Valuation

ORIGINAL

Decision No: C 102/97

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **W K CHEN**

(RMA: 196/96)

Appellant

AND **CHRISTCHURCH CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson - (presiding)
Mr R S Tasker

HEARING at **CHRISTCHURCH** on the 18th and 19th days of September 1997

COUNSEL

Mr J R Milligan for the appellant
Mr A C Hughes-Johnson for the respondent

DECISION

Background

This is an appeal under section 120 of the Resource Management Act 1991 ("the RMA") against the refusal by the Christchurch City Council to grant a resource consent in respect of a property at 24B Takahe Drive, Cashmere, Christchurch. The application to the Christchurch City Council ("the Council") was for a land

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use consent to allow the roof to exceed the 7 metre maximum height development standard for the Living H (Hills) zone under the Council's proposed plan by a maximum of 1.66 metres.

Although Mr W K Chen is the nominal appellant he was the agent for Mr K S Chan and Mrs L Y M Lee (together called "the applicants") who are the owners of the property. The applicants have neighbours, Mr and Mrs Ireland, who live at 21 Longhurst Drive uphill and south of the applicants' property.

Chronology

The basic facts were agreed by the parties although we did not receive an agreed statement of facts. Because the timing of events is rather important to this case we outline the events as they occurred:

1995

24 April	The appellant (as agent for the applicants) applied for a building consent under the Building Act 1991. This was to add a first floor to an existing single-storey building. As will be seen, under the Council's transitional district plan the maximum height was 9 metres so no resource consent was needed as the building was a permitted activity. The plans showed that the roof was to be 0.34 metres less than that;
11 May	Building consent granted;
2 June	Work of alteration commenced;
24 June	Proposed plan publicly notified. It provided: • New height limit as of right was to be 7 metres, • Between 7-9 metres high became a discretionary activity.

27 July	Concern was expressed by a neighbour as to the extent of shading to be produced by the applicants' new roofline;
9 August	Roof tiling completed;
11 August	The Council gave notice requiring that work above 7 metres cease. It is common ground that by this date all work above that height had been completed;
17 August	Application ("the application") made retrospectively for resource consent for the roof above the 7 metres limit;
19 December	Hearing before a commissioner appointed by the Council.

1996

11 March	Commissioner's decision declining land use consent;
27 March	Appeal filed with this Court in the names of the applicants;
12 August	Mr and Mrs Ireland, submitters on the application, sought orders striking out the appeal on the grounds that the applicants were not submitters;
26 August	The Environment Court made an order substituting the present appellant. At that stage section 10B RMA was shortly to come into effect and counsel for Mr and Mrs Ireland indicated that he would take further instructions in the light of that.
2 September	Section 10B became part of the principal RMA

1997

31 January	At a further call before this Court counsel for Mr and Mrs Ireland indicated that he had not yet obtained further instructions;
24 March	Mr and Mrs Ireland withdrew as parties to the present proceeding.

One feature in this chronology is of interest, and of possible significance, if the Court is able to take *"justice or fairness"* into account in the exercise of its discretions under section 104 and 105 of the RMA. It is that, up to 24 June 1995, the applicants could have obtained a certificate of compliance for the building work, and if they had, they would not have required a resource consent when the proposed plan was notified for the work they still had to complete.

The Statutory Instruments

The transitional district plan is the former Heathcote District Council district scheme under the Town and Country Planning Act 1977 ("the TCPA"). Under the transitional plan the maximum height permitted in the relevant (Residential 8) zone was 9 metres. The relevant objectives and policies for residential zones in the transitional plan are as follows:

> *"**Objective 2*** (page 17)
>
> *To provide for diversified residential development involving a variety of housing types, innovative subdivision design and a high standard of amenity.*
>
> .....
>
> *Policy 2.2* (page 17)

To use the bulk and location and subdivision controls to achieve a reasonable amount of the amenities of sunlight, view and privacy for residential sites. (Our emphasis).

.....

Objective 4 (page 18)

To maintain and improve the amenities of the existing residential area and to protect the character of the district.

.....

Policy 4.2 (page 19)

Bulk and location standards and landscaping requirements for existing residential areas will ensure that the amenities are maintained and improved by providing for such factors as visual and aural privacy, shading control, off-street parking, protection of views and landscaping." (Our emphasis).

It is of some importance (when coming to the question of how much change there has been between plans) that the transitional plan purported to protect views.

The relevant objectives and policies in the proposed plan are:

"Objective: Diverse Living Environments (p 11/3)

11.1 A diversity of living environments based on the differing characteristics of areas of the city.

Policy: Character

11.1.2 To maintain the general character of the suburban living environment.

.....

***Policy: Building Height** (page 11/6)*

11.1.5 To provide for different height of buildings in living environments based on the existing character of an area, on strategic objectives of urban consolidation, and to provide for a diversity of living environments.

.....

***Objective: Adverse environmental effects** (page 11/12)*

11.4 A living environment that is pleasant and within which adverse environmental effects are minimised, while still providing the opportunity for individual and community expression.

.....

***Policy: Privacy and outlook** (page 11/13)*

11.4.5 To ensure that the design and siting of development does not unduly compromise outlook, privacy and views of adjoining development, having regard to the character of the area and reasonable expectations for development."

As we have said, under the proposed district plan, buildings in the Living H zone between the development standard of 7 metres [rule 2.2.3] and the critical standard of 9 metres [rule 2.4.4 (p.2/19)] are limited discretionary activities. Clause 6, Section 2 (page 2/38) lists the relevant assessment matters to be considered by the Council under the heading:

"6.2.2 Building height and sunlight and outlook for neighbours".

We consider the individual criteria later in this decision.

The Evidence

The core issue for the two parties was the extent of the effect of the applicant's roof on the views enjoyed from Mr and Mrs Ireland's property.

For the applicants we heard evidence from Mr Chan himself; from their solicitor, Mr P L Mortlock; and from two planners, Mrs J Carter and Ms J Whyte. Mrs Carter is a planner employed by the Council. She had given evidence at the hearing by the Commissioner in which she recommended that the land use consent be granted. Since she was not being called before us by the Council she was called by Mr Milligan for the applicants. Before us she reiterated her expert opinion that on balance the land use consent should be granted. To like effect we heard from Ms J Whyte, an independent planner engaged by the applicants.

For the Council we heard evidence from Mr Ireland - who expressed his concern about the effect of the applicant's roof on the views from his house - and Ms Robson, a planner. She had been originally engaged by Mr and Mrs Ireland, and gave evidence on their behalf at the Commissioner's hearing, but since Mr and Mrs Ireland had withdrawn from this case (as a party) she was called by the Council before us.

In assessing the evidence, we find that the evidence of both Mrs Carter and Ms Whyte was more detailed and fuller than that of Ms Robson. The former witnesses also had photographs demonstrating the points they were making and

we find that by a clear margin we prefer their evidence. We should also add that at the invitation of the parties we inspected the site after the hearing and that inspection confirms our assessment of the evidence.

We should also comment on three evidential issues that arose during the hearing. First we were concerned that the Council was calling only two witnesses and that one was Mr Ireland who has an interest in the matter, and the other was a planner who had originally been called before the Commissioner by Mr and Mrs Ireland. It appeared to us that by calling those witnesses, and only those witnesses, at the appeal hearing, the Council could be seen to be acting with insufficient independence. Put simply, the Council would look as if it was taking the side of Mr and Mrs Ireland. We raised the issue whether it would have been preferable (and the Council has had since 24 March 1997 to arrange this) to instruct another independent planner for their opinion on the issues. As against that Mr Hughes-Johnson submitted that the Council had a duty to defend the Commissioner's decision. To do that, he said, it should call the best evidence available, and indeed the only evidence the Council had available was that of Mr Ireland and this planning witness at the Commissioner's hearing.

We still have some doubts about that, although we acknowledge that some independence was imparted to the process by the Council appointing a Commissioner. In any event we accepted Ms Robson's evidence and have considered it. Mr Milligan appeared to consider this issue was more relevant to any issue of costs.

The second evidential issue was that Ms Robson included in her evidence a reference to the Council's section 32 analysis in respect of the proposed plan. Mr Milligan objected to that. We allowed the evidence in when Mr Hughes-Johnson made the standard answer that if we were concerned about the evidence that could go to the weight we attributed to it. However we were concerned

about difficulties described by Mr Milligan (that the evidence is hearsay and may also have been challenged in submissions on the proposed plan) and so we invited later submissions from counsel on that in case we could come to a definite conclusion as to its admissibility. We have not received those (and no longer require them). Having admitted the evidence, the approach we take is to give that section of Ms Robinson's evidence minimal weight. Indeed it is of little relevance anyway. The principal reasons for any objective, policy, or method should be stated in the proposed plan itself: section 75(1)(e) RMA.

Finally Mr Hughes-Johnson referred to the passage of the Resource Management Amendment Act 1996. In cross-examination he elicited from Mr Chan that Mr Chan and Ms Lee had made submissions to the parliamentary select committee about this. Mr Hughes-Johnson referred to Hansard and the relevant pages of Hansard were put in without objection by Mr Milligan. Those pages do not contain any comment on what the attitude of the Members of Parliament was in relation to whether or not section 10B of the RMA (as added by the 1996 Amendment) was retrospective or not in its operation. However Mr Hughes-Johnson also put to Mr Chen in cross-examination (and indeed annexed to his own submissions) a copy of the report of the deliberations of the Parliamentary Select Committee in which the issue of retrospectivity was specifically mentioned in the context of Mr Chan's and Ms Lee's submissions.

We consider the occasions on which this Court needs to resort to Hansard itself are not frequent. And at first consideration we deprecate the idea of introducing hearsay reports of the proceedings of a Parliamentary Select Committee. We have had no regard to that report in this case.

Section 104 Considerations

In considering whether or not to grant consent under section 105(1)(b) of the RMA we need to consider the relevant matters in section 104 of the Act. The relevant parts of this are:

(a) *Any actual and potential effects on the environment from allowing the activity.*

Mr and Mrs Ireland previously had a one-storey building in front of them. They returned from an overseas holiday to find a two-storey building of 8.66 metres that interferes substantially with the views from the ground floor of Mr and Mrs Ireland's own building. Understandably they were distressed by that. However, a first floor could have been added to the applicants' building as of right, even under the proposed plan, in a way that would have interfered with the views from Mr and Mrs Ireland's ground floor. It is only from the first floor of the Ireland building, and in particular from their living rooms and deck, that the offending part of the applicant's building (the 1.66 metres above the 7 metre as of right limit) really has an effect on the Irelands' view. We leave more detailed consideration of the *"adverseness"* of that effect for when we consider the factors listed in the proposed plan because they give the context in which the adverseness of the effects on the views from Mr and Mrs Ireland's property can be assessed.

(b) *Any relevant objectives, policies, rules or other provisions of a plan or a proposed plan.*

As we have said a reference to the statutory instruments shows the building work and/or the building are a permitted activity under the **transitional** plan. While the objectives show that the district plan considers it desirable

to protect views (and we add that whether or not it was valid to do so under the TCPA - ***Anderson v East Coast Bays City*** (1981) 8 NZTPA 35 (HC) - it is certainly proper under the RMA) the rules give effect to that by permitting building up to a maximum height of 9 metres. To that extent the applicants' roof line, as built, is in compliance with the objectives, policies and rules of the transitional plan.

As for the **proposed** plan obviously the proposal is consistent with the objectives and policies of the proposed plan since it specifically contemplates an application of this kind. A discretionary activity under the RMA (as under the TCPA) is one which is appropriate generally in the zone, but not necessarily on every particular site. We now turn to the criteria listed in the rules of the proposed plan (at p.2/38) as matters to be considered:

"(a) ...the extent to which the character of the site and the surround area remains dominated by open space, rather than by buildings, with buildings at low heights and low densities of building coverage."

We find that the area surrounding 24B Takahe Drive is not dominated by open space. To the contrary it has buildings which are more often than not quite luxurious in scale. There are many two-storey houses and there is a relatively high density of building coverage.

"(b) The extent to which the proposed buildings will be compatible with the scale of other buildings in the surrounding area."

The large two-storey house built by the applicants is certainly compatible with the scale of other buildings in the surrounding areas. That was the evidence of the expert witnesses called for the applicants. It was not controverted by Ms

Robson; was demonstrated to some extent by the aerial photograph produced for the applicants; and was confirmed by our site visit.

> *"(c) The effect of the increased height...extends in terms of visual dominance of buildings of the outlook from other sites..."*

The photographs produced by and the opinion of the planning witnesses called for the applicant show that the applicants' roof line is not unduly dominant. Mr and Mrs Ireland still enjoy a panoramic view. Whereas the foreground to their view was formerly vegetation between their house and that of the applicants', their foreground is now small trees and a rather bland roof. That roof does not dominate the view. Since there is a reasonable distance (about 30 metres) between the two houses, Mr and Mrs Ireland could provide more screen planting (of the sort already obscuring some of the applicants' house) along their boundary.

> *"(d) The extent to which the proposed building will overshadow adjoining sites and result in reduced sunlight and daylight admission, beyond that anticipated by the recession plane requirements for the area."*

> *"(e) The extent to which development on the adjoining site, such as large building setbacks, location of outdoor living spaces, or separation by land used for vehicle access, reduces the need for protection of adjoining sites from overshadowing."*

These relate to sunlight and shadow and are not relevant in this case since the applicants' property is downhill of Mr and Mrs Ireland's house.

"(f) The extent to which the increased height would have any adverse effect on other sites in the surrounding area in terms of loss of privacy through being overlooked from neighbouring buildings."

There is no loss of privacy for Mr and Mrs Ireland.

"(g) In the Living H Zone, the extent to which the increased building height will result in decreased opportunities for views from properties in the vicinity."

The expert witnesses generally agreed that (g) was one of the two most relevant factors [(h) was the other]. There is no doubt that there is a decreased view from Mr and Mrs Ireland's property. This is however, a notoriously subjective matter. We sympathise with Mr and Mrs Ireland: anyone who has been used to a view and then finds that a building protrudes into their view is normally upset. We also find that the photographs show, and our inspection confirmed, that part of the potential view that Mr and Mrs Ireland could have (to the east of the applicants' roof) is obscured by small trees on Mr and Mrs Ireland's property which they obviously prefer to keep there rather than increase their view. Nor does the applicants' roof protrude into the horizon for Mr and Mrs Ireland from their first floor. They can still look down to Hagley Park and all the Plains beyond. While the applicant's roof does decrease the opportunity for views from their upstairs living space and deck it is only to a minor extent. Their view is not, as the policy puts it, unduly compromised.

"(h) In the Living H Zone where it would be unreasonable to require the development standard for height to be complied with given the height of existing buildings in the surrounding locality."

As we have said many of the houses in the surrounding locality are two-storeys. In the circumstances we consider it would be unreasonable to require the applicants' roof to be kept down to a seven metre development standard.

> *"(i) The ability to mitigate any adverse effects of increased height or exceedance of the recession planes, such as through increased separation distances between the building and adjoining sites or the provision of screening."*

We were told by the applicants' witnesses that the applicants' house is further away from the boundary than it needs to be. Indeed Mrs Carter went so far as to say that if the applicants had built as close as they were able to the Irelands' boundary and gone up to the maximum of 7 metres as of right under the proposed plan then an effect of the same magnitude as that actually existing could have been created. Mr and Mrs Ireland would have not been able to object to that. As far as screening goes there appears little scope on the applicants' property, but as we have said Mr and Mrs Ireland could, if they wished allow existing trees to grow and obscure more of the applicants' roof.

We now turn back to the other relevant matters in section 104(1) especially paragraph (i):

> (i) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.*

Mr Milligan urged on us the facts that the building consent had been obtained and the work started before the proposed plan was notified was relevant and that fairness required we take that into account. Mr Hughes-Johnson fairly and responsibly accepted that was a proper consideration. The effect of this is limited however by the fact that the applicants had received at least constructive

notice of potential problems from notification of the proposed plan. In cross-examination, Mr Hughes-Johnson put a *"Project Information Memorandum"* (PIM) to Mr Chan which the latter accepted had been received by the appellant Mr Chen (as the applicants' agent). That PIM showed that the Council standardly and expressly warned recipients of such memoranda of the need for certificates of compliance.

Mr Milligan also submitted that we should take into account that section 10B would, if the same scenario had occurred since the Resource Management Amendment Act 1996 came into force, have protected Mr Chan and Ms Lee and that they were simply unfortunate that their predicament arose during the 12 or 15 months before the Amendment came into force. Mr Hughes-Johnson pointed out that that would be to give *de facto* retrospectivity to the 1996 Amendment even though, as Mr Milligan had conceded, section 10B is not retrospective in operation. The reason for his concession, which we think was properly made, was that unlike section 2A of the RMA which also came into force on 2 September 1996, section 10B is substantive rather than procedural. Therefore it is not retrospective, and the High Court decision in ***Kaitiaki Tarawera Inc v Rotorua District Council*** [1997] NZRMA 372 which decided that section 2A is retrospective can be distinguished. However, we agree with Mr Hughes-Johnson that Mr Milligan cannot bring in section 10B from the side and accordingly we disregard section 10B for the purposes of considering this matter.

Section 105

Turning then to our overall weighing of all matters (including the purpose of the RMA) under section 105(1) the other matter we have to consider is the weight to be given to the proposed plan. We bear in mind that it is not yet in force and there have been many submissions on the objectives, policies and rules which are

relevant to this case. The approach of the Court was stated in ***Hanton v Auckland City Council*** [1994] NZRMA 289, 305 to be:

> *"Rather than have a general rule about the cases where a proposed plan is to prevail over inconsistent provisions of an operative plan, and vice versa, each case is to be decided individually according to its own circumstances"* (applied in ***Lee v Auckland City Council*** [1995] NZRMA 241).

Mr Hughes-Johnson submitted that this was a case where the proposed plan has produced a *"paradigm shift"* from the old TCPA regime to the new RMA regime (***Chan v Auckland City Council*** [1995] NZRMA 263) with the effect that the proposed plan should be given more weight. However, we do not find that this is such a case. Indeed the planner called for the Council gave evidence which in effect confirmed this. Although Ms Robson said that considerable weight should be given to the proposed plan, earlier in her evidence she had stated that the policies and controls in the transitional plan *"have been refined in the proposed review"*. The references in the transitional plan to protection of views (quoted earlier) confirm that. Far from being a *"paradigm shift"* there has been a relatively smooth and consistent transition from one plan to the next (proposed) plan. In those circumstances we consider we should give relatively less weight to the proposed plan.

We do not give any weight to the fact that Mr Chan and Ms Lee could have been completely protected by a certificate of compliance but did not obtain one. We agree that since their agent received a document - the PIM - drawing that issue to his attention, they are bound by the knowledge and/or lack of action of that agent. The effect of the PIM has been to reduce the weight we have given to the fact that their roof was legal when they built it.

However where the community decides, in a proposed plan, to change (slightly in this case) the allocation of property rights does not mean that people in the situation of the applicants should automatically be penalised (as ***Hanton*** recognises at 305 when it refers to *"circumstances of injustice"*). And conversely we do not consider that Mr and Mrs Ireland have any grounds for saying they are being unfairly treated if the roof is allowed to stay. The effect of the roof on their views is relatively minor. Too much weight should not be placed on section 5(2)(c) of the RMA. Just because the applicants' roof does cause some adverse effect on views does not mean that effect has to be avoided. As Temm J. stated in ***Shell New Zealand Ltd v Auckland City*** [1995] NZRMA 490 at 495:

> *"There seems to me no doubt that the Act contemplates applications for consent that not only do not enhance an amenity but also do not even maintain it."*

The adverseness is a question of degree in the overall balancing under section 105(1) of the RMA. Taking those matters and all the section 104(1) considerations into account we are of the view that a resource consent should be granted.

Since our decision reverses that of the Commissioner it is important for the parties to understand that we have come to our decision on the basis of the evidence as presented to us. It is clear that the Commissioner heard more evidence than we did but we cannot take that into account. We also observe that the Commissioner may have misled himself in a number of ways, and in deference to the obvious care and attention he gave the matter we now comment on those.

First the Commissioner was persuaded that he should consider the situation as if the applicants' roof had not been constructed. That is certainly correct as a general approach. For example in ***Taylor v Heathcote County Council*** (1982) 8 NZTPA 294 a builder applied for a retrospective dispensation from the recession plane requirements in the County's already notified review. The Council and Planning Tribunal refused the dispensation and their decisions were confirmed by the High Court in the reported case. The fact that the building had already been erected was not, it appears, considered relevant.

The factual situation is different here. It was common ground before us (if not before the Commissioner) that the roof line and underlying structure were complete before the proposed plan was notified. Indeed the only reason that Mr Milligan did not argue that the applicants had existing use rights for the building, was because some fitout building work had to be carried out (inside the roof as we understand it) after notification of the proposed plan and that work was caught as a discretionary activity before section 10B came to the rescue (but not for the applicants).

In those circumstances we consider it is appropriate for us to consider the situation as it was when the roof became illegal as part of the fairness considerations in section 104(1)(i). While the Commissioner certainly considered fairness or injustice he appears to have done so from a different starting point (an imaginary clean slate). We consider that was wrong in the particular circumstances of this case.

Secondly the Commissioner heard some valuation evidence which was not given to us - especially evidence as to the reduction in value of Mr and Mrs Ireland's property because of the interference with their view. Such evidence needs to be carefully used because it can lead to *"double-weighting"*. A valuation is simply another expert opinion of the adverse effect (loss) being assessed by the Council

or Commissioner (or Court) (see ***Goldfinch v Auckland City*** A66/95), whereas the Commissioner "also" took into account "a potential diminution in value to the Irelands property". Such a valuation can be used to confirm the Council's opinion of the scale of an effect but not as an additional or separate factor.

Thirdly he did not expressly consider the application in terms of the discretionary factors expressly set out by the Council in rule 6.2.2 (proposed plan p.2/38). He earlier describes the evidence about some of those criteria, but then in his "statutory considerations" simply says (p.21 of his decision) that he has *"taken into account the relevant objectives and policies and rules."* With respect, that is an inadequate assessment of the relevant factors. He appears to have overlooked that the activity is a limited discretionary activity under the proposed plan [rules 2.1.1(b) (p.2/12) and 6.1(c) (p.2/38)] and therefore the exercise of the Council's discretion (and, on appeal this Court's discretion) should be limited to the relevant matters stated in the rules.

That is the scheme contemplated by section 76(3B) of the RMA and it is put into effect in the rules of the proposed plan we have referred to. That is why we have considered the roof *"activity"* in terms of each of the factors in rule 6.2.2. We accept that there is an over-riding *"check"* in the form of the section 105(1) discretion (being informed by Part II of the RMA) but where a plan (or proposed plan) sets out careful criteria then applicants are entitled to have their application tested primarily by those criteria.

Determination

Accordingly under section 290 of the Act we make the following orders:

1. the appeal is allowed and the respondent's decision is cancelled; and

2. a land use consent as sought is granted to the appellant.

Our preliminary view, without in any way determining the issue, is that the applicants should have some costs from the Council and we invite the parties to resolve that by agreement. If that cannot be achieved then leave is reserved to file memoranda on the issue.

DATED at **CHRISTCHURCH** this 26th day of **September** 1997.

J R Jackson
Environment Judge

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