Case Notes

Zoning "Wipeout" and the No Compensation Principle

Mullins v Auckland City Council, Planning Tribunal, Auckland, 17 April 1996, A35/96 Sheppard Pl. J.

Introduction

The decision in *Mullins v Auckland City Council*,[1] may represent the first occasion in which the Planning Tribunal (now the Environment Court) has considered an appeal based upon s 85 of the Resource Management Act 1991. Section 85(1) states that "An interest in land shall be deemed to be not taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act". By inference, as stated in the section title, compensation is not payable in respect of general controls on land. However, as a concession, s 85(2) and (3) provide a special ground for challenging a provision in a plan or proposed plan, upon the basis that the provision would render the land "incapable of reasonable use".[2] Relief may then be granted if the provision is further determined to place "an unfair and unreasonable burden on any person having an interest in the land". Section 85 is the blunt instrument, which replaces the complex compensation provisions found under s 126 of the Town and Country Planning Act 1977.[3]

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1 Planning Tribunal, Decision A 35/96, 17 April 1996, Planning Judge Sheppard (unreported).

2 Resource Management Act 1991, s 85(6) defines "reasonable use" to include any use or potential use of the land for an activity whose actual or potential effects on any aspect of the environment or person would not be significant.

3 For details, see Palmer, K.A., *Planning and Development Law in New Zealand*

Mullins decision

The *Mullins* appeals concerned provisions in the proposed Auckland City District Plan (1993) which reduced the density permitted under the transitional operative district plan for the erection of dwellings in many residential zones. The separate appellants owned five building sites for new dwellings. In each instance, the land interest had been created prior to publication of the proposed district plan, with the ownership of the building site held separately from the parent title, and held in expectation of being permitted to erect a separate dwelling on the site (and obtain a cross lease title). The increase in the minimum site area for a second unit in the respective residential 2b and 5 zones was claimed to render the sites incapable of reasonable use.

Uncontested evidence was accepted by the Tribunal that a dwelling complying with the other bulk and location rules could be built on each of the five building sites, and the visual effect on the environment from the units would be minor. No person appeared on a cross-submission in opposition to the submissions lodged. However the respondent council asserted that the appeals, based upon s 85(3) should be rejected. The council submitted that the proposed density rules of 500 square metres (residential 5 zone) or 600 square metres (residential 2b zone), were necessary to achieve sustainable management objectives, and the owners of the cross lease sites retained a residual interest in the freehold title, and therefore did not have a valueless property.[4] Furthermore, the council's standard reply to like

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(1984) 733-745. See also infra, notes 20 and 21.

4 For practical purposes the interest in the freehold alone is not useable as a security: *Harman & Co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Ltd* [1992] 2 NZLR 416 (CA). See discussion of this case, Grinlinton, D., "Cross-leases and Competing Mortgages - A Judgment of Soloman?" (1992) 6 BCB 89.

submissions was that a person should if necessary, apply for a resource consent (probably for a non-complying activity), and each application would then be considered upon its merits.[5]

A technical point was raised initially relating to sites and land. The Tribunal held that the reference in s 85(3) to any land being incapable of reasonable use included a building site contemplated under a cross lease subdivision. On the principal issue, the Tribunal found that each building site was acquired for erection of a dwelling which could no longer be built as of right, and the density rule placed an unfair and unreasonable burden on the persons who had bought those interests.

Regarding the jurisdiction to grant relief, the Tribunal noted that s 85(3) appeared to apply only to a submission on a change of plan, rather than in respect of a plan review. However the Tribunal ruled that under clause 15(2) of the Second Schedule, it had jurisdiction to direct the local authority to amend a plan provision which had been referred to it. But where parties were not applicants, and had not made a submission, the entitlement to make an order under s 85 would not apply. The parties who did not acquire their title until after the publication of the proposed plan, and did not lodge submissions against the provisions could not qualify for consideration, as it would not be fair to other persons who may have made a cross-submission on the matter. Further, one referral party had made a coterminous resource consent application, which was the subject of

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5 In *Chan v Auckland City Council* [1995] NZRMA 263, and *Lee v Auckland City Council* [1995] NZRMA 241, resource consent applications for a second dwelling were unsuccessful where contrary to the zone policies and detracting from the character of the streets. Conversely, in *Goodacre v Auckland City Council* [1996] NZRMA 57 and *Price v Auckland City Council* (1996) 2 ELRNZ 443 an additional unit was approved where neighbouring properties had already been developed to the higher densities permitted under the older transitional plan, and no detraction from amenities would arise.

submissions, and the Tribunal ruled that that party should continue to pursue the consent application as the appropriate procedure.[6]

In the outcome the Tribunal directed that several exceptions should be made under the district plan rules, allowing in respect of two parcels of land containing 884 and 660 sq metres respectively that two residential units could be erected on the site, and in respect of another property containing 1454 sq metres, three residential units could be erected. The exceptions were advanced as sunset clauses, to apply for a period of two years. The buildings were to comply in all other respects with the proposed district plan as to bulk and location.

Daylight decision

In the same month, another decision was issued on a similar density issue, in *Daylight v Auckland City Council Planning Tribunal.*[7] In this appeal, Mr Daylight was the owner of a property comprising 917 sq metres, which under the transitional district plan was in a residential 5 zone allowing one dwelling unit for each 300 sq metres. Under the proposed district plan, the same zone contained a density rule limiting one dwelling for each 500 sq metres. The appellant sought a rezoning to residential 6a, which would allow one dwelling for each 375 sq metres. The Tribunal considered the purpose of different zoning categories and the objectives of retaining the low intensity character in certain areas. In the particular street, the houses retained a low density appearance, and a claim of unfairness or unequal treatment could not be substantiated. The council justified the lower density

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6 Having regard to the uncertain outcomes noted in the decisions (supra note 5), one may assume the council would have regard to the s 85 issues in the consideration of the resource consent application, being a relevant matter under s 104(1)(i).

7 Planning Tribunal, Decision A 32/96, 16 April 1996, Planning Judge Sheppard presiding.

zone where there should be generous areas of open space and landscaping, and some 28,000 sites came within the zone. The potential of the appeal could upset the balance between urban consolidation and intensification, and the need to protect residential amenities. The council did not support an alternative ground for relief to make additional dwellings a discretionary activity in the zone.

The appellant (appearing in person) may not have raised the matters specified in s 85, and the Tribunal decision makes no reference to the section. However some cognisance of s 85 appears in the reasons. The Tribunal observed that the appellant had engaged an architect to draw up preliminary house plans, but had not committed himself to the development prior to the proposed district plan being published, nor had a certificate of compliance been sought which could have facilitated the development during the transitional period. The Tribunal stated that "it would not be appropriate to alter the provisions of the district plan on the basis of his disappointment in those circumstances." The appeal was disallowed.

Certificate of compliance option

As noted in the *Daylight* decision, a legal option open to a property owner, who has concerns about a pending plan review or change, which may downgrade the zoning potential for development, is to seek a certificate of compliance. Under RMA, s 139, a certificate of compliance in relation to a proposed development or activity is deemed to be an appropriate resource consent, and has the benefit of a two year period for implementation. Unless limited, the certificate would attach to the land and the entitlement would be capable of being sold with the property for the benefit of a purchaser. Traditionally local authorities have maintained secrecy to the extent practicable, where a proposed plan or change is likely to downgrade zoning entitlements, with a view to preventing negation or frustration of the resource management objectives.

An example of the similar right, under the former legislation, is found in *Attorney General ex rel Wilson v Radonich Holdings Ltd.*[8] The obtaining of a building consent to plans prior to public notification of proposed scheme review, was held by the High Court to establish entitlement to an existing use right. That decision was subsequently followed by the High Court in *Ackmead Holdings Ltd v Auckland City Council.*[9]

Under the RMA, s 139, the former recognition of this right under the existing use provision has been recast to become an entitlement through the new certificate of compliance. More recently, in *Goldfinch v Auckland City Council*[10] the Court of Appeal has determined that the conventional planning approval stamp, obtained upon a building permit application, may be sufficient to constitute the issue of a certificate of compliance. In the particular case, a building consent attained for one dwelling, had been relied upon by the council as providing a subsisting entitlement to approve a dwelling (of different design) on a building site, which was below the minimum density size in the proposed district plan. The dwelling erected (to the roof stage prior to an order stopping completion), was not the same dwelling as originally designed and approved, so the matter was left open as to whether the consent under s 139, was sufficient to comprehend the

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8 [1968] NZLR 955, (1968) 3 NZTPA 113.

9 (1985) 11 NZTPA 59. Where a council may have acted deliberately to frustrate a pending building plan approval by announcing a proposed zoning change, the actions of the council are open to challenge on the grounds of ulterior objectives or bad faith; *Fairmont Holdings (No 2) Ltd v Christchurch City Council* (1989) 13 NZTPA 455, 461, 470 (HC).

10 [1996] NZRMA 329 (CA).

dwelling erected.[11] The Tribunal in the consequential decision of *Cooke v Auckland City Council*[12] found the consent to the first plan encompassed the second design.[13]

As evident from the various decisions noted,[14] the holding of a certificate of compliance under s 139 is a valuable right deriving from a "planning approval" or possibly the "building consent", which creates continuing rights during a transitional period extending for up to two years. Undoubtedly, the holder of the entitlement could obtain an advantage over other property owners affected by a zoning alteration or rule in a regional or district plan, which curtails former development rights.

Insider knowledge issue

A question arises whether there is an element of unfairness in the system, in that persons "in the know", or who make enquires and receive "insider information", are able to be better off than those other owners who merely trust that their interests will be looked after, and that equality and fairness will be an objective of the resource management system. In line

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11 Of significance in the *Goldfinch* cases, was that an alternative application for a resource consent to approve the dwelling had been rejected by the Tribunal in *Goldfinch v Auckland City Council* [1996] NZRMA 97 upon the ground that the proposed building had more than a minor effect on the environment and was contrary to the objectives and policies of the proposed plan.

12 [1996] NZRMA 511.

13 A further finding of lapse of that consent by the Tribunal was reversed to authorise completion of the dwelling: *Goldfinch v Auckland City Council* [1997] NZRMA 117(HC).

14 In particular, the judgment in *Ackmead Holdings Ltd* and the observation by the High Court in *Goldfinch v Auckland City Council* (1995) NZRMA 182, at 186 (reversed by the CA, supra, note 10).

with many personal investment and business decisions, the more entrepreneurial persons in a community may take steps to safeguard against zoning changes and secure a financial advantage. By nature a free market ethos would applaud this initiative and due reward.

As a matter of public interest and confidence, local authorities are likely to assert that confidentiality is maintained as far as practicable to avoid any leak of insider information, and to minimise the misuse for personal advantage of the information. Further, as asserted in *Mullins*, on behalf of the council, it is necessary to draw lines and to publish formal changes to resource management plans from time to time to achieve sustainable management objectives.[15]

An issue may remain whether the general exclusion of any entitlement to compensation, and the substitution of the remedy contemplated under RMA, s 85, is appropriate and sufficient to rebut or answer every claim of unfairness and unequal treatment.

Zoning and the compensation principle

The impact of resource management controls on property rights and the matter of compensation for restrictions has a long history in planning law. In *Village of Euclid v Ambler Realty Co,*[16] the US Supreme Court upheld the lawfulness of reasonable planning regulation, as a justifiable use of the police power for the purposes of the public welfare. The claims of loss of property without due process of law and denial of compensation

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15 The council must act in good faith regarding its knowledge of developments considered to be adverse: *Fairmont Holdings* case, supra, note 9.

16 272 US 365 (1926). The exclusion of large apartment houses from a low rise residential zone, was held to be justifiable, as often "the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district" (Justice Sutherland).

and equal protection, were disallowed. However, the degree of regulation would need to survive a reasonable regulation test, and in the well known words of Justice Holmes in *Pennsylvania Coal Co v Mahon*,[17] "the general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking".

The philosophy enunciated in the context of principles deriving from the US constitution, was also reflected in *Belfast Corporation v OD Cars Ltd*.[18] The House of Lords determined that reasonable planning restrictions were an extension of the common law nuisance principles and were a recognised element of the regulation of public health and amenities. The restrictions did not require compensation, although in a sense they expropriated certain rights to property. If any basis existed for the grant of compensation, it would not be on the ground that property had been taken, but that the property retained had been injuriously affected.

In New Zealand, it is well known that under the Town and Country Planning Act 1977, s 126, a complex provision allowed for compensation to be payable to a property owner who claimed to be injuriously affected by the zoning provisions of an operative district scheme.[19] In essence, compensation could be claimed for restrictions arising out of requirements and designations for a public work, or through listing of a property or object for protection, and for certain effects on a property of zoning limitations. Claims could fail if a property was still able to be utilised in accordance

17 260 US 393 (1922), at 415.

18 [1960] AC 490. Lord Radcliff affirmed (at 524) that the zoning restrictions, which prevented rebuilding of a motor vehicle retailing property, did not constitute the "taking of any property without compensation" in terms of the Constitution of Northern Ireland.

19 An analysis of the interpretation of that section, and its application, can be found in Palmer, supra, note 3.

with existing use rights, or for development contemplated within the permitted uses for the zone.[20]

This comprehensive provision for assessing the limited circumstances under which a compensation claim could be made were omitted from the Resource Management Act 1991. During the Bill stages, at least one submission was advanced questioning the wisdom of the omission upon the ground that in certain circumstances, as a matter of achieving appropriate planning objectives, the best outcome could be to require the local authority (or other responsible body) to pay reasonable compensation.[21] The submission did not succeed and the "blunt instrument" of s 85 has remained as the appropriate answer to the issue.

In support of the s 85 solution, it should be acknowledged that local authorities now enjoy an administrative and economic efficiency advantage, as the difficult matter of the determination of a reasonable level of compensation is eliminated by the general denial of the right.[22] An exception to this exclusion applies under s 85(5), where the use restraint arises from a requirement for a works designation or a heritage order or from the designation or order. In these situations, separate provisions confer on a property owner particular remedies to seek compensation, or to require the

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20 *Mackay v Stratford Borough* [1957] NZLR 96 is an example of a successful claim for compensation, for the inability to obtain a building permit for a structure on an empty allotment, due to a designation for a road.

21 Submission by the author.

22 In the *Mullins* situation, had s 126 of the Town and Country Planning Act 1977 remained in force, the outcome would probably have been that Mullins would have been entitled to compensation for the loss of the development right, subject to the ability of the council to amend the zoning provision where it chose to avoid the payment of compensation.

responsible authority to buy out the owner at a market value.[23]

Further applications of section 85

The *Mullins* decision opens the door to similar applications arising out of the impact of provisions in a proposed plan, upon a review or through a plan change. For example a proposed or operative district plan may list objects, buildings, places, and trees for protection. In these matters, it would be open to a property owner to contest the listing under s 85 where it could be established on the facts that the listing rendered the land incapable of use, and placed an unfair and unreasonable burden on that person relative to others.[24]

In relation to resource consent applications, as an option for a person affected unduly by proposed plan rules, a consent authority could be obliged to have regard to a submission raising the spirit of s 85(3) as relevant and admissible under s 104(1)(i). The applicant could claim, amongst other matters, that the restrictions, including zoning density changes, render the land incapable of reasonable use and place an unfair and unreasonable burden, having regard to the history of the property and any development of other land in the vicinity. These submissions could not be dismissed as irrelevant. By implication, the City Council in the *Mullins* case appears to

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23 RMA, ss 185 and 198. Compare the *Mackay* decision, supra, note 20. See also *Hammington v Wellington City Council* (1976) 6 NZTPA 81.

24 Any person has the right to request a (private) plan change at any time: RMA, ss 65(4)(regional plan), 73(2)(district plan), First Schedule, Part II, cls 21-29.

concede that serious weight must be given to the claim.[25]

Conclusion

The question of the equal impact of plan changes on property owners, and the existence of the right of submission under RMA, s 85, is likely to have an impact on policies and proposals by local authorities which alter the status quo in respect of sustainable management provisions in regional and district plans.

The justifiable absence of a statutory forward notice or consultation duty in relation to proposals to downgrade zoning entitlements is likely to produce some exploitation through insider knowledge. The present provisions in s 85 cannot be seen as wholly fair or even handed, yet pragmatism and economic efficiency can be advanced as a sufficient answer for the avoidance of compensation rights.

It is a matter of credit that the Planning Tribunal (Environment Court) in *Mullins* was rigorous in its interpretation and application of s 85, to limit the relief to the several persons holding property in good faith who were seriously prejudiced by the plan changes. The Tribunal was able to deny relief to the parties who had purchased property after publication of the plan change. This is a fortunate outcome, as owners and purchasers should not be able to plead ignorance of a notified change as a ground for relief. A normal expectation ought to be that a buyer of property will personally, or through a real estate agent or legal adviser, make inquiries concerning

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25 The Council can make no promise of special treatment, being contrary to RMA, s 84. The decisions, supra, note 5, indicate the Council will be impartial on the merits. See also *New Zealand Suncern Construction Ltd v Auckland City Council* [1996] NZRMA 411 (subdivision potential affected by tree preservation rules, but effect not unreasonable).

development rights. The local authority is under a duty to assist in making available relevant zoning information, once in the public domain.[26]

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26 The procedure to request a land information memorandum from the local authority may provide a formal notice of property rights and known limitations: Local Government Official Information and Meetings Act 1987, s 44A. A building information memorandum may also reveal information on zoning rule restrictions: Building Act 1991, ss 30, 31.

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