RECENT CASES

DILWORTH TRUST BOARD V ATTORNEY-GENERAL [2017] NZHC 2987

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Introduction and background

The Dilworth Trust Board (Dilworth) sought a declaration from the High Court that land beneath the New Zealand Transport Agency's (NZTA) Newmarket Viaduct in Auckland (Viaduct), which had been previously acquired from Dilworth, should be offered back to it under s 40 of the Public Works Act 1981 (PWA).

Dilworth accepted that the offer back would exclude the Viaduct itself, the airspace immediately below it, and the land on which the Viaduct's piers sat, which was still required for the public work. Dilworth also accepted that any offer back would be subject to encumbrances allowing access to, and restrictions on, the land necessary for NZTA to carry out required inspection and maintenance of the Viaduct. However, Dilworth sought that the balance of the land which was no longer required by NZTA should be offered back to it.

Decision

The Court framed its analysis around the established criteria that are looked to when determining whether land is to be offered back under s 40, being:

(a) Is the land being held for a public work?

(b) If so, is the land no longer required for that public work?

(c) If so, is the land required either for any other public work or for any exchange under section 105 of the PWA?

The Court held that if the answer to all three questions was "no", the land must be offered back unless it would be impracticable, unreasonable or unfair to do so or there has been a significant change in the character of the land.

As a preliminary point, the Court noted that the Crown is able to acquire interests in land under s 31 of the PWA that amount to less than freehold (for example, rights in the subsoil, as occurred with the Waterview Tunnel). The Court held that the offer back provisions should therefore also apply to interests in land, such that if an interest in land is no longer required by the Crown, it should be offered back to the original owner under s 40.

There was no dispute that the Dilworth land had previously been held for a public work (the Viaduct). The central issue was therefore whether the land was no longer required for that public work. The Court held that the land underneath the Viaduct, excluding the land referred to above, was no longer required by NZTA and should be considered for disposal under s 40, subject to the resolution of question (c) above.

In doing so, the Court confirmed previous authority that "required" does not mean "used", so as not to prevent the acquisition and/or retention of land for the future proofing of projects, provided there is a clear plan or "degree of commitment" to utilise the land in the future. The Court appears to have implicitly taken the view that transport infrastructure is represented by its current physical manifestation, rather than as a transport corridor that may need to adapt to future demands (at least in the absence of a clear proposal). Plans to eventually expand or replace the Viaduct in the future, within the acquired corridor, did not meet that test.

The Court also held that determining whether land is required for a public work involves an objective, rather than subjective, analysis. As such, NZTA's view as to whether the land beneath the Viaduct was still required was not determinative and could be displaced by the Court's own objective assessment. In this particular case, the Court held that the public work was completed and did not require the ongoing use of the land beneath it. The Court based

this determination on evidence that NZTA had been prepared to offer developed 99-year leases of the land, as well as evidence that the airspace retention and proposed encumbrances would be sufficient to enable inspection and maintenance of the Viaduct. The Court considered that, if the Viaduct needed to be replaced in the future, the land could simply be reacquired by NZTA.

Comment

In considering whether land held for a public work is still required under s 40, regard has not generally been had to whether *particular interests* in that land may no longer be required for the public work. Generally, the question is whether the freehold interest in the land is required. If it is, the freehold and all other lesser interests are retained. This decision directs acquiring authorities to undertake a more nuanced assessment when considering whether offer back applies. Specifically, if some interest in land held for a public work is no longer required (for example, freehold, subject to any necessary encumbrances), land holding agencies must now consider whether there is a basis under the subsequent s 40 criteria for that interest to be retained, or otherwise offer it back to the original owner.

The Court was careful to say that its decision should not be taken as imposing an obligation on the relevant land holding agency to "undertake an ongoing review as to the existence of potential, less intrusive, alternatives" to retaining all the interests in land held for a public work. However, the decision arguably has the effect that the relevant acquiring authority will in fact now need to assess whether such interests are required on an ongoing basis. Otherwise, if the relevant acquiring authority waits (as the Court suggests) until they are approached by the former landowner with a development proposal, that interest in land may need to be offered back at historic values. In practice, such a review process could be quite onerous.

As a final point, it is unclear what the Court's decision means for leasehold interests. Arguably, the decision could mean that leasehold interests may need to be offered back (subject to appropriate break clauses to enable works to be carried out in the future), thereby giving the former owner the benefit of using the land until the relevant public work actually needs to be constructed. As noted above, however, the Court was careful to emphasise the unique facts of this case, such that any subsequent case will similarly turn on its own individual facts.

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INC V BAY OF PLENTY REGIONAL COUNCIL [2017] NZHC 3080

Introduction and background

Royal Forest and Bird Protection Society Inc (Forest and Bird) appealed a decision of the Environment Court which dealt with the wording of various provisions in the Bay of Plenty Regional Council's (Council) proposed Regional Coastal Plan (Coastal Plan).

Forest and Bird sought various amendments to the provisions of the Coastal Plan relating to the avoidance of adverse effects of (amongst other things) regionally significant infrastructure on the areas of significant indigenous biodiversity, as required by the New Zealand Coastal Policy Statement 2010 (NZCPS). In particular, Forest and Bird sought to limit the circumstances in which subdivision, use and development proposals that will adversely affect these values may be considered by the Council.

The Environment Court decision

Following appeals against the Council's decisions, the Environment Court had been tasked with setting the policies and rules in the Coastal Plan. There was no disagreement among the parties that the objectives of the Coastal Plan gave effect to the NZCPS and were in keeping with pt 2 of the Resource Management Act 1991 (RMA), and so did not need to be separately assessed.

The question, as cast by the Environment Court, was which of the options proposed was the most appropriate to give effect to the settled objectives of the Coastal Plan. In answering this question, the Court adopted a "proportionate response", by reference to the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*). The Court considered that the words "avoid" and "appropriate" are capable of having varying meanings depending on the relevant context (in terms of both the wording of the plan in question and the individual case, application or environment). It concluded that, where regionally significant infrastructure is involved, a proportionate response could be adopted, having regard to the particular activity and all other factors that go to its appropriateness.

The key issue before the High Court was whether, in determining the disputed policies and rules in the

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Coastal Plan, the Environment Court erred in adopting this "proportionate approach" to the consideration of various provisions contained in the NZCPS, the Bay of Plenty Regional Policy Statement and the unchallenged objectives of the Coastal Plan.

The High Court decision

The High Court found that the Environment Court did err in adopting its "proportionate approach", and in particular, that such an approach was in conflict with the findings of the majority of the Supreme Court in *King Salmon*. In reaching this conclusion, the Court held that:

- While accepting that the ratio of *King Salmon* is relatively narrow in its application, the observations of the majority of the Supreme Court regarding the meaning and operation of the NZCPS are highly persuasive and cannot be ignored or glossed over.
- There is no shortcut in plan making. Even when the objectives they sit under are settled, rules and methods must be checked against the higher order documents as required by the RMA. It is incumbent on decision makers to check, particularly where the objectives could lead to more than one policy framework. This is to avoid the story being "lost in the re-telling".
- Avoid continues to mean avoid. The more restrictive regime flowing from *King Salmon* (where avoid means avoid, and tensions need to be resolved rather than glossed over in an overall broad judgment) does not permit a "proportionate" or contextual approach. The Court considered this was an attempt by the Environment Court to read down the Supreme Court's clear interpretation of the NZCPS in *King Salmon* and its "avoid" policies. Such an approach would have allowed a more permissive planning framework for regionally significant infrastructure than what Forest and Bird had sought, and what the Court held the NZCPS required.

Overall, the Court rejected the "contextual" or "proportionate" approach adopted by the Environment Court. Such an approach was considered synonymous with the overall broad judgment approach that had been expressly rejected by the Supreme Court in *King Salmon* in relation to plan making.

Comment

The High Court's findings are general in nature and likely to be broadly applicable to all plan-making processes. There may be significant implications in future plan reviews, which will have flow-on implications at the time of consenting / re-consenting activities.

In the current context, it effectively directs that (in order to give effect to the NZCPS) plans should not allow (i.e. prohibit or, at the very least, make non-complying) the location of regionally significant infrastructure in areas where it will have adverse effects on significant indigenous biodiversity. In other contexts, the Court's findings would be equally applicable to areas of outstanding natural character or landscapes, or other areas protected by environmental bottom lines in higher order documents.

The Department of Conservation (DOC) in its *Review of the effect of the NZCPS 2010 on RMA decision-making* (June 2017) noted that polarised views (between industry, on the one hand, and environmental groups, on the other) as to the appropriate interpretation of the NZCPS continue to persist in the wake of the *King Salmon* decision. While DOC acknowledged this divergence and the further work to be done on implementation, it ultimately found that the NZCPS is working as it was intended to. The High Court's decision in this case provides further confirmation that, for now at least, the restrictions arising from the Supreme Court's interpretation of the NZCPS in *King Salmon* are here to stay.

MAN O'WAR FARM LTD V AUCKLAND COUNCIL [2017] NZHC 3217

Introduction and background

This case involved appeals on questions of law by Man O'War Farms Ltd (MOW) and Federated Farmers of New Zealand Inc to the High Court made under the Local Government (Auckland Transitional Provisions) Act 2010. The appellants appealed against decisions by Auckland Council (Council) to adopt the recommendations of the Auckland Unitary Plan Independent Hearings Panel (IHP) regarding rules applying to farming activities undertaken in areas identified as Outstanding Natural Landscapes (ONLs). Among other things, these rules provided that any new farm buildings, earthworks or forestry exceeding a specific size were classified as restricted discretionary activities, on the basis that such activities may give rise to adverse effects of

inappropriate land use, subdivision or development.

The appellants' grounds were directed both at the substance of the rules as well as the reasoning employed by the IHP in making its recommendations. At the heart of the appeal, however, was whether farming activities on rural land that had been classified as an ONL may in some circumstances give rise to "adverse effects of inappropriate subdivision, use or development". The appellants submitted that if they did not, it was irrational and unreasonable for the IHP to confer restricted discretionary status upon them. As such, they sought orders amending the text and maps of the Auckland Unitary Plan – Operative in Part (Unitary Plan) and a direction that the Council reconsider the relevant provisions of the Unitary Plan in light of the High Court's findings.

The Council opposed the appeal. It was joined in its opposition by the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) and the Environmental Defence Society Inc.

Decision

The High Court first considered what is meant by "the adverse effects of inappropriate subdivision, use and development", in particular the terms "adverse" and "inappropriate", in the context of their expression in the Unitary Plan. Referring to the findings of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (*King Salmon*), the Court held that the standard for determining what is "inappropriate" subdivision, use and development in ONLs must be determined by reference to the natural characteristics and qualities that contribute to the values of the ONL in question. Similarly, whether an activity will give rise to "adverse effects" on a particular ONL must be assessed according to its effects on the natural characteristics and qualities of that ONL.

The focus, in both instances, is on the *natural* characteristics and qualities of the ONL in question. The Court applied the ordinary meaning of the word "natural" to hold that whether an activity causes "adverse effects" or is "inappropriate subdivision, use [or] development" will be determined by its effect on the characteristics and qualities that are "existing in or caused by nature". The Court found that is a contextual assessment. The Court held that although man-made features such as buildings, tracks or fences associated with farming activities may be characteristics or qualities of a particular ONL, they are not *natural* characteristics or qualities of that ONL.

The Court found that some types of activity would be inappropriate in all cases, and require prohibited activity status. One example given by the Court was landfills, which are prohibited in ONLs under the Unitary Plan. Other activities, such as the mere continuation of existing farming activities, will not ordinarily give rise to adverse effects on the natural characteristics and qualities of an ONL. Where the Council is satisfied that a particular activity will not give rise to adverse effects on an ONL, it can grant permitted activity status. One example given was the permitted activity status granted to existing farming activities as at 30 September 2013.

In the present case, in the context of ONLs 78 and 85 in the Unitary Plan, the Court considered that the continuation of existing farming activities would not ordinarily give rise to adverse effects on the ONL, but was satisfied as a matter of law that new farming activities may in some instances result in adverse effects and / or be described as inappropriate subdivision, use or development. On this basis, the Court dismissed MOW's appeal and held that the rules recommended by the IHP (and subsequently) adopted by the Council requiring resource consent for any new buildings, earthworks and forestry in ONLs were entirely consistent with the requirement to avoid adverse effects of inappropriate subdivision, use and development. In those cases, the Court held it may be impossible to make any generalisation regarding the effects of an activity on ONLs, and determination on a case-by-case basis is required.

A separate ground of appeal alleged that the rules were inconsistent with ss 75(3) and 75(4) of the RMA, namely the need to give effect to certain higher-order planning instruments, and to not be inconsistent with others. The focus of this appeal was consistency with the regional policy statement (RPS), as contained in the Unitary Plan, and the removal between the proposed and final RPS of a specific policy that required avoidance of adverse effects. The Court dismissed this ground of appeal, holding that the relevant RPS provisions required the "protection" of ONLs from inappropriate subdivision, use or development; and the rules promulgated give effect to those directions.

Finally, the Court dismissed arguments as to errors of process in the IHP's recommendations. The Court held that there was sufficient evidence on which to base the IHP's

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recommendations (and, as a consequence, the Council's decisions) on the new farming restrictions. The IHP was also entitled to place weight upon evidence that a threshold of 50m^2 for new farm buildings (compared to, say, a threshold of 200m^2) would prevent the establishment of an inappropriate permitted baseline for future residential development in ONLs. Lastly, the Court held that the final recommendations of the IHP in its overview report on farming activities in ONLs were not inconsistent with other statements in its reports which specifically addressed the changes made.

Comment

The High Court's findings provide further clarity as to the application of the Supreme Court's decision in *King Salmon* to plan changes, especially those that involve issues relating to outstanding natural character and landscapes under ss 6(a) and (b) of the RMA. The decision addresses, in plain language, the meaning of various terms that are commonly used in plans to control adverse effects on the environment. The decision also represents a fine balance between recognising the environment that plans are required to reflect and protect (i.e. the existing environment), and recognising their forward-looking nature and the potential impacts they can have on the environment in future (i.e. the future environment). The Court's findings in relation to the natural characteristics of an activity add further particularity to the Court of Appeal's findings in previous *Man O'War* litigation that judging inappropriateness, or what is adverse, is a contextual assessment. In some circumstances, that assessment will vary on a case-by-case basis, and so it is appropriate for consent authorities to retain some form of discretion or control. The Court was also clearly of the view that in other circumstances, those same assessments will not vary according to their particular context, and decisions can be made to permit or prohibit activities accordingly.

The High Court's decision is also another in a line of cases giving a degree of deference to the IHP as to the reasons provided for its recommendations, given the somewhat Herculean task and timeframe it faced.

NZ BUILDING AND PROJECTS LTD V AUCKLAND COUNCIL [2017] NZENVC 175

Introduction and background

NZ Building and Projects Ltd and Ruban Mahabir (Applicants) applied to the Environment Court for declarations under s 311 of the Resource Management Act 1991 (RMA). The declarations related to two dwellings at 23 Seddon Avenue, Papatoetoe (Site), which sits within the High Aircraft Noise Area (HANA) in the Auckland Unitary Plan (Unitary Plan) Aircraft Noise Overlay:

- an existing building at the front of the Site, which the Applicants sought to demolish in order to build a new dwelling (Front Dwelling); and
- a partially constructed dwelling at the rear of the Site, which the Applicants sought to continue building (Rear Dwelling).

The Applicants sought declarations that their consent application for the Front Dwelling was accepted by Auckland Council (Council) before Rule D24.4.3(A29) of the Unitary Plan, which prohibits new dwellings in the HANA, became operative. As such, the Applicants submitted that that the Front Dwelling fell to be processed as a discretionary activity under s 87B of the RMA. The Applicants lodged their application for consent for the Front Dwelling on 26 August 2016, after the Council's decisions on the Unitary Plan were released, but approximately three weeks before this Rule became operative under s 86F of the RMA.

This case note focuses on the Court's analysis of the role and status of s 87B of the RMA in determining the activity status of applications for resource consent, in the context of the Front Dwelling only. Separate issues of plan interpretation specific to the Unitary Plan arose in relation to the Rear Dwelling, which are not considered further here.

Decision

The Court's findings on the Front Dwelling turned on the interpretation of the relationship between ss 87B and 88A of the RMA, in circumstances where a rule prohibiting a particular activity becomes operative after a consent application is received for that activity, but before that application is determined. Section 87B provides that a consent application must be treated as a discretionary activity in a number of circumstances, including where a rule in a proposed plan describes the activity as a prohibited activity and the rule has not yet become operative. Under s 88A, if the status of an activity changes after an application for consent for that activity is lodged, the application is to be processed as being for the type of activity it was for, or was treated as being for under s 87B (i.e. a discretionary activity), at the time it was lodged. Also relevant here

is s 87A(6)(b), which provides that, where an activity is prohibited, consent must not be granted for it.

In considering the interplay between the protections offered by these two sections, the Court found that the reference in s 88A to those applications that are treated as discretionary activities under s 87B indicated that Parliament intended for these provisions to be read alongside one another. The Court held that, if an application for consent for a particular activity is made before a proposed rule prohibiting that activity is made operative, but decided after, s 88A "freezes" the discretionary activity status of that application pursuant to s 87B.

In doing so, the Court acknowledged the limitation that s 86F places on the "freezing" of activity status under s 88A where a proposed rule has become operative. Section 86F provides that a rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on that rule has expired, and all submissions in opposition to the rule have been dealt with. The relationship between ss 86F and 88A was considered in detail by another division of the Environment Court in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479. In *Infinity*, the Environment Court held that where a proposed rule has become operative between lodgement of a consent application and the determination of that application by a consent authority, s 86F operates to make the former rule inoperative and the proposed rule operative, such that s 88A no longer "freezes" the relevant activity status. However, the Court in this case distinguished *Infinity* and other related case law concerning the interaction between ss 86F and 88A, on the basis that the discretionary activity status conferred under s 87B must prevail over any district plan rules (whether operative or proposed), as that status is provided for by statute. In *Infinity*, the activity status changed from non-complying to discretionary. However, both of those activity statuses were provided for by different plans, and not the RMA itself (as in this case). In reaching this conclusion, the Court relied on the longstanding principle of statutory interpretation that subordinate legislation (here, the Unitary Plan) must give way to provisions of an enabling Act, unless the enabling Act (here, the RMA) expressly provides for that subordinate rule to supersede. In doing so, the Court added a gloss to s 87A(6)(b), the subsection which ordinarily precludes the ability to grant consent for prohibited activities, to read: "If an activity is described in this Act … or a plan [whichever prevails] as a prohibited activity … the consent authority must not grant a consent for it."

The Court also noted the practical difficulties that would arise if s 87B did not preserve the discretionary status of an application after a proposed prohibited activity rule became operative. The Court was wary of an interpretation that would see an application for a discretionary activity under s 87B become prohibited as a result of a proposed rule becoming operative, after a consent authority has determined the application but before any appeal to the Environment Court has been finally determined. In contemplating the appropriate approach to such circumstances, the Court emphasised that the discretionary activity status of the application must be preserved to avoid the retrospective removal of the Court's jurisdiction to determine the appeal, which in turn could deprive applicants of their rights of appeal under the RMA.

Comment

In reaching its decision, the Court recognised the importance of ensuring the objectives of a proposed plan are not undermined by the "freezing" of activity status, and the clear policy direction under the Aircraft Noise Overlay that the establishment of residential dwellings is to be avoided in the HANA. The Court rightly noted that the preservation of discretionary activity status for the Front Dwelling gave no guarantee that consent would be granted, and that the objectives and policies of the Aircraft Noise Overlay would be given due consideration by the consent authority in deciding the application.

In our view, the decision strikes an appropriate and considered balance between the recognition of the respective roles of ss 86F, 87B and 88A in determining the activity status of consent applications, and the need to ensure consistency and coherency in the application of key provisions of the RMA. While the Court acknowledged that "it is at least odd drafting to have two shield provisions in the RMA when one would surely suffice", it considered that any untidiness in drafting was simply the result of the piecemeal taken approach to RMA reform in recent years, rather than an intention to have those provisions operating inconsistently in the same circumstances.

DISCLAIMER: Russell McVeagh acted for Auckland Airport, as a s 274 party, in these proceedings.