

Decision No. A121/97

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN **CONSTANCE ALMA JANET BAKER**

(RMA 440/97)

Appellant

AND **THE WELLINGTON CITY COUNCIL**

Respondent

AND **WELLINGTON STADIUM DEVELOPMENT**
TRUST INCORPORATED

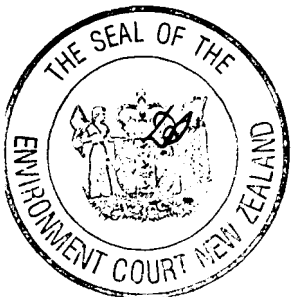
Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge DFG Sheppard

IN CHAMBERS at AUCKLAND on 14 October 1997

DECISION DISMISSING INTENDED APPEAL



On 2 October 1997 Mrs CAJ Baker lodged with the Registrar notice of an appeal under section 121 of the Resource Management Act 1991 against a decision by commissioners appointed by the Wellington City Council on an application for resource consent. Although the notice of appeal did not annex a copy of the decision ¹, it is evident from the tenor of the notice that the decision had granted resource consents for a proposed stadium on an application by the Wellington Stadium Development Trust Incorporated (the Trust). By the notice of appeal, Mrs Baker sought that the commissioners' decision be overturned.

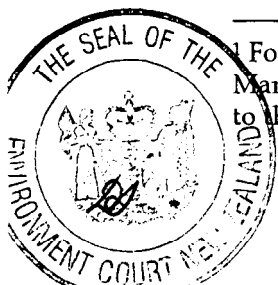
The notice of appeal records that the commissioners' decision had been given on 27 March 1997. Section 121(l)(c) of the Resource Management Act stipulates that notice of an appeal under section 120 is to be lodged with the Environment Court and served on the consent authority whose decision is appealed within 15 working days of notice of the decision being received in accordance with the Act. The lodging by Mrs Baker of her notice of appeal so long after the giving of the decision appealed against was addressed in the following paragraphs of her notice of appeal:

5. The date of the decision of the commissioners appointed by the Wellington City Council was Thursday, 27 March 1997.
6. The date on which notice of decision was known to the appellant was 26 September 1997 owing to the appellant being out of the country since late March 1997.
7. The appellant seeks and respectfully requests the Registrar of the Environment Court to use his discretionary powers to waive the statutory requirement of 15 days within which to lodge an appeal due to the fact that the appellant was not in the country until 21st September 1997.

The notice of appeal was provisionally received by the Registrar of the Environment Court subject to the outcome of the application to waive compliance with the requirement of the Act about the time for lodging appeals.

The other parties, being the Trust and the City Council, have given notice of their opposition to the waiver, and the Trust has lodged affidavits in that behalf by Mr D M Gray, secretary of the Trust, and Mr R G Stroud, consultant planner. Mrs Baker

¹ Form 7, which is prescribed for such appeals by regulation 10(1) of the Resource Management (Forms) Regulations 1991, directs that a copy of the decision is to be annexed to the notice of appeal.



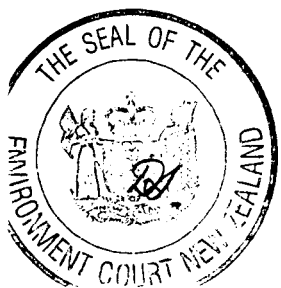
has lodged written submissions in reply, exhibiting a travel agent's memorandum listing the dates of her travel overseas.

Both the Trust (by its solicitor) and Mrs Baker have informed the Registrar that they do not seek an oral hearing of the application for a waiver; and the Trust has urged that the application be decided as a matter of urgency, on two grounds. The first is that if the matter is not resolved by 17 October 1997 when a combined meeting of the Wellington City Council and the Wellington Regional Council is to consider funding of the stadium project, then the Trust may run out of funding at the end of October 1997. The second is that the existence of a further appeal against the stadium project while the Trust is attempting to raise a substantial sum of money from the public, is likely to undermine public confidence in the project.

Those grounds for urgency were supported by Mr Gray's affidavit. Both are somewhat conjectural. However neither has been challenged by Mrs Baker. Accordingly I proceed to consider the application for waiver on the papers, and as a matter of urgency.

The Registrar of the Environment Court does not have authority to waive compliance with the provisions of section 121 about the time within which appeals are to be lodged. However by section 281 of the Resource Management Act, the Environment Court has authority to consider an application to waive compliance with requirements of the Act. Relevant passages of that section are -

- (1) A person may apply to the Environment Court to -
 - (a) Waive a requirement of this Act . . . about -
 - (i) ...
 - (ii) The time within which any appeal . . . to the Environment Court shall be lodged;
 - ...
- (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
- (3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the Court (to which subsection (1)(a)(ii) applies) unless it is satisfied that -
 - (a) The appellant or applicant and the respondent consent to that waiver; or
 - (b) Any of those parties who have not so consented will not be unduly prejudiced.
- (4) Without limiting subsections (2) and (3), the Environment Court may waive a requirement as to time under this section whether or not an application is made under this section before the requirement has been breached.



Subsections (3)(a) and (b) are disjunctive, so even where the parties referred to in paragraph (a) do not consent, the Court has a discretion to grant a waiver if the test in paragraph (b) is met ².

In considering applications to waive late lodgment of appeal the Planning Tribunal has considered the circumstances resulting in the late lodgment; whether any party had entered into any commitment on the basis that no appeal had been lodged; as well as whether any party would be unduly prejudiced ³.

“Undue prejudice” means prejudice greater than that which would necessarily follow in every case from waiving compliance with the time for appealing. Delay in implementing a consent is inevitable when an appeal is lodged ⁴. Factors which have contributed towards findings of undue prejudice have included the amount of money involved or at risk ⁵; the level of expenditure already committed to a project ⁶; and the fact that an applicant has waited longer than the statutory period for appealing before taking steps to exercise the consent ⁷.

In this case neither the applicant nor the respondent has consented to the waiver, and each claims that it would be unduly prejudiced by waiving compliance with the time for appealing.

The affidavits lodged on behalf of the Trust show that notice of the decision granting resource consent for the stadium project was sent to the submitters on 1 April 1997, and three appeals against that decision were lodged within the time prescribed by section 121. Those appeals were set down for hearing as a special fixture at a sitting of the Environment Court commencing on 15 September 1997. However one of

² *Kaitiaki Tarawera Inc v Rotorua District Council* [1997] NZRMA 281 (HC).

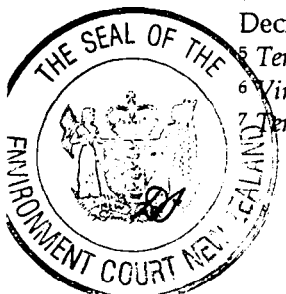
³ See *Ngatiwai Trust Board v Whangarei District Council* **Decision A111/93**; *Donald & Wesley v Waitakere City Council* **Decision A 80/92**; *Johnston v Waikato Regional Council* **Decision A92/92**; *McArthur v Tauranga District Council* (1993) 2 NZRMA 392.

⁴ See *Noel Leeming Appliances v North Shore City Council* (1992) 2 NZRMA 113; *Reilly v Northland Regional Council* (1993) 2 NZRMA 414; and *Shardy v Wellington City Council* **Decision W83/92**.

⁵ *Terekia v Gisborne District Council* **Decision W109/95**.

⁶ *Vink v Hikurua Holdings* (High Court Auckland M1748/89; 28/11/90 Jeffries J).

⁷ *Terekia, supra*.



those appeals was withdrawn, one was dismissed ⁸, and one was the subject of a consent order, so that by 5 September 1997 the Trust had reason to believe that the decision granting resource consent for the stadium project was beyond challenge.

Mr Gray's affidavit shows that the stadium project is to be funded from public memberships (\$30 million), corporate boxes (\$13 million), Wellington City Council (\$15 million), Wellington Regional Council (\$25 million), naming rights, advertising and commercial loans; that a meeting of the Councils is to be held on 17 October 1997 to consider a project plan, and for the City Council confirm its contribution to the funding, the Regional Council's approval to follow. The affidavit also shows that it is a condition of the arrangements made by the Trust with the Councils that prior to approval of the project plan, the Trust must have obtained resource consent to enable it to construct the stadium, consent which is not subject to any outstanding appeals. If Mrs Baker's appeal is outstanding by the meeting on 17 October, then that condition would not be satisfied, and Mr Gray gave his opinion that there is a very high risk that the funding would be delayed.

Mr Gray's evidence also contains his opinion that approval of funding from the two Councils is critical to the project, first for the instalments to provide interim cashflow, and secondly to provide public confidence when the Trust is promoting sale of memberships to the public. He added that if payment is not approved on 17 October then the Trust would not be able to continue past the end of this month as it would not be able to meet its ongoing costs.

In addition Mr Gray has deposed that, on the understanding that there were no outstanding appeals, the Trust has commenced final negotiations with a preferred contractor; that before the contract is finalised the contractor would have to complete the design, prepare full working drawings, and complete all tender processes to enable it to enter into a fixed price contract for the entire project. The proposed commencement date for construction is the first week of March 1998, and to meet that the contractor will have to have completed all working drawings and put all work out to tender by no later than 15 December 1997. Accordingly the contractor and its consultants (engineers, architects, and quantity surveyors) have been actively

⁸ *Hodgson-Windsor-Ríos-Varas v Wellington City Council* Decision A 88/97.



engaged in that work since final contract negotiations commenced. Furthermore, site clearance work would need to be started by the second week of December so that construction could start in the first week of March 1998; and roading changes in and around the site would also need to have been made by then.

The City Council has advised the Court that it has committed substantial resources to the development of the stadium project, and plans significant future commitments, so that any losses of the kinds referred to in Mr Gray's affidavit would ultimately also represent significant losses for the Council as a major investor in the project. The City Council also claimed to be prejudiced in its capacity as respondent because of protracted negotiations with one of the appellants leading to the consent order made by the Court on 5 September 1997, and the additional costs it would face if Mrs Baker's appeal is now allowed to proceed.

In her reply Mrs Baker has not challenged any of those claims by the applicant and the respondent. I accept the contents of the Trust's affidavits, and I find that neither the applicant nor the respondent consents to the waiver sought by Mrs Baker, and that each of them would be prejudiced by granting the waiver. I also find that they would be unduly prejudiced in that they have proceeded with planning and commitments to the project on a reasonable understanding that it was beyond appeal, and that the uncertainty resulting from admitting a late appeal at this stage would adversely affect interim funding the prospects of raising funds, the possibilities of maintaining a timetable for completion of the project, and particularly the interests of third parties -the preferred contractor and its professional consultants, and all those interested in investing in the stadium project.

I add that even if I had not found that those parties would not be unduly prejudiced, I would not have exercised the Court's discretion to grant a waiver in this case. In that respect I accept that Mrs Baker was absent from this country from 24 March 1997 to 21 September 1997; and that she did not learn until 30 September 1997 that no appeals against the stadium resource consent remained outstanding. However the Resource Management Act contains indications of Parliament's intention that the various stages in the resource consent process are to be carried out in a timely way.⁹

⁹ See sections 95, 97, 98, 101, 115, 121 and 272.



In addition, there are obvious practical reasons why those who are granted resource consents need to be able to discover without delay whether they can lawfully proceed to exercise those consents. The risk of a resource consent being challenged after more than 5 months' delay would not be consistent with the practical needs of business. A would-be appellant who is going to be absent can take steps to have his or her interest in commencing a possible appeal attended to punctually by an attorney or other agent. In my judgment it would not be consistent with the intent of the Resource Management Act to grant a waiver to allow an appeal to be lodged as long as that after notice of the decision was given.

Finding as I do that the applicant and the respondent would be unduly prejudiced, I conclude that the waiver application does not meet the conditions stipulated in section 281(2) and (3), and that the Environment Court does not have authority to grant it. The waiver application is therefore refused, and the Registrar is directed to strike out Mrs Baker's purported appeal from the Court's register of proceedings.



DFG Sheppard,
Environment Judge

