591.

In support of Michael Nidds Low Priority Raised Copy Submission Brookers

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 407/04

BETWEEN	URBAN AUCKLAND - THE SOCIETY FOR THE PROTECTION OF AUCKALND CITY AND WATERFRONT (INC) Plaintiff
AND	AUCKLAND CITY COUNCIL First Defendant
AND	NORFOLK TRUSTEE COMPANY LIMITED Second Defendant

Hearing: 15 September 2004

Appearances: M J E Williams for Plaintiff
W Akel & E C Mosely for First Defendant
D A Kirkpatrick for Second Defendant

Judgment: 2 December 2004

JUDGMENT OF KEANE J

Solicitors

Madison Hardy, Orakei, Auckland for Plaintiff
Simpson Grierson, Auckland for First Defendant
Stainton & Chellow, Auckland for Second Defendant

[1] On 27 August 2003 the Auckland City Council granted to Norfolk Trustee Company Limited consent to construct a 36 level building, at a site bounded by Queen and Lorne Streets, just opposite the Aotea Centre, Auckland, comprising a seven level podium, incorporating the St James Theatre, and a 29 level tower block for apartments.

[2] Norfolk's proposal required consent as a discretionary activity, but the Council saw no need for the application Norfolk made to be notified and when it gave consent dispensed with that need. The Council concluded that any adverse effects on the environment would be no more than minor, that no person would be adversely affected, and that the approval of the New Zealand Historic Places Trust had been obtained in respect of the St James Theatre. No special circumstances existed warranting notification.

[3] Urban Auckland, a coalition of architects, designers, and others interested, incorporated to promote good architecture in central Auckland, challenges that conclusion as wrong in law and unreasonable. It contends that the Council ought to have required, as the Resource Management Act 1991 itself requires normally, that the application be notified and that there be a public hearing.

[4] The 1991 Act, Urban Auckland contends, requires a public process, particularly where developments are as large as this is to be. The decision to dispense with notification is intended to be exceptional. Yet the Council in this case, it contends, began from the opposite point of view, and treated as peripheral the design of the major part of the development proposed.

[5] What is proposed, Urban Auckland contends, is a 36 level development in one of the most central, public, historic, prominent and visible locations in urban New Zealand. Yet, it contends, no more than three paragraphs in a specialist Council report were devoted to the design of the tower block, leaving the Council devoid of any ability to assess the visual effect on the environment, or on any person affected. That effect, it contends, has to be adverse; and the Council's decision is, it contends, contrary to the terms of its own scheme.

[6] Urban Auckland does commend the Council for introducing, as it has since, a voluntary review process: an urban design panel, which comments on proposals of equivalent scale and significance before applications are considered, perhaps even made. It says that, had this present proposal been notified, that is the contribution that it would have hoped to make.

[7] Neither the Council nor Norfolk question Urban Auckland's standing to bring this case. But, they say, Urban Auckland cannot claim to be affected adversely by the development design, either itself or as a surrogate for the wider public, some of whom may agree with its critique of the design, some of whom may disagree; yet others of whom may be completely indifferent. Aesthetics are subjective, the Council and Norfolk say; taste individual. The Council cannot be prescriptive.

[8] At the hearing there was debate as to what Urban Auckland's pleaded position was. Was it that the Council had decided, wrongly or unreasonably, under s 94(2) of the 1991 Act, that any adverse visual effect of the tower block design on the environment was likely to be no more than minor? Was it that the Council had decided, wrongly or unreasonably, that no person or entity, Urban Auckland in particular, would be adversely affected? Was it both?

[9] Urban Auckland's complaint, I consider, must comprehend both. It claims that its consent ought to have been sought, as an entity predictably adversely affected. But its fundamental complaint is that the proposal ought to have been notified. The visual effect on the environment of the tower block design, it contends, had to be adverse in a greater than minor way. I do not think that this application can be decided on any lesser basis.

[10] The confined, but important, question in this case is then whether the design of the proposed development of itself can be an issue, even a decisive issue, under s 94(2). What standing does it have under the 1991 Act and the Council's own planning regime, and with what focus? How much information did the Council need to exercise its discretion without error and reasonably? Did it have that information? Is its decision free of error? Is it reasonable or unreasonable?

[11] On the view I take, I need not consider a related possibility: that s 94(5) imposed on the Council an actual duty to notify. That does not arise.

Context

[12] The site, which the development is to occupy, is presently a theatre complex, the central element of which is the St James Theatre, completed in 1928, a category A historic place, with that status under the district plan. It is to be preserved and restored. The three other theatres, the Odeon, the West End and the Regent Theatres, none of which enjoy any special status, are to be demolished.

[13] This first became a possibility in March 2000. The then owners, Force Corporation, wished to demolish the three theatres and construct a 30 level tower. That application was notified, because of the extent of floor area non-compliance. It attracted six submissions, two opposing. Complicating the proposal was the discovery of the St James Theatre tower, concealed behind the façade. Before what that entailed was resolved, Force sold to Norfolk, and its application became superseded by Norfolk's proposal.

[14] Norfolk's application was lodged by Fox Ward Holdings, as agent, on 20 December 2002. It sought consent to demolish the existing buildings with the exception of the St James Theatre, to be retained and the tower restored; and to construct a 29 level tower block containing 359 apartments, resting on a seven level L-shaped podium. There was to be parking for 245 vehicles, retailing within the basement and ground floors, and a restaurant on the second level.

[15] A question, foreshadowed at a meeting in April 2002, was whether the tower block needed to be set back eight metres from the Queen Street frontage, as the Council's proposed plan called for, or five metres. On 24 January 2003 that was settled at five metres by consent order of the Environment Court. Consent was sought under the operative plan as to two controlled activities and six discretionary activities; under the proposed plan as to one restricted controlled activity, and five restricted discretionary activities.

[16] Of interest under the operative plan is one controlled activity, for which consent was needed, use of the light outlook bonus; and one discretionary activity, works affecting a scheduled building. Under the proposed plan two restricted discretionary activities are germane: works affecting a category A building, and the erection of a new building subject to design assessment criteria in the Council's proposed plan for the Queen Street Precinct. It is that last restricted discretionary activity on which this application turns eventually. Council officers also introduced two others for heritage reasons, one to obtain greater separation of the St James tower.

[17] Overall, as Norfolk accepted, and as the Council itself considered, the activity for which Norfolk was applying for consent was discretionary and required consent, more especially because of those aspects so classed under the operative plan. Norfolk's application needed then to be notified, before being considered, unless the Council dispensed with that need under s 94(2).

[18] To meet both purposes Norfolk supported its application with a planner's assessment of environmental effects, a locality plan, a series of 15 plans and elevations, and five specialist reports: a traffic impact assessment, a construction traffic management plan, a heritage assessment, an engineer's report and a wind assessment.

[19] A senior planner within the Council, Ms McNeal, became responsible for the application, and saw to it that three aspects were scrutinised more intensively. One, not immediately relevant, was traffic engineering. The two others, which are relevant, were the heritage and urban design implications.

[20] Mr Grant, the Council's senior architect and planner concerned with heritage issues considered those issues, one of which was the relationship between the St James tower and the new building. Mr Kirk, the Council's senior architect and planner concerned with urban design, assessed the application from five perspectives: the Queen Street Valley assessment controls, the Aotea Square special height control, the relationship of urban design issues and heritage issues, and wind and signage issues.

[21] Mr Grant's initial assessment resulted in early design changes to the podium on the Queen Street frontage to give greater prominence to the St James tower. In his report, dated 21 July 2003, he concluded that from a heritage perspective the potential adverse effects of the development would be no more than minor. The Historic Places Trust had consented and nobody else could be considered adversely affected. The St James Theatre, its exterior and interior, Mr Grant said, was to be largely retained. The restored tower, and the Queen Street canopy, he said, would preserve and enhance a significant landmark.

[22] The urban design implications, equally, Mr Kirk considered, were not significant. In his report, dated 5 August 2003, he concluded that the proposal complied with the Aotea Square height control, but only just, and that needed to be monitored. His assessment of verandas, wind environment control and footpath crossings is not of immediate interest. His analysis, as it related to the design assessment criteria for the Queen Street Valley Precinct is, by contrast, critical. I shall return to it later.

[23] Mr Kirk was concerned that the proposal as to the design and appearance of the seven podium levels lacked detail, and he proposed that this be met by a condition: 'That the exterior materials, colours and finishes of the proposal be to the satisfaction of the Manager, City Planning.' This relates to the entire building, but his focus appears from this rider:

> It is important that the design and the materials involved in the carparking floors are given special attention with respect to the design and detailing to Queen and Lorne Street. It is also important that lighting to the carpark decks shall not (be) visible to people in the adjacent streets.

[24] The report to the Council's Regulatory and Fixtures Committee, dated 19 August 2003, prepared by Ms McNeal, and countersigned by Mr Vinall, the manager for central area planning, made two reasoned recommendations. One was that notice be dispensed with for the reasons set out at the beginning of this decision. The other was that the application be granted subject to a series of conditions, amongst them those proposed in the heritage and urban design reports.

[25] On 27 August 2003, in sequential decisions, the Council Committee decided

that the application might be considered without any need for notice, and should be granted.

[26] The premise underlying each of those decisions, resting not just on Ms McNeal's report, but also those of Mr Grant and Mr Kirk, and other materials, was the same - that any adverse effects on the environment would be minor, that it was unlikely that anybody would be affected adversely, except in a minimal way, and that the restoration of the St James Theatre and the exposure of its tower, after so many years concealment, were important gains.

[27] The minutes of the Committee's decision, prepared later by Ms McNeal, or another Council officer, expresses fully also why it elected also to dispense with any need to notify:

> (a) In terms of s 104(1)(a) of the Resource Management Act 1991 and subject to the conditions that follow, the proposed activity will have no more than minor actual or potential adverse effects on the environment.
>
> (b) The height, bulk, location and intensity of development associated with the proposed building and its use for residential accommodation and retailing is consistent with the type and scale of development anticipated by the District Plan for the site and the Queen Street Valley Precinct.
>
> (c) Any adverse effect of the proposal on the heritage values of the scheduled St James Theatre will be no more than minor. The proposal will enable the retention, protection and restoration of the buildings valued heritage features, including its historic tower and the Lorne Street façade.
>
> (d) The written approval of the New Zealand Historic Places Trust has been obtained.
>
> (e) Positive effects associated with the development include the retention of a scheduled building of social, cultural and heritage significance and the provision of residential accommodation and retail activities in close proximity to civic, educational, recreational and entertainment facilities.
>
> (f) The proposal will have negligible effects on vehicular and pedestrian safety due to the low intensity of development in terms of parking spaces with numbers being well within the permitted maximum, use of Lorne Street for access (including construction traffic) and proximity to the arterial road network and motorway system.
>
> (g) In terms of s 104(1)(d), the proposal satisfies the relevant objectives,

policies and assessment criteria of the District Plans, particularly those in relation to heritage issues, traffic and transportation, amenity (including design and appearance, service and rubbish facilities) and demolition.

(h) The proposal is not contrary to Part II of the Resource Management Act 1991.

Design critique

[28] Urban Auckland, relying on the opinions of two architects, Christopher Kelly and David Mitchell, contends that the Committee's conclusions as to the effect of the design and appearance of the tower block on the amenity values applying in the immediate locality, and more widely, were superficial and insupportable.

[29] The architects, Mr Kelly perhaps more explicitly than Mr Mitchell, consider that the theatre ought not so single mindedly to have been the point of reference for the complete design. The podium, within which the theatre lies, is one of two elements to the design, and in scale by far the lesser of the two. The tower block, they say, will be much more prominent. The design, they consider, should have given greater emphasis, even first place, to the aesthetic coherence of the whole.

[30] Mr Mitchell considers even the podium design, to which the Council devoted its attention principally, to be a compromise, which ill serves both that aspect of the design and the theatre. Each, he considered, deserved to be identified for what it is, or is to be, and the difference between the two accentuated.

[31] Mr Kelly and Mr Mitchell agree that there is no natural relation in the design between the podium and the tower block. Mr Mitchell considers that the disproportion between the two is so marked that the features intended to define the podium façade, the theatre façade and tower, are dwarfed and absorbed. Mr Kelly considers that the transition from podium to tower block is abrupt; that they appear two separate buildings with no natural relation. Nor does the tower façade, he thinks, acknowledge the human scale and character of the precinct.

[32] Each considers that the design of the tower block accentuates its mass and that the device adopted to reduce that, a three-dimensional vertical form, is too

shallow. Instead, Mr Kelly considers, other detailing will have the opposite effect, and create marked and defining horizontal shadows. Mr Mitchell fears that the tower will remain an unrelieved monolith. Each points to other large buildings in Auckland and elsewhere where height and mass, far from being oppressive, are strikingly or gracefully deployed.

[33] Each considers that the detail of the tower block design, the concrete framing, the banding and moulding, the balustrades, the arches, the windows and doors, all intended no doubt to be sympathetic to the architecture of the theatre, are not; and are incoherent.

[34] Each is especially concerned, finally, by the design of the penthouse apartments that crown the tower. To comply with the Aotea Square height control, these are cast asymmetrically on a slope. Their style is criticised as derivative, and as out of place in the building and alien to the area. But they will be highly visible.

[35] Mr Kelly describes the design as serving, as it ought, Norfolk's interests, but as not 'ambitious enough in its goals for the city'. Mr Mitchell is more scathing. Mr Kelly concludes with a remark from Renzo Piano, discussing the planning inquiry into the London Bridge Tower:

> I think it is important to remember architecture can be a very dangerous discipline – unlike art or music – if you make a mistake you can damage a city forever.

[36] In defence of the design Brian Aitken, an architect experienced in large commercial projects in central Auckland, makes two comments. The St James Theatre, its retention and restoration, was central to the consent, he says, and the constraints that imposed on the new work could scarcely have been avoided. Also, the project is private, not public, and not to be compared with one deserving the rigour of a design competition. Nor do the existing planning controls mandate, he says, any such approach.

Urban Auckland submissions

[37] Urban Auckland argues that, as a coalition of Aucklanders, interested, competent and experienced in issues of design, it has a justifiable interest in this development. It does not challenge Norfolk's right to build on such a scale. Its sole concern, it says, is to ensure that the design is as good as it can be so that the building will be pleasing from the many vantage points from which it will be prominent.

[38] This, Urban Auckland contends, is exactly the intent of the 1991 Act, the policy of which is that resource consents should be decided in a public and participatory way, and that notification should only be dispensed with exceptionally, and reasonably: *Bayley v Manukau City Council* [1998] NZRMA 513, 521.

[39] The intent of the Act, Urban Auckland contends, is not simply negative: to exclude or minimise adverse effects. It is to promote a better environment for the community as a whole: *Murray v Whakatane District Council* [1997] NZRMA 433, at 467; *King v Auckland City Council* [2000] NZRMA 145, at 147; and *Lowe v Dunedin City Council* [1999] NZRMA 280, at 294.

[40] The policy of the Council, in this case at any rate, Urban Auckland contends, appears to have been the converse: that the application did not need to be, and should not be, publicly notified unless some adverse effect were plainly apparent.

[41] In this case, Urban Auckland contends, the Council treated the design aspect as peripheral, except as it impinged on the heritage aspect. Yet that is contrary to the Council's own proposed plan as it relates to the Queen Street valley precinct, which prescribes distinct criteria for design. The critique made by the architects, Urban Auckland says, goes to the very issues the Council's criteria rightly identify.

[42] The Council's urban design panel, introduced since Norfolk applied, is Urban Auckland contends, a praiseworthy initiative to subject large new buildings to good design discipline. By contrast, it says, in this case the Council paid no heed to its own criteria, or to the statutory process by which they ought to have been given their

full natural expression.

Council's submissions

[43] Urban Auckland, the Council accepts, may have standing to bring this case because the rule as to standing is generous: *Quarantine Waste New Zealand Limited v Waste Resources Limited* [1994] NZRMA 529, 535; *Whakatane District Council*, at 466. But the Council does not accept Urban Auckland's claim to be adversely affected. It is not affected immediately, and can only claim to be a surrogate for the public. But by whose mandate?

[44] The process by which applications are to be resolved, prescribed by the 1991 Act, may, normatively, be a public process, the Council accepts. But, the Council says, that norm is not and has never been an absolute; the exception that s 94(2) allows ensures that the process remains proportionate to the case, many of which do not deserve a full hearing: *Discount Brands Limited v Northcote Mainstreet Incorporated & Westfield (New Zealand) Limited & North Shore City Council* (CA 30/04, 14 June 2004). Norfolk's application, the Council says, did not need to be notified.

[45] The Council questions how Urban Auckland can challenge its decision to grant Norfolk's application, without notification, when there is no challenge to the location or size of the building consented to. The visual effects of which Urban Auckland complains cannot then, the Council says, relate to size or location, but only to design.

[46] On its face, the Council contends, the Committee did decide that the design of the building met the design appearance and amenity assessment criteria, and had no more than a minor visual effect. It imposed a condition that the final details of the exterior materials, colours and finishes be submitted for approval.

[47] In this assessment, the Council contends, the Committee was entitled to rely, and did rely, on the opinion of Mr Kirk, as part of Ms McNeal's overall assessment, as well as Norfolk's own planner and conservation architect, whose consensus was

that the development proposed was consistent with what might be anticipated from any alternative; that it restored and enhanced an important landmark; and that, if there were any adverse effect, it could be no more than minor.

[48] The Committee, the Council says, comprising three experienced commissioners, were well capable of assessing for themselves, from the plans, elevations and computer perspectives, how well the design accorded with the related criteria, and the visual effect.

[49] Ultimately, the Council contends, the question whether the design was good or bad, the visual effects praiseworthy or adverse, had to be subjective. The Council had enough information, the Council contends, to make the assessment it needed to make, and did so reasonably. There was no warrant to require the application to be notified to ventilate this one issue. That would have been unreasonable.

[50] In short, the Council contends, its decision not to notify was open to it under s 94(2), and there was no special circumstance under s 94(5) requiring notification.

Norfolk's submissions

[51] Norfolk, too, emphasises that its right to build on the site to the scale for which it has consent is not in issue, and that all that is contested is the detail of the design, which it commissioned, which the Council has approved, and on which it wishes to rely within the next five years to commence and complete construction.

[52] Urban Auckland, Norfolk contends, is concerned rather to assert a right to comment within the Council's public process on issues of design, on this occasion Norfolk's design, but with what claim to be affected? Urban Auckland's standing to bring this case may not be in issue, but can it claim to be any more affected than any other interested member of the public? By what authority public interest groups speak, and for whom, has always to be open to question: *Sierra Club v Morton, Secretary of the Interior, et al* 405 U.S. 727 (1972).

[53] Issues of design are not in themselves, Norfolk contends, justiciable, unless

related to some more tangible adverse effect. Reasonable architects can and do disagree about choices. The Council is not an arbitrator of taste, still less is the Court on review.

[54] Whether that is entirely so or not in this case, Norfolk concludes, the issue, concerning as it does general principles of urban design and planning, lies between Urban Auckland and the Council. Should the Council have erred technically, that should not result in its decision being set aside. The effect on Norfolk would be disproportionate.

Judicial review: issues and powers

[55] The Court's function on this application, as on any judicial review, is to ensure that the Council, in its processes and decisions, complied with the 1991 Act. In *Quarantine Waste*, at 540, Blanchard J said:

> Upon an application for judicial review the Court does not substitute its own discretion for that of the consent authority. It merely determines whether proper procedures were followed, whether all relevant considerations were taken into account and whether the decision was reasonably made. Unless the statute otherwise directs, the weight to be given to particular relevant matters is one for the consent authority, not the Court, to determine.

[56] The Court can set aside as unreasonable a consent authority's decision only when it concludes that the decision is one that no consent authority could sensibly have made. But that is exceptional, and even then any patent lack of reason is likely to derive from a failure to adhere to the statute, its purpose and letter: *Wellington City Council v Woolworths NZ Ltd (2)* [1996] NZLR 537, 544-545.

[57] Relevant to whether a decision is reasonable is not merely whether a consent authority asked itself the right question, and was not distracted by any wrong question, and whether the authority's decision lay within the bounds of reason, but whether it had enough information, and in *Videbeck v Auckland City Council* [2002] 3 NZLR 842 Heath J proposed a phased analysis beginning with that issue.

[58] In *Discount Brands*, the Court of Appeal preferred instead to approach reasonableness in the round. Hammond J said, at para 47:

> The question is whether the consent authority could reasonably have come to the view it did come to and the assessment of the reasonableness of the authority's decision incorporates a consideration of the evidential base for it. It is not a separate exercise.

[59] Hammond J did say that reasonableness is to be assessed objectively, and not just reflexively against the evidential base on which the consent authority relied. A consent authority itself, he said, must always decide whether it has enough to make an informed decision:

> ... a consent authority should not accept finally what is placed in front of it. Plainly as part of its general legal obligation it must ask itself whether it has in front of it – in its opinion – sufficient information to enable it to make the statutory determination. If the authority is not so satisfied, just as plainly it is open to the authority to ask for further information or even to obtain external assistance.

[60] On review, therefore, reasonableness is to be assessed by asking not simply what the consent authority had to decide and what it relied on, but whether what it had was enough. If the authority could reach a considered decision on what it had, even if what it had was less than ideal, that cannot be assailed. But if what it had did not alert it to what it had to decide, or left it only in a position to speculate, there lie the seeds of unreasonableness. Was that how the Council was left placed here?

Statutory notification

[61] Unless s 94 excludes the necessity, section 93 requires a consent authority, once it is satisfied that it has received adequate information, to ensure that an application is served and publicly notified. And in this case, it is common ground, that because the activity in its entirety was discretionary, it had to be notified unless s 94(2) applied.

[62] Section 94(2) says this:

> An application for a resource consent need not be notified in accordance with s 93 if the application relates to a discretionary 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 authority has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent.

[63] On any view s 94(2) is central to the planning process. The decision to dispense with notification must be recognised for what it is: a decision to deny those to whom the Act gives a right ordinarily to be heard any opportunity to exercise that right: *Bayley v Manukau City Council* [1999] 1 NZLR 568, CA. Blanchard J said, at 575:

> 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.

[64] In that exercise of discretion, there is an intimate link, Blanchard J said, between the two preconditions, which must be satisfied before notification can be dispensed with. Any effect, which is more than minor, must be consented to. Speaking first of s 94(2)(a), he said:

> Before s 94 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. ...

Then, speaking of s 94(2)(b), he continued:

> 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, ... 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.

[65] This theme is sustained in the decisions since in this Court. In one, *Videbeck*, Heath J said at 853 that the character of the decision is itself important:

> In effect, the consent authority (or its delegate) is making a decision to deny the public (or a particular member of the public) the right to be heard, without giving to them any opportunity to influence that decision.

[66] In *Whakatane District Council*, at 316, Elias J said that, even where the views of those affected are known, or are thought to be, the assumption that 'nothing would be gained' by notification cannot stand scrutiny. That is not the assumption of the Act itself: the decision whether the application should be notified is critical to the efficacy of the full statutory process. Nor is the assumption safe: *John v Rees* [1970] Ch 345, 402, Megarry J.

[67] In *Discount Brands* the Court of Appeal also said more recently that public participation is not, and has never been, an absolute. Hammond J said at para 43:

> Given the general purposes of the Resource Management Act – to address adverse effects on the environment – if it can be seen that there are no such effects, or that they 'will be' minor then there is no proper basis for subjecting the application to the constraints and expense of a full hearing. This 'gate-keeper' function is therefore designed to promote efficiency, whilst at the same time seeing that the proper concerns of the Resource Management Act are addressed in appropriate cases.

[68] Whether there is any essential difference between *Bailey* and *Discount Brands* may be debatable. *Bailey* holds that there must be a public process unless all but minor adverse effects can be confidently excluded, as can the need for consent from anyone potentially adversely affected. *Discount Brands* states that where those conclusions are open there ought not to be a public process. This may be no more than a matter of emphasis.

[69] In this present case the same result will flow, I consider, whichever perspective one takes. The issue is whether the Council needed to ask itself what effect the design of the development would have on the environment or anybody who might be affected, whether adversely or not, and in a minor way or not; and whether it had enough information to decide those questions without being unreasonable.

Design, aesthetics and amenity values

[70] These issues are not to be disposed of by saying that design is a matter of aesthetics, that aesthetics is taste by another name, and that taste is irretrievably subjective and individual. That proposition is at odds with the ordinary principles of architecture and design, and of planning. Is it true that in Renaissance Florence there was a civic ordinance that windows were to be twice as tall as they were wide? If it is not true, perhaps it ought to be.

[71] More pertinently, such a stance cannot begin to be reconciled with the Act. The need for coherent and pleasing aesthetics is a prime value in the Act's defining purpose, 'the sustainable management of natural and physical resources' (s 5(1)); and that purpose informs not just the way the Act is to be understood and administered but so too any planning regime and decision: *TV3 Network Services v Waikato DC* [1998] NZLR 360, Hammond J.

[72] Put positively, in this context, that purpose is to be achieved by enabling 'people and communities to provide for their social, economic, and cultural wellbeing ...'. Put negatively, it is to be secured by 'avoiding, remedying, or mitigating any adverse effects of activities on the environment.': s 5(2)(c). 'Environment' is defined (s 2), to include the aesthetic as well as the social, economic and cultural (para (c)); and, as well, 'amenity values':

> Those natural or physical qualities and characteristics of an area that contribute to a people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[73] Thus the Act makes the aesthetic an indispensable concern in every planning regime and for every consent authority. Nor has the Council in its proposed district plan abdicated that responsibility. Did it do so in its decision?

Design criteria

[74] Clause 14.4.7.2 of the proposed plan sets out the design assessment criteria for the Queen Street Valley Precinct, and their intent is, as the explanatory note says,

certainly in the main, to assert the human scale, and the sense of intimacy, which define this central area of the city:

> The application is assessed in terms of design criteria which aim to ensure that building designs respects the elements of human scale evident in the designs of older buildings.

[75] Clause 14.4.7.2 is concerned with street level perspectives primarily, but not exclusively. Paras (a) and (b) are illustrative:

> (a) The building shall be designed to address and align to the street boundary. However, minor modulation and variance of the frontage layout, such as recessed pedestrian entrances, is acceptable to avoid architectural monotony ...
>
> (b) Building levels aligned to the street boundaries shall incorporate design elements which acknowledge the existing human scale and character of the precinct. In particular:
>
> (i) frontage height and design should have regard to existing buildings in the vicinity and maintain a consistent scale. This does not mean a rigid adherence to a single height but it does mean a respect for the general appearance of the surrounding blocks.
>
> (ii) Design of frontages should include vertical and horizontal details which avoid dominance of frontage elements larger than historically present. ...
>
> (iii) The consistency of the existing character in a cohesive streetscape should be maintained with new buildings acknowledging the scale, sense of proportion and level of intricacy of adjacent Heritage buildings in the Precinct. However, new buildings should be sympathetic to those heritage buildings and should not replicate or imitate the architectural detailing or style.
>
> (iv) Design at ground level must contribute to the continuity of pedestrian interest and vitality, ... However, frontages entirely of glass (curtain walling or continuous shop front glazing) must not be used at street level as they detract from the streetscape. ...
>
> (v) At upper levels, large expanses of blank walls must be avoided. In particular, the proportion of walls and windows on elevations should reflect any patterns existing in retained heritage buildings. This will tend to favour solid walls penetrated by a pattern of windows above veranda level, articulation of floor levels and appropriate treatment of the parapet level. A hierarchy of window size is encouraged to create a distinction between the top, middle and bottom level of the frontage.

[76] Paragraphs (d) to (g), likewise, have the same focus on perspectives at street level. But what is also apparent is that these criteria lay down design principles, informed by aesthetic judgments, governed, but not inflexibly, by the architecture of existing buildings; and that these principles extend in their reach above the level of the street. In speaking of the 'scale, sense of proportion and level of intricacy of adjacent Heritage buildings' (para (b)(iii)), and as to what is desirable at 'upper levels' (para (v)), the criteria call for a coherent design of the whole.

[77] In para (c) this is made specific:

> The design of other setback levels should relate naturally to the lower frontage height levels in an acceptable architectural manner such as continuation of an elevational rhythm or recognisable visual theme or proportion.

[78] The principle stated in para (c) may, in contrast to the other governing principles, be briefly sketched, but that belies its importance. There is no sense to a careful prescription at street level, which can be ignored in the design of the balance of the building. What stands above the frontages can be as visible from the street, and can sometimes from that perspective be dominant, even completely so. Paragraph (c) stands for the principle of aesthetic coherence.

[79] What information, then, did the Committee have to begin to address this issue? It had Norfolk's application and plans, of course, the computer perspectives and other supporting papers, but its ultimate resource had to be the Council officers' reports, tracing the various implications of the proposal, and ending in the critical recommendations. What did they say?

Design assessment

[80] The conclusion in Ms McNeal's report that the design criteria for the Queen Street Valley Precinct are met rests finally on Mr Kirk's report. What he said was this:

> The assessment criteria are about design and appearance standards, particularly as they affect people on the street. The character of the precinct at ground level is a continuous retail frontage with footpaths carrying high

> pedestrian counts. The buildings in the precinct are a mixture of large and small buildings both new and old. This part of the precinct has a similar character.
>
> The proposal has retail activities on the ground and floor to Queen Street and a heritage façade to Lorne Street. The parking building also has a small frontage to Lorne Street. Apart from the ground floor to Queen Street the first seven floors of the Queen Street and Lorne Street façade are carparking buildings. Little detail is provided in the application to assess the design and appearance of these floors so it is appropriate that this aspect is the subject of a condition of consent. It is important that these facades are honestly expressed as carparking floors and carefully designed and detailed. Carparking buildings in the Queen Street Valley Precinct need to be elegant in design and appearance.
>
> The residential tower above the carparking podium is a straight forward residential design, which meets the design and appearance criteria.

[81] The principle expressed in paragraph (c), it will be seen, is spoken to only in that last sentence.

Critical recommendation

[82] The Council's conclusion that there would be no adverse effect on the environment, or on any person, that was more than minor, rests on several reasons in the first section of Ms McNeal's report, gathered in three paragraphs. Each deserves to be considered.

[83] In the first paragraph Ms McNeal acknowledged how prominent the development will be and then gives three immediate reasons why the effect will not be adverse. The first is this:

> Although the proposed 127.35m (max) high building will be a prominent landmark building in the area in terms of height (and thus rival the 39 level Metropolis in this aspect), the height and location of the development and its use for residential accommodation and retailing together with the total number of parking spaces provided and their layout are in general accordance with District Plan rules.

[84] Ms McNeal's second reason was, equally, that the building will not exceed the scale permitted for the site:

> Likewise the extent of the floor area utilised by the development takes advantage of permitted activity bonus provisions applicable to residential

accommodation in addition to controlled activity, light and outlook bonus but does not exceed the maximum total floor area ratio applicable to the site (i.e. 12.6:1 under the Operative Plan and 10:1 under the Proposed Plan).

[85] Then in the final aspect of the first paragraph, and most materially, Ms McNeal went to the design assessment criteria:

> The design of the building has taken into account the design assessment criteria relative to the Queen Street precinct through choice of podium and tower construction, alignment of walls to the streets, incorporation of a retail frontage at ground level to contribute to pedestrian interest and vitality and a façade to Queen Street which acknowledges the historic elements of the existing theatre.

[86] In her second paragraph Ms McNeal passed to the height of the building, and how carefully that will need to be monitored:

> No maximum height applies under the Operative Plan, while under the Proposed Plan the building is subject only to the AHCC which passes over the site from RL 115m 2RL 155m. Given that the building has been designed close to the maximum heights permitted by the control, surveyor certification of compliance with the control will be necessary during construction and on completion of the building.

[87] In the first aspect of the third paragraph, Ms McNeal shifted to the relation between the proportions of the development and the St James Theatre:

> The existence of the scheduled St James Theatre in the south-east corner of the site and the need for its retention, coupled with the frontage height and setback controls have dictated to a large extent the height, form (podium and tower) and the slender width (12.5m) of the proposed tower.

[88] Finally, in the third paragraph, Ms McNeal returned to the permitted scale of the development, and the predictable effects whenever buildings are of such scale:

> Effects associated with dominance, shadowing, views, proximity to neighbouring development, design and appearance, and construction activity are therefore consistent with what might be anticipated from an alternative development in the area. However, as the site and building are scheduled, any development would be subject to resource consent, hence no 'permitted baseline' can be strictly applied to the site.

[89] This section of the report, on which the Council Committee acted, concluded by saying that any effects are likely to be minimal or able to be mitigated by conditions, and that no persons are considered adversely affected, subject to this gloss:

> ... case law has established that 'affected persons' must be identified as having an interest which differentiates them from the public generally and that a generalised effect on a general viewing audience does not give rise to notification.

[90] Again, as will be apparent, the design criteria received, at best, passing mention in one aspect only of this entire analysis.

Conclusion

[91] The Council's decision to grant Norfolk's application without any need for it to be notified, was for it to make and is not to be set aside on review unless marred by error of law or unreasonableness.

[92] In every respect, except one, the Council's decision was carefully considered. Council officers assessed the application and worked through with Norfolk every aspect of the proposal, which failed to comply, as they saw it, with the Council's operative or proposed plans. The proposal as it was before the Committee for decision, Council officers were satisfied, complied fully, and was free of any except minor adverse effects. On that footing the Committee granted the application.

[93] The result was, equally, that Norfolk obtained the right to construct what will become one of the largest buildings in central Auckland without the application undergoing the public scrutiny, which the 1991 Act contemplates as normal. The assessment was made entirely within the Council itself. That is exceptional and, whether it was justifiable, depends on whether the Council was warranted in dispensing with notification under s 94(2).

[94] The fact that the Council's decision is assailed in one respect only, the lack of attention given to the design of the tower block, and that it acted conscientiously in every other respect, does not of itself answer the point. In the proposed district plan design issues are identified discretely, and they must be answered discretely. They are not to be merged with other elements in the plan, which are themselves discrete.

[95] In discharging its responsibility to be prescriptive in its planning regime as to aesthetic values, to preserve the amenity values of Auckland in its several parts, the Council had almost complete latitude. But once those design and other related criteria became fixed, the Council came under a duty in its decisions to ensure that they are adhered to in their intent and detail.

[96] In assessing Norfolk's proposal, Council officers were concerned to a high level of detail with heritage issues: whether the proposal preserved the St James Theatre, both internally and externally. They did not accept the application, or any of the supporting documents, the planners' assessment, that of the conservation architect, or the plans themselves, at face value. They probed and resolved whatever was contentious. Issues resolved ranged from the detailing of the podium façade to the integrity of the toilets.

[97] In this analysis Council officers did take account of the design criteria for the Queen Street Valley Precinct, which take as a defining value the scale and style of existing, especially historic, buildings. But, because their focus on heritage issues had become so close, even fixed, they applied these related criteria myopically.

[98] Even a cursory glance at the plans and elevations, and the computer perspectives, suggests at once that it is the tower block by its sheer mass and height, which will define this building from the street, especially as it is to be offset from the frontage not eight metres, as the operative plan normally requires, but five. Yet this reality is not remarked on, except in passing, in any of the documents the Council's Committee was given to consider.

[99] Nor were its implications under the design criteria spelt out. To the extent that they were mentioned, they were subsumed within the heritage criteria, or those as to location and size. The design of the tower block, in form and in detail, was passed over as if of no apparent consequence.

[100] That, I consider, is at odds with the design criteria for the precinct, most specifically clause 14.4.7.2(c). That aspect of the criteria identifies, I accept, a value, the significance of which will differ with each proposal. In some developments, the

levels above the frontage may be few. In others, the building may be obscured, or be in a side street. Then it may be of little significance. But Norfolk's proposed building is central and, as it says itself in its application, will be prominent. Measured in levels, nearly 80 percent will lie in the tower block. Yet the Council officers devoted themselves to what lay below. The sheer scale of the tower block demanded, I consider, a more careful assessment under paragraph (c) than it received in the Council reports.

[101] The Council itself, acting by committee, I consider, as is apparent in the reasons it gave for granting consent, without requiring notice, was led into the same error. It failed, first of all, to ask itself and to answer a question relevant to the exercise of its discretion under s 94(2): whether the design of the tower block of itself, and as it is to relate to the podium and theatre, is likely to have any adverse effect on the immediate environment, or affect adversely any person, in more than minor ways. Or, to the extent that it considered those questions, it could not help but be unreasonable because it lacked the information on which to found any reasoned decision.

[102] These deficiencies in its decision are, I consider, more than technical. They go right, to an aspect of the Council's decision, which was essential. They render the decisions taken, though arguably correct and reasonable in every other respect, invalid.

[103] Nor do I consider this is merely an issue of planning principle and practice in which only the Council and Urban Auckland have an interest. The criteria are set in place for the benefit of the community as a whole. Compliance is called for. That is a responsibility Norfolk accepted, when it advanced its proposal, and it did so conscientiously. But that it was conscientious is no answer if the Council failed materially to subject Norfolk's proposal to the discipline of its own scheme.

[104] Nor do I consider that Norfolk would be prejudiced unduly if the Council's decision to dispense with notification were set aside, and with that its consent. A term of the consent given, which Norfolk requested, was that it have five years within which to complete its development. The immediate result of this decision will

be that the Council has to consider afresh whether to dispense with notification under s 94(2), and it is not for me to anticipate what that decision will be. But Norfolk could anticipate, I expect, an adjustment as to the time within which it must comply with any consent.

[105] There will be a declaration that the Council's decision under s 94(2) that Norfolk need not give notice of its application is invalid, and an order under s 4(2) of the Judicature Amendment Act 1972 setting aside and quashing that decision and the Council's consequent consent. The Council is directed to reconsider its decision in both these respects.

[106] I am not prepared, as Urban Auckland would wish, to go further and direct the Council to decline to exercise its discretion under s 94(2), to require a public hearing. That would be to assume the Council's own power of decision.

[107] Urban Auckland is entitled to costs at, I consider, scale 2B, and disbursements, both to be fixed by the Registrar.

P.J. Keane J