

Appellant	PAYNTER HORTICULTURAL ENTERPRISES LTD
Respondent	HASTINGS DISTRICT COUNCIL
Decision Number	W025/93
Tribunal	Judge Treadwell presiding; Mr RG Bishop and Ms JD Rowan
Judgment Date	25/5/1993
Statutes	Resource Management Act 1991, 1991/69, s120, s105(2)(b), s104(1), s104(4), s7(b)

Keywords

subdivision; surveyor; horticulture; rural; activity non complying; covenant; natural and physical resources; district plan integrity

Significant in Planning - s104, s105

Subdivision of horticultural land to create residential allotments could in the future give rise to calls for restrictions on the adverse effects of horticultural activities.

SYNOPSIS

The appeal was against refusal of a subdivisional consent for a 13.95ha property (in three lots) situated on the northern side of St George's Road, to allow a lot of 8,000m² with house to be created and the balance amalgamated into one lot. The applicant offered a registerable covenant whereby the balance area of 13.1459ha would remain in one ownership and no dwelling would be erected upon it. The balance title would be transferred to one of the Appleseed group of companies and continue to operate as an apple orchard without a dwelling. The 8,000m² allotment would be transferred to the appellant, a major shareholder and governing director of Johnny Appleseed Holdings Ltd. If the subdivision was not permitted the applicant could still obtain separate title to the area of 5.01ha presently containing the dwelling and the other two allotments of 4.45ha and 4.48ha respectively could be sold separately and a dwelling erected on each. The Tribunal expressed reservations concerning the effectiveness of a covenant in view of the fact that a rule in a district plan permitting the construction of dwellinghouses has the force and effect of a regulation whereas a covenant does not attain that legal status. The zoning was Rural 1 which required new allotments to be not less than 6ha in area. The proposal would result in one new non-complying allotment well below the permitted minimum and one complying allotment over double the existing minimum. That would replace three allotments which were all below present subdivisional minima. The subdivision was deemed to be a non-complying activity.

The Tribunal found that the proposal was contrary to policies and objectives aimed at the creation of allotments with versatility and flexibility. It would result in an allotment for solely residential purposes with little or no future potential for horticulture or intensive farming uses and therefore failed to meet the first constraint in s105(2)(b) RMA. While the residential allotment was occupied by the appellant and/or his family then no perceived effects would occur. However, if the unit moved out of the ownership of persons associated with horticulture, occupiers of a residential or lifestyle lot were more likely to seek restrictions on the adverse elements of horticultural activities such as sprays; noise arising from use of helicopters; wind machines; bird deterrent devices; and nuisance from frost deterrents. The effect on orchardists nearby, should conflict occur, would not be minor. In terms of s104(1) RMA the actual and potential effects of allowing the subdivisional activity could in the future be adverse upon the operations of the large orchard intended to be created and upon other surrounding orchards and such effect was not encouraged by the provisions of the district plan.

The relevant rules, policies and objectives of the plan did not encourage the activity (s104(4) RMA). In terms of s7(b) RMA the proposal would not result in an efficient use and development of the natural resources represented by the fertile lands of the Heretaunga Plains. To grant consent would affect the public confidence in the consistent administration of the plan where the council had consistently refused to allow subdivisions for purely residential purposes based solely on matters of convenience to the landowner. The appeal was dismissed.

FULL TEXT OF W25/93

This is an appeal pursuant to the provisions of s121 of the Resource Management Act 1991 (RM Act) against the refusal of a subdivisional consent by the respondent council in relation to a property containing 13.95ha situated on the northern side of St. George's Road and described as Lot 1 DP 11426 and Lots 2 and 3 DP 10589.

The Proposal

The proposal is to subdivide to enable one lot of 8,000m² to be severed from Lot 1 DP 11426 and for the balance of that allotment to be amalgamated into one title with Lots 2 and 3 of DP 10539. The applicant Paynter Horticultural Enterprises Limited, in return for that consent is prepared to enter into a registerable covenant upon the title whereby the balance area of 13.1459ha will remain in one ownership and that no dwellinghouse will be erected upon it. The balance title would be transferred to one of the Applesseed group of companies and continue to operate as an apple orchard without a dwellinghouse upon it. The 8,000m² allotment would be transferred to Mr M J Paynter, a major shareholder and governing director of Johnny Applesseed

Holdings Limited the private company controlling and Paynter and Appleseed conglomerate .

If the subdivision is not permitted, then Mr Paynter could still obtain separate title to the area of 5.01ha presently containing the dwellinghouse and the other two allotments of 4.45ha and 4.48ha respectively could be sold separately or be sold as one unit. If sold separately a dwellinghouse could be erected on each.

An affidavit was lodged by Mr Paynter outlining the proposals and his views on protection of prime land. We have no doubts as to his sincerity. He believes the most efficient and productive use of land is to create situations where the dwellinghouse provisions of the district plan can be effectively negated by preventing the erection of houses upon land which is suitable for intensive horticultural or orchard use in terms of the plan. Whether this can in fact be achieved by a covenant upon the title was not argued before us but we have some reservations concerning the effectiveness of that method in view of the fact that a rule in a District Plan permitting the construction of dwellinghouses has the force and effect of a statutory regulation whereas a covenant upon title does not attain that legal status.

Nevertheless, we accept that a larger orchard can operate more efficiently and that a larger orchard with only one dwellinghouse, packing and storage sheds is a less wasteful land use than smaller orchards each providing those facilities.

Mr Paynter essentially wants to take the house out of the orchard for financial reasons and for his own future security and leave his companies to go about the business of orcharding for which they were established. We record that the Appleseed Group has some 140ha of apple orchards within the prime lands of the Heretaunga Plains.

Neither Mr Paynter nor counsel acting on his behalf gave the Tribunal any reason why security could not be achieved by other means. As we have recorded, Mr Paynter could if he so wished, acquire the 5.01ha allotment upon which the house is presently erected, and the other two lots could be acquired by the conglomerate. Some cross-lease or licence arrangement could enable it to continue to operate the orchard as one unit. We are, therefore, far from convinced that the subdivision suggested is necessary.

The District Plan

The land is zoned Rural 1 which requires new allotments to be not less than 6ha in area. The present proposal would result in one new non-complying allotment well below the permitted minimum and one complying allotment over double the existing minimum. That would replace three allotments which are all below present subdivisional minima.

The planning strategy of the respondent council is firm and constant. It recognises the fertility of the Heretaunga Plains which is the basis of the

economy of the district. The Council is determined to encourage the use of those soils for intensive primary production and to control the establishment of unnecessary dwellinghouses in these highly fertile areas. In its introductory statement the Council states that it will protect this land by “every available means”. It is that expression to which the consultant planner engaged by the appellant gives primary importance in that he urged upon us that the proposal with the title covenant would prevent two further dwellings being erected on the land together with ancillary buildings and that would achieve the protection policy.

Essentially we were told that the proposal now before us was superior to the district plan in that it would perpetuate a 13.1459ha orchard used solely for the growing of trees. With respect we would suggest that protection would only continue so long as the Council resisted pressure for release of the covenant. Because of the provisions of its District Plan we feel a council would be hard pressed to refuse consent to covenant removal which would enable the balance allotment to be subdivided into at least two allotments bringing about the three house scenario.

As we earlier recorded, we think that pressure on Council could even end in the High Court with the landowner urging the Court to strike down the covenant on the basis that the plan, with force and effect of a statutory regulation, permitted that which the covenant sought to prohibit. Further scenarios are possible: the companies may fail; be put into liquidation or receivership; be dismantled in favour of smaller enterprises for estate or taxation purposes. Again, the Council would come under pressure.

Before moving to a consideration of the case put to us by Council, we record that in terms of the Resource Management (Transitional Provisions) Regulations (2) (1991) (3), this subdivision is deemed to be a non-complying activity and therefore falls to be considered firstly in terms of s105 of the RM Act. We secondly accept that a condition such as suggested by the appellants could be imposed as part of a subdivisional consent particularly should the subdivider consent to its imposition.

We further record that subdivision is deemed to be an “activity” and thus fits within the provisions of the RM Act. Whilst we concede that some subdivisions may physically constitute an activity in the true sense of that word involving as they may roading works, earthworks, creation of building platforms etc., it is difficult to see how a readjustment of lines upon a plan, which is what is here suggested, is the type of activity contemplated by the RM Act. It is an artificial use of the word “activity” when that word is applied to resource use and management.

The Case for the Council The Council were concerned:

- (a) that the subdivision would create a potential for permanent loss of productive land beyond that permitted by the plan and would thus conflict with policies

and objectives

- (b) creation of purely residential sites in the Rural 1 zone would be in conflict with the objectives of the zone and have significant cumulative effects on productive capacity of land.
- (c) fragmentation of land into small sites could not be seen as consistent with sustainable management of valuable fertile soils.

The Council were basically concerned to see that the plan was administered on a consistent basis. The Tribunal is aware of this consistency of approach by this council and its predecessor the Hawkes Bay County Council.

The District Plan has as its primary purpose in the Rural 1 zone the protection of the fertile soils and the use and management of that land resource. Clause 3.3(6) reads:

"To discourage the use of farming units on the plains for rural residential living by stringently controlling the establishment of dwellinghouses"
(emphasis added).

Although stress was placed on that particular policy by the Council it will be noted that the dwellinghouse with which we are here concerned is already there whereas clause 3.3(6) is intended to prevent the establishment of dwellinghouses. Thus the present proposal does not offend that particular objective. Again in the Rural 1 zone statement clause 5.1, there is an emphasis on the establishment of dwellinghouses which it states will be tightly controlled "to prevent the use of small lots for rural residential purposes, and the consequent less intensive use provision is made for rural residential living in other zones." (emphasis added).

Again it might be observed that that particular zone statement is couched in terms which suggest that it is future establishment which is of concern to counsel. However, the zone statement contains a control which is directed precisely at the proposal now advanced to us. Namely:-

"The rural sub-division controls are designed to ensure that land parcels are of sufficient size to allow for a variety of horticultural land uses and to ensure that the sites created by subdivision would have the potential for a range of productive uses and be sufficiently flexible to adjust to varying market requirements and production techniques."

The Rural 1 zone thus has two relevant objectives and/or policies:-

- (a) To tightly control the establishment of dwellinghouses.
- (b) To ensure subdivisional controls create land parcels of sufficient size to allow for a variety of horticultural land uses. (We read this particular policy as encompassing situations where land already has a dwellinghouse erected upon it.)

In relation to the 8,000m² suggested allotment upon which the dwellinghouse is presently situated, the creation of that allotment is contrary to the provisions of that part of the zone statement contained in (b) above. It was never

suggested that it would be of a size which would allow for a variety of horticulture uses. Indeed, it would be simply a large residential section. Then follow a series of objectives and policies which hammer home the principles reflected in the subdivisional controls. Clause 5.2:-

"To ensure that the most fertile flat land of the district will be available for primary production and to encourage intensive farming and horticultural usage by every available means."

The policies in clause 5.3 include:-

"To encourage the best use of the resource by permitting the most intensive farming and by designing rural subdivisional standards to ensure that land is held in land parcels which allow for a variety of productive agricultural units in the long term."

"To ensure the dwellinghouses and other accessory buildings are erected only where they are essential to the proper management of the property."

The ordinances reflect the constraints contained in the objectives and policies. The only rule which may give some comfort to the appellants is 5.9.1(c) which permits:-

"A subdivision involving existing non-conforming lots which will result in a creation of a larger lot of less than 6 hectares provided that no existing conforming lot is rendered non-conforming."

The spirit of that particular rule is reflected in this subdivision and indeed it is possible that the present proposal better conforms with the objectives and policies of the plan than does ordinance 5.9.1(c). Essentially, the present proposal is a subdivision involving three non-conforming lots which will result in the creation of a larger lot in excess of 6 hectares and no existing conforming lot is rendered non-conforming. However we do not consider that particular district rule can, by itself, be regarded as an objective and/or policy for the purpose of s105.

In respect of dwellinghouses they are permitted at the rate of one per property if accessory to a predominant land use provided the property has a net site area of 6ha or it will be accessory to an established horticultural or farming use. In essence, it is clear to us that the proposed subdivision is contrary to policies and objectives aimed at the creation of allotments with versatility and flexibility. However, one looks at the present proposal, a large allotment for solely residential purposes is to be created which has little or no future potential for horticultural or intensive farming uses.

Although we consider it a minor point the council planner was also concerned that the covenant preventing the erection of further dwellings, was itself in conflict with the plan which recognises that dwellings are essential or desirable for intensive farming uses to enable efficient management of properties of the chosen size.

Lastly we agree with the council planner when she states that the expression

“every available means” must be read in the context of the District Plan as a whole and must of necessity mean every means available within the structure of that plan.

We thus hold that the application fails to meet the first constraint in s105(2)(b) of the Act being contrary to the policies and objectives.

The question as to whether its effect upon the environment will be minor is another matter, but in essence we tend to agree with the council planner who expressed concern at the advent of purely residential allotments in a horticultural zone. We are satisfied that whilst the residential allotment is occupied by Mr Paynter and/or his family then no perceived effects will occur. However, should the unit move out of the ownership of persons associated with horticulture, then we accept that the owners or occupiers of a residential or lifestyle lot are more likely to seek restrictions on the adverse elements of horticultural activities such as sprays; noise arising from the use of helicopters; wind machines; bird deterrent devices; and nuisance from frost deterrents. It is for this reason that it is desirable that the objectives and the policies of the Council be adhered to prevent this potential conflict. Its effect on orchardists nearby should conflict occur would not be a minor effect.

Accepting, however, for the purpose of argument that the effect in isolation may be regarded as minor, we must also have regard to s104. This does not require a consideration as to whether the effect is minor or not and we would hold in terms of s104(1) that the actual and potential effects of allowing this subdivisional activity could in the future be adverse upon the operations of the large orchard intended to be created and upon other surrounding orchards and that such effect is not an effect which is encouraged by the provisions of this plan.

In terms of the relevant parts of s104(4) the relevant rules, policies and objectives of the plan certainly do not encourage this activity. In terms of s7(b) which is contained in Part II we are not of the opinion that this would result in an efficient use and development of the natural resources represented by the fertile lands of the Heretaunga Plains. We consider the consistent Council approach to land subdivision better achieves that particular objective. Lastly, in a general way, we find that to grant this particular subdivisional consent would affect the public confidence in the consistent administration of this plan where the Council, supported by its policies and objectives, has consistently refused to allow subdivisions for purely residential purposes based solely on matters of convenience to the landowner.

Conclusion

For all the foregoing reasons we are of the opinion the decision of the respondent Council is correct and the appeal is dismissed.