N2LR

IN THE HIGH COURT OF NEW ZEALAND 28/5
WELLINGTON REGISTRY

ROTORUA AP. 118A/92

Appeal No.190/92

LOW PRIORITY

766

IN THE MATTER of the Town and Country Planning Act 1977 and/or the Resource Management Act 1991

A N D

IN THE MATTER of an appeal under section 162 of the former Act and/or section 299 of the latter Act

BETWEEN: WAIOTAHI CONTRACTORS LIMITED

Appellant

A N D: S A OWEN and CONCERNED ADJACENT RESIDENTS

First Respondents

AND: WHAKATANE DISTRICT COUNCIL

Second Respondent

Hearing: 29 April 1993

Judgment: 26 May 1993

Counsel: P M Salmon QC and T S Richardson for appellant
A M B Green for second respondent
No appearance for first respondents

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JUDGMENT OF HENRY J

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By decision dated 30 January 1992 the Planning Tribunal allowed an appeal by the first respondents (the objectors) against a decision of the second respondent (the council) delivered on 11 December 1991 in which the council had rejected objections to a proposed change to its district plan. The change was publicly notified prior to the Resource Management Act 1991 coming into force, and accordingly the appeal to the Tribunal and the present appeal to this Court both fell to be considered under the provisions of the Town and Country Planning Act 1977. This appeal is therefore brought under s.162 of the 1977 Act and is confined to points of law.

The land in question is located on the spit separating Ohiwa harbour from the Bay of Plenty. A substantial area of the spit is zoned for reserve purposes, the balance being predominantly zoned for residential use. The purpose of the proposed scheme change is to give effect to a land exchange between the appellant and the council. It involves uplifting the designation on part of the reserve land and transferring that land to the appellant, and also the new designation as reserve of other nearby land described as the salt marsh area and intended to be transferred from the appellant to the council. Approval to the sale of the reserve land by the council has been given by the Department of Conservation.

At the hearing there was no appearance by or on behalf of the first respondents, who have taken no step in the proceeding before this Court. This meant that the only arguments presented were in support of the appeal, and the Court has not received opposing submissions.

The council land in question is designated reserve with an underlying zoning of residential. The need to employ the scheme change procedure arises from the provisions of s.122 :

"**122. Removal of designation -**

(1) If the body or person having financial responsibility for any public work no longer requires that provision be made in the district scheme for the public work for which the land is designated, it or he shall inform the council and the owner and occupier of the land affected of that fact, and the Council shall thereupon, without further formality, alter the district scheme to show the removal of the designation and notify all bodies and persons to whom the scheme has been sent under section 42 of this Act of that removal.

(1A) Where land is designated in a district scheme for a public work and the body or person having financial responsibility for the public work requires only part of that land to be so designated, the body or person shall inform the Council and the owner and occupier of the land affected of that fact. The Council shall thereupon, without further formality, alter the district scheme in accordance with that information to reduce the area designated for the public work, and notify all bodies and persons to whom the scheme has been sent under section 42 of this Act of that reduction.

(2) Nothing in subsection (1) of this section shall empower the Council to remove a designation in respect of any public work for which it has financial responsibility without varying or changing the scheme, as the case may require, in

> accordance with section 47 or section 54 of this Act."

The first question which arises concerns the effect or consequence of the council's decision that it will no longer accept financial responsibility for the designated public work. That decision is inherent in the council's instigation of the scheme change, its rejection of the objections at the hearing it conducted, and was expressly confirmed by counsel during the course of this hearing. The Tribunal in its decision did not directly address this question, other than by reference in a different context to what was regarded by it as a minor consequence of the land exchange concerning the need for some monetary adjustment to compensate for unequal land values. The Tribunal accordingly proceeded to its determination by a consideration of the planning merits of the proposals, but without reference to the council's rejection of continuing financial responsibility for the presently designated land. That rejection is of importance because both the Tribunal and its predecessor the Appeal Board have in previous decisions regarded that factor as determinative in comparable cases. In ***Newspaper House Limited v Wellington City Council*** 6 NZTPA 289 a council proposed a change to its district scheme by removing a designation of "proposed elevated roadway". The Board held that because the council in its executive capacity had abandoned the proposal and no longer accepted financial responsibility for the acquisition of the land in question, an appeal against the dismissal of objections to the change had to be dismissed. The merits of the designation and its removal in the planning sense were not investigated. In ***Amesbury Court & Ors v Palmerston North City Council*** (Appeal 69/82, 9 November 1992) it was said that a designating authority cannot be forced to carry out works contemplated by a

designation. That case concerned the proposed removal by way of scheme change of part of a car parking designation, and the Tribunal dismissed an appeal by objectors on the ground that it could not uphold the designation in the absence of a commitment by the council to financial responsibility for carrying out the work. To similar effect is the Tribunal decision in ***Prudential Assurance Co Ltd v Wellington City Council*** 13 NZTPA 33. In that case the council sought as part of a scheme change to uplift an open space designation. It was held that the designation could not as a matter of law be maintained against the wishes of the designating authority.

The first two decisions noted above referred to the unclear purpose of s.122 (2), and counsel in this appeal were unable to throw further light on the problem other than by referring to cl. 85 of the Resource Management Amendment Bill, which if enacted will remove the apparent anomaly which has been carried through to the new legislation. The need for the distinction drawn by subs. (2) is certainly not apparent. Whatever may be the purpose behind this requirement for the use of the scheme change procedure with its consequential rights of appeal, there can in my judgment be no doubt that an authority's rejection of continued financial responsibility must be taken into account when a scheme change involving the removal of a public work designation is being considered. Further, so long as that rejection remains on foot, then it is difficult to see how the Tribunal on an appeal to it could insist on the designation nevertheless being maintained. The provision in a district plan for a public work such as this is directly tied to financial responsibility for it, which is something the Tribunal cannot force on an authority. In this context the nature and extent of the financial responsibility is irrelevant - that is something

which must necessarily be uncertain and may or may not involve future expenditure of a capital nature, and usually would involve maintenance expenditure. It is the existence of the responsibility which is important. I am therefore of the view that the Tribunal erred in law in proceeding to consider this appeal on the planning merits without taking into account and giving due weight to a relevant consideration, namely the council's refusal to accept continued financial responsibility for the public work.

There is a further matter of present significance. The scheme change concerned two separate proposals, although they were linked together. The first was to uplift an existing designation on one area of land, and the second was to impose a designation on another. In its decision the Tribunal appears to have run both matters together, and to have made an evaluation of the respective merits in achieving the objectives of the district plan, on the one hand by the combined effect of the two proposed changes and on the other hand by what is described as maintaining the status quo. Reference was made in the decision in this context to a balancing process, involving the merits and demerits of each of the two proposals. With respect, I think this evidences an error of approach. In doing this, when considering the proposal to uplift the designation the Tribunal placed weight on s.49 (2A), particularly paragraph (d) and the need thereunder to give consideration to alternative methods of obtaining the objectives of the district plan. Section 49 (2A) however is expressed to apply only to an appeal against a provision included in the district scheme pursuant to s.36 (8), which in turn is concerned with making provision for land to be used for a public work. It has no application to the uplifting of an existing designation. It follows that the Tribunal erred in applying

s.49 (2A) to its consideration of the proposed uplifting of the designation.

The Tribunal observed that it was not satisfied that the original decision of the council to retain what was described as the ridge top as reserve was misconceived, and noted that to use that area of land as a means of access to the further subdivision of the appellant's property would result in visual intrusion of buildings into the skyline being markedly increased. It is not, as I see the legislation, a question of whether the original designation can be supported nor whether existing zoning provisions give adequate land use control. The correctness of the original designation and of the underlying zoning are not at issue.

As regards the second limb of the scheme change, namely that of designating the new area of land, it was submitted in support of the present appeal that this also fell to be decided as a separate issue on its own merits, with s.49 (2A) admittedly being applicable. Again I think the Tribunal was in error in treating this enquiry as a balancing exercise to decide which as between the two areas was the more suitable for designation as reserve. The enquiry in respect of the proposed designation had to be considered on its own merits, but again in the light of council's express disclaimer of further financial responsibility for the presently designated land and of the consequences of that disclaimer.

I have given careful thought to whether the matter should be remitted to the Tribunal for reconsideration in the light of the above findings. The following factors are pertinent in that regard:

1. The original objectors have not taken any steps on the appeal.

2. The decision of the council to decline further financial responsibility for the designated area as reserve renders that designation of little if any purpose, and I do not see how it can sensibly remain.

3. The salt marsh area is accepted as suitable for reserve, and the council wishes to accept financial responsibility for it as a public work. Once the uplifting of the designation is upheld and removed from the equation the stated basis for finding that this proposed work is not reasonably necessary for achieving the council's objectives disappears.

Those factors when combined I think make it appropriate to bring finality to the whole matter at this stage, rather than requiring the conduct of a further hearing before the Tribunal.

Accordingly the appeal is allowed, the decision declining to uphold the scheme change is quashed and the appeals to the Tribunal against the council's decision are dismissed.

**Solicitors**:

Hamertons, Whakatane, for appellant
Brookfields, Auckland, for second respondent

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