Haslam v Selwyn District Council

The Planning Tribunal: His Honour Principal Planning Judge Sheppard, sitting alone pursuant to s 309 of the Resource Management Act 1991.

29 September; 1 October 1993 Decision No C 71/93

Practice and procedure — Alteration to proposal after public notification — Site for proposed mushroom composting plant moved several hundred metres following public notification — New site not publicly notified — Whether consent authorities exceeded their jurisdiction by granting consent without requiring further notification or new application.

Resource consents — Public notification — Extent to which proposal can be altered after public notification without needing further notification or new application — Consents granted to mushroom composting plant several hundred metres from site that was publicly notified — Correct test to be applied.

Resource consents — Permit to discharge contaminants into air — Odour emission — Mushroom composting plant — "Nuisance zone" calculated by level at which odour a nuisance and distance from site at which that odour level may be experienced.

The applicants wished to establish a mushroom composting plant on a 480 ha farm at Gigs Crossing, near Norwood. The applications to the Selwyn District Council for land use consent and to the Canterbury Regional Council for a discharge permit both incorporated a map of the Norwood locality delineating the boundaries of the applicant's property with a cross indicating the "Compost Site". (That site is referred to as "Site 1".) Copies of the applications were sent to occupiers of property in the vicinity and the applications were publicly notified in a newspaper. Both councils received 24 submissions: 2 in favour and 22 in opposition.

Following the public notification of the proposal, the applicant provided the consent authorities with a map showing a different composting site ("Site 2"), about 550 m to the west of site 1, as a replacement. Copies of that plan were mailed to the persons to whom copies of the application had originally been sent, but no public notice of the new location of the composting site was given.

Subsequently, consultants engaged by the consent authorities both concluded that consent should not be given in respect of Site 2, but favoured another site, more central to the applicant's property, about 600 m north-north-west of Site 2 and about 800 m northwest of Site 1 ("Site 3"). The consent authorities held a joint hearing at which the applicant announced that it sought consent in respect of Site 2, but would accept grants of

consents for Site 3. The resource consents were granted in respect of Site 3, which was considered to be the best practicable site for the containment of odours within the property.

The present proceedings were to determine whether the consent authorities had exceeded their jurisdiction by purporting to grant consent for a site that had not been publicly notified adequately. At issue was the extent to which a proposal the subject of a resource consent application can be altered after public notification without needing further notification or a new application.

Held (directing that the appeals could proceed):

(1) There must be a limit on the extent of the amendments that can be made to a proposal without re-advertising or requiring a fresh application, otherwise those who might have taken part had they known of the amendment might be excluded. The basis for the test to be applied is whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment.

(2) The correct standard to apply in respect of the test was not whether it could be said with certainty that any other person might not have intervened, but whether it was plausible that any other person would have intervened. The "with certainty" standard applied in *Cameron v North Canterbury Hospital Board* (1982) 8 NZTPA 356 (HC), a case relating to the adequacy of the notification of the application, was appropriate as there was no other factor conflicting with the importance of full notice. In the present case, however, the desirability of confining consent to the proposals accessible at the time submissions might be lodged conflicted with the desirability of allowing a practical response to sound points made by submitters or advisers.

(3) It was not plausible that any person who did not lodge a submission to either of the applications would have done so if the applications had shown the composting site at Site 3 instead of at Site 1. Accordingly, the respondents did not exceed their jurisdiction by granting the resource consents in respect of Site 3.

Cases considered

Cameron v North Canterbury Hospital Board (1982) 8 NZTPA 356 (HC)
Darroch v Whangarei District (Decision A 18/93)
Foodstuffs (Otago Southland) Properties Ltd v Dunedin City (1993) 2 NZRMA 497
Godber v Wellington City [1971] NZLR 184 (HC)
McFarland v Napier City (1993) 2 NZRMA 440
Nelson Pine Forest Ltd v Waimea County (1988) 13 NZTPA 69 (HC)
Noel Leeming Appliances Ltd v North Shore City (No 2) (1993) 2 NZRMA 243
South British Auckland Property Co Ltd v Auckland City (1987) 12 NZTPA 94
Wellington City v Cowie [1971] NZLR 1089 (CA)

Appeal under s 289 of the Resource Management Act 1991.

A Hearn QC for the applicant
J R Milligan for the appellants
G J Venning for the Selwyn District Council and the Canterbury Regional Council.

ORAL DECISION

This decision concerns the extent to which a proposal the subject of a resource consent application can be altered after public notification without needing further notification or a new application.

These two appeals were brought by opponents of a proposal for a mushroom composting plant on a farm at Gigs Crossing, near Norwood. There are two associated appeals, by which the applicant challenged conditions imposed on the consents, which are for land use, and for discharge to air of contaminants from the composting process.

By their notices of appeal against the grants of consent, the opponents alleged that the consent authorities exceeded their jurisdiction by purporting to grant consent for a site that had not been publicly notified adequately. At a conference of representatives of the parties, Judge Skelton accepted the submission that the allegation should be treated as a preliminary issue. Accordingly it was the subject of a hearing before me on 29 September 1993, and this decision is confined to that point. Another issue had previously been thought suitable for consideration as a preliminary point as well. That relates to whether land use consent had been properly applied for. However at the hearing, counsel for the appellants submitted that the latter point would be better argued in the context of a substantive hearing. There being no opposition, the argument on that point is reserved to the substantive hearing of the appeals (if any).

The Facts

The factual basis for the argument on the preliminary point was the records of the consent authorities (on which counsel reached agreement), and evidence that I heard from Mr C J M Tipler (an environmental engineer engaged by the Regional Council in this matter) and from Mr D A Bryce (a planning consultant engaged by the District Council in this matter).

The applicant has a farm property at Gigs Crossing, with a total area of about 480 ha. Both the application to the Selwyn District Council for land use consent and the application to the Canterbury Regional Council for a discharge permit gave the legal description of that property. The application for land use consent also stated: "Specific site shown in Figure 1 in attached information". Both applications incorporated by reference an environmental impact assessment, which contained, as Figure 1, a map of the Norwood locality on which the boundaries of the applicant's property were drawn in bold; and a cross inside a circle near the southern boundary of the property was indicated as "Compost Site". (That site is referred to as Site 1.)

The text of the Environmental Impact Assessment also contained a description of the site:

> The proposed site for the composting operation is on a 480 ha farm at Gigs Crossing located approximately 3.5 km to the north of Dunsandel (Refer to Figure 1). The composting site comprises approximately 4 ha within the farm. . . .

Copies of the applications (including the environmental impact assessment) were sent to occupiers of properties in the vicinity, including the appellants. Both applications were publicly notified in a newspaper. The newspaper notices described generally the respective applications and the locality of the subject property. The District Council's notice stated: "The whole complex, including an access drive, will cover some 2.75 hectares, within a property of some 480 hectares". The Regional Council's notice stated: "The proposed site is situated within a 480 hectare farm. . .". Both notices stated that the application and any accompanying information might be examined at four listed offices of the councils, and that any person might make submissions to be received not later than 5 pm on 11 December 1992.

Both councils received 24 submissions on the applications within the prescribed period: 2 in favour and 22 in opposition. The grounds of opposition included odour emission.

On or about 3 December 1992 the applicant provided the consent authorities with a map showing a different composting site as a replacement for Figure 1 in the environmental impact assessment. That composting site is about 550 m generally to the west of Site 1 and is referred to as Site 2. Copies of that plan were mailed by the Selwyn District Council on or about 4 December 1992 to the persons to whom copies of the application had originally been sent. No public notice was given of the new location of the composting site.

One of the submissions in opposition dated 9 December 1992, and received by the Selwyn District Council on 11 December 1992, was from a Mr J A Geddes. (It was also signed by one N C Clark.) The text shows that Mr Geddes was aware of the change of site to Site 2 but had not seen the map showing it (the revised Figure 1) so was "unsure of the exact site proposed". He suggested that a more appropriate site would be on Stranges Road in the vicinity of the woolshed, approximately 1.6 km from the corner of Coal Track Road.

It subsequently turned out that the consultants engaged by the consent authorities to advise them on the application, Mr Bryce and Mr Tipler, both concluded that consent should not be given in respect of Site 2, but favoured another site, more central to the subject property, about 600 m generally north-north-west of Site 2 and about 800 m generally northwest of Site 2. (That site is referred to as Site 3.) The opinion of each was contained in his report to the respective consent authority. Both reports were sent on 14 February 1993 to those who had made submissions.

The consent authorities held a joint hearing on 18 February 1993 of the applications for land use consent and for a permit to discharge contaminants to air, together with related applications to take water and to discharge septic tank effluent to ground. At the hearing, counsel for the applicant announced that the applicant no longer sought consent for Site 1, explaining that the original Figure 1 had not reflected the applicant's original intentions, but sought consent in respect of Site 2, not Site 3. However at the end of the joint hearing, counsel for the applicant announced that the applicant would also accept grants of resource consents for Site 3.

In their decisions, both councils granted the resource consents sought but in respect of Site 3, imposing conditions to that effect by reference to stated map coordinates. The relevant condition of the land use consent

granted by the District Council was challenged by the applicant's appeal, RMA 138/93, but evidently that was out of caution because I understood his counsel, Mr Hearn, to say that the applicant accepted Site 3.

The other matter of fact on which I need to express my findings relates to the nature of people's perception of the emanation of odour. That was the subject of the evidence given by Mr Tipler, who has considerable professional experience in that subject and who, I accept, is qualified to give expert evidence on it. He deposed that people respond differently to odours depending on many factors.

Mr Tipler had assessed effects on the environment of odour from the proposed composting by reference to observations of odour from a similar composting activity carried on by the applicant at Prebbleton. Mr Tipler had adopted a level of a maximum odour concentration of 5 odour units for 0.5% of the time for agricultural odours of moderate offensiveness as the level at which odour would be a nuisance. That was based on research in the Netherlands. One odour unit represents odour that half the population can discern.

The witness had used his observations from the Prebbleton composting plant, and wind data from Christchurch Airport, to estimate the distances from Site 3 at which that level may be experienced, and had plotted the results on a map of the locality as a contour line. He had verified the results by reference to the sources of odour complaints that had been received by the Canterbury Regional Council in respect of the Prebbleton site. He concluded that locating the composting plant at Site 3 would minimise the potential for nuisance to occupiers of other properties in the vicinity.

The contour contains what Mr Tipler described as a "nuisance zone". It has an irregular boundary (reflecting prevailing wind directions), but the distance from the composting site to the outer boundary is about 1,500 m. Parts of the "nuisance zone" constructed on Site 3 extend beyond the boundaries of the applicant's property. However, parts of the "nuisance zone" constructed on Site 2 extend considerably further beyond those boundaries.

Mr Tipler deposed that the "nuisance zone" so constructed is not the same as the area in which odours from the composting would be able to be detected, and he agreed that odours from it would occasionally be experienced over a considerably wider area. The witness also testified that a movement of the source of odours of about 400 m to 800 m would alter the intensity of the odours that may be detected, and their duration, beyond the "nuisance zone". I accept that evidence for the present purpose.

The Issue

The issue before me is whether the councils were entitled to grant resource consents in respect of Site 3 without further notification or a fresh application. For the appellants Mr Milligan submitted that they were not entitled to do so. His submissions were twofold. The first was that it cannot be said with certainty that persons other than the parties might have intervened if the alteration to the site had been publicly notified. The second was that consent authorities cannot by conditions extend the ambit of the consent sought.

In opposition, Mr Hearn for the applicant, submitted that carrying on the proposed activity at Site 3 was not likely to affect the public generally

or any individual in any manner different from, or to any degree greater than, carrying on at Site 1 would have done, and that the amendment of the site was within the scope of the councils' authority to impose conditions. He contended that it is not plausible that a person who, understanding that the composting activity was proposed for Site 1 did not lodge a submission, would have wished to intervene if it had originally been proposed for Site 3. For both consent authorities, Mr Venning adopted Mr Hearn's submissions. He explained that the councils had considered that Site 3 was the best practicable site for the containment of odours within the property without increasing the potential for nuisance to any other property. Counsel contended that the amendment did not increase the scale or intensity of the activity or alter its character or effects, but would mitigate the effects.

In reply Mr Milligan submitted that alteration of the effects is not the test under the present Act, where being affected is not a condition for lodging a submission. He also submitted that even if alteration of effects is the correct test, it is to be inferred from Mr Tipler's evidence that the effects would be altered by moving the location of the source.

The Test

In considering how to state the test to be applied to decide this issue, I have referred to cases cited by counsel. Nearly all of them were decided under the former Town and Country Planning Acts, and most related to different circumstances. So *Wellington City v Cowie* [1971] NZLR 1089 (CA) related to the adequacy of a notice of a proposed variation to a district scheme under the Town and Country Planning Act 1953; and *Nelson Pine Forest Ltd v Waimea County Council* (1988) 13 NZTPA 69 (HC) and *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497 concerned the scope of a council's authority to amend a proposed plan change under the Town and Country Planning Act 1977 and the Resource Management Act 1991 respectively. Although *Noel Leeming Appliances Ltd v North Shore City Council (No 2)* (1993) 2 NZRMA 243 was an appeal against a grant of land use consent, the passage in that decision about the permissible scope of amendments related to the review of a district scheme under the 1977 Act.

Godber v Wellington City [1971] NZLR 184 (HC) and *Cameron v North Canterbury Hospital Board* (1982) 8 NZTPA 356 (HC) related to the adequacy of notification of applications for planning consent under the 1953 and 1977 Planning Acts respectively; and *McFarland v Napier City Council* (1993) 2 NZRMA 440 concerned the adequacy of an environmental impact assessment for an application for planning consent.

Of all the decisions, only *South British Auckland Property Co Ltd v Auckland City Council* (1987) 12 NZTPA 94 and *Darroch v Whangarei District Council* (Decision A 18/93) concerned the scope of amendments to proposals the subject of applications for consents, the former under the 1977 Act and latter under the 1991 Act.

I accept Mr Milligan's submission that the former decision needs to be considered with some caution now, because the new legislation no longer requires that a person have particular status to lodge a submission on an application, as was formerly the case under the 1977 Act applicable in the *South British* case.

The decision in *Darroch's* case does address the scope of amendments to applications for resource consent. It concerned an application to use stockyards for cattle sales. The original application had indicated that there would be 200 and 300 head of cattle at each sale. The applicant sought consent for up to 350 head of cattle at each sale, but the respondent submitted that the applicant was bound by the number referred to in the original application.

The passage from the Tribunal's decision of which I was reminded is at p 27 and reads:

> We hold that it is the original application and any documents incorporated in it by reference which defines the scope of the consent authority's jurisdiction. In appropriate cases, where consistent with fairness, amendments to design and other details of any application may be made up to the close of a hearing. However they are only permissible if they are within the scope defined by the original application. If they go beyond that scope by increasing the scale or intensity of the activity or proposed building or by significantly altering the character or effects of the proposal, they cannot be permitted as an amendment to the original application. A fresh application would be required.

That decision is, of course, not binding on me. Indeed, because the Tribunal's opinion is merely stated without elaboration or reasoning, it has little persuasive value as such.

The Resource Management Act provides procedures for applications for resource consent that are designed to enable all persons who wish to take part to do so. The combination of the requirements for individual notice to those directly affected, general public notice, access to the application and accompanying information, and freedom to make submissions and be heard on them assure that result. In practice, the lodging of submissions and the presentation of opponents' cases frequently leads to applicants or consent authorities modifying proposals to meet objections that are found to be sound. That must surely be part of the statutory intent in providing for making submissions.

Plainly there needs to be a limit on the extent of the amendments that can be made without re-advertising or requiring a fresh application, otherwise those who might have taken part had they known of the amendment might be excluded. The considerations mentioned in the passage quoted from *Darroch's* case be seen in that light. They are, as Mr Milligan submitted, examples of amendments that would not be permissible, but are not a comprehensive definition. The test itself needs to relate to the provisions of the Act, allowing those who wish to take part to do so. With that in mind, I hold that the basis for the test that I should apply in this case is whether the amendment made after the period for lodging submissions had commenced is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment.

Mr Milligan contended that the standard should be whether it can be said "with certainty" that any other person might not have intervened. That was based on the language used by Roper J in *Cameron's* case.

Mr Hearn submitted that the correct standard to be applied is not

whether it can be said "with certainty" but whether it is "plausible" that any other person would have intervened.

The standard of "certainty" applied in *Cameron's* case referred to the adequacy of the notice of the application. With respect, such a high standard was appropriate for that purpose, where there was no other factor conflicting with the importance of full notice.

In the present case, by contrast, there are conflicting factors. On the one hand there is the desirability of confining consents to the proposals accessible at the time submissions might be lodged. On the other there is the desirability of allowing a practical response to sound points made by submitters or by consent authority's advisers, or even by applicant's advisers, so as to reduce adverse impacts of the proposal or otherwise serve the statutory purpose of sustainable management of natural and physical resources. In my opinion, a better balance between those conflicting values can be achieved by adopting the test of plausibility advanced by Mr Hearn, rather than the test of certainty advanced by Mr Milligan. The application of the test is underlain by the notion of fairness. I therefore ask myself whether it is plausible that any person who did not lodge a submission to either of the subject applications would have done so if the applications had shown the composting site at Site 3 instead of at Site 1.

Application of the Test

In considering that question I accept that a result of moving the source of odours some 800 m would be that some odours could, at times, be discerned at below Mr Tipler's nuisance threshold of 5 odour units for 0.5% of the time in places where, if the source was at Site 1, they would not be able to be discerned, or would be discerned at less intensity, or for shorter duration, or less frequently.

However, that conclusion does not itself provide the answer to my question. There is no exactness in predicting the extent to which odour travels. That may depend on many circumstances. There is no exactness in predicting the extent to which people may be able to discern a particular odour; nor in how they may respond to the experience.

The records of the councils show that 22 submissions were lodged. Nearly all raise objections about odour emission in various ways. I infer that any person who wished to lodge a submission expressing opposition to the proposal because of concern about odour emissions did so without any precise calculation of the extent to which they would in fact be affected, if at all. In my judgment, it is not plausible that anyone who did not lodge a submission on the original application would have done so if it had shown the composting site as Site 3 instead of Site 1. I consider that anyone who might have been concerned about the subject proposal being located anywhere on the applicant's property would have lodged a submission, even though the information available for examination at the council offices showed the site as Site 1 (later amended to Site 2).

I now turn to Mr Milligan's second submission, that the consent authorities could not, by conditions, extend the ambit of the consent sought. I accept that they could not. However, I do not accept that that is what occurred here. Rather, the proposal has been modified in a way that was understood to mitigate the effects of the activity on other

properties. It remains the same proposal. It would be located on a different site on the same property. The councils were evidently persuaded that the new site would result in minimising those effects. A similar site had been suggested in one of the submissions, and Site 3 had ultimately been adopted by the applicant. I do not consider that the amendment is beyond the ambit of the proposal.

For those reasons I hold that the respondents did not exceed their jurisdictions by granting the resource consents in respect of Site 3. Consequently, the appeals may now be set down for substantive hearing; and counsel are invited to advise the Registrar if any directions are necessary to enable final preparations for an orderly and efficient substantive hearing of these and the associated appeals.