IN THE COURT OF APPEAL OF NEW ZEALAND **CA115/98**

BETWEEN **C W BAYLEY and H BAYLEY AND OTHERS**

Appellants

AND **THE MANUKAU CITY COUNCIL**

First Respondent

AND **SANCTUARY DEVELOPMENTS LIMITED**

Second Respondent

Coram: Keith J
Blanchard J
Tipping J

Hearing: 12 August 1998

Counsel: R B Brabant and M R T Colthart for Appellants
A M B Green and M J L Dickey for First Respondent
I M Gault and M J Tingey for Second Respondent

Judgment: 22 September 1998

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Introduction

On 9 December 1997 the Manukau City Council made a determination under s94 of the Resource Management Act 1991 (the Act) that an application by the second respondent, Sanctuary Developments Limited, for three land use resource consents need not be notified in accordance with s93. It proceeded on the same day to grant the consents. The application related to a 57 unit terrace house complex which Sanctuary intends to build on a former supermarket site at

289 Shirley Road, Papatoetoe. The Council has described the proposal as "an intensive residential development."

The appellant neighbours, Mr & Mrs Bayley and Mr & Mrs Wearne, whose homes are immediately alongside the site, having failed in the High Court to obtain judicial review of the Council's determination under s94, have appealed to this Court. It is common ground that if and to the extent that the determination is held not to have been lawfully made the substantive consents were improperly granted and cannot be relied upon. It is also accepted by the respondents that the appellants have standing to bring the judicial review proceeding.

The consent application

The matter is complicated by the fact that the Council has both an operative and a proposed plan. The operative plan was prepared in accordance with the former Town and Country Planning Act 1977 and is a transitional plan in terms of the 1991 Act. Under the zoning of the site in the operative plan residential accommodation is a discretionary activity. The proposed plan zones the site as Business 1 and the appellants' properties as Main Residential. Residential activity in a Business 1 zone is a controlled activity and requires a consent as such. ("Activity" is not a defined term but in general appears to have the same meaning as "use", as can be seen from ss9 and 10.)

Because of its features in relation to the site the development also required two restricted discretionary activity consents. A discretionary activity is qualified by the adjective "restricted" when the Council has restricted itself in the matters which it may consider in the exercise of its discretion. The structure of the 57 units will almost entirely be built in accordance with the bulk and location requirements of the proposed plan. Only two aspects required restricted discretionary activity consents. The first related to access arrangements, which did not feature largely in the arguments and appear not to be contentious or to give rise to adverse effects on the appellants. The second was non-compliance with r14.11.2 of the proposed plan. This rule specifies that where a site in a business zone abuts a site zoned

residential, a yard having a minimum width of five metres is required, all of it being planted and maintained in grass, trees and shrubs. The features of the proposed structures which are non-complying, because they intrude into the yard area adjacent to the boundary with the residential zone, are spiral staircases, small first floor decks and ground floor closets. The infringement by the closets would be only 0.8 metres and was described by a Council planner as minimal.

By r14.13.3 the Council has restricted the exercise of its discretion in relation to an activity not complying with r14.11.2 to four matters. The Council is to have regard to them "and any other relevant matters set out in Section 104 of the Act" and reserves the power to impose conditions in respect of them. They are:

> (a) Sunlight and daylight
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> Whether the proposal will protect the access of sunlight and daylight to adjoining residential, public open space and future development zones.
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> (b) Visual Amenity Values
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> Whether the intensity of site development will be compatible with the visual amenity values of the adjoining residential, public open space and future development zones.
>
> (c) Site Layout
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> Whether the site layout ensures a relationship of buildings and other structures on the site, carparking, access, manoeuvring, and landscape elements which is as satisfactory as the relationship envisaged by the yard rule. Whether the site layout is compatible with the site development of adjoining residential public open space and future development zones.
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> (d) Zone Proposals
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> Whether the use of future development land is residential or public open space, or some other use, in particular yards and landscape design may not be required where the site abuts a future development zoned site that is proposed to be zoned for activities other than residential or public open space. [sic]

The Resource Management Act

Section 88(3) of the Act authorises the making of an application for a resource consent for a controlled activity or a discretionary activity or a non-complying activity under a plan or proposed plan. The application must include 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 (subs(4)(b)). But the section also says:

> (5) The assessment required under subsection (4) (b) in an application for a resource consent relating to a controlled activity, or a discretionary activity over which the local authority has restricted the exercise of its discretion, shall only address those matters specified in a plan or proposed plan over which the local authority has retained control, or to which the local authority has restricted the right to exercise its discretion, as the case may be.

Section 93 requires notification of every application by service on persons and classes of persons specified in the section. They include persons who are in the consent authority's opinion likely to be directly affected, such as adjacent owners and occupiers, "where appropriate." The section also requires an application to be publicly notified (see definition of "public notice" in s2). And s96 gives "[a]ny person" the right to make a written submission to a consent authority about an application which has been notified under s93. There is no standing requirement. Any member of the public or any interest group is entitled to make a submission and to be heard when the application comes to a hearing. No submission rights or right to be heard exist, however, unless the application requires notification. A would-be objector consequently is given no right to appeal a consent authority's decision on a non-notified application (s120(1)(b)).

Section 94 sets out when an application does not require notification:

> 94. **Applications not requiring notification-**
> (1) An application for-
> (a) A subdivision consent need not be notified in accordance with section 93, if the subdivision is a controlled activity:

(b) A resource consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:
(c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if-
(i) The activity to which the application relates is a controlled activity; and
(ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.
(1A) An application for a resource consent need not be notified in accordance with section 93 if-
(a) The activity to which the application relates is a discretionary activity over which the consent authority has restricted the exercise of its discretion; and
(b) The plan expressly permits consideration of the application without the need to obtain the written approval of affected persons.

(2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and-
(a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

...

(4) In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2)(a) or subsection (3)(b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection (2)(b) or subsection (3)(c).

(5) Notwithstanding subsections (1) to (3), if a consent authority considers special circumstances exist in relation to any such application, it may require the application to be notified in accordance with section 93, even if a relevant plan expressly provides that it need not be so notified.

In the present case the development was a controlled activity and required consent accordingly, but was considered under subs(1)(b) on the basis that the proposed plan had a provision of the kind referred to. On the other hand, subs(1A) could not apply in relation to the discretionary activities because, although the Council has placed restrictions on itself, the proposed plan does not permit consideration of such an application without the need to obtain the written approval of affected persons.

On the present facts it could not be said, and the Council has not attempted to argue, that in terms of s94(2)(b) it was unreasonable in the circumstances to require the obtaining of written approvals from the appellants and the other neighbours. The number of persons who might be affected is quite small. None appears to have been unavailable.

Section 104 states the matters which must be considered upon the substantive application for a resource consent. Subsection (1) is expressed to be subject to Part II, which sets out the purpose of the Act and certain matters of particular importance which a consent authority must recognise or have particular regard to or take into account. Under s104 the authority must, *inter alia*, have regard to any actual and potential effects on the environment of allowing the activity. "Effect" is an expression of wide import (s3). Section 104(1) also directs attention, *inter alia,* to any relevant objectives, policies, rules or other provisions of a plan or proposed plan. But subs(6) provides:

> (6) When considering an application for a resource consent where-
> (a) In accordance with section 94, the written approval of any person to the application had been obtained; or
> (b) In accordance with section 96, a submission to the consent authority has expressly given written approval to the application; or
> (c) In any other manner, to the satisfaction of the consent authority, a person has expressly given written approval to the application-

> the consent authority shall not have regard to any actual or potential effect on that person if that person has agreed to the proposal which is the subject of the application; and the fact that any such effect on that person may occur shall not be relevant grounds upon which the consent authority may refuse to grant its consent to the application.
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> Section 105 relevantly states:
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> s105. **Decisions on applications-**
> (1) Subject to subsections (2) and (3), after considering an application for-
> (a) A resource consent for a controlled activity, a consent authority shall grant the consent, but may impose conditions under section 108 in respect of those matters over which it has reserved control:
> (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:
> Provided that, where the consent authority has restricted the exercise of its discretion, [consent may only be refused or] conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion:
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> ...
>
> (3A) For the avoidance of doubt, when granting or refusing a resource consent or imposing conditions for a discretionary activity where the consent authority has restricted the exercise of its discretion, the matters in section 104 are relevant only in relation to those matters over which the consent authority has restricted the exercise of its discretion.

The words appearing in square brackets in the proviso to subs(1)(b) were inserted by an amendment which came into force in December last year, a few days after the Council granted the consent to Sanctuary's application and so did not apply to its consideration of that application. We were told, however, that the Council had always been of the view that there was implicitly a power to refuse consent where conditions would not suffice.

The High Court judgment

Salmon J's judgment recorded certain steps taken by the Council's planning staff after receipt of Sanctuary's application and referred, *inter alia*, to a report prepared on the question of notification. The Judge observed that as a result of a suggestion from the planner, Ms Fraser, Sanctuary had agreed to change the original design of the stairs at the rear of the units adjacent to the boundaries of the appellants' properties and to use a spiral stair design which would reduce the yard infringement.

The Judge found that Sanctuary's application had been confined to the provisions of the proposed plan. It did not contain any assessment in terms of the operative (transitional) plan. A Council planner had advised Sanctuary that there would be no need for the application to be considered under the operative plan because no submissions had been received relating to the site or to residential activity being a controlled activity "in the Business 2 [sic] zone." The Council believed that because the processes towards the adoption of the rules in the proposed plan had reached the stage where those relevant to the site and the applications could no longer be the subject of challenge, s19 applied and Sanctuary's intended activity could therefore be undertaken in accordance with those rules as if they were already operative and the rules of the prior plan no longer in force. But, as Salmon J correctly concluded and the respondents now accept, s19 applies only where a new rule or change to a rule will allow the activity. In this case the new rules do not. Resource consents are still needed under the proposed plan. Therefore the Council's advice was wrong. A concurrent application under the operative plan should have been made. The Judge rightly observed that upon such an application the weight to be given to the outgoing plan, especially a transitional plan prepared under the former legislation, will depend upon the stage which the proposed plan has reached.

The Judge rejected a submission that the Council had acted unreasonably because it took no action on letters received from the neighbours, including the appellants, and did not consult with them. He said that neither the Council nor the applicant, Sanctuary, had any legal obligation to consult. He accepted on the basis of the evidence that the Council reports had taken into account the matters raised

by the nearby residents and found that its decision, in so far as it related to the proposed plan, was not an unreasonable one. This appears to be a reference to the decision under s94.

The Judge then considered whether the Council had taken into account non-compliance with a rule relating to permitted or controlled activities within 50 metres of a residential zone and found that it had done so. He was of the view that the Council, in relation to the proposed plan, had taken into account under s94(2) relevant considerations and had not taken into account irrelevant considerations:

> The matters which the plan required to be addressed were addressed. The conclusion that the effects on the environment (bearing in mind that the consents required were restricted discretionary activity consents) was [sic] minor, was one which a reasonable Council could reach and similarly, the conclusion that no persons were adversely affected, was also one which could be reasonably reached.

He agreed with Mr Brabant's submission for the neighbours that the Council was obliged to have regard to Part II, but said that in the case of a restricted discretionary activity consent the only relevant issues would be those relating to the matters in respect of which the authority had restricted the exercise of its discretion (s105(1)(b)). In any event, Part II had not been raised in the pleadings. The Judge could not see what possible relevance it could have in view of the Council's conclusions as to the lack of effect of the infringements. (This Court was not referred to Part II during the hearing of the appeal.)

Salmon J also rejected a claim that "the intensive use of the yards and the extent of intrusion into them" made the application out of the ordinary and required notification in terms of s94(5). He said that the possibility of dispensation from the yard requirement was specifically recognised by the proposed plan and so could not be described as out of the ordinary. Nor could the residents' concerns be said to give rise to special circumstances. If this were so, every application would need to be advertised if there was any concern expressed by people claiming to be affected.

It was in fact part of the exercise of the Council's discretion to decide whether those concerns were justified.

Finally, the Judge considered the effect of the failure to make a determination in terms of the operative (transitional) plan because of the misunderstanding about the effect of s19. In the Judge's view valid decisions had been given on applications made under the proposed plan but there still needed to be a decision under the transitional plan. However, that omission did not invalidate the consents that had been given and there were no grounds for disturbing the Council's decision that the application under the proposed plan should be dealt with on a non-notified basis.

The Judge recognised that, in that state of affairs, the proposed development could not proceed. He made an order prohibiting Sanctuary from acting upon the consent it had obtained unless and until it had also obtained the necessary consent under the transitional plan. His order did not, on its face, contemplate the possibility that the developer might simply await the coming into force of the proposed plan and the expiry of the operative plan. If that possibility had been drawn to his attention he would presumably have qualified his order so that it ceased to apply upon expiry of the operative plan.

When notification may be dispensed with

There is a policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory. Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power and in the interpretation of the section, however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.

Before s94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. In the present case the starting point is that business activities are permitted. Then, at the second stage of its consideration, the authority must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be *de minimis*, of which the minimal intrusion of the closets into the yard space may be an example, and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected. It should not be overlooked also that "effect" in s3 includes a temporary effect, which requires the authority to consider adverse effects which may be created by the carrying out of construction work.

On behalf of Sanctuary Mr Gault submitted, and we agree with him, that it is important in considering effects to identify the scope of the activity for which consent is sought. He was answering a submission from Mr Brabant pointing out that only a day before giving his decision in this case Salmon J had delivered judgment in ***Aley v North Shore City Council*** [1998] NZRMA 361 wherein the Judge confirmed the continuing application under the Act of the approach taken by Cooke J under the former legislation in ***Locke v Avon Motor Lodge Ltd*** (1973) 4 NZTPA 17. Cooke J had held that where a particular feature of a development proposal made it non-complying (in that case, a non-complying side yard), so that a conditional use application was necessary, then the whole use of the property was non-complying. As Mr Brabant observed, by designing a structure intruding into space which the plan requires to be a yard, an applicant may have been able to utilise other portions of the property in a manner which in itself complies with the plan but actually has a greater impact on the environment of the neighbourhood because, for example, it is a more intense use than could have been achieved on the site without the yard intrusion . In other words, in this case by taking up part of a

yard the applicant may have gained a consequential advantage detrimental to the neighbours in their enjoyment of their properties even by comparison with such commercial activity as is permissible as of right. Mr Brabant argued that once there is any non-compliance which requires a discretionary activity application, it is necessary to look at the whole of what the applicant is proposing to do - in his words, to take a holistic approach. He drew attention to Cooke J's statement that a "hybrid concept" would add an unnecessary complication to legislation already sufficiently complicated and would tend to limit rights of objection:

> On a conditional use application the fact there is only minor non compliance with predominant use requirements is a relevant consideration, but it is neither exclusive nor necessarily decisive. (p22)

In ***Aley*** Salmon J approved the Environment Court's adoption of ***Locke*** in ***Rudolph Steiner School v Auckland City Council*** [1997] 3 ELRNZ 85 where it said that a discretionary activity in respect of which the Council has not restricted its discretion is wholly discretionary, and that in exercising the discretion to grant or refuse consent and to impose conditions a consent authority is to have regard to all the matters listed in s104(1) relevant to the circumstances. Salmon J commented:

> Just because a plan allows the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made an overall exercise of discretion under ss104 and 105 and application of the principles in ***Locke*** *and* ***Rudolph Steiner*** could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.
>
> On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists. The "activity for which consent is sought" is in the present instance the building that is proposed not just those aspects of the development which have had the effect of requiring a discretionary activity consent. (p377)

We would add to the penultimate sentence "or as it would exist if the land were used in a manner permitted as of right by the plan". Salmon J's observations were made concerning a discretionary activity consent application in respect of which the Council had not restricted its discretion. Mr Gault appeared to accept the force of them, but he argued that where the Council has restricted its discretion, then the activity which it is considering under s94(2) and will later consider under s104 does not consist of the whole of the proposed development, but only those aspects of it which the Council has specified as remaining for its consideration. Counsel drew attention to the fact that Salmon J had qualified his endorsement of the Environment Court's approach by distinguishing restricted discretionary activities.

Mr Gault's argument is in our view correct as a matter of construction. For the purpose of the restricted activity consent applications, the activities in the present case were the activity or use involving intrusion into the yard space and the activity or use relating to access to the site. So far as the yard space was concerned, the Council had ruled out for itself any consideration of any activity falling outside r14.13.3. The words "activity for which consent is sought" in s94(2) do not extend to an activity which is able to be undertaken without that consent and, more importantly, is unable to be considered by the Council. Section 88(5) states that the applicant's assessment is only to address the matters over which the authority has retained control. Under the proviso to s105(1)(b) the authority may refuse consent or impose conditions only on the basis of those matters. It would make little sense to require a consent authority to notify an application because it may involve effects which the authority must then disregard at the hearing of the application. That would provide false hope for objectors and be wasteful of time and money.

Mr Gault's argument does not in this case lead to the result he seeks. Here the Council, as permitted by the statute, has restricted itself to consideration of particular matters. When that has been done the approach taken in *Locke* may be inappropriate. In this case, however, when the content of r14.13.3 is examined it

can be seen that the "restriction" is relatively unconfining, especially in relation to site layout. The Council is obliged by its rules to consider and assess:

> Whether the site layout ensures a relationship of buildings and other structures on the site, carparking, access, manoeuvring, and landscape elements which is as satisfactory as the relationship envisaged by the yard rule. Whether the site layout is compatible with the site development of adjoining residential, public open space and future development zones.

That preserves a broad range of consequential effects which the Council needed to consider in the present case. It is, for example, possible that because the decks and the spiral staircases are positioned in the yard space, the overall layout of the development has been able to be designed in a way which, perhaps because it involves a greater density of use, may have an adverse effect on persons like the appellants which would not occur if those features were wholly outside the yard space. Miss Dickie, for the Council, submitted that it would be asking too much of planning staff of local authorities if they were to have to make assessments of possible consequential effects of this kind. It may be that this is a difficult exercise, but the short answer to her submission is that the Council in r14.13.3.2 has required itself to consider such matters. They are therefore within the scope of the restricted discretionary activity. The Council has not elected in its proposed plan to permit consideration of such an application without the need for written approvals; it has chosen not to allow itself the use of s94(1A).

The Council's approach

An examination of the affidavit evidence of Ms Fraser and Mr Chieng, the Team Leader, Resource Consents, who made the decisions not to notify and to grant the resource consents, does not reveal that there was an appreciation on their part of the need to consider, under s94(2), consequential effects on the site layout arising from the placement of decks and stairs in the yard - in terms of r14.13.3.2(c), whether the layout ensures a relationship of buildings and other

structures etc. which is as satisfactory as the relationship envisaged by the yard rule.

Mr Chieng deposed that he was "guided by in-house experts in their assessment of effects." Ms Fraser, his prime guide, seems to have approached her task in a conscientious manner but, although she was aware of the concerns expressed by the appellants and the other neighbours and the interest on their behalf of the local Member of Parliament, she made no direct inquiry of them concerning their perception of the possible effects of the development. The Act did not oblige her to engage in a consultation process but she may have found it helpful to gather information and opinion from them even though the residents had stated their concerns in correspondence.

Ms Fraser paid particular attention to the effects of shading on the neighbouring properties "even though the proposal complied with the height in relation to boundary requirements." It was she who suggested a change to the staircase design. She says she considered that the proposed buildings would be of a scale and form that would not detract from the visual amenity values of the area. She determined that extra traffic created would not be such as to affect the safe and efficient operation of the roading system. The on-site parking provisions exceeded the requirements of the plan. There was adequate circulation and manoeuvring area. Taking account of these matters, she determined that the proposal met the assessment criteria for a controlled activity.

In considering the yard infringement Ms Fraser did have regard to r14.13. Her affidavit refers to the need to make an assessment of the matters in r14.13.3.2. She mentions site layout:

> 5.7 The site layout, in particular the configuration of the units in three separate blocks along the residential boundary ensures that there is not one long mass or structure along the full length of the residential boundary. The third floor windows of these units are relatively small bedroom windows located reasonably high above the floor level. Therefore there will be minimal overlooking of adjacent residential properties.

The main structure of the building is set back 5m from the boundary and only the ground floor closet, the first floor deck and the spiral stairs project into the yard space to reduce it to 2.5m in the worst case.

5.8 The 2.5m encroachment of the steps into the yard is due to limitations placed on the siting of the steps relative to the deck. The effect of this infringement is negligible. The stairs will be of steel construction. They will not be of a scale or bulk to detract from the amenity of the adjacent residential area. On the contrary, they will provide an added design feature to the rear of the building which will enhance the style and appearance of the structure. The stairs will not have a significant effect on the privacy of properties backing onto the development as by nature their use will only be for short periods of time.

5.9 The effect of the 1.5m reduction of the yard space, by the first floor deck will be no more than minor. The deck is relatively small and therefore does not provide much room for outdoor living. Because the area of the deck is small, it is likely that people would not use this area for entertaining and therefore would not spend a substantial amount of time out there. Even with the deck encroaching on the yard space there will still be a 3.5m set back from the boundary, which is quite substantial when compared with the yard provision provided in the adjacent Main Residential Zone.

The infringement of the ground floor closet by 0.8m is insignificant and will not have any effects on the privacy or the amenity of the neighbouring residential area.

Putting aside Ms Fraser's statement that the effect of the 1.5m reduction of the yard space on account of the deck is "no more than minor", which seems to be a recognition of *some* adverse effect which would trigger the need for written consents, as it is obviously not *de minimis*, there is nowhere any consideration of the possibility of some consequential effects arising from the way in which the site layout may have been made possible by the use of the yard in a non-complying way. The affidavits and reports exhibited to them do not reveal that the Council directed its mind to this relevant consideration.

For this reason we reach the conclusion that the decision made under s94 not to notify the restricted discretionary activity application in relation to the yard space was invalid.

The controlled activity application

That being the case, the Council should not have permitted the controlled activity consent application to proceed on a non-notified basis. Technically, it was a separate application, although for convenience contained in the same application document seeking the three consents. Section 94(1)(b) and the provisions of the Council's proposed plan permit non-notification of such an application without written approval of affected persons but do not require the Council to dispense with notification. (It "need not be notified".) Such a course may be inappropriate where another form of consent is also being sought or is necessary. The effects to be considered in relation to each application may be quite distinct. But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, where there is an overlap, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces.

The Council does not appear in this case to have appreciated the need to approach the question of the notification of the applications in this way and thus has erred fundamentally in the exercise of its discretion under s94(1)(b). The criteria for assessment of the controlled activity included site layout and vehicle and pedestrian access, which were of course matters which had to be considered in relation to the restricted discretionary activity consent applications. All applications should have been notified.

We have not found it necessary, in reaching this conclusion, to consider s94(5) but make the observation that the Council might very well have considered,

and perhaps ought to have considered, that the sheer size of this development alongside existing residences constituted a special circumstance, something exceptional or out of the ordinary, even though the site could be used for a business activity.

Unreasonableness

We have also not found it necessary to consider Mr Brabant's argument that the Council's decision was unreasonable, particularly in view of certain discrepancies between the non-notification report and the contemporaneous substantive report on the basis of which consents were given. In the former Ms Fraser stated that no persons would be adversely affected. Mr Chieng endorsed his approval. We have already noted the inconsistency with what Ms Fraser says in her affidavit. Furthermore, in the substantive report she referred to the stairs as not having a "significant adverse effect", and there are other references appearing to recognise some more than minimal adverse effects. It suffices to say that these matters have given cause for concern. In this connection it is worth adding the comment that whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional sound proofing.

The separate application under the operative plan

The Court was informed that since the hearing in the High Court the second respondent has applied for and been granted by the Council the requisite consent under the operative plan. That application also proceeded on a non-notified basis. There has been no judicial review application in respect of that decision. We therefore make no comment on its validity. We record what has transpired because of its relevance to Mr Brabant's further argument that Salmon J erred in deciding that the Council could validly process an application and grant a

consent under the proposed plan without dealing with the matter at the same time under the operative plan.

We are of the same view as the Judge. We can find nothing in the language of the Act to preclude this course. Applications can be made under s88(3) for a consent "under a plan or proposed plan." Naturally, where two such district plans co-exist a consent under one will be of no immediate practical use if there is still a need for a consent under the other. But there is no good reason for adding to the complexity of the legislation a further complication. When asked what mischief it would prevent counsel was unable to refer to anything other than the desirability of considering all applications at the same time. That course may be preferable as a matter of practice, but in our view the Act does not impose any such requirement. Indeed, where different resource consents are needed from different consent authorities they will be determined separately unless the authorities decide to hold a joint hearing.

We are unable to think of any circumstance in which an applicant can realistically hope to use separate applications under operative and proposed plans as a means of circumventing the Act. If a consent were to be granted solely under an operative plan, it could not be used when there was also a proposed plan. A consent under a proposed plan alone will not be of practical use until that plan becomes operative and replaces the earlier plan.

Mr Brabant argued that this was contrary to Cooke J's proscription of hybrid uses, but the learned Judge's remark was made in a very different context, where an approach was being advocated which would have restricted the Council to looking at one portion of a property in isolation from another. A consent under one or other of an operative or a proposed plan will take into account all matters relevant to the particular plan and the activity in question.

We qualify these remarks to ensure that they are not taken as an expression of approval for the artificial separation of applications for land use consents under the same plan in respect of the same proposal. It would not have been appropriate for the Council to give separate consideration under the proposed

plan to the three applications made by Sanctuary when it was wishing to proceed with a development for which all of the consents were required. In saying this it is not intended to cast any doubt upon this Court's decision in ***Sutton v Moule*** (1992) 2 NZRMA 41 which involved successive applications some years apart.

Alleged delay and prejudice to developer

It was finally and optimistically submitted on behalf of the second respondent that the Court should exercise its residual discretion and refuse judicial review because of alleged delay on the part of the appellants in bringing their proceeding and the prejudice to Sanctuary which will result from overturning the Council's decisions. There was, however, in reality very little delay on the part of the appellants and it has not been a cause of prejudice. Two of the appellants learnt that the resource consent had been granted by the Council as late as 10 January 1998. By 20 February Sanctuary had been advised by counsel acting for the appellants and the other neighbours that judicial review proceedings would be issued and a copy of the draft statement of claim had been supplied. There followed some negotiations between the parties which broke down by 11 March. The proceeding was filed in the High Court on 19 March.

This Court's decision may very well cause difficulties for Sanctuary because it has made its agreement for the purchase of the site unconditional, has accepted the surrender of a lease of the property and has entered into unconditional agreements to sell the 57 units. But the first two of those actions were taken as soon as the Council issued its consents and before any of the appellants knew that had occurred. Sanctuary took it upon itself to declare the 57 agreements for the units unconditional on 20 March, after the proceeding was filed in the High Court. Service may not by then have been effected on Sanctuary but it was well aware that litigation was shortly to be visited upon it.

Sanctuary seems to have known that it faced opposition from neighbours even before it asked the Council to process its application on a non-notified basis. A developer who takes that course in the face of opposition elects to run the risk

that the consent authority's determination under s94 may be challenged and may be found to be unlawful, with all the consequences that will entail.

In the present circumstances there is no good reason for the Court to exercise its discretion in favour of the second respondent and to deny the appellants the review they seek.

Result

We allow the appeal and set aside the decisions of the Council under the proposed plan.

The appellants are awarded costs of $4000 against each of the respondents (ie a total of $8000). They will also have their reasonable disbursements in connection with the appeal, including their counsel's travelling and accommodation costs, as fixed by the Registrar of this Court. The disbursements are to be borne equally by each respondent. Costs in the High Court are to be fixed by that Court in light of this judgment.

Solicitors
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