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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

AP 43/89

UNDER	The Town and Country Planning Act 1977
IN THE MATTER	of a determination of the Planning Tribunal
1928 BETWEEN	THE HAURAKI CATCHMENT BOARD AND REGIONAL WATER BOARD Appellant
AND	N A RADOJKOVICH, M S HUTCHINSON, P W and D M KEE and M KIRBY First Respondent
AND	BARRACK MINES (NZ) LTD Second Respondent

Hearing:

Counsel:
Mr P H Cooney for the Appellant
Mr R B Brabant for the First Respondent
Mr R J Somerville for the Second Respondent

Judgment: 4 December 1989

JUDGMENT OF JEFFRIES J.

This is an appeal on a question of law pursuant to s.162 of the Town and Country Planning Act 1977. A short account of the facts will first be given which will also conveniently describe the parties to these proceedings.

The second respondent in this appeal was the applicant to the appellant, The Hauraki Catchment Board and Regional Water Board (now gone out of existence but that is not material) for water rights in the Coromandel pursuant to the Water and Soil Conservation Act 1967. Mr N A Radojkovich and others were interested parties to the original application hearing before the Board and also the appellants at the appeal to the Planning Tribunal, representing their interests in environmental issues but particularly as users of water in the region. For convenience hereafter they will be collectively referred to as first respondents or residents. Barrack Mines holds three prospecting licences over areas of land in the northern Coromandel and Kuaotunu. In order to carry out prospecting in the areas under licence, diamond drilling is carried out by a rig. Due to the forces involved and the action of the bit on the rock heat is generated which must be managed and controlled and for this purpose water is used as a lubricant and cooling agent. The location of the site for drilling is selected, as will be described hereafter, but cannot be precisely nominated at the time of application for the right to take water.

A precise site to be drilled within the area covered by the licences is chosen on the basis of extensive field work and sampling. Once this preliminary field work is completed, and it can take up to a year, then if all indicators are propitious, drilling will take place. The interest of the residents is to ensure that the drilling sites, once selected, and the activity commenced, are properly and carefully managed for the sake of the environment and the preservation of the quality of the water. It serves no useful purpose in this judgment to give further explanation of management of sites because it is not an issue here.

Already it is clear from the foregoing facts that at the time decisions are made granting water rights there is an inherent problem that precise sites, over the very large areas of the licences, cannot then be nominated because they are decided upon after extensive appraisal of all relevant data. In short, the water rights are granted for non-specific sites. This problem is recognised by all protagonists as being a real one for which special arrangements must be made so as to accommodate the goals of all participants but especially the residents who have a role to play quite distinct from those of the other parties.

Before the hearing of the original application to the Board, the first respondents, the second respondents and Board staff held a technical meeting to resolve differences between the parties over the proposed water rights. Arising out of that meeting was an agreed set of conditions as far as the first respondents and the second respondent were concerned. The first respondents advised the Board prior to the hearing that they were agreeable to the water rights being granted on the basis of the agreed conditions. The Board determined the application by granting the rights without specifying the locations from which the water is to be taken, nor the locations where it is to be discharged beyond general description of the areas within which the rights are to be exercised. This part solution recognised the nature of prospecting which has been outlined earlier. However, the Board would not agree to impose the conditions agreed between the first respondents and the second respondent. There were imposed certain conditions among which was one requiring the applicant to give to the Board two weeks' written notice of the position of a proposed drilling site, surcharge pits and points of abstraction. This condition did not meet the requirements of the

residents for it did sufficiently recognise themselves as continuing players in the whole exercise. Accordingly, they appealed pursuant to s.25 of the Water and Soil Conservation Act 1967 to the Planning Tribunal.

Pursuant to s.135 of the Town and Country Planning Act, his Honour Judge D F G Sheppard heard the appeal sitting alone on 23 February 1989. All three parties to this appeal appeared and were represented by counsel. Originally the appeal brought by the residents was against the grant of water rights in the form stipulated by the Board but prior to the hearing further negotiations and compromises of importance were conducted by the parties. When the appeal was called for hearing before Judge Sheppard, counsel for the parties informed him that they had reached agreement that an additional condition be attached to the rights in the following terms:

> "12. The Grantee shall provide the Secretary of the Kuaotunu Peninsula and Matarangi Residents and Ratepayers Association with copies of all written information to be provided to the Board in accordance with conditions 1, 7, 8 and 11. The Grantee shall in addition provide the Association with copies of any written information provided to the Board as part of the inspection and approval process by the Board."

In recognition of the fact that all parties to the hearing agreed on the terms and wording of the condition and as no other public or private interest appeared to be affected, the Tribunal amended the Board's decision to add that further condition. The appropriateness of that condition was not the subject of argument and the Tribunal in its decision specifically stated it could not be assumed it would

necessarily be imposed on an unwilling applicant in the future. That, however, was not dispositive of the hearing.

Arising out of the negotiation the residents and Barrack Mines agreed upon the terms and wording of a further condition as follows:

> "13. Before any drilling at a chosen location takes place, the Grantee must provide an opportunity to inspect the particular site and an opportunity to attend any technical meetings in connection therewith. Reasonable advance notification of the opportunity to inspect the particular site or to attend a technical meeting shall be given to the Secretary for the time being of the Kuaotunu Peninsula and Matarangi Residents and Ratepayers Association, and a nominated representative of that association together with not more than three other affected persons (or more at the discretion of the Grantee's site manager in respect of any particular opportunity to inspect) may attend the inspection of the particular site."

As stated in the Planning Tribunal decision appellants (residents) made it clear that they no longer sought that the water rights be refused by putting the grant in issue and that they only sought that both additional Conditions 12 and 13 be imposed. All parties agreed to Condition 12 but the Board would not agree to Condition 13 on the basis it would not have been a lawful condition for it to have imposed. It is of significance that the grantee of the rights did not at the hearing actively involve itself one way or the other on the legal argument about validity but nevertheless unambiguously assented to the imposition of Condition 13 and undertook to be bound by it. There is a private agreement between the appellants before the Tribunal and the original applicant company incorporating this condition. However, the appellants

argued for it to be made a condition so that it could be enforced by way of the Water Act and as a precedent for the future. This judgment does not decide that latter point in the event of there being objection by an applicant for water rights to such a condition. This follows the Tribunal's decision which was also at pains to reserve the point if a future applicant did not agree to the imposition of such a condition.

It is probably accurate to say that the Tribunal by its decision showed some hesitation before reaching the final conclusion that the condition could lawfully be imposed mainly on the ground that the grantee of the water rights agreed to its imposition relying upon the authority of Augier v Secretary of State for the Environment [1978] 38 P & CR 219. The decision of the Planning Tribunal is summarised in the following extract therefrom:

> "Considering the matter overall, I have concluded that it would be appropriate in this case to attach a condition to the water rights which embraces the terms of the applicant's undertaking to the respondent for four principal reasons: as a public record and earnest of the applicant's undertaking; so as to bind transferees of the rights; because the giving of the undertaking has influenced the respondent's decision on the application; and because imposition of the condition would not create any significant disadvantage for the respondent."

The Board carries its objection to Condition 13 to this court by way of appeal against the decision of the Planning Tribunal on the grounds that it is wrong in law.

No one disputes that the group of first respondents in this appeal, as residents and users of water, have a legitimate and valid interest in the grant of water rights to Barrack Mines. Their interest is unconditionally accepted by that company and as the

judgment to this point testifies, it has gone a long way to accommodate their interests undertaking future obligations to meet their requirements.

A somewhat unusual situation arises on these facts in that the commercial party and the residents/user party have reached agreement but the public body, which is in effect the licensing authority, will not agree and has pursued this appeal. The grounds of the appeal as contained in the Notice of Appeal are as follows:

1. Condition 13 is ultra vires the powers, duties and functions of a Regional Water Board as defined by the provisions of the Act.

2. The Tribunal cannot lawfully impose Condition 13 on the grounds that the First Respondents and Second Respondent agree that such a condition should be imposed, irrespective of whether the condition is lawful or unlawful.

3. Condition 13 which:

   (a) Fetters the administrative functions of a Regional Water Board under the provisions of the Water and Soil Conservation Act 1967 and/or

   (b) Requires the Second Respondent to obtain the consent of a land owner/occupier before access can be exercised by the First Respondents in accordance with Condition 13

   is unreasonable.

Ground 1 - Ultra Vires the Board

The court examines first Condition 13. It is a natural concomitant of Condition 12 which generally speaking

ensures that the first respondents be supplied with the necessary technical and locational information during the progress of the search for a drilling site. It enables them to keep abreast of developments and to keep their own main group of residents/users informed. However, it is strictly speaking information orientated, not requiring any particular physical activity.

It might help to distinguish between the appellant Board and the first respondents. There could be little doubt that both are commercially disinterested and seek the maintenance of quality of available water. They are both public spirited and motivated. Possibly in this particular situation their main differences are in their structure and short-term goals. The Board is a bureaucratic like structure with many functions which it fulfils in the way such other local government authorities operate. The first respondents are a loosely knit voluntary group within the community charged with the protection of their own environment and that incomparably valued feature within it which is water. The Board's officers have their statutory duties to fulfil but it is the first respondents that live within and use the environment and its water. They are the direct consumers of the environment and therefore unquestionably more immediately and deeply affected if it goes wrong.

It seems to the court that what is explicitly spelled out in the foregoing paragraph is the basis for the first and second respondents reaching agreement on Condition 13. Condition 13 and the rights it gives to the Residents' Association enables the receipt of the information to be provided by Condition 12 to be given a full and practical application by implementation of Condition 13. That condition simply allows

representatives in controlled numbers to attend meetings and to go onto proposed drilling sites for inspection. It would be unrealistic to approach the operation of the condition as one that would be carried out in silence but nevertheless no particular powers are authorised or invested in Association members other than notice and the opportunity of presence.

The court turns now to the narrow legal submission of the Board that the condition in question is ultra vires. Although counsel for the Board before the Planning Tribunal argued such a condition was ultra vires, the Tribunal in its decision did not decide the statutory argument. This was a ground of complaint by the appellant in this court. The basis of the submission is that while subsections 34D and E of the Water Act give the Board and its officers power to enter onto private land for the purposes set out in those sections, this right of entry does not extend to such persons as the first respondents. It can be said that there is no specific provision in the Act giving such power in so many words allowing what might be described as third persons onto land not owned by the applicant for rights. This argument strikes the court as technical, and lacking in conviction that it is the substantial reason why the Board is objecting. This court cannot possibly attempt to write a judgment in the abstract without a concrete set of facts to deal with if, in fact, at some future time a land owner chooses to take objection to the presence of the first respondents or appropriate Association representatives on land carrying out the function envisaged by Condition 13. It seems to the court that providing the representatives are bona fide their presence might be welcomed by a land owner in the great majority of cases. That, of course, is not the point the Board makes which is that if it itself imposed the condition,

would it be lawful? In my view the words of s.34D(1) which states:

> "... any person authorised either specifically or generally ['by' was omitted in the 1988 amendment] the Board, may -"

would cover the proposal of Condition 13 so long as the other statutory directions are adhered to. Such a construction is not strained or distorting to the language of the section.

This ground fails.

2. Tribunal's Power to Impose Condition

The Tribunal's decision seemed mainly to centre about the way it ought to act when two of the main contenders in effect agree to the condition but the Board does not. In its ground of appeal contained in the Notice of Appeal, the Board stated that the Tribunal could not impose the Condition irrespective of whether it would be ultra vires or not to do so. This ground appeared to change to the one that if Condition 13 is held to be ultra vires the Board then the Tribunal is unable itself to impose it.

This ground is disposed of by the earlier finding that such a condition would be within the Board's power to impose and therefore it is within the Tribunal's power on appeal.

3. Is Condition 13 Unreasonable?

The argument of appellant under this ground is that by s.150 of the Town and Country Planning Act a discretion is invested in the Tribunal to impose conditions. See Associated Provincial Picture Houses Ltd v Wednesbury

Corporation [1948] 1 KB 233 but the principles of that case need no further elaboration in this judgment.

The first respondents in their argument did not omit to label unhesitatingly this ground as the main reason why the Board objects to the condition. Condition 13 may encourage direct dealings between the first respondents and the second respondent to the possible exclusion of the Board but also it will greatly add to the administrative burden of the Board in having to deal with the first respondents or the Residents' Association and land owners as well as the grantee. Appellant's counsel argued that the Board wishes to exercise its statutory powers unfettered by allegations and counter-allegations between the applicant for rights and the water users. It does not want third parties becoming involved in its administrative functions. This seems to be the substantial reason why the Board objects to Condition 13 and says that it is unreasonable.

It seems the main grounds for regarding the condition as unreasonable in the Wednesbury sense are first, that the Tribunal took into account the agreement between the company and the residents/users, which was an irrelevant consideration, and secondly, for other reasons related to administrative difficulty in implementation of the condition. In this court's view the agreement was a relevant consideration. It is not denied the condition will cause administrative inconvenience to the Board because it will have another group with which to deal. Inconvenience and difficulty in implementation do not constitute unreasonableness in the legal sense.

This ground fails.

The appeal fails and costs are awarded to the first respondents to be paid by appellant in the sum of $1000. No costs are awarded to the second respondent.

Solicitors for Appellant:	Cooney Lees & Morgan Solicitors TAURANGA
Solicitors for First Respondent:	Shieff Angland Dew Solicitors AUCKLAND
Solicitors for Second Respondent:	A E Cook Solicitor DUNEDIN