

ORIGINAL

Decision No. W 8/94

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of an appeal pursuant to
s.120 of the Act

BETWEEN SHELL OIL NEW
ZEALAND LIMITED

(RMA 54/93)

Appellant

AND AUCKLAND CITY
COUNCIL

Respondent

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge S E Kenderdine (presiding)
Mr P A Catchpole
Mr F Easdale

HEARING at AUCKLAND on the 1st, 2nd and 3rd days of September and the 1st
day of October 1993

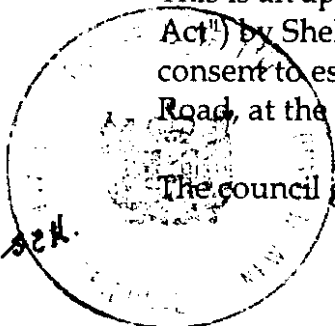
COUNSEL

Mr G Harrison for the appellant
Mr J M Savage for the respondent
Miss S J Simons for BP Oil (NZ) and the Pagani Clothing Company
Mr M D Gifkins for the Carrick Place Residents' Group
Mr P Lange on his family's behalf and behalf of the residents of Carrick House

DECISION

This is an appeal brought under s.120 of the Resource Management Act 1991 ("The Act") by Shell Oil NZ Limited ("Shell") against refusal by the respondent of consent to establish a service station and other facilities at 184 to 196 Dominion Road, at the corner of Carrick Place, Mt Eden, Auckland ("the site").

The council gave the following reasons for its decision:



- "1. *Granting the consent to the application would be contrary to the objectives policies and the rules of the district plan.*
2. *The actual potential effects of light spill from the proposed activity would have a more than minor adverse effect on the surrounding residential environment.*
3. *The character and visual effect of the proposed development is inconsistent with the adjoining commercial and residential development and would have a more than minor adverse effect of the amenities of the neighbourhood.*
4. *The proposed service station development is a non-complying activity in the Commercial 1 Zone and in the absence of any special or unusual circumstances, consenting to the application would have adverse potential effects in public confidence in the consistent administration of the District Plan and the maintenance of the essential interrelationships between provisions."*

This appeal has followed.

The land the subject of the appeal comprises an area of 1915 square metres comprising Lots 1, 2 and 3 DP 182 and is zoned Commercial 1 in the Auckland Transitional District Plan.

The Site And Locality

This site is rectangular in shape with a frontage of 50.3 metres, a depth of 38.0 metres. It is presently a vacant lot, previous buildings on the site having been demolished sometime ago. The site has one frontage only, the end of Carrick Place having been stopped to exclude both legal and physical access to the site.

It is located on the south corner of the former Carrick Place intersection with 184 - 196 Dominion Road, Mt Eden, a short distance north east of the Dominion Road intersection with Valley Road, and slightly to the north of the Valley Road commercial area which is characterised by commercial business premises. The somewhat bulky building immediately to the south of the subject site is occupied by the Pagani Clothing Company and consisting of a shop frontage and an attached industrial workshop set back to the rear of the site. It has no verandah on its street frontage.

At the rear of the site situated at a lower ground level is a recent retirement unit development (Carrick Grove Retirement Village) comprising of 10 individually owned units. There is a driveway of approximately 3.5 metres wide running down the boundary of the site from a crossing on Carrick Place which provides access to garaging and manoeuvring space for the residents. The garages abut the service station boundary with a 6 metres boundary wall. Beyond this point there are four units set between 14 and 7 metres back from the boundary, with their outdoor living spaces facing towards the site. Approximately 16 metres of the common boundary of the service station adjoins the outdoor living courts which are partially screened by trees. Six of the units are distributed along the boundary

of the site. The remainder of Carrick Place contains residential buildings and a small reserve.

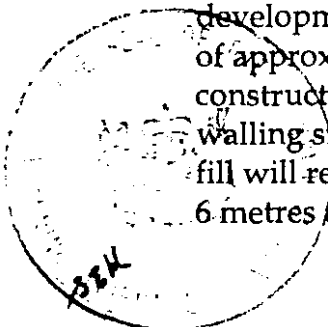
The northern limit to the Dominion Road commercial centre is defined by Carrick Place to the east and Onslow Road to the west. Some of the commercial buildings are in the neo-Edwardian architectural style. Others are of more recent design. The closed end of Carrick Place is now zoned Recreation 3 and contains six car-parks. The land to the north is zoned Residential. Opposite the site to the north of the closed road the corner property, a former residential home is used for offices. The remaining residential properties on the north side are elevated above the service station site and overlook Carrick Place and the site itself. Some of these are being restored. Further north again, on Dominion Road is the Bellevue Reserve containing a number of large trees on the street frontage. Further to the east on Carrick Place are further residential properties which have their outlook towards Dominion Road. East of the site, towards the Carrick Place Reserve, the dwelling houses are characterised by their old villa-type architecture. In the commercial area on the western side of Dominion Road, opposite the site, the shop frontages are characterised by rounded verandah frontages with a small landscaped strip set back on western side of Onslow Road. Behind this group of shops is situated a large car-park. Residential dwellings on the west side of Dominion and Onslow Roads are characterised by buffer planting to the road edges.

The Proposal

Shell previously operated a service station on the western side of Dominion Road, 400 metres north of the intersection of Balmoral Road and we had evidence that options for development other than on this site are extremely limited elsewhere in the area.

This proposal will face Dominion Road with a six lane toll style gate forecourt serviced by two crossings 9 metres wide. The partial white concrete block building will be covered by a T-shaped canopy some 26.0 metres in length and 10.5 metres in width and comprises some 200 square metres consisting of a store room, staff offices, toilets and a Circle K Convenience Store of 120 square metres. This will be situated 10-12 metres back from the rear boundary. The service station building and convenience store is also located on the southern boundary approximate to the Pagani Clothing Company. A butt glazed building located on the boundary parallel to Carrick Place will house a fully automatic car wash machine. There will be associated car-parking and ancillary storage facilities; adjacent to the building is an enclosed rubbish bin compound. It is proposed to operate the service station 24 hours a day.

The site has a crossfall from Dominion Road to its south eastern boundary and any development of the property will therefore require levelling filling and retention of approximately 3 metres is proposed in the south eastern corner contained by constructing a landscaped batter over a width of 6 metres with a portion of crib walling situated opposite the existing retirement village carport. The height of the fill will reduce towards Carrick Place with the landscape strip reducing from 6 metres to a minimum width of 3 metres. It is proposed to fully landscape all the



boundaries of the site including that adjoining the car wash building with large specimen trees. Across the front of the service station the landscaping on the corner and along the frontage is ground cover to protect sight lines into the crossings from Dominion Road. A two metre high fence is proposed along the boundary of the retirement village and during the hearing it was proposed that screen planting would also be provided on the village side of this fence. The forecourt under the canopy plus the remainder of the surface materials will be cobblestone. The layout of the service station described by Mr G Lane, Shell's Retail Development Manager, Northern Region, is virtually identical to that of 20 other sites constructed in the Auckland region since 1988 some of which are familiar to the Tribunal. However, Mr Lane gave evidence that Shell has introduced a new signage regime for service stations known as R.V.I, (Retail Visual Imaging). This requires a single prime sign with a height of 7.0 metres replacing a pole sign of 9.0 metres and a price board at 3.0 metres. Its location has been shifted from the Carrick Place boundary to a position in the landscaping strip directly opposite the main building next to the Pagani Clothing Company. Two poster boards are to be installed on the landscape strip along Dominion Road and an illuminated entry/exit sign will identify the locations of the vehicle crossings. On the service station canopy, the red band is eliminated and the strip lighting consequently becomes more yellow dominant. The word "Shell" remains as previously, whilst the Circle K colour banding along the shopfront is also eliminated and replaced with an illuminated K logo installed above the shop entrance.

It is not proposed that LPG and CNG facilities will be offered at the site. Mr Burton gave evidence also that Shell is in the process of having the service lane designation uplifted, the council having resiled from its earlier position that it is unwilling to do so in the light of possible future commercial development taking place on the site. Mr Harrison in his opening submission advised that the council had confirmed that in the event of this appeal being allowed the designation will be uplifted.

The Resident Objectors

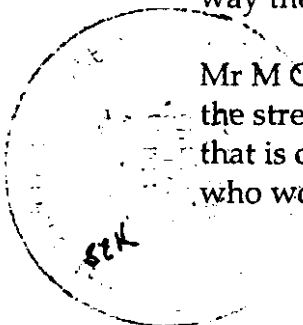
The appeal was challenged by a number of residents and their representatives. Mrs J Ayres a resident of one of the retirement units and who suffers from a heart disorder stated she would be "in fear of her life" on her daily trip to the shops or the bus stop. The witness explained that there is only one route to the shopping centre from where she and the other residents live and with a service station on that site they would need to pass two large vehicle crossings interrupting their passage. Mrs Ayres explained that because Dominion Road is exceedingly busy and at times there is large traffic build up at the lights, vehicles exiting the site will have to move rapidly alarming pedestrians. Her plea was for the safety of the old, children by themselves, and a group of ex-psychiatric patients located in Carrick House in Carrick Place. Mrs June Head who owns the western-most unit fronting Carrick Place objected because her kitchen, living and bedroom windows look out over the site. She considered the impact of the service station to be unreasonable, that the noise and visual impact would ruin her lifestyle, that she would not have privacy as the service station would operate 24 hours a day, seven days a week.

The witness was fearful that the illuminated canopy would throw indirect light into her property and be a visual intrusion. She also considered the location of the car wash on the northern section of the site meant it would be located immediately above her property and be visible from her living area window and front yard, causing noise, and glare from headlights.

Evidence was given by a Mr Peter Lange who lives at 16 Carrick Place. He spoke not only on his own and his family's behalf but also those who lived at the psychiatric half-way house "Carrick House" situated at 18 Carrick Place as a Trustee Elect of the Eden Trust Board which runs the facility. Mr Lange spoke of the time when the residential environment of the street was protected acoustically by the row of two storey shops on the site, the three residences and the block of flats and mature trees and which ensured the residents seclusion. He described the Shell proposal as "*a banal, rectilinear, bunker-like complex glowing forever red and yellow to sit next to an interesting and complicated collection of architectural shapes*". He considered that no other building could be less sympathetic to the surrounding architectural character of the area and considered the car wash as a building "*of arrogant and careless design*". He spoke also of recent renovations to the surrounding Edwardian villas particularly to one of the grand two-storey houses characterised by fine architecture which lend a dignity and graciousness to the area. He saw the service station activity almost as industrial than commercial activity which would operated all night and during the day, in close proximity to the residential units, with attendant noise factors. The witness spoke also of the 12 patients at Carrick House who require fulltime supervisors and consistent medication and whose favourite past-time he described as walking - some days all day, just up and down to the Valley Road shops. He described the patients as less nimble and slower in reacting than most and the possibilities of having to negotiate past the vehicle accessways to the site. He spoke also of the 11 children under 10 years of age in Carrick Place who visited the shops. He was of the opinion that the members of Carrick House, the retired people and the children made up an "*unusually high component*" of the residential mix in the area and that they would be disadvantaged by the vehicular activity on and off the site. He spoke also of a recreation centre for the psychiatrically disabled eight houses further up Dominion Road and that there was a lot of pedestrian movement from that source, also to the Valley Road shops.

Mrs S M Newlands a resident who lives opposite the site with her family, spoke similarly and gave evidence of her involvement in effecting the closure of Carrick Place which she saw as creating a barrier to activity and as reinforcing what she saw to be the quiet and self-contained nature of the street. She too, did not see a service station as giving any protection at all to the residents from the traffic activity on Dominion Road. Nor did she consider that the landscaping proposed would afford protection from the 24 hours per day site activities because of the way the houses opposite were elevated with views over the site.

Mr M Gifkins, convenor of the Carrick Place Residents' Group gave a history of the street, the social cohesion and sense of community that exists in the area and that is centred in Carrick Place. He spoke also of the large number of residents who work from home and the adverse community response to some previous



commercial proposals which would have resulted in intrusion on residential amenities. He gave evidence also that the Group is equally critical of the service station development seeing it as intrusive - due to its hours of operation, lighting, and glare, placement of buildings, noise and traffic. He was critical also of any further need for a service station on Dominion Road.

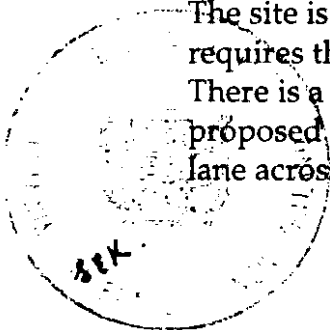
Generally the residents wished for a development on the site which would act as a buffer to the effects of Dominion Road.

DISTRICT PLAN PROVISIONS

Under this heading and before examining the district plan provisions it is pertinent to briefly examine the zoning history of the site. Mr R J Burton, planning consultant for Shell explained that prior to Shell's ownership there has been a proposal by the previous landowner to construct a major commercial building on the site. This did not proceed because of the sharemarket crash. Subsequent discussions between Shell and the Mt Eden Borough Council resulted in the council advertising Proposed Change 53 which sought to zone the site Commercial F (service station) as part of a major upgrade of the borough's commercial zoning strategy. The zoning would have recognised the suitability of the site for a service station. The change was withdrawn at the time of council amalgamation in 1989. Shell subsequently lodged a s.60 objection to the Mt Eden District Scheme considering it was well overdue for review (by three years). They allowed the objection to lapse however, due to the implementation of the Resource Management Act 1991. Meanwhile the Auckland City Council refused to propose a change to the transitional district plan on the grounds that the new plan was about to be advertised and that the previous council had withdrawn Proposed Change 53 and clause 25(4)(b) First Schedule to the Act could apply despite the fact that no hearing was ever held on Change 53. Shell considered therefore that it had no other option but to apply for a non-complying consent on the grounds that there are unusual circumstances pertaining to the site and to the pattern and development along Dominion Road. Meanwhile the closure of Carrick Place was provided in Scheme Change No. 41 which recognised that any development of 184 - 196 Dominion for commercial purposes would have the potential to increase traffic flows on Carrick Place. It states that this is not desirable, given the residential character of the street. It states that the purpose of the road closure is to limit the impact of non-local traffic in the area.

Turning now to this appeal the relevant planning document is the Mt Eden District Scheme operative in February 1985 now part of the Auckland City Transitional District Plan. There is also now the Auckland City Proposed District Plan 1993 for which submissions closed recently.

The site is zoned Commercial 1 in the Transitional Operative District Plan which requires this proposal for the site to be dealt with as a non-complying activity. There is a 2.15 metres designation across the Dominion Road frontage for proposed road widening and a further designation for a proposed 6 metres service lane across the eastern side of the site and 5 metres from the boundary.



It is an objective of the plan that Mt Eden commercial areas comprise three shopping centres serving the local residents and those passing through the district. The objectives for the Commercial Zone include: the facilitation of the operation and development of a balance of retail activities, service industries ... and employment opportunities for the benefit of the residents: the promotion of a better and more attractive commercial environment: assurance that any adverse environmental impact of the commercial areas on the residential areas is reduced to a socially acceptable level: promotion of the provision of community facilities and a community focus within each centre.

Relevant policies include the reinforcement and support of commercial centres by encouraging the renovation and renewal of existing properties and facilities to make them attractive to a wide range of shoppers: support for commercial renovation and renewal which provides for pedestrian requirements such as pedestrian shelters (particularly to parking facilities), sitting or resting places, pedestrian malls, shopping arcades, plazas and open spaces around buildings: to control commercial activity close to residential zones in a manner such as to ensure any detrimental effects that may occur are kept to a socially acceptable level.

The final policy indicates that the objectives and policies of the district plan for service stations only make provision for new service stations where that involves the relocation of those existing. The policy states:

"To facilitate the relocation of an existing service station, should such relocation be necessary or desirable, the council will upon request promulgate a Scheme Change, rezoning as C2, land zoned C1 and fronting Dominion Road, Balmoral Road or Mt Eden Road, in order that the owner's proposal to relocate his service station might be tested in the appropriate manner."

In the Commercial 1 Zone service stations are conditional uses only where it is necessary to increase frontage.

The Commercial 2 Zone is specifically for service stations and provides for them to be either expanded on existing sites or relocated in terms of the above policy.

Several objectives and policies relating to the amenities of the Mt Eden are also relevant to this proposal such as that relating to "signs" where the objective is to control (and where necessary) prohibit signs, advertising displays or visual devices of any kind to protect the amenities. "Lighting" has as an objective the prevention of disturbance to the community caused by glare from floodlighting illumination of signs and buildings. "Noise" also has an objective the prevention of disturbance to the community.

The district plan relates specific standards for bulk and location and activity requirements, noise levels, street verandahs, proposed service lane, signage. It is not our intention to examine these in any depth and then briefly here.

The bulk and location controls require a rear yard of 6 metres. There is also a provision for daylight admission to the adjacent residentially zoned land. A landscape plan is also required which includes trees and contributes to the amenities of the street frontage. The noise standard requires the corrected noise level (L10) as measured on the boundary of the site do not exceed the 50 dBA on Monday to Friday between 7.00 am to 8.00 pm and on Saturday from 7.00 am to midday 50 dBA and at other times 45 dBA. It is a requirement of the plan also for a street verandah on any building with frontage to Dominion Road (except for one portion where the existing situation is except) which shall:

- "(i) *Be so designed as to achieve continuity with verandahs on neighbouring sites to provide continuous cover for pedestrians; and*
- (ii) *Not overhang less than three quarters the width of the footpath; and*
- (iii) *Be built and maintained to provide shelter an attractive appearance to the street."*

With respect to signage the council is to be "satisfied" that the display of signs in (commercial) zones will not be obtrusively visual from land zoned for recreational, and residential uses. Identification signs for service stations are an exception to the above requirement.

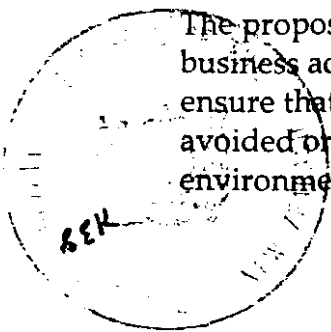
THE PROPOSED PLAN

The proposed plan notified on 1 July 1993 was open for submissions until 30 September 1993. We were advised the main parties to this appeal had presented submissions on the proposed plan. At this stage in its processing however, it merely indicates the manner in which the council seeks to proceed, and it is accepted it will be amended before being finalised.

In the proposed plan the land use zoning approach of the previous plan is retained.

The site is now zoned Business Activity 2. The Business Activity Zones cover areas which were traditionally included in commercial and industrial areas such as suburban retail centres. The residential areas which lie adjacent to this site, are zoned Residential 1 which recognises the heritage and amenity character of these areas. The adjacent retirement units are zoned Residential 6A to recognise the medium density of development achieved on the site. The site is affected by the same road widening and service lane proposals as in the operative transitional plan and the adjacent closed road is zoned as Open Space.

The proposed plan includes a number of objectives and policies relating to business activities and to the Business Activity 2 Zone. These generally are to ensure that any adverse effect of business activity on the environment is to be avoided or reduced to an acceptable level - they seek to protect and enhance environmental values, public safety and amenity values. They attempt, as Mr A R



Watson consultant planner for the council stated, to "build on" those in the operative plan. It is an objective to recognise the importance of the main retail frontage in maintaining the pedestrian amenities of the area and it is policy to identify the main retail frontage of centres and apply measures which seek to reinforce it by requiring the provision of verandahs and providing bonuses in floor areas for new development where specified pedestrian facilities are provided. It is an objective of this zoning to acknowledge the role of suburban centres as a focal point of the community interests and activities. It is a policy to adopt controls which limits the intensity and scale of development to a level appropriate to the zone's proximity to residential zone properties and open space areas. It is policy to seek controls which make noise levels acceptable in the interface between residential zones and business zones to adopt controls to seek to protect residential zones, privacy and amenity. Policies also adopt parking and traffic measures which seek to avoid congestion and parking problems.

Mr Watson stated that it is relevant to the context of this appeal to note the principal objectives of the proposed plan being directed at achieving the sustainable management of the resources of the Isthmus as including those to protect and enhance residential amenities.

Service stations are listed as a discretionary activity and various criteria apply to avoid, mitigate or reduce any significant adverse effects. Matters to be addressed are traffic generation, parking, access, buildings, noise, development controls, the residential zone interface, the natural environment, infrastructure constraints, outdoor activities and public safety. Additional criteria included for the assessment of service stations and which recognise their important service to the community, state that depending on their location and scale they may have adverse affect on traffic generation, noise and visual amenity. In particular the criteria is stated as follows:

"The site must be landscaped and adequately fenced and screened from adjacent properties, particularly where the adjacent land is zoned residential.

All signs and lighting must be approved as part of any application. They must be in keeping with the intent of the zone and the existing development of the area.

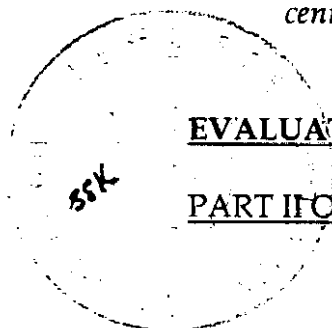
Restrictions may be imposed on the hours of operation of service stations adjoining residential zones where noise is likely to be a problem.

Any compressor or machinery must have adequate sound insulation, in particular, any development must comply with the noise standards set out in Clause 8.8.1.4.

Demonstrate that where the proposal is to be located in an established commercial centre it will not break up or isolate parts of the retail frontage."

EVALUATION

PART II OF THE ACT



As the notice of appeal was lodged before the provisions of the 1993 Amendment Act applied, we are required to assess it under the 1991 provision. Accordingly s.104(4)(g) requires us to have regard to matters set out in Part II of the Act. Whilst these do not have primacy they contain numerous issues which we are required to consider as part of our overall assessment of the proposal.

Section 5(1) states that the purpose of the Act is to promote sustainable management of natural and physical resources. Sustainable management is further defined at s.5(2) as:

"Managing the use, development and protection of natural and physical resources in a way, or at a rate which enables people in communities to provide for their social, economic and cultural wellbeing and for their health and safety while -

- (a) Sustaining the potential of natural and physical resources ... to meet the reasonably foreseeable needs of future generations; and*
- (b) Safe guarding the life supporting capacity of ...; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of the activities on the environment."*

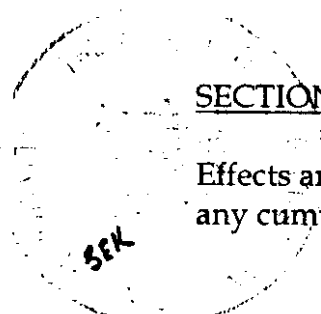
Section 5(2)(a), (b), (c) provisions may be considered cumulative safeguards which enure (or exist at the same time) whilst the resource, in this case the land resource, is managed in such a way or rate which enables the people of the community to provide for various aspects of their wellbeing and for their health and safety. These safeguards or qualifications for the purpose of the Act must all be met before the purpose is fulfilled. The promotion of sustainable management has to be determined therefore, in the context of these qualifications which are to be accorded the same weight.

In this case there is no great issue with s.5(2)(a) and (b). If we find however, that the effects of the service station on the environment cannot be avoided, remedied or mitigated, one of the purposes of the Act is not achieved.

Section 7 is of special relevance in this case and requires particular regard to be had for a development such as this to the efficient use and development of the land resource (s.7(b)), to the maintenance and enhancement of amenity values (s.7(c)), and the maintenance and enhancement of the qualities of the environment (s.7(f)). "Amenity" imputes pleasantness and the quality of the environment relating to its intrinsic character or nature. Section 7(e) requires the recognition and protection of the heritage values of areas.

SECTION 105(2)(b)(i) PROVISIONS: THE EFFECTS ON THE ENVIRONMENT

Effects are defined as positive, adverse, temporary, permanent, past or future and any cumulative effect which arises over time or in combination with other effects



regardless of scale, intensity, duration or frequency and includes any effect of high or low probability (s.3).

"Environment" includes in s.2(c) amenity values, and at s.2(d) the social, economic aesthetic and cultural conditions which affect people, their communities and their amenity values.

Noise

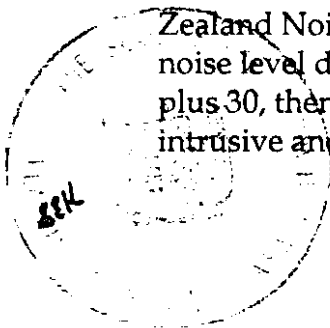
Mr N Hegley, acoustic consultant for Shell identified the four main noise sources associated with the proposal as the air compressor, fuel dispensers and associated movements on the forecourt, the car wash and on-site parking. The City of Auckland Proposed Plan 1993 Isthmus Section, sets out an average maximum noise level L10 of 50 dBA during the day and 40 dBA at night at the residential boundaries. The night time noise level will therefore control the night time use in this proposal if the plan as stated is implemented, as it is a 24 hour operation.

Mr Hegley undertook measurements on other service station sites on arterial roads. The resulting single event noise levels (L max) measured up to 52 dBA for car doors closing, the opening and closing of car bonnets from less than 47 dBA to 51 dBA. The background noise levels in the area were measured in fine, clear conditions at 53 dBA (daytime) and 28 to 30 dBA in the early hours of the morning.

We listened intently to the cross-examination of Mr Hegley when he was asked about average ambient levels about and after midnight. Generally they range about 40 dBA till 11 pm 30 dBA until midnight, then 23-30 dBA until 5 am. The witness acknowledged that the latter measurement indicated a very quiet noise environment and that a westerly wind would exacerbate any noise intrusion. He gave evidence that after midnight there had never been complaints of noise from vehicles on service stations. His information also was that on Great South Road (which could be compared with Dominion Road and of which he had direct experience) there were likely to be only three cars an hour after midnight possibly on site.

Mr Hegley considered the car wash only to be intrusive of the night time noise levels. However, it is now proposed to avoid this adverse effect, by not operating the facility during night time hours. Mr Hegley also considered that vehicles parking close to the residential boundary might have an adverse impact and recommended a suitable acoustical fence be built to mitigate any problems. This too is now part of the proposal.

Overall we do not consider that noise in general and single event noise is going to have an adverse effect on the residential environment. Paragraph 4.2.2 of New Zealand Noise Standard NZS 6892:9991 suggests that if the night time single event noise level does not exceed the lower of 75 dBA or the existing background level plus 30, then noise should not be a problem. The odd car door closing will not be intrusive and the car wash will not be operating at a time when it could have an



adverse effect. We consider also the acoustical fence will assist in mitigating any possible noise adverse effect on the residents of the retirement village.

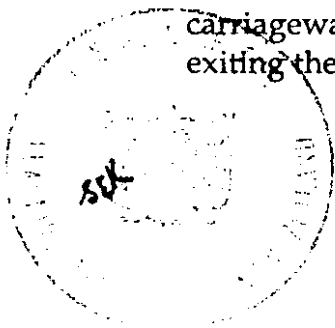
Traffic

Dominion Road is one of the major north south arterial roads serving the Auckland area. The only expert traffic evidence was given by Mr J M Burgess, Traffic Consultant for Shell. He was of the opinion that traffic safety was not an issue on this site.

Traffic volumes on Dominion Road to the north of Valley Road recorded in 1991 showed 24,000 vehicles per day and 2,250 vehicles in peak hours. Valley Road itself has a single controlled intersection, being some 160 metres south of Carrick Place. The witness stated that the movements at the intersection are affected during the evening peak, by the queue that forms back from the Valley Road signals past the subject site and through the Onslow Road intersection. A clearway operates however at peak period on the eastern side when it is likely to be congested, and ensures a relatively non-obstructed traffic flow. Meanwhile Carrick Place was recently closed some 30 metres from Dominion Road forming a cul-de-sac providing six car parking spaces arranged at 90 degrees to the kerblines. There are therefore very few traffic flows within this portion of the former Carrick Place.

The accident records for the area do not indicate any particular problem in the vicinity of the site which Mr Burgess stated must be considered to be reasonably good having regard to the relatively high traffic volumes in the general traffic environment. He acknowledged to Mr Savage however, that currently there is limited use by vehicles of the one accessway to the Pagani site and that lack of accessways generally contributes to the lack of accidents (implying that two further accessways might enhance the accident factor). Nevertheless the evidence established that most of the cars would fuel on their way home, so a left turn in and left turn out are the most likely vehicle movements. Whilst any right turning vehicle heading north may well increase the likelihood of accidents so would putting a building on the site if it had vehicle access available from Dominion Road. Further, it was Mr Burgess' evidence that the council is likely to provide a median strip eventually to allow for right turning movements if the service station went ahead. This was not challenged by the council.

The witness considered however, that the vehicles currently parking at the kerbside would restrict motorists visibility leaving the site. It is proposed therefore that parking along the site frontage should be removed to ensure adequate sight distances. We note also that the proposed district plan provides a 2.15 metres set back along this length of road which will provide an additional carriageway width and consequently more opportunity for cars entering and exiting the site to stack safely in the peak periods.



It is Mr Burgess' opinion that say an office building containing 2,390 square metres of floor space and containing parking for 53 cars would generate traffic at a rate similar to, or higher than the service station. In addition it would generate turning movement more evenly less split between north and south in comparison to the service station which would have predominantly southbound left hand turns because of the proximity of a BP station servicing northbound traffic further north of the site. We make no comment on this aspect other than we note the proposed plan provides for a service lane across the rear of the site which would allow vehicle access, an aspect pointed out by Mr H Bhana, planning consultant for BP and Pagani Clothing. The commitment by the council to removing the service lane designation was, at the time of hearing, to be conducted if the service station proposal went ahead. Otherwise, it is part of submissions in the review process.

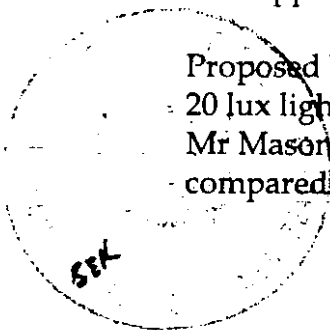
Overall we concluded on these aspects of the proposal there is likely to be no adverse traffic effects from a service station on the site. The pedestrian issue is one however we address further below.

Lighting

One of the chief concerns of the residents was light spill and glare at night. Mr Gifkins for example saw glare as principal nuisance in this respect both from the illuminated edge to the service station canopy on all but its eastern side and from reflection from the illuminative forecourt area. He put in evidence photographs taken of the Royal Oak Shell Station forecourt at 7.00 pm in winter showing reflection on the windows of the house opposite.

Controls on lighting relate to glare. Expert evidence was given by Mr P H Mason, a consultant lighting engineer for Shell that the luminaires selected for the canopy for placement 2½ metres inside the canopy are designed to cut-off almost all light above an angle of 70° from the vertical, and direct the bulk of the light downwards. Mr Mason cited the Auckland City Consolidated Bylaw 13.3 for spilled light and glare. His assessment of the lighting effects of this proposal (roughly the intensity of a 40 watt lamp) was that it would be less than 20% of that allowed under that bylaw. This would be further reduced by the 2 metre boundary fence proposed between the service station and residential flats which would itself provide a light baffle wider from the ground. He considered from the ground these combined, would shield any light from falling on the nearest flat. The witness considered that this lighting effect should be placed in context with the adjacent street lights on Dominion Road which have a 250 to 100 watt rating and residential security lights with the 150 watt rating. Evidence was given too of the curved yellow fascia of the Shell sign illuminated by the lighting tube in part directly and in part by light bouncing off the reflection on the back of the red line. This apparently creates "a fade" over the whole face of the fascia.

Proposed Plan Provision 8.8.1.7 requires that for a proposal such as this, that 20 lux light levels have to be met at the nearest boundary. According to Mr Mason's estimate this development will produce 4 lux only. This could be compared with a car coming up Onslow Road with car lights shining at 20 Lux



and the 10 lux lighting bollard on the nearest side of the residential boundary put there for the residents.

We do not anticipate on this evidence, which was not effectively challenged, that the lighting will cause an adverse effect through light spill or glare. However unscreened lighted surfaces will be clearly visible from many of the surrounding residential properties at night.

Diminution of Amenity

Diminution of amenity may be considered as an effect under 105(2)(b)(i) and it is also a requirement that amenity be maintained and enhanced under s.7(c). We will consider both together. We hold that "*the maintenance and enhancement of amenity*" is a conjunctive phrase so that it is not sufficient if a proposal simply maintains amenity. It must also enhance the amenity.

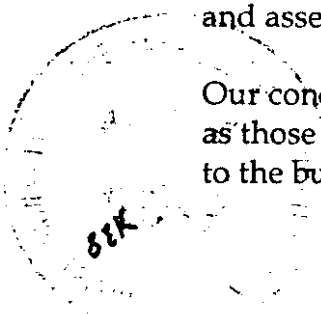
In terms of amenity the evidence presented is of a cohesive locality with a strong sense of community consisting of a residential mixture from older style housing to a more modern retirement cluster plus a shopping and business centre again with a range of building types and ages located on a busy main road. For the residents there exists a high degree of amenity and the district planning controls recognise this amenity and the importance of maintaining and protecting it.

The site is on the northern interface of the merging uses and the zoning intends commercial use though it could be developed for residential use or could become an extension of the Carrick Place reserve without diminishing the current amenities. The site is also on the topographical interface between elevated residences and the lower Valley Road shops, Dominion Road and the lower lying retirement cluster. Mr Lane for Shell advised us his company has employed a landscape architect on this site because it was fully accepted that it was in a sensitive location.

The proposal, a 24 hour service station in the current image devoted to product promotion and dispensing is a very well-known form of development. It would be ranked by the residents as amongst the least desired of commercial uses in a shopping centre/residential setting particularly as a neighbour. It became clear to us that while the main road carriageway corridors of vehicle movement are accepted as facts of life, the residents did not want that activity overflowing into their residential/commercial amenity zone by the siting of a use primarily devoted to servicing vehicles with what they clearly saw to be an anti-amenity result.

We need to examine the aspects of the proposal which give rise to such a reaction and assess its validity.

Our concerns in this proposal are not with those of the motoring public so much, as those of the residential and business community and the wider public attracted to the business or commercial centre. Currently this vacant site provides a fine



view across the residential area to the west and to Mt Eden from the Dominion Road frontage and we have therefore taken account of Mr Burton's evidence that the service station buildings being of somewhat lesser form than that permitted for a commercial building, would allow both pedestrians and motorists to enjoy this view of Mt Eden. This can be considered a positive effect and an enhancement of amenity.

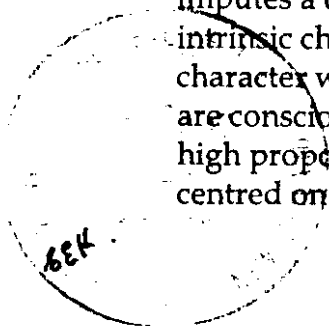
1. Pedestrian Amenity

Mr Burgess stated that a service station of this kind can typically expect some 500 to 600 customers per day with some 40 to 60 vehicles visiting in the peak period. South bound traffic will make a left turn manoeuvre into the site followed by a left turn exit. Figures from Mr Burgess taken on a showery Friday afternoon showed that at midday 53 (adult) pedestrians passed the site, 11 elderly and two children whilst 46-32 adults, 7-1 elderly persons, 14 -7 children passed by between 3.00 pm and 5.00 pm. Peak hour figures supported six cars on the site at any one time. Figures from the Ministry of Transport show a site is unsuitable if there are 1,000 per hour which is certainly not the case here.

When the traffic queues bank up from the lights and when vehicles leave the service station and try to enter the queue, the evidence given was that one will wait on the footpath and one should be clear of the footpath. Accident statistics, Mr Burgess demonstrated, illustrate that there is no danger to pedestrians crossing accessways to the service station. He stated however, there will certainly be some delay experienced by vehicles leaving the site during the afternoon period when the queue extends back from the Valley Road signalised intersection.

Ms de Lambert, consultant landscape architect for the council although she did not do a specific pedestrian count as did Mr Burgess, stated that there was a lot of pedestrian activity on the Saturday of her site visit, past the site to the residential areas or the bus-stop. In her opinion with such a vehicle-orientated activity on the site there would be little to attract pedestrians. It was her evidence that the two nine metre entry/exit vehicle crossings to Dominion Road represent four vehicle movements for pedestrians to negotiate along the 50 metre road frontage. We note that the 18 metres of total crossings proposed represent 36% of the site's frontage subject to vehicle pedestrian interaction. By comparison most commercial uses in a traditional strip shopping centre gain service access from the rear and do not provide for vehicle crossings to the footpath. This is an adverse effect.

Whilst we respect Mr Burgess' count of less than 1 pedestrian a minute on a showery Friday at midday, we note that the Part II provisions of the Act require us to avoid any adverse effects on the environment whilst any assessment of amenity imputes a quality of pleasantness to the pedestrian environment related to its intrinsic character. This environment is essentially residential/commercial in its character with a strong emphasis on the maintenance of pedestrian amenity. We are conscious of the evidence of the various residents who spoke of the unusually high proportion of elderly, mentally disabled and children in this community, centred on Carrick Place and Dominion Road and the effect of the vehicle



crossings and the vehicle activity on the site on the pedestrian convenience. We are of the opinion that a service station use on this particular site will not maintain nor enhance those amenity values which are currently free of apprehension or anxiety about negotiating vehicular across-ways and the activity of cars on the site. We hold that people are entitled to have their social well-being protected. We adopt Ms de Lambert's evidence that the proposal denies the opportunity for an appropriate uninterrupted pedestrian linkage between the commercial and residential environments - appropriate that is, in the particular circumstances of this case.

2. Parking

Eight parking spaces will be lost to the area causing a certain loss of amenity, countered perhaps by the convenience of a service station in the immediate vicinity of the business area providing a service identified in the district and proposed plan.

The problem with the removal of car-parking spaces as part of the proposal is that if the current parking facility is removed, and it has a frontage of approximately 50 metres, with it goes one of the chances for eight shoppers to park and shop on the eastern side of the road. Mr Burgess' oral evidence was that the western side only provides 2 or 3 parking spaces along Dominion Road, although there were 50 spaces behind the shops on the western area. He acknowledged kerbside parking does "serve" shoppers.

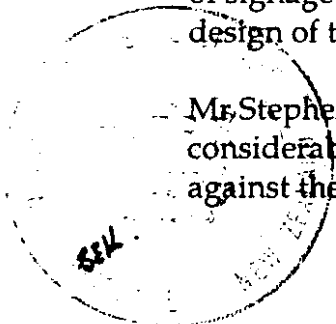
We note the transitional district plan currently records that currently Mt Eden is a convenient place for its senior citizens because of its variety of shops. "Convenience" in this context implies easily available parking.

On this aspect of convenience shopping, we have concluded however that the provision of six car-parks in Carrick Place and the 50 spaces behind the commercial development on the western side of the road mitigates against the adverse effect of the removal of 8 car-parking spaces on Dominion Road.

3. Signage, Lighting, Vehicular Movements and Residential Amenity

The proposal meets most of the identification requirements in the plans which require that there shall be no more than one identification sign to each service station in terms of the identification of signs for the service station rules. Mr Burton explained that the signage re-imaging referred to earlier is largely cosmetic and there are no fundamental changes to the nature of visual imaging. Nevertheless, his view was that the re-imaging would be unlikely to increase the effects on adjoining properties. It was his evidence that the aggregate of the area of signage on the site exceeds council rules but is in keeping with the size and design of the service station and in keeping with the general locality.

Mr Stephen Brown consultant landscape architect for the appellant went to considerable lengths to provide comprehensive landscape plans to mitigate against the utilitarian character of the service station. He gave evidence that all



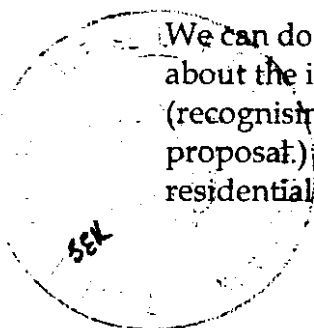
that most of residents will see, is the forecourt of the service station rather than the canopy, (apart from its edge) with the forecourt itself partly screened due to the car wash. He anticipated dense planting of native species and possibly camellias at 5-6 metres high and what he termed the significant amount of corner planting would largely obscure the proposal in eight to ten years time, whilst the melia bushes would provide screening in 3-4 years with a spread of 5-6 metres on both boundaries. He anticipated that in 8-10 years time the planting would provide a buffer for the residents and onlookers from the site. It was his opinion that it was a majority of the paving which the residents would see in the short-term.

The witness then went on to acknowledge however that some of trees (like the melias) are deciduous - chosen because of their use in adjoining streets and because they would minimise some light loss for the Carrick Place residents in winter. He established lighting is confined to under canopy lighting of the forecourt, to backlit perimeter lighting around the canopy and the illumination of service station signs. He acknowledged however that the canopy was a high one which meant the lighting was visible too.

Mr Bhana's concern about landscaping related partly to the depth that could be provided on a small site, but also the function of the topographical relationship between the site and its residential neighbours. He had concerns for the amenity of the retirement residents looking upwards towards the underside of the light source and to a lesser extent those who overlook the lighted forecourt.

Shell is in a difficult position. On the one hand it has attempted, very properly, to provide a landscaping plan which in time with obscure the utilitarian edges of the proposal, but also has tried to prevent shading of the retirement village by providing deciduous trees. This effectively means that for approximately half the year a greater part of the site will be exposed to the residents opposite looking over the site and to the residents of the retirement village looking upwards to the site (although their view will be partially obscured by the two metre high fence in any event). Even then it is going to take the landscaping nearly a generation to mature. The canopy rises to around 5.5 metres above the station forecourt level and the 7 metre pole sign sits on the south-western corner of the site. While in the main lighting is confined to under-canopy lighting of the forecourt and backlit perimeter lighting around the canopy and the illumination of service station signs they will all contribute visible lighted surfaces if unscreened. In addition the service station itself is decorated in primary colours of red and yellow which will impact visually in a marked way until the landscaping has matured. As to signage, we acknowledge that looking south along Dominion Road several buildings carry two signs but those buildings are linear to Dominion Road. What Shell proposes however is an exposed site which because of its sheer openness attracts the eye to the signage because that is the objective of the signage and the nature of the site.

We can do no better than reproduce here the observations of another Tribunal about the impact service stations can sometimes have on residential amenity (recognising of course that different provisions of the district plan applied to that proposal.) In this case the proposal is in the commercial zone but it has a strong residential interface. As Mr Watson's evidence established, as the proposal faces



northward rather than to the west on Dominion Road it "opens" the service station development to the residential area rather than turning its back on it. And as Mr Watson said also, the 24 hour operation of the site means it will operate in a different manner to other activities which may be permitted if the site was developed as a commercial building shutting down outside of normal business hours are.

In Shell Oil New Zealand Limited v Wellington City Council Decision No: W57/92 at 4,5 discussing a situation where the resident objectors overlooked a site over a main road the Tribunal stated:

"... We observe that the RM Act and in particular the provisions of Part II of that Act give a strong caution to commercial enterprises wishing to establish utilitarian brightly coloured and eye-catching structures of standard design in areas where they are not permitted merely for the purpose of attracting attention and custom. If operators such as the present appellant wish to bring their enterprise into zones of residential character and of harmonious design, then they must tailor their structure to fit the amenities there at present.

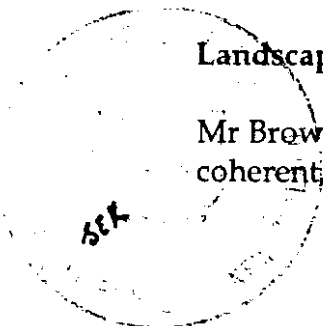
The definition of 'amenity values' places strong emphasis on present neighbourhood character. It would not be exaggerating to state that the design of most modern service stations is effectively a complete advertisement for the product. An advertisement in one sense of the word is something which causes the observer to take note of and consider. The whole colour scheme, layout, lighting and signage of a modern service station is one large attention attracting complex with motifs designed to indicate from a distance the brand of fuel which is sold."

Mr Burton in his evidence-in-chief acknowledged the land use as generating a relatively high level of activity on the site but stated whilst a service station has long business hours as the volume of traffic diminishes so does the activity. He also acknowledged that at night a pool of light and a strip of light on the red Shell stripe could be seen but considered the overall lighting effects "*lesser than before*".

We hold that the obvious signage, the vehicular activity and the generally lit environment of the service station at night will be obtrusively visible for some of the time, despite the appellant's best endeavours. In terms of residential amenity which may be considered in terms of pleasantness and the coherence of built forms we hold it is more than a minor adverse effect on the environment and the community of people in its vicinity (see the definition of "community" in J W & G P Lefeber v Franklin District Council & Auckland Regional Council Decision No. C 21/93, 1 5,6). On our assessment, it is the intensity of the use, the character of the use and the scale of the use that when contrasted with the adjoining uses forces us to conclude that the proposal is unacceptable on this site.

Landscape/Architectural Amenity

Mr Brown laid emphasis on the character of the locality as diverse and less than coherent, characterised by advertising "*clutter*". He pointed out that the 1980's

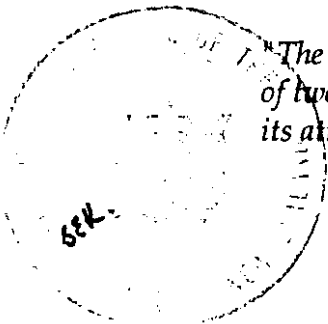


and 1990's development opposite the site on the corner of Onslow Road, reflected in a mixture of rolled corrugated iron roofing connected to a barrel vault matching curved perspex verandah and for the most part continuous floor to ceiling glazing of 1½ storeys high as being in conflict between the character found in both old and new forms of commercial development. He saw wooden villas interspersed with art deco brick and plaster and the plastered concrete block with tiles found in the retirement village. Mr Brown added that the buildings closest to the Shell site containing the Pagani Fashions and Sasson *"are a more recent addition to the block redolent of the 1950's and 60's - their concrete slab walls, narrow horizontal windows and corrugated iron conveying a far more utilitarian, semi-industrial image"*. Mr Brown saw there is little in the way of urban forms and elements in the vicinity of the Shell site, other than the continuation of the verandah as a vernacular form which responds positively and harmoniously to the more historic character and *"artefacts"* of the main parts of the shopping centre. Consequently he was of the opinion that it is difficult to foresee the proposed station either instigating or greatly compounding a discontinuity already so obvious. Instead he saw the Shell proposal as a transitional element of limited vertical scale, interposed between high density and larger scale commercial premises. He was of the opinion also, that there were some similarity both in scale and form and boundary planting with the small scale commercial development across Dominion Road, with its central parking area framed by Smiths Shoes and the adjoining commercial premises. He concluded that it would be unlikely that the service station would substantially change or further degrade the amenity value of its locality. Mr Brown saw, for example, the traffic on Dominion Road as importing a strong sense of activity and dynamism being at odds with the more sedate residential precincts on the other side, creating dysfunction on the amenity of the interface between commerce and residents. The witness emphasised the slender frames of the service station's component. He also stated the service station allows a considerable degree of visual penetration into its confines beneath and beyond the forecourt. He said consequently a station may well be judged almost as much by what is seen through and beyond it as much by its own physical character. He added also that in his view the Shell development would have less effect, and offend less, the residential coherence and amenity than any future commercial development which could well be pushed to the edge of the boundaries of the site. Mr Burton shared generally similar views but in a planning context.

Evidence was given by the residents about the special nature of the housing in Carrick Place emanating from approximately 1883, the distinction being identified in the proposed district plan. Ms Moira Elliott saw the expected outcome of the proposed Residential 1 zoning as creating a climate of stability and certainty for the community and *"creating a safe and supportive environment where the elderly, children and the disabled are not marginalised"*.

Ms de Lambert for her part said this:

"The heart of this traditional strip shopping district benefits from a good collection of two storey commercial buildings in the neo Edwardian architectural style with its attendant detailing. The Valley Road intersection which forms the opposite end



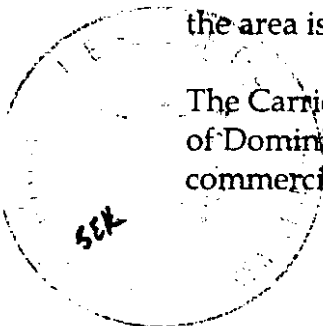
to the block which includes the proposed site, is a typical collection of buildings in this gracious style ...

Whilst the commercial buildings on the adjacent southern boundary and those across Dominion Road from the site are of more recent design and do not draw from the historical neo Edwardian architectural style, they retain certain characteristics, which continue the pedestrian scale and interest of the traditional strip shopping centre. These characteristics include building right up to the pavement, the frequent incorporation of verandahs and shop front windows for display. As a statement of entry to, or departure from, the Dominion Road shopping centre, they are relatively benign buildings, of little architectural strength, but allowing the strong neo Edwardian character to exist unchallenged. These more recent commercial premises are also of significant shopping interest and generate pedestrian traffic to their respective uses."

Ms de Lambert and the residents considered that even a commercial building on the site, although causing shading and overshadowing on some of the retirement units, was preferable to have because it fronted and continued the form of the street and consequently the "built" environment. Ms de Lambert also saw Carrick Place and Onslow Road as "defining" the northern limit to the Dominion Road commercial centre. She placed some emphasis too, as did Mr Gifkins, on the area between View Road and Carrick Place, characterised by two blocks of mature vegetation situated on residential properties and the trees of the Bellevue Reserve. When travelling from the south she saw these trees as providing a strong enclosure to the road edge and creating a special vegetated quality to Dominion Road not downgraded by the use of the corner dwelling on Carrick Place as a real estate office. In contradistinction to Mr Brown, Ms de Lambert described the service station as resulting in a visually permeable built use providing no retail frontage, no containment to the street, introducing low level planting at the footpath frontage and generating a predominantly vehicular instead of pedestrian use. She criticised the proposal as providing an abrupt "fullstop" to the commercial strip, both visually and commercially, denying the opportunity for appropriate pedestrian linkage between the commercial residential environment. She highlighted the fact that the two 9 metre entry/exit vehicle crossings onto Dominion Road represent a potential for vehicle movements for pedestrians to "negotiate" and contrasted this with the traditional strip shopping centre with service access from the rear. Ms de Lambert stated that the service station would deny the commercial centre "a strong entry statement" in keeping with the identity and character of the locality.

Whilst we have sympathy with Mr Brown's view that some aspects of the form of the opposite corner of Dominion and Onslow Road is not too dissimilar to what is proposed by Shell (low set buildings set back from the road frontage), and whilst we are conscious too that there is not a verandah on the Pagani building, and that the area is one in transition, we prefer Ms de Lambert's opinion of this proposal.

The Carrick Place corner is a significant focal point in the urban/commercial fabric of Dominion Road. The corner needs a physical built presence to highlight its commercial nature, to separate it from the residential area behind and to make the

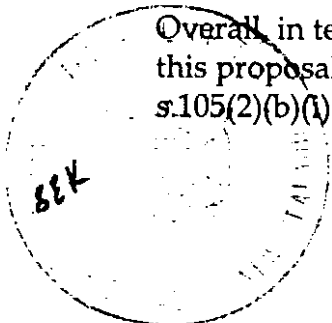


corner work as a commercial statement of the zoning's intent. We think this is what the residents were expressing when they were talking about creating a climate that was stable, certain and supportive of their community. The hard edges of the Pagani building however unattractive, are more related to a commercial building on this site. It is a matter either of compounding and confusing further the architectural styles in transition by adding in the bleak clinical (utilitarian) lines of the service station, or allowing for a future opportunity to marry the built environment with a further solid building. We prefer the latter. This hopefully will provide an urban edge which would be more supportive to the amenity of the residential/commercial interface than would be a service station. It could provide a pedestrian precinct uninterrupted by vehicle crossings which we see as disruptive of the commercial form and pedestrian amenity. We do not see the proposed development demonstrating any sensitivity towards this special area other than through increased landscaping, setting the canopy back 12 metres from the boundary (which is greater than normal), non-illumination of the east boundary of the proposed canopy, relocation of the Shell emblem (and stopping the carwash at night). It provides no visual harmony or coherence or aesthetic consistency with the nearby housing or the commercial area being not one thing nor another. Mr Brown conceded to Ms Simons for example, that the area had a notable Edwardian and strong architectural character. We do not consider "*the fragmented collection of building elements*" of the Shell proposal as adding to either (see Mobil Oil v Dunedin City Council Decision No. C 19/93, 1, 7).

All the residents complained of their properties being opened up to the visual and noise pollution and Dominion Road when the site was originally cleared. To some extent that problem would disappear with the imposition of a solid building, though the residents in the retirement units may have to accept a service lane if it is retained and resultant shading on their boundary. It would negate, however, the considerable visual penetration of the forecourt and vehicles which Mr Brown identified and which we do not see as being ameliorated by the landscaping and fencing on the back boundary for many years to come. Mr Burton's evidence on the design of the service station was that it was somewhat utilitarian and functional. Most of the other witnesses saw it as utilitarian. We consider the policies and objectives and rules relating to permitted activities both in the transitional and proposed plans as being able to provide for something less than merely utilitarian in future developments and that this opportunity should remain available.

In terms of the commercial community which we must also consider, the proposal does not add to the retail frontage and consequently does not add to the amenities afforded by a commercial continuum. As Mr Bhana also stated and we agree, the lack of verandah coverage for example highlights the negative contribution made by the service station to the amenity of the Valley Road Shopping Centre.

Overall, in terms of amenities we consider the cumulative or sum of the effects of this proposal outweigh in negative terms, any positive effects. It fails the tests of s.105(2)(b)(i).



SECTION 105(2)(b)(ii): THE OBJECTIVES POLICIES AND RULES OF THE DISTRICT PLAN AND THE PROPOSED PLAN

The first matters to consider are the policies and the objectives and rules in the transitional operative plan in respect of the facilitation of the relocation of an existing service station should it be necessary or desirable as a specific policy, or an extension to the frontage of an existing service station where necessary or desirable. Prima facie, the existing proposal clearly does not comply with these provisions.

It was the appellant's argument that the Commercial 1 Zone provisions provide for objectives and policies relating to building form which differ considerably from the building "form" permitted by the rules. It was its argument that the greatest impact on the built environment comes through buildings built in compliance with the rules governing the form of buildings and the objectives and policies only have a real effect on building form where a specific development requires a resource consent which is required to be assessed against the objectives and policies. It was Mr Burton's evidence that the rules governing development in the Commercial 1 zone permit developments as of right which bear no resemblance to the form promoted by the objectives and policies of the zone. In support he cited the requirements for permitted activities and those for service stations.

To evidence this perceived dysfunction between the objectives and policies of the district plan and the rules, the appellant obtained from the council two certificates of compliance pursuant to s.139 of the Act one in respect of a two storey commercial building of a permitted size and one relating to a building virtually identical to the proposed service station building, but limited to use as a convenience store which is a permitted use in the zone. They were relied upon by the appellant to demonstrate a comparison between the effect of permitted forms and the present proposal. These, it was put to us, would have a greater effect on the environment than the service station as it was held they would have greater visual impact, a lack of landscaping and cause a lack of privacy. It was Shell's submission that unfortunate consequences would flow regarding sunlight admission on the southern and western boundaries and particularly on the retirement village, if in the first form a permitted activity was established on the site.

With respect to the certificates of compliance the validity of which was challenged, Mr Harrison submitted that due to the operation of s.139(6) of the Act a certificate of compliance shall be deemed an appropriate resource consent and the Tribunal cannot go behind the wording of the certificate to nullify the consent even if it has been wrongly issued. (see Culpan v Vose and Auckland City 2 NZRMA 380). It was his submission that Shell as owner of the site could as of right build either of the two buildings identified in the two certificates.

Mr Burton also saw the rules allowing for service station development through relocation of an existing service station only as a form of licensing which is at odds with the philosophy of the Resource Management Act 1991. We were referred to Bachelor v Tauranga District Council 1 NZRMA 266 and 2 NZRMA 137, [1993] 2

NZLR 777 and Noel Leeming Appliances Limited v North Shore City Council 2 NZRMA 243 as authorities for considering the district plan provisions, sufficiently unusual and unrelated as to objectives policies and building form to provide an exception to the philosophy of preserving the integrity of the district plan as required in Bachelor. Mr Burton listed the following unusual circumstance: the plan being overdue for review: the proposed scheme change being withdrawn by council: deregulation as bringing about a major change in service station planning not recognised in the district plan: no zone opportunities for a new service station serving south bound traffic on Dominion Road: the proposed district plan providing for a service station on the site as a discretionary activity: the site having unusual characteristics as the only vacant site with sufficient area for a service station which directly adjoins an existing commercial centre, (Planning Tribunal decisions being supportive of sites adjoining a commercial or industrial zone). It was also the appellant's argument that this could be considered to be a special case because the rules of the District Plan appeared to allow a larger development than contemplated by its policies and objectives which was the fifth circumstance to be supplied in the Noel Leeming case. Because the rules are not integrated and as such could not be given much weight with a coherent plan of interrelated objectives and rules then applying the legal principle of construction *generalia specialibus non derogant*, Mr Harrison submitted that the rules should be given precedence over the objectives and policies because they are specific whilst the policies and objectives are general in their application only.

It was BP's submission that the holder of a certificate of compliance cannot use it to effectively change the plan, nor can the certificates release a local authority from its obligations to enforce the provisions of the plan. Otherwise, it was submitted, compliance certificates would become ad hoc planning tools. Mr Bhana's evidence was that s.374(4)(b) of the Act indicates that any rule that requires an activity to be subject to the council's consent is deemed to be a discretionary activity. In this case rule 51.6(c) of the plan requires council's consent for any excavation or deposition of material on any site where that exceeds 25 cubic metres. The purpose of the rule is to protect adjoining sites from the overpowering, dominating effects of large scale land filling. It was submitted that both the convenience store and the office development for which the certificates were issued are in breach of the filling requirements and the office development is in breach of the excavation requirements. Mr Bhana stated and Miss Simons submitted, that clearly a certificate of compliance cannot be issued for discretionary activities and clearly these were issued by the council in error. It was also contended by Mr Bhana that the two proposed developments were in breach of the daylight admission (height to boundary) rules in the plan.

As to the height in relation to the boundary argument, the council, supported by BP and Pagani Clothing referred to the dicta in Lawton v Auckland City Council Decision No. A 54/86 as authority for saying that the height in relation to boundary control requires daylight admission on all four boundaries of the site thus drastically reducing the floor space of the hypothetical office building and the location of the convenience shop buildings. This, it was submitted, makes the appellant's argument in respect of shading the retirement village specious and inaccurate. Mr Harrison countered this argument by drawing our attention to the

fact that Lawton referred to three adjoining residential boundaries and the precedent cannot apply because in this case there is only one.

In regard to these matters we hold that the fact that there was a proposed scheme change which the public knew about, but which was withdrawn because of council amalgamation is of no avail, because as Mr Harrison himself submitted, there is no guarantee the scheme change would have come into effect. The fact that the district plan is overdue for renewal is of no avail either as the new one has been advertised and submissions have been closed and thus far, it appears to endorse the thrust of the provisions of the transitional plan. We adopt both Mr Savage and Miss Simons' submission that because the operative plan is overdue for renewal and because the proposed plan is yet to become operative they cannot be seen to have "diminished value". The Tribunal has a statutory obligation to consider both although we wish all parties to note that we place far less weight on the proposed plan. As for no zoning opportunities as the only service stations provided for in the Commercial Zones are existing ones, Mr Burton himself stated that in applying for a non-complying activity Shell had "*taken an appropriate course of action*" because there are unusual circumstances pertaining to this site. As to the fact that the proposed plan provides for a service station on the site as a discretionary activity the council is still required to evaluate the proposal in light of the provisions in the General Criteria for Assessing Discretionary Activities and Additional Criteria for Specified Activities and these indicate (to give but two examples) special concern for residential amenity at the zone interface, and a demonstration where the proposal is to be located in an established commercial centre, that it will not break up or isolate parts of the retail frontage. There is no guarantee therefore that consent would be given. Further, we do not consider the site has unusual characteristics merely because it is vacant and has sufficient area for a service station directly adjoining a commercial centre. Finally, we can pay no attention to the previous Tribunal decisions which allow service stations directly adjoining commercial/residential areas because we do not know of the particular circumstances surrounding the consents - they may have considered circumstances which do not exist here. We concluded on all these aspects also, that the circumstances were not sufficiently unusual for us to approve the application without upsetting the integrity and coherence of the district plan.

As to the argument about certificates of compliance we have come to a view different from that of Shell.

Section 139(6) states as follows:

"A certificate of compliance shall be deemed to be either a land use consent or a subdivision consent, whichever is appropriate, granted subject to any conditions specified in the plan, and the provisions of this Act shall apply accordingly, except that, with the exceptions of sections 120, 121, 122, 125, and 134, this Part does not apply."

Our focus is on the words "*a certificate of compliance shall be deemed to be either a land use consent, ... whichever is appropriate, granted subject to any conditions specified in the plan ...*". The use of the adjective "any" indicates there may, or may not be,

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conditions. In this case there are conditions emanating from the provisions of the plan to be applied. Even though the certificate of compliance may not be expressed as being granted subject to compliance with these conditions, it could not qualify to be a deemed land use consent unless any applicable conditions specified in the plan are complied with.

In this case there are applicable conditions specified in the plan. Rule 51.5 contains a condition that notice is to be given of any substantial alteration to natural features. On the evidence we are not able to find that the requirement has been complied with. The district plan rules referred to us by Mr Bhana stated as follows:

"51.4 Every application made to the Council for the issue of a building permit, or approval of a scheme plan of subdivision or for consent to any other work under any Act may be deemed for the purpose of this ordinance to be also an application for a consent in terms of this ordinance. In such cases consent may be given subject to conditions imposed under this ordinance in addition to any other conditions that the Council may elsewhere be empowered to impose.

51.5. No substantial alteration to such natural features shall be made until:

(a) Notice shall be given to the Council in order to avoid opportunity to examine and obtain advice about the feature:

(b) Written consent has been given by the Council.

51.6 For the purposes of ordinances 51.3, 51.4 and 51.5 the following shall be deemed to be substantial alterations:

(a) ...

(b) ...

(c) Any change in the natural land contours extending over an area of more than 500m² or involving the excavation and/or depositing of more than 25m³ of soil or other material."

We are not aware of notice being given to the council of the change in the natural land contours in order to afford it the opportunity to examine and obtain advice. We understand also that there was no written consent about the landfill.

We therefore find that applicable conditions are not complied with, and hold that the certificates of compliance are therefore not deemed to be land use consents.

Further, because the alteration to natural features involved in the landfill requires the council's consent, the proposal is by section 374(3)(b) a discretionary activity.

As such, we do not understand how the council could have considered that the proposal complied with the district plan without that required consent having been obtained. We hold that in that respect too the proposal does not comply with the plan.

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This case illustrates one of the difficulties with the provision for certificates of compliance. If we are wrong in this, we adopt Ms Simon's submission that viability of other possible developments cannot be usefully assessed in this forum. The Act does not provide for such an assessment as a criteria for determining the outcome of an application such as this.

Turning now to some specific rules of the transitional plan. It is a requirement of the transitional plan for a verandah on any building with frontage to Dominion Road. Its lack is also directly contrary to the provision in the proposed plan and planning maps where Dominion Road is shown as requiring pedestrian verandahs. We do not consider the current lack of verandah on the Pagani Clothing Company is persuasive enough to consider the provision irrelevant in respect of the Shell site. The Pagani site may well have one in the future if redeveloped. The plan observes that verandahs are a feature of the New Zealand retail/commercial pedestrian environment and that they contribute to the streetscape in commercial areas. In this case a verandah on the Shell site would not only provide an amenity to shoppers and residents alike but it would link the proposal more visually with that on the western side of Dominion Road.

In respect of the signage provisions the council must be satisfied that signs will not be obtrusively visible from land zoned recreational or residential. This site has land zoned reserve on its immediate northern side and residential on its eastern side and residential on the northern side overlooking the site. The pole sign has been reduced from 9 metres to 7 metres but the total area of signs is greater than 2.5 square metres and instead of one of the identification signs there are six. The signage includes the face of the shop and the carwash and some or all will be visible from the surrounding land. Mr Watson stated both the area and number of signs both still exceeded the rules although both had been reduced. Mr Bhana an experienced witness considered these aspects to be intrusive after being specifically questioned about them by Mr Harrison. As an expert's answer we gave it particular attention and accorded it particular weight due to the sensitivity of the site.

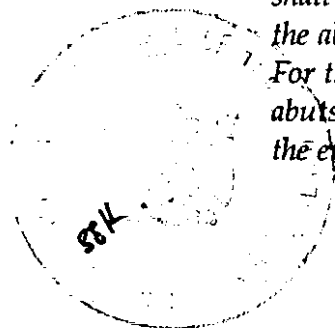
As to the provision requiring daylight admission, that states as follows:

"85.33 Daylight Admission to Adjacent Residential Land

In order to ensure that adequate daylight is admitted to residentially zoned land within 30 metres of the site on which a proposed building is to be erected the proposed building shall comply with the following equation:

No part of the building shall exceed a height equal to 3 metres plus .75 of the shortest horizontal distance between that part of the building and the nearest site boundary, provided that heights for that purpose of the foregoing height limitation shall be measured from the ground level at the point on the site boundary to which the above measurement is taken.

For that purpose of 'daylight admission to adjacent land' where a site boundary abuts an entrance strip, the boundary shall be taken as the furthest boundary of the entrance strip."



The provision is exactly the same as applying in the Employment Zone. In Recreation Zones where the site has a common boundary with land zoned Commercial or Employment, the height in relation to boundary shall not apply to the common boundary.

In our analysis of this provision we agree in part with the appellant's opinion of the matter. We see the rule as applying to residentially zoned land only. Adopting a purposive approach to an interpretation of the phrase "the nearest site boundary" we hold to mean the nearest residential site boundary and it may be usefully contrasted with the phrasing in the Recreation Zone which relates to "its site" and in the Residential Zone as relating to the size and rear boundaries of "the site". Lawton's case does not apply in that it has three residential boundaries and this has only one. We hold there may be restrictive sunlight available to the retirement village but the rule relates to daylight which is protected by it. We note also that as Mr Bhana pointed out, that in the proposed plan there are additional controls for specified activities which adjoin Residential or Open Space Zones which this site would do. This limits the height of buildings on the subject site to no greater than 2 metres plus the shortest horizontal distance between that part of building and the common boundary with the Residential or Open Space Zone. This proposal appears to allow the top of the carwash to intrude upon that control.

The objective and related policy of the transitional plan most applicable to this proposal seeks to ensure that any detrimental effects of the proposal are to be kept to a socially acceptable level. Our findings on the effects of the proposal on residential amenities demonstrates that in this aspect the service station is not at a level of community social acceptability. Further, because of the intrinsic nature of a service station we have also given weight to Mr Watson's evidence that the proposal will not relate in a functional way to the existing commercial area or promote any features which would contribute to a *"better and more attractive commercial environment"* for shoppers or pedestrians which is a general objective for commercial zones. Finally a service station on this site precludes its use for a commercial development which would ensure the site is used efficiently for its zoned purpose. The Noel Leeming case also talks about a *"combination of circumstances"*. It is not to be inferred that consent to a non-complying activity will necessarily be granted whenever a rule in the district plan does not comply and lacks the support of an integrated set of objectives and policies. It is the combination of circumstances not the least that allowing the activity will not offend the objectives and policies. We find that the combination of circumstances in this case does not warrant our intervention. We acknowledge there has been a loss of opportunity for relocation for Shell due to changing circumstances but we do not consider this to be unique in the overall context of council amalgamations and changing legislation which have national implications for all developers. We had no evidence that Shell sold on the guarantee of a scheme change (nor could the council legally promise this) merely that it relied on the business opportunity provided in the district plan to pursue a provision which included all the policies, objectives and rules currently before us.

As to the objectives and policies of the proposed plan which we are required to consider, these, as Mr Watson pointed out, place emphasis on supporting the

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existing retail area with provisions for verandahs and retail frontages and protection of the amenities of the residential zones which lie in proximity. The Shell proposal gives no credence to these due to our findings above except in respect of noise intrusion and traffic and some minor aspects. We note however, that with service stations allowed as discretionary activities there are substantial differences between the provisions of the transitional and proposed plans but this particular site imposes its own limitations over and above those.


Conclusion

For all these reasons and in exercising our discretion in terms of s.105(1)(b) to grant or refuse consent, we have concluded that whilst some of the effects on the environment would be minor, the effect on amenities would be an major adverse effect. In terms of the objectives and policies for a commercial site with a residential interface, granting consent in this case would be contrary to the objectives and policies not only of the transitional plan but the proposed plan, (as much as we can give it weight at this stage of the planning process).

The appeal is consequently disallowed and the council's decision confirmed.

The question of costs did not arise during the hearing. However, we are of the opinion whilst reserving the question that we should indicate to the parties at this stage how we view this matter. We have been impressed by the planning, and landscaping and legal submissions that have gone into this proposal. It has required very careful and close attention. Some of the provisions of the Resource Management Act 1991 have not been altogether straightforward and in addition the proposed plan was still at the time of hearing, in the process of submission. We hold that the appellant had good reason, in spite of our findings, to test the provisions of the transitional plan in the way it did. Accordingly we are of the opinion at this point not to make an award of costs. As we have stated however, we reserve this question for further submission should the parties consider it necessary to do so.

DATED at WELLINGTON this *2nd* day of *February* 1994


S E Kenderdine
Planning Judge

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