RECENT CASES

BLUESKIN ENERGY LTD V DUNEDIN CITY COUNCIL [2017] NZENVC 150

Introduction and background

Blueskin Energy Ltd (Blueskin) appealed the Dunedin City Council's decision to decline resource consent to construct and operate a single wind turbine on Porteous Hill, Blueskin Bay. The appellant, Blueskin, is a renewable energy company established by local residents to develop renewable energy production.

The proposal was originally for three wind turbines on Porteous Hill. Independent Commissioner Weatherall declined resource consent on the ground that there would be significant adverse effects on the amenity and character of three properties near the application site that could not be mitigated.

On appeal, Blueskin substantially amended its proposal to remove two of the three turbines. The amended proposal for a single "community turbine" to improve the resilience of power supply at Blueskin Bay was still opposed by the Council and 19 other parties to the appeal.

Decision

As a preliminary legal matter, the Environment Court was required to determine its approach to assessment under s 104 of the Resource Management Act 1991 (RMA), particularly in light of the High Court's decision in *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52, [2017] NZRMA 227. *Davidson* (subject to appeal) upheld a decision of the Environment Court that the reasoning in *Environmental Defence Society Inc v New Zealand King Salmon Co* [2014] NZSC 38, [2014] 1 NZLR 593, regarding the role of pt 2 of the RMA in decision-making, applied equally to resource consents. In *Davidson*, the Court held that relevant provisions of planning documents in that case had already "given substance to the principles in Part 2" absent "invalidity, incomplete coverage or uncertainty" (*Davidson* at [76]). The Court further held that to allow regional and district plans to be rendered ineffective by general recourse to pt 2 would be inconsistent with the scheme of the RMA.

The Environment Court agreed with *Davidson* that there

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was an inherent risk when applying an overall judgment approach under s 104 of the RMA (that is, by assessing an application directly against the provisions in pt 2 of the RMA) that the decision-maker will take into account an irrelevant matter, or fail to take account of a relevant matter. The Court recognised that the decision in *Davidson* was binding on it, but noted that the "structured inquiry" under s 104(1)(b) set down by the Environment Court in *Davidson*, was not commented on by the High Court. While not explicitly criticising that "structured inquiry", the Environment Court considered *Blueskin* lent itself to a different approach, assessing considerations under s 104(1)(b), and weighing them by reference to direction in the relevant plans and/or the considerations in pt 2 of the RMA.

In determining the role of pt 2 in that approach, the Environment Court held that:

- "direct" recourse to pt 2 is not required where policy direction is provided for in higher order instruments (absent invalidity, uncertainty or incomplete coverage); but
- pt 2 considerations may assist in determining the weight to be given to the matters in s 104(1)(b), thus informing the exercise of the Court's discretion, or "judgment", as to whether to grant consent.

In weighing its findings under s 104, the Court relied on the approach in *Stirling v Christchurch City Council* (2011) 16

ELRNZ 798 (HC). The Court further said that:

> *"[Stirling] precedes the High Court Decision of R J Davidson and the interpretation of 'have regard to' in s 104 is now more nuanced. The direction 'must, subject to Part 2, have regard to' includes having regard to any indication of the weight given to the relevant consideration in the planning instrument. Where there is no coverage of the relevant effect under any plan or policy statement [or the instrument or its provisions are uncertain or invalid] then Part 2 may provide guidance on the weight. We consider this approach is consistent with Stirling where the High Court held an effect may be proven but receives little weight if that is justified by policy considerations".* (Blueskin at [34] (footnotes omitted))

The Court held that its approach should not be taken as a formula for future decision-making, which should be determined by the facts of each case. The appeal itself was declined on adverse visual and amenity grounds (whilst acknowledging the significant positive benefits for sustainability and energy resilience in the area).

Comment

The decision is a much less prescriptive approach to the assessment of objectives and policies than the strict inquiry approved in *Davidson*. It recognises that decisions under ss 104 and 104B of the RMA remain a "judgment", if not an "overall broad judgment", and have stepped back slightly from the "structured inquiry" put forward in the Environment Court's decision in *Davidson*.

Interestingly, the decision does not refer to any "conflict" between the considerations in s 104(1) as an instance where regard can be had to pt 2. In an earlier Minute on another matter, the same division of the Environment Court had referred to the "frequent overlap" between matters in s 104(1)(a), (b) and (c), and the ability to resort to pt 2 where there is "no discernible priority" between plan provisions (Minute of the Court dated 19 May 2017 – *Yaldhurst Quarries Joint Action Group v Christchurch City Council* ENV-2016-CHC-049). The absence of that discussion in the decision is curious, as it appears to accord with the commonly understood meaning of the use of "subject to" as a matter of statutory interpretation.

The authors have previously suggested that the High Court's approach in *Davidson* would raise the importance of plan provisions and higher-order documents that provide strong direction against consent, and the importance of careful drafting to ensure that all matters covered under pt 2 (both protection and enablement) are addressed, as the provisions would ultimately decide the result. The Environment Court in *Blueskin* appears to be seeking a more flexible approach, to avoid being "straight-jacketed" by the provisions of a plan whilst remaining respectful to the new world order post-*King Salmon*.

The *Davidson* appeal is to be heard by the Court of Appeal on 21 and 22 November 2017.

MATAKANA COAST TRAIL TRUST V AUCKLAND COUNCIL [2017] NZENVC 149

Introduction and background

Matakana Coast Trail Trust (Trail Trust) appealed a decision of Auckland Council to grant subdivision consent for a block of forestry land at Moir Hill, near Warkworth. The Trail Trust sought the imposition of a condition requiring a connecting cycle trail between public roads to the north and the south of the subdivision, thereby enabling cyclists and pedestrians to travel through the area safely.

On a site visit, the Court determined that a cycling/walking trail was feasible.

The crux of the appeal was whether the Environment Court had jurisdiction to impose the condition sought by the appellants. The Court cited various Supreme Court and High Court authorities that provided that it could not impose a condition that does not address an adverse effect, nor simply to achieve objectives, policies, methods or rules of a Plan. The question, therefore, was whether the proposed condition addressed an adverse effect of the proposal to subdivide.

Decision

The Court determined that the proposed cycle trail, while also benefiting the new owners, would provide a practical family walking or cycling environment, not otherwise provided for between the north and south parts of the block (given the current terrain and distance). Cycling or walking to (and along) the State Highway that bordered the site was considered dangerous given the combination of high speed vehicles and low speed corners.

The Court concluded that both the Auckland Regional Policy Statement and the Auckland Unitary Plan supported greater connectivity, including off-road pedestrian and cycling facilities, as part of Auckland's transport network. In the Court's view, the relevant objectives and policies contemplated poorly integrated transportation connectivity as an adverse effect. Given the mandatory nature of these provisions, the Court considered that excluding off-road cycling and walking trails on private land was a "significant failure" of the proposal. The proposed cycling/walking trail would conceivably provide a form of mitigation or compensation for the loss of other, wider, connectivity issues. The Court granted the appeal and directed the parties to conference on the wording of a suitable condition.

Comment

In reaching its decision, the Court seems to have equated the apparent lack of a positive effect arising from a proposed activity with an adverse effect. This approach significantly widens the scope of conditions. It potentially encourages future decision-makers to impose their views of what a proposal should look like through conditions of consent, and thereby take a much more active role in directing the use of private land.

This case was decided under the former provisions of the Resource Management Act 1991 (RMA) in relation to conditions which (as of 18 October 2017) have been replaced. In reaching its view that it had jurisdiction, the Court relied on the legal test set down by the Supreme Court in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149, requiring a "logical connection" between a condition and a proposed development. The RMA now requires a "direct connection" between the condition and an adverse effect or a rule, which may have precluded the Court from extending the concept as far as it did in this case.

It will be interesting to see whether subsequent decisions follow the Court's reasoning. Given the apparent departure from standard practice, the decision and reasoning may well be confined to its particular facts.

GABLER V QUEENSTOWN LAKES DISTRICT COUNCIL [2017] NZHC 2086

Introduction and background

This case involved an application for judicial review of a decision by Queenstown Lakes District Council (QLDC) to grant consent on a non-notified basis to The Playground Ltd (TPL). TPL has sought consent to undertake a range of outdoor recreational activities on a site at the foot of Coronet Peak in Queenstown. Those activities included paintball, a high ropes course, bubble soccer, archery combat, mountain boarding and sumo wrestling.

The applicants for judicial review were owners or occupiers of land to the south and west of TPL's site. The area was zoned Rural General in the District Plan, meaning that consent was required for the commercial recreation activities listed above.

The core of the applicants' argument was that QLDC did not have sufficient relevant information before it to reach a decision on notification and the grant of consent. In particular, the applicants were concerned that QLDC had insufficient information on the effects of noise from the activities. Relevantly, in this case, consent was not sought to breach the noise limits in the District Plan for the relevant zones. Rather, TPL had stated in its detailed assessment of environmental effects that the noise generated from the site would meet the District Plan noise limits, due to the natural topography, vegetation and separation distance from the nearest residential neighbours. TPL's conclusion, and QLDC's, was that the application would have a less than minor effect on all potentially affected persons.

Decision

The Court examined the key provisions relating to information requirements for resource consent applications under the Resource Management Act 1991 (RMA). The Court held that, together, s 88 and sch 4 of the RMA "without question demonstrate the significant obligation of an applicant to *inform* the consent authority, by description of the activity, relevant Plan/s or other instruments, and assessment of environmental effects" (*Gabler* at [46] (emphasis in original)). The adequacy of this information was a "crucial aspect of this case" (*Gabler* at [46]).

Associated to that aspect was whether amendments to the RMA in 2006 and 2009 have lessened the information

requirements on applicants, allowing the consent authority greater scope not to notify. The Court reviewed the Supreme Court's decision in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597, which required, under an earlier version of the RMA, that a consent authority must be "satisfied" that it has adequate information before it before considering whether or not to notify. The applicant argued that, despite amendments to the RMA, the test remained largely the same. QLDC argued that the standards had been relaxed, relying on appellate court decisions following the 2009 amendments, which suggested that the replacement of the requirement to be "satisfied" with a requirement to "decide" had lowered the bar (*Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, (2013) 17 ELRNZ 427 and *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, (2016) 19 ELRNZ 535.

The Court rejected QLDC's submission. It held that while a consent authority does not have to be "satisfied" of the "adequacy" of the information, it still must decide the level of effects based on a sufficiently and relevantly informed understanding of those effects. The Court recognised that there was room for debate on whether the word "satisfy" as opposed to "decides" indicated that a higher degree of certainty was required before the amendment. However, the Court could not see how a council could "decide" something "unless it was satisfied that it was sufficiently and relevantly informed, and satisfied of the decision it makes. A council could not say it was 'not satisfied' about those matters but nevertheless go on to make a decision which affects the rights of others" (*Gabler* at [65]).

While the Court agreed with Wylie J in *Tasti Products* that the requirement to be satisfied of the adequacy of information is no longer a separate and reviewable element of the decision-making process, it did not consider that this "in any way altered the need for a decision maker to be sufficiently and relevantly informed" (*Gabler* at [66]). That requirement was held to be a "secure foundation" for decisions on notification, which Parliament could not have intended to remove through the amendments to the RMA. Fundamentally, the tests of sufficiency and relevance remain a test of the quality of the decision.

Returning to the substance of the applicants' claims, the Court held that it should be slow to intervene in the specialist exercise of councils' powers, and should only do so where there is a plain error of law needing correction. The Court also realised the "nuanced" nature of assessment of effects, and held that QLDC reached a tenable and reasoned conclusion (based on sufficient relevant information put forward by the applicant, and from the Council's own noise expert) that noise effects would be less than minor.

Comment

The decision strikes an appropriate and careful balance between the recognition of the role of the amendments to the RMA in 2006 and 2009, and the fundamental tenets upon which decisions under the RMA framework are made. In that way, the decision is both respectful to the jurisprudence that questioned the level of intensity of review after 2009, and the earlier Supreme Court statements regarding the importance of the role of public participation in planning and consent processes. The decision provides some much-needed clarity in that area, and is based on common sense reasoning and a "real world" and not overly legalistic view of the decision-making process of a council officer.

Postscript

Long after submissions had been made, the Judge identified a potential (unpleaded) argument that the Council had not complied with its obligations under s 95C of the RMA and sought submissions from the parties. The requirement under s 95C to publicly notify an application if an applicant receives a further information request under s 92 and either fails to provide the information before the deadline or refuses to provide the information, was held to have a "peremptory ring to it" (*Gabler* at [72]). However, the Court took a purposive approach to the interpretation of s 95C, holding that Parliament could not have intended that s 95C should apply in a "drop dead" way in every case. If a reply was a day late, or the Council obtained the information it sought from elsewhere, it could not follow that there *must* be public notification. The Court held that s 95C "is a discipline on an applicant for resource consent" (*Gabler* at [106]), but is not as strict and exacting as the plain meaning of the statute suggests. We agree with that sentiment.