NEW ZEALAND

Reverse Sensitivity

While the issue of incompatibility between land uses usually arises where established users oppose the introduction of a new activity because of what they perceive will be the effect of the new activity onthem, it can also arise in the reverse situation. That is where an established activity opposes the introduction of a new use in the neighbourhood because of what the established activity perceives as its likely effects on the proposed activity.

Two recent High Court decisions have considered this issue of so-called reverse sensitivity. Both considered the validity of consent conditions which sought to protect existing industrial activities, by preventing developers of more sensitive activities from later objecting to or otherwise trying to limit the industrial operations.

In *Rowell v Tasman District Council* (Neazor J, High Court, Nelson CP 16/95, 12 February 1997) the Court considered, by way of judicial review, the lawfulness of a resource consent condition attached to a consent for residential subdivision under section 220(1)(f) of *Resource Management Act (RMA)*. The condition required that an easement be granted in favour of a nearby quarry, allowing it to emit noise, rock and dust on to the applicant's land.

The easement contained covenants that the holder of the subdivision consent and all successors in title would not make any legal claims against the quarry relating to the dust etc, nor oppose any renewals or variations of consent for the quarry.

This easement was voluntarily granted by the developer in return for the withdrawal of the quarry's opposition to the subdivision application. The plaintiff was a submitter in support of the subdivision application and lived between the applicant's land and the quarry. He issued proceedings to challenge the validity of the easement condition.

The plaintiff argued that the easement condition and associated covenants was contrary to the right to freedom of expression as contained in the *Bill of Rights Act* 1991, and was unreasonable and in conflict with the purpose principles of the *Resource Management Act* 1991.

In considering the Bill of Rights point, the Court referred to the decision of the Planning Tribunal in Application by *Christchurch International Airport Limited* [1995] NZRMA 1 (The High Court appeal - see below - was not referred to). That case involved opposition to an application to construct a new residence in the vicinity of the Christchurch Airport. The Airport Company was concerned that the occupier of the dwelling would ultimately take steps to limit noise from the airport, thereby potentially constraining airport operations. The Council in that case had sought to impose a condition that the consent for the new residence would enure only so long as the person owning or occupying the property refrained from doing anything which would restrict the operations of the airport.

The Environment Court held that this condition would be contrary to freedom of expression guaranteed in the *Bill of Rights Act*:

> In effect [this type of condition] would not only prevent a consent holder from complaining to his or her elected representatives, they would make it an offence to do so. A breach of a condition in a resource consent can attract severe penalties under the *Resource Management Act*. ... To place a consent holder in such a position when the Bill of Rights Act affirms his or her right to freedom of expression and opinion and the freedom to seek, receive and impart information of any kind in any form, has to be inimical to the whole concept of a free and democratic society, and for ourselves we condemn it wholly and unreservedly.

The High Court in *Rowell* distinguished the Christchurch Airport case on the basis that the rights affirmed in the *Bill of Rights Act* are not inalienable. There is nothing in the *Bill of Rights Act* which prevents an individual giving up or limiting any of the rights contained in that Act:

> In my view there is no breach of the *Bill of Rights Act* by a consent authority which imposes a condition limiting rights of a landowner when that owner freely consents on an informed basis to the imposition of a condition notwithstanding that the landowner's action may result in the giving up or limitation of what would otherwise be his or her affirmed right. Accordingly there is nothing unlawful in such circumstances in the imposition of the condition.

The plaintiff also argued that the easement and its associated covenants was unreasonable and outside the Council's powers because the condition discouraged public participation in resource management matters and that it is unlawful for a consent to authorise a nuisance, such as the discharge of dust.

The Court rejected these submissions observing that the rights to participate in *RMA* procedures can voluntarily be dispensed with by consent applicants. No nuisance in the legal sense had been authorised by the condition.

Finally, the Court observed that:

> The condition could not otherwise be said to be tainted by unreasonableness: the Council had to choose between one of two uses or to provide conditions under which they could co-exist. It cannot be said to be unreasonable to make a provision which sensibly balances those interests.

The other decision of the High Court considering this type of condition is the appeal against the decision of the Tribunal in the Christchurch Airport case. The appeal, *Building Industry Association v Christchurch City Council* (High Court, Christchurch, AP 78/96, 11 December 1996), was confined to the Bill of Rights issue.

As in Rowell, the High Court held that rights under the *Bill of Rights Act* can be given up voluntarily. However, the Court in this case went further. It held that individual rights under the *Bill of Rights Act*, must, in certain circumstances, and where resource management purposes requires, yield to the greater public or private good inherent in the imposition of the condition.

Section 5 of the *Bill of Rights Act* states that the rights contained in the Act are subject to such reasonable limits as may be prescribed by law and as can be demonstrably justified in a free and democratic society. The Court considered that a consent authority, balancing individual and public interests may fairly, reasonably, and in accordance with the law, curtail individual rights in light of the wider public good.

The Court's reasoning was of course premised on the basis that the condition in issue was in fact reasonable. This raises the issue of whether a condition restricting the ability of a consent holder to complain about adverse environmental effects, or to take steps under *RMA* to address them is reasonable in the circumstances. This issue was not addressed by the High Court in the Building Industry Authority case.

A Recent Environment Court Decision Considers the Issue of Reverse Sensitivity in the Context of District Plans.

In *Auckland Regional Council v Auckland City Council* (A 10/97), the Environment Court considered whether it is appropriate for district plans to restrict sensitive activities from locating in the vicinity of industrial activities. The regional council maintained that certain activities in heavy industry zones which were likely to be adversely affected by discharges to air from other activities in the vicinity, should be classified as controlled or discretionary activities. It contended that this was necessary to provide an environment in which heavy industry can function effectively and to ensure that public health and safety would not be compromised by the inappropriate location of sensitive uses.

The city council argued that the *RMA* focuses on adverse effects "on" the environment, rather than adverse effects "from" the environment, and that the onus should be on those producing adverse effects to avoid, remedy, or mitigate those effects. In holding that the provisions sought by the regional council were appropriately contained in a district plan, the Court referred to section 76(3) of *RMA* which states that rules may provide for permitted, controlled, or discretionary activities, having regard to the actual or potential effects on the environment of activities. The authority to classify activities in this way is not limited to the classes of activity that give rise to the actual or potential effect. The Court concluded that to reject provisions of the kind proposed on the basis of leaving people to judge their own needs would be to fail to properly perform the functions of territorial authorities under *RMA*.

Use of Aircraft as Ancillary to Residential Activity

In *Queenstown Lakes District Council v McAulay* (18 December 1996, High Court, Dunedin, Fraser J) the respondent owned a rural property near Wanaka, which included an aircraft landing strip. Following complaints by neighbours about noise and other matters, the Council issued an abatement notice requiring that all aircraft activities cease. The notice stated that such activities were non- complying and no resource consent had been obtained.

The High Court confirmed the Planning Tribunal's finding that in this case the private use of an aircraft for personal transportation of a person resident on a property comes within the residential use of a dwelling house. The council argued that, following the Planning Tribunal's reasoning, every residential property throughout New Zealand has a right to land a fixed wing aircraft in the backyard if it has sufficient room to allow it.

The High Court held that there would be no "floodgates" as there needed to be sufficient room on the residential property before an aircraft could take off and land. In addition, a consideration of the adverse effects on the environment may also result in aircraft activity being prohibited.

Section 17 Duty

In *Kaimanawa Wild Horse Preservation Society v Her Majesty's Attorney-General* (A 27/97), the Environment Court considered an application by the Attorney General, on behalf of the Minister and Director-General of Conservation, to dismiss an application for a declaration by the Kaimanawa Wild Horse Preservation Society that the cull of wild Kaimanawa horses in the North Island breached the duty in section 17 to avoid, remedy or mitigate adverse effects on the environment.

The Court held that wild horses fall within the meaning of the term "natural and physical resources", being an animal introduced into New Zealand. Section 5(2) *RMA* extends the principle of sustainable management to managing the protection of natural and physical resources, and is therefore capable of applying to the protection of wild horses.

The Court also held that the proposed cull constituted an "activity" within the ordinary dictionary meaning of that word, and that a duty to avoid adverse effects on the environment would therefore arise from such an activity. However, the statutory context of section 17 within the *RMA* restricts the otherwise broad scope of the term "activity". For instance, section 17 is a provision within Part III of the *RMA*, a part of the Act characterised by provisions which establish the scope of duties and

restrictions on the use of resources.

The Court held that the provisions of section 17 cannot extend to activities which are not related to the use of land, water and air, even though such activities may give rise to an adverse effect on the environment. Accordingly, the Court determined that the proposed cull of wild horses did not constitute a "use" of land within the meaning of section 9 of the Act, and therefore was not an activity subject to the duty imposed by section 17.

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Customary Rights and the Law

Maori claims concerning trout fishery, whales and even dogs are not based on race. These claims are based on two principles: first, the introduction of British law to New Zealand did not destroy pre-existing rights (otherwise known as customary rights) belonging to the original inhabitants; and second, a citizen's rights will be respected unless Parliament expressly takes those rights away. In *Taranaki Fish and Game Council v McRitchie* (CRN 5083006813-14 District Court, Wanganui 27/2/1997) (the trout case), Judge Becroft confirmed that the *Conservation Act* 1987 recognises and protects customary fishing rights. The trout case is part of an international trend seeking to affirm and protect customary rights. To restrict customary rights to species of fish pre 1840 would be to unreasonably deprive a culture of new technology and a right to development. The United Nations has declared that all peoples have a right to development with international endorsement, including New Zealand's. The common complaint raised against the decision is that trout should have not been included within the scope of the customary fishing right, because trout were introduced after the signing of the Treaty of Waitangi. This complaint is ill-founded The Treaty guaranteed Maori the full, exclusive and undisturbed possession of their Land, Forest, Fisheries and other Taonga (English text). Customary rights, supplemented by the treaty and its principles, include a right to exercise control over and utilise the fisheries resource, including the waters, the right to engage in the activity of fishing and the right to the fish caught. It is these rights, among others, that were specifically preserved by the fisheries legislation and now by the *Conservation Act.*

Rights do not, however, exist in a vacuum. Conservation of the fisheries resource is an important matter of public interest. If our democratically elected representatives agree that the conservation objective out weighs the public, collective and individual interest in protecting customary rights, then they may introduce legislation to extinguish these rights. But, until such time as they take that course, our law should respect customary rights.

It may be that the *Treaty of Waitangi Fisheries Settlement Act* 1992 does expressly extinguish customary fishing rights. One aim of that Act was to record the settlement of all fisheries claims. At first glance, the Act extinguishes the rights of Maori to fish species that are subject to the *Fisheries Act* 1983. And, broadly speaking, the Fisheries Act 1983 applied to trout. But there is some ambiguity here. The *Fisheries Act* 1983 does not specifically deal with freshwater fish. By contrast, the *Conservation Act* deals directly with trout. As the *Conservation Act* recognises customary fishing rights, there is a strong argument for saying that those rights continue to provide a defense to prosecution under the *Conservation Act.*

What, then, are the implications of Judge Becroft's decision? Plainly it means that local Maori are not required to have a licence or permit in certain regions to fish for trout. But Judge Becroft points out that any Maori exercising the right to fish trout must follow kawa (local protocol). This is a customary form of regulation under tikanga Maori (Maori custom). In presenting his defence to the charge of taking trout without a licence, Mr McRitchie established that he was acting in accordance with the regulatory controls imposed by the Hapu which exercise manawhenua (authority) over the Mangawhero River. Judge Becroft's decision is not a precedent for wholesale rejection by Maori of regulatory controls such as the avoidance of registration fees for dogs. The *Dog Control Act* 1996 expressly requires the payment of registration fees and appears to leave little room for a defence based on customary rights.

Customary rights regarding whales have also been subject to judicial scrutiny. The courts have acknowledged those customary rights. Equally, however, the court has recognised that those rights do not extend to exclusive rights to whale watching. Any claim that there is a right to commercial whaling will confront many obstacles. There is legislation such as the *Marine Mammals Protection Act* 1978 which safeguard such species. This reflects public interest in ensuring the conservation of whales, some of which are endangered. But, the basic principle remains: until Parliament expressly takes away customary rights, then the law should seek to protect those rights.

The effect of the Treaty of Waitangi has been set out in several cases. The Treaty is a living document, changing to reflect modern circumstances. Both Treaty partners are obliged to act reasonably. That combination should ensure the protection of customary rights, but ought not permit an abuse of those rights.

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Compliance Costs for Business

The Minister of Commerce, John Luxton, has called for submissions on the costs to business of the *Resource Management Act* 1991. This process forms part of a programme to improve the quality of regulation and to minimise the costs to business of complying with legislation.

The programme includes:

* Establishing Best Practice Guidelines for policy makers within government;
* Requiring regulatory impact statements;
* Developing a Regulatory Responsibility Act along the lines of the Fiscal Responsibility Act;
* Improving stakeholder consultation in the development of regulations;
* Systematically reviewing all existing regulation

A joint industry/officials group (managed by the Ministry of Commerce and approved by Cabinet) has been set up to examine and provide advice on improving regulation and reducing costs which government imposes on business.

The review has three components:

* Evaluating the effectiveness of the existing Compliance Cost Assessment Framework, including its scope;
* Making recommendations on options for improving the quality of regulatory proposals (Best Practice Policy Development);
* Consulting with the Ministry of Justice, the Legislation Advisory Committee, the Parliamentary Counsel Office and other relevant agencies on ways of encouraging adequate marketing, evaluation and review of existing regulation.

The focus of the review this year is the compliance costs associated with the *Resource Management Act* 1991. In 1997, the focus will be the *Health and Safety in Employment Act* 1992. These Acts, along with the Human Rights Act 1993 and the *Privacy Act* 1993 have been specifically identified by business as causing the biggest drain on their resources. Negative effects of such legislation include the stifling of competition and innovation and the moving of operations offshore.

Whistle Blowers - The Protected Disclosures Bill

The *Protected Disclosures Bill* establishes a whistle blowers' protection scheme, which confers protection on employees disclosing information about serious wrongdoing by employers. The scheme will cover organisations in the private sector. The legislation is presently before the Government Administration Select Committee. Compliance costs on businesses will be increased by the Bill which requires that internal procedures be set up.

The Bill also has a range of other serious implications for employers:

* It creates a new area of ambiguity in employer-employee relationship which contradicts existing law.
* It creates further uncertainty by extending the application of the *Human Rights Act* in to the employment relationship.
* It involves the Ombudsman in investigating the private sector.
* It exposes the private sector to the risk of disclosure of confidential commercial information by employees to competitors in the guise of public interest "whistle blowing".
* It encourages employees to disclose information on private sector bureaucracies to a range of public authorities, most of which have no statutory role or experience in dealing with the private sector.
* The Bill adds contradictory and uncertain obligations to other legislation affecting the employer-employee relationship, particularly the *Privacy Act*. It will inevitably lead to increased litigation between employer and employee.
* Given the stated focus of the government to reduce costs of compliance and the amount of regulation, it is difficult to imagine why this Bill has been extended to the private sector. Any input therefore by businesses into the Ministry of Commerce's Review, should include criticism of this Bill.

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