

7th August 2017

Dear Lynne,

Further to the request made by the Commissioners by your e-mail dated 4th August, please find written submissions and case law reflecting my oral submissions to the consent authority on Friday 4th August 2017, that in turn respond to the variations in evidence and proposal adduced by the applicant during the course of the hearing. I have attached copies of the authorities to this e-mail.

1. Local Authorities cannot use the consenting process to 'license businesses' or engineer particular business outcomes (see Simon Upton NZPD Third Reading of Resource Management Bill,¹ various writings of Justice Randerson,² and the line of jurisprudence from ***Batchelor v Tauranga District Council (1993) 1A ELRNZ 221 at 223-4*** and ***Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (1993) 1A ELRNZ 399 at 410 onwards***³).
2. The statutory focus means we cannot approach the matter along the lines of: 'Dunedin wants a 5 star hotel and the applicant is developing a 5 star hotel'. If the matter passes the s 104D test, the applicant's case is that positive economic effects will outweigh adverse effects in the s 104(1)(a) test. It is trite that the applicant has to produce objective probative evidence of positive effects not just assert.⁴ It is inconceivable that the applicant's experienced and able counsel would not know this. Adducing evidence of economic effects on the penultimate day of the hearing has the effect of locking out submitters who may have submitted on the economic effects if this information had been filed before submissions

¹ Hon Simon Upton MP, (4 July 1991) 516 NZPD 3018 ("Government has moved to underscore the shift in focus from planning for activities to regulating their effects ... economic and social outcomes are in the hands of citizens ... Government's focus is now on externalities ... Significantly, it is not for those exercising powers under the [RMA] to promote, to control, or to direct...") ; see also Hon Geoffrey Palmer MP (5 December 1989) 503 NZPD 14167 and (28 August 1990) 510 NZPD 3951 (the focus of the Resource Management Bill was on environmental effects and is not meant to be a social and economic planning device); Hon Simon Woollaston MP (28 August 1990) 510 NZPD 3960 ("now have equal treatment of different land uses rather than a statutory picking of winners and deciding what should be preferred above all else").

² For example, A P Randerson 'Environmental Law and Justice' (1999) NZJEL (3), 1

³ For example, *Eldamos Investments Ltd v Gisborne District Council* EC Gisborne W047/2005, 22 May 2005; *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249; *Boon v Marlborough District Council* [1998] NZRMA 305, paras [26-27] etc.

⁴ For a particularly acute example of the need to adduce objective probative evidence not rely upon assertions see *Heybridge Developments v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593 at para [51]

closed. Further, the AEE does not evaluate this evidence on economic effects.

3. ***AFFCO NZ Ltd v Far North District Council (1994) 1B ELRNZ 116*** – the applicant has a duty to put all relevant evidence before the Local Authority. See in particular pages 113-114 on AEEs.⁵
4. There are difficulties with the process that is now being adopted. The EnvC has highlighted the different procedures that may be employed at EnvC level compared to consent authority level and noted that amendments that change the proposal following expert caucusing at a late stage in the hearing effectively disadvantage submitters who cannot cross-examine experts at consent authority level – see ***Gisborne District Council v Gisborne District Council A 230/ 2002 EnvC 21st November 2002 (unreported decision) paras [13-16]***.
5. Many submissions addressed amenity effects of the development. The applicant is now proposing to change the design of the hotel. We do not know what alterations will be made. Design alterations will create different effects on amenity values. Because of the abstract and complex nature of amenity effects, the general approach to scope - i.e. following a test of permitting amendments that reduce adverse effects - is difficult to apply in this context. (Or, putting it another way, Descartes second-order evaluative qualities are an ill fit with a 'building envelope' approach to scope!)
6. The AEE does not evaluate the evidence of economic effects now adduced. Nor does it evaluate any new design that may emerge and so cannot address impacts on amenity values. It completely fails to address the mandatory criteria in Sch 4 6(1)(a). An AEE that no longer coalesces with the proposal and the effects means that there is no relevant AEE. An inadequate AEE is a *jurisdictional* issue - see ***Scott v New Plymouth District Council (1993) 1B ELRNZ 43 at 48***.
7. My submission is that the consent authority no longer has the jurisdiction to determine this matter.

Thank you,

Ceri Warnock

⁵ Note Sch 4 has become even more prescriptive since AFFCO.

ORIGINAL

Decision No. A 230 /2002

DOUBLE SIDED

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of appeals under section 120 of the Act

BETWEEN

GISBORNE DISTRICT COUNCIL

(RMA 926/01)

GISBORNE ENVIRONMENT CENTRE
INCORPORATED

(RMA 940/01)

Appellants

AND

GISBORNE DISTRICT COUNCIL

Respondent

AND

GISBORNE DISTRICT COUNCIL

Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge W J M Treadwell
Environment Commissioner W R Howie

HEARING at GISBORNE on 29, 30, 31 July 2002 and 1, 2, 6 & 7 August 2002

COUNSEL/APPEARANCES

K Fletcher for Gisborne Environment Centre Inc
A M B Green for Gisborne District Council

DECISION

[1] These two appeals relate to an application by the Gisborne District Council (the District Council) to itself as District Council and as Regional Council (Regional Council) seeking consent to establish and operate a landfill in a rural area for the disposal of municipal waste including but not limited to domestic waste, sewage and sludge, milliscreenings, septage, and grease trap wastes; and to discharge hazardous wastes to land in circumstances where it may enter water. Combined with this were applications to discharge leachate and grey water to land; to discharge liquid wastes from a composting toilet to land; to discharge to air gases dust and odour from the establishment and operation; to discharge stormwater which may be contaminated; to disturb land for the purpose of construction stormwater and leachate ponds.



to disturb land and vegetation removal in land overlays; to drain and infill wetland areas; to disturb land overlays; to drain waterways and infill an artificial lake; to alter natural water courses; to divert contaminated stormwater; to divert natural surface water; to divert groundwater for the purpose of avoiding the proposed landfill; and to take water from the Waimata River to ensure available water for fire fighting.

[2] The main consent sought was to establish and operate a landfill and that application was to the District Council as territorial authority whereas the balance of the consents sought were also to the District Council but in its role as regional authority. The District Council is a unitary council pursuant to the provisions of the Local Government Act 1974.

[3] All of the applications relate to land located off Mander Road, Waimata Valley, Gisborne and, apart from some consents concerning road widening and upgrading all relate to land described as Lot 3 DP9022 contained in Certificate of Title 6B/345 Gisborne Registry. Mander Road is at present a narrow winding country road which would be unsuitable for use by landfill vehicles carting refuse from the proposed transfer station to the landfill. We heard evidence indicating that there have been accidents on that stretch of Mander Road which leads to the forestry track which in turn accesses the landfill site and in particular one incident where a laden cattle truck overturned down a bank.

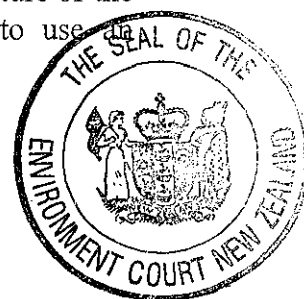
[4] The evidence we heard concerning the upgrading of the road did not lead us to the conclusion that this could be achieved without further land acquisition in terms of the Public Works Act 1981.

[5] The District Council is a unitary authority. It operates under a transitional District Plan which is operative and a Transitional Regional Plan. The former comprises the previous Cook County District Scheme Review No. 1 and the latter the former East Cape Catchment Board Transitional Plan. There is also a Proposed Gisborne Combined Regional Land and District Plan 1997 and a proposed Gisborne Regional Plan for discharges to land and water. There is also a Proposed Regional Air Quality Plan. The Transitional Regional Plan (TRP) and the Transitional District Plan (TDP) were prepared under legislation predating the Resource Management Act 1991 (RMA). A Regional Policy Statement awaits the resolution of one reference.

[6] In terms of the TDP the landfill activity is non-complying but in terms of the Proposed Gisborne Combined Regional Land and District Plan 1997 it is discretionary. There are no references which could affect its discretionary status in terms of the latter document which we will refer to as "the Combined Plan".

Preliminary Comment

[7] The District Council has chosen a course legally open to it in terms of its plan. The other course would have been to issue a requirement which would have brought into play the provisions of s.171 of the Resource Management Act 1991 (RMA). By not doing so it has deprived this Court of the ability to assess whether adequate consideration has been given to alternative sites, routes or methods of achieving the public work and whether the nature of the work means that it would be unreasonable to expect the requiring authority to use an alternative site, route or method.



[8] Viewing the matter as a discretionary activity in terms of s.104 this Court is not concerned with alternatives because the site is either suitable for the proposed activity in terms of s.104 (or can be made suitable by means of appropriate conditions), or it is unsuitable for the activity. In both those circumstances the question of alternatives is largely irrelevant to determination of suitability, or unsuitability.

[9] In the present case the District Council had been considering a number of sites and one site in particular was more or less adjacent to the site finally selected in Mander Road.

[10] The District Council were well advanced in assessing those other sites when the Mander Road site came into consideration.

[11] The second matter is that an applicant in terms of s.104 is required in terms of the Fourth Schedule to notify the decision making authority of consultations which have taken place but the schedule does not impose an obligation to consult. Nevertheless this issue was raised. We are perfectly satisfied that consultation with neighbours and with local iwi did not take place in any meaningful way. The evidence before us shows that once the Mander Road site was decided upon the extent of "consultation" was to tell those affected that a decision had been made and why it had been made. That is not consultation within the meaning of the RMA which is a process where a council has a mind open and receptive to alternate arguments. We are clear in our minds that the District Council was under time constraints when investigating the Mander Road site (that investigation being also of necessity truncated) and once it had determined that the site was suitable there was simply no opportunity at that stage to back out and consider other reasonable proposals. The existing landfill is now closed and the District Council is faced with the cost of trucking waste to Napier. The use of the resource application process as opposed to the requirement process has enabled the District Council to legally side step the requirements of s.171. As a result this Court had virtually no direct evidence concerning other sites. It also had little evidence as to the adequacy of District Council consideration of those other sites when compared with the chosen site at Mander Road.

[12] The second unsatisfactory aspect of this case was the procedure adopted by the Hearing Commissioners resulting in the final District Council decision which essentially deprived submitters of any chance to investigate in detail the final format of the landfill design. It is accepted law that this Court must accept the decisions of a council as being a valid decision subject only to amendment or cancellation by this Court exercising the jurisdiction given to it by the RMA. We have no inherent jurisdiction to declare council decisions illegal or invalid.

[13] We consider we should however briefly comment on the method by which the Commissioners arrived at their decision and in doing so we make clear that we are not criticising the Commissioners who went about their task in a totally responsible way seeking legal advice when required. We accept without question that the actions of the Commissioners were motivated solely by a desire to reach a just and reasoned decision fair to all parties.

[14] It appears that the Commissioners reached a stage in their deliberations where they felt unable to adjudicate as between conflicting engineering evidence and were in doubt concerning the potential for failure of the landfill liner with consequential escape of leachate into the waters of the Waimata River. The normal course open to them in such a situation would be to adjourn the hearing indicating the areas of concern and requiring the applicant to



satisfy them on the question of landfill integrity. A second course would be to refuse consent and leave it to the applicant Council to apply again. We appreciate however that in the Gisborne situation the public interest would not be served by causing an unnecessary duplication of procedures but would be best served by resolving the issue. That must however be balanced against the fact that submitters are entitled to time to consider the ultimate design of any particular public work of this nature.

[15] The Commissioners do not appear to have the power vested in the Environment Court under s.276 whereby it can call before it persons to give evidence if in the opinion of the Court that would assist it in making a decision or recommendation. In the absence of that power the Commissioners made a decision to constitute a peer review panel to assist it in evaluating the engineering and scientific evidence before it. The difficulty with that particular approach is that whereas s.276 requires the experts called by the Court to give evidence which in turn enables them to be cross-examined by parties, the peer review system sets the peer review panel apart from the procedures of the Court, and submitters have no opportunity to test the views of those persons who effectively become Judges answerable only to the Commissioners.

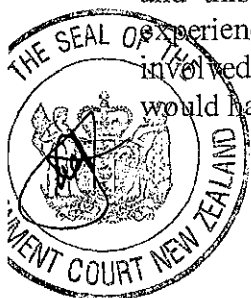
[16] In the event the peer review panel made substantial changes to the landfill design with a view to preventing or mitigating the consequences of liner rupture caused by earthquake.

[17] The Commissioners accepted the recommendations of the peer review panel and made a decision accordingly. A member of the peer review panel was called before this Court to give evidence and was subject to cross-examination. We record that in the case of the peer review panel we again take no issue with the integrity and expertise of the members of that panel.

[18] In the event because the matter finally came before this Court the appellant Society had ample time to assess the views of the peer review panel and call evidence in that regard. It also had the opportunity for questioning the member of the panel who gave evidence before us. In the event the Court is satisfied that the ultimate result achieved by use of the peer review panel would largely be in accord with the results which would have been achieved had this Court exercised s.276 powers.

[19] In making the observations we have made on the question of the peer review panel we record that we were not assisted by legal submissions from the appellant Society. In that regard the Society were largely bereft of funds. Counsel who assisted them quite candidly admitted that she had little or no knowledge of the RMA but was doing her best to help the Society presumably on an unpaid basis. At the time of the submission hearings the Society had the support of the Ministry of the Environment and we gather had some form of financial assistance thereafter.

[20] The Ministry for the Environment wrote to the Society informing them that it would be taking no formal part in the appeal to this Court indicating that its efforts and resources were being directed to some form of New Zealand standard relating to landfills whereby landfills not conforming to the guidelines of the Ministry might in future be closed. Both the Society and this Court were accordingly bereft of assistance from the Ministry in the form of experienced counsel. We had the advantage of hearing one engineering witness who was involved with the Ministry for the Environment but do not know whether any other witnesses would have been available to assist us.



[21] The number of landfill cases which come before the Environment Court are not great. This Court expresses some concern that the Ministry for the Environment, when it finds a proposed landfill unacceptable, should elect not to give assistance to the Court but rather reserve a future position whereby it will presumably have the power to close a landfill even should this Court approve it.

[22] The last preliminary matter related to the question of the relationship of Maori and their culture and traditions in terms of s.6 of the RMA which in this case related specifically to the protection of the waters of the Waimata River. We will address this in more detail later but the hapu who appeared before us had at no stage been consulted by the District Council. This being a resource consent we have already recorded that there is no obligation to consult but it appears generally accepted that consultation with Maori on issues of this nature is a wise and courteous course. There is certainly nothing to prevent consultation by an applicant and in a case such as this where the decision making process was to be conducted by Commissioners, there is probably no legal impediment to consultation by the council itself in that the council would not ultimately be called upon to sit as a judicial body. The hapu was not consulted and evidence was given by the then District Council senior planner to the effect that he had no knowledge that that hapu had an interest in the area. We find this a little puzzling in that the hapu is specifically mentioned in regional planning documents and the District Council being a unitary authority should have been alerted by those provisions and not made an assumption that the hapu had no interest in the area generally. This however appears to be symptomatic of the haste with which the Mander Road situation has been advanced.

[23] The foregoing we hope has generally set the scene for the actions which followed.

General

[24] The Mander Road site is approximately 25 kilometres distant from the city. A refuse transfer station together with recycling facilities is proposed within the city.

[25] The District Council is active in the field of recycling and indeed is endeavouring to aim for virtual zero solid waste disposal. As a result of this activity the proposed landfill is small insofar as capacity is concerned. The transfer station forms part of the recycling process.

[26] Mander Road itself serves a number of lifestyle blocks, together with a large pastoral farming unit. The Court heard evidence from representatives of the smaller blocks and from the manager and part-owner of the large sheep/cattle station.

[27] A site inspection revealed that the area served by the road is reasonably unspoiled and exhibits a remote and pastoral vista. Mander Road comes from Waimata Road and is an unsealed winding road which, as we have previously recorded, would be totally unsuited for use by refuse transfer vehicles or by construction vehicles necessary for the formation of the landfill site.

[28] The majority of the homesteads on Mander Road will be unaffected by passing landfill traffic being beyond the entry into the landfill site. All residents however express fear for their safety and the safety of their children. School children wait for school transport at the intersection of Mander Road and Waimata Road. The District Council have already foreseen that potential danger and are shifting the school bus stop to a position clear of that



intersection. Nevertheless between the entry to the landfill site and Waimata Road there will be potential conflict between vehicles and children.

[29] For that reason we consider that a condition should be imposed preventing the use of Mander Road for landfill traffic and in particular for refuse transport vehicles during the times when school children will be proceeding to or leaving from the school bus pick up site.

[30] Apart from landfill traffic we do not consider the submitters, apart from the occupants of the station homestead, will be affected to any particular degree by the landfill. It is virtually hidden from view being within a commercial pine forest. Nevertheless, a serious concern expressed by residents and supported by evidence relates to the potential for forest fire caused by the increased activity of vehicles within this forest and the potential for refuse to either contain materials already combusting or with a potential for instantaneous combustion.

[31] Forestry is rapidly developing in this area with much of it reaching the harvesting stage and residents on Mander Road fear they may be isolated and endangered in the event of fire. Evidence was given on behalf of the Rural Fire District which we will address in a little more detail later but we are satisfied that personal safety is unlikely to be an issue because the Rural Fire Service appear to have such matters well under control. The nearest dwelling to this site is some 700 metres distant and the next over one kilometre.

[32] We record at this stage that the Rural Fire Service whilst not welcoming a landfill consider that the forestry area will not be subjected to excessive risk. Nevertheless the District Council for its part must realise that Fire authorities have the ability to shut the landfill down for such periods as it thinks fit if there is a fire risk at any time which is considered to be unacceptable.

[33] The landfill site itself will contain 41 hectares consisting of the landfill and associated leachate disposal areas. This is presently covered in plantation pines forming part of a 122 hectare forestry estate. The site is contained within an old oxbow of the Waimata River which lies approximately 13 metres above present river level. We will describe the site in more detail later.

[34] The base of the landfill is presently swampy and part is covered by a reasonably substantial lake formed by a man-made dam constructed in connection with the operations of the farm. We do not accept the swampy wetland as being a significant wetland in terms of s.6 of the Act.

[35] As with the whole of the Gisborne area there are signs of earthquake faulting but the faults are not apparent within the actual landfill site. The Society produced a report indicating a suspected fault across the site, but that report was not accepted as correct by experts called by the District Council. The Society did not call the compiler of the report being at that stage bereft of the necessary funds and for that reason this Court cannot accept an untested report as against the evidence given on behalf of the District Council. Whether or not there is a fault is not however greatly material to our decision because even the engineers who have designed the landfill candidly accept the danger of earthquake and unequivocally accept that the landfill liner will rupture during the life of the landfill and/or during its subsequent maintenance period.



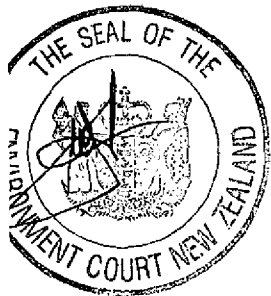
[36] The question of liner failure is the crux of this case. This Court must be satisfied that any leachate escape will be trapped and treated as proposed and will not find its way into the waters of the Waimata River. Although the waters of that river are presently degraded by farm run-off the situation should not be exacerbated by entry of leachate with potentially toxic elements which leachate is likely to contain. We also accept that the presence of leachate in the river waters is unacceptable to the Maori people. We will later discuss in greater detail the situation whereby there are water divides combined together with ascertainable natural water movements below the landfill.

[37] The landfill liner will be designed at the base as a dome. This should cope with any settlement caused by the weight of the landfill and will ensure that leachate movement will be to the sides where collector drains will intercept. The water divide will ensure lateral containment. Should the liner rupture, and the engineers were more or less agreed as to the area where rupture may occur, any leachate traversing strata and materials below the liner can be collected in subsoil drains and treated. All leachate escaping whether by way of the internal drains or as a result of ruptures in the liner through the subsoil drains, will be spray irrigated under a controlled system into adjacent forestry areas. We record at this stage that there is some concern that there may be a subterranean river flow following the old oxbow pattern forming a direct flow pattern from the landfill site to the adjacent arm of the Waimata River. There is some anecdotal supportive evidence in that regard to which we will later refer. The question of an actual leachate escape to the river and the potential environmental effects has not been addressed in this decision because there is no application in that regard. It is discharge to land which the District Council has decided upon.

The Major Issue

[38] The major issue for us to determine is whether leachate can and will be contained within this site in the event of a liner rupture. We are satisfied from the evidence we have heard that without a liner rupture the site in terms of leachate management, is a suitable site for a landfill in that any leachate could be contained within the liner and leachate drained from the landfill can be readily dealt with on site. We record however that the maintenance period after the landfill ceases could extend for many decades. The District Council is a unitary authority and will be both the landfill operator and the enforcement authority. Furthermore the present methods of leachate disposal onto forestry areas will continue well into the future and will continue beyond the time of harvest of the forests. We consider that some form of independent certification must be in place to assess on a biennial basis compliance with leachate disposal conditions and further charged with making a report to the regional arm of the unitary council should a situation arise when enforcement action should be taken -- namely when the presence of leachate is detected near the river. We are in a little difficulty as to what will transpire should action not be taken but feel that public pressure at that stage would result in a satisfactory outcome. We suggest an independent certifying engineer and a condition is to be imposed accordingly.

[39] There are of course further difficulties with the way in which governments have over the last few decades reconstituted local authorities; regional authorities; drainage boards; and bodies of that nature. Unfortunately we cannot foresee that far into the future.



Groundwater

[40] The essential finding of fact which we must make at the commencement of this decision is whether leachate can escape the landfill site. We use that expression to encompass the landfill itself and the various ancillary aspects of the site such as leachate ponds, stormwater ponds, and works of that nature. The site itself for the purpose of a groundwater assessment is generally the area contained within the oxbow. For the purposes of environmental effects it would be any part of the site liable to be contaminated in close proximity to the Waimata River or to any groundwater systems leading to that river.

[41] We are satisfied from the evidence given to us on behalf of the District Council that the District Council is justified in its conclusion that leachate can be contained within the site even should the landfill liner rupture. We exclude of course from that remark any major upheaval caused by earthquake of a catastrophic nature such as the Napier earthquake in 1931. Excepting such a catastrophic event our conclusions in respect of groundwater follow.

[42] The site chosen by the District Council for this new landfill is in a valley that was until some 5,000 years ago the ancient course of the Waimata River. In this reach the old river course followed a "U" shaped meander path that has now been cut off by the river leaving what is called an "oxbow". The base of the oxbow feature is now elevated some 13 metres above the Waimata River and is drained by two streams, one draining the western arm and the other the eastern arm. A man-made pond has been created near the head of the western stream.

[43] The landfill is proposed to be located in the western arm of the oxbow starting just below the pond and extending down the open-ended valley in a northerly direction about 900 metres. It is to be 30 metres deep and is to have a finished level of approximately 70 metres ASL. It may ultimately have two tipping faces.

[44] The hill to the west of the proposed landfill rises to RL 74 metres ASL and to the east the hill rises to RL 100 metres ASL. Land at the head of the stream draining the western arm of the oxbow rises to RL 53 metres ASL approximately. This is the catchment watershed between the western and eastern streams. Bedrock in the valley is typically at about RL 33 metres ASL and the pond is at an elevation of RL 50 metres ASL approximately.

[45] Beneath the proposed landfill the valley is infilled with up to 15 metres of alluvial deposits that overlay the thick tertiary siltstones and sandstones that form the bedrock. The dip of the bedrock is generally very low at the site as it is situated on the axis of the Waimata Syncline. No major faults have been identified within the site catchment, although the appellants challenged this conclusion and the matter has been dealt with elsewhere in this decision. Colluvial deposits occur on the valley sides.

[46] A prime design philosophy adopted by the District Council for this site is the containment within the site of any contamination resulting from the operation of a landfill. Of principal concern therefore was the prevention of the escape of leachate to the river, streams or groundwater beyond the site. Leachate from within the landfill is to be collected and recirculated within the landfill, with excess volume being biologically treated and disposed of by land irrigation on the site. Any leachate that escapes to groundwater beneath the landfill is to be collected by underdrains and treated similarly. The collection, treatment and disposal of



leachate are proposed to be located at the northern end of the landfill where it is downstream of the landfill in the western arm of the oxbow.

[47] The appellants challenged the concept that the groundwater in the western arm of the oxbow flowed northerly generally in the same direction as the surface stream. We were referred to Figure 11 of Mr Mazengarb's evidence that showed that the ancestral Waimata River flow direction was southerly around the old oxbow. They contended therefore that the now buried river channel would provide a groundwater flow path in a southerly and easterly direction to the Waimata River. It was their view that any contamination of this groundwater flow by leachate from the landfill would not be captured and treated and could contaminate the river.

[48] Mr Sharp, part-owner and manager of the neighbouring Waimata Station, told us that as a result of soil improvement work and drainage work he had undertaken in the area he concluded *"it appears that the old river bed has a substantial active drainage system which is contra to the surface water system."* Mr Sharp produced a sketch/drawing showing his view of the groundwater flow. It postulated a similar groundwater flow direction to that of the ancestral Waimata River flow direction.

[49] The District Council refuted this possibility of the escape of leachate from the landfill and into the Waimata River, relying on the conclusions of Mr Pattle. He is a qualified civil engineer with 25 years of experience in the assessment of the effects of development on water and soil resources. He has specialised in groundwater resources including groundwater flow and contamination investigations. Mr Pattle has investigated the groundwater conditions at the landfill site and has concluded, *"the natural hydrogeological features of the landfill valley give the site a level of containment for the escape of leachate that is consistent with modern landfill standards. The features that are key to this containment ability are the low permeability of the site soils and the encirclement of the site by a groundwater divide."*

[50] From numerous borehole investigations and piezometer records Mr Pattle deduced that the hydraulic conductivity of the alluvium is about 5×10^{-6} m/s and for the siltstones it is between 1×10^{-6} m/s and 1×10^{-8} m/s. He considered *"such low permeability materials provide effective natural containment for the landfill."* With a distance of 800 metres from the finished extent of the landfill to the Waimata River Mr Pattle estimated it would take over 300 years for any escaped leachate to reach the river through the groundwater. If there existed a more permeable path for the groundwater, a proposition not accepted by Mr Pattle, then the travel time would still be 10 years. Mr Pattle observed that the long groundwater residence times that he assessed are in keeping with the high natural chemical contamination and poor quality of the groundwater. Some of the boreholes intersected crushed zones and joints in the rock. Mr Pattle compared the hydraulic properties of those sections of the boreholes with unaffected sections and found they were relatively unaffected. He concluded, *"the joints are tight and do not offer significant pathways for groundwater flow."*

[51] The second part of Mr Pattle's conclusion was that there existed a groundwater divide around the site such that all groundwater in the western arm of the oxbow flowed northwards in the same direction as the surface stream and any leachate contamination of the groundwater could not affect areas beyond this western arm of the oxbow. As recorded this proposition was challenged by the appellants.



[52] A groundwater divide is like a surface watershed between two catchments. Water on either side flows away from the groundwater divide or the surface watershed. Thus the quality of water on one side of the divide will not affect that on the other side. Because the landfill site is bordered by a groundwater divide any contamination of the groundwater can manifest itself only on that one side to which the groundwater flows or migrates.

[53] Mr Pattle described his conclusions as to the location of the groundwater divide around the landfill site. He considered the divide in three sections; firstly the divide that separates the western arm of the oxbow (where the landfill is proposed) from the eastern arm; secondly the divide beneath the ridge to the west of the landfill site; and thirdly the divide beneath the ridge to the east of the landfill site.

[54] In respect to the groundwater divide within the oxbow Mr Pattle said, "*Any hydraulic boundary close to the man-made lake divides the main catchment into the two sub-catchments.*" We were not provided with a cross-section along the full valley floor of the oxbow showing the presence of this groundwater divide and the inability of any escaped leachate to migrate through the alluvium into the eastern arm of the oxbow. This was one of the challenges mounted by the appellants viz: that contamination of the groundwater could flow along the ancestral Waimata River flow path and reach the present Waimata River. However examination of a cross-section that included the valleys of both the western and eastern arms of the oxbow (Fig 2, Cross-Section AA, Pattle) shows the valley floor, the groundwater level and the level of the bedrock in the eastern arm to be significantly higher than in the western arm. This would reinforce Mr Pattle's opinion that the groundwater systems of the two arms of the oxbow are separate. We accept the presence of a groundwater divide between the western and eastern arms of the oxbow and that any escaped leachate from the landfill will not contaminate groundwater in the eastern arm.

[55] If we are wrong then we are satisfied that with the monitoring of the groundwater quality in the eastern arm as required by the conditions and the very low permeability of the alluvium any contamination would be discovered with ample time to collect the contaminated water, treat it and dispose of it through the irrigation system. We note also that no discharge to the Waimata River of leachate from the landfill is permitted.

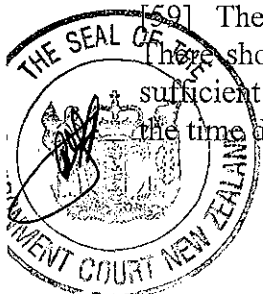
[56] In respect to the groundwater divide beneath the western ridge and that beneath the eastern ridge, Mr Pattle showed by reference to borehole logs and cross-sections that those features were sufficient to contain any escaped leachate within the confines of the western arm where the landfill is proposed.

[57] We therefore accept Mr Pattle's opinion that "*overall, the encircling groundwater divide is secure from the escape of leachate across it.*"

Leachate

[58] We are satisfied that the conditions relating to monitoring, containment, and disposal of leachate are now satisfactory but there should be two further conditions.

[59] The first relates to the disposal of leachate by way of irrigation onto forestry areas. There should be a condition requiring the progressive replanting of forestry areas to enable sufficient areas to be available for irrigation onto growing plantations throughout the whole of the time during which the landfill will be operational plus the period of maintenance which we



understand could be up to 45 years. Put another way the forest must be maintained at a growth stage whereby irrigation can continue uninterrupted.

[60] The second condition is a closure condition. The condition must require the closure of the landfill within six months of it being concluded as a result of monitoring combined with the report required by paragraph 38 of this decision that leachate is escaping. We suggest monitoring stations within 20 metres of the banks of the river closest to the landfill site. Monitoring of those sites should commence at the expiry of five years from the commencement of the landfill for the purpose of assessing the ambient make-up of groundwater. From then on biennial tests should be taken to establish whether there is any change to that ambient level consistent with the chemical constituents of leachate emanating from the landfill. Should the presence of leachate be established then the landfill is to be closed and capped in accordance with the conditions of consent. The treatment of leachate for the maintenance period must continue. We have chosen biennial checks because escape of leachate will be a slow process.

[61] As any proven escape of leachate to the Waimata River would be in breach of the conditions of consent, we would expect the regional arm of the District Council to in any event commence enforcement procedures in terms of the RMA or any Act in substitution in order to take what steps are possible to trap the leachate escape to the river.

Fire

[62] The question of fire is not only a local but a regional problem. The region as a whole is investing heavily in forestry with many tracts of forest now connecting one with the other and with many residences now finding themselves isolated to a degree by forestry interests. Taking into account what is now commonly referred to as the "baseline" test, the Court can generally accept that forestry is likely to increase and with that increase fire danger will also increase.

[63] The District Council application for a landfill has been assessed by the Rural Fire Service, as we have already recorded. It does not object to the establishment of a landfill subject to compliance with conditions it has suggested. It is not only concerned with landfill activities but also with potential sparks from vehicles or danger caused by vehicles meeting with an accident within forestry properties.

[64] Because this particular landfill will be accessed only by vehicles carting rubbish from a transfer station (or by other vehicles duly authorised for a specific purpose) there will be a reduced danger from fire caused by the refuse itself. In other words it will already have been vetted at the transfer station stage thus making it unlikely that material which is already combusting will be carted to the landfill. Also, on the plus side of the ledger the landfill site will contain approved fire fighting equipment which would otherwise be absent in the Mander Road area.

[65] In the absence of opposition from the Fire Service we are not prepared to refuse consent to the landfill on the basis of fire danger. Although it may be regarded as a cumulative effect within the meaning of the RMA we are not persuaded that a controlled operation such as this is likely to pose any greater threat than the thoughtless activities of the general public in relation to cigarettes, outside barbeques, and activities of that nature which frequently trigger fires. We are however prepared to give leave to the Officer in Charge of the Rural Fire



Service in this area to lodge any further suggestions as to conditions which may have occurred to him since the hearing. Ten working days from the date of the delivery of this decision is given to the Fire Service in that regard.

Traffic

[66] The Court is being asked to accept that the District Council will upgrade the road to the standard necessary to cope with landfill traffic on the public road leading to the forestry track which in turn gives access to the landfill site. The public road will need straightening and upgrading to a sufficient width to enable use by landfill traffic; traffic associated with the residents of Mander Road; and traffic necessary for the types of activities such as farming conducted by those residents. The road to where it meets the entry into the forestry track should be of two lane standard suitable for such traffic or, if that be found impossible then an adequate system of passing bays would be required.

[67] The District Council for its part accepts that the landfill cannot commence without an adequately upgraded road but does not yet appear to have taken any steps to survey the route of that road and to acquire land from the private individuals who will be affected by the realignments.

[68] The residents for their part are far from satisfied that the District Council will heed any of their concerns as to safety and fear that once the landfill receives approval the District Council will be anxious from an economic viewpoint to have the landfill operational and will tend to leave access as a secondary consideration.

[69] The Court for its part is not used to nor receptive to situations where it is being asked to allow the final detail of schemes to be at the mercy of decisions by the applicant without any further input by those who are most closely affected.

[70] In order to be fair to all parties the Court considers that this is an appropriate circumstance where a peer review should be required to certify that the design of the access road is of a standard adequate for its purpose and of an acceptable standard to ensure as far as is practicable the safety of those making use of that road.

[71] We accordingly desire a condition to be formulated whereby the surveyed route of the road; the proposed standard of construction; and signages and road markings required are placed for peer review in order that they may be certified as reaching an acceptable standard of safety as outlined in paragraph 66 and including the design of the Mander/Waimata intersection and school bus stop. The exact criteria may need to be defined a little further. The peer review will be conducted at the expense of the District Council. Insofar as the peer review is concerned we consider that Transit New Zealand, if it would accept the brief, would be an appropriate authority for peer review purposes although the road is of course not a road within its jurisdiction as a highway authority. In the absence of consent by Transit to accepting the role we have suggested then the Court would accept as a review authority any of the major traffic engineering consultants practising within New Zealand not previously employed or consulted by the District Council.

We await suggestions concerning that condition and as to the peer review authority to be appointed.



[73] In respect of Waimata Road the intersection with that road and Mander Road is to be part of the peer review we have suggested in the previous part of this decision. There are other intersections on Waimata road and in particular the intersection with the State Highway leading to Opotiki but we are not persuaded that the additional load caused by landfill traffic is sufficient at this stage to justify this Court requiring any major roadworks in respect of those other intersections. We are however conscious that in the not too far distant future logging traffic on this road will increase substantially and at that stage upgradings of the road and its intersection will require attention regardless of whether the landfill proceeds or not.

[74] We are content to leave resolution of that difficulty for the future disassociated from any conditions imposed in respect of the landfill.

Maori Issues

[75] Evidence was given to us by Mr Toa Tütapu (Victor Lewis). His Maunga is Papatūrangī Whakapūnaki, Maungahau Mī, Arawhāna Hikurangi. His marae is Te Te Kiko O Te Rangi situated on the northern bank of the Te Arai River, Papatū Road, Manutuke. He descends from the Hauraki and Tütapu whanau.

[76] He established that the ancestral estate of Ruapani takes in the boundaries of the Waimata River.

[77] He complained of lack of consultation which we have already addressed. His evidence covered his lack of confidence in the management skills of the District Council and its predecessors in respect of landfill sites.

[78] He claims Kaitiakitanga in terms of the Treaty of Waitangi over waterways. In that regard he refers to the liability and governance issues in regard to the cleaning up of contaminated landfill sites.

[79] His evidence covered the importance Maori place on the preservation of quality of waterways and in particular in this instance the Waimata River. It is perhaps ironic in the course of the same week the presiding Judge was called upon to make decisions on interlocutory proceedings by Maori aimed at preventing the District Council from discharging contaminants to sea. That particular case involving sewage whereby the applicants were seeking directions that land based treatment be mandatory. It is land based treatment of rubbish that the District Council seeks in this case.

[80] In the present case and in the present state of technology some disposal of rubbish is inevitable onto land. We have already recorded that the District Council is actively endeavouring to recycle and to reduce the quantity of landfill to the lowest possible level. It is indeed this ongoing policy of District Council which has enabled a landfill site of this size to be even contemplated.

[81] The witness was adamant that no leachate should escape into the river and the District Council have accepted that proposition. We therefore consider the conditions imposed coupled with the more stringent conditions we have already discussed in the course of this decision should ensure that the water values will be respected. In that regard we must also record that we cannot accept the proposition that the District Council will wilfully ignore conditions preventing discharge into the river and thus act illegally in respect of landfill



activities. Lastly in respect of this evidence we again record that there is no obligation by an applicant in respect of resource consent to consult with Maori or any other organisation or body of persons but having regard to the fact that the District Council did consult with those whom it felt exercised Manawhenua in this area we are a little surprised that those who are represented by this witness were overlooked.

Archaeological Sites

[82] We can find no evidence to suggest that the landfill area contains any such sites.

Seismic Activity

[83] We have already commented on this and, as we have recorded, Gisborne is in the unfortunate position where virtually all of the areas which might be considered for landfill operations may face this risk. The District Council have conceded this risk by acknowledging through its engineers that the liner will rupture. The landfill is accordingly designed with a second line of defence which the engineers are satisfied will contain leakage resulting from such a liner rupture.

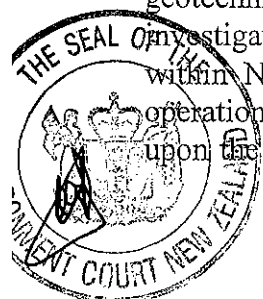
[84] In the course of the case, a curious question arose when Mr A H Nilson called on behalf of the Society expressed surprise that a liner was needed at all if the District Council accepts that rupture will occur. The matter was not pursued to any great degree but as we understand the situation the whole liner is unlikely to rupture and it would therefore be better that the drains put in place to cope with leachate contained within the liner will continue to trap the majority of leachate created with the other sub-catchments coping with only limited quantities.

Economic Concerns

[85] The Society submitted that the District Council was intent on polluting the environment as a means of preventing future expenditure relating to the cost of carting waste to out of city sites. As we recorded earlier this is an application for a discretionary activity and if the site is found not suitable for that activity or cannot be made suitable for that activity then that is an end of the matter and the cost of transport of waste elsewhere would be a problem for council and of no interest to this Court.

Landfill Design

[86] We agree with the Society that the District Council have been dilatory in placing before anyone a comprehensive engineering design of the landfill following the peer review. Indeed it was only at the direction of this Court that plans of a preliminary design have been produced. The Society are entitled to take exception to the fact that this has been given to them at the last moment without a chance being given to comment. The Society in the course of its evidence called as a witness Mr A H Nilson who is the holder of a Bachelor of Science Civil Engineering from the University of Capetown; is a registered engineer; a Member of the Institution of Professional Engineers New Zealand and has been practising in the field of geotechnical and solid waste engineering for 20 years. He has undertaken geotechnical investigations and design work on a large number of landfill sites in the Auckland region and within New Zealand generally. He has also undertaken peer reviews for major landfill operations. His evidence accordingly deserves respect. He has had no chance to comment upon the designs now produced to this Court. The Court has accordingly issued a direction



that a further affidavit from Mr Nilson would be accepted in evidence and, dependent on the content of that affidavit, a right of reply will be accorded to the District Council.

[87] We also intend that a peer review panel should certify that the final design plans are in general accordance with the design plans now produced to us and will achieve the objectives of containing leachate:-

- [a] Within the area contained by the landfill liners in normal operating circumstances or
- [b] Within an area clear of the Waimata River or any waters leading to it should the landfill liner rupture as a result of any natural or man-made event.

[88] The peer review panel should consist of three people of suitable expertise appointed by the District Council. The appellant is given leave to apply to this Court in that regard.

[89] The conditions setting up the panel should recognise the fact that engineers and geotechnical scientists will never be able to certify or state that the design will be foolproof therefore the certification we would expect from such a panel would be to the extent that they are satisfied that the design of the landfill should achieve the objectives of containment.

The Community Concerns

[90] Members of the Mander Road community were distressed at the advent of a landfill. Most of the community lives in a quiet area and wishes to retain that amenity. The landfill is close to Waimata Road and if properly managed should not affect the community to a greater extent than other rural activities. Sawmills would be an example.

Section 104 of the RMA

[91] This section is subject to Part II of the Act. The issues under Part II commence with s.5. We are satisfied that some method of waste disposal is essential for the people and communities in and about Gisborne to provide for their health and safety but in that connection we accept the submissions of the Society that a careful approach must be taken which necessitates mitigation measures of the highest standard together.

[92] The second s.5 matter relates to the waters of the Waimata River which should be preserved as far as possible for the benefit of future generations and in particular residents of Gisborne city itself who should be allowed to enjoy the waters of that river uncontaminated by the toxic elements likely to emanate from a landfill operation.

[93] In respect of s.6 we have paid close attention to the preservation of the natural character of the Waimata River and again reiterate that no party to these proceedings suggests that leachate should be allowed to reach its waters. With that proviso the development of the landfill is appropriate. In relation to the wetland which forms the base of the landfill we have already commented upon that. It is an isolated wetland invisible to the public and we accept that it does not contain any significant indigenous vegetation or form a habitat for significant indigenous fauna.



[94] Also in relation to s.6 we have already commented upon the relationship of the Maori people and their culture and traditions with the waters of this river and accept without question the importance of those values not only to Maori but to New Zealand as a whole.

[95] In respect of s.7 we find nothing in that section of particular relevance to the case now before us.

[96] Section 8 relating to the Treaty of Waitangi is not in issue.

[97] Turning now to the provisions of the district plans before we embark upon a s.104 analysis.

[98] The transitional district plan which is still operative makes no provision for a landfill operation. This makes the land use consents and stormwater discharges both non-complying activities. Although argument was directed to us that the landfill and discharge elements of this proposal should not be bundled together as required by *Locke v Avon Motor Lodge Limited* (1973) 5 NZTPA 17 as modified by *South Park Corporation Limited v Auckland City Council* A111/00 it is perfectly obvious to this Court that the primary activity is a landfill. The comments in the *South Park* case (supra) are therefore relevant to these proceedings. Although the *Locke* approach is generally applicable, we consider this proposal should be considered as a whole not split artificially into pieces.

[99] In the present circumstances in terms of the transitional plan the landfill itself is a non-complying activity with the necessity for discharge consents etc. flowing from that primary activity. It would be unrealistic to assume that this Court could decline the landfill consent and grant the others because in that case the consents would have no effect.

[100] Therefore, in addressing s.105(2A) and according some relevance to the TDP the Court is satisfied that in the context of the hidden area wherein the landfill is situated including potential increased vehicular activities caused by forestry the effects of the landfill will be minor provided the suggested conditions already imposed together with conditions imposed by this Court form part of the consent and are observed.

[101] We are furthermore of the opinion that although landfills are not specifically covered in the district plan the objectives and policies are couched in terms which suggest that such an activity properly planned and conducted will not be contrary to those objectives and policies.

[102] We do not intend to spend a great deal of time on these aspects because the provisions of the Proposed Plan are now dominant.

[103] In respect of the proposed plan which we refer to as the Combined Plan. It has been prepared in terms of the RMA. There are no references to the Court relevant to the proposed activities. It provides for landfills as a discretionary activity and policies and objectives of the plan must be read and considered in that light. In terms of s.105(2A) the Court can therefore accept that the present application is for an activity which will not be contrary to the objectives and policies of the proposed plan in terms of (2A)(b)(iii). We hold that the Combined Plan is the relevant plan in terms of s.105(2A). Therefore we are satisfied that this activity passes the threshold tests and we accordingly consider we have the power to assess it under s.104.



[104] Generally the proposed plan contains policies relating to disposal of solid wastes and policies relating to mitigation or remedying of adverse effects. The policies are directed at avoiding proliferation of contaminated sites; minimisation of noxious odours; greenhouse considerations; modern techniques; and transportation of waste effects. The general strategies etc. are not inconsistent with what is presently proposed in that the site has a unique geological formation which enables containment of leachate within the site even should it escape the landfill itself.

[105] To now turn to the various limbs of s.104 which are relevant to this particular appeal. We will consider them under the various subsections:

- [a] We have considered the actual and potential effects on the environment of allowing the activity with the exception of questions of dust, windblown litter, and odour. There will inevitably be some dust associated with the activity but proper remedial measures on site combined with the protective screening afforded by forestry will ensure that dust will be minimal and probably no greater than would be associated with normal farming activities connected with planting of crops.
- [b] Measures are in place by way of condition to deal with windblown litter. There is unlikely to be any offensive odours emanating from a properly managed landfill but in any event the separation distances to residences with the nearest being 700 metres away combined with variable wind directions would render the question of odour only a marginal consideration.
- [c] The relevant policy statements being the proposed regional policy statement as contained in the proposed plan are consistent with a landfill designed and operated to minimise environmental effects. We have briefly discussed the proposed plan and provided mitigation measures are in place the proposed activity is not inconsistent with that plan. The same applies to subs.(e) and (f).

[106] We do not intend to discuss s.104 in any great detail because the bulk of this decision has been concerned with subs.(a) which, combined with the question of the protection of the waters of the river we find to be the two dominant considerations we are required to address.

Conclusion

[107] The Court is generally in agreement with the decision arrived at by the Commissioners subject to the peer review proposals we have previously discussed. We are prepared, if necessary, to convene another short hearing preferably in Wellington to tidy up final conditions and to consider the design review panel. This decision insofar as conditions are concerned is interim because we have yet to hear from the Society as to whether it wishes to file a further affidavit by Mr A H Nilson concerning the landfill design.

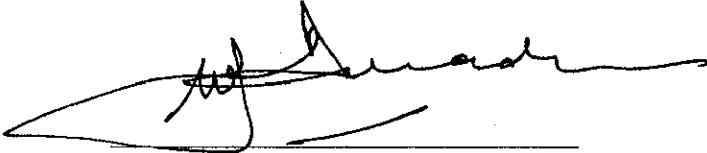
[108] The question of costs is reserved as requested but the Court makes clear at this stage that it considers the Society despite a paucity of funds went out of its way to present a helpful case to this Court and the Court is most unlikely to penalise it.

[109] The parties have ten working days from the date of this decision or such further time as the Court may allow to forward a final set of conditions and plans together with suggested conditions concerning the peer reviews we have suggested. The question of peer review may



also be subject to submissions should the District Council consider that such conditions are either beyond the power of the Court to impose or are unnecessary. However, it is the District Council itself which has rendered such conditions necessary because of paucity of detailed evidence. Should it be found that the conditions proposed are ultra vires and the District Council will not agree to such conditions then the Court reserves the right to revisit the whole decision in which case consent may well be refused.

DATED at AUCKLAND this 21st day of November 2002



W J M Treadwell
Environment Judge

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Appellant	TE AROHA AIR QUALITY PROTECTION APPEAL GROUP
Respondent	WAIKATO REGIONAL COUNCIL; MATAMATA PIAKO DISTRICT COUNCIL
Applicant	LOWE WALKER (TE AROHA) LIMITED
Decision Number	A070/93
Tribunal	Judge Sheppard presiding; Mr PA Catchpole and Dr AH Hackett
Judgment Date	29/6/1993
Quoted	Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council A056/93; JD Wallace Ltd v Piako County A052/79; Northland Harbour Board v Whangarei County (1977) 6 NZTPA 184; Home Products v Mt Roskill Borough (1979) 6 NZTPA 542; NZ Industrial Gases v Whangarei County (A101/80); Thompstone v Piako County A094/86; JD Wallace Ltd v Ors v Matamata-Piako District Council A082/90
Statutes	Resource Management Act 1991, 1991/69, s2(1), s3, s5, s87(e), s88(e), s104, s105(1)(b), s319, s342, s392; Clean Air Act 1972, s31; Town and Country Planning Act 1977, 1977/121, s4(1), s54(3), s75

Keywords

industrial; rural industry; activity non complying; discharge to air; odour; effect potential; effect adverse; environment; district plan change; council procedures; certainty

Significant in Planning and Procedure - s104, s105

An application for a byproduct's rendering plant on land not zoned for that purpose was refused where there was a low probability risk that objectionable odour could reach other properties and could have a high potential impact. Councils should promptly process and come to a decision on changes and variations to their district plan. Where objections and cross objections had been called but no action had been taken between August 1991 and June 1993 the Tribunal commented this was poor practice.

SYNOPSIS

Three appeals arose from a proposal for a new by-products rendering plant located adjacent to an export beef plant at Stanley Road, Te Aroha. The plant would employ a new low temperature rendering system; 90% of its product would be margarine grade tallow; it would have a design capacity of eight and a half tonnes per hour and an actual operating capacity of approximately 15 hours per day. Land use consent as a non-complying activity was required and also permits for the discharge of contaminants into the air from the biofilter

and from boiler flues. An amendment to the existing deemed permit for discharge of contaminants to water was also required.

The site and adjoining land on which there is an abattoir, have had a long and complicated planning history. The site is currently zoned Rural A1 and the abattoir Industrial C. There had been previous applications and appeals relating to a proposed by-product plant never built, unsatisfactory district scheme provisions and a proposed scheme change. The site is subject to a variation to a scheme change which had not progressed beyond calling for objections and cross objections, although publicly notified in August 1991. The Tribunal commented that to leave a proposed scheme change in such a state indefinitely, and not to proceed to hear and decide submissions, was poor practice. Those affected by the proposed change (which had some interim effect (s74A and s75 of the Town and Country Planning Act 1977 (TCPA)), were entitled to have the proposal progressed with reasonable expedition so that the appropriateness of those effects could be fairly considered and determined. If for whatever reason the respondent was unwilling to proceed to hear and decide the submissions and objections, it should have withdrawn the change (s54(3) TCPA).

The transitional district plan provided for animal by-products manufacture as of right in Industrial D zones, and as conditional uses (discretionary activities) in Industrial C zones. There was vacant land in both zones at various settlements throughout the district.

There was no rule of a regional plan permitting the proposed discharges - s15 RMA, so a resource consent was required: in terms of s87(e) RMA, a discharge permit. The Tribunal treated the applications for discharge permits as not falling within any of the classes mentioned in s88(3) RMA but to be decided under s105(1)(b) RMA after having regard to any relevant matters mentioned in s104 RMA, and where appropriate those mentioned in s392 RMA.

The neighbourhood was relatively closely occupied for a rural area and in addition to houses included a racecourse with reception facilities, a motor camp, an undeveloped recreation reserve and a cemetery. The Tribunal held that the attitude it took in 1979 accepting occasional noxiousness from plant failure or other random or unforeseeable cause, was no longer appropriate. It had been able to say then that an element of noxiousness must be accepted, though not allowed to become the norm but was not able to say that under the RMA for a non-complying activity. For value to be given to promoting sustainable management, enabling people to provide for their wellbeing while avoiding adverse effects, there was no place for accepting objectionable odours even occasionally when resulting from malfunctions or breakdowns. Defences available under s341 RMA should not be sufficient response where a rendering plant has been established out of zone on land where that activity was not a permitted activity.

The Tribunal contemplated granting consent expressly referring to the

applicant's assurances as to the efficacy and reliability of the air control equipment and holding the grantee responsible unconditionally for fulfilment of its assurances for the purpose of s319, so that in the event of offensive odour reaching adjoining properties the operator could not resist an enforcement order or defend a prosecution. However, avoidance of adverse effects was more consistent with the purpose of the Act than enforcement proceedings after adverse effects had been experienced. Also, the evidence did not satisfy the Tribunal that the plant would be designed and built to prevent adverse effects on the environment.

It found that there was a plausible risk (albeit of low probability) that as a result of management error, malfunction or mechanical failure, objectionable odour would reach other properties. It is also found that if they did, they would adversely affect people and their social, economic, aesthetic and cultural conditions, and the amenity values that contributed to people's appreciation of the pleasantness of the area. An escape of odour would have a high potential impact. For a new plant out of zone that risk would not be acceptable. Land use consent was refused as was a permit to discharge to the air. The question of costs was reserved.

FULL TEXT OF DECISION NO A70/93

These three appeals under s120 of the Resource Management Act 1991 arise from a proposal for a new beef by-products rendering plant located adjacent to an export beef plant at Stanley Road, Te Aroha. The applicant is Lowe Walker (Te Aroha) Limited, which operates the existing processing plant at Te Aroha. The applicant is a subsidiary of Lowe Walker New Zealand Limited which (or other subsidiaries of which) also operates export beef plants at Paeroa, Hastings, and Hawera, and proposes to operate a further plant currently under construction at Dargaville.

Many existing rendering plants are relatively unsophisticated in controlling the effects of their activities; employ relatively high temperature rendering processes, and produce one grade of inedible tallow. Unlike them, the proposed rendering plant would occupy new purpose-built premises incorporating air control systems to capture fugitive emissions of odour, and a biological filter (biofilter) for treatment of gases mixed with air from within the building, its effect being to absorb odorous compounds. The plant would employ a relatively new low temperature rendering system; and 90 per cent of its product would be margarine grade tallow, the balance being inedible tallow. The plant would have a design capacity of eight-and-a-half tonnes per hour and an actual operating capacity of approximately 15 hours per day.

The proposal requires land-use consent as a non-complying activity, and also requires permits for the discharge of contaminants into the air from the biofilter and from boiler flues. At a late stage it was discovered that an amendment to the existing deemed permit for discharge of contaminants to water would

also be required. As none of the other parties objected, the Tribunal yielded to the applicant's urging that the fixture for hearing these appeals be held. However in view of the intent of the Resource Management Act that there be an integrated consent process, parties should not rely on similar tolerance in future. Applications for all necessary resource consents should be so timed that they can all be dealt with together - both at primary and if necessary at appellate levels, lest the balancing of beneficial and adverse effects in the light of the statutory purpose be skewed.

It is proposed to locate the rendering plant on a property owned by the applicant on the north-east side of Stanley Road, about 2.5 kilometres south of Te Aroha, having an area of 12.44 hectares. The adjacent property to the south, also owned by the applicant, is the site of the existing meat processing plant and has an area of 7.18 hectares. Another adjoining property to the south of the meat processing plant site has also been purchased by the applicant, and has an area of 17.878 hectares.

The meat processing plant had originally been commissioned as a municipal abattoir in 1926, and after improvements and expansions, was purchased by the applicant in 1987 for a beef processing plant. Planning consent was granted the following year for major additions to provide additional cold storage space. The present application for land use consent was made in July 1991; and the application for permits to discharge contaminants into the air was made in November 1991. Those applications were heard together by a joint committee of the Waikato Regional Council and the Matamata-Piako District Council which, acting under delegated authority, granted both consents and imposed similar conditions on each.

The present appeals followed. By Appeal RMA 217/92 the Te Aroha Air Quality Protection Appeal Group (the Appeal Group) challenged the grant of the permit to discharge treated air and contaminants to the air and sought that the grant be cancelled, or in the alternative, that more stringent conditions be imposed to avoid, remedy or mitigate adverse effects on the environment to the fullest extent possible. By Appeal RMA 218/92 the Appeal Group challenged the grant of land use consent and sought similar relief. By Appeal 219/92 the applicant challenged some of the conditions of consent and sought amendments to them.

The appeals were heard together by rehearing *de novo* at a sitting at Te Aroha and Cambridge over 8 days in which 18 witnesses gave evidence.

During the course of the appeal hearing, the applicant announced that it no longer sought consent on the basis of processing raw material from outside sources as well as from its beef export plants at Paeroa and Te Aroha. The hearing continued on the basis of rendering material only from those plants. Later in the hearing, counsel for the Appeal Group sought leave to adduce evidence from a witness in addition to that in the statement delivered to other parties prior to the hearing, in accordance with the Tribunal's practice. After

hearing argument we gave leave accordingly. The record of the reasons given orally for that decision is identified as Decision A 56/93.

Planning History

The abattoir site and the adjoining property the subject of the present application had been zoned Industrial C in successive district schemes since 1968. The principal uses permitted in that zone were defined by lists of industries contained in an appendix.

In 1979 the then owner of the abattoir, the Piako County Council, applied for planning consent for a by-products factory ancillary to the abattoir. The County Council granted consent to a specified departure from the district scheme for that purpose. A competing business, J D Wallace Limited, appealed to the Planning Tribunal. In its decision (J D Wallace Ltd v Piako County A 52/79) the Tribunal commented adversely on those provisions referring to lists in an appendix (as it had on similar provisions in Northland Harbour Board v Whangarei County (1977) 6 NZTPA 184 and Home Products v Mt Roskill Borough (1979) 6 NZTPA 542). The Tribunal also expressed the opinion that although it was possible to design a plant that, given proper management and adequate maintenance, would operate without noxiousness, it was impossible to preclude the possibility of a degree of noxiousness arising occasionally from plant failure or from some other random and unforeseeable cause. The Tribunal commented that that element of noxiousness or danger had to be accepted; but that it should not be allowed to arise so often that it became the norm. However, although the Tribunal dismissed the appeal, the consent was not exercised, and the by-products plant was not built.

Despite the Tribunal's comments about the appendix to the district scheme defining the uses permitted in the Industrial C zone, (and continuing difficulty with similar provisions elsewhere - see for example NZ Industrial Gases v Whangarei County A 101/80) the Piako County Council did not take the opportunity of its review of the scheme to replace the appendix. When the reviewed district scheme became operative on 1 August 1985, it continued the Industrial C zoning of the abattoir site and the subject site, and continued the definition of permitted uses in that zone by similar lists in an appendix. In the following year the County Council published a proposed change to the scheme which would rezone the subject site Rural A1, and rezone the abattoir site Industrial D to give a purchaser an assurance of continued operation of the abattoir in conformity with the district scheme. However, neighbours appealed to the Tribunal about the proposed Industrial D zoning of the abattoir site (in which the abattoir would be a predominant use). In its decision (Thompstone v Piako County A 94/86) the Tribunal directed that the abattoir site be zoned Industrial C so that occupiers of adjoining properties would have assurance of proceedings in which they could participate before any significant increase in the scale of the abattoir operation could occur, or before

any change of use to another industry which may cause noxiousness. In that decision the Tribunal again expressed criticism about the lists in the appendix to the district scheme.

In 1988 the present applicant applied for planning consent for a rendering plant on the former abattoir property. The Piako County Council granted consent subject to conditions. On objectors' appeals, the Tribunal cancelled the grant and refused the application, but without prejudice to the applicant making a fresh application in the light of the decision (see J D Wallace Ltd & ors v Matamata-Piako District Council A 82/90). The Tribunal was not satisfied that the proposal had been adequately investigated and could safely proceed. In particular the applicant had not obtained approval under s31 of the Clean Air Act, and the Tribunal was concerned that the amenities of the neighbourhood should be adequately protected.

In August 1989 the then Piako County Council had initiated proposed Change No 15 to the district scheme which would reclassify the industrial zones of the district as Service Industrial and Industrial. The lists in the appendix would be recast to avoid the difficulties mentioned by the Tribunal in earlier decisions. If the changes were incorporated into the district plan, the applicant's meat processing plant site would be rezoned Industrial. The proposed change was publicly notified, objections were received, and cross-objections were called for. To date the proposed change has not progressed any further.

At the request of the present applicant, the respondent purported to have initiated proposed Variation No 1 to proposed Change No 15, but it appears that it never formally resolved to do so. The effect of the variation would have been to rezone the rendering plant site (about 0.5 hectares of land) from Rural A1 to Industrial. A rendering plant would be a conditional use in the Industrial zone. Proposed Variation No 1 was publicly notified in August 1991 and objections and cross-objections were called for. No further progress has been made with the variation to date. It turned out that on 25 June 1990 the respondent had resolved that the hearing of objections to the proposed scheme change be withheld, and that the scheme change remain proposed until a review of the district scheme was carried out. On legal advice it was decided that objections to Variation No 1 could not be heard separately from those affecting proposed Change No 15.

In our opinion, to leave the proposed change in that state indefinitely, and not to proceed to hear and decide the submissions to it, was poor practice. Those who responded to the public notification of the proposed change were entitled to expect that their submissions and objections would be duly considered, not ignored. Those affected by the proposed change (which had some interim effect - see sections 74A and 75 of the Town and Country Planning Act 1977) were entitled to have the proposal progressed with reasonable expedition so that the appropriateness of those effects could be fairly considered and determined. The respondent's course prejudiced those people. If for whatever

reason the respondent was unwilling to proceed to hear and decide the submissions and objections to the proposed change, it should have withdrawn the change (see s54(3) of the 1977 Act).

By the rules governing use of land in the Rural A1 zone, farming and related land uses are predominant uses (permitted activities in the Resource Management Act classification); and rural industries and industry ancillary to farming are conditional uses (discretionary activities). However, industries listed in Appendix 1 of the district plan are excluded, and that list contains the item: Animal by-product manufacture. Consequently it was common ground that the proposed land use is a non-complying activity.

The transitional district plan provides for animal by-products manufacture as of right in the Industrial D zones, and as conditional uses (discretionary activities) in Industrial C zones. There is vacant land zoned Industrial D south of Morrinsville, and also land at Waihou so zoned, though the latter may not be large enough for a stand-alone rendering plant. There are also adequately sized pieces of vacant land zoned Industrial C at Tahuna, and Waihou; and there is a block at Waharoa where a rendering plant would be a discretionary activity.

The Discharge permits The applicant sought to discharge contaminants into the air from the proposed rendering plant from two sources: from the plant itself via the biological filter into the atmosphere; and from two flues above two boilers in the rendering plant.

Section 15 prohibits discharge of contaminants from any industrial or trade premises into the air unless the discharge is expressly allowed by a rule of a regional plan or a resource consent. There is no rule of a regional plan permitting the proposed discharges the subject of the application, so resource consent is required: in terms of s87(e), a discharge permit.

We heard considerable argument about the classification of the resource consent in terms of the categories listed in s88(3) of the Act. In that respect it was submitted for the Appeal Group that the proposed discharges would be a non-complying activity; for the applicant that they would be a discretionary activity; and for the Regional Council that they would fall outside any of those classes, and be considered simply as an application for discharge permits to be decided under s105(1)(b) after having regard to relevant matters mentioned in s104 (and possibly s392).

The functions of the Regional Council defined by s30 include the control of discharges of contaminants into air (see s30(1)(f)). Although there are transitional rules of a deemed regional plan for the Waikato region, none of them relates to discharge of emissions to the air, and the deemed regional plan does not contain any provisions applicable to them by which they could be classified as controlled, discretionary or non-complying activities.

Section 88(3) is expressed in permissive terms, and does not purport to exclude

other kinds of resource consent for which application might be made. We are not aware of any other relevant provision in the Act, and it is clear that the legislature contemplated that applications are to be made for resource consents for discharges such as those proposed. We therefore adopt the Regional Council's submission and treat the applications for discharge permits as not falling within any of the classes mentioned in s88(3) but to be decided under s105(1)(b) after having had regard to any matters mentioned in s104 that are relevant, and where appropriate those mentioned in s392.

The Neighbourhood

The neighbourhood of the site is relatively closely occupied for a rural area. There are about 8 houses within 500 metres of the centre of the site, although five of them are owned by the applicant. (Those not owned by the applicant are between 320 metres and 580 metres away.) There is a racecourse about 600 metres away, and facilities there are used for receptions as well as for race meetings. There is a motor camp about 550 metres away; a recreation reserve (currently undeveloped) about 450 metres away; and a cemetery about 740 metres away. There is land zoned Rural B some 700 metres from the site, and that is a zone for subdivision into small farms (particularly for racehorse training) where lots as small as 2 hectares are permitted, so relatively close settlement may be expected there. In the Rural A1 zone, permitted activities include camping grounds, churches, recreation and dwelling houses; and discretionary activities include motels, restaurants, taverns, schools and hospitals.

Emissions to Air

The actual and potential effects of the proposed activity include the emission of contaminants to air from the biofilter, and from within the rendering plant itself. The raw materials that would be rendered (offal etc) are capable of giving unpleasant odours if they are no longer fresh. Gaseous emissions from the rendering process itself give strong and objectionable odours. It was the applicant's case (as it evolved during the hearing) that all the raw material would be treated with acid to preserve it from deterioration so it would not give off odour; and that vapour from the rendering process itself would be captured and conducted to the biofilter where it would be so treated that when discharged to the air it would no longer have an odour.

That case was contested by the Appeal Group, who contended that unforeseen breakdowns or malfunctions would allow odours to escape beyond the applicant's property, and although those events would be of low probability (in terms of s3) they would have high potential adverse impact on the social and economic wellbeing of people and the local community. On the Appeal Group's behalf it was asserted that even occasional emissions of rendering odours reaching other properties in the neighbourhood would have serious adverse effects.

That is obviously true for sensitive uses such as the cemetery and the motor camp. Furthermore, even though patrons of race meetings and receptions at the race course may find smell from horse manure unobjectionable, they could be adversely affected by smell from rendering animal by-products.

Both resource consent applications - that for land-use consent (for a non-complying activity) and that for the permit to discharge contaminants to the air from the biofilter - involve an exercise of discretionary judgment under s105(1)(b) after regard has been paid to the matters mentioned in s104, not the least of which are the actual and potential effects (as defined in s3) of allowing the activity. If the Appeal Group is right in submitting that there cannot be confidence that raw material odours and rendering odours would not reach other properties in the vicinity occasionally, even if only as the result of breakdowns or malfunctions, that would significantly influence the exercise of that discretionary judgment, because the judgment must be informed by the statutory purpose of promoting sustainable management of natural and physical resources.

In that regard, the present position is different from that addressed by the Tribunal in considering the 1979 by-products plant application in two respects. First, in the 1979 case the Tribunal had no jurisdiction over the clean air issues as such, but they are the subject of the discharge permit application before us. Secondly, although smell was an issue in the planning consent application before the Tribunal in 1979, that was in the context of the statutory purpose of district planning in s4(1) of the Town and Country Planning Act 1977 - a purpose which gave value to convenience and welfare of people and to amenities in the context of direction and control of the development of the district. By comparison, the meaning given by s5(2) of the present Act to sustainable management (the promotion of which is the statutory purpose), though still giving value to use and development of natural and physical resources for people and communities to provide for their wellbeing, also expressly gives value to potential to meet future needs, to life-supporting capacity, and to avoiding or mitigating adverse effects. In addition the duty to have regard to any actual and potential effects of allowing the activity is to be performed by reference to the extended meaning given to the term "effects" by s3. In relation to the environment (a term defined in s2(1) to include people and communities, amenity values (also defined) and social, economic, aesthetic and cultural conditions which affect them) the term "effects" is to be understood as including any potential effect of low probability which has a high potential impact.

In the present context, then, the attitude taken by the Tribunal in the 1979 decision accepting occasional noxiousness from plant failure or other random or unforeseeable cause, is no longer appropriate. The Tribunal was able to say then that an element of noxiousness must be accepted, though not allowed

to become the norm. The Tribunal is not able to say that of the present proposal under the Resource Management Act for a non-complying activity. For value to be given to promoting sustainable management, enabling people to provide for their wellbeing while avoiding adverse effects, there is no place for accepting objectionable odours even occasionally and when resulting from malfunctions or breakdowns.

For both applications the decisive issue is odour emission. The odour from the rendering process is offensive and can be nauseating. Occupiers of properties in the Rural A1 and Rural B zones in the vicinity of the site are entitled to be free from having to experience that odour. Proprietors of businesses on properties in the vicinity of the site are entitled to be able to conduct those businesses without their patrons or customers being deterred by experiencing rendering plant odour.

Occupiers, business people and their patrons should be free of rendering plant odour at all times without condition or qualification. It would not be sufficient for the proprietor of a rendering plant to demonstrate that emission of rendering plant odour which reached adjacent properties was the result of an unforeseen or random accident or malfunction. Nor would it be sufficient for the proprietor of a rendering plant to demonstrate that the best practicable option had been taken to avoid emission of odour which might reach adjacent properties. Defences available under s342 should not be a sufficient response where a rendering plant has been established out of zone on land where that activity is not a permitted activity.

The applicants sought to establish the efficacy and reliability of the air control equipment proposed for the rendering plant. The appellants did not challenge the proposition that the proposed plant would incorporate modern means of avoiding odour emissions. Their case was that even in the best designed and best managed plants, accidents can occur, mechanical plant can break down, people can fail to follow procedures reliably, and unexpected combinations of events can circumvent designs to avoid emission of odours to the environment.

We have considered the possibility of granting the consents sought on the basis of reliance on the applicant's assurances, and holding the grantee responsible unconditionally for fulfilment of its assurances that there would not be emission of odours from the rendering plant capable of reaching adjoining properties. We contemplated grants of consent expressly referring to those assurances for the purposes of s319, so that in the event of offensive odour from the rendering plant reaching adjoining properties the operator would not be entitled to resist an enforcement order or defend a prosecution. We were assured by the regional council that it would be assiduous to exercise its enforcement powers under Part XII in the event of offensive odour from the rendering plant reaching adjoining properties.

However, avoidance of adverse effects is more consistent with the purpose of the Act than enforcement proceedings after adverse effects have been experienced. Further, the evidence did not satisfy us that the plant would be designed and built to prevent adverse effects on the environment. After the evidence had been given, and in the course of his address in reply, counsel for the applicant felt obliged to concede, on the evidence before us, that rendering odours could escape due to a breakdown of the exhaust fan, or damage to the ducting conveying rendering vapours to the biofilter. And although he reminded us that the biofilter would be in two parts, so that if one part was not functioning, the other part would be available, he accepted that the evidence did not establish how effective the odour absorption from one part only would be. We doubt whether those possibilities exhaust possible modes in which, in various ways, odour from the plant might escape and affect properties in the vicinity.

We find that there is a plausible risk (albeit of low probability) that as a result of management error, malfunction or mechanical failure, objectionable odours from the proposed rendering plant would reach other properties. We also find that if they did, they would adversely affect people and their social, economic, aesthetic and cultural conditions, and the amenity values that contribute to people's appreciation of the pleasantness of the area. If an escape of rendering plant odour reached the motor camp when visitors were present, or the racecourse during a race meeting or reception, or the cemetery during a burial service, it would have a high potential impact. In the context of granting or refusing resource consent under the Resource Management Act for a new plant out of zone, we are not able to conclude that the risk would be acceptable.

Those who occupy property in the vicinity of land zoned Industrial D or even Industrial C may perhaps be expected to tolerate some risk of smells arising from error or malfunction from a plant on land so zoned if the best practicable options (as defined) had been taken. That might well involve duplicating all extraction and treatment systems to avoid being at risk from a single mechanical failure. However the present proposal does not provide for full duplication of the systems to avoid emanations of objectionable odour. It would be located on land zoned Rural A1 where it would be a non-complying activity. It would be located in a relatively closely occupied rural area where there are uses that would be particularly sensitive to objectionable odour.

Conclusion

We have concluded that, having regard to the statutory purpose of sustainable management, and the direction to have regard to actual and potential effects of allowing the activity (s104(1)) when the term "effects" is defined by s3 so as to include those of low probability but high potential impact, the intention of the Act would not be fulfilled by granting the consents sought. Even with

the strict conditions of consent contemplated, and the enforcement provisions of the Act, we find that those on adjacent properties would be likely at some time to be affected by unintentional but unavoidable emission of offensive odours from the proposed rendering plant. Even if the rendering plant management acted promptly and effectively to stop the emission of odour, neighbours would have had to endure objectionable effects for periods of up to two hours or even more. That would degrade the amenity values of their properties, and depending on the timing it may also adversely affect the businesses of the racecourse and the motor camp.

In our judgment such potential effects deserve such weight against the grant of the consents sought that it must prevail against even the most optimistic evaluation of the positive effects of establishing the rendering plant at the proposed site rather than on land suitably zoned for the purpose. In our opinion that is determinative against both applications. It would be pointless to consider other aspects of the proposal because in the end it must fail on account of those potential effects. The applicant contended that a proposal to establish the rendering plant on land suitably zoned would inevitably involve a site with land zoned Rural B nearby; so that even on such a site effects on adjacent properties would need to be considered in a similar way. That may be true as far as it goes. However, during the transitional period, regard is to be given to the provisions of the transitional district plan. Where such a plan expressly provides by objectives, policies and rules for rendering plants to be directed to particular zones, the effect of having regard to the plan must be to strengthen the case for establishment on a site in such a zone; and to weaken the case for such a site in a zone where it is not provided for.

We record that we have not been influenced by the appellants' case that there is no need for an additional rendering plant in the district because of spare capacity at other rendering plants there. **The Resource Management Act does not provide for licensing the number or capacity of rendering plants, or other commercial enterprises. It is concerned with natural and physical resources as defined, not with economic resources.** If we had been able to feel confident on the evidence that adjacent properties would not be affected at all by objectionable odour emitted by the rendering plant, we would not have been influenced against the proposal by the effects of the competition which the plant would provide to existing rendering businesses in the region.

In the circumstances it is our unanimous judgment that land-use consent should be refused; and that a permit to discharge rendering plant products from the biofilter to the air should also be refused. For these reasons, Appeals RMA 217/92 and RMA 218/92 are allowed; the decisions appealed against are cancelled; and the applications for the discharge permit and for land-use consent are refused. As the consents have been cancelled, Appeal 219/92 becomes otiose, and it is therefore dismissed. The question of costs is reserved.

Appellant	SCOTT B & OTHERS
Respondent	NEW PLYMOUTH DISTRICT COUNCIL
Applicant	HURLSTONE EARTHMOVING LTD
Decision Number	W091/93
Tribunal	Judge Treadwell presiding; Ms JD Rowan and Mr RG Bishop
Judgment Date	21/10/1993
Counsel/Appealances	CB Wilkinson ; KJ Anderson; KA McKenzie; SD Nightingale; R Rai
Statutes	Resource Management Act 1991, s120, s88(4), s88(6)(b), s92, s6, Fourth Schedule

Keywords

quarry; rural; river; assessment criteria; effect; information required; submitter; natural justice

Significant in Planning - s88(4) and Fourth Schedule

This is an important case emphasising that resource consent applications are required by s88(4) and the Fourth Schedule to be accompanied by a statement of effects which adequately addresses the matters specified in the Fourth Schedule. Where such assessment is deficient the council and Tribunal may have no jurisdiction to hear the application.

SYNOPSIS

The appeal was against consent to permit operation of a quarry on the true right bank of the Waiwhakaiho River a short distance downstream of the water intake for the New Plymouth city water supply. This particular stretch of the middle Waiwhakaiho is highly sensitive both in respect of its margins and maintenance of water quality and needs careful management to protect downstream water values. The proposal was to remove 100,000m³ of metal from the site, approximately 20,00m³ per year for five years, with a right of renewal for a further five years if the resource was more extensive than first thought. The council's decision acknowledged that Kaipoi Road was inadequate as existing and was subject to a condition requiring road widening and visibility improvement. The proposal was a discretionary activity in the Rural zone applying to the site. The objectors' concerns, (management of the quarry, reclamation, and water discharge issues) had been virtually set to one side for determination later in a manner depriving them of final input.

The Tribunal found, having regard to the emphasis of the Act on the result of activities on the environment, that the initial information supplied was totally inadequate. The application as filed omitted the assessment required by s88(4) of the Resource Management Act 1991, did not comply with the requirement to prepare an assessment in accordance with the Fourth Schedule and merely

produced a management plan. Essentially the environmental and physical effect were not addressed. There were no suggestions as to how any potential effects could be mitigated and potential effects upon the river waters themselves were not mentioned. The council had not exercised its power under s92 to require further information other than to request a management plan. The requirement to provide an assessment of effects is mandatory in terms of s88 and substantial compliance with the Fourth Schedule is a necessary requisite to the lodging of a proper application. The Tribunal commented on the relevant provisions of the Fourth Schedule in turn in relation to the application.

It concluded that the original application did not follow the mandatory guidelines of the Act and was deficient to a degree where the council at first instance had no jurisdiction to hear the matter. As a result the Tribunal itself declined jurisdiction and referred the matter back to council for rehearing when the provisions of the Act had been complied with. For the guidance of the council the Tribunal commented upon the issues which needed to be addressed. The application illustrated a lack of detailed proposals on the part of the applicant and an almost total lack of information as to why the resource was of such local or regional importance that a matter of national importance (preservation of the natural character of rivers and their margins and their protection from inappropriate development (s6 RMA)) should be set to one side.

FULL TEXT OF W91/93

This is an appeal pursuant to section 120 of the Resource Management Act 1991 (the Act) against a decision of the respondent council granting consent to Hurlstone Earthmoving Limited to operate a quarry on the true right bank of the Waiwhakaiho River a short distance downstream of the water intake for the New Plymouth city water supply.

The river reaches at and below this point were for many years subject to severe environmental degradation to the extent that it was regarded as a dry water channel except in flood conditions. Recently a minimum flow regime has been put in place to return at least some water to the channel. Whilst the evidence does not indicate that this particular stretch of the middle Waiwhakaiho is extensively used for recreation purposes the evidence disclosed that it is highly sensitive both in respect of margins and maintenance of water quality and needs careful management in order to protect downstream water values.

The Council Decision

The decision addressed various matters which have caused concern in the course of the hearing. The decision records a proposal to remove 100,000 cu.m. of metal from the subject site with a rate of extraction of approximately

20,000 cu.m. per year for five years and, if the resource is more extensive than first thought, then the applicant sought a right of renewal for a further term of five years.

The material removed is to be crushed and stockpiled on site and removed by trucks along Kaipi Road when sold.

The resource consists largely of river boulders located within a terrace and/or ridge which forms a secondary terrace. A primary or lower terrace separates the bed from the proposed extraction site. The metal, although not of a high standard, is average for the Taranaki area and is suitable for many purposes including roading.

The council decision acknowledged that Kaipi Road was inadequate as it presently exists and the decision is subject to a condition requiring road widening and visibility improvement. That particular aspect of the council decision has not alleviated the concerns of the objectors concerning conflict with dairy cattle using the road at various times and, more importantly, conflict with young children numbering some 15 who may be found on the road on their way to and from the school at Egmont Village.

The council addressed the question of water quality and the Tribunal was frankly surprised that the Taranaki Regional Council did not require an application for a resource consent, being content to operate under general authorisation provisions which by virtue of the transitional provisions of the Act have now become regional rules. We express some surprise because the precise intentions of the applicant appear to be a moving target with final plans of quarry format being produced but a few days before the Tribunal hearing. Even those plans were not fully acceptable to Regional Council engineers.

The council addressed the question of river margins; noise; dust; site management plan; restoration plan; and conditions.

The consent given was subject to conditions listed in a schedule and of those conditions the most important are:-

- (a) That a detailed reclamation plan be submitted prior to the operation commencing which would essentially include all details of reclamation.
- (b) A quarry management plan was to be prepared and approved by the New Plymouth District Council in consultation with the Taranaki Regional Council.

The consent covered various other matters, including road sealing; bonds; riparian strips; and planting of vegetation. We record that the appellant has not appealed against any of those conditions.

Nevertheless, despite the council's decision, the Tribunal is largely bereft of any precise evidence as to the activities likely to be undertaken in this sensitive area and is not prepared to delegate its responsibilities to other organisations. In respect of the council decision we record that the objectors were greatly

concerned with the management of the quarry; reclamation; and issues as to water discharge; and have virtually had their objections set to one side for determination later in a manner depriving them of final input.

Preliminary Comment

We apprehend from the evidence presented to us which was largely undisputed, that the application has proceeded as a type of rolling review of the original application. The original application as filed was accompanied by a plan which did not greatly assist in evaluating the proposal. The application gave but sparse details as to the precise ambit of the quarry operation. At the request of the council, that request being made pursuant to a District Plan rule, a management plan was prepared and lodged which was essentially an operational plan for the quarry itself and did not address the environment in which it found itself. Having regard to the emphasis of the Act on the result of activities on the environment, the initial information supplied was, as the objectors correctly state, totally inadequate.

There is however a more serious matter of preliminary jurisdiction which was raised by counsel for the objectors. This relates to the original application which is the cornerstone of jurisdiction. The required contents of such an application need not necessarily be in precise form but should contain the matters required by statute. Section 88 of the Act sets out that an application may be made for a resource consent for a discretionary activity. In terms of the district plan, this particular activity because of its scale is a discretionary activity in the Rural zone. The section requires that the application be in the prescribed form and **shall** include:

- (a) A description of the activity for which consent is sought, and its location; and
- (b) An assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated; and
- (c) Any information required to be included in the application by a plan or regulations; and
- (d) A statement specifying all other resource consents that the application may require from any consent authority in respect of the activity to which the application relates, and whether or not the application has applied for such consents, and
- (e)(not applicable)...

The application as filed omitted the assessment required by (b) above. Section 88(6) expands upon that requirement in s88(4)(b) namely:

Any assessment required by subsection (4)(b)....

- (a) shall be in such detail as corresponds with the scale and significance of the actual or potential effects the activity may have on the environment; and
- (b) shall be prepared in accordance with the Fourth Schedule.

We record at this stage that although the scale of the quarry may not be major compared with some quarries in the area, it is significant and actual or potential effects upon the environment could be severe.

In the event the applicant did not comply with the requirement to prepare an assessment in accordance with the Fourth Schedule and merely produced a management plan which set forth the operations of the quarry; the quantity of extraction; storage; staff numbers; hours; vehicle movements; a short two sentence statement on reinstatement; and some comment on environmental and physical effects restricted to dust, noise, and visual impact. Essentially the environmental and physical effects were not addressed apart from a statement that there would be no problem. There are no suggestions as to how any potential effects could be mitigated. Potential effects upon the river waters themselves were not mentioned.

Although the council has power under s92 to require further information it did not ask for that further information other than a request for a management plan despite the fact that the application when publicly notified immediately attracted considerable attention from residents in the area.

Turning now to the provisions of the Fourth Schedule in relation to "Assessment of Effects on the Environment", Clause 1 relates to matters that should be included in that assessment of effects and Clause 2 relates to matters that should be considered when preparing such an assessment.

The requirement to provide such an assessment is mandatory in terms of s88 and although the wording of the Fourth Schedule is itself not mandatory we would consider that substantial compliance with it is a necessary requisite to the lodging of a proper application. We will take the relevant provisions of the Fourth Schedule in turn and comment upon them.

Clause 1(b): It is likely that; the activity will result in a significant adverse effect on the environment because there can be no doubt that it will be visually obtrusive to those near the river margin and would therefore require specialist attention. Preservation of the natural character of rivers and their margins and their protection from inappropriate development is expressed as a matter of national importance under s6. Far from giving any method of undertaking the activity which would ameliorate that adverse visual effect the applicant is actively resisting a condition which requires the planting of riparian strips.

Clause 1(d): The assessment of the actual or potential effect on the environment of the proposed activity. The use of Kaipoi Road (a small country road) by up to 20 heavy motor vehicles per day has been ignored.

Clause 1(f): The activity includes the discharge or potential discharge of contaminants and that has not been addressed at all in the management plan.

- Clause 1(g): There is no description of any mitigation measures other than to say that if something occurs it can probably be remedied.
- Clause 1(h): There is no identification of persons affected by the proposal and no consultation has been undertaken.
- Clause 1(i): Monitoring will undoubtedly be required and there is no description of how, once the proposal is approved, effects will be monitored and by whom.

Clause 2 of the Fourth Schedule requires consideration of various matters such as:

- (a) Any effect on those in the neighbourhood;
- (b) Any physical effect on the locality, including any landscape and visual effects;
- (c) Any effects on ecosystems, etc;
- (d) Any effects on natural or physical resources ... recreational ... or other special values for present or future generations;
- (e) Any discharge of contaminants into the environment including any unreasonable emission of noise and options for the treatment and disposal of contaminants.
- (f) ... (not relevant)

None of these issues have been addressed other than by inference.

The RM Act is concerned (inter alia) with environmental protection; with consultation; and with the effect of activities upon the environment which includes, amongst other things, people and communities. The word "effect" also has a wider meaning by virtue of s3 of the Act and in that regard includes potential effects of low probability which may have a high potential impact and/or cumulative effects.

Preliminary Conclusion

We have concluded that the original application did not follow the mandatory guidelines of the Act and was deficient to a degree where the council at first instance had no jurisdiction to hear the matter. As a result the Tribunal itself declines jurisdiction and refers the matter back to council for a rehearing when the provisions of the Act have been complied with.

Comment

For the guidance of the council we make a few short comments but do not take the matter further at this stage in case it should again come before a differently constituted Tribunal. The issues which appeared clear to us and which need to be addressed are as follows:

- (1) The plan of quarry operation must be prepared in detail in order that the plan can be addressed by objectors if its terms are not acceptable.
- (2) That full details of any conditions pertaining to general authorisations for discharge of contaminants is to be included in the Fourth Schedule report.
- (3) The question of the preservation of the margins of rivers appeared a matter

of considerable importance to the Tribunal. The historical presence of other quarries on the Waiwhakaiho River is no reason for perpetuating that type of land use. We would require evidence as to why the resource is of such importance in this area that an issue of national importance should be set to one side for the purpose of accommodating it. We record that we heard no such evidence in the case as presented to us and indeed there seemed to be some implication that the material was plentiful in the Taranaki area but perhaps not so readily accessible as in this particular location. If the applicant wishes this site to be even considered then detailed plans as to screening and riparian planting would be required. The Tribunal is far from satisfied with the glib statement that planting would be difficult and that the property owner does not want the area planted. If the property owner wants a quarry operation on his property with attendant royalties then he must be prepared to abide by all conditions imposed and we suggest he become a party pursuant to s274 of the Act.

- (4) The hours of operation of the quarry are critical and in this regard there are two aspects of environmental protection which are of importance, namely:
- (a) Kaipi Road must not be used when cows are crossing and recrossing the road during milking periods,
 - (b) Kaipi Road must not be used by heavy traffic when school children are present.

Although we were told that road widening improvements would be undertaken by the applicant we are still mindful of the comment in the report by Mr Scott that in the event of cyclists and/or pedestrians being on the road it would be difficult for two quarry trucks to pass without one or other braking.

- (5) Noise levels would require to be set at a boundary for the purpose of preventing planning blight spreading from one property to another.

Conclusion

Those are but some suggestions as to the matters to be taken into account but as can be seen the Tribunal is presently uneasy, that unease being largely motivated by a lack of detailed proposals on the part of the applicant, and by an almost total lack of information as to why this resource is of such local or regional importance that a matter of national importance should be set to one side.

Appellant	AFFCO NEW ZEALAND LTD
Respondent	FAR NORTH DISTRICT COUNCIL; NORTHLAND REGIONAL COUNCIL
Applicant	NORTHLAND ABATTOIR CO LTD
Decision Number	A006/94
Tribunal	Judge Sheppard presiding; Messrs PA Catchpole and JR Dart
Judgment Date	2/2/1994
Counsel/Appearances	JK MacRae; A Ray & DR James; PW Mahood & RM Bell; H Rapata
Quoted	Te Aroha Air Quality Group v Waikato Regional Council (1993) 2 NZRMA 574 at 577; Turner v Allison [1971] NZLR 833; 4 NZTPA 104 (CA); AFFCO v Far North District Council A030/ 90; PG Barton, Forest Research Institute (FRI), "Land Treatment Site Selection Criteria", (August 1991); Tribunal's Practice Note 29 July 1992, para 4-6
Statutes	Resource Management Act 1991, 1991/69, s120, s91(d), s15, s104(1), s104(3), s104(7)(b)

Keywords

abattoir; resource consent; discharge permit; discharge to air; waste disposal; spray irrigation; water discharge; stormwater; application notification; information required; environment; effect actual; trade competitor

Significant in Procedure and Planning - s91

Good resource management practice requires that in general all resource consents required should be carefully identified from the outset and applications made so that they can be considered together jointly.

SYNOPSIS

Interim Decision

The 49 page decision deals with appeals arising from a proposal for a new abattoir at Mangakahia Road, about 1km north-west of Tautoro and 7km south of Kaikohe. The appellant owns a meatworks at Moerewa, some 30 km away. It appealed against the granting of land use consent, consent to take water, and a discharge permit for spray irrigation of treated effluent seeking that the decisions be cancelled and the consents refused.

The proposal was for a \$2.2 million facility for killing a variety of livestock, (goats, pigs, sheep and cattle) to provide a full abattoir service and to supply all offals for butchers. Meat would not be processed on the site, but offal would be trimmed and packed for processing elsewhere. The site is part of a 136ha property.

The proposal required the following resource consents for which applications were the subject of the proceedings: land-use consent for the abattoir, the wastewater treatment ponds and spray irrigation; consent to take water from

a bore and from the Punakitere River; and, discharge permits for the spray irrigation of treated effluent to ground and for the discharge of stormwater to the river. The Tribunal held that the proposal also required the following resource consents which were beyond the scope of the present applications and which could not be granted in the present proceedings as they stood: land-use consent for the composting of solid wastes from the abattoir; permits for discharges into air of contaminants from the abattoir, from wastewater treatment ponds and from composting; and, consent to earthworks required to form the sites for the abattoir buildings, treatment ponds, driveways and manoeuvring and parking areas.

Good resource management practice requires that in general all resource consents required should be carefully identified from the outset, and applications made so that they can be considered together jointly. It also requires that sufficient particulars be given with an application to enable those who might wish to make submissions to be able to assess the effects on the environment and on their own interests. Advisers to consent authorities and would-be submitters should not have to engage in detailed investigations to enable them to assess effects. The application had failed to specify design, size and location of the wastewater treatment system. It was argued that those details were unnecessary as they were well covered by the Meat Act and its regulations and would have to be submitted to the Ministry of Agriculture and Fisheries (MAF) for approval. The Tribunal found that despite the value and importance of MAF controls, consent authorities need to give their own consideration to the details of a proposal to enable them to assess its effects on the environment and to consider whether the statutory purpose of sustainable management would be promoted.

The site was suitable for the proposal as a discretionary activity. It is generally appropriate for consent authorities to have regard to effects of trade competition on other than trade competitors. While any effects of trade competition on the appellant were rejected (s104(3) RMA), effects on others, and in particular, on social and economic conditions of people and communities were addressed (S104(1) RMA). Apart from the question of smells, as a land-use activity the proposal deserved favourable consideration by reference to the specific criteria in the transitional district plan. A proposal to take water from a bore, or from the river, appeared satisfactory and worthy of consent on the basis that the two sources were to be complementary. In respect of wastewater treatment ponds, the desirability of a consent authority imposing conditions to avoid or mitigate adverse effects on the environment did not excuse it from considering the extent to which the proposal as designed would avoid or mitigate adverse effects on the environment. The Tribunal's findings on the treatment pond system were: that the wastewater treatment proposed would be likely to emit smells into the environment; that it was not

satisfied that it had been designed so as to avoid leakage into the ground; nor that the capacity of the proposal would be sufficient to treat the volumes of wastes likely to arise to a standard where it would be suitable for spray irrigation on pasture as proposed. By s104(7)(b) the Tribunal was to have regard to possible alternative methods of discharge into any other receiving environment. The evidence was not sufficient to enable it to have regard to those matters. It was not satisfied that the proposal for spray irrigation of treated effluent and its discharge into ground had been designed sufficiently fully to enable a responsible decision to be made about the likely effects, whether the permit should be granted or refused, and if granted, conditions that should be imposed. Subject to a condition that stormwater be diverted to a small holding pond to allow settlement of solids, and permit closing of the outlet during spillages, cleaning operations and other contingencies prior to discharge, and subject to conditions imposed by the regional council, the discharge permit for stormwater deserved to be granted. The applicant was allowed the opportunity to obtain the other resource consents required; the hearing would be reopened within 6 months; the applicant was to be ready to present further evidence on which the Tribunal could assess the practicability of the treatment ponds being constructed and assess the likely effects of the wastewater treatment system, the spray irrigation, and the composting of solid wastes. The decision was therefore further reserved. If the applicant did not give notice within that period, the appeals would be disallowed.

FULL TEXT OF DECISION A6/94

Introduction

These appeals arise from a proposal by Northland Abattoir Limited (the applicant) for a new abattoir at Mangakahia Road, about 1 kilometre north-west of Tautoro, and some 7 kilometres south of Kaikohe. AFFCO New Zealand Limited (the appellant) owns a meatworks at Moerewa, some 30 kilometres away. It appealed against decisions of the district and regional councils granting land-use consent, consent to take water from a bore or from the Punakitere River, and a discharge permit for spray irrigation of treated effluent. By its appeals, the appellant sought that the decisions be cancelled and the consents sought refused. By consent, both appeals and both applications were heard together.

The Proposal

The proposal is for a facility for killing a variety of livestock, namely goats, pigs, sheep and cattle. Initially there would be three and a half killing days per week, but consent was sought on the basis of building up to five killing days per week. The purpose of the facility is to provide a full abattoir service for local trade killing of all classes and species of livestock for butchers, and the supply of all offals to butchers.

The main abattoir would occupy a two-storey building about 55 metres long and having a maximum height of 11.4 metres. That building would accommodate slaughtering, chiller and load-out facilities. There would be an ancillary office and amenities building, stockyards and holding pens, parking areas, driveways and turning areas, and wastewater treatment ponds. There would be a 750-kilowatt boiler fired by LPG or diesel to provide hot water for the abattoir. The total complex would occupy an area of about 4 hectares. There would be no processing of meat on the site, but offal would be trimmed and packed for processing elsewhere.

The estimated cost of the abattoir is \$2.2 million.

The site forms part of a property comprising about 136 hectares, and the applicant has a provisional agreement to lease the whole property for a term of 20 years with a right of renewal on the basis that the owners would farm the rest of the property and would put aside sufficient area for holding paddocks for the abattoir.

Initially, the abattoir would kill up to 185 head of cattle, 160 pigs, and 850 lambs, sheep and goats per week. There was some difference about the number of people who would be employed but we find that at that rate of killing and with killing at three and a half days per week about 17 people (including 6 part-time workers) would be employed at the abattoir.

Water for processing in the abattoir would be taken from a bore on the site, or if that is not available, from the Punakitere River.

Solid waste from the abattoir would be collected in bins and removed each night by contractors. Blood would be removed to Auckland for processing. The contents of cattle paunches would be taken for composting at a position on the farm adjacent to the irrigation area referred to shortly.

Sewage from the abattoir would be treated in a septic tank system and the effluent passed to the treatment ponds.

The design of the wastewater treatment system has been based on an estimated production of about 400 cubic metres per week initially (from the initial killing rate mentioned above) rising to 800 cubic metres per week at full capacity of the abattoir.

The liquid wastes from the abattoir would pass in a pipe to where they would be screened and then to a settling tank (with a retention time of one hour) where gross solids would settle out and fat would float to the surface. The solids would be removed from that tank by manual skimming and drainage. The wastes would then be combined with wastewater from the stockyards and discharged into an anaerobic pond measuring 15 metres by 15 metres by 3 metres, which would effectively hold 10 days effluent at a rate of 400 cubic metres per week. The outflow from the anaerobic pond would flow to an aerobic pond measuring 45 metres by 45 metres by 1.5 metres, which would have 48 days' storage. The outflow from the aerobic pond would go to a

third pond measuring 70 metres by 70 metres by 2 metres having a capacity of 10,000 cubic metres, which would be capable of holding at least 100 days' effluent at 400 cubic metres per week. The capacity of the final holding pond would need to be increased if the rate of wastewater production increases.

The site for the treatment ponds comprises topsoil overlaid on basalt rock with lenses of clay in low-lying areas. Additional clay, for lining the ponds as well as for bunding, would be required to form the ponds.

Water from the third (holding) pond would be pumped to an area on the farm where it would be disposed of by spray irrigation on the ground. The irrigation area would initially comprise 16 hectares, although it is anticipated that a larger area may be needed in the long term.

Leachate from the composting of solid wastes would be drained to the treatment ponds.

Stormwater from roofs, roadways and parking areas would be drained to discharge to a tributary of the Punakitere River.

The Primary Decisions

The decision of the district council was to grant land-use consent for an abattoir for the slaughtering of pigs, goats, sheep and cattle and for effluent treatment, but expressly excluding any rendering or fellmongery, and stipulating that all offal and hides were to be removed from the site daily. Nine conditions were attached to the land-use consent. They required that development was to proceed in accordance with the plans submitted with the application; that a landscaping plan was to be submitted and approved; that planting of the site was to be commenced within six months of building consent being granted; that slaughtering was not to operate for more than 28 hours per week between 6:00 am and 6:00 pm Mondays to Sundays; that a description of building materials was to be submitted for approval to ensure that the proposal would not be visually intrusive; that the entrance was to be formed to the satisfaction of the district engineer prior to issue of the building consent; and that all areas noted to be of spiritual and cultural significance were to be undisturbed by the development.

The regional council gave decisions granting consent to take water, to discharge wastewater by spray irrigation, and to discharge stormwater. The consent to take water was for 200 cubic metres per day from a bore at a point identified by a map reference (adjacent to the abattoir site) or from the Punakitere River at a point identified by a map reference. Seven conditions were attached to that consent. They required that details be supplied to the council of the duration of pumping and the quality of the water pumped daily from 1st November to 31st March from each source; that a piezometer be installed at a point approximately midway between the bore and an existing bore, and levels in it recorded and supplied to the council; that the holder was not to take water from the Punakitere River at a rate in excess of 16.2 cubic

metres per hour; and reserved the right to review the conditions at yearly intervals.

The wastewater discharge permit was for discharge of wastewater from the abattoir after treatment in a settling tank, anaerobic and aerobic pond system. It authorised discharge of up to 200 cubic metres per day to ground by spray irrigation. Twelve conditions were attached to that discharge permit. They required the operation to be carried out in accordance with a management plan to the satisfaction of the council, the plan to cover all aspects of the operation from descriptions of daily operation of the spray irrigation system to contingency measures for unforeseen or emergency situations; and to be reviewed at not greater than two-yearly intervals. The conditions also required supply to the council at two-monthly intervals of records of daily volumes and times of waste discharged, application rates and areas sprayed, and daily rainfall; with a limit for any area of 40 millimetres for the period 1st June to 31st August, and an annual limit of 540 millimetres. There was provision for notice to the council and remedial action where contaminant escapes other than in accordance with the consent. There were requirements for design details of the effluent treatment system to be submitted to the council for approval prior to construction; for the works to be maintained and for the council to require additional work necessary for the efficient operation of the works. There was provision for review of the conditions at yearly intervals in the event of an adverse effect on the environment which was not anticipated or foreseen.

The other consent authorised discharge of stormwater from abattoir buildings, roadways and carparks at a rate of 144 litres per second (based on a 1 in 10 year storm of 10 minutes duration) to an unnamed tributary of the Punakitere River. That permit was subject to six conditions which included a requirement for design details to be submitted to the council for approval prior to construction; a requirement that the outlet effectively dissipate energy to prevent scouring; and a requirement for baffles to be constructed in ditches at 2-metre intervals to stop the passage of solids. There was provision for the council to require additional work necessary for the efficient operation of the works.

The applicant did not appeal against any of those decisions, and may be taken to have accepted the conditions imposed.

Planning Instruments

Transitional regional plan

Of the instruments which, by s368, are included in the deemed regional plan for Northland, the only one which is relevant to this case is a former notice under s34(2) of the Soil Conservation and Rivers Control Amendment Act 1959 by which consent is required for earthworks exceeding 2,000 cubic metres per annum.

Proposed regional policy statement

By public notice given on 11 October 1993 the regional council proposed a regional policy statement for Northland. The statement contains a number of objectives and policies relating to soil conservation and land management, biodiversity and ecosystems and transport. It records a general policy of maintaining minimum flow regimes in rivers and streams so that not less than 75 per cent of the best available estimate of the natural 1 in 5-year low flow at any point on any river or stream is reserved as a minimum residual flow, and that not less than 50 per cent of the flow above that low flow be retained in stream. In respect of discharges, the statement has an objective of avoiding, remedying or mitigating adverse effects of discharges of contaminants on the traditional, cultural and spiritual values of water held by the tangata whenua.

Northland regional planning scheme

Because there is now a proposed regional policy statement in respect of the Northland region, by s367(2) the councils are no longer required to have regard to the principal section of the Northland regional planning scheme which had been approved under s24 of the Town and Country Planning Act 1977.

Transitional district plan

In respect of the part of the Far North district in which the abattoir site is located, the relevant transitional district plan is the former Bay of Islands County district scheme which had been prepared under the Town and Country Planning Act 1977, was publicly notified in February 1988, adopted in November 1992 and made operative in December 1992.

That plan expresses an objective of minimising intervention in the use and development of rural land, and a policy of "maximum flexibility in rural production options". It also contains an objective of fostering the service, employment and productive potential of industry, and states policies for attaining that objective. None of the policies questions the appropriateness of establishing industry in rural areas.

By the transitional district plan, the abattoir site is zoned Rural 1 (General), which is the principal rural zone in that scheme. Nearly all the land in the vicinity of the site is also in the Rural 1 zone.

The zone statement for the Rural 1 zone states that the zone "provides for a diverse range of permitted rural land uses with controls on uses only introduced where the operation may detrimentally affect the amenities of the neighbourhood, traffic, safety, environmental qualities or any other aspect of the local environment". Rural industries are conditional uses in the zone, and are therefore, by s374(1)(b), discretionary activities under the Resource Management Act 1991. The district plan contains general criteria for assessing

conditional uses and also specific criteria for assessing rural industries in the Rural 1 zone. The general criteria are broadly stated. The specific criteria are arranged as site criteria and performance criteria. The site criteria are access, water supply, effluent disposal, labour force, size limitation, land quality, wetlands and wildlife habitats and natural environment. The performance criteria are stormwater and waste disposal, noise, air pollution, glare, hazardous substances, loading and parking, landscaping, and smell.

Resource Consents Required

Land-use consent

As mentioned, the transitional district plan prescribes that rural industries are conditional uses in the Rural 1 zone. A rural industry is defined by ordinance 201 (which has become a rule of the transitional district plan) as follows:

“Rural industry means any industry for the processing of agricultural products and the servicing of the agricultural sector, and includes packhouse and coolstore facilities, but excludes timber processing facilities.”

We find that the proposed abattoir is a rural industry within that definition, and hold that the proposal requires land-use consent as a discretionary activity. That is evidently how the applicant and the district council treated the proposal. The applicant had applied to the Far North District Council for land-use consent, and in these proceedings it pursued that application.

By the transitional district plan, storage of more than 20 tonnes of LPG requires land-use consent. However the applicant does not propose to store more than 20 tonnes of LPG, so consent is not required in that respect.

The wastewater treatment system was described in the application, and as a land use it is part of the discretionary activity for which land-use consent was applied for.

Similarly, the irrigation of treated effluent on grazing pasture is also a land-use activity that was included in the application for land-use consent.

However, the proposed composting of solid wastes from the abattoir was not referred to in the application for land-use consent. We find that it is a use of land in terms of s9(4)(b), being a deposit of substances on land, and being part of a rural industry, and not being part of normal farming activity, it is a discretionary activity and requires land-use consent. As that activity was not referred to in the land-use consent application in any way, it is beyond the scope of the application and cannot be authorised in these proceedings. A further application for resource consent in that respect will be required.

Taking of water

The applicant proposes to take up to a total of 200 cubic metres per day of water from a bore on the site, being in the catchment of the Punakitere River, or from the Punakitere River itself. That taking is not expressly allowed by a rule in a regional plan or otherwise by s14(3), so resource consent is required.

The applicant's applications to the regional council for resource consent to do so are identified as applications 4951 and 4952 respectively.

The Tribunal was informed that groundwater from the bore is preferred by the applicant because it is likely to have better quality and to require less treatment. The application to take water from the river was made in case the permit to take groundwater is declined, or in case that resource proves inadequate. The applicant has drilled and tested the discharge from a bore on the site.

Discharge to ground

Because the transitional regional plan contains no provisions by which the discharge of treated effluent to ground by spray irrigation is allowed, resource consent for that discharge is required by s15. The applicant has applied to the Northland Regional Council for a discharge permit to discharge up to 200 cubic metres per day to ground accordingly, that application being identified as No 4953.

Discharge to water

The applicant proposes that stormwater runoff from the abattoir roofs, roadways and carparks be discharged to an intermittently-flowing unnamed tributary of the Punakitere River at two points. The design maximum rate of runoff from roofed areas for a 1 in 10-year storm of 10 minutes' duration is 58 litres per second, and from all roadways and carparks, it is 86 litres per second, a total of 144 litres per second. No treatment is proposed.

Again the discharge is not allowed by the transitional regional plan, so a discharge permit is required by s15. The applicant has applied to the Northland Regional Council for a permit, and that application is identified as No 4954. The receiving waters are not in the Bay of Islands catchment, but run to the Hokianga Harbour, and are not classified waters.

Discharge to air

Initially the applicant submitted that it did not need resource consent to discharge contaminants from the abattoir or from the wastewater treatment ponds into air. The relevant provision is s15(1), the material passages of which read:

"(1) No person may discharge any - ...

- (c) Contaminant from any industrial or trade premises into air; or unless the discharge is expressly allowed by a rule of a regional plan, a resource consent or regulations."*

The term "contaminant" is defined in s2(1) as follows:

"Contaminant" includes any substance (including gases ...) ... that either by itself or in combination with the same, similar, or other substances ... -

- (b) When discharged ... into air, changes or is likely to change the physical, chemical, or biological condition of the ... air ... into*

which it is discharged.”

The term “industrial or trade premises” is defined in the same subsection as follows:

“ ‘Industrial or trade premises’ means -

- (a) Any premises used for any industrial or trade purposes; or
- (b) Any premises used for the storage, transfer, treatment or disposal of waste materials or for other waste management purposes or used for composting organic materials; or
- (c) Any other premises from which a contaminant is discharged in connection with any industrial or trade process - and includes any factory farm; but does not include any production land.”

There are four broad areas of the proposed abattoir operation from which gaseous substances would be discharged into air: the abattoir itself; the wastewater treatment ponds; the spray irrigation of treated effluent; and the composting of solid wastes. None of those discharges would be expressly allowed by a rule of the transitional regional plan or by regulations. It is necessary therefore to consider whether any of them requires resource consent as a discharge of contaminant from industrial or trade premises into air.

We find that in each case the discharge would be from industrial or trade premises as defined. We find that from the abattoir itself there would be discharged into air, methane gas and carbon dioxide from paunch contents, and hydrogen sulphide from intestines.

From the wastewater treatment ponds carbon dioxide, methane and nitrogen gases would be discharged. From the composting operation there would be discharges of carbon monoxide, nitrogen and carbon dioxide. However, there was not evidence on which we could find any discharge of contaminants into air from the spray irrigation.

We find that the gases referred to from the other three classes of activity would be contaminants within the defined meaning of that term. On the face of it discharge permits are required, but no applications have been made. Evidently the applicant had not turned its mind to the possibility that resource consent would be required; nor had the regional council. It was contended that the contaminants would not be detectable beyond the boundaries of the site and that as the activities are within the scope of the application for consent to an abattoir, separate discharge permits are not needed.

We accept that there may be some discharges to air of contaminants which are so insignificant that they may be ignored under the principle *de minimis curat non lex*. However there is no evidence on which we could find that the discharges from the proposed abattoir treatment ponds and composting would be so insignificant. In our opinion it is not relevant that the contaminants may not be discernible beyond the boundaries of the site. As counsel for the appellant reminded us, there is no allowance for mixing in respect of the

discharge of contaminants to air which may be compared with the provision for mixing in s107(1) for the discharge of contaminants to water. That omission must have been deliberate and, as Mr MacRae pointed out, contaminants in the air within the site could affect natural resources within the site.

We therefore hold that resource consents in the nature of discharge permits are required for the discharges of contaminants into air from the abattoir, from the wastewater treatment ponds, and from the composting. No application for consent to discharge into air has been made, and the topic is therefore beyond the scope of the present proceedings.

Earthworks

We find that earthworks involved in excavation of the treatment ponds, preparation of the building site, drives and paved areas would far exceed the threshold of 2,000 cubic metres per annum in the deemed rule in the transitional regional plan that succeeds to the former s34 notice. Resource consent is therefore required for those earthworks, but no application has been made. Again that consent is beyond the scope of the present proceedings. Counsel for the applicant accepted, in his address in reply, that an application would need to be made.

Summary

In summary the proposal requires the following resource consents for which applications are the subject of these proceedings: land-use consent for the abattoir, the wastewater treatment ponds and spray irrigation; consent to take water from the bore and from the Punakitere River; and discharge permits for the spray irrigation of treated effluent to ground and for the discharge of stormwater to the river. We hold that the proposal also requires the following resource consents which are beyond the scope of the present applications and which could not be granted in these proceedings as they stand: land-use consent for the composting of solid wastes from the abattoir; discharge permits for discharges into air of contaminants from the abattoir, from the wastewater treatment ponds and from the composting; and consent to the earthworks required to form the sites for the abattoir buildings, treatment ponds, driveways, manoeuvring and parking areas.

Version of sections 104 and 105 applicable

The respondent's decisions were given on 24 June 1993 and the appeals were lodged on 19 July 1993. The Resource Management Amendment Act 1993 came into force on 7 July 1993. By s54 of that Act, s104 of the Resource Management Act (relating to matters to be considered on applications for resource consent) was repealed and a new s104 substituted; and by s55 of the Amendment Act, subsection (1) and paragraphs (a) and (b) of subsection (2) of s105 (relating to decisions on applications) were repealed and a new

subsection (1) and new paragraphs (a) and (b) of subsection (2) were substituted. The question therefore arises for consideration whether the appeals are to be considered and decided by reference to sections 104 and 105 of the Resource Management Act 1991 as originally enacted, or by reference to s104 as substituted by s54 of the Resource Management Amendment Act 1993 and to s105 as amended by s55 of that Act.

The applicant's counsel preferred not to make submissions on that question; and counsel for the other parties submitted that on these appeals the application should be considered and decided as if the amendments made by sections 54 and 55 of the Amendment Act had not been passed. We accept that that is the effect of s230(5) of the Amendment Act, and we hold that for the purposes of considering and deciding these appeals, we should therefore apply the versions of sections 104 and 105 as originally enacted.

Resource Management Practice

The Resource Management Act 1991 contemplates that where more than one resource consent is required for a proposal, applications for all the consents required should be made at about the same time. Indications of that may be found in the provisions for joint hearings and decisions by primary consent authorities (see sections 102 and 103) and by this Tribunal (see s270), and in references in the Act to integrated decision-making (see s31(a) and s88(4)(d)). The value of integrated decision-making is apparent from the purpose of the Act and from the considerations stipulated by s104. Unless all the effects, positive and negative, of a proposal are assessed together, the consideration of them required to make the ultimate judgment whether the consent should be granted or refused may be incomplete, and the balancing of them may be distorted. In that regard we adopt what was said in Te Aroha Air Quality Group v Waikato Regional Council (1993) 2 NZRMA 574 at 577.

Therefore good resource management practice requires that in general all the resource consents required for a project should be carefully identified from the outset, and applications for them all should be made so that they can be considered together or jointly. That is not entirely new. Similar practice was expected by this Tribunal for proposals under the previous regimes, as is indicated by paragraphs 4 - 6 of the Tribunal's former Practice Note issued in June 1985. An indication of the practice expected under the Resource Management Act 1991 is contained in paragraphs 4 - 6 of the Tribunal's Practice Note of 29 July 1992.

The Resource Management Act 1991 has been in force now for over two years. Those involved have had sufficient time to learn of the practice to be expected. It is time that applicants and their advisers were conforming to that practice, and that primary consent authorities were insisting on conformity to it.

Similarly, the Resource Management Act 1991 contemplates that applications

for resource consents be accompanied by particulars of the proposal which the consent would authorise. The indications of that are to be seen from a combination of several provisions. First there are the reference in s88 to the application including an assessment of effects on the environment in detail corresponding with the scale and significance of the effects, and prepared in accordance with the Fourth Schedule; and the provision in the form prescribed for resource consent applications (Form 5 of the Schedule to the Resource Management (Forms) Regulations 1991 (SR 1991/170)) for the applicant to give a description of the activity to which the application relates. Then there is the provision of s92 for a consent authority to require further information necessary to enable it to understand the nature of the activity and the effect it would have on the environment. Further there is the provision of s96 for those making submissions about applications for resource consent to state reasons and the general nature of conditions sought. Then there is the duty imposed by s 104 on a consent authority to have regard to the effects of allowing the activity, and the power conferred by s105 on a consent authority to impose conditions on a resource consent.

From those provisions we infer that it is intended that the proposed activity the subject of the resource consent application is to be described with sufficient particularity to enable those various functions to be performed. The proposed activity has to be described in detail sufficient to enable the effects of carrying it on to be assessed in the way described by the Fourth Schedule. The description is intended to include whatever information is required for a consent authority to understand its nature and the effects that it would have on the environment. The description is expected to be full enough that a would-be submitter could give reasons for a submission about it and state the general nature of conditions sought. The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to impose to avoid, remedy or mitigate adverse effects without abdicating from its duty by postponing consideration of details or delegating them to officials. (The limits on delegation were authoritatively described in Turner v Allison [1971] NZLR 833; 4 NZTPA 104 (CA).)

It is to be remembered that unlike corresponding legislation in England, the Resource Management Act makes no provision for outline approval, or approval in principle, the final permission to follow on subsequent presentation of more detailed plans. Under this Act, a consent authority is expected to make a final decision, and if resource consent is granted, to impose conditions that will enable the grantee to assess their full effect before deciding whether or not to exercise the consent.

In summary, good resource management practice requires that sufficient particulars are given with an application to enable those who might wish to

make submissions on it to be able to assess the effects on the environment and on their own interests of the proposed activity. Advisers to consent authorities and would-be submitters should not themselves have to engage in detailed investigations to enable them to assess the effects. It is an applicant's responsibility to provide all the details and information about the proposal that are necessary to enable that to be done. The proposal and the supporting plans and other material deposited for public scrutiny at the consent authority's office should contain sufficient detail for those assessments to be made.

Again the practice is not new, though the more systematic decision-making process required by the Resource Management Act needs full conformity to it. It is time that applicants and their advisers were conforming to the practice, and that primary consent authorities were insisting on provision of full plans and other details from the start, and refraining from notifying and assessing applications, let alone hearing or considering them, until all the necessary information has been provided.

In this case the applicant answered points raised that the application had failed to specify design, size and location of the wastewater treatment system by stating that those details were unnecessary as they are well covered by the Meat Act and its regulations and would have to be submitted to the Ministry of Agriculture and Fisheries (MAF) for approval. We do not know the purpose of the MAF controls, but we accept that they would be designed to prevent transmission of disease, and to avoid contamination of food. The consideration by MAF of the proposal may indeed overlap in some respects with consideration of the design of the proposal in deciding resource consent applications. Yet the consent authorities under the Resource Management Act have their own responsibilities under that Act. They are not free to abdicate from them in favour of MAF officials. Despite the value and importance of MAF controls, consent authorities need to give their own consideration to the details of a proposal to enable them to assess its effects on the environment, and to consider whether the statutory purpose of sustainable management would be promoted.

On these appeals the presentation of the applicant's case left the Tribunal without a clear understanding of the proposal in several points of detail necessary to enable us to assess the effects on the environment. Following announcement to that effect, further plans were presented during the course of the appeal hearing, and without the appellant having had the opportunity to consider and obtain advice on them. The circumstances in which we decided, reluctantly, to continue with the appeal hearing were described in the oral decision given on 19 October 1993, the record of which is identified as Decision W 98/93. That decision should be read with the present decision. In the result, we cannot in these proceedings make a final decision to grant consent to the proposal without giving the other parties the opportunity to

present submissions and evidence on the composite drawings and management plans presented on 19 October 1993; nor should we make a decision favourable to the applicant while there remains the need for resource consents which have not been obtained (or even applied for) and which are not before the Tribunal in these proceedings.

The applicant eventually understood that position and elected to proceed with the appeal hearing.

The Site and its Locality

As mentioned, the site is about 1 kilometre north-west of Tautoro which is a rural locality about 7 kilometres south of Kaikohe, the main rural service town in the mid-Northland region. There are currently no industries in the Tautoro area other than farming. The site is fairly centrally located in mid-Northland and has good road access.

Tautoro is a spread-out community with pockets of groups of families. Within about 1 kilometre of the site approximately ten families live and another ten families live within a radius of 1.5 - 2 kilometres of the site.

The district has consistently high unemployment figures and the average income of people living there is significantly below the national average. There is a high level of dependency in the district. In the last few years a number of enterprises in the district have closed, including a milk treatment station at Kaikohe, a sawmill, the railway to Okaihau, and branches of the Ministry of Forestry and of the Department of Maori Affairs. There have been reductions in Telecom staff, and a winding down of the Kaikohe Agricultural Research Station is imminent. The appellant has substantially reduced the numbers employed at its meatworks at Moerewa. It was estimated that there are 40 people unemployed or on work schemes within a 5 kilometre radius around the site.

The property on which the abattoir is proposed to be located is described as Maungakawakawa 20 Block (formerly ML 15258) Blocks IV and VIII Punakitere Survey District and has a total area of 135.3421 hectares. On the revised plans, the nearest house would be 270 metres from the first treatment pond, and the next nearest would be between 800 - 900 metres away. The main stem of the Punakitere River flows between 250 and 300 metres to the north-west of the site. The property is owned Pat Te Whata and Sons Limited which operates a dairy farm at Tautoro, and as mentioned, it is intended that the applicant take a lease of the property.

The land proposed to be developed for the abattoir is reverted farmland mainly in gorse and ti tree (some of which has been cleared for the site for the proposed buildings and ponds). The land is flat to moderately undulating and the soils are shown on the land inventory map as Ohaeawai silt loam and Aponga clay. The site for the abattoir and ponds is rocky and, in effect, waste land.

The proposed irrigation area is broken ground being part of a sandstone ridge

running north-west to south-east surrounded on both sides by basalt lava flows. Tributaries of the Punakitere River run approximately along the boundaries between the basalt and sandstone formations, and the proposed disposal site is at the north-western end of the ridge. The soils at that site are typically about 180 millimetres depth of dark brown sandy clay loam topsoil underlain by 140 millimetres of intergrade (mixed) soil, predominantly orange/brown subsoil mixed with some topsoil. That intergrade overlies sandy clay subsoil. The only waahi tapu on the land proposed to be leased is a fenced-off area near the school where the body of a baby is buried.

Site Selection

It was the applicant's evidence (unchallenged by the appellant) that a list of desirable site characteristics had been prepared prior to final site selection. The requirements that had been considered necessary were a size of not less than 4 hectares (to allow for holding paddocks); good road access for heavy trucks; proximity to high tension power supply; availability of sufficient water of high quality; and means of disposing of liquid effluent economically.

The evidence established that the applicant had considered various sites, handy to water supplies, with enough area for waste disposal. About 30 sites had been considered, and a lot of them had been found to be too expensive or not having enough water available or near dusty roads. A site had been found at Kerikeri but it was not big enough. Industrial sites had been considered at Waipapa and Moerewa, and no land at Puketona Road had been found for sale. The applicant had looked at sites at Moerewa offered by the appellant at some length but some of the conditions did not suit their proposal. Most of the sites considered had been eliminated because they did not comply with the applicant's requirements, the criteria of the district plan, or were land having horticultural potential, or the price was considered prohibitive.

The characteristics of the subject site which the applicant contended made it suitable were its access on to a main road which already carries a substantial flow of stock trucks, milk tankers and cars; that road being sealed so there would be no dust problem; adequate visibility at the proposed entrance; the building site being unused for productive purposes, being rocky and difficult to develop for pastoral farming; an adequate electricity supply at the entrance; sufficient land in pasture for safe disposal of wastewater by spray irrigation; adequate supplies of water; the nearest houses being sufficiently far away as not to be affected; adequate land for holding stock if required; a central location for supply of stock from the mid-Northland region; ready access to a workforce; and electrical and mechanical engineering and other services being readily available as Kaikohe.

Although the site selection method may not have been sufficiently methodical and rigorous if the proposal involved a non-complying activity, we find that in general the site is suitable for the proposal as a discretionary activity.

Effects on Moerewa

The appellant is a co-operative company, with a principal business in meatworks, mainly for export meat. It has long had a meatworks at Moerewa (which is about 24 kilometres east of Kaikohe), and has recently upgraded those works, constructing a modern efficient plant for killing and processing beef and sheep.

Three principal grounds of the appeal were first, that social and economic conditions of people and communities would be adversely affected by loss of employment at the Moerewa works as a result of livestock being killed at the applicant's abattoir instead; secondly, that the abattoir would threaten the only export sheep and lamb processing works in Northland, which would prejudice the interests of sheep farmers in the district; and thirdly, that the proposal would unnecessarily duplicate existing killing and processing resources at the appellant's Moerewa works.

The case in support of those grounds was based on the following five propositions. First, the appellant's new Moerewa works operates two chains, one for beef and one for lambs, mutton and bobby calves, and employs a total of 257 employees. As the Moerewa works is a full processing plant, it is more labour-intensive than slaughter-only plants like the proposed abattoir; so that every job offered at a slaughter-only plant would correspond to two jobs lost at Moerewa. The second proposition is that the lamb and mutton chain at Moerewa has a capacity of 1,400 head per day; that the 850 lambs, sheep and goats which the applicant hopes to kill on 3 and a half days per week would represent about 27 per cent of the appellant's projected production; that the appellant's lamb and mutton chain is only marginally viable, and a loss of 15 per cent of the budgeted killing quantities would make it unprofitable so that it would have to close; that if the Moerewa lamb and mutton chain was closed, 60 jobs would be lost, and in addition, there would not be casual work for extra workers taken on in the bobby calf season.

Thirdly, the projected beef kill at the applicant's abattoir of 185 head per week represents about 6 per cent of the Moerewa beef capacity; and about half that number are likely to be stock that otherwise would have gone to the appellant's works; and that would cost further jobs at Moerewa.

Fourthly, the effect of the lost employment at Moerewa would be an annual net loss of wages of about \$854,000 and, applying employment multipliers, indicative results of the relative impacts of closure of the Moerewa chain are that there would be a loss of a further 44 jobs through production-induced flow-on effects (and a loss in wages after accounting for unemployment benefit of \$1.7 million); and a loss of a further additional 16 jobs as a result of consumption-induced effects (and a loss in wages from direct production-induced and consumption-induced effects after accounting for unemployment benefit of about \$2 million). Fifthly, the likely social effects of those losses

would be borne not only by those made redundant and their immediate families and households, but also by the community itself through subsequent redundancies or under-employment as well as through cumulative and collective effects of unemployment on the social fabric of the community. The net loss of income after accounting for unemployment benefits would affect the amount of cash available in the community, further depressing the local property market, further reducing local services, and increasing the demand on local caring groups and increasing social stress.

On the prejudice to sheep farmers in the district, it was established that there is no other export lamb processing operation in Northland.

The applicant did not accept that the livestock which it would kill would otherwise be killed at the appellant's works at Moerewa. It estimated that 75 per cent of its throughput would be stock that is not currently killed by the appellant, and it referred to an agreement it had with a wholesaler who would be supplying livestock and retailing the meat through its shops. The applicant did not accept that operation of its abattoir would cause the appellant to close its lamb and mutton chain, and asserted that there is a need for local competition for the appellant in Northland to provide a choice of service and costs.

The district council referred to AFFCO's case in previous Tribunal proceedings (Appeal 554/89 AFFCO v Far North District Council Decision A 30/90 8 June 1990) and claimed that the appellant was not entitled to use the planning process to achieve regulation of trade competition, and that establishment of a further abattoir outside Northland could have potential for similar effects on the appellant as the present proposal is alleged to have. Counsel observed that with competition there must be some potential effect on a competitor's labour force.

We commence our consideration of this issue by quoting s104(3) of the Act:

"When considering an application for a resource consent a consent authority shall not take into account the effects of trade competition on trade competitors."

We note that it is only the effect on trade competitors that is not to be taken into account. Apart from that, consent authorities are to have regard to any actual and potential effects of allowing the activity (s104(1)). That would include effects on the environment, which is defined (by s2(1)) to include people and communities and the social and economic conditions which affect them. The reference in the defined meaning of "sustainable management" in s5(2) to managing resources in a way which enables people and communities to provide for their social and economic well-being supports the view that consent authorities should have regard to effects of proposals such as the present on social and economic conditions, though not taking into account effects of trade competition on trade competitors. We hold that it is generally

appropriate for consent authorities to have regard to effects of trade competition on other than trade competitors.

So while we reject from consideration any effects of trade competition of allowing the abattoir proposal that are effects on the appellant, we address those effects on others, and in particular, on social and economic conditions of people and communities.

The heart of the appellant's case in that respect is that an effect of the applicant's abattoir would be that the appellant would have to terminate the employment of more people than the applicant would employ. That in turn depends on the applicant persuading suppliers of livestock for killing whom the appellant hopes will send the stock to its Moerewa works to send them to the proposed abattoir at Tautoro instead.

We accept that there are likely to be some of that undefined class of livestock suppliers who would do so (although no individual was called to give direct evidence of an intention to that effect). Despite the urging of the parties for disparate estimates of the quantities of livestock that might be diverted to the applicant's abattoir, we do not consider that we have any sound basis for a judicial finding of the extent of the diversion. The amount of livestock killed by the applicant instead of by the appellant is likely to depend partly on relative prices and quality of service, partly on the success of relative marketing, and partly on personal influences such as suppliers' individual attitudes to the appellant and to the applicant. There may well be other factors of which we are unaware. Any finding that we might attempt would be little better than speculation, and an unworthy basis for deciding these appeals. If the applicant finally secures the required resource consents, raises the necessary funding, and establishes its abattoir, the resulting competition of animal killing facilities in mid-Northland is likely to advance in a general way the economic well-being of those involved in supplying livestock and in dealing in meat, and may also advance the economic well-being of the mid-Northland community.

The adverse effects on the economic well-being of any who lose jobs as a result of that competition would be regrettable; as would any consequential economic and social effects of numerous "lay-offs" on the local communities. However those effects would flow as much from the general economic conditions in the district, because there are not other jobs available for those laid off from the appellant's works. The management of an individual enterprise, even one as prominent as the appellant is in Moerewa, cannot sensibly be held responsible for those general conditions merely because, in efforts to survive as a business, it has converted an old-fashioned labour-intensive plan to a modern mechanised plant, and now employs many hundreds fewer than it did 10 years ago.

(These proceedings do not provide a forum for putting the appellant on trial

for its management practices at its Moerewa plant over that period. The persistent efforts by the applicant's counsel to focus on those matters were regrettable.)

Because (for the reasons already given) we are not able to make a finding that the proposed abattoir would deprive the Moerewa works of any particular proportion of its budgeted supply of sheep and lambs, we have no basis for concluding that the export sheep and lamb chain would be threatened.

The third of the grounds advanced for the appellant in the present context is that the applicant's proposal would involve duplication of plant already provided by the appellant at its Moerewa works. We do not consider that we should take that into account in deciding this appeal. Our reason is that if the duplication of plant is a relevant effect of the proposal it is an effect (as defined) of trade competition on the appellant, which we find to be a trade competitor of the applicant. Taking such effects into account is forbidden by s104(3). In summary, although we recognise that potentially there might be adverse effects on the economic and social well-being of people and communities from the establishment of the proposed abattoir, for the reasons given we will not permit that potential to influence our decision on these appeals.

Land Use Consent

It was the applicant's case that as a land use the proposed abattoir would have three general advantages: first, that it would provide a local service for killing livestock that currently is not killed at Moerewa but taken further south, and particularly for pigs which are not killed at Moerewa and which do not travel well; secondly, that it would provide employment for about 17 local workers in an area where there is high unemployment; and thirdly, that it would make use of local natural resources of land that is presently under-utilised and of water, and that the disposal of wastewater by spray irrigation would be beneficial for production from the land. We accept those submissions so far as they go.

As previously mentioned, the transitional district plan contains general assessment criteria for conditional uses, and also specific criteria for rural industries in the Rural 1 zone. The former are covered by the latter, and do not require further attention separately. We now address each of the specific criteria for rural industries in the Rural 1 zone.

“(1) Site

(a) Criteria

Access The site access shall be to a State Highway or other principal road ... which is now or is proposed to be upgraded to a sufficient width and design to accommodate the traffic likely to be generated by the proposed use. [Sight] distances at entry and exit points shall be 100 metres in each direction and capable of construction in accordance with the provisions of Ordinance

1204.5 and appendix P/3. ..."

The proposed site has access to Mangakahia Road which is defined as an arterial or principal road. It is sealed and has sufficient width and design to accommodate the traffic likely to be generated by the abattoir, namely 10 - 15 trucks and service vehicles per day and light vehicles carrying staff to and from work. Sight distances at the entrance/exit exceed the specified 100 metres in each direction. The district council's conditions, which were accepted by the applicant, contemplate formation of the entrance to the satisfaction of the district engineer.

"(b) Water Supply

The site shall have an adequate supply of water for the proposed use."

If the appellant's appeal against the consent to take water is disallowed, the consent granted by the regional council would allow the applicant to obtain an adequate supply of water for the proposed use.

"(c) Effluent Disposal

The proposed development shall be sited such that the disposal of all effluent and other by-products resulting from the use is adequately provided for."

If the appellant's appeal is disallowed, the discharge permits granted by the regional council would meet the criterion that disposal of effluent is adequately provided for. Other by-products, for example offal, are to be removed from the site in accordance with MAF control by contractors for disposal elsewhere.

"(d) Labour Force

The proposed development shall be so located that the labour force required for the project can be provided from established settlement patterns and will not create a need to establish new and sporadic urban development in rural areas."

We find that there is a labour force available at Tautoro, and a further source of labour at Kaikohe. As the abattoir would only employ 17 people in the initial stage, no new urban development would be involved.

"(e) Size Limitation

The proposed development shall be of such limited size and scale as will enable it to harmonize satisfactorily with the rural surroundings and environment. In assessing whether the size and scale is suitably limited the Council will have regard (inter alia) to the proposed site area, the number of persons to be employed and the capital cost of the project."

Having regard to the proposed site area, the number of persons likely to be employed, and the capital cost of the project, and our judgment being assisted by a visit to the site and its environs, we find that the proposed premises would be of such limited size and scale as would harmonise with the rural surroundings and environment.

"(f) Land Quality

Wherever practicable the proposed development shall be so located that land

having high actual or potential value for the production of food is protected. If Class Ic1, IIe1, IIs1, IIIs1, and IIIs2 soils are present, the site should generally be viewed as unsuitable."

The site for the abattoir itself and the treatment ponds is not actively farmed and is classified in Class IVs1 on the NZ Land Inventory Worksheets. The land does not have high actual or potential value for the production of food, and is not unsuitable from the viewpoint of protecting land of high food productive value.

"(g) Wetlands and Wildlife Habitats

The proposed development shall be sited such that those objectives and policies contained in Chapter 4 of the District Scheme are addressed."

Chapter 4 contains, relevantly, provisions concerning conservation of wetlands and wildlife habitat. We find that the subject site does not include wetlands or wildlife habitat which deserve to be protected, nor would any such features be affected by the proposal.

"(h) Natural Environment

Site selection shall take into account areas of landscape significance and, in particular, the requirement to preserve the natural character of the coastal environment and the margins of lakes and rivers."

We find that the proposal would not affect any areas of landscape significance, the coastal environment, or the margins of lakes or rivers.

(2) Performance Criteria

(a) Stormwater and Waste Disposal

(i) All stormwater shall be disposed of in such a manner as to avoid surface erosion, or contamination of waterways or groundwater.

(ii) All liquid and solid waste is to be treated and disposed of in such a manner as not to cause contamination or erosion of surrounding soils, waterways or groundwater, or detract from the amenities of the area.

(iii) No use shall commence until the necessary water rights have been granted by the Northland Regional Council."

If the appellant's appeal against the grant of the discharge permits is disallowed, the consent granted by the regional council would allow the applicant to dispose of stormwater and liquid effluent in ways that would avoid erosion and contamination of receiving soils and waters, and which would not detract from the amenities of the area.

"(b) Noise

The environment standards specified in Appendix T Table No 1 shall be met by any development."

We find that the proposal would be able to meet the prescribed noise standards. Item (c) of the performance criteria contains reference to processes defined under the Clean Air Act 1972 which was repealed by the enactment of the Resource Management Act 1991. Those references are superseded by the

need for the applicant to obtain resource consents for discharge of contaminants into air.

"(d) Glare

Any use of the land shall be so conducted and buildings shall be so designed, that direct or indirect illumination arising from the industrial activity does not cause annoyance or nuisance to nearby properties."

We find that the distance of the site from other buildings would ensure that direct or indirect illumination from the activity would not be likely to cause annoyance or nuisance to nearby properties.

"(e) Hazardous Substances

All hazardous substances shall be:

(i) Stored, covered and secured; and

(ii) Transported within the property;

in such a way that substance cannot enter the surrounding soils, waterways or groundwater."

Any stocks of hazardous substances required to be kept at the premises (such as chlorine and LPG) would be so small as to give no problems for secure transportation and storage.

"(f) Loading and Parking

All vehicles associated with the use shall be accommodated within the property."

We find that the amended loading and parking proposals would be adequate.

"(g) Landscaping

Live plantings and landscaping shall be established and maintained to ensure that the rural character, amenity and visual quality of the area is maintained and where possible, enhanced."

The applicant proposes that planting and landscaping of the development be carried out in accordance with the landscaping plan to be approved by the district council. That would meet the criterion of enhancing, or at least maintaining the amenity and visual quality of the area.

"(h) Smell

Processes shall adopt the best practicable means to contain and minimise smell, including if necessary the provision of adequate control equipment to assure that any smell is inoffensive and not likely to create annoyance or nuisance to nearby properties."

Although we find that it is unlikely that the activities would create smell annoyance or nuisance to nearby properties (at least after the initial commissioning period for the anaerobic treatment pond, and acknowledging the possibility of occasional malfunctions of the oxidation ponds in certain climatic conditions), final findings on those topics can only be made after the applicant has applied for the necessary discharge permits for discharge of contaminants into air, and after we have had the opportunity of hearing the

cases of the other parties on the management plans for the treatment ponds, the spray irrigation system, and the composting all being potential sources of smells.

In summary, apart from the question of smells, as a land-use activity the proposal deserves favourable consideration by reference to the specific criteria in the transitional district plan.

Consent to Take Water

The appellant's case in support of its appeal against the regional council's grant of consent to take water was based on challenges to the quantity of water available from the sources, and to the quality of that water for use in a meat plant. In particular, it was asserted that there was insufficient evidence that taking the quantities of water authorised would avoid depleting the Punakitere River in low flow; and that there was insufficient evidence that the water from the bore was not contaminated by bacteria, contained inappropriate concentrations of iron, and was untested for most metals. We were reminded that no details had been given of the water treatment system or how suspended solids or other metals are to be removed; or of the manner in which any backwash from a filtration plant was to be disposed of.

Evidence on those topics was given by the regional council's Water Quality Officer, Mr C T Dall, a qualified scientist with over six and a half years' experience.

Mr Dall explained that the bore is located in Tauanui basalts and is about 250 metres from where they meet Omapere and Kaikohe basalts. He deposed that the basalt is about 60 metres thick in the vicinity of the applicant's bore. He also deposed that the closest known bore to the applicant's is that of Pat Te Whata and Sons Limited and explained that the latter bore would not be likely to be affected by abstraction from the applicant's bore because Te Whata's bore penetrates through the basalt and taps an underlying aquifer, but the applicant's bore does not penetrate through the basalt. He also gave the opinion that other groundwater users in the area, such as Tautoro School, are unlikely to be affected because of their distance and because they are understood to be upstream of the applicant's bore. Mr Dall expressed the opinion that an abstraction at the rate of 200 cubic metres per day would be relatively small in relation to the size of the resource, considering the extent of the basalt geology. He also explained that if monitoring of the initial abstraction, which is likely to be of the order of only 75 cubic metres per day, shows that abstraction from the bore is inappropriate, then the applicant would be required to take its water from the Punakitere River instead.

We accept that the applicant has not yet conducted sufficient pump testing of the bore to establish that it is capable of sustaining abstraction at 4.5 litres per second; but that is why the applicant has also sought consent to abstract water from the river.

The applicant's consent to take water from the river relates to taking at a gauging station known as "Above Falls" where the lowest flow recorded was 48 litres per second and the one in five-year low flow is estimated to be 45 litres per second. There is no water resource management plan in force for the Punakitere River, and Mr Dall deposed that in such cases the regional council's policy is to allow up to 60 per cent of a 1 in 5-year low flow to consumptive users (although the proposed regional policy statement would reduce that to 25 per cent). The witness explained that abstraction of 200 cubic metres per day, when taken over 12 hours, would be equivalent to a flow of about 4.6 litres per second, so that using the low flow of 45 litres per second for the "Above Falls" site, the abstraction would represent a reduction in flow of 10.2 per cent. In giving the opinion that the proposed abstraction from the river would be unlikely to have a significant impact on other current users or to adversely affect water quality or stream biota, Mr Dall explained that the Wairoro Stream flows into the Punakitere River a short distance downstream of the proposed abstraction, and that the stream increases the flow in the river at the Mangakahia Road bridge to 80 litres per second.

On the basis of Mr Dall's evidence, which we accept, we find that the proposed taking of up to 200 cubic metres per day of water from the applicant's bore, or from the Punakitere River, would be consistent with sustainable management (as defined in s5) of the natural resources involved, in that it would not jeopardise the potential of those resources to meet the foreseeable needs of future generations; would not jeopardise the life-supporting capacity of the water of those sources; and that the conditions imposed by the regional council would avoid, remedy and mitigate any adverse effects of the abstractions on the environment.

On the quality of the water from the bore, the applicant's engineer, Mr L Sim, accepted that full tests had not yet been done and initial analysis of a sample of the water from the bore had shown some mineral and some bacterial contamination and some iron. Mr Sim deposed that the process for treating the bore water before use would be multi-media sand filter using correction for pH, dosing with either polycarbonate or soda ash to help flocculate iron, or multi-media sand beds followed by chlorination.

In our opinion, the acceptability for use in the proposed abattoir of water of the quality available from the sources referred to in the consent is primarily a matter for the applicant's judgment. It can install water treatment plant, and the water is not so plainly unsuitable that consent should be refused on the basis that the applicant cannot make beneficial use of it.

In summary, the proposal to take water from the bore, or from the river, appears satisfactory and worthy of consent on the basis that the two sources are to be complementary - that is, that the total abstracted from both sources is not to exceed 200 cubic metres per day.

Treatment Ponds

General

The proposed wastewater treatment pond system would be relevant to future applications for resource consents for the discharges into air of contaminants from the components in the system, and for the earthworks necessary to construct them. Neither of those topics is before the Tribunal in these proceedings. The waste water treatment system is also relevant to the proceedings presently before the Tribunal in three respects. First we must have regard to effects of the creation and operation of the ponds on the environment - both visual impact of the construction of the ponds, and potential smell from the system - in considering the application for land-use consent for them. Secondly we must have regard to the potential for leaking or seepage of contaminants from the ponds in the ground, and the means of avoiding that. That is relevant to the land-use consent for the ponds too. Thirdly we must have regard to the quality of the treated effluent that would be used for spray irrigation. That is relevant to our consideration of the discharge permit for irrigation.

The regional council informed us of its attitude that it should not be involved in design detail other than to ensure that the design proposed will be adequate for the purpose of ensuring that the conditions minimising the effects of an activity authorised by a particular permit can be met. It submitted that in this case final design details will need site investigation which is not warranted prior to approval because of the availability of a large area of land. Counsel asserted that conditions of the discharge permit would effectively minimise the actual and potential effects, and that the river would be monitored to ensure that the consent conditions are complied with.

For ourselves we are not satisfied that we can responsibly address the various matters to which we are required to have regard without having details of the design. We could not assess the acceptability of the visual impact of construction of the treatment ponds without knowing the height of the bunds to confine the ponds above natural ground level. We could not assess the potential for leaking or seepage of contaminants into ground without having a specification for the permeability of the lining of the ponds and the method by which that is to be achieved. We could not assess the potential of the wastewater system to emanate unpleasant smells without details of the design capacity of the system and the likely loading on it.

In summary, the desirability of a consent authority imposing conditions to avoid or mitigate adverse effects on the environment does not excuse it from considering the extent to which the proposal as designed would avoid or mitigate adverse effects on the environment.

Outline of System

As previously described, the wastewater treatment system would consist of a primary treatment tank for trapping fat and sedimentation of the process effluent, and screening of the yard effluent. That primary treatment system

would be followed by three lagoons in series, an anaerobic lagoon, an aerobic lagoon or oxidation pond, and a holding or storage lagoon.

Waste water from staff showers and toilets would pass through a separate drain system to a two-chamber 6.7-cubic metre septic tank, the discharge from which would be diverted to the treatment ponds for further treatment. The ponds have been designed so that the top of the design water level would be one and a half to two metres below the ground floor of the abattoir. Pond 1 would be excavated to two metres below existing ground level; Pond 2 to half a metre below that level; and Pond 3 to one metre below that level. The bunds would have a maximum height of about two metres, which we accept would not be a significant visual impact in the size of the terrain. The system would have capacity for one and a quarter days' effluent from the abattoir.

Construction and Lining

The applicant's engineering witness, Mr Sim, considered it likely that there would be suitable clay for lining the ponds available in the area, but deposed that if not, a permathene liner could be used. He explained that all rocky outcrops in the way of the ponds would be removed and that clay or membrane liners would cover all fissures. Pond 3 would have membrane on the slopes and clay on the bottom of the pond. In cross-examination he accepted that it was possible that if there was a substantial fracture in the ponds that got through the liner, water from the ponds would pass through a fissure in the basalt-like piping.

It was the appellant's case that there would be a danger of failure of the ponds and discharge of effluent through basalt seams into underground waters or the river. The appellant's engineering witness, Mr WK Brown, observed that the site for the ponds is in a volcanic area where there is great local variation in the soils and bare rock. He observed that it had not been demonstrated that it would be possible to create a flat area sufficient to form the ponds and although he acknowledged that a clay lining of the ponds with a conductivity of 10-9 metres per second would be acceptable, he observed that that would be a glib specification. He considered that some permathene layer would be required to achieve that level of permeability, and that it would be difficult to prevent the permathene being damaged on underlying rock in that the load from the clay lining and the water above it would be likely to result in cracking of the sealant over the rocks. Mr Brown also referred to the possibility of scoriaceous cavities below ground level leading to subsoil collapses under the weight of the water in the ponds. He also expressed the opinion the excavation of areas of the size required may be impracticable given the presence of basalt seams in the area.

In effect there was a difference of opinion between the two engineering witnesses for the applicant and for the appellant about the practicability of forming ponds on the selected site with the appropriate impermeable lining.

The inadequacy of the design of the proposal had evidently been raised by the appellant before the joint hearing committee of the primary consent authorities; and was also raised in the notice of appeal. The applicant was therefore on notice that its proposal was challenged in this respect. The appellant's case was supported by a qualified civil engineer with relevant experience. The applicants called no witness with similar qualifications. Its engineering witness, Mr Sim, is no doubt well experienced in the practice of process engineering in meatworks. However, he claimed no experience comparable to Mr Brown's in the construction of sealed ponds of the kind proposed. Nor did another consultant engineer called for the applicant, Dr R N Cooper, profess to be qualified in that respect. Although we also accept that a lining of the ponds with a conductivity of 10-9 metres per second would be acceptable, we have not been satisfied that it would be practicable to construct ponds of the size proposed on the site in such a way that the desired threshold of conductivity would be maintained in the long term.

Design Capacity

It was the applicant's case that the abattoir would generate a waste stream of liquid effluent variously given as between 400 and 440 cubic metres per week from processing 185 cattle and 850 sheep, lambs and goats and 160 pigs; and that the ponds had been designed with capacity for that quantity of waste. It was acknowledged that if the number of beasts killed increased, the capacity of the waste treatment system would also have to be increased.

It was the appellant's case that the volumes of wastes had been underestimated and that the treatment plant as designed would be inadequate to handle the volume of wastes likely to be generated. The principal ground for that was the assertion that the amount of liquid wastes generated by the abattoir would be considerably more than estimated; and in addition, no allowance had been made for additional components in the wastewater stream from human wastes, from runoff of rainfall from cattle yards and sheep yards, and from leachate from the proposed composting. In particular, yard washings and truck washings were said to require large quantities of water and to produce significant quantities of waste.

Dr Cooper supported the design capacity, and referred to two meat plants which produced less than 1.5 cubic metres of wastewater per beast killed.

We accept that it is important that the wastewater treatment system be shown to have sufficient capacity to cope with the quantities of waste to be expected. If the system became overloaded, it would be less effective in removing biological oxygen demand and suspended solids, would be more likely to produce smells, and the resulting effluent would be less suitable for irrigation. In this respect, we are left with a reservation about whether the ponds as designed would have sufficient capacity. We are not clear that the other plants referred to as operating at less than 1.5 cubic metres per beast would be truly

comparable with the applicant's proposal.

Primary Treatment

It was the appellant's case that the primary treatment system was inadequately designed and unsatisfactory in that there would be no screening of solids from the abattoir and no screening of solids from the yards.

We suppose that the omission of reference to the screening of those waste streams is a function of the little attention that has been given to the design of the system. Plainly it would be readily capable of being amended to provide for screening of those waste streams, as would be desirable.

Anaerobic Lagoon

The anaerobic lagoon would have a residence time of 10 days and would remove 60% to 70% of the influent biological oxygen demand (BOD). The principal issue concerning the anaerobic lagoon was the practicability of forming a cover of crust or scum on the surface of the lagoon to confine smells from being discharged to the atmosphere. Dr Cooper considered that although it would take some time to develop (and there could be commissioning problems when there would be odour in the early stages), a scum layer would effectively cap the pond and contain any odours after that. However it was the evidence of the appellant's witness, Mr R W Ralph, that a regular and even loading is crucial, and that there would be difficult problems with intermittent processing as the applicant intends, so that there would be difficulty in maintaining a scum layer which would contain the smells.

In this respect also we remain unconvinced by the applicant's case that with the intermittent loading proposed, smell from the anaerobic lagoon would effectively be contained by a scum layer that would not break up.

Oxidation Pond

The oxidation pond is designed to be 1.5 metres deep and to have a surface area of 2,025 square metres. It would have a surface area loading in the range of 130 to 160 kilograms of BOD per hectare per day, and at an inflow of 440 cubic metres per week would have a retention period of about 48 days. Dr Cooper estimated that the effluent from that pond would have BOD and suspended solids concentrations of about 100 grams per cubic metre, the reduction being of the order of 10%.

It was the applicant's case that the pond would probably operate in a facultative mode with anaerobic conditions at the bottom, and Mr Ralph deposed that those conditions would be exacerbated by increased quantities of suspended solids and BOD from the anaerobic pond. It was the appellant's case that a facultative pond is far more difficult to manage than an oxidation pond, and has much greater potential for odour emission.

In our opinion the concern over the oxidation pond is a function of the capacity of the system. The pond has evidently been sized to cope with an inflow of

440 cubic metres per week and if the quantity of waste water discharged to it is greater than that designed capacity, no doubt it would be more difficult than normal to manage, and there would be enhanced potential for generation of smells.

Storage Pond

The storage pond would measure 70 metres by 70 metres and 2 metres deep, a total capacity of about 10,000 cubic metres. Dr Cooper deposed that further effluent renovation may occur in that lagoon by nitrification and denitrification processes. The size of the pond was calculated using records of rainfall at Kerikeri. Mr Sim deposed that he understood that the rainfall of the two areas was not that different, though he was not able to inform the Tribunal with precision on that point.

It was the appellant's case that storage of effluent in a holding pond of that size for irrigation in summer months would be likely to generate odours, the production of algal blooms, and possibly toxic condition in the effluent to be discharged for spray irrigation. Mr Brown deposed that those problems would be more likely when the pond is nearly empty.

In comparing the differing opinions of Mr Sim and Mr Brown concerning that pond, we find the opinions of the latter more persuasive because he has professional experience in practice of wastewater ponds in the climatic conditions of mid-Northland. We are left with some reservations concerning the ability of the storage pond to be managed successfully as designed and without the generation of smells. We are uncertain about the quality of the final effluent for spray irrigation from that pond.

Emission of Smell

We find that the anaerobic lagoon is likely to emit smell during commissioning and at any times after that when it is not sealed by a crust on the surface or in some other way. With the intermittent loading from the abattoir working only three and a half days per week, we are not persuaded that a crust formed from solids floating to the surface would continue to seal the lagoon so as to prevent emission of smells.

On the applicant's own evidence the oxidation pond would operate partly in a facultative mode, which means that there would be some anaerobic action at the bottom of the pond, at least in some climatic conditions, that is likely to result in the emission of smells. The same can be said for the storage pond. Although the site for the ponds is relatively remote from houses or concentrations of human activity, the emission of smells from the treatment ponds would be an adverse effect on the environment.

Consideration of Alternative Methods

Mr Dall deposed that to his understanding the applicant had investigated other methods of wastewater treatment including activated sludge, trickling filters,

ultra filtration and ponds with mechanical aeration. We have not been able to identify evidence given on behalf of the applicant to that effect.

Pathogens

Mr Ralph deposed that diversion of human waste septic tank effluent into the treatment plant would have the potential of human viruses and pathogens being sprayed onto the land, presenting a potential health concern. In cross-examination the witness acknowledged that he had not studied the survival of human viruses in wastewater treatment plants, but that he knew viruses survived treatment systems because that had been widely reported. Mr Ralph did not profess specialist qualifications on the topic.

However that topic is within Mr Dall's expertise. He acknowledged that a septic tank can discharge a high number of viruses and bacteria in the effluent. He deposed that exposure to ultraviolet radiation is a key mechanism in the deactivation of viruses which is accelerated at temperatures greater than 15 degrees when organisms feed on particulate matter to which viruses adhere. He also deposed that some organisms in treatment ponds excrete enzymes which inactivate viruses. He concluded that distribution of human wastes to pasture would be acceptable given sufficient treatment.

Dr Cooper, who is also well-qualified on this topic, deposed that the treatment system would remove viruses from the effluent by sedimentation, though he could not say that the process would effectively remove all of them; and held to his opinion that irrigation of the effluent would not be a risk to public health or to animal health.

We accept the expertise and opinions on this topic of Mr Dall and Dr Cooper, and consider that there is no basis for a finding that the proposal would have an adverse effect in terms of the distribution of pathogens.

Findings on Treatment Pond System

In summary, we find that the wastewater treatment system proposed by the applicant would be likely to emit smells into the environment; and we have not been satisfied that it has been designed so as to avoid leakage into the ground; nor have we been satisfied that the capacity of the proposal would be sufficient to treat the volumes of wastes likely to arise to a standard where it would be suitable for spray irrigation on pasture as proposed.

By s104(7)(b) we are to have regard to possible alternative methods of discharge, including discharge into any other receiving environment. The evidence was not sufficient to enable us to have regard to those matters.

Irrigation and Discharge to Ground

General

It was the applicant's case that the principles of irrigating pasture with wastewater are well known; that the effluent is retained in the soil and partly or wholly treated there and taken up by plants; and that properly managed,

there would be no surface runoff of contaminated water.

The area proposed for spray irrigation of effluent from the abattoir is at the end of a sandstone ridge. There are areas of wetland on both sides, and tributaries of the Punakitere River flow around the base of the flanks of the slope.

It was the appellant's case that details given of the irrigation system and equipment were inadequate to enable the Tribunal to make a finding that there would not be adverse effects. In particular the appellant noted that no details were given of the subdivision of the irrigation area into paddocks, no management plan was submitted, no proposals for monitoring were detailed, and there had been no decision on the selection of discharge equipment; there was no evidence on how the spray irrigation would perform on sloping ground, or on the pattern of distribution of effluent on that ground; and there had been no evidence on the performance of spray irrigation of effluent from meatworks.

Size of Irrigation Area

As mentioned, the area proposed for initial use for spray irrigation contains 16 hectares. It was the appellant's case that that area would be too small, and that even on the applicant's own estimate of the volumes of effluent to be produced (variously given as 400 and 440 cubic metres per week) a greater area would be required. Of the applicant's own witnesses Mr M J McCallum had estimated 22 hectares, and Mr Sim 25 hectares; and the regional council's Mr Dall had estimated 31 hectares.

Geology and Soil Type of Application Area

It was the applicant's evidence that the soil of the irrigation area is mapped as a moderately-leached northern yellow-brown earth; that all profiles examined had a sandy nature; that topsoils were deeper on flatter sites; that mottling was never strong, indicating generally good drainage; and that one hole indicated evidence of a natural seepage zone.

It was the appellant's case that the soils of the irrigation area are unsuitable because they are impermeable. However that was not established by the evidence. Mr Brown had been concerned about the geology of the irrigation area, but on inspection found that it had considerably less volcanic rock than he had thought, so that concern appears to have been eliminated. We find that the soils of the irrigation area are suitable for the purpose.

Slope

An agricultural scientist called for the applicant, Mr MA Richardson, deposed that he had measured slopes on the irrigation area and found that they ranged between 2 degrees and 12 degrees, but in cross-examination he accepted that there could be smaller areas with slopes up to 25 degrees.

It was the appellant's case that the area is unsuitable for irrigation because of its slopes. Mr Brown deposed that the irrigation area has slopes of about 1 in

4, that there is a range of slopes which vary from 12 degrees and in some parts are as much 24 degrees. He gave the opinion that ponding would occur in depressed areas which would dry out more slowly and could not be irrigated as frequently; that application rates which may be valid for flat land or slightly sloping land would not be appropriate on the proposed irrigation area because after a short time much of the irrigation would run downhill, giving much lower rates of application at the top and much higher rates at the bottom; and also that heavy rain would leach out the nutrients and contaminants in the vegetation. Mr Brown pointed out that percolation into the ground does not happen on the slope; but when rain starts, the soil accepts moisture for a while and then the moisture starts to runoff. He was concerned that it would not be possible to obtain an even rate of application of the effluent over the whole area because of concentration due to gravity flow.

In cross examination, Mr Brown was referred to a paper by P G Barton of the Forest Research Institute (FRI) Land Treatment Site Selection Criteria (August 1991) which, at page 8, indicated that spray irrigation could be applied on slopes up to 35 degrees. Mr Brown commented that the FRI tests had been on volcanic ash soil which has much higher percolation than the soils on the subject site. The witness observed that he had not seen references indicating that irrigation could be applied on clay soils with slopes of 1 in 4, and observed that irrigation on such slopes would be subject to reduction of the average rate of application, and that the chance of overland flow would increase with increasing slope.

We accept the validity of Mr Brown's concern about the practicability of obtaining even application of irrigated effluent on ground sloping as much as 1 in 4; and we accept that after saturation of the upper layer of soil, effluent sprayed on the upper slopes would run overland and concentrate in depressed areas. We have not been persuaded that the proposal has been designed to take into account the problems of managing application of irrigation to avoid overland flow and possible contamination of waterways.

Rainfall and Evaporation

The applicant had predicted a balance between ground moisture losses by evapo-transpiration and gains from rainfall which had been based on meteorological records at Kaikohe to estimate maximum monthly water application rates for months with average rainfall equivalent to the 1 in 10-year dry conditions and 1 in 10-year wet weather conditions.

Mr Sim deposed that on 60 to 70 days per year there would be sufficient rainfall to cause rain to runoff; that irrigation requirements would occur on 55 days of the year; and that on about 200 other days in the year the soil would be capable of absorbing more moisture. Mr Richardson deposed that timing of application of irrigation would be critical because considerable runoff is likely following natural rainfall events, especially in winter and

spring. From that evidence we conclude that it is critical to whether the proposed irrigation would lead to contamination of waterways that there be a detailed irrigation management plan to determine the conditions in which irrigation may occur, and the rate of application. Settlement of such a management plan is not a matter which a consent authority could responsibly delegate to officials subsequent to a grant of consent. The likely adverse effects of the proposed discharge of contaminants into the environment could only be avoided by appropriate terms of the management plan, so it must be the consent authority's responsibility to satisfy itself that the conditions in which irrigation is authorised would be effective to avoid contamination.

Penetration

It was the applicant's case that hydraulic conductivities and soil water-holding capacity had been assessed in the laboratory on the basis of core samples taken from the irrigation area; that the analyses had indicated that water would not quickly penetrate deep into the soil profile because most of the water lost from the site would be surface runoff or lost by evaporation and transpiration; and Mr Sim deposed to the opinion that if properly managed there would be sufficient water supplied to soak into the topsoil but not percolate into the subsoil structure.

For the appellants Mr Ralph deposed that there would be so much nutrient applied to the ground that in practice a humus layer would form on the surface which would seal the soil and inhibit penetration of the irrigation.

We are satisfied on the evidence that there would not be undue penetration to the subsoil, but are left with an unresolved concern about runoff of contaminated effluent which may reach waterways.

Nutrient Load

It was the applicant's evidence that the nutrient level of the effluent discharged from the abattoir would have a total Kjehdal nitrogen (TKN) level of 240 grams per cubic metre, and that the nitrogen concentration would be reduced in the treatment ponds by at least 10% to 15% and, with an expected production of effluent at 400 to 440 cubic metres per week, the total nitrogen loading of the effluent to be irrigated would be about 5,000 kilograms per year. Mr Sim deposed that the minimum nutrient requirements of grass pasture are equivalent to 50 kilograms per hectare per year, and concluded that the available nutrient in the aerobic lagoon effluent would be suitable for 24 hectares. Dr Cooper deposed that irrigation area loadings used in the meat industry in New Zealand lie in the range 500 to 1,000 kilograms of nitrogen per hectare per year, tending towards the lower end of the range.

That evidence was not challenged by the appellant, and we accept that the nitrogen content of the treatment pond effluent would be taken up by the pasture without harm.

Balancing and Storage

The applicant maintained that its storage pond would permit it to store up to 100 days' effluent from the abattoir for application by irrigation when conditions permit. Mr McCallum deposed that a nitrogen balance could be established in conjunction with the water balance, and that the application rates would be more governed by the soil and water balance than by the nitrogen loading. The holding pond would allow for more flexible operation and under average rainfall conditions 16 hectares of irrigation area would be adequate for the initial loading and under the 10-year wet scenario there would be a safety factor of 2.3 for a 16-hectare irrigation area. The calculation of the storage required had been conservatively based on frequency distribution analyses on a monthly basis, looking at each month in isolation, on the assumption that it would be extremely unlikely to have 1 in 10- year wet conditions in August, following 1 in 10-year wet conditions in July.

We accept the importance of the storage pond for that purpose and that storage for 100 days' effluent would be sufficient for the purpose, although we have some reservations about using climatic extremes as frequent as 1 in 10-year conditions for design purposes. We would have thought greater extremes would be more prudent.

Application Rates

Mr McCallum deposed that daily irrigation would require application of 63 cubic metres; so that if that amount was applied over one hectare, 6.3 millimetres would need to be applied. The witness also deposed that to obtain maximum benefit from irrigation effects in dry weather, an application of 40 millimetres per hectare every 8 to 10 days would be desirable; and that would be applied over a 10-hour period at an application rate of 4 millimetres per hour. He considered that at those rates, ponding and runoff would be negligible if the system is operated in accordance with water and nitrogen balances.

Mr Dall deposed that the regional council has traditionally applied a 20 millimetres per day irrigation rate.

For the appellant Mr Ralph questioned whether, given the likelihood of algal blooms in aerobic and holding ponds, large nozzles to the spray irrigators would be required, which would result in the relatively rapid application of the effluent to the soil.

We consider that the applicant is entitled to have its application judged on the basis of its proposal of application rates of 4 millimetres per hour, and should be held to that rate. If for any reason it is unable to achieve that, the basis of the discharge permit itself would need to be reviewed. The application rate is too fundamental to be adjusted by review of a condition of consent.

Application Methods

It was accepted by the applicant that irrigation of effluent would need to be carried out in accordance with a management plan, the amount and rate of

application depending on on-site examination of conditions on the day, including measurement of the absorptive capacity of the soil.

The applicant had not designed a specific irrigation system, although the basic layout of lateral spray-lines connected to an irrigation pipeline would be adopted. Mr McCallum had recommended a Van Den Bosch system which would incorporate a number of small mobile sprinklers operating from the main delivery line. The sprinklers would be designed to apply water to the root zone of the pasture plants at a rate which would be removed by evaporation and transpiration. The witness acknowledged that monitoring would be required, and that in winter there would need to be visual observation of the spraying and its effects.

For the appellant, Mr Ralph deposed that calculating the correct size of nozzles and the correct delivery pressure would be quite complex in this case, particularly because of the steep slopes on the site; and that it would be difficult to design a system that would operate successfully at varying heights.

Design of the irrigation system itself needs to be completed for us to be able to assess what effects the proposed irrigation would have on the environment. Rotation and Buffer Zones

The applicant proposed a 14-day period of rotation for irrigation of paddocks in the irrigation area, and establishment of a buffer zone adjacent to watercourses which would not be irrigated. It also proposed to spell pasture after effluent irrigation for 14 days before introducing grazing animals.

The appellant's witness Mr Brown deposed that buffers between spray irrigation areas and watercourses or areas of high porosity would be needed to prevent contaminants ending up in the river or aquifer. He considered that the buffer zone shown on the revised plans produced during the appeal hearing did not deal with the issue because it did not have a drain and would not prevent nutrient strippings washing across the buffer area.

In our opinion the effectiveness of the proposed buffer areas is important, and we would wish to be satisfied that they are so designed that contaminated effluent would be prevented from flowing overland into the river or through soil of relatively high permeability to the aquifer.

Spray Drift

Mr Ralph deposed that Bosch irrigators have an upward discharge direction of 25 degrees, and that significant spray and aerosol drift would result, with a risk that even in moderate wind conditions spray could be carried to where it could enter low-lying surface waters in streams and wetlands on the site and adjacent to it.

Spray drift of effluent containing contaminants would be an effect to which regard must be had in deciding whether a discharge permit should be granted or refused. We have not been satisfied by the applicant's evidence that the design of the proposal is satisfactory in that respect.

Benefits for Pasture

We accept the applicant's case and find that there could be significant benefits to the pasture of the irrigation area from irrigation in dry conditions of the treated effluent; and that it is likely to increase the productivity of the land.

Wetland Alternative

It was the appellant's case that the applicant had not sufficiently investigated an alternative of treating and disposing of the waste water from the abattoir by use of a wetland system.

Possible alternative methods of discharge are relevant in terms of s104(7), and the topic is not adequately addressed by responding to an opponent's suggestion made at an appeal hearing. The Fourth Schedule clearly contemplates that an applicant should address alternatives before settling on a method which is made the subject of an application for resource consent. The evidence before us does not establish that the applicant identified and considered alternative methods in a systematic way prior to settling on spray irrigation of the effluent as a disposal method. Although we accept that irrigation has benefits for the pasture which wetland disposal would not have, that does not preclude the duty of serious consideration of alternatives.

Monitoring

We accept Dr Cooper's opinion that if the discharge permit for irrigation is granted, there should be a condition requiring monitoring of nitrogen loadings of the effluent being irrigated; and similarly we accept Mr Dall's opinion that there would need to be frequent testing of the water quality of the Punakitere River both upstream and downstream of the site for a range of determinants.

Summary on Irrigation and Discharge

In summary we are not satisfied that the proposal for spray irrigation of treated effluent from the abattoir and its discharge into ground has been designed sufficiently fully to enable a responsible decision to be made about the likely effects, whether the permit should be granted or refused, and if granted, what conditions should be imposed.

Discharge of Stormwater

It was the applicant's proposal that stormwater from the abattoir premises be discharged into a stream that feeds the Punakitere River. It was explained that it was not proposed that the stormwater be treated before discharge as it was considered that it would not contain contaminants different from those in runoff from other sealed roads and roofs in the area. We find that the roof water would be uncontaminated, but that runoff from roadways and carparks would contain contaminants and elevated levels of sediment which could discolour and reduce the clarity of the receiving water and affect aquatic life by smothering riverbeds.

Mr Dall proposed that there should be pre-settling sumps and accepted that provided appropriate silt sediment traps are installed, the stormwater discharge would have no discernible adverse impact on the receiving waters.

The appellant proposed that because some of the stormwater would be contaminated, it should be diverted to a small holding pond to allow settlement of solids, and permit closing of the outlet during spillages, cleaning operations, and other contingencies prior to discharge.

In our opinion that would be an appropriate condition; and subject to that, and the conditions imposed by the regional council, the discharge permit for stormwater deserves to be granted.

Composting

We have already concluded that the proposed composting requires land-use consent and a discharge permit for discharge of contaminants into air; and that the applications already before the Tribunal do not incorporate applications for those consents. For the purpose of this interim decision therefore it is sufficient to describe in outline the proposed composting of solid wastes from the abattoir.

Dr Cooper explained that solid wastes recovered from the effluent stream would not exceed 8 cubic metres per week; that those solids may be mixed with a bulking agent such as sawdust or bark to keep the material aerobic during windrowing; that periodic turning would be required to assist with aeration; that the material would heat to 60° or 65°C; and that it would be stabilised in 6 to 12 months and suitable for use as a soil conditioner. The witness estimated that the compost heap would contain 580 cubic metres of material, mostly of faecal origin. He recommended that it be placed on an impermeable base with all-weather access, constructed so that rainfall or leachate would be capable of being drained to the treatment ponds.

Mr Ralph calculated that to cater for about 580 cubic metres of solid material, the composting heap should be based on a sealed pad which need to be about 2,000 square metres in area to allow room for turning and windrowing of the compost; that it would produce about 200 cubic metres of runoff per month in the summer, and about 340 cubic metres a month in winter. Mr Ralph deposed that, composting being an aerobic process, turning and windrowing of it would release significant odours.

Consideration of Statutory Criteria

We have already considered the effects of allowing the activity in respect of each of the components of the proposal already discussed.

Of the matters listed in s104(4), we have referred to the relevant rules of the transitional district plan which is applicable to the land-use consent required for the abattoir. By those rules, that use of land is a discretionary activity and we have addressed the various assessment criteria contained in the plan as

they apply to that proposal.

In having regard to relevant policies and objectives of the plan, we note an objective of fostering the service, employment and productive potential of industry in references to proposals for industrial development opportunities in three localities in the district. In respect of resource use there is an objective of providing for versatility in rural land-use and policies of minimum controls to ensure maximum flexibility in rural production options and of protecting elite soils. There is a statement that land-use planning and water management need to be complementary when waste disposal is considered; and a statement of the paramount importance of conserving and protecting natural and valued features which contribute to the district's natural environment.

We have found nothing in the policies and objectives of the transitional district plan that would be inconsistent with granting the land-use consent for the abattoir as indicated by application of the assessment criteria in the plan.

There are no rules in the transitional regional plan or in the proposed regional policy statement that would apply to the activities the subject of these proceedings; the proposed taking of water would not conflict with the proposed policy about maintaining minimum residual flow regimes in rivers, nor with the proposed objective about discharges of contaminants already mentioned. Consideration of Part II is also required. In our judgment the proposed abattoir could only be found to promote the sustainable management (as defined) of natural and physical resources to the extent that we are able to conclude that the disposal of wastes from the abattoir into the environment would meet the objectives stated in paragraphs (a), (b) and (c) of s5(2). We have already indicated in detail various respects in which the evidence has not satisfied us. On the evidence we have heard, we accept that the proposed abattoir would enable people and communities to provide for the social, economic and cultural well-being (but at cost to the social and economic well-being of other people and communities). We have not been satisfied that it would be practicable to construct the treatment ponds on the site so that the desired threshold of impermeability of 10⁻⁹ metres per second would be maintained in the long term; nor that the wastewater treatment plant as designed would have sufficient capacity to cope with the volume of wastewater from the abattoir, roofs and vehicle areas, and from the composting area; nor that the treatment plant, with intermittent loading and varying climatic conditions, would consistently operate without discharging unpleasant odours, and would produce effluent suitable for spray irrigation; nor that the proposed spray irrigation, including the size and trajectory of spray nozzles and delivery rates and pressures, would cope with the sloping ground of the irrigation area so as to provide even application of the effluent at varying elevations without ponding, without overland flow to waterways and without seepage through ground of relatively high permeability to groundwater. Nor are we satisfied that appropriately

methodical investigations have been made into possible alternative methods of treatment and disposal of wastewater. There is insufficient evidence about adverse effects on the environment of the systems for treating and disposing of wastewater and solid wastes from the abattoir to enable us to judge the extent to which the proposal would avoid, remedy or mitigate any adverse effects of the activities on the environment.

There are no other matters in Part II that appear to be applicable in the circumstances of this case.

Determination

In its submission to the primary consent authorities, and by its notice of appeal, the appellant had called in question the sufficiency of the design and definition of the proposed works. Despite that, the applicant elected to pursue its present applications rather than make further applications based on more full design. Furthermore, the applicant has not applied for all the resource consents required by the proposal. Those are the circumstances in which the appellant, understandably, urged the Tribunal to allow its appeals, accepting that fresh applications might be brought.

However we acknowledge that the substance of the proposal is already before the Tribunal, and although further design detail may be needed before the Tribunal could reach a final decision on the merits, no one would be prejudiced if that detail were provided to the Tribunal direct rather than in the context of fresh applications. We consider that it would be more efficient to allow the applicant the opportunity to complete the presentation of its case before the Tribunal than to require it to repeat the process of applications and primary hearings, with the possibility that the matter would come before this Tribunal again on further appeals. However in giving the applicant the opportunity to complete its case we make two reservations. First it should not be assumed that the appeals will be disallowed and the necessary consents granted. We are not yet in a position to make that decision. Secondly other applicants should not presume that the Tribunal would offer similar indulgences for inadequately prepared proposals.

For those reasons the Tribunal intends to allow the applicant the opportunity to obtain the other resource consents required for its proposal; and the Tribunal will re-open the appeal hearing if within 6 months of the date of this decision the applicant gives notice that it has obtained the other consents required (or that they are the subject of appeals to this Tribunal); and that it is ready to present further evidence on which the Tribunal can assess the practicability of the treatment ponds being constructed and assess the likely effects on the environment of the wastewater treatment system, the spray irrigation, and the composting of solid wastes. The decision on the appeals is therefore further reserved. If the applicant does not give that notice within that period, the appeals will be disallowed.

Appellant	BATCHELOR RA & OTHERS
Respondent	TAURANGA DISTRICT COUNCIL
High Court No	AP189/92
Tribunal	Barker J (presiding), Henry J, Blanchard J, High Court, Wellington
Judgment Date	12/11/1992
Counsel/Appearances	Cavanagh PT, QC; Cooney PH; Green AMB; Dickey MJL
Quoted	The Exercise of Discretionary Powers under the Resource Management Act 1991 (1990), AP Randerson, NZ Recent Law Review 445; Highway Motors Limited v Mt Wellington Borough Council (1971), 4 NZTPA 220
Statutes	Resource Management Act 1991, 1991/69, s2(1), s3, s5, s7(b), s79, s88(4), s104, s104(1), s104(4)(a), s105(2)(b), s299, s373(1), s373(3), s377; Town and Country Planning Act, 1974, 1974/121, s59, s74
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Keywords

high court; precedent; point of law; sustainable management; resource consent; effect actual; effect potential; activity non complying; licensed premises; retail industrial; zoning; district plan integrity; precedent; district plan rules

Significant in Law - s104, s105

In considering a non-complying activity land use consent to establish an off licence the Tribunal made general findings as to the interpretation of RMA s104 and s105. Reference should be made to the full text of this decision for the detailed rationale. Significant points to note are:

- i) A consent authority can only consider an application for a non-complying activity if one of the alternative conditions in s105(2)(b) is fulfilled.*
- ii) An effect to be taken into account in considering s104 is the effect on public confidence in the consistent administration of the district plan and on the coherence of the plan.*

SYNOPSIS

The full Court of the High Court considered the appeal against the Batchelor decision and upheld the Tribunal's decision.

The Court commented that:

“the Act imposes a different regime for the preparation and promulgation of district plans from that under the 1977 Act. A much greater consultation process is envisaged.”

It also indicated that:

“there are likely to be difficulties in reconciling the regime of the new Act to an operative district scheme created under and treated as a transitional plan, for plans under the new Act are intended to be different in concept and form from the old district scheme. Yet, during the transitional period, the old must be treated as if it were the new. That is a necessary consequence of the statutory situation and must be dealt with in a pragmatic way.

In considering a non complying activity there is now no longer a broad discretionary jurisdiction in the Tribunal to grant consent to a non-conforming use in the public interest unlike the comparable situation under the 1977 Act. The Court rejected the main thrust of argument advanced for the appellant which was that the Tribunal adopted an approach similar to the approach formerly applied under the 1977 Act, an approach not justified by and contrary to the purpose and intent of the RMA. It said that it could not discern any general error of approach by the Tribunal. The Court then went on to deal with particular challenges as follows.

(a) The Tribunal misdirected itself as to the weight to be afforded the Statement of General Purpose of the Act set out in s5 when interpreting s104 and s105(2)(b).

In rejecting this point, the Court noted that the Act does not either expressly or inferentially specify the weight which is to be attached to its general purpose when applied the requirements of s104. In considering an application under s104 the Act requires regard to be had to the effects and to the rules of a plan and to its relevant policies or objectives.

The Court said:

“In our view those provisions envisage consideration of the integrity of the Plan. The weight to be given to any effect on that integrity must be a matter of judgement for the consent authority or the Tribunal. In carrying out that exercise regard must also be had to the other relevant provisions of s104, including the general purpose provision as set out in s5. Although s104(4) directs the consent authority to have regard to Part II, which includes s5, it is but one in a list of such matters and is given no special prominence.”

The Court also rejected a submission, made with reference to the way the Tribunal had applied s7(b), that the Tribunal should have had regard to whether the activity was an efficient use of the land which could be carried out without offending the sustainable objectives contained in Part II of the Act.

(b) The Tribunal has conceived and therefore misdirected itself as to the interpretation to be given to s104(1) with regard to the application of s105(2)(b) when considering whether or not the appellant’s application for consent for a non-complying activity should be granted or refused.

The Court commented as follows

“It can also be noted that s105(2)(b) is directed solely to the question of

jurisdiction to give consent. The matters detailed in s104 are those which must be considered in determining the jurisdictional question, whether or not the effect of the activity would be minor.”

The remaining points of appeal (as set out in the judgement attached) were also rejected by the Court without substantive comment.

FULL TEXT OF DECISION AP 189/92

This is an appeal brought under s299 of the Resource Management Act 1991 (the Act) against the decision of the Planning Tribunal dismissing an appeal from a decision of the respondent Council. The appellants had sought land use consent to establish an off-licence shop in premises formerly used as a petrol service station.

It was considered appropriate to assemble a Full Court to provide an early determination on the Tribunal's approach when it has to consider applications for consent to non-complying activities.

The facts are not in dispute. The appellants propose to add a coolstore to their existing building at Hewlett's Road, Mt Maunganui, to make the total floor space 375.8 square metres, of which only 50 square metres would be used for the sale and display of liquor. Under the transitional plan of the respondent (the successor to the Mount Maunganui Borough Council), the property is zoned Industrial C. A liquor store is not a permitted use in that zone, so that the appellant's proposed use is deemed to be a non-complying activity under the Act. In terms of s373(1) of the Act, the operative district scheme in force at the date of commencement of the Act is deemed to be a 'transitional plan'.

Section 373(3) of the Act provides:

“(3) where a plan is deemed to be constituted under subsection (1), or where a proposed plan or change is deemed to be constituted under subsection (2), the plan shall be deemed to include a rule to the effect that every activity not specifically referred to in the plan is a non-complying activity.”

Under s74 of the Town & Country Planning Act 1977 (“the 1977 Act”), the appellant would have needed a specified departure from the provisions of the operative district scheme. There is no equivalent to s74 in the 1991 Act.

The Act, which came into force on 1 October 1991, is stated in its long title to be: ‘an Act to restate and reform the law relating to the use of land, air and water’. It repealed a large number of enactments, including the 1977 Act, the Water and Soil Conservation Act 1967, the Clean Air Act 1972, and the Noise Control Act 1982. It imposed a whole new nomenclature to replace terms which had become well known under the regime of the 1977 Act and its predecessor. Thus ‘operative district scheme’ and ‘ordinance’ became ‘district plan’ and ‘rule’.

The Act imposes a significantly different regime for the regulation of land use by territorial local authorities. Commentators have said that the Act moves

away from the concept of direction and control of development, inherent in the 1977 Act, towards a more permissive system of management of resources, focused on control of the adverse effects of land use activities on the environment (see, for example, A P Randerson, "The Exercise of Discretionary Powers under the Resource Management Act 1991" (1990) NZ Recent Law Review 445).

Some relevant sections of the Act must now be set out.

Section 2(1):

"... 'Amenity values' means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes:

... '

Environment' include -

- (a) Ecosystems and their constituent parts, including people and communities; and*
- (b) All natural and physical resources; and*
- (c) Amenity values; and*
- (d) The social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters: ...*

"Natural and physical resources' includes land, water, air, soil, minerals and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures: ..."

Section 3:

"In this Act, unless the context otherwise requires, the term 'effect' in relation to the use, development, or protection of natural and physical resources, or in relation to the environment, includes -

- (a) Any positive or adverse effect; and*
- (b) Any temporary or permanent effect; and*
- (c) Any past, present, or future effect; and*
- (d) Any cumulative effect which arises over time or in combination with other effects - regardless of the scale, intensity, duration or frequency of the effect, and also includes -*
- (e) Any potential effect of high probability; and (f) Any potential effect of low probability which has a high potential impact."*

Section 5:

"(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

- (2) In this Act, 'sustainable management' means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety*

while -

- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and*
- (b) *Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment."*

Section 7:

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have regard to - ...

- (b) *The efficient use and development of natural and physical resources:*
- (c) *The maintenance and enhancement of amenity values: ...*
- (f) *Maintenance and enhancement of the quality of the environment: ..."*

Subsections (1) and (4) of s104:

"... (1 Subject to subsection (2), when considering an application for resource consent, the consent authority shall have regard to any actual and potential effects of allowing the activity. ...

- (4) *Without limiting subsection (1), when considering an application for resource consent, the consent authority shall have regard to -*
 - (a) *Any relevant rules of a plan or proposed plan; and*
 - (b) *Any relevant policies or objectives of a plan or proposed plan; and*
 - (c) *Any national policy statement, New Zealand coastal policy statement, and regional policy statement; and*
 - (d) *Where the application is made -*
 - (i) *In accordance with a regional plan, any relevant district plan, and*
 - (ii) *In accordance with any district plan, any relevant regional plan; and*
 - (e) *Any relevant water conservation order; and*
 - (f) *any relevant draft water conservation order included in the report of a special tribunal under section 208 or the report of the Planning Tribunal under s213; and*
 - (g) *Part II; and*
 - (h) *Any relevant regulations."*

[Sections 5 and 7 of the Act are included in Part II].

Section 105(2)

"(2) A consent authority shall not grant a resource consent -

- (a) *[not quoted], or*
- (b) *For a non-complying activity unless, having considered the matters set out in s104, it is satisfied that -*
 - (i) *Any effect on the environment ... will be minor, or*
 - (ii) *Granting the consent will not be contrary to the objectives and*

policies of the plan or proposed plan;...”

[The words omitted from para. (b)(i) are not relevant to this case]

Section 59 of the 1977 Act required every district scheme to be reviewed when it had been operative for five years. Section 377 of the Act imposes an obligation on the territorial local authority to review a transitional district plan within five years of the date on which that plan became operative under the 1977 Act. After this process of review of the transitional plan has occurred and there is a new district plan notified and approved under the provisions of the Act, it is to be reviewed every 10 years; s79.

The Act imposes a different regime for the preparation and promulgation of district plans from that under the 1977 Act for the preparation and promulgation of district schemes. A much greater consultation process is envisaged. Significant changes include:

- (a) The right of a landowner to ask a local authority to initiate a plan change (under the 1977 Act only the local authority could initiate a scheme change)
- (b) s88(4) specifies the information to be provided by an applicant for a consent to a non-complying activity, which is far greater than information normally required for a s74 application under the 1977 Act.

There are likely to be difficulties in reconciling the regime of the new Act to an operative district scheme created under and treated as a transitional plan, for plans under the new Act are intended to be different in concept and form from the old district schemes. Yet during the transitional period, the old must be treated as if it were the new. That is a necessary consequence of the statutory situation and must be dealt with in a pragmatic way.

In the present case, it is common ground that the Tribunal properly held under s105(2)(b) that the effect of the non-complying activity would be minor and therefore the discretionary jurisdiction to grant consent was founded. Unlike the comparable situation under the 1977 Act, there is now no longer a broad discretionary jurisdiction in the Tribunal to grant consent to a non-conforming use in the public interest - as was done, for example, in Highway Motors Limited v Mt Wellington Borough Council (1971), 4 NZTPA 220.

In a lengthy decision delivered on 6 July 1992 by Principal Planning Judge Sheppard, the Tribunal concluded as follows:

“Although the transitional district plan was prepared and became operative under earlier legislation, the Resource Management Act provides for it to continue until it is replaced by a district plan prepared under that Act. Therefore in our judgement the adverse effects of allowing the proposed non-complying activity on confidence in the consistent administration of the district plan, and on its coherence, ought to prevail over the advantage of making use of the resource represented by the existing building on the site, which is currently unused. In our judgement, the application should be refused.”

The right of appeal is on questions of law only. Some eight grounds of appeal, all framed as errors of law on the part of the Tribunal, were set out in the notice of appeal. At the conclusion of argument, Mr Cavanagh identified five as requiring consideration by the Court.

Before examining those, we note that the main thrust of the argument for the appellants appeared to be a contention that the Tribunal adopted an approach to its task similar to that which it formerly applied under the 1977 Act; an approach not justified by and contrary to the purpose and intendment of the Act. Counsel for the appellants described the approach to planning under the 1977 Act as to a “blue print” or “rule book” approach instead of “process planning” under the new Act.

We do not think that criticism is warranted. The Tribunal carefully considered the respective legal submissions of the parties: in reaching its conclusions, it dealt specifically with the relevant provisions of the Act. We cannot discern any general error of approach.

We turn now to the particular challenges:

(a) The Tribunal misdirected itself as to the weight to be afforded to the statement of general purpose of the Act set out in s5 when interpreting s104 and s105(2)(b).

It is difficult to see how this could constitute an error of law. The Act does not either expressly or inferentially specify the weight which is to be attached to its general purpose when applying the requirements of s104. Mr Cavanagh submitted that the introduction of the concept of the coherence and integrity of, an public confidence in, the plan was erroneous because the Act was primarily concerned with effects on the environment. Section 104(1) requires that regard be had to the “effects” (widely, but not comprehensively, defined in s3) of allowing the particular activity. Section 104(4)(a) and (b) require that regard also be had to the rules of a plan and to its relevant policies or objectives. In our view, those provisions envisage consideration of the integrity of the plan. The weight to be given to any effect on that integrity must be a matter of judgement for the consent authority or the Tribunal.

In carrying out that exercise, regard must also be had to the other relevant provisions of s104 including the general purpose provision as set out in s5. Although s104(4) directs the consent authority to have regard to Part II, which includes s5, it is but one in a list of such matters and is given no special prominence.

There is some suggestion in the Tribunal’s decision that the specific measures detailed in other provisions, which spell out the Legislature’s intent in detail, may render reference to s5 unnecessary. However, read as a whole, we think it is implicit in the Tribunal’s finding that overall regard was had to s5, in that the weighing of the s104 considerations which resulted in consent being refused was found not to offend against the general dictates of s5.

- (b) **The Tribunal misconceived and therefore misdirected itself as to the interpretation to be given to s104 (1) with regard to the application of s105(2)(b) when considering whether or not the appellants' application for consent to a non-complying activity should be granted or refused;** This ground is in essence a re-statement of that expressed in ground (a) above and is subject to the same comments. It can also be noted that s105(2)(b) is directed solely to the question of jurisdiction to give consent. The matters detailed in s104 are those which must be considered in determining the jurisdictional question whether or not the effect of the activity will be minor.
- (c) **The Tribunal misdirected itself when holding that when determining whether or not the appellants' application for a resource land use consent should be granted or refused, it was entitled to take into account the effects of granting the activity on public confidence and consistent administration of the district plan, and on the coherence of inter-related objectives, policies and rules that make up the district plan;** This also is in essence a re-statement of ground (a) and subject to the same comments.
- (d) **The Tribunal misdirected itself when holding that the Resource Management Act 1991 does not preclude councils from making provisions in district plans for people that are capable of serving the promotion of sustainable management of national and physical resources.**

We are unsure just how the submission impinges on the validity of the Tribunal's decision. The passage in the decision reads as follows:

"Our conclusion on the competing submissions about the application of S5 to this case is that the section does not in general disclose a preference for or against zoning as such; or a preference for or against councils making provision for people; or a preference for or against allowing people to make provision for themselves. Depending on the circumstances, any measures of those kinds may be capable of serving the purpose of promoting sustainable management of natural and physical resources."

It was submitted that there was a change in emphasis under the Act from planning for activities to regulating adverse effects of activities on the environment. We do not read the Tribunal's conclusion stated above as holding that activities can be regulated without regard to their effects. On the contrary, the finding expressly highlights the underlying purpose of the Act - promoting sustainable management of natural and physical resources.

- (f) **The Tribunal misdirected itself as to the interpretation of a weight to be afforded to s7(b) when considering whether or not the appellants' proposed activity was an efficient use and development of the land resource.**

Again the question of weight to be afforded this factor, being one of the matters to which regard must be had when the function and powers under the

Act are exercised, is for the consent authority or the Tribunal.

In its decision the Tribunal made express reference to s7(b), and acknowledged that the proposal would make use of a building resource currently unused. It noted that any permitted activity would also achieve that purpose. It was further submitted to us that the Tribunal should have had regard to whether the activity was an efficient use of the land **which could be carried on without offending the sustainable objectives contained in Part II of the Act.**

There is no warrant for reading those words into the provision. The efficient use and development of resources is one factor in the overall equation. The lack of significant adverse effect of a particular activity on sustainable management objectives cannot of itself justify consent to a non-complying activity, consent being in the end a matter of discretion following consideration of all the statutory dictates. Zoning is a method of resource management, and, under this transitional plan, activities are regulated by that means. It must, for present purposes at least, be accepted that the zoning provisions of the plan are appropriate, and the prohibition against a liquor outlet as a use in the area in question must be a further factor to be considered. The starting point is that such a use is one which is not permitted as of right. Here the Tribunal has weighed up the advantage of using the site for the intended purpose against the competing consideration of adverse effect on the integrity of the district plan. That exercise was not carried out in a way which contravened the terms or the purposes of the Act.

In closing submissions, Mr Cavanagh also submitted that the Tribunal's decision to refuse consent could be classified as unreasonable in all the circumstances. Assuming such an argument were open on the present appeal, we are unable to accept that submission. The argument, when analysed, appears to be based on the proposition that because the activity was found to have a minor effect on the environment, then the general purpose of the Act would be met by granting consent.

That is an over-simplification of the position. Section 105(2)(b) is one of two provisions which limit the jurisdiction to grant consent. The establishment of jurisdiction does not entitle the applicant to consent, which is something which is determined by the exercise of an overall discretion following consideration of the s104 matters.

For the above reasons we hold that none of the grounds of the appeal have been made out and it is accordingly dismissed.

The respondent is entitled to costs which are fixed at \$1,500.00.