CASENOTE

Notification of Discretionary and Non-Complying Activity Resource Consent Applications — Assessment of Effects

Aley v North Shore City Council [1998] NZRMA 361

Introduction

The recent High Court decision in *Aley v North Shore City Council* will impact on the notification of discretionary activity and, by implication, non-complying activity resource consent applications under the Resource Management Act 1991 (RMA). It provides important guidance for consent authorities in their assessment of the effects of an activity under s 94 of the Act when considering whether or not a particular application should be notified.

In this instance, the application for judicial review was initiated by a group of local residents opposed to the North Shore City Council's (the "Council") decision not to notify the discretionary land use resource consent application of the second defendant developer, Anzani Investments Ltd. The residents obtained interim orders from the Court preventing the Council from continuing to hear the merits of the substantive application. The application was to construct a five-level building encompassing apartments, car parks and retail space in the Browns Bay commercial area adjacent to the Browns Bay beachfront reserve.

There was a dispute between the residents and the Council as to which aspects of the proposal required consent and the nature of the consents required. It was, however, agreed that discretionary activity consents were required in respect of the parking, site works, and vehicle movements associated with the proposal. Overall, therefore, the application fell to be considered as a discretionary activity.

Although the height and bulk of the building were provided for in both the Council's transitional and proposed district plans, existing built development had not taken advantage of the maximum building envelope of fifteen metres and predominantly remained at a height of two levels. It was this aspect of the proposal that was of concern to the residents, a number of whom would have their sea views impaired by the development.

The East Coast Bays Community Board Planning Committee had delegated authority from the Council to determine whether or not the application should be

notified and considered the matter on three separate occasions. On each occasion it concluded that the application should proceed on a non-notified basis.

By reference to s 94(2) of the RMA, the Committee was satisfied that the adverse effect on the environment of the activity for which consent was sought would be minor, and that there were no persons adversely affected by the proposal from whom written consents should have been obtained.

On the second occasion the Committee considered the matter, on the question of whether the height was a consideration in determining notification, it received planning advice that it was not an issue as it was provided for in both the proposed district plan and the transitional plan. On the third occasion the Committee considered the matter, the developer's legal adviser told the Committee that the developer was entitled to rely on the building envelope contemplated by both plans and that there was no basis for notification.

The Court ultimately made the crucial finding of fact that on the last occasion the Committee confirmed its decision not to notify the application, it did so on the basis that the height and bulk of the building were irrelevant to a consideration of the effects of the proposal on the environment for the purposes of notification.[1]

Submissions

The plaintiffs contended that the Committee's approach in failing to take into account the effects of the height and bulk of the proposal in allowing the application to proceed on a non-notified basis was incorrect. In support of this, they submitted that a discretionary activity is a wholly discretionary activity and relied upon the Supreme Court's decision in *Locke v Avon Motor Lodge*[2] under former Town and Country Planning legislation, and the Environment Court's recent decision in *Rudolph Steiner School v The Auckland City Council.*[3]

The Council agreed with this proposition in terms of the classification of an activity but submitted that a distinction must be made between the notification discretion exercised under s 94(2) and that concerning the granting or refusal of a consent under ss 104 and 105, RMA. It argued that in making an assessment of effects under s 94(2), a consent authority cannot ignore the provisions of the district plan which permit the height and bulk of a proposal. The developer submitted that in considering a discretionary resource consent application, the Council should concern itself only with those matters in respect of which consent is required.

1 *Aley v North Shore City Council* [1998] NZRMA 361, 371–373.
2 *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17.
3 *Rudolph Steiner School v The Auckland City Council*, A 34/97 [1997] 3 ELRNZ 85.

Decision

The Court concluded that at issue was whether the RMA should permit what Justice Cooke in *Locke* described as a "hybrid concept"[4] or whether, as Judge Sheppard held in *Rudolph Steiner School*, a non-discretionary activity must be wholly discretionary.

The Court held that the position under the RMA is the same as it was under the Town and Country Planning Act 1977. Justice Salmon considered that indeed the arguments in favour of that approach are stronger under the present legislation because specific provision is made for restricted discretionary activities. He stated:

> In respect of such an activity the Council's discretion may be restricted to matters specified in the plan or proposed plan for that activity. In the case of a non-restricted discretionary activity Council's discretion is not so limited.[5]

By contrast to the discretionary judgment exercised under s 105 and taking into account the matters referred to in s 104 of the Act, Justice Salmon stated that the only inquiry under s 94(2)(a) of the RMA is whether the adverse effect of the activity on the environment will be minor.[6]

His Honour found that the Committee's decision not to notify the application was flawed on the basis that it considered the height of the building was irrelevant. The Court directed that the matter should be referred back to the Council so that proper consideration could be given to the question of whether the application should be notified. The learned Judge concluded that a proper application of s 94(2)(a) required the consent authority to consider all aspects of the activity proposed and the effects of that activity on the existing environment. He stated:

> For the purposes of the section 94(2)(a) assessment the height of the building is relevant, as indeed is every aspect of the activity in so far as it has an effect on the environment. Whether that effect is more than minor is a question for assessment.[7]

Conclusion

The decision in *Aley* makes it clear that when making an assessment of effects for the purposes of notification under s 94 of the Act, the consent authority must take into account all environmental effects of an activity that fall to be considered as a discretionary or non-complying activity. This will be the case even if

4 *Locke v Avon Motor Lodge* (1973) 5 NZTPA 17, 22.
5 *Aley v North Shore City Council* [1998] NZRMA 361, 374.
6 Ibid 378.
7 Ibid 379.

the component of the activity generating the effects complies with the relevant plan provisions, and even if there is only one element of the activity creating a non-compliance with the provisions of the plan.

It is arguable that the decision adds nothing new to the existing principles established in the *Locke* and *Rudolph Steiner School* decisions. However, it must be acknowledged that those decisions both concerned the grant of resource consents. The *Aley* decision is the first authoritative direction on the way in which the *Locke* and *Steiner* principle of "no hybrid activities" should be applied by a consent authority exercising its discretion under s 94(2) of the RMA. The decision clearly focuses a consent authority's effects inquiry under s 94(2) in a way that no previous decision under the RMA has.

The potential impact of the decision is therefore significant. It is probable that previously some consent authorities have directed their assessment of effects for notification purposes under s 94 to those aspects of a proposal that required resource consent. The result of a more far-reaching assessment of effects previously considered to be of little importance will be the notification of considerably more discretionary and non-complying resource consent applications. This will create increased financial costs for developers and consent authorities alike who will need to invest more resources in the assessment of applications and notification of consents. In the future, it is also likely to result in the categorisation of more activities as restricted discretionary activities in proposed plans as opposed to discretionary activities in order to circumvent the nature of assessment required to be undertaken by the consent authority.

In *Bayley v The Manukau City Council*,[8] a decision given the day after the *Aley* decision, Justice Salmon set out the limited nature of a consent authority's inquiry in respect of a restricted discretionary activity. He stated:

> In the case of a restricted discretionary activity application the only relevant issues will be those relating to the matters in respect of which the authority has restricted the exercise of its discretion. (See s 105(1)(b).[9])

Whilst there are clearly arguments that an applicant ought to be able to rely upon the provisions of a plan prepared under the RMA, which is an effects-based regime, as providing guidelines after the submission and decision stage as to what are acceptable effects from the community's perspective, the *Aley* decision should be viewed in light of the policy behind the notification provisions of the RMA which encourage informed decision-making by public participation in the process. Indeed, in the decision itself, Justice Salmon sets out that the approach to s 94(2)(a) taken by the Court is consistent with not limiting rights of objection to any greater an extent than is justified by the words of the Act and to giving

8 [1998] NZRMA 396.
9 Ibid 407.

effect to the intent of the Act which favours interested persons having an input into the decision-making process.[10]

The *Aley* decision has been appealed by the developer to the Court of Appeal although at the time of writing a hearing date has not been applied for. The decision has also been cited with approval by His Honour Justice Williams in another very recently decided notification decision of the High Court, *Belgiorno-Nettis & Ors v Auckland City Council & Sweet Developments Ltd.*[11]

Addendum

Since the initial drafting of this casenote, there have been a number of further developments in relation to the High Court's *Aley* decision. The developer, Anzani Investments Ltd, has now withdrawn its appeal to the Court of Appeal. In addition, His Honour Justice Salmon's High Court decision in *Bayley* was appealed and the Court of Appeal released its decision in *Bayley v Manukau City Council*[12] on 22 September 1998.

The Court of Appeal's decision in *Bayley* is of much interest and expands upon the principles set out by the High Court in the *Aley* decision, in particular those relating to the nature of the assessment of environmental effects that a consent authority is required to undertake under s 94, RMA. Arguably the Court of Appeal's decision in *Bayley* overrules some aspects of the reasoning behind the *Aley* decision.

In the *Bayley* proceedings, a group of neighbours sought judicial review of the Manukau City Council's decision not to notify and then to grant resource consents to Sanctuary Development Limited. Sanctuary Developments' application was for three land use consents to construct an intensive residential development comprising fifty-seven terrace houses on a former supermarket site with a business zoning. The Court ultimately decided that the Council's decision not to notify the application was invalid. This was due largely to the Council's failure to take into account the possibility of consequential effects arising from the way in which the site layout of the proposal may have been made possible by the use of yards in a non-complying way.[13]

10 *Aley v North Shore City Council* [1998] NZRMA 361, 379 per Salmon J citing Barker J in *Ports of Auckland v Auckland Regional Council* [1995] NZRMA 233, 238.

11 *Belgiorno-Nettis v The Auckland City Council*, High Court, Auckland, M 467/97, 24 July 1998, Williams J.

12 *Bayley & Ors v Manukau City Council & Sanctuary Developments Limited* [1998] NZRMA 513, Blanchard, Keith & Tipping JJ.

13 Ibid 525.

In *Bayley,* the Court of Appeal sets out that before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. Of importance is the Court's subsequent statement that "the appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right".[14]

The Court of Appeal also cites Justice Salmon's statement in *Aley* that "... a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the proposal on the environment as it exists". The Court then states that it would add to this sentence "or as it would exist if the land were used in a manner permitted as of right by the plan".[15]

On a plain reading of the Court's decision in *Bayley*, a consent authority should assess the effects of an activity by comparison with what is being lawfully done on the land or could be done there as of right, including what is permitted as of right in a plan. This latter concept was argued unsuccessfully before the High Court in the *Aley* decision. The Court of Appeal in *Bayley* does not expressly overrule the *Aley* decision. Rather it "adds" to its principles. Thus how far the practice of taking into account, pursuant to a s 94 assessment, what a plan permits as of right, may need to be clarified in a later case on point.

The decision also places greater emphasis on the obtaining of consents from every person who "may be adversely affected" by the grant of consent. This cumulative obligation will apply in situations where there is *any* adverse effect, including any minor effect, that *may* affect any person. The Council can disregard only such adverse effects as will certainly be *de minimis*, and those where it is merely a remote possibility. With no more than that very limited tolerance, the Council must require a written consent from every person who may be adversely affected, before dispensing with notification.

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14 Ibid 521.

15 Ibid 522.

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