ANDERSON v EAST COAST BAYS CITY COUNCIL AND OTHERS

High Court, Wellington.
31 March, 1 April and 11 May 1981.
Speight J.

Appeal — Dispensation — Height restriction — Matters to be considered on application for dispensation from height restrictions in district scheme — Extent to which neighbours' view entitled to protection — Whether expense and inconvenience which the owner would suffer if the dispensation were refused was a proper consideration.

The judgment, which is abridged in this report, was given on a case stated on questions of law arising out of the decision of the Planning Tribunal, which had confirmed the grant of a dispensation by the Council.

In the course of erecting their dwellinghouse the applicants discovered that its height would infringe by a few feet the maximum height restrictions in the Council's operative district scheme. They accordingly applied for a dispensation. Their neighbours, whose view would be affected, objected. When the dispensation was granted the objectors appealed to the Tribunal and the Tribunal confirmed the grant.

Held: (1) The object of height, bulk and location restrictions in a district scheme is to promote coherence and harmony of buildings in an area, not to protect the view enjoyed by individual house-owners, who must accept that an occasional dispensation may be granted.

(2) The Council and the Tribunal were entitled to take into account the advanced stage which the construction of the house had reached and the degree of

inconvenience and expense the applicants would suffer if the dispensation were refused.

Cases mentioned in the judgment
Attorney-General v Birkenhead Borough [1968] NZLR 383.
Attorney-General v Mt Roskill Borough [1971] NZLR 1030.

Appeal
This was an appeal to the High Court by way of case stated under s 162 of the Town and Country Planning Act 1977.

Salmon for the appellants.
Bollard and *Sargesson* for the first respondent.
Worth for the second respondents.

SPEIGHT J. This is an appeal by way of case stated under s 162 of the Town and Country Planning Act 1977, on questions of law arising out of a determination by the Planning Tribunal (No 1 Division) which granted a dispensation to the respondents in respect of height restrictions under the operative and reviewed district schemes of the first respondent. That decision was by way of affirmation on appeal of a similar dispensation previously granted to the second respondents by the first respondent. I have before me an eight page decision of the Planning Tribunal setting out the history of the case and the relevant facts and its conclusion in support of its decision to grant the dispensation, and I have a case stated which briefly recites the effect of the Tribunal's decision, and then asks a total of seven questions, doubtless drafted, as is the usual practice, by appellant's counsel and approved as the case by the Chairman.

[The second respondents owned a hillside section on which they were erecting a substantial dwellinghouse. When the building permit was issued it was believed that the height conformed with the maximum height restrictions in the operative district scheme, but when construction was well advanced it became clear that this was not the case and an application was accordingly made to the Council for a dispensation. An objection was received from the next-door neighbours, whose view would be affected. The Council granted the dispensation and the neighbours appealed to the Planning Tribunal, which disallowed their appeal and affirmed the grant of a dispensation. This appeal by way of case stated followed.
After setting out the facts which are briefly summarised above, His Honour continued:]

What now require to be considered are the points of law upon which the decision was based, and these must be gleaned from a consideration of the whole decision and matched against the questions asked in the case stated where appropriate. At p 5 of its decision the Tribunal discussed at some length the purpose of height, bulk and location restrictions in a district scheme and held that these restrictions were to ensure that all buildings received adequate light and air with appropriate space between them, and that buildings in the neighbourhood were in scale one with the other, and that this type of consideration was related to, inter alia, the amenities of the neighbourhood. It considered that building height was particularly important in keeping scale of one with another to promote harmony and coherence within the definition of amenities. Nevertheless, as the Tribunal pointed out — and I agree with it — these restrictions are of an overall or "broad approach" variety suitable for the neighbourhood as a whole and are not drafted with consideration of any individual sites in mind. Consequently the Tribunal held that the provisions regulating height, bulk and location do not have the objective of preserving views. I agree with this conclusion. In support of his submission that protection of views is one of the objects of the bulk and location require-

ments, Mr Salmon relied on *Attorney-General v Birkenhead Borough* [1968] NZLR 383. However, an examination of that case shows that although views were mentioned, it was there observed that such requirements are for the *overall* preservation of neighbourhood amenities by preventing buildings of disproportionate size and character. This supports rather than undermines the Tribunal's finding. Within a local body area contours and vistas will vary infinitely and a building of conforming height might make serious inroads upon the view of an existing neighbour because of topography but with no room for objection, and equally buildings of nonconforming height might, for the same reason, have no effect on neighbourhood views. Nevertheless the Tribunal went on to hold — and again I agree with it — that owners are entitled to rely on a general anticipation that bulk, height and location requirements will be complied with, and persons will probably plan their own houses accordingly with justifiable expectation that benefits (such as a view) will not be encroached upon. This was Mr Salmon's principal argument; but it overlooks the fact, as the Tribunal says, that there is no absolute certainty that the restrictions will be enforced, because of the powers of granting conditional use applications (s 72), specified departures (s 74) and dispensations and waiver (s 76). Views, of course, will be taken into account in such determinations as, for example, in *Attorney-General v Mt Roskill Borough* [1971] NZLR 1030, but in my opinion the Tribunal was not in error in law in holding that there is no absolute right in an owner to the preservation of view — either at common law or in planning law.

The final matter, which might be termed one of law, which the Tribunal took into account, as had the Council, was that it could give consideration to the existence of the house structure as at the time the application for dispensation came to be considered. All town planning dispensation applications must be considered as a matter of reality against existing facts, and in its judgment the Tribunal expressly stated that it was granting the dispensation under s 76. It seems to me that the very existence of the building and the great inconvenience and expense of demolishing or partly demolishing it are matters relevant to be considered under subs (2)(a), namely:

"That it is not reasonable . . . to enforce the provision . . . ."

The Council then went on to consider the matter under ss 74 and 75 in the alternative, and correctly stated that s 75 does not specify matters to which regard shall be had in granting or refusing consent under that section. Therefore equally the existing situation was appropriate to be considered. It appears to me, therefore, that all the legal matters which were relevant for consideration by the Tribunal before it exercised its discretion on the factual matters before it were correctly interpreted.

Peter Haig Barrister