ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. A 118 /2008

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN BEEJAY LIMITED AND JOHNSTON O'SHEA LIMITED

(ENV-2007-AKL-000727)

Appellant/Applicant

AND WHANGAREI DISTRICT COUNCIL

Respondent

Hearing at Whangarei on 8, 9 and 10 October 2008

Court: Environment Judge L J Newhook
Environment Commissioner P A Catchpole
Environment Commissioner R M Dunlop

Appearances: J C Brabant on behalf of appellant
J C Dawson on behalf of respondent
A Cutts-Lambert on behalf of herself, D Kennett, M and G Little, B and M Maugham and H Thompson (under s274)

DECISION OF THE ENVIRONMENT COURT

A. Appeal allowed, and consent indicated subject to conditions being settled.

B. Costs reserved.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

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[1] The appellant had applied to the respondent for resource consent to establish and operate professional offices on a site located on the corner of Western Hills Drive (State Highway 1) and Douglas Street, Kensington, a suburb of Northern Whangarei. The respondent refused consent, and this appeal followed.

[2] The address of the property is 114 Western Hills Drive, and the legal description Lot 21 Deeds Plan 721.

[3] The proposal is to establish and operate professional offices (in particular those of a firm of Chartered Accountants) in a two-level building with a footprint of 262m^2 in total floor area of 420m^2, on a site of 959m^2.

[4] The zoning of the site, and indeed of all land in the relevant neighbourhood to the west of Western Hills Drive, is "Living 1".

[5] A design had been produced by Auckland Architects Jasmax, and a comprehensive analysis of effects on the environment undertaken by that firm, together with a local planning consultant, a landscape architect, and a traffic engineer.

[6] The proposal requires consent in relation to 5 rules in the Operative District Plan namely rule 33.3.1 *activities generally*, rule 36.3.4 *parking spaces,* rule 36.3.6 *traffic movements*, rule 36.4.4 *setbacks* and rule 47.2.1 *parking and loading.*

[7] The appellant called evidence from Ms C O'Shea a director of the appellant companies, Mr M den Breems, the architect, Mr M Lockhart, a landscape architect, Mr D Scanlen, traffic engineer, and Mr R J Mortimer, planning consultant.

[8] The appellant's accountancy firm has outgrown its present space in central Whangarei. It was unsuccessful in finding suitable space in the commercial area, and ultimately identified the subject site as suitable to its needs.

[9] The proposal has the status of a discretionary activity in the Living 1 zone.

[10] The parties narrowed the issues in contention in the appeal to traffic, and character/amenity. The concept of permitted baseline featured significantly in the submissions and evidence on behalf of the appellant and respondent.

[11] The decision of the respondent acknowledged that the permitted baseline for building coverage, height, and setbacks could be met (the latter with the exception of the placement of a timber louvre screen). The committee also accepted the evidence of Mr Scanlen that subject to conditions, the traffic effects of the proposal would be no more than minor, with no adverse effects on traffic safety. They also found that the proposed parking spaces were sufficient and acceptably designed subject to conditions.

[12] As already noted, Western Hills Drive is in fact State Highway 1. Transit New Zealand was not a party in the appeal, but had provided some comments to the respondent at an earlier stage, suggesting some appropriate conditions of consent.

[13] The respondent had found that the proposal would not maintain and enhance amenity values, and accordingly would not therefore satisfy Part 2 of the Act. It was concerned about an alleged undisguised commercial appearance, and associated carparking. It considered that businesses in the wider area invariably retain some residential character, at least in part. The committee was concerned about noise and nuisance from the carpark and held that these effects could not be suitably avoided or mitigated.

[14] There was no expert evidence concerning noise, and the appellant indicated that it could and would meet the controls in the District Plan.

[15] The evidence concerning traffic effects was interesting for the reason that the experts called by each of the appellant and the respondent agreed in their overall conclusions, that the effects on the environment in terms of traffic movements, safety, and parking, would be no more than minor. They differed however in their calculations of vehicle movements to and from the site. We perceived that this was not ultimately a traffic issue, but one of amenity, at least in the minds of the council planner and the s274 parties. That became the true focus of the case (along with other amenity issues such as the design and appearance of the building, privacy, overlooking and shadowing).

[16] The appellant submitted that it was within our discretion under s104(2), and appropriate, for us to consider certain relevant permitted baselines in the District Plan. The respondent disagreed.

[17] Section 104(2) provides:

> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

[18] The council and the appellant having agreed that the departures from the individual bulk and location controls were few and minimal, the focus on effects above any identified baselines related to the absence of a residential component in the building, and the council's insistence that a dwelling (as a permitted activity) would not conceivably be as large as the bulk and location controls would technically enable. We shall return to the topic of permitted baseline after examining potential effects on the environment from the proposal.

[19] The appellant's witnesses considered it to be relevant that the subject is located on the State Highway, with an average daily traffic volume measured near the site last year, of over 15,000 vehicles per day. They considered that the proposal could act as something of a buffer between the busy State Highway and the quieter parts of the residential area immediately west of the appellant's site.

[20] The evidence of Mr den Breems as architect, and Mr Lockhart as landscape designer, generally (subject to minor changes) satisfied us that the design and surrounds would be attractive and would have no more than very minor adverse effects on the environment. The planning analysis of Mr Mortimer supported this, but Ms K M Mackie, the respondent's planning officer, and the s274 parties, differed.

[21] We agree with Mr Mortimer's view that accountancy firms are not by their nature a noisy activity. Also, that most of the activities on site will take place within the building.

[22] Ms Mackie and the s274 parties considered that a small triangular area of grass with a Himalayan Cedar tree in it, between the front boundary of the site and the formed

edge of the highway, would act as a suitable buffer between the busy State Highway and the residential area, and that there was no need for the proposal to constitute one.

[23] Ms Mackie ultimately conceded in answer to questions from the Court, that there would be no likelihood of any acoustic buffering from the small grass reserve and its single tree, and agreed that people in vehicles passing on the highway would be able to see under the canopy of the tree, through to the subject property, such that visible buffering would be very limited.

[24] We do not consider that the grass reserve and tree provide buffering. What we have here is the classic situation of a residential-zoned property on an arterial road, where a less than pure residential approach will often be taken to development, sometimes resulting in a buffering of visual and acoustic effects as between the road and the residential properties further into the block. We find these factors relevant to consideration of the term "feeling of community", one of the characteristics contributing to levels of amenity in the Living Environment zone which we discuss below. What is more, the plan provisions here recognise that such buffering might occur, given the level of commercial activity that can be undertaken on a property in this zone, as already described.

[25] Chapter 5.2 of the District Plan sets out twelve characteristics which in combination contribute to the levels of amenity experienced in Living environments. They are: low intensity of development; presence of trees and gardens; landscape frontages and street setbacks; off-street parking; high degree of privacy; daylight and sunlight access; high proportion of private and public open space; low level of noise, visual pollution, and odour nuisances; safe environment for children, cyclists and pedestrians; level of vehicular traffic; feeling of community; non-residential support activities such as business and community activities of "appropriate scale".

[26] Each of Mr Mortimer and Ms Mackie assessed the proposal against those, with Mr Mortimer finding that the proposal measured up well, and Ms Mackie generally disagreeing.

[27] The difficulty with the council case was that it tended to focus heavily on the existing environment (which we acknowledge is one that comprises mainly small

attractive houses on quite large residential lots with attractive gardens). But the District Plan does more than that. It also sets a scene for the future, as it should.

[28] Mr Mortimer identified 3 key objectives, 5.3.1, 5.3.2, and 5.3.5:

> 5.3.1 To maintain characteristic amenity values of each environment (and where appropriate enhance them).
>
> 5.3.2 Where adverse effects on amenity values result in a reduction of amenity value, to ensure that the reduction is not below a level which is desirable for peoples' health and safety.
>
> 5.3.5. To control the actual and potential effects of use and development in their location and design so that they are compatible with existing and identified future patterns of development and levels of amenity in the surrounding development.

[29] As we have said, the cases for the council and the s274 parties focussed heavily on the amenity of the neighbourhood as it exists today. They took inadequate account of permitted future patterns of development and levels of amenity, an issue to which we shall return.

[30] The approach taken in this regard by the council's planner Ms Mackie (mirrored in the submissions of its counsel Mr Dawson) appeared driven by an inaccurate approach to the issue of permitted baseline. She considered that the permitted baseline should not be taken into account by us in our discretion for various reasons, including that the construction of a single residential unit would not be relevant as a permitted baseline *"because it would be of a very different scale, intensity and character...I do not think it sufficiently discounts the effects of the proposal"*. Also that permitted accessory buildings would be small in size and would have to be ancillary to an existing use; and the operation of a (permitted) commercial activity in conjunction with a residential activity would necessitate *"sacrificing a substantial portion of the commercial floor area...* [to accommodate a residential component]". Hence, she opined, *while, a building of this size may be permitted under the bulk and location rules of the District Plan, the solely commercial activity proposed is not consistent with the permitted baseline*.

[31] Ms Mackie seemed to use her opinions about permitted baseline as a basis for her following extensive thesis that the attractive existing residential environment should be protected from hosting the proposed development. She noted that the existing residential character of Douglas Street included established trees, well kept gardens, residential

buildings primarily of a single level, clad in weather boards, relatively quiet levels of activity, with very few signals of active commercial activity. She was concerned at the prospect of on-street parking, increased vehicle movements, and traffic-associated noise. She considered that the need to accommodate up to 9 vehicles parking on Douglas Street would create an adverse effect on amenity, meaning that residents and their visitors might find it difficult to park and to access their properties, and would be subject to additional noise from vehicles coming and going and doors closing. She considered that the effects on residential amenity would be more than minor.

[32] Ms Mackie was inclined to discount the visual and apparently commercial effects of the nearby Kensington Park on the eastern side of Western Hills Drive, despite its slab-like buildings and the presence of some commercial outlets.

[33] We paid close attention to statements on behalf of the s274 parties by Mr and Mrs Maugham of 8A Douglas Street, Ms A D Cutts-Lambert of 9 Arthur Street, and Mr and Mrs Little of 1 Douglas Street. Not unexpectedly, the residents strongly supported the statements being made by Ms Mackie. Their focus was on their existing attractive environment of modest houses on large lots, with attractive gardens. They feared the introduction of more cars into the street, and thought that kerb-side parking would limit the ability of visitors and service people to come to their properties.

[34] We consider that it is most unfortunate that the thrust of the council's case has misled the s274 parties into believing that our enquiry should centre primarily or even exclusively on the existing environment, to the exclusion of relevant aspects of the permitted baseline.

[35] We consider that questions relevant to determining the relevance of permitted baseline were helpfully suggested by another division of the Court (in a non-exclusive way) in ***Lyttleton Harbour Landscape Protection Association Inc v Christchurch City Council***[1]:

- Does the plan provide for permitted activity or activities from which a reasonable comparison of adverse effect can conceivably be drawn?
- Is the case before the Court supported with cogent reasons to indicate whether the permitted baseline should, or should not, be invoked?

[1] [2006] NZRMA 559, at para [21].

- If parties consider that application of the baseline test will assist, are they agreed on the permitted activity or activities to be compared as to adverse effect, and if not, where do the merits lie over the area of disagreement?
- Is the evidence regarding the proposal, and regarding any hypothetical (non-fanciful) development under a relevant permitted activity, sufficient to allow for an adequate comparison of adverse effect?
- Is a permitted activity with which the proposal might be compared as to adverse effect nevertheless so different in kind and purpose within the plan's framework that the permitted baseline ought not to be invoked?
- Might application of the baseline have the effect of overriding Part 2 of the RMA?

[36] The appellant's resource management witness Mr Mortimer, in our view, undertook a more complete and accurate assessment of the relevance of permitted baselines possibly present, and the application of them, than did Ms Mackie. He considered that it was in no way fanciful that a professional office might seek to establish itself on this relatively large residential lot on an arterial road, and pointed to the recent establishment of a firm of surveyors a few doors along to the north. At that location, as confirmed by our site and locality inspection, a professional firm has taken over, and occupied with offices, the whole of an older dwelling, concreted the frontage area extensively for parking, and gained consent to add a slightly commercial looking extension to contain more offices.

[37] Mr Mortimer was tested in cross-examination about his opinions, and stood firm, in our view realistically, to the effect that a building resembling the one proposed, and containing a small residential flat of no more than about $60m^2$ with the rest developed for commercial offices, could realistically be anticipated as a permitted activity. The council's response that the idea was fanciful because the applicant did not favour that configuration, in our view demonstrated that it had closed its mind on the issue.

[38] We were sufficiently interested in the logic of this part of the case, that we asked the two traffic engineers to caucus during the hearing, in order to advise of any differences in traffic movement numbers likely to be associated with such a development, as compared to the proposal. They willingly did that, and examined as well another scenario (considered by the appellant's team to be equally non-fanciful), that of a building resembling the proposal, with residential accommodation established in the ground floor, and commercial offices above.

[39] In the scenario involving the commercial space plus 66m^2 apartment, it was agreed between the traffic engineers that the apartment would generate approximately 6 movements per day. They then assumed (pursuant to input from other members of the appellant's team) that the commercial space would continue to be able to house sixteen staff, such that the 6 movements associated with the apartment would be additional.

[40] In the second scenario, with the whole of the top floor residential and the lower floor commercial, the traffic engineers came close to agreeing numbers. The upstairs floor would contain residential accommodation of 158m^2, and the downstairs commercial floor, 262m^2.

[41] Mr Scanlen calculated (and Mr Edwards agreed) that movements associated with the residents would be eight per day. Concerning the commercial space, Mr Scanlen calculated, based on 12 or 13 people working in the office, 8 to 9 of those driving their own vehicle (16 to 19 movements); couriers and visitors 6 to 8 movements per day; people getting dropped off, 2 to 6 movements per day; giving a total in the range 32 to 42 movements per day.

[42] Mr Edwards had based his traffic movement calculations on various NZ and overseas data, and his total estimate was 34 to 44 movements per day.

[43] These two sets of estimates were very close, and when compared to the permitted 30 per day, would in our view produce effects on the environment (amenity) that would be no more than minor. The difference would not be discernible.

[44] In his evidence in chief Mr Edwards had called on some overseas data to estimate possible densities of employees in commercial premises, and consequent traffic movement numbers. These came from Australia, America and Canada. After hearing him questioned about these sets of data, we formed the view that those derived locally were more likely to reflect New Zealand conditions, and be the more reliable. We noted in particular that Mr Edwards accepted that the America data ("ITE") reflected particular American conditions. The New Zealand data being at the lower end of the scale, and being closer to the detailed and practical assessment undertaken by Mr Scanlen, we consider that the latter's approach is to be referred.

[45] We have taken account of the fact also that the appellant has offered to instal an acoustic attenuating fence along the boundary with 1 Douglas Street.

[46] We also formed the impression from the evidence overall, including photographs supplied by several witnesses, and confirmed by our visit to the locality, that Douglas Street has an abundance of kerb side parking on weekdays and is only under pressure at weekend when sporting fixtures are taking place at Kensington Park on the other side of Western Hills Drive. The limitation on hours of operation being offered by the appellant will nicely dovetail with this pattern, and we do not agree that there will be the weekday pressure on parking spaces perceived by Ms Mackie and the s274 parties. At the end of the day, streets are for traffic circulation and parking (the latter unless restricted for traffic safety or other lawful reasons).

[47] Questions were raised by the council and s274 parties about height in relation to boundary, overlooking, privacy, and shadowing. We were satisfied on the evidence of Mr Mortimer that, as a permitted activity, a two-storey building could be erected very close to one of the internal boundaries. The appellant has chosen to design the proposal to meet that control, along the southern boundary. The building has been designed to be approximately 17m from the boundary with 1 Douglas Street. This offers a very substantial yard, and in addition the appellant has offered to build not only the acoustic attenuating fence, but undertake screen planting. We consider that it will be possible to select species that provide either evergreen or deciduous vegetation along this boundary, at the option of Mr and Mrs Little, and there can be a maintenance regime to maintain particular height and shape, imposed as a condition of consent.

[48] A degree of frosting should be applied to upper floor windows in the south wall, to a height of 1.8m above floor level in meeting rooms, to prevent overlooking onto the adjoining residential property. The upper part of the glass panel can be left clear so that the occupants and visitors gain daylight and distant views.

[49] The suggested controls or limitations on the western and southern faces of the building, and at least one of the yards, exceed by a considerable margin what the residents could expect if a permitted dwelling were to be erected on the site. This is because no controls could be imposed by the council, as no resource consent application would be needed.

[50] Hence, not only does application of the permitted baseline produce a result in which there would be negligible adverse effects above its level, but in fact there would be positive comparative effects for immediate neighbours in several ways.

Conclusion

[51] We are in no doubt that consent should be granted, for the many reasons set out in the course of this decision. The appellant is to undertake the minor architectural alterations to the southern face of the building that we mentioned during the hearing, to soften the slightly severe impression presently given, from vertical long run steel material. The appellant is also to attend to the landscape matters on the boundaries discussed during the hearing (including extending the acoustic fence eastwards along the southern boundary, with a return onto the building); also advise where it wishes to place the external sign.

[52] The appellant is also to draft conditions of consent, consult with the other parties about them, and lodge them in Court, hopefully in agreed form. It is to consult with the owners of 1 Douglas Street about matters of screening and landscaping along the western boundary.

[53] These matters are to be attended to within 20 working days of the date of this decision.

[54] Costs are reserved. Any application should be made within 20 working days, and any response within 10 working days after that.

DATED at Auckland this 28th day of October 2008.

L J Newhook
Environment Judge

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