IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

M.146/80

N2LR

[redacted]

IN THE MATTER of the Town and Country Planning Act 1977

- AND -

IN THE MATTER of an appeal pursuant to Section 162 of the Act

BETWEEN ALLAN GERALD ANDERSON and SUSAN HELEN ANDERSON both of Auckland

Appellants

A N D EAST COAST BAYS CITY COUNCIL

First Respondent

A N D GARY ROY JOHNSTONE and SUSAN ANNE JOHNSTONE both of Auckland

Second Respondent

Hearing: 31st March and 1st April, 1981.

Counsel: Salmon for Appellants.
Bollard and Mrs. Sargesson for First Respondent.
Worth for Second Respondents.

Judgment: 11 MAY 1981

JUDGMENT OF SPEIGHT, J.

This is an appeal by way of Case Stated under Section 162 of the Town and Country Planning Act, 1977, on questions of law arising out of determination by the Planning Tribunal (No. 1 Division) on the 4th March, 1980. By that decision the Planning Tribunal granted a dispensation to the Respondents in respect of height restrictions under the Operative and Reviewed District Schemes of the First Respondent. That decision was by way of affirmation on appeal of a similar dispensation previously granted to the Second Respondents by the First Respondent. I have before me an eight page decision of the Planning Tribunal setting out the

history of the case and the relevant facts and its conclusion in support of its decision to grant the dispensation, and I have a Case Stated which briefly recites the effect of the Tribunal's decision, and then asks a total of seven questions, doubtless drafted, as is the usual practice, by Appellant's counsel and approved as the Case by the Chairman.

As often happens out of an abundance of caution the case as settled puts forward a large number of questions, some of which were not strictly relevant for the determination of the appeal to the Tribunal, nor, as in this case, do some of them seem crucial to the resolution of the appeal argument put forward before this Court, which is not to ask whether the Tribunal exercised its discretion correctly but whether it applied a wrong legal test. So one must look to see what test was applied.

Very briefly the history shows that the Second Respondents had a vacant section in Kowhai Road, Mairangi Bay, adjacent to a property upon which Appellants already had a dwelling house. The Second Respondents applied for and obtained a building permit from the First Respondent for the erection of a substantial dwelling, and at that time applied for and obtained a very minor dispensation under Section 76 relating to a one foot variation in side boundary. This apparently was a rather steep and difficult site, and doubtless the dispensation was made bearing in mind the provisions of Section 77 (2)(a) and (b), namely, that it would allow better development of the site and would not detract from the amenities of the neighbourhood. It has been accepted both by the Council and by the Tribunal that at the time the original permit was issued it was believed by all parties that the building conformed to the height restrictions contained in the bulk and location requirements on both the Operative and the Reviewed District Schemes. When construction was part way completed and at a time when the house had been completely framed, the Appellants

objected to the Council that the building as being constructed was over height and a stop work notice was issued. Apart from the question of height, investigation at that time showed that the dwelling was slightly askew from its approved site, but this had not been the subject of complaint. However, the Second Respondents submitted a revised site plan to correspond with the work as being done and requested a dispensation to give a permit for the plan as originally drawn, albeit it was now recognised that there was some height infringement which, of course, was the grievance of the Appellants. Complaint was made that their view was partly obstructed in a way which would not occur if the correct height restriction was observed. The figures as to the height of the building then being constructed (and indeed eventually completed) as against the Operative and the Reviewed Scheme, produced some very confusing results. The Tribunal is very critical, and probably rightly so, of ambiguities. Excess height there certainly is, but it may be .8 of a metre, 1.48 of a metre, or 1.64 of a metre, or, in an extreme interpretation, 2.96 of a metre. The Tribunal was unable to resolve what was the exact figure. Now this application for a dispensation was dealt with by the Council on a notified application. The Appellants objected but a dispensation was given, recorded as being under Sections 67 and 74 (specified departure). In view of the power which the Tribunal has on appeal to it to make any substituted determination, the grounds relied upon by the Council are probably not relevant, but it was mentioned that the alternative of removing the top of the main ridge would be a very substantial alteration to the house as planned as compared with a minimal loss of view by the Appellants. It also held in the phraseology of the specified departure type of decision that the effect would not be contrary to public interest and would have little significance beyond the immediate vicinity. It was not recorded that this was also under Section 75 because the Reviewed Scheme was also relevant but it was apparently so intended.

The Appellants took the matter to the No. 1 Division of the Planning Tribunal and, as has been already stated, the appeal was dismissed and consent was given to the application, though in this instance relying upon Sections 36 (6) and 76, with the addendum that if 76 was not applicable it was also granted under Sections 74 and 75.

What now requires to be considered are the points of law upon which the decision was based, and this must be gleaned from a consideration of the whole decision and matched against the questions asked in the Case Stated where appropriate. At page 5 of its decision the Tribunal discussed at some length the purpose of height, bulk and location restrictions in a District Scheme and held that these restrictions were to ensure that all buildings received adequate light and air with appropriate space between them, and that buildings in the neighbourhood were in scale one with the other, and that this type of consideration was related to, inter alia, the amenities of the neighbourhood. It considered that building height was particularly important in keeping scale of one with another to promote harmony and coherence within the definition of amenities. Nevertheless, as the Tribunal pointed out - and I agree with it - these restrictions are of an overall or "broad approach" variety suitable for the neighbourhood as a whole and are not drafted with consideration of any individual sites in mind. Consequently the Tribunal held that the provisions regulating height, bulk and location do not have the objective of preserving views. I agree with this conclusion. In support of his submission that protection of views are one of the objects of the bulk and location requirements, Mr. Salmon relied on A.G. v. Birkenhead Borough (1968) N.Z.L.R. 383. However, an examination of that case shows that although views were mentioned, it was there observed that such requirements are for the overall preservation of neighbourhood amenities by preventing buildings of disproportionate size and character. This supports rather than

undermines the Tribunal's finding. Within a local body area contours and vistas will vary infinitely and a building of conforming height might make serious inroads upon the view of an existing neighbour because of topography but with no room for objection, and equally buildings of non-conforming height might, for the same reason, have no effect on neighbourhood views. Nevertheless the Tribunal went on to hold - and again I agree with it - that owners are entitled to rely on a general anticipation that bulk, height and location requirements will be complied with and persons will probably plan their own houses accordingly with justifiable expectation that benefits (such as a view) will not be encroached upon. This was Mr. Salmon's principal argument but it overlooks the fact, as the Tribunal says, that there is no absolute certainty that the restrictions will be enforced because of the powers of granting conditional use applications (Section 72), specified departures (Section 74) and dispensations and waiver (Section 76). Views, of course, will be taken into account in such determinations as, for example, in Attorney-General v. Mt. Roskill Borough (1971) N.Z.L.R. 1030, but in my view the Tribunal was not in error in law in holding that there is no absolute right in an owner to the preservation of view - either at common law or in planning law.

The final matter, which might be termed one of law, which the Tribunal took into account, as had the Council, was that it could give consideration to the existence of the house structure as at the time the application for dispensation came to be considered. All Town Planning dispensation applications must be considered as a matter of reality against existing facts, and in its judgment the Tribunal expressly stated that it was granting the dispensation under Section 76. It seems to me that the very existence of the building and the great inconvenience and expense of demolishing or partly demolishing it are matters relevant to be considered under sub-section (2)(a), namely:-

" That it is not reasonable . . . . to enforce the provision . . . . . "

The Council then went on to consider the matter under Sections 74 and 75 in the alternative, and correctly stated that Section 75 does not specify matters to which regard shall be had in granting or refusing consent under that Section. Therefore equally the existing situation was appropriate to be considered. It appears to me, therefore, that all the legal matters which were relevant for consideration by the Tribunal before it exercised its discretion on the factual matters before it, were correctly interpreted.

I turn then to the questions contained in the Case Stated and the answers are as follows:-

(i) Was the Tribunal correct in law in holding that the District Scheme does not confer upon the appellants any legal protection of their view?

Answer: Yes.

(ii) Was the Tribunal correct in law in holding that provisions regulating the height bulk and location of buildings do not have the objective of preserving views?

Answer: Yes, in relation to individual views as here.

(iii) In determining an application under the provisions of Section 76 was the Tribunal correct in law, in considering as relevant to the question of whether it was reasonable or practicable to enforce the provisions of the scheme in respect of the site, the circumstances that a building permit had been issued, and a building partly erected before a stop-work notice was issued, and that at the time the permit was issued the Johnstones and the Council believed that it had been properly issued?

Answer: Yes.

(iv) In determining an application under the provisions of Section 76 was the Tribunal correct in law in considering as relevant to the question of whether consent would have little planning significance beyond the immediate neighbourhood a situation authorised or created by a building permit issued in good faith?

Answer: Yes in relation to the "reasonable" test in Section 76 (2)(a).

(v) In the circumstances of the case was the Tribunal correct in law in holding that consent to the application could be granted under Sections 36 (6) and 76?

Answer: Yes.

(vi) In the circumstances of the case was the Tribunal correct in law in holding that consent could be granted under Section 74?

Answer: Yes.

(vii) In the circumstances of the case was the Tribunal correct in law in holding that consent could be granted under Section 75?

Answer: Yes.

The appeal is therefore dismissed. Costs to the First and Second Respondents $200 each.

Solicitors:

Grierson, Jackson & Partners, for Appellants.

Brookfield, Prendergast & Co., Auckland, for First Respondent.

Butler, White & Hanna, Auckland, for Second Respondents.