Scheme to provide for dispensations or waivers of provisions of District Schemes relating to the six types of matters (a) to (f) set out in the subsection but it must also provide for "the circumstances under which, the manner in which, and the conditions subject to which" the Council may grant an application for dispensation or waiver.

There is no part of Ordinance 2.4 which spells out such matters in specific terms. Although s 36 provides that any District Scheme may provide for such matters, that is merely permissive as to whether the District Scheme shall provide for a power of dispensation or waiver at all. Once Council has decided to include such a power in its scheme, it must provide for them because in accordance with s 76(1) it can only grant a dispensation or waiver "to the extent that it is provided for in the District Scheme pursuant to s 36(6)".

The Council's District Scheme has provided for the provisions of the District Scheme from which dispensation a waiver will be granted. It has listed items (a) - (f) of s 36(6) but it has not set out, the respondents argue, the circumstances, manner or conditions as required by that subsection.

It was submitted on behalf of the Council that s 36(6) and s 76 of the Act constitute a "mini code" on the powers of dispensation and waiver and that it is

sufficient compliance with the Act merely to repeat these provisions in the District Scheme, which it has done.

It was further submitted on Council's behalf that the Council had by repeating the statutory provisions of s 36(6) and 76 complied with its obligation to provide for the circumstances, manner and conditions in the following way:

"Circumstances" under which Council may grant a dispensation were where the application was in respect of one or more of the matters set out in s 36(6) (a) - (f) of the Act which was repeated in Ordinance 2.4.1. namely, where the application related to subdivisions, height, bulk, location, design, parking, landscaping.

The "manner" in which dispensation may be granted was covered by repeating s 76(3) of the Act in Ordinance 2.4.3.

As to the "conditions" subject to which the Council may grant the application, it was said that the "pre-conditions" for the granting of a dispensation are covered by repeating s 76(2)(a) and (b) of the Act in Ordinance 2.4.2.

Counsel for the respondents answered these submissions by saying that the District Scheme has merely repeated those matters which the Council must be satisfied about in any event - no matter what circumstances, manner or conditions are set out in the District Scheme pursuant to s 36(6) and if all that is required is for counsel to apply the criteria set out in ss 36(1) and s 76(2) then there is no need for s 36(6) to even refer to circumstances, manner and conditions. Section 36(6) could simply have said:

> " The District Scheme may provide for the Council to grant an application for the dispensation wholly or partly from any provision of the District Scheme relating to - etc."

and left it to s 76(2) to spell out the criteria. There is considerable weight in that argument.

Another indication of the intent of the Legislature in this regard, counsel for the respondents submitted, is to be found by considering s 76(1). That subsection allows an application to be made for dispensation "to the extent that it is provided for in the District Scheme pursuant to s 36(6) of the Act".

I have considered the meaning to be given to the words of s 76(1). The expression "to the extent" means - "the measure of the space or degree to which anything is extended - dimensions, compass, size" Shorter Oxford Dictionary.

"In ordinary English the phrase 'to the extent of' means up to but not more than" - per Coyne J.A. in Re Wilson's Will (1954) 11 W.W.R.(N.S.) 497, 502.

"The phrase 'to ... extent' should not be qualified by adjectives introducing any idea beyond that of quantity." Fowlers Modern English Usage (2nd Ed).

So where s 76(1) enables a dispensation to be granted "to the extent" provided for pursuant to s 36(6) the District Scheme should set out the spatial or quantitative limits of the dispensation beyond which a dispensation will not be granted.

Such a requirement is consistent with the Act as a whole, and particularly with the application of secs 62, 74 and 76.

Section 62(3) requires that except as otherwise provided in the Act while a District Scheme is operative it shall be enforced.

Section 76(1) enables dispensations to be granted within the limits required to be set out in the District Scheme pursuant to s 36(6); and

Section 74 contains provision for specified departures where a departure from the provisions of a District Scheme is greater than can be dealt with by dispensation or waiver. It becomes a matter of degree having regard to the powers of dispensation contained in

the District Scheme to determine at what point a matter which may be dealt with by way of dispensation ceases to fall into that category and falls to be dealt with by way of specified departure.

It seems to me that the requirement of s 36(6) that circumstances, manner and conditions be set out in the District Scheme is to enable not only the Council but also nearby residents and other members of the public to know when considering the purchase or use of properties in the area, the intent to which the Council may grant dispensations which could affect them and the limits beyond which dispensations will not be granted.

The interpretation which I have adopted appears to me to give the words of s 36(6) and s 76(2) their ordinary grammatical meanings in the contexts in which they are used. 44 Halsbury (4th ed) para 857.

It may be helpful at this stage to refer to the legislative history of the present sections 36 and 76. The Town and Country Planning Act 1953 contained no specific authorisation for a Council to retain powers to grant dispensations. In Ideal Laundry Ltd v Petone Borough [1957] NZLR 1038 the Court held that the reservation of a discretion was implicit in the Act. The decision in Attorney-General and Robb v Mt Roskill Borough [1971] NZLR 1030 no doubt gave rise to the Town and Country Planning Amendment Act 1971, s 3(1) which specifically gave to Councils power to include in District Schemes, provisions for dispensation or waiver. It provided for the insertion in s 21 of a new subsection (1A):

> " Any district scheme may provide for the circumstances under which, the manner in which, and the conditions subject to which, the Council may grant an application for the dispensation wholly or partly from or waiver of any provision of the district scheme relating to -
>
> (a) The subdivision of land zoned for any urban purpose;

(b) The height, bulk, density, and location of buildings permitted on sites;

(c) The provision of parking and loading spaces;

(d) The design of buildings, verandahs, and signs; and

(e) Such other matters as may be specified in that behalf by any regulations for the time being in force under this Act -

if, as a minimum requirement, the Council is satisfied that -

(f) It is not reasonable or practicable to enforce the provision in respect of a particular site;

(g) The dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought; and

(h) The written consent has been obtained of every person the interests of whom in the Council's opinion might be prejudiced by granting the dispensation or waiver, unless in the Council's opinion it is unreasonable in the circumstances existing to require such consent to be obtained. "

The passage of the Town and Country Planning Act 1977 resulted in the provisions of s 21(1A) of the 1953 Act being divided between what are now s 36(6) and s 76(1). The only major change in the legislation was that the word "minimum" was removed from s 76 of the 1977 Act as referring to the two criteria relating to Council's consent.

As the legislation now stands, s 36(6) is an empowering provision giving the Council authority to provide in its District Scheme for the exercise of powers of dispensation or waiver. If it decides to include such powers in its District Scheme then it must set out the circumstances under which, the manner in which, and the conditions subject to which it may grant an application. It must also set out the provisions of the District Scheme in relation to which it may grant dispensations or waivers. Section 76

then enables applications to be made for a dispensation or waiver "to the extent that it is provided for in the District Scheme pursuant to s 36(6) of this Act".

Unless the Council has set out in its District Scheme pursuant to s 36(6) the limits of the dispensations or waivers which will be granted, then there is no yardstick to measure by when considering applications.

Having considered the history of the relevant legislation I now turn to the cases involving dispensation or waiver.

1. Presbyterian Church Property Trustees v Wellington City Council [4 NZTPA 433; decision 31 August 1973] Special Town and Country Planning Appeal Board.

The Wellington City Council acting under s 21 of the Town and Country Planning Act 1953 had included a power of dispensation in its ordinances in very general terms and was held by the Board to be ultra vires the Act for two reasons: first because it enabled the Council to dispense with the "observance of the Code" which was beyond the power of the Council; and second because it gave to the City Planner a power of dispensation which by virtue of s 21(1A) could only be exercised by the Council.

2. Forsythe & Ors v Birkenhead City Council [Decision A.7/79, 16 August 1979 Planning Tribunal (No 1 Division)]. The case was decided after the 1977 Act came into force. The Tribunal said:

> " The matters which Section 36(6) declares may be the subject of dispensations and waivers are not the principal planning factors which bear upon the development of land; those matters are subsidiary matters, matters of detail. No doubt that is the reason why the limiting factors specified by Section 76(2) in relation to the granting of dispensations and waivers are less stringent than the limiting factors specified by Section 74 for specified departures.

> We recommend to all Councils that they review the provisions of their district schemes bearing upon the grant of dispensations and waivers and if necessary bring them into line with the provisions of Section 36(6) and Section 76. Furthermore, if all that a planning application seeks is consent to a dispensation or waiver, the application should be decided under the provisions of the relevant Ordinance and of Section 76; it should not be decided under Section 74. "

3. Pizza Restaurants (N.Z.) Ltd v Hamilton City Council [Decision A.49/79, 22 November 1979 Planning Tribunal (No 1 Division)].

The nature of the ordinance relating to dispensations was not set out in the decision. However, the Tribunal said in relation to dispensations generally:

> " The provisions of Section 36(6) exist because the provisions of district schemes dealing with the matters specified in the subsection are to a large extent arbitrary; and because it is often impracticable or unreasonable to insist upon strict compliance with them or because in a particular case a waiver or dispensation would encourage better development of the site in question. Whenever a waiver or dispensation is sought, it is important to bear in mind the planning objective of the provision which the applicant seeks to have waived. "

4. Anderson v East Coast Bays City [7 NZTPA 123; decision 4 March 1980] Planning Tribunal (No 1 Division). The decision did not refer to the ordinance under which dispensation was sought. The Tribunal said, however, at p 127:

> " Normally a dispensation or waiver of a provision regulating the height, bulk or location of buildings is granted pursuant to ss 36(6) and 76. But the council has first to be satisfied on the matters specified in s 76(2), viz:
>
> (a) The dispensation or waiver would encourage better development of the site or that it is not reasonable or practicable to enforce the provision in respect of the particular site; and

(b) The dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought. "

It is to be noted that although the Tribunal said that normally a dispensation is granted pursuant to sections 36(6) and 76 of the Act, s 36(6) does not itself authorise the granting of a dispensation. It merely empowers a Council to include a power of dispensation in the Code of Ordinances of its District Scheme. The Tribunal held, however, that "consent to the application can and should be given under ss 36(6) and 76".

5. Perry v Waimairi County Council [Decision 13 August 1981; Planning Tribunal (No 3 Division). Once again no reference is made in the decision to the provision (if any) in the Code of ordinances which have been included pursuant to s 36(6). The decision was based upon the application not having satisfied s 76(2)(b) of the Act.

6. Motel Vista Del Rio Ltd v Wairoa Borough Council [Decision 7 January 1982; Planning Tribunal (No 2 Division)]. The Tribunal said at a 339:

" We have therefore concluded that s 36(6) enables the council to promulgate an ordinance provided the conditions etc do not infringe the statutory criteria for the granting of consent as set forth in s 76. In exercising its powers under s 36(6) the council may also set spatial limitations or have unlimited power of waiver. If the application does not meet ordinance requirements, then s 76 does not apply and the matter is one for a specified departure. If the conditions etc are met, then the matter is looked at under s 76; and at that stage it is the spatial restrictions of any ordinance which would be the limiting factor. If an application infringed the spatial limitations set forth in the ordinance, then again s 76 would not apply. As noted previously we are reluctantly forced to

> the conclusion that the waiver clause in the ordinances is now meaningless if the parts thereof which are ultra vires are severed. This leaves the Tribunal broadly in the position faced by the Number One Division in the Forsythe case (supra). "

The dispensing ordinance in that case was as follows:

> " If, in the opinion of the council in any particular case, compliance with the yard requirements of these ordinances would seriously diminish the usefulness of the site for building purposes, and subject to the written consent of the owners of the land adjoining the yard which is to be diminished, the council may, by resolution in respect of that site, vary or dispense with the provisions of these ordinances relating to one or more of the yard requirements. "

It is interesting to note that in this case the Tribunal held that a Council acting under s 36(6) may set spatial limitations or have unlimited powers of waiver. The Tribunal, however, recognised that the power of the Council to grant dispensations was to be gained from an appropriate ordinance included in the District Scheme pursuant to s 36(6), not from the direct authority of s 36(6) itself.

7. Broadhead v Wellington City Council [9 NZTPA 27 (Decision 18 October 1982) Planning Tribunal (No 1 Division)]

This case was decided under the Council's current Code of Ordinances "2.4 Dispensations and Waivers" as set out earlier in this judgment. The question of the validity of the ordinance was not considered.

8. Dunajtschik & Ors v Wellington City Council & Anr [Decision A.122/82; 26 October 1982. Planning Tribunal (No 1 Division)].

Once again the application was considered in relation to the criteria set out in s 76(2) and the validity or sufficiency of the Council Ordinance was not discussed.

9. Williams v Auckland City Council [9 NZTPA 402; decision 11 November 1983; Planning Tribunal (No 1 Division)].

The Tribunal dealt with the matter under s 76(2) and said at p 405:

> " However, in considering an application for a dispensation or waiver one must bear in mind the purpose of the provision in respect of which the dispensation is sought; and a dispensation should not be granted if the effect would be to allow a building of a significantly larger size than the ordinances permit. Furthermore, consent can be given only to those proposals which comply with the criteria in s 76(2), and come within the limitations imposed by that section. "

There was no discussion of "the extent" to which the dispensation could be granted having regard to the Code of Ordinances in the District Scheme.

10. A.M.P. Society v Wellington City Council [Decision 83/83; 7 November 1983; Planning Tribunal (No 4 Division)]

The Wellington City Council Ordinance 2.4 as previously noted sets out the same criteria as are contained in s 76(2) of the Act. The Tribunal noted that the Council had not set out any further criteria than those in s 76(2). The Tribunal said at pp 7 and 8:

> " The respondent has not specified with any particularity in the reviewed scheme when a dispensation or waiver may be granted, apart from reciting the provisions of s 76(2) of the Act. In these circumstances those provisions as contained in the Act itself, and in the reviewed scheme, should be considered from two points of view.
>
> (a) Firstly, as to when consent to a dispensation may be granted. Consent to a dispensation or waiver can only be granted if the dispensation complies with the requirements s 76(2)(a) and (b). If the dispensation or waiver sought does not come within the terms of those provisions then there would be no jurisdiction to grant consent. As well, there would be only

> jurisdiction to grant such consent in relation to the matters specified by s 36(6) of the Act. Under subsection 36(6)(d) there is jurisdiction to grant a dispensation from, or waiver of, provisions requiring a verandah.
>
> (b) Secondly, if there was jurisdiction to grant consent, as we have found there would be in this case, then it would be a matter of discretion as to whether or not such consent might be granted. In exercising that discretion regard is again to be given to the provisions of s 76(2)(a) and (b). That is because pursuant to s 36(6) of the Act the respondent in its reviewed scheme has not specified any criteria for the granting of consent, other than the provisions of s 76(2). Because the reviewed scheme has not specified in what instances provision for a verandah may be dispensed with (apart from the s 76(2) provisions), as, for example it has provided in dispensation from certain window requirements, under Ordinance 9.2.6.9(2)(d)(ii), or has provided in the case of verandahs the more particular circumstances under which, the manner in which, and the conditions subject to which, dispensation may be granted, we conclude that it is the intention of the reviewed scheme to give a wide and liberal power of dispensation. This is a relevant circumstance to the exercise of our discretion under s 75. This wide power or discretion under the dispensation provisions of the reviewed scheme in our view means that every case thereunder is to be dealt with on its own facts and merits. This may lead to some uncertainty, and inability for the respondent to achieve an objective of the reviewed scheme, namely the provision of a continuous verandah along certain street frontages. That is because the wide power of dispensation from that provision for verandahs is contained in the same scheme document as the objectives and ordinances relating to verandahs, without any limitation, other than the s 76(2) provisions mentioned.

The sufficiency of the Ordinance 2.4 as complying with s 36(6) was not considered by the Tribunal.

It is important to note that the Tribunal in that case considered that it was sufficient for the Wellington City Council District Scheme to specify only the provisions

of s 76(2) as the criteria for granting of consent. But the argument that the adoption of a power of dispensation or waiver pursuant to s 36(6) required more than a mere repetition of s 76(2) was apparently not addressed to the Tribunal or considered by it.

The Tribunal apparently took the view that by the inclusion in the District Scheme of Ordinance 2.4 the Council had indicated that it adopted a power of dispensation or waiver in respect of those matters set out in the ordinance to the extent that such dispensations or waivers could be allowed within the principles set out in s 76(2). As the Tribunal said, the ordinance in the reviewed District Scheme intended to give a wide and liberal power of dispensation which requires that every case thereunder is to be dealt with on its own facts and merits.

11. Turner & Ors v Porirua City Council & Ors [Decision 27/84, 29 March 1984 Planning Tribunal].

This application was decided under s 76(2). The requirements of a District Scheme in relation to the matters set out in s 36(6) were not discussed.

It is apparent from the cases referred to that so far, apart from the present case, the Tribunals have not found it necessary to decide the specific requirements of an ordinance for inclusion in a District Scheme pursuant to s 36(6). They have interpreted a general power of dispensation as being sufficient to enable dispensation to be given.

At least under the 1953 Act there may have been justification for such interpretation. The way in which s 21(1A) was framed leads to an interpretation that the minimum requirement for a valid power of dispensation is that the Council must be satisfied of the three matters set out in (f), (g) and (h), the reference to minimum requirement presumably excusing the Council if it saw fit from including in its ordinance any further details of the circumstances under which, manner in which, and the conditions subject to which, the Council may grant the application.

However, with the passing of the 1977 Act and the division of the s 21(1A) provisions into the two sections (36(6) and 72(2)) the specification of minimum conditions no longer applies. Under s 36(6) the Council is required to specify the circumstances, manner and conditions subject to which it may grant dispensations or waivers. The criteria now contained in s 76(2) are no longer minimum requirements. They are provisions applicable to all applications for consent to dispensation or waiver as matters of general principle. The intent of the dispensation or waiver granted must be determined, however, by the provisions inserted in the District Scheme pursuant to s 36(6) setting out the circumstances, manner and conditions subject to which the Council may grant an application.

So if an application could validly have been granted under the 1953 Act under a power of dispensation or waiver expressed only in the general terms of s 21(1A)(f), (g) and (h), such in my opinion cannot be so under the 1977 Act and where the only criteria set out in the ordinance are those now contained in s 76(2) of the Act.

The question in the present case therefore simply is - Does ordinance 2.4 of the Council's District Scheme set out adequately the circumstances, manner and conditions as required by s 36(6)? On this issue I have arrived at the same conclusion as that reached by the Tribunal. The wording of s 36(6) is, in my view, plain and specific. It requires the Council to set out in its ordinance the circumstances, manner and conditions subject to which it will grant an application for dispensation or waiver in a way which will enable persons concerned with an application to ascertain the extent to which a dispensation or waiver may be granted. Unless that is done, an applicant does not know when contemplating an application under s 76(1) for Council's consent, the extent of the waiver he can seek.

When considering an application for dispensation or waiver a Council must first decide whether the matter under consideration falls within the criteria set out in

the District Scheme pursuant to s 36(6) and then if it does, to go on to decide whether it is satisfied that the application meets the requirements of s 76(2).

I conclude that the Wellington City Council ordinance 2.4 does not comply with the requirements of s 36(6) of the Act.

2. THE EXTENT OF THE WAIVER

Under the Council's Code of Ordinances there was a very wide power of dispensation and waiver. If ordinance 2.4 was a valid ordinance, I would need to consider the question, but it is impossible to measure the degree of dispensation sought against any yardstick contained in the Code because the Code provides no quantitative or spatial criteria against which the dispensation may be measured. In view of the conclusion I have reached on the first issue, no answer is required to this question.

THE QUESTIONS IN THE CASE

There are twelve questions set out in the case. I now deal specifically with them.

Question (i) Whether the Tribunal erred in law in taking into account the Second Appellant's stated intention to bring about a variation to its District Scheme Review which could result in an introduction of side yard requirements affecting the subject site.

Question (ii) Whether the Tribunal erred in law in taking the view that the provision of side yards was a relevant issue in the application.

The Council has stated that it intends to bring about a variation to its District Scheme which could result in the introduction of side yard requirements affecting the site under consideration. The Council has a discretion whether or not it grants a dispensation sought under the provisions of ordinance 2.4. The only limiting factors on that discretion are, first, those imposed by the terms

of the appropriate ordinance 2.4 and by the provisions of s 76(2) of the Act; and, second, by considerations of relevance. Neither of those factors would prevent the Council from taking into account its intention to bring about the variation of the District Scheme proposed.

The answer to Question (i) is NO.
The answer to Question (ii) is NO.

Question (iii) Whether the Tribunal erred in law in not taking into account the Second Appellant's reasons for reducing the height permitted as of right in the Residential D1 zone.

The Tribunal in several passages of its decision referred to the Council's reasons for reducing the height of buildings permitted as of right in the Residential D.1 zone. Whether the Tribunal failed to take such reasons into account is difficult to determine. However, as the question is asked it implies that the Tribunal did not do so. Even if it did not, was it obliged to? I hardly think so. What the Tribunal was required to do was to interpret the appropriate provisions of the Code of Ordinances and to apply them to the factual situation as found to exist. The reasons why the Council includes a certain provision in a District Scheme are not relevant except in so far as such reasons may be referred to in the Scheme itself.

The answer to Question (iii) is NO.

Question (iv) Whether the Tribunal erred in law in its construction of the Ordinances relevant to the First Appellant's proposal.

For the reasons earlier set out in this judgment, which I do not repeat here -

The answer to Question (iv) is NO.

Question (v) Whether the Tribunal erred in law in taking the view that neither the Second Appellant nor the Tribunal could impose conditions on a dispensation application modifying other bulk or location provisions in return for the granting of the dispensation sought, particularly having regard to Ordinance 2.4.6 of the Second Appellant's District Scheme Review Ordinances which specifically provides for the imposition of conditions on allowing an application for a dispensation.

The Tribunal held that neither the Council nor the Tribunal could impose conditions on a dispensation application, modifying other bulk or location provisions, in return for the granting of the dispensation sought. It said:

> " The dispensation procedure is designed to give a flexibility to a scheme and there appears nothing in section 36(6) or section 76 which controls the extent of dispensation powers. On the other hand we must be conscious of the fact that other owners and/or occupiers of land in a particular zone are entitled to rely on the general scheme provisions. Thus they should not be faced with something radically different from that general provision, particularly having regard to the fact that neither the council nor this Tribunal can impose conditions on a dispensation application modifying other bulk or location provisions in return for the granting of the dispensation sought. "

It is of the nature of a dispensation that it excuses strict compliance with a provision or provisions of the Code in respect of which the dispensation is sought. Neither the Council nor the Tribunal is justified in dealing with an application for dispensation to change the requirement of some other ordinance in respect of which the application for dispensation has not been made and which other ordinance

residents and property owners would not have expected to be interfered with. To make the grant of a dispensation subject to a condition affecting some other ordinance would be quite a wrong use of powers to grant dispensations.

Although ordinance 2.4.6 authorises the Council in allowing any application for dispensation a waiver to impose such conditions as it thinks fit to achieve the purposes of the scheme and achieve the purposes of the Act, it does not allow it by such conditions to go outside the provisions of the ordinance in respect of which dispensation or waiver is sought and make conditions affecting other provisions of the Code.

The answer to Question (v) is NO.

Question (vi) Whether Ordinance 2.4.6 of the Second Appellant's District Scheme Review is ultra vires the Town and Country Planning Act 1977 and therefore invalid.

Ordinance 2.4.6 which authorises the imposition of conditions is not ultra vires the Act and invalid. It merely restates in the dispensing ordinance the power of the Council given it generally by s 67(1) of the Act to impose conditions.

Section 67(1) provides:

> " After any application for the consent of the Council and any objections to it have been considered, the Council may grant or refuse its consent; and in granting consent may impose such conditions, restrictions, and prohibitions as it thinks fit. "

The answer to Question (vi) is NO.

Question (vii) Whether the Tribunal erred in law in taking the view that the dispensation ordinance of the Second Appellant's District Scheme Review failed to follow the directions contained in Section 36(6) of the Town and Country Planning Act 1977.

This question has already been fully discussed earlier in this judgment.

The answer to Question (vii) is NO.

Question (viii) Whether the Tribunal erred in law in taking the view that the thrust of Section 36(6) of the Town and Country Planning Act 1977 required the Second Appellant in its relevant District Scheme Review ordinances to specify the circumstances under which, the manner in which, and the conditions subject to which the Second Appellant could grant dispensations.

This question, too, has already been fully discussed.

The answer to Question (viii) is NO.

Question (ix) Whether the Tribunal erred in law in taking the view that where an application for dispensation did not fall within the circumstances under which, the manner in which, and the conditions subject to which the Council might grant a dispensation it became a specified departure.

A dispensation or waiver can only be granted in an application made under s 72(1) of the Act to the extent that it is provided for in the District Scheme. If the dispensation sought is not provided for in the District Scheme or is greater in extent than the District Scheme provides for then the matter must fall to be dealt with by way of specified departure under s 74(1) of the Act. It is by incorporating into the District Scheme the provisions required by s 36(6) that it becomes possible to determine what are the limits of the power of dispensation and when a proposed deviation from the Code of Ordinances requires the grant of a specified departure.

If the power of dispensation is unlimited then s 76 cannot apply, but a valid power of dispensation to comply with s 36(6) should not be in such form.

The answer to Question (ix) is NO.

Question (x) Whether the Tribunal erred in law in holding that matters of principle required to be enunciated in the Second Appellant's District Scheme Review Ordinances pertaining to dispensations should relate to topographical matters and not to intensification and use.

The Tribunal in its decision said:

> " The latter (s 76) gives the council power to grant a dispensation subject to the provisions of ordinances covering matters of principle which pertain to that particular dispensation. The matters of principle may be difficult to enunciate, but section 76(2)(a) indicates that they should be topographical and should not relate to an intensification of use. It may well be that in the present case the applicant could have established that the proposed square meterage of apartment house space could have been accommodated on site within the 16m limit if larger floor areas per storey were provided and if some excavation took place into the steep slope leading up to St Gerard's Monastery. If this had been established then, subject to whatever circumstances may be spelt out in the district scheme, the developer could possibly have argued that it would be better development of the site if such excavation did not take place and the square meterage lost were incorporated within a taller building on a smaller platform. In fact in this case no evidence to that effect was given, but it is an example of the type of situation which may well be within the ambit of section 76. "

Section 76(2)(a) refers to "better development of the site". A "site" is "the ground or area upon which a building has been built or which is set apart for some purpose": Shorter Oxford English Dictionary.

Where therefore the section refers to development of the site it is referring to the physical aspects of the site or, as the Tribunal said, the "topographical" aspects,

topography being "the science or practice of describing a particular place ... or tract of land: a detailed description or delineation of the features of a locality": Shorter Oxford English Dictionary.

To the extent that the Tribunal expressed any opinion on this matter it was, in my view, correct.

The answer to Question (x) is NO.

Question (xi) Whether the Tribunal erred in law in its construction of Section 76 of the Town and Country Planning Act 1977 in taking the view that in the absence in Section 76 of the type of criteria contained in Section 74 of the Act that it is to be inferred that there are provisions in the District Scheme with which the dispensation or waiver sought complies.

I must say that I am not sure what is meant by this question. The Tribunal did say:

> " We would further record that we consider the absence in section 76 of certain criteria appearing in section 74, namely that the effect of the departure will not be contrary to the public interest and the provisions of the scheme can remain without change or variation, indicates that there is something already in the scheme with which the particular dispensation or waiver complies."

What that means I do not know unless it be that the Tribunal is saying that a dispensation can only be granted within the terms of the District Scheme and the scheme itself will not require to be changed. I am unable to answer this question in any meaningful way.

Question (xi) - NO ANSWER.

Question (xii) Whether the Tribunal erred in law in finding that even if the Second Appellant's dispensation powers were valid that the dispensation sought was not capable of being dealt with under the Second Appellant's dispensation powers because inter alia of the degree of dispensation sought.

The Tribunal said:

" Our basic concern is to ascertain when a dispensation becomes in law a specified departure under the provisions of section 74. It must be remembered that the dispensation granted effectively increases the building height by some 50% taken from ground level to parapet; and if this is to be permitted by dispensation, then it could be argued that there is considerable planning significance beyond the immediate vicinity in relation to other areas of Wellington subject to height controls of one type or another. On the other hand, we concede that Wellington is a city with difficult topography and an enlightened use of liberal dispensation provisions may well be an appropriate method to enable an examination of particular sites which may possess physical attributes taking them beyond the general provisions of a particular zone. The dispensation procedure is designed to give a flexibility to a scheme and there appears nothing in section 36(6) or section 76 which controls the extent of dispensation powers. On the other hand we must be conscious of the fact that other owners and/or occupiers of land in a particular zone are entitled to rely on the general scheme provisions. Thus they should not be faced with something radically different from that general provision, particularly having regard to the fact that neither the council nor this Tribunal can impose conditions on a dispensation application modifying other bulk or location provisions in return for the granting of the dispensation sought. "

There does not appear to be any question of law involved in this question. The degree of dispensation sought cannot be measured against any quantitative criteria set out in the Code of Ordinances in this case because there

are none. The degree of dispensation can only be measured against the provisions of s 76(2)(b) of the Act, namely, whether the dispensation will detract from the amenities of the neighbourhood and will have significance beyond the immediate vicinity. This is a question of fact.

If the Tribunal did make a finding on the matter referred to in this question then it was not a finding of law and the question must be answered No.

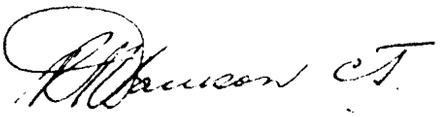
Question (xii) is answered NO.

SUMMARY

The answers to the questions posed in the case are:

(i)	No
(ii)	No
(iii)	No
(iv)	No
(v)	No
(vi)	No
(vii)	No
(viii)	No
(ix)	No
(x)	No
(xi)	No answer
(xii)	No

Questions of costs are reserved.



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