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TIME OLD AND TOPICAL ASPECTS OF TOWN PLANNING

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1 INTRODUCTION

The Town Planning System has never been above criticism. One of the most interesting aspects of it is that it is a quasi legal system operating in a most practical and sometimes political environment which is constantly changing. Its mechanisms have developed in New Zealand over a comparatively short period of time. The adequacy of those mechanisms have been questioned as they have periodically struck difficulties.

In this paper an effort is made to examine some of those mechanisms. This has been done in relation to recent problems that have been encountered and in the general context of a long standing dilemma. That dilemma is whether greater certainty or greater flexibility should be introduced to the town planning system.
This paper is not designed to attempt to resolve the difficulties but merely consider the mechanisms, see how they function, how practical they are and assess to some degree the significance of the difficulties.

2 SURVEY AND RESEARCH MATERIAL

A questionnaire was prepared and sent out in mid August 1985 to 71 Local Authorities. These Local Authorities were of varying sizes scattered throughout the length of New Zealand. The response to that questionnaire has been most encouraging in that the time of writing a reply had been received from approximately 80% of the recipients. The contents of the information contained in those replies permeates this

paper. Several large cities at the date of writing had not replied. It is understood that they were unable at the time to accumulate some of the information in the period given and hence when assessing the information some regard should be had for this fact.

Earlier in the year a telephone survey was carried out covering the Local Authorities surrounding Wellington. In addition discussions have been held with two Planning Judges, a Senior Town Planner, a leading local Town Planning Practitioner and several local Town Planning Officers. The information contained from those discussions and interviews is included in this paper. At the outset the writer wishes to acknowledge the contributions made by the parties mentioned above and express gratitude for the same.

3 SPECIFIED DEPARTURES

3.1 General

District Schemes cater for a wide range of uses. It is clearly impossible to envisage all possible suitable uses and provide for them in an operative District Scheme. Even if it were possible to do this such a document would be far too lengthy and complex to the point where it would defeat its intended purpose which in my view is to provide some degree of certainty in the majority of cases as regards permissible land use. To make provision for flexibility in 1966 Local Authorities were empowered to authorise conditional uses within zones which were uses permitted subject to the Local Authorities consenting on an individual basis. Later

in 1971 dispensations and waivers were also introduced. Contemporaneously with the introduction of conditional uses in 1966 provision was made for the granting of consents for specified departures. A specified departure is defined in Section 2 of the Town and Country Planning Act 1977 as "an exception to any provision of the scheme granted under Section 74 of this Act". This therefore allows for flexibility in respect of exceptional or unforeseeable developments. A consent to an application for a specified departure does not rezone the land or alter the provisions of the District Scheme but allows for the land to be used in a non-permitted way. This permission subsists whilst the use continues unabated in the same or a similar form continuously or at least without the elapsing for a period of more than six months without the consent of the Local Authority.[1] Section 74 of the Town and Country Planning Act 1977 makes provision for applications for the grant of a specified departure. Section 74 reads:-

> "74. Specified departure from District Scheme -
>
> (1) Notwithstanding the provisions of section 62 of this Act, an application may be made for the grant by the Council of an exception to any provision of an operative District Scheme by consenting to a specified departure. Every such application shall be by way of a notified application.

1. Section 90(2) of the Town and Country Planning Act 1977.

(2) Subject to section 3 of this Act, the Council may consent to such a specified departure only if:-

(a) The effect of the departure will not be contrary to the public interest and will have little town and country planning significance beyond the immediate vicinity of the land concerned, and the provisions of the scheme can remain without change or variation; or

(b) The departure is in accord with the effect of a resolution which the Council has passed initiating a change or variation in the scheme, but which is of such urgency as to warrant its immediate authorisation in the public interest without waiting the time involved in completing the change or variation.

(3) Repealed by s. 16, 1980 No. 167.

(4) In considering an application under this section to create an allotment that does not comply with the provisions of the District Scheme, the Council shall, if it is relevant in the circumstances of the case, and if the

applicant was the owner of the land when the District Scheme or the relevant part or provision of it became operative, take into account the fact that the subdivision of any land in respect of which the application was made has been previously approved or did not require the approval of the Council at the time it was subdivided."

3.2 Who can apply?

Under the 1953 Act only the owner or occupier of the land concerned could apply for a specified departure. Now this restriction has been lifted and any person can apply whether they have an interest in the property or not.[2] If the applicant was not the owner or the occupier, the owner or the occupier would be required to be served with a copy of the application as they would be persons with a greater interest in the application than the general public.[3]

3.3 The Application

The application submitted is stated to be for planning consent as required by Form A set out in the Schedule to the Town and Country Planning Regulations 1978. It is for the Local Authority to interpret the basis of the application and treat it accordingly. The application must state fully what is proposed so as to fully and fairly inform both the Local Authority and prospective

2. Benfield v Wellington City Council (1979) 2 N.Z.L.R. 385.
3. Regulation 37(3) of Town and Country Planning Regulations 1978.

objectors. It is not necessary for the application to set out details of the ways in which the proposal fails to comply with the relevant District Scheme requirements. The application does not follow the prescribed form it is not necessarily invalid.[4] Where there is some doubt as to whether planning consent for a proposed or altered use is needed but the applicant wishes to avoid being faced with any application for an interim injunction it is not uncommon for the applicant to submit the application on a without prejudice basis subject to any existing rights, planning approvals or compliance with the operative District Scheme.

It is up to the Local Authority to determine whether or not it requires further detailed information to fully comprehend an application for a planning consent. It makes sense that for a departure to be specified it is not possible to give blanket approval for a non-conforming use. Too often one suspects applications are filed stating proposals of a general nature accompanied by drawings and sketches suitably vague showing a considerable number of instant trees and foliage masking the true impact of the proposal. It is not essential to provide plans if a precise written definition of the proposal is given in the application as regards the proposed uses. It is possible to circumvent the needs of plans by giving exact details as regards the uses, bulk and location restrictions but if plans are later drawn for permit purposes the earlier detail submitted with the application consent must be incorporated within the plans.[5]

4. Fletcher Development Limited v Wellington City D No. W7/81C2298
5. Reapplication by Regional Centres (Mt Albert) Limited (1964) 2 N.Z.T.C.P.A. 181.

3.4 Matters of National Importance

The starting point for any Local Authority when considering an application for planning consent which it considers requires treatment as a specified departure application is to examine Section 3 of the Town and Country Planning Act 1977 and consider whether the proposal is affected by matters in Section 3 of the Act to be of national importance. The matters stated in Section 3 of the Act to be of national importance are:-

"(a) The conservation, protection, and enhancement of the physical, cultural, and social environment:

(b) The wise use and management of New Zealand's resources:

(c) The 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:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban development in rural areas:

(f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

The listed matters of national importance seldom arise in domestic applications for specified departures especially involving a suburban or city site. They more commonly arise in applications relating to rural areas or where environmental considerations are involved. Section 3 of the Act states that in implementing or administering a District Scheme the listed matters of national importance shall be recognised and provided for. There is therefore no absolute duty on the Local Authority to feel compelled to disallow an application which may be contrary to a matter of national importance or conversely consent to an application which may be in accordance with one or more of the listed matters of national importance.[6]

3.5 Criteria to be satisfied

The most commonly required criteria to be satisfied before a specified departure is granted are the threefold provisions of Section 74(2)(a).

The criteria to be satisfied are conjunctive. The onus of proof is on the applicant not only to satisfy the Local Authority that

6. Lion Breweries v Waimea County (1979) D.B. 2087
Hyslop Properties v Waimari County D. No. C. 18/80 C. 337

the provisions of Section 74(2) have been fulfilled but also that the departure will not be contrary to the public interest.[7] If the applicant believes he can demonstrate the the departure sought in the application is warranted in the public interest but fails to satisfy either of the two limbs of Section 74(2) the applicant can appeal to the Planning Tribunal under Section 69(2). This involves a special set of circumstances that justify separate consideration. Similarly where the application comes before the Tribunal in the ordinary course and the applicant believes that it can satisfy one of the two limbs of Section 74(2) it is still open to the applicant as a residuary ground to seek to have the Tribunal exercise its discretion under Section 69(2) if it finds against the applicant on the first matter. Section 69(2) will be discussed in more detail later.

In considering an application for a specified departure the Local Authorities and the Tribunal (except where exercising its discretion under Section 69(2)) cannot consent to the application unless it can find there are circumstances peculiar to the application.[8] The specified departure procedure is very suitable for dealing with circumstances that are true exceptions. It is a useful procedure for allowing the use where no or inadequate provision has been made for that type of use in the District Scheme.[9] This may be due to a new need arising or an increased need for land to be used for a certain type of activity. In addition to providing for such things as private art

7. Kemp v Wellington City (1978) D.B. 1014
8. Meadow Mushrooms Ltd v Papakura County Council (1977) 6 N.Z.T.P.A. 327
9. Auckland Gliding Club Inc. v Franklyn County (1974) 4 N.Z.T.P.A. 355
Z.M. Patrick v Auckland City Council (1971) 4 N.Z.T.P.A. 26

galleries in residential zones and glider fields where this was unexpected other applications have been granted for such things as a blacksmiths workshop where there was no suitably zoned land [10] and an LPG outlet for similar reasons on a site zoned for a petrol station.[11] In Morris and Another v Hawkes Bay County Council (1977) 6 N.Z.T.P.A. 219 there was no appropriately zoned land to enable Maoris to live close to their marae. The grant of the departure was held to be justified in the public interest and it was said if the Council was likely to be embarrassed in refusing future similar applications it should take the step of providing suitable zoned land. One suspects some recognition in this case was also given to s. 3(1)(g) of the Act.

A finding that the circumstances relating to an application constitute a true exception leads to finding the application is not contrary to the public interest.

Where it is held that exceptional circumstances exist the view is taken that the integrity of the scheme is not threatened. The Tribunal over recent years has consented to a number of applications on the basis that the proposed use is a one off use which the scheme couldn't necessarily be expected to make provision for. A review of a selection of such decisions gives one an insight into the Tribunal or Boards thinking on such matters. In 1971 the Board recognised this principle in Z.M. Patrick v Auckland City Council (1971) 4 N.Z.T.P.A. 26. The

10. Canterbury Regional Planning Authority v Christchurch City (1977) 6 N.Z.T.P.A. 262
11. Terry v Thames/Coromandel District No. A151/80 C1750

applicants sought to establish a private art gallery in their residential property situated in Remuera Road, Auckland. The zoning did not permit such a use but the Tribunal held that the establishment of a private art gallery with a personal setting in a residential atmosphere would serve the public better than by forcing it to be placed in commercial premises in a commercial zone. In making the decision the Board recorded "that it is a proper use of the powers conferred by Section 35" (predecessor of Section 74) "to consent in appropriate cases to uses of a specialised or unusal kind the needs of which cannot be provided for in advance by general provisions in a District Scheme". In 1982 the Tribunal considered an application to establish a clay shooting range in an area zoned Rural A in the case of Whangarei Combined Gun Club (Inc) v Whangarei County Council (1982) 8 N.Z.T.P.A. 476. Nearby rural residents objected. The basic ground of objection related to the noise level anticipated. It was held that the noise level restrictions could control any detrimental effects and the proposal was of a one-off kind for which the scheme couldn't be expected to make provision and it would not seriously detract from the amenities of the neighbourhood. Accordingly the Tribunal held that the integrity of the scheme was not threatened. In 1984 in the decision of Metge v Kapiti Borough Council 11 December 1984 W122/84 the Tribunal considered an application for a comprehensive health and fitness centre to be established in an industrial zone. The Tribunal noted that there was not provision for such centres in the District Scheme and described

the application as "a true departure and one that met the tests of section 74(2)(a)". In this case there were some anomalies about this particular piece of industrial land and there was plenty of other spare industrially zoned land which could be used for normal industrial purposes and hence it was appropriate to grant consent. A fourth decision of Eyes v Whangarei City Council (1984) 10 N.Z.T.P.A. 217 is a little surprising. The appellants sought consent to serve between 10 a.m. and 3.30 p.m. "Devonshire Teas" in the garden of an attractive old house established in a residential area five days a week. The use was not a permitted use and the Tribunal held itself persuaded that the true nature of a place serving Devonshire Teas is not in a commercial location as suggested by the Local Authorities. It held that if the such a use is to be established, it must be found in a residential or rural setting. As in this particular instance such a use was not provided for in those parts of the City the Tribunal granted its consent holding that the reason no doubt why no such provision had been made was because it was a relatively uncommon use which would not have been in mind when the scheme was prepared.

Some of the above decisions are quite understandable but others do lead one to the conclusion that if one is seeking to establish a use which is even slightly unusual one has a better prospect of succeeding in establishing the use out of zone if the scheme is deficient in that it has not made provision for such a use. For this reason one may feel somewhat sorry for the appellant in

the case of Kerr v Christchurch City Council Appeal 914/83. In that case the appellant sought to establish on the edge of a residential area "a factory" employing three workers to construct cycle touring equipment. The Tribunal held that such a business was not a "home occupation" and therefore not an enterprise of a one-off kind. In this respect one is left to question whether in 1984 a health and fitness centre or an outlet for Devonshire Teas are any more of a one-off or unusual type of use than a small type of cottage industry to construct cycle touring equipment situated on the edge of a residential area.

3.6 Not contrary to the public interest

Formerly the onus was on the applicant to prove that the proposal was positively in the public interest. Now it is only necessary for the applicant to prove that the proposal is not contrary to the public interest. Public interest is defined in Section 2 of the Act as "including all matters which in the circumstances of the case can be of public interest". It has been held that it goes beyond purely town planning considerations but any proposal which calls into question a general provision of a District Scheme is likely to be contrary to the public interest.[12] What precisely is in the public interest or rather not contrary to the public interest may vary according to the particular circumstances or alter with changing patterns of lifestyle and values. It was said by no lesser person than Mr Justice Casey in Raceway Motels Limited v Canterbury Regional Planning Authority (1976) 6 N.Z.T.P.A. 40 "But any question of

12. Highway Motors v Mt Wellington Borough (1972) 4 N.Z.T.P.A. 220

public interest must depend upon any examination of the whole of the surrounding circumstances and can fluctuate with them and its assessment is obviously a matter of fact for the Council or Board".

The public interest cannot clearly be a static standard as it must change with society. It is for Local Authorities and the Tribunal to move with the times. If the proposal will enhance the district or locality it has been suggested that it is not likely to be contrary to the public interest.[13] An example cited in support of this statement is the decision where the use of part of a rural property for a nudist camp has been found to be acceptable.[14] If one accepts that the primary nature of public interest is the "integrity" of the District Scheme [15] and that its general provisions and objectives should be followed then it is I suggest wrong to purely evaluate the public interest from the stand point at any one time on the basis that if the proposal enhances the district or locality then it is likely to be in the public interest.

It is the above type of approach that negates the element of certainty that a District Scheme is designed to provide. That type of approach would encourage ad hoc decisions which have been held to undermine public confidence in planning.[16] People

13. K.A. Palmer "Planning Law in New Zealand"
14. Tainui Investments Limited v Waimea County Council (1980) N.Z.T.P.A. 65
15. Centrepoint Community Growth Trust v Takapuna City (HC) Wgtn M596/83
16. Sweetapple v Wellington City D. No. 42/83

are entitled to rely for the most part on the pattern of development laid down in the District Scheme. The difficulties arise when schemes are not reviewed regularly despite the statutory provision that they shall be reviewed once they have been operative for five years.[17] Even the District Schemes that are reviewed regularly take time to be completed e.g. the Wellington District Scheme Review which has just been completed was commenced in 1979. Hence, the provisions of the District Scheme become outdated in some respects. The real problem arises when a proposal may enhance the district or locality but is not in accordance with the provisions of the District Scheme due to the fact that the District Scheme in respect of that particular aspect may be outmoded or outdated. If it cannot be said that there is anything particularly unique or exceptional about the proposal then the question arises as to whether consent should be given to the application. It is my view that in such circumstances the ends cannot be allowed to justify the means. The correct procedure to be adopted is to effect a scheme change by way of a variation. The Planning Tribunal have certainly been fairly consistent in its view that specified departures should not be used to remedy zoning deficiencies except in the special circumstances provided for in Section 74(2)(b) of the Act.[18] It is the writer's experience however, that Local Authorities are far more willing to grant a specified departure in such cases to bring "justice" to a particular situation. This is unfortunately at best "ad hoc justice". Whilst this approach may be justified in viewing the circumstances in a

17. Section 59 of the Act as amended 1983 No. 149
18. May v Newmarket Borough (1970) 3 N.Z.T.P.A. 230

vacuum this is not the case I submit when the circumstances are viewed in a wider context because such decisions will slowly erode the reliability of the District Scheme. I suggest the advantages of dealing effectively with the given situation to the detriment of others is short-sighted. It is an approach that one can readily understand Local Authorities taking especially the larger ones where the composition of the Town Planning Committees change regularly to the extent that there tends to be a lack of consistency and overview. This issue highlights the continuing conflict between the benefits of flexibility as opposed to the benefits of certainty. It is this equation that must be regularly balanced.

The public interest being considered in respect of any one application is the public interest of those people to whom the particular District Scheme is applicable.[19] For the benefit that may be derived from consent being given to any particular proposal on the basis that it is in the public interest such benefit must assist the community at large and not just private interests.[20] One of the points raised in favour of the proposal for which consent was being sought in the case of Sweetapple v Wellington City was that the prospect of a retail timber supply outlet would be most desirable for the local residents who had no similar facility nearby. The Tribunal took the opportunity of repeating the often cited contrary view that it is not simply sufficient for the applicant to show that the proposal is for the

19. Waimea Borough v Waikatane Borough (supra)
20. Hill v Wellington City (1971) 4 N.Z.T.P.A. 29

public convenience for it to be considered in the public interest or rather not contrary to it. The Tribunal made similar comments in Gisborne Gas Company v Gisborne City (1983) 9 N.Z.T.P.C.A. 124 in assessing the appellant's only argument in relation to the siting of an LPG filling station that "the proposed site is more convenient for motorists than the areas chosen by the respondent Council" not surprisingly the appeal was disallowed.

Often when a specified departure is sought to introduce a commercial activity all the applicant's possible competitors who are ensconced in the District object to the proposal. The Tribunal has been quite prepared to examine the possible effects on existing local commercial interests to ascertain whether such proposal is in the public interest.[21] Even where the applicant seeks to break a monopoly or strengthen competition which will one hopes lead to a better deal for the consumer the Tribunal has held that such matters do not justify the establishment of a commercial venture outside a suitably zoned area.[22]

There have been two recent decisions in relation to the above aspect which at first sight appear difficult to reconcile. The first was Foodstuffs Christchurch Limited v Waimari County Council Division No. 3 10 June 1983 A. 670/82. Consent was given to a supermarket to construct an "out of zone" extention to its shop which was situated in the "Parklands Centre". A rival supermarket and others appealed. The Tribunal held that

21. Sweetapple v Wellington City (supra)
22. Roberts v Matamata County D No. A 131/80

there were exceptional circumstances in this instance and noted in particular the continued liability of "Parklands" and the supermarket company's inability to secure the implementation of a comprehensive development plan before 1989. This can be contrasted with the decision in Concept Projects Limited v Auckland City Council Division No. 4 15 June 1982 A. 730/82. Part of a road had a special residential zoning permitting medical and dental clinics and offices. The appellants purchased a site in this zone and constructed a building suitable for a medical or dental surgery. Unable to dispose of it the appellants sought consent to use it for ordinary professional offices. The Tribunal refused the application holding "a specified departure should not be used to protect those who undertake business ventures against the risk that the venture will not be financially successful". Presumably in the latter decision the Tribunal was saying to the appellants that the building must be saleable as a medical or dental clinic and offices "at a price" and the appellants must accept the lowering of the price to that level as part of the business risk. If the buildings were not saleable as a medical or dental surgery at any price because e.g. they were near an area where the drugs used would be affected, then the answer may well have been different as the decision could hardly have been in accordance with wise use of resources and therefore it may have been in the national interest to grant consent. The distinction between the two cases seems to be that in the former others would suffer as well as the applicant seeking consent whereas in the latter case it was only the appellants who would suffer. It is somewhat ironic that one can get planning permission for a specified departure "on the coat-tail of others".

The availability of other possible sites especially those appropriately zoned for the intended use is always a consideration taken into account if such sites exist. A conclusion that the subject site is not suitable would be justified if another site is shown to be demonstrably superior, and not merely marginally better.[23] The public interest may require individual private interests to be considered [24] and that the avoidance of injustice may be a matter of public interest.[25] If however an adjoining owner is likely to be prejudiced by a consent to a departure this will be contrary to the public interest except in the most exceptional circumstances.[26] One such case however where the alleviation of injustice or hardship was found to outweigh the disadvantaged neighbour was Schultz v Paparua County Council (1978) 6 N.Z.T.P.A. 532. An addition to the first floor rooms of a house were found to infringe the height ordinance. The applicant had genuinely believed he could obtain the neighbour's consent. He didn't and the neighbour objected to his specified departure application on the grounds of loss of sunlight and privacy. The Tribunal especially recognised the former but following Smeaton's case (supra) held that this was the a case where it was in the public interest to alleviate the hardship of the applicant. It wouldn't grant the consent under section 74 as it held it could have Town and Country Planning significance beyond the immediate vicinity

23. In re an application by NZ Synthetic Fuels Corporation (1981) 8 N.Z.T.P.A. 138
24. Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd 5 N.Z.T.P.A. 33
25. Smeaton v Queenstown Borough Council 4 N.Z.T.P.A. 410
26. Findlay v Wellington City Council 6 N.Z.T.P.A. 76

of the site but exercised its jurisdiction under Section 69(2). Personal hardship as a relevant factor was also recognised in the recent case of Smith v Clifton County Council (1983) 9 N.Z.T.P.A. 134. The appellant purchased a residentially zoned section and sought permission to move onto it a house he had purchased from the New Zealand Synthetic Fuels Corporation Limited. He had left Motonui after living opposite the site of the Synthetic Fuels Plant when planning permission was granted despite his objection. He wished to live in the house but utilise part of it as a base for drying, storing and selling opossum skins. The Tribunal held that the personal hardship was not persuasive enough to enable the Tribunal to find that such activities were not contrary to the public interest since any hardship was due to the appellant's refusal to separate his proposed work from his home (there were other suitable sites with sheds further away).

3.7 Little Town and Country Planning Significance

How does one judge whether the effect of the departure will have little Town and Country Planning significance beyond the immediate vicinity of the land concerned? A decision most often cited in respect of this issue is Highway Motors Limited v Mount Wellington Borough (supra) where the Board said

> "The "significance" spoken of is Town Planning importance or consequence. It can and should be measured in two ways:-

(a) In the actual effect of the proposal on land uses (actual or prospective) in the immediate vicinity and beyond.

(b) In its consequences in relation to the general provision of the District Scheme and the patterns of development laid down thereby."

What constitutes "the immediate vicinity" will naturally depend on the scope and nature of the proposal and similarly the size and nature of the zone. It is suggested that a greater protection is likely to be given to predominant uses in residential areas where the standards of amenity are higher than in industrial areas.[27] The case law isn't entirely consistent with this statement in its simplest form. The likely effect of the proposal in terms of any detriment to the physical environment is also a significant part of the equation. Consent was given for the manufacture of soap on an industrial site where such an activity was a non permitted use and the site was surrounded by residential homes. This at first sight would seem horrendous but quite properly the proposal was considered in light of the effect on the physical environment and in proper context. The context was that the site had been used for 30 years for the manufacture of kitchen, cleaning and laundry products including steel wool soap pads. The proposed use which was to be on a small scale purely for the manufacture of soap for the steel wool pads and was therefore incidental to the existing activities. Furthermore the manufacturer could be regulated by a licence issued under the Clean Air Act 1972. This meant there would be no discernible

27. Mount Wellington Borough Council v A.W. Bryant (1984) 10 N.Z.T.P.A. 122

odour from the soap manufacturing process at its boundary.[28] This case can be contrasted with the decision in Davies Properties v Auckland City Council (1972) 4 N.Z.T.P.A. 205. There the appellant sought consent to erect a plumbers workshop, office and storage building in a residential zone. In this case it was held that to grant the application would break down the stability of the zoning of the neighbourhood. It was held that the significance in question is to be measured "not only in respect of the immediate vicinity and beyond, but also in respect of its significance in relation to the total pattern of development defined by the scheme itself".

A departure that does not increase the existing non-conformity has been held to have little Town Planning significance.[29] This is especially so where the proposal is visually appropriate in the neighbourhood and the detraction, if any, to the neighbouring properties will be minimal.

The second aspect to be considered as stated in the Mount Wellington Borough Council decision is what could broadly be termed as the precedent effect of a planning consent. Mr Justice Casey considered this matter also in the Raceway Motors v Canterbury R.P.A. decision (supra). It was not argued that the doctrine of stare decisis applied to the Tribunal but that the Tribunal (or Board as it was then) is bound not to ignore its own decisions especially where the factual circumstances are very

28. Home Products (NZ) Limited v Mount Roskill Borough Council (1979) 6 N.Z.T.P.A. 542.
29. Re an application by McMillan and Another v Auckland City Council (1977) 6 N.Z.T.P.A. 310

similar. Mr Justice Casey held that the Board was not bound by its previous decisions and free to consider each case on its own facts and merits. The Board he held was free to take previous decisions on similar facts into account if it thought fit but its failure to do so was not an error of law.

Despite the above comments the basic principles of administrative law provide that there is a general duty for a Local Body and Tribunals to act fairly and reasonably. The real issue arises where there are many sites similar to the subject site which accordingly dictate that an even handed approach be taken. Just as the rules in natural justice provide that offenders who are in a similar position should be treated equally so should identical applications be accorded equal consideration. This aspect was considered in Croxilles Ohu Limited v Marlborough County Council (1976) 6 N.Z.T.P.A. 74. The appellants sought to establish a community in the Rai Valley to manufacture goods for sale and produce the group's food with the rest being for sale commercially. The land zoning permitted only one dwelling house as of right and the appellants sought permission to erect nine cottages. The Board held that in the vicinity there were large areas of unalienated Crown land and giving consent would create a precedent on which similar applications could be based. Great difficulty it was said would be experienced in distinguishing persons genuinely interested in communal living and those merely grouping themselves together for the purpose of circumventing the provision of the District Scheme.

Perhaps the most definitive pronouncement on this issue was contained in the decision of O'Connell's Hotel v Queenstown/Whakatipu Combined Planning Committee (1970) 3 N.Z.T.C.P.A. 269. In that case the Board allowed a Hotel to be extended beyond the maximum height limit and held that it would not set a precedent for other commercial buildings in the area and it was not necessary in these circumstances to change the scheme due to the circumstances of this particular building. In reaching this decision the Board stated the following matter of principle which has been applied subsequently:-

> "... where circumstances in respect of a large number of separate areas of land in any zone in a local authority District are identical, and cause one of the owners to apply for consent to a specified departure, the Local Authority would be justified in deciding that the effect of granting its consent would have more than little significance beyond the immediate vicinity of the applicant's land and the District Scheme could not properly remain without being changed or varied. The basis of that finding will not be the creation of a precedent, but a similarity of circumstances which logically had to be dealt with in the same way in each case".

Sometimes there are special reasons which enable consent to be granted in borderline cases for a limited period of time. It has

been stated however that a planning consent should not limited in time unless there are special reasons for doing so. They may be planning reasons. They may also be reasons found in Section 74(2)(a) - a use may be justified for a temporary period, and, because it is temporary come within the limitations imposed by the subsection, whereas a consent unlimited as to time might well go beyond those limitations.[30] In an interesting decision the Tribunal one suspects had that principle partly in mind and also no doubt the desire not to create any long lasting precedent when it gave consent to an application in the decision of La Grouw Builders Limited v Rodney County Council (1977) 6 N.Z.T.P.A. 308. This decision concerned an application to construct and periodically replace three show homes in a residential area adjacent to a commercial zone. Consent was granted on the basis that although the site would be better used for residential purposes it may be some time before it was so used. The Board therefore gave consent and viewed the consent given as allowing an interim or temporary use of the site as it believed in due course with the further growth and development of Orewa, economics would dictate that full and intensive use of the site be made for residential purposes. In a more recent decision the Tribunal was more specific - Bailey v Tauranga City Council (1984) 10 N.Z.T.P.A. 215. In this case Mr and Mrs Bailey were nursery persons who had been growing roses and fruit trees in Tauranga for 35 years. Mr Bailey was aged 69 years of age and wished to use a two acre block of land zoned

30. Lindsay v Waitamata City Council (1980) 6 N.Z.T.P.A. 638

residential for a fruit tree and rose nursery for a period of up to four years. There were to be no permanent plantings and the only building to be erected on the site was a temporary shed. The City Council's Town Planner gave evidence that the more readily developerable residential land in the City would last for about 10 years. The Tribunal accordingly granted the consent to the Baileys to utilise the land in the manner sought. The Tribunal however added the conditions that the consent was personal to Mr and Mrs Bailey and did not run with the land. The consent was also to subsist for a period of only four years.

3.8 Scheme can remain without change

In the Davies Properties case referred to earlier the Board stated that after consent has been given to a departure permitting a non permitted use the question as to whether the District Scheme can remain without change will depend on the circumstances. It was stated

> "If a public need has been demonstrated for a particular use to become established on that site; and if it is not appropriate that any other of the uses permitted in the zone in which that use is ordinarily to be found should become established on that site; and/or if it is desirable that the particular use should remain under specific planning control as a non-conforming use, then it can be said that the District Scheme can remain without change. Once such a new use is established, if there is no reason

why it should remain under specific planning control, or if there is no reason why other uses permitted in the zone in which the use is ordinarily to be found should not become established on that site, then the District Scheme cannot remain without change - the zoning of the site must be changed so that the use of the site becomes a conforming use, and so that the District Scheme can remain an honest document".

The scheme cannot remain an honest document if consent will amount to a de facto re-zoning of the land [31] in such cases a variation or re-zoning is required. Where there is no provision in the District Scheme for such uses and the need exists e.g. for a CNG retail sales outlet in 1981 [32] there is no threat to the integrity or honesty of the District Scheme. Where the consent sought relates to a general standard or ordinance e.g. residential use or subdivision a scheme change is the appropriate tool in fairness to the other land owners and to preserve the accuracy of the District Scheme.[33]

3.9 Urgent Applications

Subsection 2(b) of Section 74 deals with urgent applications made in relation to a scheme change or variation that has been notified pursuant to a resolution passed by the Local Authority prior to the completion of the formalities.

31. O'Connor v Waimea County Council (1971) 4 N.Z.T.P.A. 40
Whangarei City Council v Whangarei City Council (1975) B.C.L. 807
32. Bhula v Lower Hutt City Council (1981) 8 N.Z.T.P.A. 174
33. Haimoana v Raglan County Council (1978) 6 N.Z.T.P.A. 447

It is a supplementary provision to Section 74A which permits non-permitted and conditional uses and waivers under the Operative District Scheme where such uses are in conformity with the new scheme or scheme change and the appeal process has been satisfied.

It is not possible to utilise this subsection until the resolution has been actually passed by the Local Authority. A resolution stating that it was the Local Authority's intention to review certain provisions of the District Scheme is insufficient.[34]

The urgency that is required to be present must not be borne from private interests but of public necessity. It was held in GUS Properties Limited v Timaru City Council (1971) 4 N.Z.T.P.A. 12 that:-

> "A desire to take advantage of an existing market in a new way and to be ahead of competitors does not in the opinion of the Board constitute urgency. The subsection contemplates urgency of a particular and irresistible kind which demands action to protect or enhance the public (not just private) interest".

The plight of a businessman whose premises became too small due to rapid expansion was held not to satisfy this test.[35] One is lead to question the consistency of approach when comparing

34. Butler v New Plymouth City Council (1969) N.Z.T.C.P.A. 213
35. Alexander v Christchurch City Council (1970) 3 N.Z.T.P.A. 271

these decisions declining applications in such circumstances to those decisions of the Tribunal in the "hardship" cases referred to earlier where consent had been given under Section 74(2)(a). The application must also protect and enhance the public interest under Section 74(2)(b) when if pursued pursuant to Section 74(2)(a) it may not be so vital.

If private interest is not enough then it is difficult to envisage a situation where the public interest would need protection pursuant to this emergency type procedure. If the scheme change or variation was proceeding it is difficult to envisage how the speeding up of the procedural process could protect the public interest. It is not difficult to comprehend that the speeding up of the process could enhance the public interest by allowing a desirable use to become operative sooner but the ability to provide protection seems doubtful.

3.10 Subdivisional Allotments

Section 74(4) is a special section dealing with subdivisional allotments. This Section only applies when certain narrow specified criteria are satisfied. Not the least of these criteria is that the applicant must have owned the land at the time when the actual subdivision limitation in the District Scheme first became operative. The provision is so special and limited that it does not require consideration in the context of this paper.

3.11 Special Reasons

Section 69(2) of the Act provides:-

> "(2) In determining any appeal against the decision of the Council under Section 74 of this Act, the Tribunal shall observe the limitations set out in subsection (2) of that section; but the Tribunal may allow a specified departure from the scheme if, for special reasons specified by the Tribunal, it finds the specified departure is warranted in the public interest in the particular circumstances of the case".

The case of Schultz v Paparua County Council (supra) was one of the first reported decisions under Section 69(2) of the Town and Country Planning Act 1977 which differed significantly from the corresponding section in the previous Act. The appeal was actually commenced under the 1953 Act but determined pursuant to the present Act.

In examining this section the Tribunal quite properly "observed the limitations" set out in Section 74(2). The Tribunal stated that pursuant to that wording they were required to firstly look at the provisions of Section 74(2). They reviewed the evidence to see if they could grant consent purely on the basis of satisfying the criteria of Section 74(2). After determining that they could not they then looked at the provisions of Section

69(2). This approach was confirmed as being correct by Mr Justice White in the High Court decision of Pinfolds Transport Limited v Wairarapa South County Council (1981) 8 N.Z.T.P.A. 93 when he referred to that section as conferring on the Tribunal an additional power. The wording of the section is that the Tribunal may allow a specified departure for special reasons. However in this decision the Court held that although the Tribunal had an additional discretionary power it was a facility it was obliged to exercise when considering an application for a specified departure. The High Court held that the facts indicated the Tribunal had not considered the matter pursuant to its powers under Section 69(2) and accordingly allowed the appeal and remitted the matter back to the Tribunal for further consideration. The Court held:-

> "... it can be said that in the present case all matters affecting the public must be weighed in applying the provisions of Section 74(2) and 69(2), the latter raising a specific question for the Tribunal's determination on the evidence".

The Tribunal held in the Schultz case that the use of the word "special" was an indication by the Legislature that before the Tribunal exercised its jurisdiction under Section 69(2) it must be satisfied that it was dealing with "a very exceptional set of circumstances". It is a power that should be exercised in only rare cases.[36] It has been said by Mr Justice Cooke:-

36. Schultz v Paparua County Council (1978) 6 N.Z.T.P.A. 532

"What Section 69(2) requires is special reasons applicable to particular circumstances - not unique reasons that can never be applicable to other cases".[37]

Consent has been granted under Section 69(2) where the Local Authority has been lax in enforcing the provisions of its District Scheme and where the scheme is inadequate. In such circumstances consent was granted for 4½ years [38], 5 years [39] and for 3 years where the Local Authority has been simply lax in enforcing its District Scheme.[40]

The inactivity of the Local Authority or the failure of the District Scheme to provide for a particular use will not always be sufficient to persuade the Tribunal to exercise its discreation under Section 69(2). It is very much a case of the Tribunal balancing the various interests when weighing up what is required in the public interest. In the case of Burns v Franklin County Council (1984) 10 N.Z.T.P.A. 25 the Tribunal considered an application seeking permission to enable a number of mobile homes to become permanent homes in a caravan park in an area zoned rural. It was argued that there was no provision in the District Scheme for such sites and there was a clear need for such accommodation. It was argued there was a serious of shortage of cheap housing in the area and a refusal would create a real hardship for those now living semi-permanently in the

37. North Taranaki Environment Protection Association v Governor General (1983) 1 N.Z.L.R. 312
38. Roozen & Fryer v Marlborough County Council 11 March 1980 Division No. 3 (unreported)
39. Waitaki Transport (Holdings) Limited v Waiheno County Council 3 March 1982 Division No. 3 (unreported)
40. Blakely v Waimari District Council (1983) 9 N.Z.T.P.A. 246

caravan park. To be considered against this plea was the fact that the proposed review of the regional scheme stated holiday caravan parks should not become de facto settlements. The Tribunal in exercising its discretion stated that the inaction of the Local Authority did not justify omitting proper planning for the use or authorising ad hoc decision making. The Tribunal had greater difficulty in balancing the plight of the homeless against the abstract concepts of sound planning practise. In deciding against the application the Tribunal held that after balancing all matters it would be doing a long term disservice to the homeless to grant consent. It concluded that it would not be in the public interest to yield to expediency.

Whether the honest belief that one is doing the right thing will be enough to qualify is doubtful. It has been cited as one of the reasons with varying degrees of success. It was not enough to carry the day in Rattray v Christchurch City Council (1983) 9 N.Z.T.P.A. 385. It was however one of the reasons in Deaker v Heathcote County Council (1984) 10 N.Z.T.P.A. 39 which helped persuade the Tribunal it should exercise its discretion.

Not surprisingly the Tribunal has held where an applicant has flagrantly breached the terms of the planning consent granted to it and as a result and in doing so established at considerable cost a non conforming use the applicant could not plead exceptional circumstances when it was commercially and financially embarrassed when its own misdeeds were uncovered.[41]

41. Kitto v Manakau City Council (1981) N.Z.T.P.A. 211

It is impossible to try and set out a definitive list of criteria that one may seek to establish exists in order to successfully sway the Tribunal to exercise its discretion under Section 69(2). It is not surprising as it has been held that the decision to determine what might or might not be in the public interest for the purpose of Section 69(2) must eventually become an exercise in intuitive judgment after weighing the quality and significance of the subject matter inside its relative factual environment. In the final analysis it is all a question of degree and circumstances.[42]

Whilst one can appreciate that the advocates for greater flexibility would praise this provision giving the Tribunal the power and means to provide justice for each particular individual set of circumstances it must seriously undermine the certainty of any scheme. Although the Tribunal have been anxious not to allow the exigencies of a particular case to outweigh the desirability of retaining a consistent and reliable scheme, the very existence of the discretion must pose a threat. The Tribunal in the Deaker decision wasn't putting at risk the certainty of the scheme but in many ways was getting around an unfairness caused to the appellants by the Local Authority's failure to rectify its ordinances in the wake of the Donald Design decision. Conversely consent was refused in the Burn's decision because the reliability of the present scheme may well to some degree have "gone out the window" if consent had been given. So the Tribunal does appear to be mindful of the situation but it is a provision that is surely open to abuse. Because it relies on

42. From Shepperd & McVeagh (Town Planning) cited with approval in Centrepoint Growth Trust v Takapuna City Council HC M59683

a question of judgment unless the Tribunal was quite amiss in the way it went about its consideration of this issue it is even difficult to see how the High Court can effectively remedy the situation in dealing with an appeal which is restricted to points of law.

A further question that arises in respect of the purpose of Section 69(2) is the fact that it provides the Tribunal with a discretion and remedy which is not available to the Local Authority. It is applicable when the criteria of Section 74(2)(a) cannot be satisfied. It therefore encourages appeals as even if an applicant believes he can show special reasons but knows he cannot satisfy the criteria of Section 74(2)(a) he must proceed with a full hearing through the Local Authority. The Tribunal have ruled that the applicant must call all evidence before the Local Authority if he wants to call the same before the Tribunal. It therefore does appear in such circumstances that the initial hearing amounts to somewhat of a fool's errand simply for the purpose of obtaining appeal rights. Is the intuitive judgment of the Tribunal so much better than that of the Local Authority? Why should the Tribunal have this special discretionary power in respect of specified departure applications and not others? These questions are difficult to answer. They seem to raise doubt as to the consistency of the legislation. Apart from this aspect the Local Authority and Tribunal hearings could have been seen to have been a consistent two stage approach even allowing for the fact that the Tribunal hearing involves a hearing "de novo". This special reservation of a discretionary

power for the sole use of the Tribunal on appeal is inconsistent. Although limited in its applicability I suggest it undermines the consistency and logic of the system. If a limited orderly degree of residual flexibility is required when dealing with specified departure applications then why should the Local Authority be excluded from utilising this power. The answer to that question is not readily apparent to this writer.

3.12 Survey Results

The results of the survey referred to earlier are set out in annex 1 at the back of this paper. The information obtained is not precise as the questionnaire was relatively brief and general to encourage a wide and immediate response. Various caveats and conditions were added to the replies and accordingly the information contained can not be regarded as particularly accurate. It is submitted however that the survey was sufficiently comprehensive to enable a reasonable insight to be obtained as to how Local Authorities treat specified departure applications.

Considering the fact that specified departure should only be granted in exceptional circumstances the results are to some extent alarming. Many responses noted that great care was taken in vetting the application. In many cases it is not known whether the percentage figures given take into account applications that were lodged and subsequently withdrawn, in some cases this was recorded.

Given the high across the board success rate one must seriously consider whether the Local Authorities understand on what legal basis they should be considering specified departure applications. The results could possibly be an aberration as a number of Local Authorities indicated that following the Donald Design decision they treated all dispensation and waiver applications as specified departure applications and some still do. This from the comments received and seeing other statistics is not believed however to be a significant factor. Several recipients indicated that their percentage figures were relatively constant. It is recognised that some of the Boroughs in particular deal numerically with very few specified departure applications but still concern must be had for the results obtained.

A survey of specified departure applications consented to on appeal would provide a most interesting contrast. This writer is reasonably sure that the percentages would not be nearly as high. This would be due to the more legalistic approach adopted by the Planning Tribunal. As regards applications for conditional use and waivers one can accept that this is not so important. The apparent failure of most Local Authorities to seriously apply the stringent specified departure criteria tests must however be considered with real concern. If this is not done the value and veracity of District Schemes are in jeopardy.

The expected discrepancies between the figures produced by the smaller Boroughs as compared with the larger cities failed to

emerge to the degree anticipated. This may be due to the limitations of the survey but one could confidently say that in any event the discrepancies are unlikely to be as great as this writer would have expected.

The results could indicate that the specified departure applications are very carefully checked by the applicants prior to filing or on filing many are dissuaded by the Local Authority before they are proceeded with further. This I believe however may be true in part but it is stretching ones credibility to suggest that it is as prevalent as the outcome of the survey would have us believe if Local Authorities were strictly applying the legal criteria.

4 CONDITIONAL USES

4.1 Preliminary

A conditional use is defined in Section 2 of the Town and Country Planning Act 1977:-

> "'Conditional Use' means any use specified in the operative District Scheme as a conditional use".

This type of use was first officially recognised in 1966. There was in 1960 a regulation which allowed a use specified in the ordinances that would be permitted only with Council consent and subject to any conditions which might be imposed. Now the situation is more certain. Section 36(4) of the Act states:-

"(4) Every District Scheme may distinguish between classes of use or development in all or any part or parts of the district in any one or more of the following ways or any combination of them:

(a) Those which are permitted as of right provided that they comply in all respects with all controls, restrictions, prohibitions, and conditions specified in the scheme:

(b) Those which are appropriate to the area but which may not be appropriate on every site or may require special conditions and which require approval as conditional uses under Section 72 of this Act:

(c) ...."

Section 72 of the Act provides:-

"Conditional uses -

(1) Every application for the Council's consent to a conditional use of any land or building shall be by way of a notified application.

(2) Subject to Section 3 of this Act, in considering an application for consent to a conditional use, the Council shall have regard to-

(a) The suitability of the site for the proposed use determined by reference to the provisions of the operative District Scheme; and

(b) The likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and the economic, cultural, social, and general welfare of the people of the district".

4.2 General

Whilst a predominant use is permitted as of right in a zone a conditional use is one that is generally suitable for the zone but not necessarily suitable for any particular site. It is necessary as stated in Section 72(1) to make a notified application for a conditional use. Although many District Schemes don't, it has been held that a District Scheme should contain express provisions on which the suitability of a site for a particular class of conditional uses may be judged.[43] A conditional use has to be judged by examining the list of conditional uses cited in

43. Watson v Manakau City Council D.A 20/84

the Code of Ordinances. It follows therefore that where there is no Code of Ordinances i.e. no Operative District Scheme there can be no conditional uses.[44] A conditional use application is considered in light of the criteria specified in section 72(2). An examination of those criteria will follow but firstly it is relevant to trace the development of a time old argument as to whether the Council and Tribunal can exercise an overriding discretion as to whether to grant consent and consider matters over and beyond those specifically mentioned in section 72(2).

4.3 Discretion

The argument first began in 1964 and was last adjudicated upon by the Court of Appeal in December 1984. The basic issue is whether when considering a conditional use application the Local Authority and Tribunal are entitled to have regard to general planning factors when considering the question of site suitability and whether there is a prima facie presumption that the site is suitable once the use is shown to come within the class of conditional uses prescribed in the Code of Ordinances.

The first case was McNamara v Waimairi County Council (1964) 2 N.Z.T.P.C.A. 146. The appellants sought permission to erect a garage and a petrol station in Waimairi, Christchurch. The land in question was zoned Residential A but such a business was a conditional use. The Local Authority declined the application following many objections and an appeal to the Board followed. The Board considered its discretion in terms of the then legislation and stated:-

44. Barr v Blenheim Borough Council (1980) 2 N.Z.L.R. 1(CA)

> "In other terms, a council has a discretion. A discretion of this nature, however, is not to be exercised arbitrarily. While regard must, of course, be had to the particular circumstances of each individual case, the Board takes the view that, when any particular use is included in a code as a "conditional use" it is to be assumed that, in general terms, it is a use suitable to the zone in question, though not necessarily suitable in respect of every particular site in such zone".

The Board allowed the appeal and a significant factor was that it saw its discretion limited in the above way.

Following this decision there was a legislative change in 1966 to provide a uniform procedure and direct appeal rights for conditional use applications. It is doubtful however whether such a change made a significant difference to the issue. Despite this the change in the legislation was utilised to allow a special Board to reach a different conclusion as to its discretion. The decision was Mobil Oil (NZ) Limited v Napier City Council (1968) 3 N.Z.T.P.C.A. 82. The facts were similar but the location different. Mobil applied for consent to erect a service station on land zoned Residential A in Napier. Once again such a business was a conditional use. The Local Authority refused consent and the special Board considered its discretion. It noted that the ratio decidendi in McNamara had been subsequently applied consistently by the Board. However it

contended that the 1966 Amendment Act enabled it to decide the issue differently. It held:-

> "The Board does not believe that it should fetter its own jurisdiction, extended as it is by statute, in this manner. To do so, would to a large extent nullify the newly created rights of persons affected, to object to the granting of a conditional use. Further, the Board holds the view that to follow, simpliciter, the dictum in McNamara's case in all appeals under Section 28D would result in the virtual disappearance of conditional uses from the ordinances of district planning schemes. The Board is aware of a tendency in this direction already. The specification of conditional uses in ordinances is a planning tool, the usefulness of which should not be diminished by the application of a rule established under different legislation and in circumstances where the public interest could be safeguarded by other means".

Later in 1968 another special Board considered the conflict between the McNamara and Mobil decisions. This was in the case of Blackwood Wilson Properties Limited v Petone Borough Council (1968) 3 N.Z.T.C.P.A. 157. The application sought consent to enable a dairy/grocery to be established in a residential area but the facts are not particularly relevant. The Chairman acknowledged uncertainty prevailed because of the conflict between the two decisions. To resolve this conflict he

determined that the McNamara decision did not as it had been contended mean that where an application for a conditional use was made the site relevant to the application was to be considered prima facie suitable for the use for which consent was sought. He said that in both decisions it was agreed that the suitability of the site was the real question to be determined and for this purpose matters of public interest were relevant.

So the point reached after the 1966 amendment was that both the merits of the site and the wider public interest were considered relevant.

Since 1977 we have had the present provisions cited earlier i.e. Section 36(4) and Section 72 but the dispute continues. It came to a head and has hopefully been determined by the Court of Appeal in Foodtown Supermarkets Limited v Auckland City Council (1984) 10 N.Z.T.P.A. 262. That decision however had its beginnings earlier.

The facts of the case were that Lynley Buildings Limited sought planning consent to erect a supermarket having a gross floor area of 1,770m^2 in Glenn Innes. The site was zoned Industrial E and shops were a conditional use in the Auckland City District Scheme. The nearest substantial shopping centres were 1km to the north and 1.3km to the south.

The Auckland City Council refused planning consent on the grounds that the proposal was contrary to the scheme statement

policies on commercial development which aimed to encourage the consolidation of existing commercial centres, and was likely to have a significantly adverse effect on the commercial viability of the area to the detriment of the convenience, economic and general welfare of the people of the district.

Lynley Buildings Limited appealed to the Tribunal. The appeal was refused by the Tribunal.[45] Of the Tribunal's findings three are relevant. The Tribunal held:-

1. In considering a conditional use application the discretion should be exercised against the background that the use was appropriate to the area generally, but might not be appropriate on every site.

2. When considering the matters referred to in section 72(2)(a) and (b) and in forming an overall judgement, the proposal should not be seen as a shop in general but as the particular shop which was the subject of the application, with its nature, its scale and the characteristics which it was likely to have.

4. The suitability of the site should be determined by reference to all the provisions of the District Scheme and

45. Lynley Buildings Limited v Auckland City Council (1983) 9 N.Z.T.P.A. 266.

account should be taken of the totality of those provisions relative to the proposal. The proposed use being a commercial use (albeit in an industrial zone,) regard should be had to the provisions of the scheme relating to commercial development and commercial zoning policies.

The decision was taken on appeal to the High Court. Counsel for the appellant stressed the need for certainty in planning matters. He argued that the criteria of Section 72(2) were applicable only in considering the specific site and the use proposed for it, and that the Tribunal had erred in considering the suitability of the use rather than of the site. Mr Justice Casey in accepting this argument after considering the previously mentioned decisions on this issue held that:-

> "..... the combined effect of Sections 36(4)(b) and 72(2) of the 1977 Act was to limit the Council in this instance to considering the relationship between the particular site and the particular supermarket. Questions about the suitability of the use generally in the zone, whether by reference to other parts of the scheme or to general planning principles, were not relevant. The matters specified in Section 72(2)(b) are distinct from the site-related matters referred to in Section 72(2)(a), and hence the discretion under paragraph (b) must be limited to the matters set out in that paragraph, and does not permit an unrestricted resort to general planning

principles. The Tribunal had erred by assuming an overall discretionary judgment based on planning justification, whereby it felt entitled to override the ordinance which declared in effect that supermarkets without restriction on size or character were appropriate in the zone".

The Court on the above basis remitted the case back to the Planning Tribunal for further consideration.

The matter did not end there for as previously mentioned one of the objectors Foodtown Supermarkets Limited, took the matter to the Court of Appeal. The Court of Appeal held that the Local Authority and Tribunal were entitled, on a conditional use application, to have regard to the District Scheme as a whole and in particular to policies set out in the scheme statement, and were not restricted to the wording of the ordinances governing the particular zone. The Court of Appeal vacated the High Court's findings and held the Tribunal's findings were not wrong in law and held that the Tribunal's dismissal of the appeal should stand. Of particular interest was this statement of Mr Justice Cooke:-

"Each application has to be considered on its merits, but any relevant planning policies embodied in the scheme as a whole must always be a legitimate consideration. The emphasis laid for the present applicant on certainty is,

with all respect to the argument, misplaced. Certainty is one desideratum in planning law, but in zoning matters it is given effect primarily by predominant uses. The very nature of conditional uses means that, while any such use qualifies for consideration, there is no presumption that it will be allowed in any given case".

4.4 Conclusion

The Court of Appeal decision is far removed from the ratio decidendi of the McNamara decision. It will be of considerable comfort for those seeking greater flexibility in the town planning decision making process. It certainly means that applicants for conditional use consents cannot simply rely on establishing that the proposed use comes within one of the listed conditional uses and that the site is suitable for the proposed use. The question must be raised however as to whether the conditional use procedure in this light now to some extent overlaps with the discretionary use procedure provided for in Section 36(4)(c). There may be some degree of overlap but the crucial point is perhaps that the discretion is fettered at least to some extent by the criteria set out in paragraphs (a) and (b) of Section 72. Where regard was had to some of the considerations to paragraph (a) but virtually no consideration was given to the criteria of paragraph (b) the conditional use consent was set aside.[46] Whilst it is not necessary in a decision to refer slavishly to the criteria of the section [47] it would clearly be desirable to indicate that the discretion was exercised with reference to the relevant criteria.

46. Small v Christchurch City Council S.Ct 24/8/77
47. Nippert v Admiral Wellington Properties S.Ct WNM 450/78

CRITERIA

4.5 Matters of National Importance

In determining any conditional use application a Local Authority and the Tribunal are required to recognise the matters of national importance specified in Section 3 of the Act. Whilst it is not necessary to show evidence of the need for the proposed use in an absolute sense [48] it would certainly be necessary to rebut any presumption that the proposed use was contrary to a matter of national importance. Where the extension of a factory on high value rural land was permitted as a conditional use, approval was given only after 13 conditions were imposed.[49] In that case the amount of food production likely to be lost by using the extra ground was held to be minimal. A contrasting decision was where consent was refused to abstract sand from a beach front. In that case the removal of the sand was likely to adversely and permanently affect the beach.[50]

Whether the matters likely to be of national importance will prevail will undoubtedly depend on the extent of any detrimental affect, the need for the proposed use, any hardship likely to be caused by declining the application and any other options that may be available. There is no rule that Section 3 matters have overriding importance in determining Section 72 applications.[51]

48. National Trading Company Limited v Tauranga City Council D.A 23/85
49. New Zealand Particle Board Limited v Rodney County Council (1976) 6 N.Z.T.P.A. 1
50. The Proprietors of Mataroa Nos. 1 and 2 v Ohinemuri County Council (1978) 6 N.Z.T.P.A. 406
51. Allens Service Station v Glen Eden Borough Council (1985) 10 N.Z.T.P.A. 400

4.6 Site Suitability

The scheme may refer to minimum size requirements for a site. If so, this is then a matter of primary importance. Where bulk and location standards apply to conditional uses these can be used to assess the suitability of the site. If a proposed use slightly infringes any of the aspects it is more likely to be approved than if in infringes more significantly. In such cases where the infringement is almost 50% or greater such applications may be treated as applications for a specified departure. Where no standards are applicable general planning principles must be utilised. It is not appropriate to consider the application in light of the requirements for predominant uses.[52]

In the Van Duyn decision the Board listed what it considered to be relevant factors to be taken into consideration in assessing the suitability of a particular site and of the likely effect of the proposed use. These were:-

(a) The exact nature of the proposed use, e.g. football training, games of chess.

(b) The intensity of the proposed use, i.e. the average number of people who will be on the site at any one time, the hours during which activities will be carried on and the maximum number of persons to be accommodated.

(c) The nature of the buildings to be erected for the accommodation of the proposed use, in the light of the exact nature of the proposed use.

52. Van Duyn v Takapuna City Council (1971) 4 N.Z.T.P.A. 1

(d) The location of those buildings on the site and in relation to the buildings erected (or which would be permitted to be erected) on adjoining properties.

(e) The number of motor vehicles likely to be attracted to the proposed use, the ability of the site to accommodate them, the nature of the street pattern in the locality, and the relationship of the site to main distributor roads.

(f) The ability of the site to allow for the insulation of adjoining properties from any noise which is likely to arise from the proposed use itself and from the movement of people and vehicles to and from the site.

(g) The size of the site having regard to all the foregoing factors.

It is not open for the Local Authority or the Tribunal to consider the proposed site in relation to alternative sites. The Tribunal overturned a decision to allow a proposed camping ground to be established next to a large scale honey complex that already existed even although the site was suitable because the two uses were clearly not compatible.[53] The Tribunal has held such arguments raising the possibility of other more suitable sites to be of no relevance.[54] Consent should not be refused because the Local Authority does not believe that the

53. Arataki Honey Limited v Rotorua District Council (1984) 10 N.Z.T.P.A. 180

54. Presbyterian Trustees v Wellington City Council (1973) 4 N.Z.T.P.A. 433

proposal does not make the best use of the site. Whilst attention must be given to whether the proposed use is appropriate to the subject site and whether the subject site is a suitable site consent should not be refused because another possible site exists which may be a better site.[55] The economics of the matter has been also held to be an irrelevant consideration which is consistent with the Tribunal's view that their function is not concerned with the end use.[56] Similarly, the anticipated conduct of persons who may use the site if consent is granted has been held an irrelevant consideration.[57] What someone may do in the future if consent is granted is a common fear of objectors but the High Court has ruled that if the anticipated uses are illegal then as far as the planning application is concerned these fears are not valid grounds for refusing consent. Questions as to the suitability of the site may also be relevant in considering the likely effect on the amenities of the neighbourhood.

4.7 Amenities of the Neighbourhood

Section 74(2)(b) sets out the various matters to be examined when considering the impact of the proposed use on the neighbourhood and the people who live in it. It has been held that:-

> "the amenities of a neighbourhood are unique to that neighbourhood. Some qualities and conditions in a

55. Liquigas v Manakau City Council (1983) 9 N.Z.T.P.A. 193
56. Auckland Christian Schools Trust v Manakau City Council (1979) D.B. 1449
57. Barry v Auckland City Council (1975) 2 N.Z.L.R. 646

> neighbourhood may be relatively unimportant or even totally insignificant in relation to the overall qualities and conditions constituting the amenities of that neighbourhood, and a proposed change in those qualities and conditions may affect appreciably only a few persons who enjoy the amenities of that neighbourhood. Other qualities and conditions may be important or even fundamental in relation to the amenities of that neighbourhood; and a proposed change in them may affect appreciably all the persons who enjoy the amenities of that neighbourhood. In the latter case all the persons in that neighbourhood can properly claim to be affected if the proposal is one to which the provisions of Section 28(C) apply; and that consequently they have a right of objection and appeal. That, however, does not make the right of objection and appeal open to the public generally; the right is open to those who belong to the neighbourhood and who will be appreciably affected".[58]

The Tribunal has held in considering a case involving the occupants of rest home that under Section 72(2) it is not required to have regard to the particular individuals who happen to reside in the immediate vicinity, nor to any characteristics or needs that may be peculiar to them and not shared in common with the rest of the community generally.[59]

58. Hadley v Opotiki County Council (1972) 4 N.Z.T.P.A. 443
59. Lines v Onehunga Borough Council (1980) 7 N.Z.T.P.A. 346

The Tribunal has however on the other hand been prepared to recognise the prior claims of an existing activity in an area.[60] The Tribunal has had to volley back and forth the merits in respect of night tennis. The Board recognised the fact that the tennis club had been established since the turn of the century and that the residencies had grown up around it [61] and in another more recent similar case on this issue the Tribunal tried to strike a reasonable balance after weighing up the community value of the tennis club against the detrimental effect the lighting would have on the amenities of the neighbourhood.[62] The balance was struck by allowing some of the central courts to be used for night tennis. This decision is consistent with the fact that it has been held that a conditional use may have some adverse effects upon existing and future amenities; but provided the adverse effect is not too undue in all the circumstances, it may be proper to give consent after having regard to all matters specified in section 72(2)(b).[63]

As regards to the health and safety of people the Court has held that not only the physical but also the psychological health of persons is a relevant consideration. The Court has held "if the evidence establishes fear and consequential harm (actual or potential) the Tribunal is required to give that such weight as it thinks fit, along with all the other relevant evidence and circumstances".[64]

60. Expans Holdings Limited v Auckland District Land Registrar (1972) 4 N.Z.T.P.A. 437
61. Eden-Epsom Tennis Club v Mount Eden Borough Council (1976) 6 N.Z.T.P.A. 17
62. Khandallah Lawn Tennis Club (Inc) v Wellington City Council (1985) 10 N.Z.T.P.A. 353
63. Lower Waitaki Presbyterian Church v Waitaki County Council D. No. A143/82
64. Allens Services Station v Glen Eden Borough Council (supra)

The safety of persons living near proposed shooting ranges has not unnaturally been considered. The possibility of accidents occurring was taken into account. The effect of increased traffic is a common concern. The benefits from the proposed use have to be weighed up against the degree of the harm likely to be caused. Where the increase in traffic volume was slight although likely to bring about some change to the character of the neighbourhood consent was granted.[65] It would not be possible to canvas all of the factors likely to be taken into account in considering these matters and in any event they change as time passes and social attitudes change. This is reinforced in a passage from Centrepoint Community Growth Trust v Takapuna City Council (1978) 6 N.Z.T.P.A. 503 where at page 507 it was stated:-

> "With the coming into force of the 1977 Act, the promoting and safeguarding of "the economic, cultural, social and general welfare of the people" has become one of the objects of district planning; the conservation, protection and enhancement of the cultural and social environment has been declared to be of national importance. At this stage we do not have any clear understanding of how those ends are to be achieved through the planning process. But we record that the underlying philosophy of the British law has for centuries been the recognition of individual freedom and liberty except to the extent

65. Norris Avenue (Tauranga) Hall Trust Board v Tauranga City Council (1971) 4 N.Z.T.P.A. 141

necessary to achieve the common good. Therefore, the new provisions in the Planning Act must, in our view mean that for a start planning must allow a diversity in social behaviour; and that it may restrict that behaviour only when necessary for the common good. Applied to this case we believe that those new provisions require that, subject to this proviso to follow, and subject to the other relevant land use considerations, planning gives the members of the appellant community the opportunity to adopt the lifestyle they desire, notwithstanding that it may be a lifestyle foreign to or even criticised by others. The proviso is that in living in the manner they desire, members of the community must not adversely affect the cultural, social and general welfare of the other people of the district".

4.8 Conditions

It is not uncommon for conditions to be imposed when granting conditional use application. Section 67 of the Act allows conditions to be imposed when granting consent to a general application. This applies to both Local Authority and the Tribunal. The Tribunal has also the power to impose conditions of its own initiative during an appeal hearing - Section 150.

As regards the restrictions on imposing conditions the leading commonwealth case is Fawcett Properties Limited v Buckingham County Council (1961) A.C. 636(HL). In analysing the attachment of conditions to planning consents the House of Lords held:-

1. The condition must be certain (but a condition had to be very vague or ambiguous before it became "uncertain").

2. The condition must fairly and reasonably relate to the permission to which it is attached; and

3. The condition must not be ultra vires the powers of the Local Authority.

The above principles are equally applicable in New Zealand. The Court of Appeal in Turner v Allison (1971) 4 N.Z.T.P.C.A. 104 added a gloss to the law in the Fawcett Properties case holding that an improper condition or part of a condition may be severed from the Town Planning consent if this condition is not essential or integral to the consent.

The position was perhaps best summarised New Zealand in the case of Onehunga Timber Holdings Limited & Another v Rotorua City Council (1971) 4 N.Z.T.P.A. 38. In that case it was held that the power to impose conditions when granting an application for conditional use consent is not a power to impose any condition of any kind that the Council may think fit. It is a power to impose conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy. Conditions must be reasonable in all the circumstances of the case. If the conditions are found to be reasonable when related to such matters as the future

amenities of the neighbourhood etc. but the property owner finds them unreasonably restrictive on the proposed use, then the site is unsuitable for the proposed use.

The types of conditions imposed have related to both the construction of dwellings and the uses to which dwellings and properties may be put. Some useful examples are:-

Construction Conditions

- the type of materials to be used
- the number of parking spaces
- the area of open space
- the planting of trees and hedges
- the number of road entrances
- the erection of advertising
- the type of lighting to be used
- the installation of music systems

Usage Conditions - These have varied from preventing noise to prohibiting the use of a building for a T.A.B. agency. Other conditions have restricted the days and times at which activities can take place whilst other miscellaneous restrictions have been imposed pursuant to which successful applicants have been required to make payments to the Local Authority in lieu of parking requirements, agreed to drain land, purchase the neighbouring properties if necessary, and give the neighbour the first right of purchase.

4.9 Precedent effect

Bearing in mind the emphasis on site suitability it is not surprising that is has been held there is no precedent value in conditional use applications. It has been held that if there were the effect would be to write the decision into the Code of Ordinances as a predominant use.[66]

4.10 Survey Results

The relationship between the number of conditional use applications granted by Local Authorities compared with the specified departure applications granted is not particularly surprising. With one or two exceptional cases a greater number of conditional use applications are granted. Once again however the percentage of conditional use applications granted must give some cause for concern. Almost half the Local Authorities surveyed granted all conditional use applications presented to them and this in itself seems staggering. It seems to mean that either they have a District Scheme which is particularly inadequate or they have a large number of sites which have special characteristics which make them appropriate for consent to be given in respect of a conditional use application.

The survey results indicate that there appears to be little distinction between the Boroughs, Counties/Districts and Cities. This is not all together surprising except that one would have have envisaged that the smaller Local Authorities would have had

66. Garrett and Another v Christchurch City Council (1977) 6 N.Z.T.P.A. 193

less comprehensive District Schemes and therefore had fewer successful conditional use applications which thus then justified to some extent the increased number of consents given in respect of specified departure applications.

Given the limitations of the survey it is difficult to read too much into the results obtained they can however be of little comfort to those who would advocate that there should be greater certainty in the town planning process. Considered together the results as to the outcome of specified departure and conditional use applications must lead one to question as to how far one can rely on a District Scheme if it is as easy to depart from it as the survey results suggest.

5 DISPENSATIONS AND WAIVERS

5.1 Legal Basis

As we have seen the District Scheme endeavours to set out what could be regarded as the Rule but there are exceptions to all rules. The general scheme provisions in every circumstance will not encourage the best use of the site and hence the need for exceptions by way of specified departure and conditional uses. For certain aspects of town planning it is necessary to provide the Local Authority and the Tribunal with general discretionary powers to keep the system reasonably flexible and to recognise that the system is a fluid one. This is done by providing Local Authorities with the power to grant dispensations and waivers.

5.2 Historical Development

The original Town and Country Planning Act 1953 did not specifically recognise the need for making exceptions to the rules. The Courts however did [67] and through case law there evolved a standard dispensation and waiver ordinance. The Town and Country Planning Act 1977 has refined the power of Councils to have such ordinances. The power to grant a dispensation or waiver from an operative District Scheme must be included in the scheme otherwise the Council does not have the power. Section 36(6) of the Town and Country Planning Act 1977 details what powers may be contained in a District Scheme enabling the Council to grant dispensations and waivers in respect of certain matters. The Council is not obliged to grant itself all or any of these powers when it formulates its ordinances. Section 36(6) defines the scope of the powers and reads:-

> "Any District Scheme may provide for the circumstances under which, the manner in which, and the conditions subject to which, the Council may grant an application for the dispensation wholly or partly from, or waiver of, any provision of the District Scheme relating to -
>
> (a) The subdivision of land permitted to be used for any urban purpose;
>
> (b) The height, bulk, and location of buildings permitted on site;
>
> (c) The provision of parking and loading spaces;

67 Ideal Laundry Limited v Petone Borough [1957] N.Z.L.R. 1038

(d) The design and appearance of verandahs;

(e) Landscaping; and

(f) Such other matters as may be specified in that behalf by any regulations in force under this Act".

If the consent sought relates to one of the factors listed in Section 36(6) regard must then be had to whether it is an appropriate case for the granting of such a dispensation or waiver. Section 76(1) of the Act sets out the basis upon which an application can be made for the Council's consent to grant such a waiver or dispensation. The particular wording of sub-section (1) of Section 76 is of considerable interest and reads:-

"An application may be made for the Council's consent to a dispensation from or waiver of any provision of a District Scheme to the extent that is provided for the District Scheme pursuant to section 36(6) of this Act".

The actual criteria to be observed by the Council is set out in Section 76(2) which reads:-

"The Council may grant its consent if it is satisfied that

(a) The dispensation or waiver would encourage better development of the site or that it is not reasonable

or practicable to enforce the provision in respect of the particular site; and

(b) The dispensation or waiver will not detract from the amenities of the neighbourhood and will have little town and country planning significance beyond the immediate vicinity of the land in respect of which the dispensation or waiver is sought".

The remainder of the section specifies that if the written consents of all interested parties aren't obtained then the application for consent must be a notified one unless the Council finds that it is unreasonable to require that such consents be obtained.

5.3 Onus of Proof

The onus of proof is on the applicant to produce sufficient evidence or show sufficient reason to satisfy the Council on the balance of probabilities that the criteria set out above have been complied with.

5.4 Criteria

It is necessary for the applicant to show that there are particular reasons pertaining to this site which should enable the proposal to be permitted on its merits although it is not allowed as of right under the existing ordinances. The test although involving elements of subjective judgment must be applied in an objective way. When considering this criteria the effect of the

development or neighbours or neighbouring properties will be material.

5.5 Enforcement not Reasonable or Practicable

Whether it is reasonable or practicable to enforce the provisions in respect of the particular site clearly by definition involves an analysis of the site specific. It is only necessary to show that it is either not reasonable or not practicable to enforce the provisions to satisfy this particular criteria. In analysing what may not be practicable regard will be had to the physical difficulties associated with the site or the building due to the nature of the design or materials contemplated. On the other hand, in determining whether or not the enforcement of the ordinances is not reasonable, more general considerations relating to the applicant may be taken into account.[68]

5.6 Existing Amenities

If the Council is to grant the dispensation or consent it must be satisfied that in granting the dispensation or waiver it will not detract from the amenities of the neighbourhood. Amenities are defined in Section 2 of the Act as being those qualities and conditions in an area which contribute to the pleasantness, harmony and coherence of the environment and to its better enjoyment for any permitted use. The test therefore requires an assessment of the proposal against the existing amenities of the neighbourhood with some regard being given to the foreseeable development permitted as of right within the particular area.

68. Findlay v Wellington City Council (1976) 6 N.Z.T.P.A. 76

Where the proposal detracts from one of the various amenities and that detraction is appreciable it is unlikely that a dispensation or waiver would be granted.[69]

5.7 Little Planning Significance

The dispensation or waiver must have little town and country planning significance beyond the immediate vicinity of the land. This terminology is used in the criteria that are required to be satisfied to obtain a specified departure pursuant to Section 74 of the Act. The term has been the subject of judicial interpretation and to satisfy the term the dispensation or waiver sought must not have significant detrimental effects on the actual or prospective land uses in the immediate vicinity and beyond. The second element to be satisfied is that the precedent effect of granting such an application must not be of such planning significance to cause particular concern. Where the granting of such an application would lead to a series of others it is highly unlikely to be granted.[70]

5.8 Applications before Donald Design Decision

The Local Authorities used to find the procedure of granting dispensations and waivers most useful for dealing with what one could fairly describe as the less significant run of the mill planning matters. The use of this procedure should not be under-estimated. It forms a very vital cog in the planning machinery as reflected in a survey carried out by the Christchurch City Council in 1984 which showed the number of

69. Straven Services Limited v Waimari County Council [1966] N.Z.L.R. 966

70. Highway Motors Limited v Mount Wellington Borough Council (1972) 4 N.Z.T.P.A. 220

dispensation applications processed for the year ending 31st March 1983 by some of the larger local authorities:-

Auckland City	-	327 dispensations
Christchurch City	-	287 dispensations
Manukau City	-	698 dispensations
Wellington City	-	497 dispensations

5.9 Practical Use of Dispensations and Waivers

It was a particularly useful device for dealing with relatively minor infringements in such aspects as height, side yard or parking provisions. The Local Authorities, where the written consents were available or it was deemed unreasonable to require them, used to operate a fast track procedure. Often a special planning committee in the larger cities would meet and have the application dealt with in the space of one or two weeks. Alas, this has not been the case now for most Local Authorities since 14 July 1984. It was on that day the Chief Justice, Sir Ronald Davison made public the judgment in the case of Donald Design Limited and Wellington City Council v Black [1984] 10 N.Z.T.P.A. 80. A leading New Zealand newspaper had a banner headline "Planning Edict Throws Council". It is believed that the High Court ruling has upset the planning schemes of virtually every local authority in the country. The Deputy City Planner of the Manukau City Council has reported that in a three week period immediately following the release of the decision 47 dispensation or waiver applications have had to be publicly notified to be processed as specified departure

applications as a direct result of the decision. Conversely, the Eastbourne Borough Council found that many applications were either amended or abandoned to avoid the necessity of a hearing. The effect of the decision was that many local Councils were quite unsure as to whether or not they still had any powers to grant dispensations or waivers. Some local authorities like the Christchurch City Council which had detailed ordinances setting out the grounds upon which dispensations or waivers could be granted may well have felt less pressured by the decision but they were in a very small minority. Most local authorities mindful of the decision of the High Court in Craig v East Coast Bay City Council [1984] BCL 595 in which the Council was found to be negligent in unlawfully consenting to a dispensation where only a specified departure would authorise the particular proposal have opted to suspend the granting of all dispensations and waivers until there is either statutory reform or they have had the opportunity of reviewing and amending their ordinances. Most Councils have been not only unsure as regards which way to move but also how far they should move. Some Authorities have now drafted scheme changes of two to three pages aimed at retaining the earlier flexibility and discretionary powers of the Council. One Local Authority is proposing to expand the existing two pages in its District Scheme relating to dispensations to some 21 pages in trying to satisfy what it believes to be the impact of the High Court decision.

5.10 Practical Effect Donald Design Decision

The effect of the decision has been to enormously increase the number of applications being publicly notified and having to be formally decided following a full hearing of the Council's Town Planning Committee. It may have boosted the newspapers advertising revenue but a quick survey shows the effect on the increase in hearings before the local authorities:-

Wellington City Council - 300% increase;

Lower Hutt City Council - 300% increase;

Porirua City Council - 10% increase - revised Ordinances effective December 1984;

Upper Hutt City Council - suspended applications - revised Ordinances effective December 1984;

Eastbourne Borough Council - 30-40% increase;

Tawa Borough Council - minor dispensations continuing, major ones being treated as specified departures.

5.11 History of Donald Design Decision

Wellington City Council Decision - Donald Design Limited applied for a building permit to erect a 5 storey apartment block above a ground floor parking area on Oriental Parade. At the time of the application the Wellington City Council height requirements under the operative District Scheme were 30 metres and the application complied with this limit. Two days after the application was lodged the decision on the objections to the District Scheme Review were released pursuant to which the

height level was reduced from 34 metres to 16 metres. No appeals were lodged and the Wellington City Council treated the application as an application under Section 76 of the Town and Country Planning Act 1977 for a dispensation from the height ordinance.

Written consents from the adjoining owners were not forthcoming and hence the application was notified. A number of objections were lodged. Following a hearing the Wellington City Council granted the dispensation sought limiting the building to 24.3 metres in height. An appeal was subsequently lodged with the Planning Tribunal.

Planning Tribunal Decision - The Planning Tribunal looked to see whether the Wellington City Council had the power to grant a dispensation or waiver. In determining this issue it is irrelevant that in this instance the dispensation sought was a major one increasing the building's height by some 50%. The Planning Tribunal actually conceded that Wellington City is of such topography that the flexibility of the dispensation procedures are particularly appropriate to deal with particular sites that may have special physical attributes that take them outside the general provisions of a particular zone.

The Planning Tribunal examined the Wellington City Council District Scheme Review to ascertain whether the Wellington City Council had complied with the requirements of Section 36(6) of

the Town and Country Planning Act 1977. The Tribunal noted that Section 36 calls for the Council to provide for the circumstances under which, the manner in which, and the conditions subject to which, the Council may grant dispensations or waivers. The particular ordinance in the Wellington City Council District Scheme Review simply stated:-

"2.4 Dispensations and Waivers

2.4.1.1 Whether or not any ordinance expressly provides for Council to dispense with any provision of the Scheme, the Council may grant an application for the dispensation wholly or partly from, or waiver of, any provision of the District Scheme relating to:

1 the subdivision of land permitted to be used for any urban purpose;

2 the height, bulk and location of buildings permitted on site;

3 the provision of parking and loading spaces;

4 the design and appearance of buildings and signs and the provision, design and appearance of verandahs;

5 landscaping; and

6 such other matters as may be specified in that behalf by any regulations in force under the Act".

The above ordinance as will be realised is simply a verbatim recital of the provisions of Section 36(6) of the Act.

The Tribunal noted that the Wellington City Council was not alone in this practice and ventured to say many of the District Schemes in New Zealand failed to follow the direction of Section 36(6). The Tribunal viewed this as defeating the purpose of such a power as it didn't enable the public who may be offended by such a dispensation to ascertain with any degree of precision the circumstances which may justify the granting of such a dispensation.

The Tribunal believed its approach as to the correct interpretation of Section 36(6) was reinforced by the opening words of Section 76(1) ".....to the extent that it is provided for in the District Scheme pursuant to Section 36(3) of this Act". The Tribunal conceded this when looking firstly to see if the Wellington City Council had the power to grant the dispensation sought and clearly hinted that in failing to follow the directions of Section 36(6) that it didn't have such a power. The Tribunal accordingly disallowed the dispensation granted on its merits as it did not have any specific legal jurisdiction to declare the ordinance invalid. It did, however, invite a case to be stated to the High Court on the issue.

It is interesting in the Tribunal's decision to note that it conceded that matters of principle may be difficult to enunciate

but they should be topographical rather than relate to the intensification of use. Thus they should not be general in nature but designed to cater for the special needs and requirements of a certain area or situation.

The matter proceeded to the High Court by way of a case stated and hence the High Court was called upon to examine the adequacy of the Wellington City Council ordinance. The Chief Justice followed very closely the approach of the Planning Tribunal in deciding that the Wellington City Council Ordinance 2.5 was invalid for its failure to comply with the requirements of Section 36(6). Attention was focused again on the wording Section 76(1) which enables a dispensation to be granted "to the extent" provided for pursuant to Section 36(6). The Court held that this meant the District Scheme should set out the spatial or quantitative limits of the dispensation beyond which a dispensation should not be granted. The Chief Justice again stressed that the main purpose of this was to enable nearby residents and members of the public to know where they stood. An historical analysis of the dispensation and waiver powers was undertaken along with a brief survey of decided cases. This only reinforced the Court's view that the Wellington City Council ordinance failed to set out adequately the circumstances, manner and considerations as required by Section 36(6). As a result of this decision many questions have no doubt now been raised in the minds of various officials of local authorities.

5.12 Are the Existing Dispensations Valid?

That was a question raised by Dr K.A. Palmer in an article contained in Volume 75 of the Planning Quarterly published not long after the decision was made known. It was his view that the Councils need not greatly concern themselves in this respect as a result of a ruling given by the Court of Appeal in A.J. Burr v Blenheim Borough Council [1980] 2 N.Z.L.R. 1. This decision held that a purported conditional use planning consent granted under a scheme prior to it becoming operative, was not invalid as a matter of substantive law, as the application procedures followed in fact were substantially fair and similar to the correct procedures, and the planning consent was confirmed. Given that the High Court has ruled that the Wellington ordinances are invalid and cannot be used for the granting of future dispensations the question then is "are the Courts prior to the completion of any revised ordinances likely to follow a procedure that is substantially different from the one pursuant to which the existing dispensations and waivers were granted". The case of Otumoetai Baptist Church v Tauranga City Council (which will be noted at greater length shortly) indicates that the approach to be adopted will not be substantially different and hence it could not be said that those procedures previously adopted were substantially unfair or incorrect. Accordingly it is difficult to see any existing dispensation granted could be held invalid, notwithstanding any inadequacies in the scheme ordinances. This was the view of Dr Palmer even before he was aware of the outcome of the Otumoetai Baptist Church case which only enforces the validity of that conclusion.

5.13 Could a Council be Liable for Negligence

In continuing to grant dispensations if a Local Authority had a dispensation or waiver ordinance similar to the one contained in the Wellington District Scheme which only repeated verbatim the provisions of Section 36 then that Authority would be most unwise to continue to grant dispensations and waivers. If it did so for a short time due to the fact that it was not aware of the High Court ruling then it is quite probable that a claim in negligence could not succeed. Authority for this proposition is Port Underwood Forests Limited v Marlborough County Council [1982] 1 N.Z.L.R. 343. That case suggests that a Council cannot be held to be liable in negligence for inadvertently failing to observe planning procedures. It does however suggest that if the Council deliberately failed to observe planning procedures then a claim in negligence could succeed. The Donald Design decision, however, has been well publicised in the mass media and the more specialist journals and there would be little doubt that most local authorities knew of the impact of the same very shortly after its release.

5.14 The Remedy

The effect of the decision has, as we have seen, been quite catastrophic on the work load of many Local Authority town planning sections and committees especially the larger ones. Most have considered that they no longer have the power to grant any dispensations or waivers without firstly revising their code of ordinances to add the necessary detail and information required to comply with Section 36(6) of the Act. In the

December 1984 issue of "People & Planning" it was recorded at that time that 16 Local Authorities had initiated changes to their District Schemes to take into account the High Court decision. It is recorded that the new provisions show varying interpretations as to the way in which one must satisfy the ratio of the High Court judgment which has been basically held to be that District Schemes should state clearly the conditions under which, and the extent to which, dispensations and waivers should be granted. Most apparently include a mixture of qualitative and quantitative criteria.

Some would suggest that the only real solution rests with remedial legislation. Apparently at least one local authority with the support of others is pursuing amending legislation. This, however, is not a view held by Dr Palmer who believes that the Donald Design decision ought to be met in a positive way by Councils and planning officers alike and that any District Scheme with inadequate dispensation provisions should be amended by way of a scheme change as soon as adequate guidelines can be formulated. Dr Palmer has in fact considered ways in which each of the five matters set out in Section 36(6) (a) to (e) could be dealt with. A brief summary of these are:-

(a) Subdivision of land permitted to be used for any urban purpose - He proposes the scheme could limit the extent of a possible dispensation to, say, 25% as regards the reduction in minimum lot size. The scheme would also

identify which zones this power applies to ie. those used for any urban purpose.

(b) The height, bulk and location of buildings permitted on site - In respect of the height dispensations different maximum percentage increases could be established for different areas. This could similarly be done in respect of bulk or site coverage dispensations. He recommends that in some situations guidance be given as regards set offs ie. a dispensation in respect of outdoor living spaces being replaced by balconies or roof gardens.

(c) The provision of parking and loading spaces - He suggests that the Council may well distinguish between residential areas and commercial or industrial areas with dispensations being granted more freely in respect of the former except perhaps where the vehicles movements from a site are uncharacteristically low or parking demands for different uses occur at different times etc.

(d) The design and appearance of buildings and signs and the provision, design and appearance of verandahs - He suggests the scheme could provide for a dispensation where insistence upon the design of a verandah would not achieve the harmony and amenity objectives of the ordinance, or would involve a minor inconsequential variation. As regards signs, he suggests the setting of guidelines as to maximum percentage increases e.g. 20%

where justified by particular circumstances.

(e) Landscaping - The scheme could indicate that one could reduce the required landscaped area in a particular zone by a fixed percentage where the ground conditions or nature of the site or building justified such a reduction. Similarly the scheme could make provision for offsetting procedures, ie. the landscaping obligation for a particular yard could be dispensed with if it was transferred to an alternative part of the site.

Whether one should have to provide this detail in District Scheme ordinances very much calls into question the vexed debate as to the need for certainty to enable every owner and prospective owner to know where they stand as opposed to the need for flexibility to avoid any unnecessary restrictions upon the utilisation of land which will have no detrimental effect to the planning objectives of the area. The answer to that issue has never been easy to determine and as times and attitudes change, greater and lesser emphasis are respectively placed on both flexibility and certainty. One certainty that has arisen since the Donald Design decision is that it does appear that commonsense is likely to prevail and, apart from increasing the work load of Local Authorities town planning committees, the net effect of the decision in terms of the actual outcome of the various applications is not likely to be particular great. It appears now that Local Authorities and the Tribunal are likely to make

subsequent decisions in accordance with the spirit and intent of the dispensation provisions although not being able, at this time in many instances, to rely purely on Section 76 of the Act. The first reported case to be decided since the Donald Design decision was that of Otumoetai Baptist Church v Tauranga City Council [1985] 10 N.Z.T.P.A. 321. The Church wished to erect a new and larger auditorium on a large site in Tauranga which was zoned residential. It required dispensations from side yard, height and daylighting requirements. Application was made in December 1983 and the consent of the main neighbour was not forthcoming. The Council granted the height dispensation but said the other two matters must be the subject of a notified application. The Council heard the notified application, the main neighbour objecting, and refused consent under Section 76 of the Act. An appeal by the Church followed and was heard by the Tribunal after the height High Court decision in the Donald Design case. It was conceded that in light of that decision the ordinance in the Tauranga District Scheme must be considered invalid and the Church required consent under Section 74 of the Act.

The side yard and daylighting provisions were the two issues principally considered. The Tribunal noted that whilst the daylighting control provision existed principally for the benefit of neighbouring properties, the side yard requirements had a general objective. They had to be considered from three perspectives (1) those who occupy the subject site, (2) the

neighbours and the effect the buildings will have on them, (3) the general public in their perception of the building in relationship to neighbouring buildings.

The Tribunal stated that the provisions in the District Scheme as to the height, bulk and location of buildings for a neighbourhood is fixed in a somewhat arbitrary manner on a broad brush basis and hence the need for exception or exemption provisions to deal with particular sites and their individual needs. Then the Tribunal went on to confirm that dispensations and waivers are merely a category of exceptions to, or departures from the provisions of a District Scheme. Up to this point in the decision there is nothing particularly unexpected. But at this point the Tribunal stated:-

> "Irrespective of whether consent to a dispensation or waiver can be given pursuant to a provision in the District Scheme, or whether consent (if it is to be given) can only be under Section 74, the appropriate questions to be asked are those contained in Section 76(2) viz:
> Whether the dispensation or waiver would encourage better development of the site; and
> Whether it would be unreasonable or impracticable to enforce the provision in respect of the site".

In this case the Tribunal held the non-compliance of the side yard requirements would not allow better development of the site

from the viewpoint of either the neighbour or the general public at large. The latter consideration seemed to be the predominant one.

It is the Tribunal's approach to considering what is basically a dispensation or waiver matter under Section 74 which is of most interest. This has been since confirmed correct by the High Court.[70A] It seems that the difference between determining such matters under Section 74 and Section 76 is not great. The Tribunal at least in this case looked firstly at Section 76 and the suggestion is that if those requirements can be met it is likely consent will be given under Section 74.

The second case was the decision in Golding & Walker Motors Limited v Stratford Borough (unreported). This related to a provision in the Stratford Borough District Scheme which required that buildings in the heart of the commercial district provide a verandah along the street frontage. The ordinance provided that "the verandah provisions may be dispensed with where the building is set back to the approval of the Council". Although the Tribunal was not called upon to rule as to the validity of the dispensation provision in the light of the Donald Design case, it expressed the view that it was still valid "because it prescribes the manner in which and the circumstances in which the ordinance provision may be dispensed with".

5.15 Conclusion

The decision in Golding & Walker Motors Limited suggests that those Local Authorities setting about the enormous task of

70A Nicholson v Waimari County Council (1985) 10 N.Z.T.P.A. 375

inserting into their Code of Ordinances lengthy conditions and provisions pursuant to which dispensations and waivers may be granted could be doing so unnecessarily. It does seem that the insertion of brief criteria may not only satisfy the requirements of Sections 36 and 76 as interpreted by the High Court but in doing so provide an appropriate balance between certainty and flexibility.

5.16 Survey Results

At least two recipients noted that much depended on how long the operative District Scheme had been in force and commented that a one year spot survey didn't provide very accurate results.

The survey did however produce some crys of protest from Local Authorities resulting from the Donald Design decisions. The Howick Borough Council recorded a fourfold increase in its notified applications as a result of that decision. Many however confirmed that a Scheme change had or was being promulgated.

Most indicted that they believed there was still scope for adopting more informal procedures to deal with minor dispensations. One or two noted that some dispensations may involve what are considered at times to be minor matters but because of the degree of non compliance are really significant departures and should be treated accordingly. Quite a number of recipients voluntarily indicated how their Local Authorities

utilised their powers of delegation to deal with minor applications. The system seems to vary from small committees to giving the responsibility to the Town Planner.

A significant number of Local Authorities reported an increase in their work load in the planning area. This was not all due to the Donald Design decision. Some expressed concern at the strain this placed on their financial and administrative resources. Comments in this regard were often expressed along with a desire for greater flexibility. It would seem that a significant number of Local Authorities which to simplify the planning procedure for minor dispensation application. Whilst few would contest that proposition the $64,000 question is however when dealing with the non obvious examples, what is a minor application or dispensation?

6 EXISTING USE RIGHTS

6.1 General

As a general rule one must observe the provisions of Local Authority District Schemes. The relevant Town Planning Statutes have over the years made special provision covering those uses of land or buildings which do not conform with the current provisions of the District Scheme, but which had previously conformed with the provisions or had not been contrary to the provisions due to the fact that there was no

scheme. For this reason there has always been special provisions covering situations that have been held to be governed by what is known as existing use rights. It stands to reason for commercial purposes if one is to have a fluid town planning scheme that is able to change with the times and the needs of society and the community there must be some protection for those who in the past lawfully carried out an activity and then, following the implementation of a District Scheme or a District scheme Review, find that their particular activity is non-conforming. Provided such activities are continued (i.e. not discontinued for six months or more) then the protection remains and runs with the land or building. The Town and Country Planning Act 1977 does not provide for a phased removal of such non-conforming uses or in any way limits them in duration. The only definitive absolute action which the Local Authority can take to bring the use of the land or building into conformity with the provisions of the District Scheme is to acquire the land pursuant to Section 81 of the Town and Country Planning Act 1977 which provides in sub-section 1(c) that the Council can acquire the land for:-

> "the purpose of terminating any use of any land or building that does not conform to the scheme".

The above course of action is somewhat drastic and it is not in the intersets of good planning to entrench non-conforming uses. It would also delay the day when the objects of the scheme will be achieved.[71] There are fairly strict requirements and limits

71. Canterbury Regional Planning Authority and Dalgety Properties Limited v Riccarton Borough Council (1980) 8 N.Z.T.P.A. 30, 40

imposed by statute as regards existing uses. It has been said by the Planning Tribunal as regards existing uses that:-

> "Whilst existing uses may continue, they may not expand to the extent that is beyond the ambit of Section 90. The impetus of the Act is to protect the persons who have existing land uses, but to prevent those uses, within certain limits, from becoming destructive to cohesive development which is one of the objectives of the District Scheme".[72]

It has now pertinent to consider the present statutory provision relating to existing use rights which is Section 90 of the Town and Country Planning Act 1977 as amended by Section 23 of the Town and Country Planning Amendment Act 1980.

6.2 Present Section 90 of the Town and Country Planning Act 1977

The present Section 90 reads:-

> "90. Existing use may continue - (1) any land or building may be used in a manner that is not in conformity with the District Scheme or any part or provision of it as in force for the time being if -
>
> (a) The use of that land or building -
>
> (i) was lawfully established before the District Scheme or the relevant part

72. Waitaki New Zealand Refrigerating v Waimea County (1980) 7 N.Z.T.P.A. 339, 341

or provision of it became operative; and

(ii) is of the same character, intensity, and scale as, or of a similar character, intensity, and scale to, that for which it was last lawfully used before the date on which the District Scheme or the relevant part or provision of it became operative; or

(b) In the case of a new building, whether proposed, partly erected, or erected, which has not been used before the date on which the District Scheme or the relevant part or provision of it became operative, the use is for any purpose for which approval for its erection was given by the Council; but any use of such new building which commenced after the expiry of a period of 2 years after the date on which the Council consented to the erection of the building shall not be lawful unless -

(i) the Council certifies that substantial progress has been made within the 2 year period towards the erection or completion of the building; and

(ii) the building has been used for the purpose for which it was to be

erected or for any purpose that is of the same or a similar character, intensity, and scale since the erection or completion of the building; or

(c) The use is pursuant to an application granted under this Act or the Town and Country Planning Act 1953 either before or after the date on which the District Scheme or relevant part or provision of it became operative.

(2) Notwithstanding the provisions of subsection (1) of this section, if at any time after the date on which the District Scheme or the relevant part or provision of it became operative the use of any land or building authorised under subsection (1) of this section is discontinued for a period of 6 months, no use of that land or building shall at any subsequent time be regarded as permitted by this section unless the Council, on application made to it within 12 months after the use first being discontinued, consents to that period of 6 months being extended to a period coinciding with the period during which the use was discontinued".

6.3 Prior to 1980 Amendment

Prior to the 1980 Amendment, Section 90 of the Town and

Country Planning Act 1977 linked Section 90(1)(a)(i) and Section 90(1)(a)(ii) with the disjunctive word "or" rather than the conjunctive word "and". The Bill's explanatory note states that the amendment was made to correct a drafting error. A learned writer on this issue, Mr Keith Berman, believes the amendment itself is a drafting error and the section in its original form was far more satisfactory.

The Number One Division of the Planning Tribunal interpreted Section 90 as it read in 1977 very simply i.e. that existing uses existed when two sets of circumstances existed. This was neatly put by the Number One Division headed by Judge Skelton in the case of The New Zealand Farmer's Fertiliser Company Limited [1980] 7 N.Z.T.P.A. 315 where it was said "having regard to the disjunctive provisions of Section 90(1)(a), we take the view and so hold that the legislature intended to provide for two sets of circumstances, the first being those where the use of the land and/or building remains the same use and secondly, those where the use, whilst changing, remains for the same or similar character, intensity and scale". However, the Number Two Division of the Tribunal headed by Judge Treadwell did not hold that the section should be interpreted so precisely in the case of Waitaki New Zealand Refrigerating Limited v Waimea County Council [1980] 7 N.Z.T.P.A. 339 the different interpretations are discussed in an article by Mr Berman.[73] The interpretation of the Number Two Division of the Tribunal in the Waitaki case

73. Whats the Use 9182 N.Z.L.J. 17

of the disjunctive wording of Section 90 as it applied prior to the 1980 amendment was to consider whether there was a change in the character of the use without firstly determining whether the present use differed from the earlier one. It must be conceded that the Number Two Tribunal blurred the precise disjunctive approach in using the tests of character, intensity and scale as contained in Section 90(1)(a)(ii) to deal with the question posed in Section 90(1)(a)(i). The comments of Mr Berman however I submit may be somewhat harsh.

When examining the situation prior to that amendment various decisions have confirmed the interpretation given to the disjunctive word "or" by the Number One Tribunal with the most positive affirmation not surprisingly being made when Judge Skelton was sitting alone.[74] It is not purely of historical interest to examine how the Tribunal interpreted the section prior to the 1980 amendment as the decisions made since the 1980 amendment have indicated that despite the amendment they are going to interpret the section as it presently stands to provide for a fair and equitable result even if it is necessary to stretch the meaning of some of the words of the English language. Whilst Mr Berman called for legislative reform to enable fair results to be achieved, the Tribunal have considered that they can reach these conclusions despite what would appear to be the narrower ambit of the section following the 1980 amendment. The question to be asked is whether or not the Tribunal has really been entitled to reach the decisions that it has following

74. Re an application by Roald Bank [1983] 9 N.Z.T.P.A. 6

the 1980 amendment if it took full cognaisance of the actual wording of the section.

6.4 1980 Amendment

There can be no doubt no matter what interpretation was placed on the former Section 90 that the 1980 amendment in substituting the word "and" for "or" has literally speaking tightened up the provisions.

Mr Berman suggested that the form of provision was more sensible when he stated:-

> "Previously the use could either be the same use as earlier established or a different use of the same character etc. There was good sense in that approach because, so long as the impact of the use on its neighbours did not change, it mattered not whether the use was the same, or different, but of the same character etc".

On reading literally the wording of the section following the 1980 amendment, it should follow that a different use is totally prohibited because it cannot satisfy the first leg of Section 90(1)(a) whereas previously one could have had a different use provided it was of the same character, intensity and scale. Mr Berman's fear was that Section 90 as amended no longer allowed one to alter the use from one non-conforming use to another an inocuious non-conforming use e.g. a change from a baker's shop to a cake shop. It clearly has made the determination of the

"use" a paramount consideration. Where as the terms "character" and "amenities" are defined in the Act the term use is not so defined. Where our courts have been called on to determine what deviation from lawfully established uses are permissible New Zealand courts have in the main as cited by Mr Berman shown a willingness to take a generous view of these categories. It is now pertinent to consider how the Planning Tribunal has handed the problem since the 1980 amendments.

6.5 Post 1980 Amendment Cases

First leading decision following the 1980 amendment was Huljich v Mount Wellington Borough (1981) 8 N.Z.T.P.A. 53:-
The applicant sought a declaration that a small proposed addition to part of his wholesaler's butcher's premises would have the benefit of existing use rights that pertained to the rest of the premises. The Tribunal read Section 90 in conjunction with Section 91 of the Act to interpret that the word "building" encompassed the proposed addition as permitted by Section 91. That being the case, the use was clearly the same and consideration was required pursuant to Section 90(1)(a)(ii). The case is interesting and noted because the Tribunal determined that in assessing the "intensity and scale" of the use one regards the affects of the use upon the amenities of the neighbourhood.

This is an interesting approach and has been followed in subsequent decisions.[75] Whilst perhaps somewhat irrelevant, it is interesting to note that whilst small additions to existing

75. Dawson v Marton Borough Council [1981] 8 N.Z.T.P.A. 190

buildings have been held to satisfy Section 90 and 91 provided the criteria regarding character, intensity and scale are met, the same cannot be said for an addition of a large separate structure.[76]

The next case was:-

Dawson v Marton Borough Council [1981] 8 N.Z.T.P.A. 290.

This case concerned a small builder's workshop and depot owned by the Calkin Brothers. From 1963 to 1980 the premises were used for these purposes until 1980 when two separate parts were sub-let to an electrical contractor and a cabinet maker. Although the superseded District Scheme would have permitted all these uses, the Tribunal held that in considering the particular uses, reference to the provisions of the previous schemes were irrelevant. The Tribunal followed the approach adopted in the Huljich case and this time determined the "character" of the use had changed after examining the intensity and scale of the new activities from the viewpoint as to how they affected the amenities of the neighbourhood.

In this case, the Tribunal is clearly emphasising that existing use rights are not to be viewed in a vacuum or too literally, but

76. Wilson v Wanganui City Council [1982] 8 N.Z.T.P.A. 398

with regard to the practical affects the change will have on the amenities of the neighbourhood. The fact of the Tribunal held the "character" of the use had not changed in the ordinary sense, but had changed as regards the affect of the amenities of the neighbourhood reveals the willingness of the Tribunal to use semantics to adhere to the spirit of the Act rather than be confined by the precise wording of the legislation.

The next case was:-

Griffiths v Auckland City Council [1981] 8 N.Z.T.P.A. 290.

In this case, the Tribunal tackled the fear expressed by Mr Berman head-on.

The land was originally used as a wood and coal yard, for the storage of cement and other builders' materials and as a cartage depot. It was then used for servicing motor vehicles and for a period by a towing company. The issue was whether the existing use right covered by the proposed operations relating to the hire of domestic, party and catering equipment involving the parking, loading and unloading of vehicles.

The Tribunal held:-

> "It is not necessary for the actual use to remain precisely the same as that which existed when the District Scheme or relevant provision became operative. The actual use can change provided the use made of the property is of

> the same character, intensity and scale as (or of a similar character, intensity and scale to) that for which it was being lawfully used at the time the District Scheme (or relevant provision) became operative. And in that context, the term "character" has to be construed with regard to the effect of the use upon the amenities of the neighbourhood - see Section 2(2)".

The real bottom line of this decision was contained in the statement:-

> "Although Section 90 speaks of a use which is of the same or a similar character as that of its predecessor we have interpreted that as including a use which is less detrimental to the amenities of the neighbourhood than its predecessor was".

Now Mr Berman's worst fears have been allayed, but is the situation really any clearer? The interpretation of the section as contained in the previous statement may be a fair interpretation, but it does, I suggest, blur any clear interpretation of the conjunctive approach and indicate that perhaps things haven't changed very much at all with the 1980 amendment as this interpretation is akin to the approach followed by the Tribunal in the Waitaki case.

The next case illustrating how difficult Section 90 is an is likely to remain was:-

Taupo Borough Council v Williams [1981] 8 N.Z.T.P.A. 348.

The Tribunal considered the use of Rotonui Lodge, a six bedroom boarding house in Taupo used extensively by truck drivers. The Tribunal examined two Australian decisions when considering the meaning of the word "use" and held the word use as it applies to the use of Rotonui Lodge is limited to the activities which are under the management and control of the proprietors or managers of the premises.

Although it was conceded there are more heavy trucks visiting Rotonui Lodge who park in or around Rotonui Lodge because the management can't control how their guests arrive at Rotonui Lodge there was no change in the character, intensity and scale of Rotonui Lodge, as it was still being used as a boarding house. This was the ruling despite the fact that the amenities of the neighbourhood were clearly affected.

Whilst one can understand the fine distinction being made as regards the definition of "the use" of Rotonui Lodge, it does seem to be a strict interpretation that contrasts with the more flexible approach offered in the Griffith's case to achieve a more equitable result. The only consolation offer here is that it is suggested that the parking of heavy trucks on Rotonui Lodge property with the adherent manoeuvrings may constitute an "objectionable element" and hence be actionable under Section 77 of the Act.

Re an application by Roald Bank [1982] 9 N.Z.T.P.A. 6.

This decision examines the history of the amendment and the article of Mr Berman. The Tribunal here simply follows the lead given in the decision of Griffiths v Auckland City Council. This was another case where the manufacturing activities changed quite radically from manufacture of garage doors and ladders to that of leather goods. The effects on the amenities of the neighbourhood were considerably lessened. The Tribunal held following the Griffiths decision that one should interpret Section 90 broadly whilst expressly rejecting the narrow interpretation postulated by Mr Berman. In conclusion it was stated:-

> "In the case of a statute dealing with land use planning where a consideration of the effects on the amenities of a neighbourhood is a integral part of the scheme of the statute, I cannot bring myself to give this decision a narrow interpretation. I have concluded that I should follow Griffiths v Auckland City Council (supra) which seems, to me, to accord with the spirit of the statute".

The Tribunal once again showed its flexibility when it distinguished the Roald Bank and Griffiths decision in the case of:-

Re an application by Riccarton Borough Council [1983] 9 N.Z.T.P.A. 66. This was an application to erect a lean to onto

the side of a small neighbourhood residence/shop to accommodate space invader machines. This decision is interesting on three counts:-

1. The solicitor for the Riccarton Borough Council urged the Tribunal to adopt what is reported as a narrower interpretation of Section 90(1)(a) as taken in the Waitaki case. This ignores the 1980 amendment, although there is no comment on this fact in the decision. It highlights the confusion that still exists as regards this section.

2. The Tribunal distinguished the cases of Roald Bank v Christchurch City and Griffiths v Auckland City Council on the basis that this was not a case where an established protected use was being replaced by a different use of the same or similar intensity and scale. In interpreting those decisions so precisely in that way, the Tribunal has really said that we are back to the former disjunctive situation whereby the use can be quite different, but one still goes on to examine the second part of Section 90(1)(a) namely sub-paragraph (ii). In those cases, the difference in use was not great and the decisions made sense when reviewed in context. In this instance, the Tribunal has stated the principle of those decisions is that where the protected use is replaced by a different use then one goes on to examine the character, intensity and scale of the different use.

3. Not surprisingly, the Tribunal has held that when one introduces amusement devices to a neighbourhood residence/shop, the character, intensity and scale of the use alters materially and thus the Tribunal declined the application.

The next case to follow was:-

Graham v Christchurch City [1983] 9 N.Z.T.P.A. 449.

The facts are not relevant. The Tribunal here reviewed the series of decisions following the 1980 amendment that adopted the liberal approach of Section 90 from Griffiths to Roald Bank to an unreported decisions of Smith - Hall v Te Awamutu Borough Council W/83 given on 3rd June 1983. This line of authority was compared with Mr Berman's view supporting the narrow interpretation of Section 90. The solicitor for the Christchurch City Council seeking the narrower interpretation conceded that whilst the liberal interpretation made sense and would lead to greater justice in the majority of cases, it was not open to the Tribunal to interpret the legislation in that way because of the literal wording simply to promote the expedient or most just result.

The solicitor of the Christchurch City Council noted the words "The use" at the beginning of Section 90(1)(a), which introduces sub-paragraphs (1) and (ii). He submitted that "the use" must

refer to the same use, namely the use that was formerly established prior to the new District Scheme or relevant provision becoming operative.

The Tribunal rejected this interpretation and stated:-

> "It is evident that the words "The use of the land or building" in the introductory part of paragraph "a" are to be read as the opening words of both sub-paragraph (i) and (ii). When they are read as introducing sub-paragraph (i), they clearly refer to a past situation, one which existed before the District Scheme became operative. However, when they are read as opening (ii) they cannot refer to the same past situation, because that sub-paragraph calls for a comparison to be made with that past situation. To make sense of that sub-paragraph, the opening words must be read as referring to the use which is the subject of the consideration of whether it qualifies as an existing use authorised by Section 90 of the Act, being a use which, in terms of the introductory part of sub-section (1), is 'not in conformity with the District Scheme'".

The Tribunal concludes that on the above basis the use may be the same as that which existed at the specified time in the past or may be different. It is however necessary for the present or proposed use to be of the same character, intensity and scale as the past use.

The writer's view is that the interpretation of the Tribunal is contrived and wrong. The writer believes that the solicitor for the Christchurch City Council was wrong in his submission that "The use ..." at the commencement of paragraph (a) referred to the same use as that which was formerly established. The Tribunal willingly adopted this interpretation to come to its logical but with respect incorrect conclusion. The writer believes that the words "The use ..." at the beginning of paragraph (a) refers to the present or proposed use. This would be consistent with the proceeding words that commence Section 90 ("any land or buildings may be used ...").

This would mean that the purpose of Section 90(1)(a)(ii) would be to regulate or control variations in the character, intensity and scale of uses lawfully established prior to any District Scheme or part thereof becoming operative, so as to make such uses non-conforming. It would not allow such uses to change even if the effects of the new use were to be less detrimental to the amenities of the neighbourhood. Whilst this view may seem rigid and produce harsh results, it is, I believe, more consistent with what the legislation actually states.

The next case that followed the Griffith's approach indicated how dangerous it can become when one has to consider the consequences of a contrived interpretation. It was the decision of:-

Papatoetoe City Council v I.H. Wedding & Sons Limited [1983] 9 N.Z.T.P.A. 430.

The premises in question were used initially as an agricultural contracting depot, then by a carrier for the parking and maintenance of trucks for seven years. When the Scheme became operative the premises were being used as a general contractors; yard, depot and workshop. The Tribunal held here:-

> "It is not necessary for the actual use of the property to remain the same for "existing use" rights to continue".

The Tribunal found that a non-conforming use of one kind or another had to be conducted on the property for all the relevant period and accordingly in this situation Section 90(2) did not apply as regards the period of discontinuance of six months. The Tribunal held the words "the use of the land or building" in Section 90(2) referred to any nonconforming use. The interpretation is consistent with the view that the use can be different, but still satisfy Section 90(1)(a)(i) and (ii).

The Tribunal here in fact held that the activities of a contractors' workshop and yard were, when considered in their totality, the same as activities associated with the maintenance and repair on site of vehicles. The affect on the neighbourhood of these two uses were of an industrial nature and held to be the same. Accordingly, the Tribunal was then able to move on to consider Section 90(1)(a)(ii).

The Tribunal here in fact held that the activities of a contractors' workshop and yard were, when considered in their totality, the same as activities associated with the maintenance and repair on site of vehicles. The affect on the neighbourhood of these two uses were of an industrial nature and held to be the same accordingly, the Tribunal was then able to move on to consider Section 90(1)(a)(ii). The Tribunal in adopting a broad definition of the word "use" wasn't drawn into the debate as whether one could proceed to consider Section 90(1)(a)(ii) if the uses were different but perhaps the affect on the neighbourhood were the same or less.

The latest decision on this issue is:-

Waimari District Council v United Bridge Club (non-smokers) [1983] 9 N.Z.T.P.A. 437.

The premises were in a residential area. They were used by a Free Mason's Lodge for meetings. As the Lodge didn't require the full use of the building, a Bridge Club took over the use of the building for part of the time and substantially increased the day and evening functions held on the premises. The only apparent evidence of increased usage was seen through the movement of people in cars to and from the premises.

The interesting point raised is whether the use of the premises by the Lodge for meetings was the same use as that carried out by the Bridge Club when having card games and meetings. The

Tribunal properly considered the purpose of considering land use in Section 90 related to the determination as to whether a particular use was lawful and if so the use "runs with the land" and is not personal to the individual use. On this basis the Tribunal held:-

> "The context of the Act calls for a broad approach as to the identity and definition of a use, rather than a fine distinction".

The Tribunal then, not surprisingly, held the use of the premises of the lodge and bridge club were part of the same use.

One aspect here that the Tribunal examined the two activities in question from the point of view of the amenities of the neighbourhood and held because they were the same the uses were the same. The Tribunal went on to decline the application on the grounds of Section 90(1)(a)(ii), but the writer considers it doubtful under the present legislation whether in fact they should have been even faced with that task.

6.6 Conclusion

The present wording of Section 90(1)(a) seems to encourage the contrived reasoning to achieve a fair result. The Tribunal is getting, I submit, entwined in an artificial reasoning process which may soon rebound on the Tribunal. With interpreting the

word "use" so broadly, one can envisage situations where the Tribunal will have to accept the uses are the same and also the character, intensity and scale are the same, although the activities carried on inside the building are quite different e.g. a get-fit club converting to a massage parlour.

Perhaps if the effect on the amenities of the neighbourhood are similar, the result is desirable in a planning sense. The writer really wonders whether it was envisaged that the section would permit this type of change of activity and more importantly whether this type of interpretation is going to entrench existing uses provided they are of the same character, intensity and scale. One questions how long this can be allowed to continue before the total overall planning scheme becomes pitted.

7 COMMENT AND SUMMARY

The difficulty arising in respect of existing use rights and some of the others we have identified arise directly from the legislation that has been enacted to deal with a practical planning problem. It highlights what many people especially planners see as being at the cause of many "planning problems" i.e. the interference of the law. They see less legislation as being the panacea for many of the present ills of planning. The growth in the length and complexity of the Town and Country Planning Acts over the years must be a course for concern. The present 1977 Act has 178 sections whereas in the 1953 Act there were 53 sections and 80 in the 1976 Act. Some Local Authority's Codes

of Ordinances are becoming extremely lengthy and complex containing many different types of uses and shades of uses. This cannot assist what is a basic practical task of endeavouring to improve the quality of life through the improvement of the physical environment, determining the optimal location for activities and making adequate and economic provision for services.

One alternative is to follow the English system which is to deregulate and allow for a more ad hoc decision making process. However this has been dubbed "the mockery of ad hocery". This creates greater flexibility but in doing so one losses a degree of certainty. Some degree of security and certainty is felt needed by many writers and local planners surveyed. With greater certainty comes confidence, reliability and an inbuilt shield against abuses of the system. One local town planner in responding to the survey advocated greater flexibility in District Schemes whilst noting "provided they don't become lawyer's financial dreams and benefits". Some would say the present system is adequate and provides the necessary balance between certainty and flexibility. In a recent article Mr W. Williams the city planner for Christchurch stated that the present Act offers many benefits for planning authorities and the general public. He listed those benefits as being:-

> "(a) There is reasonable security and certainty: for example most people can have reasonable confidence that beyond the limits of what is permitted by the District Scheme, the environment they enjoy cannot be changed at least without rights of objection and appeal.

(b) There is reasonable predictability, especially when schemes are operative and land use patterns begin to stabilise.

(c) There is little discrimination. The manual worker has the same rights as the wealthy businessman (although of course he may not have the same means to exercise them, but this is not the fault of the planning system).

(d) Third party rights are well respected, perhaps more so than under any other system in the world.

(e) There is little to prevent participation by individuals and groups in most stages of the planning process.

(f) Our independent appeal Tribunal, free from pressure group and political influence is an immeasurable benefit - we take it for granted.

(g) Considerable flexibility does exist.

(i) With a five yearly review.

(ii) With a scheme change or variation.

(iii) With specified departures.

(iv) Conditional Uses.

(v) With modification of conditions - Section 71.

(vi) Applications against changes or reviews - Section ?

(vii) Discretions - Section 36".

It is the writer's personal view that it is essential to not only strike but also maintain a balance. It does seem the system is now perhaps overly judicial. Efforts have been made to restrict this happening e.g.

cross examination is excluded at Local Authority hearings - Regulation 29(3) of the Town and Country Planning Regulations 1978. This however is a small concession and because all evidence is required to be called before the Local Authority if one is to be sure that the Tribunal will permit you to call all evidence on appeal it is necessary to call that evidence before the Local Authority unduly increasing the length and complexity of that hearing. The Local Authorities in some cases don't understand the legal principles to be applied and their decisions reflect this., To a lawyer this may sound totally unacceptable but does it really matter given the context of the system? All parties have the right to appeal to the Planning Tribunal who hear the matter de novo. So what real harm has been done if the Local Authority applied the wrong section. They are determining the matter on its merits and ignoring the fine legal distinctions in a way one suspects a jury does despite receiving lengthy directions from the Judge. If one delegalised the Local Authority procedure then perhaps the right of appeal could be opened up totally so that even if one failed to object on time or thought it unnecessary at the Local Authority stage one could remedy the situation if one thought the decision was totally incorrect. This procedure may one suspects increase the number of appeals but hopefully would drastically reduce the time, expense and effort involved at the Local Authority level which in many cases is unlikely to go further or alternatively is always only going to be the first step in at least a two step process.

In a paper prepared in 1983 by Miss K.A. Edmonds a Town Planner with the Ministry of Works she considered five options for legislative change which were:-

"1. Give councils the power to exercise total discretion i.e. allow them to write the rules in their District Scheme and define the categories of uses, procedures and criteria to which they will be subject and let the citizens of each local authority decide what is not acceptable.

2. Extend the principle of discretionary uses to allow a local council to approve proposals without the present third party objection and appeal rights.

3. Make more limited changes to the legislation so the criteria under which dispensations and waivers conditional uses and specified departures can be granted are more flexible.

4. Return to the intention behind the changes in the 1977 Act.

5. Revert to the classes of use and procedures established in the 1953 Act".

Her conclusion was that the practice in district planning appears to differ from what the legislation seemed to her to permit. The survey results conducted by the writer as to specified departures and conditional uses certainly confirms this. She advocated a change in the legislation and saw the best options as being a fine tuning of the present system which could be implemented in one of three ways which were:-

"1. Extent the principle of discretionary uses to allow a local council to approve proposals without the present third party objection and appeal rights.

2. Make more limited changes to the legislation so the criteria under which dispensations and waivers, conditional uses and specified departures can be granted are more flexible.

3. A combination of 1 and a limited 2".

In the writer's survey the question was asked "would you prefer to see District Schemes provide for greater certainty or greater flexibility?" Some answered yes and others no which did not advance matters greatly. A few thought the District Scheme was satisfactory. The majority however advocated greater flexibility. Some indicated that they were moving in this direction whilst reviewing their District Schemes. Others made it clear they saw nothing wrong with the legislative framework but believed many Local Authorities were not utilising the potential of the legislation when drafting their District Schemes. It was noted that a price of greater flexibility may be greater costs as it would require more administrative efforts. It was suggested more District Schemes should follow the example of the Christchurch City Council and move away in part from the concept of defined uses and in turn legislate for performance standards that any use would have to met to be included within a specified zone. The loss of the Local Authority's dispensation powers was mourned in some

responses. One indicated that greater flexibility was needed for residential zoning but greater certainty for industrial zoning. One saw it desirable that the District Scheme in question provide greater flexibility in terms of its ordinances but greater certainty and clarity in terms of the aims and objectives of the Local Authority for the particular zones.

As will be seen there is a wide variety of opinions. The need for greater flexibility is certainly highly favoured. How that is achieved is somewhat uncertain. The performance standard's concept is one continuing to find favour. Whether it will be a passing phase or a developing new concept only time will tell. The restless unease as to whether Town Planning legislation and proceedings need greater flexibility or certainty is an age old argument (considering the vintage of Town Planning). In 1977 a group of five architects headed by the well known Wellingtonian Ian Athfield met the Select Committee studying the Town and Country Planning Bill prior to the 1977 Act. They sought radical changes to the present system that would have resulted in a very flexible system based on a consensus approach. It was said:-

> "There is a fundamental difference between the process of Town Planning and the process of Common Law. In Town Planning decisions the final result is, in most cases, a decision which will go far beyond the initial intention of the parties involved in the first instance and will effect the community as a whole and the people who inherit any decision. A system which establishes

co-operation between the parties and finally results in an amicable decision through initial dialogue and a continuation through to an ultimate conclusion, must be far more beneficial than the current judicial process".

The debate is bound to continue for many a year. In conclusion a quote which is somewhat pessimistic:-

"The politicians
(who are buying huge cars with hobnailed wheels the size of
merry-go-rounds)
have a new plan.
They are going to put cobbles
in our eyesockets
and pebbles
in our navels
and fill us up
with asphalt
and lay us
side by side
so that we can take a more active part
in the road
to destruction

Roger McGough"

ANNEX 1

Borough Councils - Specified Departures/Conditional Use 1984

NB Percentage Granted

Borough	Specified Departure	Conditional Use
Matamata	100	100
Gore	100	100
Alexandra	100	100
Otahuhu	100	100
Rangiora	100	100
Howick	100	100
Morrinsville	90	90
Statford	90	100
Kaiapoi	80	100
Greymouth	80	80
Mount Eden	80	90
Kapiti	77.8	100
Levin	75	100
Cambridge	71.4	100
Tawa	70	80

Figures unavailable from Picton and Te Aroha

ANNEX 2

County and District Councils

Specified Departure and Conditional Use Applications 1984

NB Percentage Granted

County or District	Specified Departure	Conditional Use
Buller Bounty	100	100
Grey County	95	100
Rotorua District	90	100*
Manawatu County	90	100
Heathcote County	85	100
Southland County	80 approx	80 approx
Thames-Coromandel District	77	98
Bay of Islands County	75	95
The Lakes, Queenstown Wakatpu	45	55
Rangitikei County	34	100
Taupo County	very few	?

*some only in part

ANNEX 3

City Councils

Specified Departure and Conditional Use Applications 1984

NB Percentage Granted

Cities	Specified Departures	Conditional Use
Gisborne	100	100
Nelson	100	100
Lower Hutt	98	100
Waitemata	91	97
Birkenhead	90	100
Papakura	90	80
Papatoetoe	88	100
Upper Hutt	84.21	96.77
Whangarei	82	100
Wanganui	82	88
Timaru	75	99
Tauranga	67	83
Palmerston North	66.6	100
Hamilton	55	86
Hastings	33	100

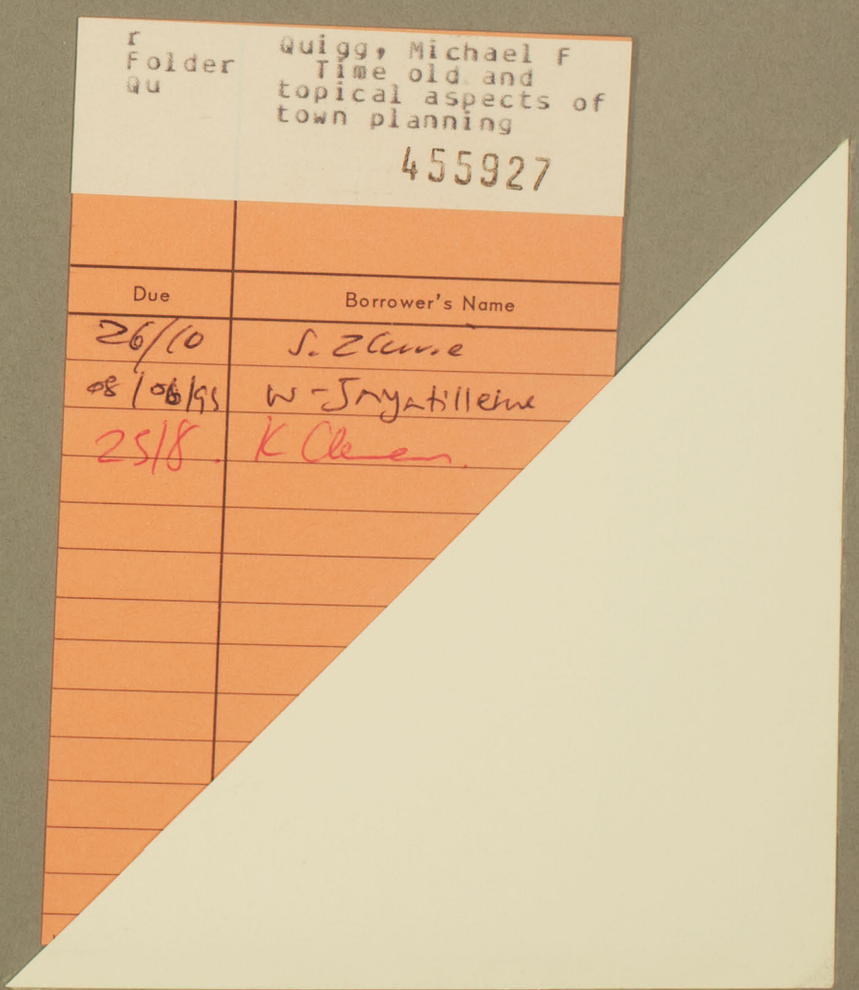
NB Porirua City Statistics unavailable

Wellington City Council

1984 figures unavailable

1981/83 Specified Departures - 70% approx

Conditional Uses - 93% approx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