Decision No. W014/2004

ORIGINAL

DOUBLE SIDED

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application under s85 of the Act

BETWEEN **FORE WORLD DEVELOPMENTS LIMITED and BAYSIDE VILLAS LTD**

(RMA 0860/03)

Applicants

AND **THE NAPIER CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson sitting alone under s279

IN CHAMBERS

RULING ON SERVICE AND NOTIFICATION

[1] The applicants have sought Orders under s85(3) and cl 21 of the First Schedule to the Resource Management Act 1991, directing the respondent Council to modify various aspects of its proposed district plan, insofar as it concerns land owned by them at Bayview, north of Napier City. In terms of s85(3), the applicants claim that the inclusion of a some of that land within the proposed coastal hazard zone renders the land incapable of reasonable use, and places an unreasonable and unfair burden upon them, as its owners. The Council disputes both of those contentions.

[2] So far, the application has been served upon the respondent Council, and the Hawkes Bay Regional Council. There is an issue as to how much more widely the application should be notified/served, and who should do that. The Council seeks directions about those issues. I conducted a telephone conference with Counsel and representatives on 19 February, in which several issues were discussed. I wanted time to reflect on the issue of notification and/or service in particular. I will discuss that issue and give directions on that and the other less contentious matters.

[3] Some recitation of the background is necessary to put those issues in context. According to the affidavit filed by Mr Alastair Thompson, the Council's Planning Manager,

the relief sought in this application is 'almost identical' to that the applicants' sought in submissions on the proposed plan under cl 6 to the First Schedule. Those submissions attracted cross submissions; two in support, one in part opposition, and 56 in opposition. Mr Thompson is plainly right when he suggests that that number of cross submissions indicates a high level of public interest in the issue raised by the substantive application.

[4] For whatever reason [and that is not intended in any way critically] the applicants elected to proceed to this Court by way of the application under s85, rather than a reference, which is the more common procedure. Had this been a reference, every submitter on the issue would have been given notice of the reference to this Court, and would have had a right to appear and be heard. I do note also that there are references which, on the face of it at least, appear to deal with the same, or at least similar, issues.

[5] The s85/Cl 21 procedure is different. In its decision in *An application by PA Steven* (1997) 4 ELRNZ 64, The Court spoke of the legislative uncertainty about the procedures to be followed in such an application. They held that there is no statutory requirement that an application must be notified [p74, L3]. While agreeing that the s85 procedure, if the applicant can satisfy the threshold test, is intended to be *'...quick efficient and inexpensive..'* [p69 L7] the Court went on to say that: *'As far as notification is concerned, we do not consider that there has to be an inflexible rule either way.'* [p73 L30]. One of the suggested procedures was that the Court might see whether the applicant had made out a reasonable case for changing a plan, and if it had, service or notification to others could be considered at that point, with an opportunity to be heard before a final decision is made.

[6] In the circumstances of this case, I find that possibility unappealing. It seems to me to be almost certain to lead to a great deal of duplicated effort, and wasted time and expense. Issues about a coastal hazard zone along the foreshore north of Napier are very much in the public arena: – the level of interest about it as it potentially relates to this piece of land is ample demonstration of that. One could reasonably foresee that an attempted resolution without giving reasonable opportunity for participation will result in litigation that is more protracted, rather than shorter. It would not be fair on the Council, or satisfactory in principle, to require it to choose the persons or bodies it could advise of the application, so that they could seek to join as s274 parties.

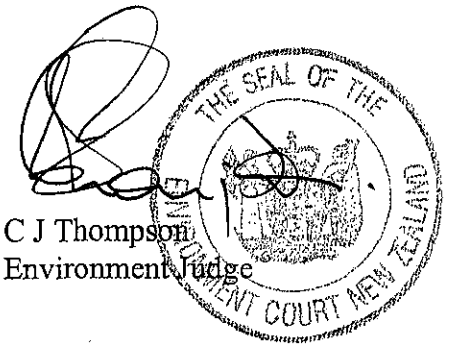
[7] It may rather nullify the applicant's wish to avail itself of the 'quick efficient and inexpensive' s85 procedure, but in the end, I suspect that any such advantage would have been short-term and illusory. I really see no practical alternative but to require service of the application on those persons or bodies who made submissions [whether in support or in opposition] in respect of the submissions made by or on behalf of the applicants on the proposed plan. That should provide ample scope for a cross-section of opinion and evidence to be presented, without the need for general notification.

[8] Mr Cooper, somewhat faintly, suggested that if some sort of service regime was required, then the Council should do it. I do not see why that should be so. It is the applicants' responsibility to advance their proceeding. At the moment, I do not know what material should be included in what is to be served, but I imagine that there may be scope for waiver of service of a good deal of material on the basis that interested parties will already have it, or can get access to it at a central point.

[9] There will be directions that:

1. Subject to any application for waiver as to the documents to be served, the applicants should serve notice of the application on those persons and organisations who were submitters to the Council on the issue when it was considering its proposed district plan.
2. The Council should, within 14 days, formally advise the applicants of the reasonable uses it contends the affected land could be put to, assuming that it remains subject to the coastal hazard zone.
3. The Hawkes Bay Regional Council should, within 14 days, lodge and serve a notice of intention to be heard, containing an address for service.

DATED at Wellington this 24th day of February 2004



C J Thompson
Environment Judge