

Hay v Banks Peninsula District Council

The Planning Tribunal: His Honour Alternate Planning Judge Willy, presiding; Mrs N J Johnson and Mrs M McG Clark.

2-5 July; 23 July 1990

Decision No C 44/90

Condition — Variation of condition — Condition requiring amalgamation of titles — Material change in circumstances warranting deletion of condition — Town and Country Planning Act 1977, s 71(1).

District scheme — Dwellings on rural land — Farming of any kind was a predominant use on the subject land, as were buildings including dwellings that were accessory to that use — Ensuing words in the relevant ordinance were ultra vires for reserving a discretion to the council in respect of visual impact of buildings — Severability of invalid portion — Proposal worthy of consent also as a conditional use, despite doubts as to validity of test requiring “an independent economic unit”.

District scheme — Review — Tests for treating the review rather than the operative scheme as the dominant planning document.

District scheme — Validity of ordinance — Discretion reserved to council — Severability of invalid part.

Matters of national importance — Protection of coastal environment — How far inland did the “coastal environment” here extend? — Town and Country Planning Act 1977, s 3(1)(c).

The Hays owned and farmed land in the Lyttelton Harbour basin which enjoyed fine views over the harbour. Part of the lower land was in a certificate of title which a condition of an earlier consent had required should be amalgamated with the main title. Since that time the Hays had at the council's request made some of that lower land available for residential purposes. The Hays sought cancellation of the condition as to amalgamation.

At the same time they applied for consent to erect a house and farm buildings on level upper land, on a site in the vicinity of the Summit Road. This road was subject to restrictions on building nearby, contained in the Summit Road (Canterbury) Protection Act 1963. In a passage omitted from this report the Tribunal considered the evidence on this aspect, finally holding that, although there were pointers in Hansard to an intention that the site for the Hays' proposed house should be within the area in which building was restricted under that Act, the manner in which the affected land was identified in the Act itself was sufficiently unambiguous to make

reference to Hansard unnecessary. In terms of the Act the proposed house site was not within the affected area.

The council, acknowledging some uncertainty in the relevant parts of its district scheme, refused both applications, treating them as conjoint and the building consent as requiring consent as a specified departure. Between the date of the application and the date of the decision, a review had been publicly notified. In the Rural zone concerned predominant uses included "farming of any kind", and "buildings accessory to use of buildings or land for [farming of any kind] *except in a position where such buildings might . . . detract from the scenic character and visual amenities of the rural environment*". The Hays argued that the italicised words in this passage rendered the ordinance invalid, but that they could be severed.

The council argued that to permit a dwelling to be erected on this site would also conflict with the requirement in s 3(1)(c) of the Planning Act to protect "the natural character of the coastal environment . . . from unnecessary subdivision and development".

Held: (1) The circumstances had changed since the condition requiring title amalgamation was imposed, to an extent that warranted removal of the condition under s 71(1).

(2) The part of the relevant ordinance which purported to reserve a discretion to the council in respect of a predominant use was ultra vires and void. However, the tests for severing the invalid part were met in this case, with the result that the erection of the buildings was a predominant use, and no planning consent was required.

(3) In case this were wrong, the proposal merited consent also as a conditional use, despite some reservations about the true ambit of the words in the operative scheme "for residential purposes" and the efficacy of the test prescribed that the holding concerned should be "an independent economic unit".

(4) The review having been notified before the council's decision was given, reference should also have been made to s 75. Whether the review has become the dominant planning document depends on whether all objections that might bear on the point at issue have been disposed of. Where, as in this case, it appeared that some objections (albeit of a vague and general nature) which might have a bearing on the issues in this case had not yet been disposed of, the review could not be treated as the dominant planning document, although its contents were to be considered under s 75(1).

(5) It is a question of fact in each case what is or is not part of the coastal environment for the purposes of s 3(1)(c). In this case, Parliament could not have intended that the provision should be applied to all those parts of Lyttelton Harbour that have some (albeit distant) view of the sea. Accordingly, consent to erection of the Hays' buildings was not restricted by the section.

Cases considered

Attorney-General v Mt Roskill Borough [1971] NZLR 1030

Fletcher Development and Construction Ltd v Auckland City (1990) 14 NZTPA 193

Furness Farm Ltd v Sunny Points Estates Ltd, Decision No 69/77

Northern Contractors Ltd v Mt Eden Borough (1985) 11 NZTPA 151
Northland Regional Planning Authority v Whangarei County, Decision No 463/76

Potts v Invercargill City [1985] 1 NZLR 609 (CA)

Ruddlesden v Kapiti Borough (1986) 11 NZTPA 301 (HC)

Turner v Allison [1971] NZLR 833 (CA).

Appeals under s 69 of the Town and Country Planning Act 1977.

A Hearn QC for the appellants

N A Till for the respondent

G H Nation for the Canterbury Regional Council

F S Robinson for the Summit Road Society Inc.

The decision of the Tribunal was delivered by His Honour Judge Willy.

DECISION

Introduction

The appellants own 71.77 ha of land between the Summit Road of the Port Hills and Governors Bay, in the Lyttelton Harbour Basin. The land is of outstanding scenic value, commanding impressive views of the Port Hills the harbour and the Seaward Kaikoura Mountains. Mr Hay has farmed the land for some years. He now wishes to build a house on the area of flat land adjacent to the Summit Road. He also seeks to change an earlier condition imposed by the then Mount Herbert County Council, relating to the amalgamation of two disparate blocks of land in one title.

The applications were made to the respondent council on 26 February 1988. They drew opposition from the Summit Road Society Inc and the Minister of Conservation. The council gave its decision on 21 February 1989 following a hearing on 28 November 1988. On 23 December 1988 the council publicly notified a review of its operative district scheme.

In its decision the council acknowledged that the case had "an involved background", that it found its task "somewhat difficult", and considered the two issues to be closely inter-related. It took the view that the requirement for the two separate blocks of land to be held in one certificate of title was not only volunteered by the appellant, but was imposed "largely to prevent the need for a house to be located higher on the property near the Summit Road". It clearly linked the application to remove the condition relating to the titles with Mr and Mrs Hay's wish to sell off a substantial part of the block of land comprised in the lower lot, and also with the appellants' wish to build a house higher up on their land nearer to the Summit Road.

The council noted that the situation "with regard to the Summit Road Act appears far from clear" and that "the operative district scheme is not clear as well". In doing so it adverted to the fact that cl 1(c) of the predominant uses at p 25 of the operative scheme gives rise to confusion. It considered that "reading the scheme as a whole" it would "appear that the intention is not to make dwellinghouses a predominant use in the rural zone". It then went on to consider that, even if that was the result of the

provisions of the scheme it was in the minds of the council— “. . . clear that if the development would or might detract from the scenic character and visual amenities of the rural environment it would not be permitted”.

Because of those considerations, and in particular the confusion which it considered to exist concerning the proper interpretation of its own scheme, it treated the application pursuant to s 74 of the Act, and then went on to hold that to grant consent to the applications would be— “. . . contrary to the public interest and would have considerable town and country planning significance beyond the immediate vicinity”. The applications were therefore refused. It is from those decisions that the appellant now appeals. We have thought it appropriate to set out in summary the matters which weighed with the council because they were subjected to severe criticism by Mr Hearn in his opening.

Counsel submits that the respondent did not properly turn its mind to the matters in issue, and in fact acted unlawfully in dealing with the matter in the way it did. Counsel noted that the respondent's own planning adviser, Mr Garland, who gave evidence before us, considered that the application should be granted, because in terms of the operative scheme it could not be refused. Mr Hearn submits that it was wrong in law for the council to have considered the matter as a specified departure, particularly as, between the time of the hearing and the date upon which it gave its decision, the council had notified a review of its operative district scheme. In those circumstances it ought as a matter of law to have had regard to the provisions of s 75 of the Act. Mr Hearn notes that the decision makes no reference to the review document at all. It is counsel's submission that, having regard to the interposition of the review, it was the council's clear duty to reconvene the hearing and deal with it in such a way that it observed the obligations imposed upon it by s 75. In particular the council should give such weight to the review as was appropriate having regard to the stage it had reached in the planning process.

In his opening Mr Hearn submitted strongly that the review document was the primary planning document with which the Tribunal should be concerned. That was a submission concurred in by counsel for the other parties. The submission was made on the basis of an assertion from the bar that, as at the date of the hearing before the Tribunal, the review had reached the stage where most of the relevant objections had been heard and determined, and in particular no objections touching upon the merits of either matter before the Tribunal remained outstanding.

Unhappily it became apparent during the evidence of Mr Garland given late in the case that the factual basis for this assertion is lacking. In response to some questions from the Tribunal, Mr Garland expressed the opinion that in his view the review document is not the dominant planning document because there are extant a large number of “very vague objections”. That evidence is not controverted by any other witness. It comes from an experienced town planner who has had a close involvement with the Mount Herbert County Council, and who was at least part author of the drafting of the second review of the scheme. We must therefore accept that evidence at face value. It is clear from cases such as *Northern Contractors Ltd v Mount Eden Borough Council* (1985) 11 NZTPA 151 and *Brewster v Dunedin City Council*, C 30/87, that where the relevant provisions of a review are unsettled, the provisions of the operative district

scheme remain dominant. It is only where the relevant provisions of the proposed review have passed the stage where they could be affected by objection or appeal that they become the superior planning document; see *Riddell v Bay of Islands County Council* (1979) B 2046. Clearly, however, the Tribunal is obliged to consider the matter in terms of s 75 and the discretions there conferred, simply because the review has in fact been publicly notified. In exercising those discretions, however, the Tribunal must have regard to the fact that there is no satisfactory evidence before it which convinces us that the review document is, as a matter of fact, to be regarded as the "superior planning document".

For those reasons we hold that in the absence of any reliable evidence indicating the stage in the planning process which the review has reached, we must regard the operative district scheme as the superior planning document, paying such regard to the review as the facts relating to its status allow.

The Notice of appeal

The appellants seek the following relief: (1) to delete a condition on a previous planning consent, and (2) consent to erect a house and accessory farm buildings. The grounds on which the appeal is based are, as to (1) above:

- (a) That there has been a change of circumstances since the granting of consent and determining of the conditions thereon which makes such conditions inappropriate or unnecessary.
- (b) That Lot 1 has no physical connection with the other property used for farming and cannot be used for any farming purpose in an economic way, but is now suitable for urban development and is planned to be substantially zoned for that purpose . . .

As to (2), there are six grounds which may be summarised as follows:

- (a) That the appellants' proposal is a predominant use in terms of the operative district scheme.
- (b) That any limitation or qualification on that use as is contained in the scheme is ultra vires.
- (c) That it is appropriate to sever the ultra vires part of the relevant ordinance, with the result that the appellants' proposals are a predominant use in the rural zone.
- (d) That, in the alternative, the objects and goals of the district scheme contemplate that dwelling houses and accompanying farm buildings are permitted in conjunction with farming; and that if the use is not held to be a predominant use then planning consent should be given under s 72, s 74 or s 69(2) as may be thought appropriate.
- (e) That the appellants' proposals comply with the criteria of each of the above sections.
- (f) The appellants seek an order under s 75 of the Town and Country Planning Act 1977 that their proposals in relation to the house and farm buildings are in conformity with the provisions of the reviewed scheme.

Mr Hearn went further in his submissions in support of the appeal and contended that the appellants' proposals are a predominant use in terms of the reviewed scheme.

The relief sought in respect of (1) is an order varying the condition of the planning consent given on 16 March 1987, by deleting the required amalgamation of Lot 1 DP 52650 and Lot 3 DP 34290, and consent to the issue of separate certificates of title for each lot.

In respect of (2) the relief sought is: (a) consent to the erection of the dwellinghouse and accessory buildings on the land described in the application; and (b), to the extent that it may be necessary, an order under s 75 of the Act to the same effect.

In the alternative, and if the above relief cannot be granted or is held to be inappropriate, then the appellants seek a declaration that the proposed use of the land for the erection of a dwellinghouse and accessory buildings is a predominant use, in respect of both the operative district scheme and the review of that scheme.

The respondent's reply

At the hearing the respondent filed an amended reply from which the following relevant matters may be extracted. As to the question of the condition concerning the amalgamation of the titles, the respondent says there has been no change of circumstances and therefore the application should not be allowed. It does however accept that there is no physical congruity between the two lots, and that the lower lot, which lies above the residential land at Governors Bay, cannot be used for farming purposes in any economic way. It also acknowledges that only part of that land is zoned Rural B under the scheme review.

As to the application to build the house and associated farm buildings, the respondent in reply to the grounds (a), (b) and (c) of the appeal: (a) does not accept that the proposed use is the predominant use in the rural zone; (b) does accept that the limitation or qualification to be found in ordinance 1(c) of the rural zone is ultra vires; (c) does not accept that the ultra vires part of the predominant use can be severed from the valid part.

As to grounds (d) and (e) of the appeal, the respondent says that the operative scheme intends that dwellinghouses should only be permitted in conjunction with independent economic units, and then only as a conditional use. It denies that the proposal meets the criteria of s 72, 74 or 69(2). As to ground (f), it accepts that its decision makes no reference to the review document, but says that the application was heard and decided on 28 November 1988. It admits that the appeal should be dealt with by reference to the scheme review, and as to that, says that the proposal is not a predominant or a conditional use under the scheme review. It further contends that an order under s 75 is inappropriate. Finally it contends that the land is subject to the Summit Road (Canterbury) Protection Act 1963 (hereafter referred to as the "Protection Act") and is protected under s 6 of that Act.

The substantial amendment to the reply is to introduce the provisions of the Protection Act.

The Canterbury Regional Council

The stance of the Canterbury Regional Council is that although it does

not welcome the introduction of the proposed buildings so close to the Summit Road it does not wish to be heard on that matter. We must assume therefore that the Council is neutral on the subject. It seeks only to be heard and has called evidence and made submissions in respect of the relevance of the Protection Act, and in particular the areas of land which are subject to it. Its submission is that the place on the appellants' land where they wish to build their house is outside the area of land covered by the Protection Act, and to that extent it supports the appellant in its construction of the Act.

The only other objector is the Summit Road Society, for whom Mr Robinson (a member of this society) appears. His society, which has some 250 members, is totally opposed to the introduction of the proposed buildings into what it regards as a highly sensitive part of the area. It considers that the land is within the spirit of the Protection Act and therefore, he says, subject to its provisions. As to the question of whether or not the condition requiring the amalgamation of the titles should continue in force, it became clear from the evidence of the association's witness, Mr Kirk (the President), that the society really has no strong views one way or the other about whether or not this condition should remain in force. Indeed, he recognised that given the fact that the bulk of the lower lot is now to be zoned residential, there is little point in keeping the small balance which will be left in that lot on that title. In fairness to Mr Robinson, who also gave evidence, we note that he disagreed with Mr Kirk on this point. With respect we can find no factual basis for Mr Robinson's view.

Amalgamation of title boundaries

We are satisfied that the first ground of appeal relating to the condition requiring amalgamation of the titles should be allowed. We are satisfied pursuant to s 71 of the Act that there has been a significant change in circumstances, which has caused the condition to become both inappropriate and unnecessary. The change to which we refer is the fact that at the time the condition was imposed the zoning of the bottom lot above Governors Bay was rural. Since that time the council has invited Mr and Mrs Hay to consider making that land available for urban use. They have agreed to that after some three or four years' consideration, and in notified Change No 9, now operative, about two-thirds of the lower section was zoned residential. The plan of subdivision creating 14 lots has been deposited. Six lots have been sold. Of the remaining eight lots, one is to be used for the purposes of locating a water tank needed by the respondent for its urban water supply. Two or three of the lots will be retained by the appellants because they have on them the only stockyards and woolsheds which exist on the property. These cannot be demolished until the appellants have some alternative. After that time there is a strong probability that these lots also will be sold for residential purposes.

We reject any suggestion that there is anything dubious about the appellants' wish to have this condition lifted. In particular we are satisfied that it is not a device to improve their prospects of persuading either the council or this Tribunal that it is necessary for them to build a house on the upper part of the land nearer to the Summit Road.

The council says the condition was volunteered and should therefore remain. As to that there is no doubt that it was volunteered, but at a time when both of the lots were rural, and there was some point to the requirement that the titles be amalgamated.

We note that Mr Till does not refer to this matter at all in his typed submissions in opening his case. Neither did he amplify on the matter in any way in his oral submissions.

Conclusion as to Title Amalgamation

We are satisfied beyond any doubt that the foregoing are changed circumstances of the sort contemplated by s 71(1). There will therefore be an order cancelling the condition attached to the planning consent given to the appellants on 16 March 1987 by the respondent.

In respect of the land comprised and described in CT 31A/689, which required the amalgamation of Lot 1 DP 52650 and Lot 3 DP 34290, the condition is cancelled. Consent is given for the issue of separate certificates of title for each of such lots.

The application to erect the dwelling and farm buildings

Mr Hearn's primary submission is that no consent is required, because what his client is proposing is a predominant use within the terms of both the operative district scheme and the second review. He acknowledges that in order to succeed in such a submission he must in addition to district scheme matters show that the land is not the subject of the Protection Act. We therefore think it is appropriate to deal first with that matter.

[The appellants' relevant certificate of title had entered on it a notice that part of the land comprised in it was protected under the Protection Act. The question was whether the site on which the appellants proposed to erect their house and farm buildings was within the part so protected. The Tribunal permitted, at the respondent's request, resort to the Hansard record, which was thought to cast doubt on the form in which the protected land was identified in the Act. However, the Tribunal were in the end satisfied that the definition in the Act was unambiguous, and on that basis they held that the site was outside the protection of the Act.]

They next turned to consider the provisions of the district scheme.]

The Mount Herbert County District Scheme

The operative scheme is the one which was reviewed and which became operative on 1 April 1979. It provides for the following predominant uses in rural zones: "(a) Farming of any kind". There are then a number of conditions and exceptions relating to farming, none of which are relevant to this case, except for (c), which reads as follows:

Buildings accessory to use of buildings or land for any of the foregoing purposes including dwelling houses, *except in any position in relation to any undertaking within or outside the zone, that would or might in the opinion of the Council prejudice the health or safety of the occupiers of dwellinghouses or detract from the scenic character and visual amenities of the rural environment.* [emphasis added]

It is agreed by all concerned that the use proposed by Mr and Mrs Hay comes within the description of "farming of any kind", and all counsel are agreed that the words [in italics] purport to make the predominant use dependant on the opinion of the council and are therefore ultra vires the provisions of s 36 of the Act, which allow councils to distinguish between classes of use or development, but only in one or more of the ways set out in subs (4)(a) to (c). Subsection 4(a) reads: "Those which are permitted as of right provided they comply in all respects with all conditions, restrictions and prohibitions specified in the scheme".

It was pointed out by McMullin J in *Attorney General v Mount Roskill Borough Council* [1971] NZLR 1030 that in order to "... specify conditions there must be some measure of certainty about those conditions, otherwise it can hardly be said that they are specified". Davison CJ in *Ruddlesden v Kapiti Borough Council* (1986) 11 NZTPA 301 at 305 added to that: "An ordinance which permits a council to refuse approval on the basis of some value judgment to the exercise of a predominant use right is outside the provisions of s 36 and is therefore ultra vires". The particular ordinance in that case referred to a restriction on structures, buildings etc which were "... visually inappropriate to the neighbourhood or would otherwise detract from the amenities of the neighbourhood or would tend to depreciate public or private values therein". It is therefore similar to the restriction which this council has purported to place upon the predominant use of "farming of any kind".

It is clear from *Ruddlesden v Kapiti Borough Council* (supra) and the cases referred to therein that such a restriction is not to be permitted and that the offending words should simply be disregarded, as being surplusage having no legislative basis.

The next question which arises is the extent to which the surplus wording can be severed from the rest of the ordinance. That was a matter referred to at some length in *Fletcher Development and Construction Ltd v Auckland City Council*, a decision of the Tribunal presided over by His Honour Judge Sheppard [reported at (1990) 14 NZTPA 193]. In that case the Tribunal was faced with the problem of reconciling earlier dicta of the Privy Council in *A-G for Alberta v A-G for Canada* [1947] AC 503, and dicta of the House of Lords in *Kingsway Investments (Kent) Ltd v Kent County Council* [1971] AC 72. In the *Alberta* case Their Lordships placed emphasis on "... whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires".

In the *Kingsway Investments* case Lord Reid applied a test whether or not striking out the bad conditions would alter the character of the consent. Three of the other Law Lords applied a test of whether the condition is part of the structure of the permission and of fundamental importance. Lord Guest said the test was whether the good part is so inextricably mixed up with the bad that the whole must go, and Lord Upjohn considered that the test was whether the invalid language can be severed without doing violence to the language that remains.

The New Zealand Court of Appeal in *Potts v Invercargill City Council* [1985] 1 NZLR 609 reconciled those various conflicting views by saying at p 621: "There can be no severance where excision would produce a substantially different provision".

In expressing the matter in that way Their Honours relied upon the judgment of Cussens J delivering the judgment of the full Court of Victoria in *Olsen v City of Camberwell* [1926] VLR 58, 69, concerning a bylaw which contained invalid parts. In that case His Honour said:

. . . The conclusion at which the Court is to arrive must in such a case as the present be drawn from a notional comparison of two documents, one containing and the other omitting the invalid portions, and cannot depend on what may be called outside speculations as to what the members of the legislative body would or would not be likely to do.

That is not quite how the Court of Appeal put the matter in *Turner v Allison* [1971] NZLR 833. In that case it followed the decision of the House of Lords in the *Kingsway* case as expressed by Lord Morris (ie whether the condition is part of the structure of the permission and of fundamental importance). McMullin J in the *Potts* case, (supra) at p 614, expressed the test as follows:

In any given case the question must be whether the enactment with the invalid portion omitted is so radically or substantially different a law as to the subject matter dealt with from what it would have been with the omitted portions forming part of it, as to warrant the belief that the legislative body intended that if all could not be carried into effect it would not have enacted the remainder independently. If it is then the whole must fail: *Olsen v City of Camberwell* [1926] VLR 58, 68 . . .

Faced with that somewhat confusing array of shades of opinion it is difficult to know with precision what test to adopt. In those circumstances it is the Tribunal's view that it should follow the formulation of the majority in *Potts v Invercargill City Council* and enquire whether severance of the offending portion of para (c) from what remains will produce something quite different from that which the ordinance would otherwise have achieved.

Approaching the matter in that way, and relevant to the facts of this case, the ordinance would provide that in a rural zone, farming of any kind, together with buildings including dwellinghouses associated with that activity, are a predominant use. In our view such a result is entirely consistent with the general scheme of the rural zone provisions. Indeed it is of some significance that dwellings are not expressly mentioned among the conditional uses in the rural zone, although there is a rather vague conditional use which we will deal with later. If dwellings are not to be permitted in some form when associated with the principal predominant use, then the quite illogical result would follow that if the whole of ordinance 1(c) is struck out of the scheme as being ultra vires because no part of it is severable, farming would be the principal predominant use within the zone, but the building of a dwellinghouse in association with that activity would not be permitted either as a predominant or conditional use. That cannot have been the intention of the framers of the scheme. It is not a question of "outside speculation" as to what their intention might have been. The Tribunal is entitled to assume that the document was not intended to produce that sort of absurdity.

We are therefore satisfied that the [italicised] words should simply be ignored as being ultra vires the provisions of s 36 of the Act, with the result that ordinance 1(c) would then read "Buildings accessory to the use of buildings or land for any of the foregoing purposes including dwellinghouses".

Before leaving this topic we should mention that Mr Robinson contended that, even if the offending portions are struck out of the ordinance, what is left does not mean that dwellinghouses are permitted for people who want to live on and farm the land. He contends that dwellinghouses are only permitted as accessory to the use of some other buildings on rural land. That is a strained and unnatural interpretation of this ordinance, and we think it clear beyond any doubt that what is intended is that if the use qualifies as a predominant use those carrying on that use should be allowed to build houses on that land.

Conclusion

In the result we are satisfied that the use proposed by Mr and Mrs Hay is a predominant one in terms of the operative district scheme and no notified application was required. The proposal must of course comply with the bulk and location requirements of the scheme, but that is a different matter and not at issue in this case.

[The Tribunal gave its consent also under s 75, since the review had been publicly notified].

Conditional Use

In case we are wrong in approaching the matter as we have done, we are invited by counsel to make findings on the basis that the application should be treated as a conditional use. The only relevant conditional use in the operative scheme which could be applicable is that contained at ordinance 2 (f), which reads as follows: "2. The following shall be conditional uses in rural zones:

- (f) Use of the site for residential purposes. If the site is an independent economic unit for farming purposes and has not less than the minimum area and frontage required for that farming use in the zone, ..."

The minimum area provided for farming in a rural zone is 40 ha (see p 42 of the scheme). The applicant's proposal therefore meets that criterion. "Site" is defined at p 20 of the scheme and, if there is any difficulty about the definition there contained, the appellants agree to such title amalgamation as would be necessary to come within that definition.

One of the conditions attaching to the ordinance is to be found at p 26, 3(a). It reads as follows: "All buildings shall be sited, designed and maintained so as not to detract from the scenic character and visual amenities of the rural environment".

That, in turn, raises precisely the same argument as exists in the case of ordinance 1(c) in so far as it imported into a predominant use discretionary value judgments on the part of the council. It is clear from the decision in the *Fletcher Development* case (supra) that the same test

is to be applied to the question of severability, notwithstanding that the subject matter is a discretion attached to a conditional use. Clearly, in our view, the question of whether or not a building is sited, designed and maintained in such a way as to detract from scenic character and visual amenities is a subjective value judgment which results in uncertainty in the application of the conditional use provisions of the scheme, and is to be treated in the same way as similar conditions attaching to predominant uses. We respectfully adopt the reasoning of the Tribunal in the *Fletcher* case where at p 197 His Honour Judge Sheppard said:

However, even though the legislature did not use the word “specified” in s 36(4)(c), which authorises provision for conditional uses, the reasoning which leads to the need for predominant uses to be specified with certainty is equally applicable to the definition of any other category of permitted uses. Although those uses require specific consent which involves exercise of discretionary judgment, the reader of the scheme is entitled to know whether or not a proposal will qualify for consideration as a conditional use . . . Any conditions which qualify a use for consideration as a conditional use should not be matters of degree or judgment.

Applying the same test which we applied in relation to the offending part of the predominant use ordinances, we are of the view that placing the two documents side by side — that is the one with the offending ordinance 3(a) and the other without it — it is possible to excise 3(a) without doing any violence to the wording of the remainder of the conditional use ordinances; nor would it in any way impinge upon the effectiveness of the remainder of the conditions attaching to the conditional uses. We therefore disregard the provisions of ordinance 3(a) as being *ultra vires* the provisions of s 36(4)(c) of the Town and Country Planning Act.

A further difficulty, however, exists in endeavouring to interpret the scheme in so far as it relates to conditional uses in rural zones, and that is the requirement that the site “is an independent economic unit for farming purposes”. The scheme does not define what is meant by an independent economic farming unit. It is therefore impossible for a person reading the provisions of the scheme, and ordering his or her affairs on the basis of it, to know whether or not what is proposed will come within the provisions of ordinance 2(f) until after a hearing by the council, the Tribunal, and possibly the High Court, as to whether the particular use proposed on the rural land will result in that land being an independent economic unit.

There is a further difficulty about ordinance 2(f) in so far as it refers to the use of the site for residential purposes. It is to be noted that the scheme does not refer to the building of a residence on rurally-zoned land, but relies on the concept of “residential purposes”. These are not defined in the scheme, and we should have thought that a residential purpose is the antithesis of a rural purpose. The condition does not seem to become effective until it is first established that the use to which the land is to be put is residential in character. That is clearly not the case here. The building of a dwellinghouse is purely ancillary to the need to use the land for rural purposes. The drafting of cl 2(f) is at best confused, and therefore we think it is appropriate to have some regard in this context to the provisions of

the review document, in order to endeavour to ascertain what is meant by that particular condition. We find that it has been deleted entirely.

We are conscious of our earlier observations that the review is not the superior planning document because of the uncertainty surrounding the evidence of the stage to which objections and appeals have reached, but in this narrow respect it does, in our view, give some guidance as to what the council currently thinks is in the public interest in relation to the erection of dwellings on rural allotments in the area under its jurisdiction. We are also conscious that the whole concept of economic farming units has come in for a good deal of criticism over the years because it has proved to be an uncertain and elusive measure upon which to make planning decisions. We see no warrant for accepting Mr Till's submission that what it means is "the unit should be able to be operated reasonably profitably such that it produces a reasonable return for the farmer for his efforts". But even if we did adopt such an approach the financial aspirations of one person may of course be quite different from the requirements of another person in similar circumstances, and that of course is where the difficulty arises, involving as it does a series of elusive value judgments.

To the extent that this condition is relevant and sufficiently certain to have application, we are satisfied on the evidence that what is proposed will amount to an independent economic unit in the sense that it will provide Mr and Mrs Hay with the livelihood to which they aspire, without reference to outside sources of income or capital. However, we stress that the public interest in relation to this particular condition has been significantly watered down by the provisions of the proposed review.

If consent is required under the conditional use provisions of the scheme we would be minded to grant it, but on terms that the buildings be sited and constructed in accordance, first, with the landscape plans prepared by Mr Rackham and submitted to the Tribunal (together with any amendments which may be agreed to by Mr Rackham, the respondent and the appellants) and, secondly, the plans prepared by Mr Prebble, the architect, and submitted to the Tribunal (together with any amendments agreed to by Mr Prebble, the appellants and the respondent).

Section 3 of the Town and Country Planning Act 1977

It was contended by Mr Garland and Mr Robinson that s 3(1)(c) of the Act has relevance. It relates to the need for — "preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development."

It is the first part of the subsection which is relied on. The argument runs that, because Mr and Mrs Hay's building site overlooks Lyttelton Harbour, it impacts on the natural character of the coastal environment. Reliance is placed upon observations of the Tribunal in *Furness Farms Ltd v Sunny Points Estates Ltd* (69/77, interim decision 23 March 1979). That case concerned rural land surrounding the Akaroa Township. The Tribunal was referred to the definition of coastal environment given in *Northland Regional Planning Authority v Whangarei County Council*, 463/76.

The dictionary definition of "environment" which is apt to the context in which the word is here used, is; "the conditions or influences under which any person

or thing lives or is developed". The word "coastal" is an adjective qualifying the noun "environment", and is derived from the noun which means "the side of the land next the sea, the seashore". We therefore hold that the term "coastal environment" means an environment in which the coast is a significant component part or element, but clearly it is impossible to give an abstract definition which is capable of simple and ready application to any given situation. What constitutes the coastal environment will vary from place to place and according to the position from which a place is viewed. Where there are hills behind the coast, it will generally extend up to the dominant ridge behind the coast. But where the land behind the coast is generally flat, there may be great difficulty in defining the coastal environment.

The Tribunal in *Furness Farms Ltd* then went on to qualify these observations in the following way:

We are generally in accord with the definition of coastal environment as contained in that decision but we do not consider it of general application, each particular area requiring a particular consideration. If that decision were to be strictly applied to the Akaroa Harbour Basin most of the county could be held to be part of the coastal environment.

That in our view is precisely the case here. The land slopes back from the seashore, at first relatively gently and then with increasing steepness. The bluffs below the proposed building site are almost impassable in parts. Above the site the land continues to rise to a ridge before falling away. We are not told exactly how far the building site is from the sea, but it is clearly sufficiently far that Lyttelton Harbour is a distant vista. If we applied the broad definition given in the *Whangarei County Council* case then all of the land between the sea and the skyline surrounding the Lyttelton Harbour Basin would be part of the coastal environment. With respect we do not think that is what is intended by s 3(1)(c). It is in our view a question of fact in each case what is or is not part of the coastal environment, or when land is within or without the "margin" of a lake or river. It is one of those theoretically difficult questions which will usually yield to the facts and a liberal dose of common sense. A variety of matters must be taken into account, including on the facts of this case the significant residential development between the foreshore at Governors Bay and the proposed building site.

We are satisfied that it was not part of Parliament's intention in enacting s 3(1)(c) to apply that provision in a blanket way to an area the size of those parts at Lyttelton Harbour which have some (albeit distant) vista of the sea. Whatever portion of the appellant's land might be said to be part of the coastal environment we are satisfied on the evidence that the building sites are not.

Specified departure

We are unable to see any possible basis in fact or in law upon which this application should be considered as a specified departure. The proposals are either a predominant use or they come within the reconstructed conditional use provisions (as we have found them to be). Whether one

has regard to the operative district scheme or the reviewed district scheme, there can be no basis for suggesting that the proposals fall within the provisions of s 74 or 69(2) of the Act, and we therefore decline to speculate on what might have been the decision of the Tribunal had those provisions been relevant.

For the foregoing reasons, the appeal is allowed in the terms we have indicated. It is therefore not necessary to make a declaration as requested by Mr Hearn. Costs are reserved and counsel are invited to submit memoranda.

New Zealand Society for the Intellectually Handicapped Inc
v Rotorua District Council

The Planning Tribunal: His Honour Planning Judge Bollard, presiding;
Dr A H Hackett and Mr T W Smallfield.

4 May 1990

Decision No A 23/90

Permitted use — Group home — Group home for the intellectually handicapped — Whether qualifying as a "household unit".

In a Residential zone in which a "household unit" was a predominant use and a "home care facility" was a conditional use, the Society owned a large house which they used to accommodate five intellectually handicapped young persons, under the supervision of a resident staff member. The occupants were generally out at work or school during the day. The Society sought a declaration that this use was a "household unit" and hence predominant. The council had treated it as a home care facility and hence conditional.

Held: On the facts of this case the use concerned was a household unit and thus a predominant use. The fact that under the scheme definition the use might well qualify also as a "home care facility" did not justify the council's denying it predominant use status.

Application for an order under s 153 of the Town and Country Planning Act 1977.

M F Quigg for the applicant
D J McDonald for the respondent

The oral decision of the Tribunal was delivered by His Honour Judge Bollard.