IN THE HIGH COURT OF NEW ZEALAND No. AP 121A/92
AUCKLAND REGISTRY

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

AND

IN THE MATTER of an appeal under s162 of the former and/or 299 of the latter Act

BETWEEN ESTUARY HOLIDAY PARK LIMITED

Appellant

AND NOELINE ANNE WHITE AND OTHERS

First Respondents

AND OPOTIKI DISTRICT COUNCIL

Second Respondent

AND MAKERE JONES AND OTHERS

Cross Appellants

AND THE MINISTER OF CONSERVATION (a party pursuant to s157 of the Town & Country Planning Act 1977)

Date: 3, 4 & 7 February 1994

Counsel: T S Richardson for appellant
A P Randerson & N Collis for first respondent and cross appellants
J Smith for second respondent
K Robinson for Minister of Conservation

Judgment: 7 February 1994

JUDGMENT OF HILLYER J

This is an appeal under s162 of The Town and Country Planning Act 1977 (TCPA) against a decision of the Planning Tribunal, which was delivered on 7 November 1991. The matter began as far back as October 1988 before the Resource Management Act 1991 (RMA) came into effect, and the parties are agreed that it is to be determined under the TCPA pursuant to the transitional provisions of the RMA.

The appeal is lodged on behalf of Estuary Holiday Park Limited, a company owned by Mr and Mrs K R Goddard. The company made application to the Opotiki District Council for a planning consent to establish a camping ground on the banks of the Waiotahi Rover near the mouth of that river, approximately 10 km north west of Opotiki. The application was advertised, and was subject to objections by a number of people, including the first respondents.

Originally, the application was to establish a motor camp/caravan park comprising a total of 140 sites on a level and well grassed location near the mouth of the Waiotahi River. Mr & Mrs Goddard at the moment live in a house which is erected on the proposed site. From photographs that have been put before me, and on the evidence that has been led before the Council and Tribunal, it must be an idyllic spot in a remote and beautiful area of the country. There is a spur of Rural A zoned land on the northern side of State Highway 2, bounded to the west by farmland, to the east by an esplanade reserve and then the Waiotahi River near its mouth. On the northern side of the river is a sandspit zoned partly scenic reserve and partly historical reserve. Beyond that is the Bay of Plenty and the Pacific Ocean.

Originally it was proposed that access would be either over a recreational reserve adjoining State Highway 2 and the mouth of the river to the east of the property and across accreted land. In the alternative, access would be along existing legal access-ways further

to the west. Amongst thick vegetation on the northern bank of the river, near its mouth lies a small urupa, Maori burial ground, and on the point of the spit is a nesting place for New Zealand Dotterel, an endangered species of native bird. In addition there are many other native birds, including the reef heron, the banded rail, the fernbird and the bittern which are also threatened species. The Department of Conservation made objection to the proposal, amongst other grounds because of the diminishing habitat of these endangered species caused by coastal development.

Consequent on certain observations made by the Planning Tribunal, the proposal to provide 140 sites was amended to 104 and a proposal to provide a camp store on the recreation reserve was abandoned. That figure of 104 sites, as I understand it, would have permitted something of the order of 360 people to be present when the camp was occupied to its full capacity, which it was anticipated would be from Christmas to the end of January in most years. The abandonment of the camp store proposal was in the light of what appeared to be opposition from the Minister, and an alternative proposal provided for a much smaller store to be established in the basement of the present home occupied by Mr and Mrs Goddard.

The proposal involved the construction of an ablution block, tanks for storing water and effluent holding tanks, the use subject to such modifications as were necessary of the existing house for the manager's residence and offices, and the camp store in the basement There would be a new access road if that was permitted, and the construction of the main access in the camping ground itself. This would have been 7½ metre in width, formed metalled and sealed. There would be lighting, drainage and individual power connections for the 104 camp sites.

It is common ground that the recreation reserve to the east of the proposed camping ground is widely used by the public. At one time there was informal camping there, but in more recent times it is mainly used for day visitors and sometimes an unauthorised overnight campervan.

The application for permission to establish the camping ground was made under the Rural A zoning of the site. Camping grounds are a conditional use and therefore the Opotiki District Council was initially asked to give permission, which it did. The decision of the Opotiki District Council was given on 2 March 1989, notified to the parties on 10 March 1989. From that decision an appeal was brought to the Planning Tribunal. There was then an application to strike out the appeal, which was heard by the Planning Tribunal at Tauranga on 11 September 1989. In the meantime, a water right application had reached the stage where the Regional Council had heard the application and made a decision granting it. Appeals against the water right decision by those associated with the present proceeding were filed and served in March, but were later abandoned.

The appeal against the decision of the Opotiki District Council to the Planning Tribunal was notified for hearing on 23 October 1990, and on 12 October 1990 the Minister of Conservation gave notice of his intention to appeal. Some criticism was made by counsel for the appellants of the somewhat hesitant attitude of the Minister on behalf of the Department of Conservation, but by the time the matter came before the Planning Tribunal. the Minister of Conservation who had initially indicated neutrality was clearly opposing the application.

The hearing before the Tribunal was not reached in the two week sitting of the Tribunal in Rotorua in October 1990 and it eventually commenced on 11 February 1991. At the end of the second day the Tribunal indicated it might be more favourably disposed to an amended site layout. The case was adjourned partly heard. The question raised by the Tribunal was as to the access proposed to the reserve.

Finally, the matter was brought on for hearing again on 13 and 14 August. The Tribunal adjourned for a site inspection on 14 August. Written closing submissions were called for which were provided between 20-28 August, and the Planning Tribunal produced its decision on 7 November 1991. Prior to the hearing before the Tribunal commencing, the Opotiki District Council circulated amended briefs of evidence of one of its witnesses, and a new brief of a

planner. The appellants (the respondents before me), provided an amended brief from the Regional Council and the Minister of Conservation provided an amended brief from ornithologist Mr Owen. The matter was dealt with over a lengthy period and with considerable care. Nearly 2½ years elapsed between the Council's hearing and completion of the Tribunal's hearings. Appellants in this Court received ample advance notice of all the evidence that was to be presented in connection with the appeal to the Tribunal and had every opportunity to respond to that evidence.

There is no challenge to the broad approach of the Tribunal which is set out as follows:

> "It is trite to observe that in approaching the case, regard must be had to the criteria under s72(2) of the Act, but priority weighting must be afforded to any matters of relevance under s3 relating to national importance. It is plain on the facts that this is a case where s3(1)(c) is relevant."

Those subsections are as follows:

> **"72 Conditional uses -...**
> (2) Subject to s3 of this Act, in considering an application for consent to a conditional use, the Council shall have regard to -
> (a) The suitability of the site for the proposed use determined by reference to the provisions of the operative district scheme; and
> (b) The likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and the economic, cultural, social, and general welfare of the people of the district."

> **"3. Matters of national importance** -(1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:...
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and

> rivers and the protection of them from unnecessary subdivision and development."

The Tribunal. referred to the evidence of the principal planning witnesses and of some 16 other witnesses. It commented that the case before it was very fully canvassed on all sides. It reached the conclusion:

> "In the result, we have reached the clear view that the proposal, if allowed, even in its modified form, would have too great an impact on the amenities of the surrounding area. We agree with Mr Ralph's view, supported by other evidence, that the Waiotahi estuary has physical, ecological and cultural features or elements that together produce a relatively sensitive environment. Although the pipi bed is a continual source of visitation by local people and others 'passing through', use of the general area comprising the various reserves earlier described and the estuary is low key, in keeping with the absence of facilities of the kind sought to be established by the applicant....
>
> Our view is that, as a matter of degree, the proposal would constitute an 'unnecessary ... development' within the meaning of paragraph (c), and that the prime consideration must be to protect the natural character of the coastal environment and the margins of the river leading to the sea. In essence, the scale of the proposal, though reduced, remains greater than the area can suitably accommodate or absorb. For the reasons outlined, the application must therefore be declined.""

From that decision, Estuary Holiday Park Ltd appeals to this Court.

Mrs Makere Jones has cross-appealed. She was one of the appellants before the Planning Tribunal, but was not held to have status to appeal by the Tribunal. It simply held it did not need to determine Mrs Jones' status, having found that the first respondents, Mrs White and Mr Larsen did have status to appeal.

I have had the benefit of submissions on behalf of the Minister supporting the opposition by the first respondents to the appeal. In

the same way I have had the benefit of submissions in support of the appeal by the Opotiki District Council.

Before me, the appellant and the Opotiki District Council did not challenge the basic approach of the Tribunal. It was accepted by them that this was a case which the Tribunal had assessed and concluded as a matter of degree that it was an unnecessary development within the meaning of s3(1)(c).

The general principle upon which this Court may interfere where questions of law arise are well settled. In *Environmental Defence Society v Mangonui County Council* (1988) 12 NZTPA 349,353, Chilwell J summarised the principles as follows:

> "The limited role of this Court in hearing and determining an appeal confined to errors of law is well known. The general principle is that the Court can interfere with the Tribunal decision only if it has applied a wrong legal test or if it has come to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come, or if it has taken into consideration matters which it ought not to have taken into account or if it has failed to take into consideration matters which it ought to have taken into account"

As I have said, the appellants before me accepted that the Tribunal was entitled to come to the view it did, weighing the evidence on both sides, and has confined its appeal to three areas, substantially questions of law. The first question relates to the status of the first respondents, Mrs White and Mr Larsen, and to the status of Mrs Jones, the cross-appellant in this application. On behalf of the appellant it was submitted that none of those parties had status to appeal.

The second ground of appeal was whether the Tribunal was correct in law in admitting all the evidence tendered on behalf of the appellants and the Minister of Conservation, notwithstanding the specific nature of the contentions set out in the objections by Mrs White, Mr Larsen and possibly Mrs Jones.

The third basis of the appeal is as to the interpretation of s3(1)(c) of the TCPA. The submission made was that the words "subdivision and development" did not include a mere use of the land and the proposal therefore did not constitute an unnecessary development within the meaning of s3(1)(c). A further question was raised on the issue of costs.

The question of status is governed by s2(3) of the TCPA:

> "(3) The following bodies and persons shall have the right to object ...
> (c) Any body or person affected
> (d) Any body or person representing some relevant aspect of the public interest."

The principles have been well established in the case of *Blencraft v Fletcher Development Company* [1974] 1NZLR 295, 312 where Cooke J put the matter as follows:

> "I think that an objector whose status is challenged must be able to show that he has reasonable grounds for contending that he is appreciably affected by the use, in the sense that there is or is likely to be an effect on him significantly greater than or different from the effect on the general public"

The question is one of fact and degree and is primarily for adjudication by the council at first instance, or the Appeal Board on appeal.

In *BP Oil (NZ) v Taupo District Council* (unreported decision of Doogue J; High Court, Hamilton M300/85, 31 January 1989) His Honour said:

> "The test set out by Cooke J in *Blencraft's* case ... has been adopted for many years ... in my view however, when the language of Cooke J is read in context, the objector whose status is challenged must merely establish that there is an appreciable effect upon the objector which is more than minimal and which places that objector in a different category to ordinary members of the general public."

Mr Richardson referred me to the cases of *Station Realty Ltd v Henderson Borough* (1972) 4NZTPA 190 and *Swartz v Wellington City* (1987) 12 NZTPA 187 were at 192 Davison CJ said:

> "There must be something in the way of affection which distinguishes a person claiming status from the general public at large."

The question really comes down to what is the general public. The Tribunal in this case, after referring to the status of Mrs Jones said:

> "However, whether or not we are right in this, we are satisfied as to Mrs White's and Mr Larsen's claims to status. While, as we have indicated, Mrs White resides some 3 km away, we find and hold, as a matter of degree, that she is a person sufficiently proximate, with a particular interest in the land concerned, as to warrant her claim to be affected over and above the public generally. We hasten to say that distance in a case like this is relative. It may be, as a matter of degree, that Mr Collis is somewhat too far away at 7 km; but Mrs White, in our opinion is sufficiently close by at 3 km to warrant her recognition as an appellant. Again, Mr Larsen has a particular interest over and above the public generally. He spoke in his evidence, of school pupils' trips to the estuary area (later described) for study purposes from time to time. We are satisfied that, as head of the local school, Mr Larsen has a genuine interest and concern to see the amenities of the area protected. He qualifies as someone representing a relevant aspect of the public interest - namely, the maintenance and preservation of the relevant area for the educational purposes of the school. We likewise uphold his status."

Thus the Tribunal held, and in my view correctly, that the finding as to status is essentially a question of fact and degree. As such it is not a matter with which this Court should interfere unless it is satisfied that there was no evidence to support the finding, or it was unreasonable in the *Wednesbury* sense.

A relevant decision is the case of *Hadley v Opotiki County Council* (1973) 4NZTPA 443. That was a case in which the applicants sought

consent to a conditional use to establish a camping ground at Oruaiti Beach Waihaua Bay. Again in that case there was a challenge to the status of the objectors. The Appeal Board found the objectors had appropriate standing to object and made the following comments:

> "What is the 'neighbourhood' will vary from case to case according to the nature of the locality... the amenities of a neighbourhood are unique to that neighbourhood. Some qualities and conditions in a neighbourhood may be relatively unimportant or even totally insignificant in relation to the overall qualities and conditions constituting the amenities of that neighbourhood, and a proposed change in those qualities and conditions may affect appreciably only a few of the persons who enjoy the amenities of that neighbourhood. Other qualities and conditions may be important or even fundamental in relation to the amenities of that neighbourhood; and a proposed change in them may affect appreciably all the persons who enjoy the amenities of that neighbourhood. We hold that in the latter case all the persons in that neighbourhood can properly claim to be affected if the proposal is one to which the provisions of s28C apply; and that consequently they have a right of objection and appeal. That however, does not make the right of objection and appeal open to the public generally; the right is open to those who belong to the neighbourhood and who will be appreciably affected."

It is quite clear that what is the neighbourhood and what is a neighbour will vary widely, depending on the circumstances. Thus for someone living in the centre of Auckland, a person who lives half a mile away could not be described as a neighbour, whereas in a remote area in the country, a person living half a mile away may be the nearest neighbour. In my view that demonstrates it is a question which should be determined on the facts of the particular case. The Tribunal, having determined that in their view Mrs White came within the definition of a neighbour and was one particularly affected by this application, it is not a matter that I could or indeed think I should interfere with. Equally Mr Larsen is the head of the local school. He took his pupils on trips and has an interest greater than the ordinary person and one which comes within the scope of s2(3)(d) - a person representing some relevant aspect of the public interest.

The second basis, as I have said, on which the appellants challenged the decision of the Tribunal is that the Tribunal did not act correctly in receiving all the evidence tendered on behalf of the respondents and by the Minister of Conservation. The inquiry before the Tribunal is into the application as well as to the objections. It may regulate its own procedure (s149(1)), it has powers to call for and receive evidence whether or not legally admissible (s149(2)), it may itself call evidence from any person who it considers has special knowledge, skill or experience which might assist it (s149(3)) It conducts a complete rehearing de novo which is in substance an exercise of an original jurisdiction to determine the application or objection completely afresh on the basis of the evidence before it and in the light of the circumstances prevailing at the time of its decision. *Ireland v Auckland City* (1981) NZTPA 96, 99 per Speight J, *Raceway Motors v Regional Authority* [1976] 2NZLR 605, 613 (Casey J).

For the purpose of hearing and determining any appeal the Tribunal has all the powers, duties, functions and discretions of the Council at first instance. That therefore includes the inquiry into the application as well as to the objections. The Tribunal has the duty of considering not only the objections lodged, but also the application itself. The provisions of s72(2)(a) & (b) make that clear.

In *Minister of Works and Development v Oroua County Council* DNo W103/86, the Minister'/s appeal stated that the granting of consent:

a. Could compromise the level of safety and efficiency of the state highway
b. Would have significance beyond the immediate vicinity of the land and set a precedent.

Counsel for the applicant in that case took issue with the second ground of appeal maintaining that this ground was not specified in the original objections. Judge Treadwell at P2 of the Tribunal's decision said:

> "Ground (b) is not however a factual ground but is merely an indication that one of the limbs of s74, which the applicant must overcome is in issue. Ground (b) is thus merely a statement of the law which the Tribunal is

> required to apply and could form part of the Minister's argument whether or not it was specified in the appeal documents. We do not accept, as submitted, that the appellant is debarred from arguing questions of law or applying facts to a situation for the purposes of that argument merely because it is not referred to in the appeal documents. It is for the applicant in the present case to establish that the application does not infringe the limbs of s74 of the Act and all parties are at liberty to adduce evidence in that regard. However, if a party was taken by surprise, which is not the case here, then an adjournment might be granted with costs."

The full range of the whole 36 objections lodged with the Council was summarised in the Planning Officer's report produced before the Planning Tribunal. Those objections raised the environmental sensitivity of the area, the major significance of the site to local Maori people as a traditional food gathering area, disruption to wild life that live and feed in the area, the cultural significance of the area to the local Maori people including 3 pa sites and an urupa located in close proximity to the site, the utilisation of the Waiotahi recreation reserve and the adjoining esplanade reserve and the issue of public access.

The appellants before me, have made no attempt to submit that they were in any way taken by surprise by the matters raised on behalf of the respondents and of the Department of Conservation, and indeed the notice of appeal specifically raised the issues. The applicants on evidence presented to the Planning Tribunal covered the full range of issues and relied in particular on the evidence of Mr Goddard, the director of the applicant company, Mr Martin, the planner for the applicant, and Mr Morton the engineer.

The evidence called by the Department of Conservation was heard pursuant to the Department's right to appeal under s157 of the Act as a party, having an interest in the proceedings "greater than the public generally". Any person coming in under the section is required to establish his or her right to do so, but having done so, may participate fully in the hearing in the sense of calling evidence, cross-examining witnesses and making submissions on any matter relevant to the issues raised in the hearing and on any matters arising from that party's particular interests and responsibilities.

I am of the view that such a party appearing under s157 cannot be limited to the issues raised by the appellants and the objections filed by them. The purpose of the section is to enable parties having some specific interest in the proceedings greater than the public generally, to appeal and give evidence on any matter relevant to the effects of the application on matters in which they have a special interest.

I am therefore of the view that the Tribunal was well entitled to hear and take into consideration all the evidence presented to it, not only on behalf of the first respondents in this application, but also on behalf of the Minister of Conservation.

The final issue raised by the appellants relates to s3(1)(c) which I have set out. Basically what the appellants are saying is the present proposal would not constitute a development within the meaning of the section, but I have already set out changes, modifications and improvements to the land required for the purpose of turning it into a camping ground capable of dealing with some 360 people at peak periods. What is a use of the land may well involve development. Here, in my view, what was proposed was clearly a development to some extent.

It was acknowledged on behalf of the appellants that there would be some development, but it was submitted that development would be so minor it would not really come within the scope of s3(1)(c). Again that was a questions which was a matter for the Tribunal to determine.

The Tribunal weighed all the factors and came to the conclusion that the different matters required to change the area to enable the establishment of the camping ground, would be a development, and in its discretion held that that development was unnecessary within the meaning of s3(1)(c), and would go against the requirement under that section to preserve the natural character of the land.

In *EDS v Mangonui County* [1989] 3NZLR 257 at 259, the Court of Appeal held that s3(1)(c) is authority for the following propositions:

(a) in the end, matters of national importance must carry greater weight than district goals.

(b) in the context of s3(1)(c) the word "necessary" is "a fairly strong word falling between expedient or desirable on the one hand and essential on the other."

(c) the section does not provide absolute protection to the coastal environment; a reasonable rather than a strict assessment is called for; but the test is no light one.

The *EDS v Mangonui* case involved the rezoning of a remote part of the Karikari peninsula in the Far North to accommodate a destination tourist resort. In another decision *Opoutere Residents & Ratepayers Association v The Planning Tribunal* (1989) 13 NZTPA 446 the Court of Appeal dealt with a proposal to establish a camping ground for up to 325 people in a remote scenic coastal area of Coromandel. Like the present case, the application was for conditional use consent under s72. The case confirmed that matters of national importance have primacy over district considerations. At p451 Somers J said:

> "Under para (c) the natural character of the coastal environment is to be protected against unnecessary developments. It is for a developer to show a necessity sufficient to override those national interests. I doubt whether that could be achieved by demonstrating that many people wish to camp or stay in a comparatively undeveloped part of the coast when many other parts of the same coast afford all types of accommodation. One of the objects of para (c) must be to prevent that happening."

As I have said, there is no attack on the Tribunal's weighing of the different factors. Once it is established that some development must take place to enable the proposal to proceed, it is then a matter for the Tribunal weighing those factors to determine whether that was such a development as would come within the provisions of the section. The Tribunal has done so, and it is not a matter I can or should interfere with.

Fundamentally, what was being done was development. The only question was how much. The Tribunal considered the matter and came to a conclusion which was well within its powers.

The final matter I have to deal with is as to the question of costs, and I am of the view in this particular case I should not interfere, nor am I asked by the appellants to interfere with the determination of the Tribunal that no costs should be allowed on the hearing before the Tribunal. On behalf of the respondents in this application however, Mr Randerson submitted it would be proper for costs to be allowed and I will hear Mr Richardson on that point.

In response to my invitation, Mr Richardson has set out in particular the way in which the case for the first respondents, the objectors to the proposal has developed and grown with the addition of further evidence, and in particular the intervention and eventual opposition from the Minister of Conservation. All of those matters were quite clear before the appeal lodged in this Court was filed. I accept as counsel for the respondents have done, that the Tribunal was correct in ordering no costs on the hearing before it, but in my view the application to this Court was an entirely separate matter, undertaken with a full knowledge and understanding of the different issues I have dealt with.

In the circumstances, I am of the view it would be proper to allow the respondents costs. I have no doubt they have been put to substantial expense, and I therefore allow costs to the first respondents in the sum of $2500 together with any disbursements or costs they have met, such costs or disbursements to be settled by the Registrar if necessary.

In all the circumstances I do not allow costs to the Minister of Conservation who is not subject to the same difficulties an individual objector may face.

P.G. Hillyer J

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