Aley v North Shore City Council

High Court M251/98
18 May 1998
Salmon J

Notification — Judicial review of decision not to notify application for resource consent — Whether decision not to notify made illegally or unreasonably — Relevant considerations — Discretion of Council in relation to discretionary activity consents — Whether effects on environment referred to environment as it currently existed — Whether effects more than minor — Resource Management Act 1991, s 94

The second defendant proposed to develop a five-storey building, including apartments, carparking and retail space, in a low rise commercial area. It sought a resource consent for the proposal from the first defendant. The first defendant decided not to notify the application for resource consent. The plaintiffs sought judicial review of that decision. The bases of the claim were that the first defendant acted illegally and unreasonably in reaching the decision not to notify. The plaintiffs sought a declaration that the decision was invalid and requiring the first defendant publicly to notify the application for a resource consent.

Held (Council to reconsider whether application should be notified):

(1) The decision-making process of the Council was flawed. Initially the resolution failed to take into account all relevant matters in s 94 of the Resource Management Act 1991; in particular the Council failed to consider what persons, if any, were adversely affected by the application. Consequently, no consideration was given to the consultation undertaken or the views of those consulted. That failure was not remedied at a later meeting where the matter was considered. Moreover, the Council was wrongly informed that the height of the proposed building was not an issue, and so did not consider it. When it decided whether to notify, it did so on the basis that the height and bulk of the building were irrelevant to a consideration of the effects on the environment, which was not the case.

(2) A non-restricted discretionary activity must be wholly discretionary. A hybrid concept whereby discretion was somehow qualified would add an unnecessary complication to legislation which was already sufficiently complicated. Such a hybrid concept would also tend to limit rights of objection.

(3) The phrase "effects on the environment" in s 94 of the Resource Management Act referred to the existing environment. A consideration of the effects on the environment of the activity for which consent was sought therefore required an assessment to be made of the effects of the proposal on the environment as it existed. That construction was supported by the scheme of the Act, existing case law, and the desirability of simple administration of the Act.

(4) It was not appropriate for the Court to carry out the required assessment whether the effects on the environment which were involved in the proposal were more than minor. That was a matter for the Council. It would be necessary for the Council to balance the significant positive aspects of the activity with its negative aspects in order to determine whether the effects on the environment were more than minor.

(5) It was also necessary for the Council to consider again whether there were any persons who might be affected by the granting of the resource consent, in light of its conclusions about the effects of the activity. In making that assessment, the mitigating effect of proposed conditions would need to be taken into account.

(6) It was inappropriate for the Court to make findings in order to determine whether the same result would be reached by the Council upon reconsideration of the application. The matter was referred back to the Council to consider properly whether the application should be notified.

Cases referred to in the judgment:
Elderslie Park Ltd v Timaru District Council [1995] NZRMA 433
Hanton v Auckland City Council [1994] NZRMA 289
Locke v Avon Motor Lodge (1973) 5 NZTPA 17
Murray v Whakatane District Council [1997] NZRMA 433
Neil Construction Ltd v North Shore City Council (Planning Tribunal W136/95, 6 November 1995)
Ports of Auckland v Auckland Regional Council [1995] NZRMA 233
Quarantine Waste NZ Ltd v Waste Resources Ltd [1994] NZRMA 529
Rudolph Steiner School v Auckland City Council [1997] 3 ELRNZ 85
Vose v Auckland City Council (1993) 2 NZRMA 373

Judicature Amendment Act 1972
This was an appeal under the Judicature Amendment Act 1972.

R B Brabant and J C Campbell for the plaintiffs
W S Loutit and D K Hartley for the first defendant
P T Cavanagh QC and N B Pritchard for the second defendant

SALMON J.

Introduction
Browns Bay is a maritime suburb in North Shore City. It has a commercial area which extends down to the beachfront reserve. Existing development within the commercial area is substantially low rise – one or two levels. The proposal which is the subject of these proceedings is intended to have five levels, one of mixed commercial and parking, one of parking and three levels of residential use. The height and bulk of the building has

created concern amongst large numbers of local residents, and that concern has resulted in these proceedings. A group of local residents has issued this application for review challenging a decision made by the first respondent not to notify a resource consent application made by the second respondent.

The Resource Management Act 1991 provides generally for resource consent applications to be notified and to be the subject of submission by parties interested in the application. Section 94 of the Act provides for an exception to that procedure in the circumstances set out in that section. I will return to a closer examination of s 94 later in this judgment, but it is sufficient to say at this stage that in the circumstances of this case the Council could determine that an application be not notified, if:

(a) It was satisfied that the adverse effects on the environment of the activity for which consent is sought will be minor; and
(b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

The proposal the subject of the application was described in a report completed by a Council officer, Ms Sally Robins, as:

> To construct a five level building, including 24 apartments, carparking and retail space, part of which will extend and cover a service lane.

The property the subject of the application is situated at 87 to 109 Clyde Road, Browns Bay. The applicant for dispensation from the requirement to notify, and for resource consent, is the second defendant Anzani Investments Ltd. The consent application was lodged with the first defendant, the North Shore City Council on 28 October 1997. Council purported to grant the dispensation from notification on 3 December 1997.

Council reconsidered the non-notification decision at a meeting on 19–20 January and again on 20 and 23 February. On each occasion it confirmed its earlier decision. On 24 February 1998 the committee convened to commence hearing the consent application. The hearing was not concluded and the matter was adjourned to 2 March. On that day the plaintiffs obtained interim orders from this Court preventing the hearing from resuming.

There is no doubt that in making the decision that the application could proceed on a non-notified basis, the Council was exercising a statutory power of decision and that that power is subject to review pursuant to the Judicature Amendment Act 1972. No challenge has been made to the standing of the plaintiffs to bring these proceedings. No challenge has been made to the delegated authority of the Committee, which in fact, made the decision. The task of this Court has been described by Blanchard J in *Quarantine Waste NZ Ltd v Waste Resources Ltd* (1994) NZRMA 529, 540 as follows:

> Upon an application for judicial review the Court does not substitute its own decision for that of the consent authority, it merely determines whether

proper procedures were followed, whether all relevant and no irrelevant considerations were taken into account and whether a 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 for the Court, to determine.

The Proceedings

In their amended statement of claim the plaintiffs alleged that the first defendant in reaching a decision not to notify the application for resource consent, acted illegally and unreasonably.

The first cause of action relying on illegality alleges:

- a failure to require written approval from affected persons
- a failure to consider whether it was unreasonable to require that to be done
- a failure to give proper consideration to s 94(2)
- a failure to give any or proper consideration to the question of whether special circumstances existed.

The first defendant is alleged to have been influenced by material errors of law. In particular:

- that as the development complied with the overall height limit, notification was not necessary
- the conclusion that special circumstances did not apply
- that the application was not accompanied by an assessment of the effects of the proposed development on the amenities of public and private land
- the conclusion that the effects of the proposed activity on the environment would be no more than minor as a ground for not notifying the application.

It is also alleged that the decision not to notify was influenced by material factual errors, in particular that the finding that the effects of the development were no more than minor when no attempt had been made to consult and the committee had no advice from planning consultants employed by the Council as to whether or not the requirements of s 94 could be met.

It is also alleged that the assessment material accompanying the application failed to correctly identify the consents required and was not an assessment complying with s 88(6) of the Act.

Also under this head, it is alleged that the first defendant failed to take into account relevant provisions of the Transitional and Proposed Plan and relevant effects and took into account irrelevant provisions of s 94 of the Act.

Under the head of unreasonableness the statement of claim alleges that the first defendant acted unreasonably in failing to inform itself properly of the nature of the consents required, acted in the absence of complete information, took no or no proper account of the relevant criteria which should be applied to the non-notification question and failed to take into account an absence of proper consultation. The plaintiffs claim that

the first defendant unreasonably exercised the discretion not to notify the application.

The relief sought is a declaration that the decision of the first defendant not to notify the application is invalid and an order requiring that the first defendant publicly notify the application for resource consent.

The Second Defendant's Application for Resource Consent

The resource consent application made under s 88 of the Resource Management Act seeks a land use consent and describes the activity to which the application relates as:

> Establishment of an apartment building in accordance with the plans and assessment of effects on the environment attached to and forming part of this application.

The Plans illustrating the proposed activity are annexed as are the relevant certificates of title. Annexure C is the assessment of effects required by the Resource Management Act. The introduction to that assessment included the following:

> This document is part of the application for resource consent for the development of an apartment building at 87–109 Clyde Road Browns Bay.
>
> An apartment building is proposed to be established on a site towards the northern end of the Commercial centre of Browns Bay. The apartment building is proposed to be constructed over the parking area occupying the eastern half of the site which serves an existing commercial building on the site. The commercial building and the shops within it are not proposed to be altered or removed. Within this carpark is a retail area or cafe facing East and the beach.
>
> A resource consent is required due to the proposed activity being a Controlled Activity within the Proposed North Shore City District Plan and non-compliance with parking requirements of the transitional district plan, proposing to occupy a portion of the site subject to a service lane designation under the transitional and proposed district plans, and the car park screening requirements of the transitional district plan.

There follows a description of the site, the locality and the proposed activity. The proposed activity is described as comprising a five level building occupied by 24 apartments on the third, fourth and fifth levels, a carparking area solely for the use of the apartments on the second level, and retail and retail parking on the first level. The document makes an assessment against the District Plan provisions and concludes that the proposal is in accordance with those provisions.

The next section of the assessment is a description of potential effects on the environment. The only effects referred to in this section are those arising from non-compliances with the District Plan. In fact, the document does not identify completely the areas of non-compliance.

The assessment of effects concludes with an assessment against the provisions of the Resource Management Act. In relation to s 94 the document states:

> With regard to the need for written approval from potentially affected persons; there are effectively none for the reason that the proposal is utilising

the opportunities provided for the site under the district plan as a controlled activity to the extent provided for. The proposed non-compliance's are specifically provided for by the district plan and are proposed to completely compensate in accordance with the principles applied to this by the district plan. Therefore the result will be in accordance with what any person examining the district plan could be expected to envisage is possible on the site.

Also the activity is essentially a controlled activity.

With regard to the proposed non-compliance's; these are expected to have minor if any adverse effects on the environment. In fact beneficial effects are expected.

Therefore the preconditions for processing this application without notification have been met.

Annexure D is a series of photographs of the site and its surrounds. Also annexed to the application was a report from a consulting traffic engineer.

What is notable about the assessment of effects, is that in terms of effects on the environment, the only issues addressed are non-compliance with the parking requirements and with a service lane designation. The latter non-compliance arose because the building was shown as occupying a portion of the site which was subject to a service lane designation. As to parking requirements, the description of effects referred just to the number of spaces and the proposal to deal with shortfall in the form of cash in lieu.

The nature of the consents required

The first stage in the inquiry as to the proper application of s 94 is to ascertain what consents the proposal requires. That inquiry in turn requires in this case, an examination of two plans – the Transitional Plan, which is a plan applying specifically to the East Coast Bays planning district, and the proposed District Plan, which is a plan applying to the whole of North Shore City. The Transitional District Plan was prepared under the provisions of the Town and Country Planning Act 1977. The proposed District Plan has been prepared under the provisions of the Resource Management Act. Both plans need to be considered.

Under the Transitional Plan it was the plaintiffs' contention that the following consents were needed.

(1) Controlled activity for the building (essentially a design issue).
(2) Discretionary activity with regard to the outlook living court, and landscaping.
(3) Discretionary activity with regard to provision of parking spaces and cash in lieu of parking spaces.
(4) Non-complying activity consent for infringement of the ten metre yard requirement for residential accommodation.

Under the proposed plan the plaintiff alleges that the development requires consent for:

(1) Discretionary activity with regard to the provision of parking spaces and cash in lieu.
(2) Controlled activity as the proposal is a new activity and is located with a buffer strip.

(3) A non-complying activity consent as a comprehensive development is required as the area of the site exceeds 2000 square metres, but none has been supplied. (The contention that a non-complying consent was required was abandoned in the course of the hearing.)
(4) A discretionary activity with regard to landscaping.
(5) A discretionary activity consent in respect of earthworks.
(6) A consent in relation to building over designated land.
(7) A discretionary activity consent as the proposal is expected to generate in excess of 100 vehicle movements per day.

The first defendant acknowledged that discretionary activity consents were needed. It did not agree that any consent was needed under the Transitional Plan with regard to outlook, living court and landscaping. Under the proposed plan the first defendant agreed that discretionary activity consents were needed in respect of parking, site works, and vehicle activities exceeding 100 vehicle movements per day, and a controlled activity resource consent because the activity was in a buffer zone.

The second defendant admits that under the Transitional Plan the consents alleged by the plaintiff are required, but says in relation to the proposed plan that the only consents needed are discretionary consents in relation to the parking spaces, the earth works, and the generation of in excess of 100 vehicle movements and a consent to build over designated land.

For the purpose of these proceedings the differences between the parties as to the consents required is not of fundamental importance. What is important is that all parties agree that discretionary consents are required.

There was a difference between counsel as to the extent of Council's discretion in relation to the discretionary activity consents required. The resolution of this difference is essential to a determination of these proceedings. I will return to this issue later in this judgment.

The Council's Decision

Council was required to make a decision in terms of s 94 of the Resource Management Act 1991. Subsections (2), (4) and (5) are relevant. They provide as follows:

> **94. Applications not requiring notification —**
>
> . . .
>
> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and –
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

. . .

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

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

The East Coast Bays Community Board Planning Committee first considered the application on 27 November 1997. It appears that there were no reports available to the Committee at this meeting but the chairperson explained that a decision on the notification issue could not be made until landowners' consent was decided. The issue of landowners' consent arose because part of the land the subject of the application was owned by the Council and there was a proposal for a land swap between the developer and the Council. On that day the following resolution was passed:

> That the full East Coast Bays Planning Committee make the decision on notification or non-notification and in either event the full Committee consider the Resource Consent application at the appropriate time.

The matter was next considered on 3 December 1997. Once again no report was before the Council and members asked why this was so and why there was not a planner present. After a brief adjournment, members were advised that the specialist development planner had been instructed by his manager not to attend the meeting and that no report had yet been written.

Mr Crosson, the applicants' architect, was in attendance and is reported as having answered members questions. The Council resolved with one recorded dissent that the Resource Consent application be:

> A non-notified application pursuant to s.94 of the Resource Management Act 1991 for the following reasons:
>
> (1) That the effects are no more than minor.

The Committee met to consider the matter again on Monday 19 January. It had before it a letter from Mr Holmes, a member of the Committee, to the area manager requesting further information. Mr Holmes noted that it appeared that the only information the Committee had received as at the date of the first meeting as to any possibly affected parties, was that contained in the application itself (in fact the application contained no reference to possibly affected parties) and verbal assurances from the applicant's architect. He asked questions concerning affected parties and the impact of the development. He received quite an extensive reply from Mr Andrews, the specialist development planner. Mr Andrews reviewed the situation and advised Mr Holmes that he would have recommended that the application be notified for three primary reasons.

(1) That there were no consents from the lessees of the development site.

(2) That there had been no consultation.
(3) That there could be special circumstances under s 94(5) because through notification a range of issues both positive and negative could be raised to help the Committee in the next phase of its consideration under ss 104 and 105.

At that meeting the Committee were told that the application itself was on hold awaiting further information and that a petition had been received relating primarily to the height of the development, but also to the whole development. Information provided during the hearing suggests that the petition had about 4000 signatories.

It was moved and seconded that in the light of new information the Committee should review its decision. The resolution eventually passed by the Committee was:

> That the motion standing in the names of members Holmes and Barry lie on the table pending receipt of advice from the Chief Executive Officer regarding procedures available to the Committee. This may include legal opinion if deemed necessary by the Chief Executive Officer.

A Committee member asked for the planner to provide a list of those parties deemed affected by the application. The meeting reconvened on Tuesday, 20 January when members were advised that a legal opinion had been received.

After a discussion with the public excluded, the meeting was reopened to the public and the motion in the names of members Holmes and Barry was discussed. The minutes disclose the following matters.

(1) The specialist development planner was asked who was deemed to be affected by the proposal. He advised that there was no list of those deemed to be affected, that prior to the application being lodged, the applicant was asked to consult with the Browns Bay Business Association, Council as adjoining owner and adjoining landowners. No written approval was asked for by the planners.
(2) That when the application was lodged the specialist development planner was advised by the applicant that they had not undertaken any consultation. Arguments were put forward as to why they had not and were not prepared to consult.
(3) The specialist development planner said that any adverse effects could well be mitigated by conditions, and the only one that he had reservation about was that of traffic and carparking.
(4) When asked if he still thought the application should be notified, he answered, yes.

The minutes record that the specialist development planner was then asked the following questions:

> Is it right to state that any building in Clyde Road could actually go to a 15 metre height limit?
>
> Yes.
>
> Any building between Clyde Road and Beachfront Lane could have a residential component in it and could that component be as much as say 95 per cent?

> Yes.
>
> Is the height a consideration in determining notification? This is not an issue as it is provided for in both the proposed District Plan and the Transitional Plan.

The motion to review the decision was put and was lost. It is to be noted that the resolution then extant was that passed on 3 December 1997. Mr Loutit, for the Council, acknowledged that that resolution was not an effective one because the Committee considered only one part of the test under s 94(2). It concluded that the effects were no more than minor but it did not consider the question as to whether any person was adversely affected, and if so, whether they had given written approval or whether it would be unreasonable to require such approval.

In my view Mr Loutit's concession was rightly made. The Committee has failed properly to understand what was required of it by s 94. Its resolution did not address the matters required by that section, in particular, there is no evidence whatsoever that the Committee made a determination as to what persons, if any, were adversely affected by the application.

Subject to the exercise of discretion the plaintiff would be entitled to the first order it seeks in relation to the resolution of 3 December. That leaves open though, the possibility, that the Committee may have remedied that defect during the course of their deliberations on 20 January. It is clear that on that day the question of whether there were persons adversely affected was given some consideration, although the earlier resolution was not amended to indicate what decision the Committee came to on that issue or whether it ever made a decision on the point. But there is another respect in which it appears that the Committee's decision making process was flawed. The Committee was advised that the height of the building was not an issue as it was provided for in both the Proposed District Plan and the Transitional Plan. On the basis of the finding I make later in this judgment as to the discretion available to a Council in considering a discretionary activity application, this advice was clearly wrong. Council could consider the question of height when it came to consider the resource consent application and it was, therefore, a relevant consideration in exercising discretion under s 94. I will return to this point later in this judgment, but for present purposes it is sufficient to note that for the above two reasons, it is my view that the 20 January resolution did not cure the defect that I have identified in the resolution of 3 December.

The non-notification application was again before the Committee at its meeting of 20 and 23 February.

On 20 February Council's legal advisor was present and so too was Mr Cavanagh, QC on behalf of the applicant. The minutes record Mr Cavanagh as having advised the committee that the developer was entitled to rely on the building envelope contemplated by both the Transitional and Proposed Plans and that the only issue requiring an assessment by the committee was the question of parking. He said that there was no basis whatsoever for notification and that the issue of concern to residents related to the maximum height which both plans permitted. He invited the committee to consider the matter solely on the

basis of the recommendations received in technical reports from Council's own officers. So far as I can ascertain from the papers the only report before the Committee at that stage was the letter from Mr Andrews, already referred to.

Mr Cavanagh went on to acknowledge that the shop tenants of the existing building were affected, but produced a plan which they had signed and submitted that any affect on them must be ignored. In that respect Mr Cavanagh was clearly correct in terms of subs (4) of s 94.

As to parking, Mr Cavanagh submitted that that could be dealt with by a cash in lieu payment.

Mr Cavanagh confirmed his advice to the Committee in a letter of 21 February which was faxed to the Council and which it is acknowledged was before the Committee when it passed the resolution referred to below. In that written advice and referring to Council's earlier decision not to notify, Mr Cavanagh said that Council must consider whether adequate grounds existed to enable Council to revisit its decision. He set out reasons for that view and concluded in this way:

> . . . it is my submission that provided the original plan as lodged in the application is pursued no third party is so affected by the application that public notification is required. There is no new information or evidence that has been tendered that would allow the Council to revisit its decision not to notify. It is clear from a discussion I had with Gary Taylor who represents opposing interests that their objection is solely related to the height and bulk of the proposed building and this is an irrelevant consideration in your discretion as to whether or not to notify the application because all issues relating to the bulk of the building meet the requirements of the Plans. For all these reasons I submit that the Council must uphold its original decision not to notify this application.

The question for consideration is whether the Committee acted on the advice that the height and bulk of the proposed building was an irrelevant consideration in their discretion as to whether or not to notify the application.

There are two further matters that should be noted. First, at each of its meetings other than the first one the Committee received advice from its own legal advisors which it considered in the absence of the public. The evidence does not disclose the nature of that advice. Secondly, although members of the public were present and sought the opportunity to address, the Committee refused to hear from them. As a matter of law the Committee was within its rights to hear from the applicant, but not from members of the public. In fact, of course, a Council does not have to have any sort of a hearing before it determines a non-notification application, but it will often be desirable for the application to be further explained by the applicant to assist the Council in making its decision. It is, however, easy to understand that members of the public in such a situation would find it difficult to appreciate why the applicant and its Counsel should be heard while no similar opportunity was given to them.

The Committee adjourned the meeting to 23 February. On that day it passed the following resolution:

> RESOLVED: (McCulloch/Parfitt)

THAT THE MEETING BE OPENED TO THE PUBLIC AND THE RESOLUTION UNDER ITEM CEP. 1 BE TRANSFERRED ONTO THE OPEN REPORT

THE RESOLUTION IS AS FOLLOWS:

THE COMMITTEE RECOGNISES THE SIGNIFICANCE OF THIS APPLICATION FOR BOTH THE COMMUNITY AND THE BROWNS BAY COMMERCIAL AREA.

THE COMMITTEE FURTHER RECOGNISES THAT BOTH THE TRANSITIONAL AND PROPOSED DISTRICT PLANS PROVIDE FOR THIS TYPE OF APPLICATION WITHIN THE OBJECTIVES, POLICIES AND RULES.

THE COMMITTEE HAVING CONSIDERED THE MATTER ON THREE OCCASIONS, HAVING EXAMINED ALL DOCUMENTATION, AND HAVING TAKEN LEGAL AND PLANNING ADVICE, AND IN THE ABSENCE OF NEW INFORMATION, HAS AGREED NOT TO REVIEW ITS DECISION ON NOTIFICATION BASED ON THE FOLLOWING REASONS;

(1) THE EFFECTS OF THE APPLICATION IN TERMS OF SECTION 94(1) OF THE RESOURCE MANAGEMENT ACT 1991 WILL BE NO MORE THAN MINOR AND

(2) THAT BOTH THE TRANSITIONAL AND PROPOSED DISTRICT PLANS PROVIDE FOR THE HEIGHT, BULK AND LOCATION OF THE APPLICATION AND IT IS THEREFORE ESSENTIALLY A COMPLYING ACTIVITY; UNDER SECTION 94(2) OF THE RESOURCE MANAGEMENT ACT 1991 THERE ARE NO NEIGHBOURS DEEMED TO BE ADVERSELY AFFECTED BY THE PROPOSAL. (IT IS HOWEVER NOTED THAT WRITTEN CONSENTS OF THE TENANTS HAVE BEEN PROVIDED). AND

(3) GIVEN THAT BOTH THE TRANSITIONAL AND PROPOSED DISTRICT PLANS CONTEMPLATE THIS TYPE OF DEVELOPMENT, THE APPLICATION CANNOT BE CONSIDERED AS "SPECIAL CIRCUMSTANCES" UNDER SECTION 94(5)C OF THE RESOURCE MANAGEMENT ACT 1991.

It will be seen that that resolution addressed both legs of s 94(2). At the time of that resolution the Committee had before it reports from its traffic engineer, its development engineer and its senior urban design planner. Those reports had been prepared for consideration of the consent application, but were available to be taken into account on the non-notification application.

I noted above that it was important to attempt to ascertain whether the Committee had accepted Mr Cavanagh's advice. The second and third reasons would suggest that they had, but consideration should also be given to the report from their planner which had been prepared for the purpose of committee's deliberations under ss 104 and 105 of the Act, but which it is said was also taken into account for the purpose of its s 94 decision.

I have read that report and its recommendation that consent be granted. The first reason given for granting the application is that the bulk and height of the development complies with the development controls

contained within the District Plan. That is certainly a relevant factor in determining whether or not the application should receive consent. However, what is important is that nowhere in the report is there advice to the effect that the Committee should treat the bulk and location provisions applicable to permitted activities as a guide rather than as determinative of what should be allowed. Taking into account the specialist development planner's answers to questions on 20 January and Mr Cavanagh's advice on 20 February, I conclude on the balance of probabilities that when, on 23 February, the Committee confirmed its decision not to notify, it did so on the basis that the height and bulk of the building were irrelevant to a consideration of the effects of the proposal on the environment.

Discretionary Activity Consents – The nature of the Council's discretion
Earlier in this judgment I noted that there was a difference between counsel as to the extent of Council's discretion when determining a discretionary activity application.

A determination of this issue is necessary before considering the discretion exercised by the Committee under s 94.

Mr Brabant submitted that a discretionary activity is wholly discretionary and this means, for example, that Council can decide that a building which might be allowed in terms of height and bulk if it were a permitted activity could be refused as a discretionary activity. Mr Loutit conceded that that was so. However, he submitted that a distinction must be made between the discretion exercised under s 94(2) and that exercised under ss 104 and 105. He pointed out that the decisions on the subject relate to the granting or refusal of resource consent rather than a consideration of whether the application should be publicly notified. He submitted that in making an assessment under s 94(2) a consent authority cannot ignore the provisions of the District Plan which permit the height and bulk of a particular proposal. Mr Cavanagh, QC for the second defendant maintained that on consideration of an application for discretionary consent the Council should concern itself only with those matters in respect of which the consent was required. The consequence of that would be that in the present case the height and the bulk of the building should be disregarded because a building of that height and bulk could be erected as of right, as a permitted activity. He submitted that to use the bulk and location rules as a guide would undermine the District Plan.

There is no doubt that under the Town and Country Planning Act 1977 the approach contended for by the plaintiff was the correct one. That was settled as long ago as 1973 in *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17. That case dealt with an application for conditional use consent which was the equivalent to a discretionary activity consent under the present legislation. Cooke J as he then was, held that a use is either wholly predominant or wholly conditional. In that case the only non-compliance was in relation to a side yard. The ordinances provided that any predominant use which did not comply in respect of bulk and location was deemed to be a conditional use. At p 22 His Honour said:

> The Board evidently acted mainly on the view that it was only concerned with any detraction from the amenities that might result from the

> non-complying side yard. In my opinion that approach is not warranted as a matter of interpretation of the Act and the ordinance. I agree with counsel for the City that a use is wholly predominant or wholly conditional. The hybrid concept would add an unnecessary complication to legislation already sufficiently complicated and it would tend to limit rights of objection. In a case of ambiguity the legislation should not be so construed. On a conditional use application the fact that there is only minor non-compliance with predominant use requirements is a relevant consideration but it is neither exclusive nor necessarily decisive.

Mr Cavanagh, whilst acknowledging that that was the position under the Town and Country Planning Act argued that a different approach should be taken under the Resource Management Act. In fact the Environment Court has determined that the approach taken in *Locke* is appropriate under the Resource Management Act. *Locke* was considered and adopted as a basis for the Environment Court's decision in *Rudolph Steiner School v Auckland City Council* [1997] 3 ELRNZ 85. That case concerned the validity of a condition of consent granted for the erection of a school hall and gymnasium. Resource consent was not needed for the use of the site for those purposes. Discretionary activity consent was required only because part of the building roof exceeded the maximum building height control by some 2 metres. The challenged conditions did not relate to the building itself but to the use that might be made of it once erected. The conditions imposed restrictions on the nature of the activities for which the building could be used and the hours of that use. The Court upheld the conditions and relying on *Locke* said:

> A non-restricted discretionary activity is wholly discretionary and in exercising the discretion to grant or refuse consent and to impose conditions a consent authority is to have regard to all the matters listed in s.104(1) that are relevant in the circumstances. – pp 3, 4, 87.

It is important to appreciate that in this case the proposed plan provides that an activity is eligible for permitted activity status subject to compliance with all the controls specified in the plan. A discretionary activity consent is required because in this case the proposal does not comply with all the controls in the plan.

At issue is whether the Resource Management Act should permit what Cooke J described, as a "hybrid activity" or whether, as Judge Shepherd has held in *Rudolph Steiner* a non-restricted discretionary activity must be wholly discretionary.

I have concluded that Judge Shepherd is right and that the position under the Resource Management Act is the same as it was under the Town and Country Planning Act. Indeed, the arguments in favour of that approach are stronger under the present legislation. This is because specific provision is made for a restricted discretionary activity. In respect of such an activity the Council's discretion may be restricted to matters specified in the plan or proposed plan for that activity. In the case of a non-restricted discretionary activity Council's discretion is not so limited. The distinction is clear from a consideration of s 105(1)(b) which provides:

> **105. Decisions on applications** — (1) Subject to subsections (2) and (3), after considering an application for –
>
> . . .
>
> (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108. Provided that, where the consent authority has restricted the exercise of its discretion, consent may only be refused or conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion.

Mr Cavanagh's argument is correct in relation to a restricted discretionary activity but obviously the legislation treats non-restricted discretionary activities differently.

Under s 104 a consent authority is required to have regard to a wide range of factors including, "any actual and potential effects on the environment of allowing the activity" and the provisions of any plan or proposed plan. The exercise of discretion under s 104 is subject to Part II of the Act which contains the Act's purpose and lists matters of national importance and other matters that must be considered in giving effect to that purpose.

In the passage quoted above from *Locke* Cooke J referred to two factors which supported his view that an application should be either wholly predominant or wholly conditional. Each of those factors has even more force under the Resource Management Act. The first of the factors was that a hybrid concept would add an unnecessary complication to legislation already sufficiently complicated. Some would argue that compared with the Resource Management Act the Town and Country Planning Act had an appealing simplicity. There is no doubt that the Resource Management Act is more complex legislation. Equally as important, the plans being prepared under that Act have in general terms a much greater degree of complexity than plans under the Town and Country Planning Act.

The second factor referred to by Cooke J was that the hybrid concept would tend to limit rights of objection. As Elias J has pointed out in *Murray v Whakatane District Council* [1997] NZRMA 433, 467:

> Section 94 provides an important exception to the general rule implemented by s 93 and underscored by s 105(5) that notice must be given for resource consents. The scheme of the Act is for notification in accordance with s 93 unless the application comes within the terms of s 94. The requirements of notice and the wide rights of public participation conferred as a result are based upon a statutory judgment that decisions about resource management are best made if informed by a participative process in which matters of legitimate concern under the Act can be ventilated. Section 94 must be assessed in the light of that general policy.

In my view it would be contrary to the scheme of the Act to limit rights of objection any further than the provisions of the Act permit. The introduction of the "hybrid concept" for which Mr Cavanagh contended would have the result of limiting rights of objection.

An Analysis of s 94(2) and the Committee's Decision

For convenience I set out again the provisions of subs (2) of s 94:

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

The making of a decision under that subsection is a two-stage process. The Council must first be satisfied that the prerequisites of paras (a) and (b) exist. If it is so satisfied it must then exercise a discretion whether or not to require notification.

Paragraph (a) of subs (2) requires the consent authority to be "satisfied" as to the matters set out. That requires the committee to be free from doubt or uncertainty or convinced of that state of affairs. It is reasonable to conclude that rightly or wrongly the committee was so satisfied. The paragraph uses the word "minor". In relation to that word, which is not defined in the Resource Management Act, I accept the approach of Williamson J in *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433, 445 that it means:

> Lesser or comparatively small in size or importance. Ultimately an assessment of what is minor must involve conclusions as to facts and the degree of effect. There can be no absolute yardstick or measure.

I accept too, that in assessing whether there is an adverse affect on the environment of the activity, a conclusion must be drawn after weighing the mitigating effects of beneficial aspects of the development and conditions proposed.

A key question in this case is what is relevant when considering the "environment". Quite apart from the issues already referred to arising from the decisions in *Locke v Avon Motor Lodge* and *Rudolph Steiner School v Auckland City Council* it is important to determine whether the expression "environment" can include what might be built "as of right" in terms of the District Plan.

I have concluded that in context the phrase "effects on the environment" must refer to the existing environment. The definition of "environment" in the Resource Management Act is as follows:

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

A keyword in the definition is "amenity values". That term is itself defined as follows:

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

The emphasis of the latter definition is on existing conditions. Clearly, the environment will change as an area undergoes development and redevelopment. Just because a plan allows the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made an overall exercise of discretion under ss 104 and 105 and application of the principles in *Locke* and *Rudolph Steiner* could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.

On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists. The "activity for which consent is sought" is in the present instance the building that is proposed not just those aspects of the development which have had the effect of requiring a discretionary activity consent. That follows both from the plain wording of the rules in the plan and from the principle defined in *Locke*. It is also the approach taken by the second defendant because the application itself describes the activity as –

> Establishment of an apartment building in accordance with the plans and assessment of effects on the environment attached to and forming part of this application.

In my view this approach to the meaning of the term "environment" is supported by three considerations:

(1) The scheme of the Act.
(2) Existing case law.
(3) Simplicity of application of the Act.

1. The Scheme of the Act

A comparison needs to be made with what the Council is required to take into account under s 94(2)(a) and the matters to which it must have regard under s 104. Subsection (1) of s 104 provides as follows:

> **104. Matters to be considered** — (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –
>
> (a) Any actual and potential effects on the environment of allowing the activity; and
> (b) Any relevant regulations; and
> (c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and
> (d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and

(e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and
(f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
(g) Any relevant water conservation order or draft water conservation order; and
(h) Any relevant designations or heritage orders or relevant requirements for designations or heritage orders; and
(i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

It will be noted that the first of the matters to which the Council must have regard under s 104 is "any actual and potential effects on the environment of allowing the activity". To that extent there is a similarity with the requirement of s 94(2)(a). But there follow in s 104 a number of other matters to which regard must be had including, the objectives, policies, rules, or other provisions of a plan or proposed plan. It is under that head that it is appropriate for the Council to consider and use as a guide the development rules applicable to permitted activities.

An interesting example of the contrast between an assessment of effects and the application of the provisions of the plan appears in the decision of the Planning Tribunal in *Vose v Auckland City* (1993) 2 NZRMA 373. The case concerns s 104 rather than s 94. A building under construction, although complying with the bulk and location requirements for predominant uses was considerably higher than other residential buildings in the immediate neighbourhood. The appellant wished to use the premises for a boarding-house which was a discretionary activity. In considering the question of effects the Tribunal found that the building was unneighbourly because of its height and bulk and that although it met the bulk and location requirements for permitted uses, it would have adverse effects on the amenities of the neighbouring properties.

In exercising its discretionary judgment the Tribunal noted that the District Plan permitted the building and if not used for a boarding-house, it could be used for permitted activities. It concluded that the adverse effects on neighbouring amenities would occur regardless of whether it was used as a boarding-house and that in those circumstances on balance refusal of consent would not be justified.

The important thing to note about that conclusion is that it was reached exercising the discretionary judgment given by s 105 and taking into account the matters referred to in s 104. By contrast, the only inquiry under s 94(2)(a) is whether the adverse effect on the environment of the activity will be minor.

2. Case Law

In relation to a similar phrase used in s 105(2)(b)(i) the Environment Court in *Hanton v Auckland City Council* [1994] NZRMA 289, 307 said that although the use of the word "minor" implies a comparative judgment of degree it had found nothing in the section to indicate a comparison with the effect of permitted uses on the environment. It held that judgment had to be made in the circumstances as they exist.

A similar approach in relation to s 105(2)(b) was taken in *Neil Construction Ltd v North Shore City Council* (decision W 136/95).

3. Ease of Administration

As well as being contrary to the apparent purpose of the Statute the task of Councils or those to whom authority is delegated in considering applications under s 94 would be made much more difficult if it was necessary to take into account all matters which are separately provided for by s 104.

I have concluded that a proper application of s 94(2)(a) requires the consent authority to consider all aspects of the activity proposed and the effects of that activity on the existing environment. Such an approach is consistent with not limiting rights of objection to any greater an extent than is justified by the words of the Act and to giving effect to the intent of the Act which as Barker J said in *Ports of Auckland v Auckland Regional Council* [1995] NZRMA 233, 238 favours interested persons having an input into the decision making process.

Tested against the findings as to the law made in this judgment, and the finding of fact that the Council made its decision on the basis that the height of the building was irrelevant, the Council's decision is flawed.

For the purposes of the s 94(2)(a) assessment the height of the building is relevant as indeed, is every aspect of the activity in so far as it has an effect on the environment. Whether that effect is more than minor is a question for assessment. It is not an assessment that it is appropriate for this Court to make. Relevant to that assessment will be the conclusion of the Council's senior urban design planner that:

> This building does not at present propose a good relationship with its wider context. This makes it marginal in its long-term contribution to the amenity of the beachfront area as well as uncomfortable in the short term juxtaposed against development of a significantly lower scale.

He goes on to refer to significant positive aspects and these will need to balanced in a determination as to whether the effect on the environment is more than minor. Similarly, the effect of proposed conditions will be relevant in that regard.

The error in relation to para (a) also impacts on the Council's finding in relation to para (b). In order to determine whether there are persons adversely affected whose written approval should be obtained, it is, of course, necessary to be aware of the effects that are relevant for the purpose of that assessment. It will be necessary, therefore, for Council to consider again the question as to what persons (if any) "may be adversely affected by the granting of the resource consent", in the light of what it concludes are the effects of the activity. Once again, in making the assessment under para (b) the mitigating effects of proposed conditions need to be taken into account.

The findings I have made make it unnecessary to consider whether or not subs (5) of s 95 applies in these circumstances. Council's will find it of assistance to consider the observations of Elias J at page 468 of the *Murray* decision.

Further Matters Raised by the Plaintiffs

The plaintiffs allege that the assessment of effects was inadequate and did not fully address relevant matters. It claimed that as a consequence the first defendant was influenced by a material error of law and a material factual error. I find it difficult to see how an inadequate assessment of effects could have the first mentioned result, although it is possible to see how the Council might be influenced factually.

In any case, the inadequacies of the assessment of effects are in large part due to the failure to appreciate what effects were relevant. I have no doubt that the Council will wish the applicant to review its assessment of effects in the light of the findings in this judgment.

It is also alleged that the decision not to notify was influenced by a material factual error because no attempt had been made to consult. This lack of consultation is also said to go to the question of the reasonableness of the decision. Mr Brabant conceded that there was no legal obligation on either the Council or the applicant to consult and the lack of consultation does not, in my opinion, raise issues of unreasonableness.

However, the assessment of effects does seem to me to be inadequate because it does not identify those persons interested in or affected by the proposal or the consultation undertaken or any response to the views of those consulted. Those are all matters which in terms of the Fourth Schedule to the Resource Management Act should be included in an assessment of effects on the environment.

Exercise of Discretion

As has been frequently observed, it does not follow from the fact of illegality in the decisionmaking that the decision will be set aside. As Elias J said in *Murray* at p 479:

> Matters relevant to the determination of the Court as to the form of relief will include the gravity of the error and its effects upon the applicant, the inevitability of the same outcome or the futility of granting relief, and questions of delay and prejudice to third parties.

Mr Cavanagh raised a number of issues relevant to the exercise of discretion. The most important was his submission that it was inevitable that the same outcome would be achieved if the matter was referred back to the Committee. A conclusion that that was so would require this Court to reach findings in the factual and planning discretion areas which would be entirely inappropriate. This is a matter where the seriousness of Council's failure is such that the matter should be referred back so that proper consideration can be given to the question of whether the application should be notified.

Relief

As indicated earlier in this judgment, two orders are sought by the plaintiffs. I make a declaration that the decision of the first defendant (made under delegated authority) not to notify the application of the second defendant is invalid.

The plaintiff also seeks an order requiring the first defendant to publicly notify the application for resource consent. Elias J made such an order in *Murray*. I do not consider it appropriate to do so. The

circumstances which have led to relief being granted in this case are quite different to those which faced Elias, J. In this case the Council has misunderstood the extent of its discretion under subs (2) of s 94. In reconsidering the matter the Council will need to make findings of fact and planning judgment. It may need to have recourse to subs (5), but that will be a matter for consideration in the circumstances as the Council finds them to be. Accordingly, I have concluded that in this case I should not make the second order sought by the plaintiff.

There remains the question of costs. In that regard I invite written submissions from the parties.