ORIGINAL

Decision No. W27/97

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to s.120 of the Act
BETWEEN	**AMMON and OTHERS**
	(RMA No. 730/96)
	Appellant
AND	**NEW PLYMOUTH DISTRICT COUNCIL**
	Respondent
AND	**TE IHI TU TRUST**
	Applicant

BEFORE THE ENVIRONMENT COURT

His Honour Judge Treadwell
Mrs R Grigg
Mr I G McIntyre

HEARING at NEW PLYMOUTH on the 23rd and 24th days of January 1997

COUNSEL/APPEARANCES

Mr D G Medway for the appellants
Ms S W Hughes for the respondent
Mr R T Wilson for the applicant

DECISION

This is an appeal against a decision of the respondent Council, granting resource consent to Te Ihi Tu Trust (the Trust), to enable the establishment of an habilitation centre as defined by the Criminal Justice Amendment Act 1993 in a building known as the Labor Unit forming part of the old hospital premises at 34 Barrett Street, New Plymouth, the use of those premises for hospital purposes having been discontinued.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

The original application for consent was opposed by a group of some 31 residents living in 22 properties, the group largely forming a cross-section of residents in the near vicinity.

Description of Site and Proposed Activity

The site is large and contains many now redundant, buildings forming part of the old hospital. Tabor House is on an elevated north facing part of the site, with the closest residences being on the north boundary of the hospital complex. These residences are nevertheless well separated from the unit, both topographically and by distance of some 15 to 20 metres. Residences on the other three boundaries are well separated and also those to the south and the east are buffered by the buildings of the old hospital complex. One might indeed say that in the context of an urban environment, it would be most unusual to find a building capable of being used for hostel and/or educational purposes with such a degree of isolation.

Nevertheless the two neighbours on the north boundary are concerned that the inmates of the proposed habilitation centre can overview their rear gardens from a path above and indeed, we were given evidence of such an incident where the owner felt intimidated. That incident was not associated with the Trust, which has not yet commenced activities upon site. The Trust has offered to plant a fast growing hedge along that boundary and there should be no future inter-visibility problem if the habilitation centre operates as intended.

The site is zoned Residential 2, with a hospital designation in place. It has in the past been used as a medical hospital, including accommodating psychiatrically disturbed patients, who have in the past caused some problems in the neighbourhood according to evidence we received.

The Government, following a report on rehabilitation of criminals, passed the Criminal Justice Amendment Act in 1993, providing for habilitation centres, which are defined as:-

> *"... an approved residential centre that operates programmes for offenders designed to discover and address the cause or causes of all factors contributing to their offending".*

We agree with the appellant that the definition does not require that such centres be established in residential areas, but we further accept that because the main objective of the exercise is to return offenders to the community in a social, rather than antisocial frame of mind, the benefit of any programme will be enhanced if it can be conducted within a normal residential atmosphere.

The greater proportion of those attending the habilitation centre will be offenders released on parole with specific conditions that they attend the centre and remain at that centre. Therefore not only must the matters set forth in the Criminal Justice Act 1985 relating to parole be satisfied, but there is this additional pre-requisite of attendance at an habilitation centre. Also the offender must volunteer for the course thus indicating a desire to reform - there is no element of coercion. Should an

offender abscond from the centre or in other ways breach parole, a recall can immediately be effected by the Department of Corrections, either by immediately re-arresting the parolee or by applying to the Court for a recall.

The centre is a secure unit, in that the inmates are not permitted to leave the unit or its immediate environs and should they do so this is regarded as a major breach of habilitation centre rules. In all other respect, the inmates are there of their own volition.

The Trust is a charitable organisation, despite suggestions by one of the neighbouring residents that it is in some way commercial. It is manned by a staff containing a mix of qualifications directed at the rehabilitation of parolees. Of the five full time staff members, there are qualifications and experience in the field of science; teaching; language; psychotherapy; nursing; trades (such as joinery); drug and alcohol rehabilitation; psychiatric and clinical nursing; counselling (both individual and group); community development; saw milling, earth moving and like activities; business management, including accounting and administration; teaching in design and computer graphics. The proposed manager of the courses holds a degree of Bachelor of Science, with a post graduate teaching diploma. He is well experienced in criminal rehabilitation.

The whole emphasis on the course, which lasts 12 weeks per intake, is to change the attitude and lives of those who wish to be changed, and to equip them for return to society. The Trust has considered many sites for the establishment, but on aspects of desirability and availability chose the subject site.

The Court inspected the premises with the consent of the parties and concedes that, in so far as interior layout is concerned, it could almost be said to be architecturally designed for the proposed unit which requires a degree of security. It is intended that ten residents would be housed and each of the residents has an individual cubicle, separated from the corridors and passages by a curtain. Therefore the supervisor who will be on site at night and will be patrolling the unit at hourly intervals, is readily able to check that all inmates are present. There are lounges and other rooms for teaching and/or counselling purposes; an area suitable for dining; a fully equipped kitchen; and some other rooms which can be put to various purposes. These are all situated on the first floor of Tabor House, the ground floor being occupied for use by another Maori educational unit. This latter unit includes weight lifting equipment and various facilities of that nature, which can link well with the activities of the Trust.

In so far as the actual building is concerned, the only way in which an inmate could avoid the surveillance of supervisors, either by day or by night, would be by escaping through a window or by using a fire door. All other means of egress require a person to pass the desk/office area, which we understand would be occupied at all times by a supervisor, except when on inspection rounds.

The course itself is exacting, and we suspect even exhausting. Re-education in Maori value appears to predominate over relaxation activities. The course is obviously subject to Department of Corrections approval, but we were curious to observe that

the course appears to revolve almost exclusively round Maori values and culture, with but minimal attention paid to the ability of urban Maori to assimilate into existing mixed communities.

Essentially the difference between the habilitation centre and a normal release on parole, is that those who wish to undergo a re-education programme are housed at and essentially kept at the centre, whereas those who have no desire to be rehabilitated can, when released on parole, may chose to scatter through the community and go their own way subject to much less control than is intended in this case. It must be remembered that those who will be in the habilitation centre are almost exclusively those who have been imprisoned (which means that the Courts have reached the end of tolerance in respect of criminal activities) but who have chosen at the time of parole consideration to remain under supervision in an attempt to break free of the criminal cycle.

Lastly, in relation to those who may be within the habilitation centre, the Trust has voluntary offered a condition of consent prohibiting those who have convictions for offences listed in s.105(9)(b) of the Criminal Justice Amendment Act 1993, from eligibility for the habilitation centre courses. This subsection largely covers very serious offences, such as murder; attempting to murder; wounding with intent; sexual offences largely directed at offences against those under the age of 16 years; offences accompanied by violence; or offences of a total antisocial nature. We acknowledge without hesitation that there are many offences not covered by that subsection which members of society may find equally abhorrent.

Definition of the Activity

Essentially the activity involves a residential element; an element of education; some limited recreational components; and cultural and hobby elements. In respect of the latter activity, the residents expressed great concern at the occasional haka or at rock carving if that is to be accomplished by use of pneumatic drills.

We record that we were not greatly assisted by any of the witnesses in terms of the Transitional District Plan which we discovered by chance contained a definition which accurately covered the activity. It had been urged upon us by way of submission on behalf of the applicants, that because habilitation centres post dated the provisions of the Transitional Plan, and because such an activity was not specifically defined by *"label"* in the Plan, therefore it must be regarded as a non-complying activity. The Resource Management Act 1991 (RMA) is not greatly concerned with the labelling of an activity, but is mainly concerned with its effects. Setting to one side the security fears of the appellants (which can be relevant in terms of the RMA with relation to psychological health), it is perfectly clear to us that this proposed activity, whether or not contemplated at the time when the Transitional Plan became operative, is fairly and squarely within a definition contained within that Plan, under which it is permitted as a discretionary activity. The definition relevant is that of a *"hostel"* which reads:-

> *"Means a residential building for the accommodation of students or workers, or other special class of residents, such hostels being operated in association with schools, colleges, employers or Government, or charitable institutions."*

"Residential home" is not a specific element of that definition, the hostel definition referring to *"residential building"*, but again, the definition of *"residential home"* is apt as:-

> *"Residential premises established or used for the purpose of providing community care and living accommodation for specific groups or categories of people, and includes any welfare home, old peoples home, home for the disabled or intellectually handicapped, emergency shelter or hostel."*

Taking from those definitions the factors relevant to the present activity, there is no doubt that it is a residential building intended for the accommodation of a special class of resident, operated in association with Government or a charitable institution or both. It provides care and living accommodation for a specific category of person.

However, because it caters for more than eight persons, (which is a predominant and/or controlled use), it falls to be considered as a discretionary activity in terms of the RMA. The Court must therefore apply the provisions of s.104 to the activity and in so doing bear in mind that if elements of it were such as to cause adverse effects upon the environment, or were in conflict with objectives and policies of the plan or contained elements relevant to any of the other subsections of s.104, then the power remains with the Council and the Court to refuse to allow the activity on any particular site.

We will now briefly address the submissions raised by the appellants, which sought to persuade us otherwise.

The appellants took issue with the definition of habilitation centre in terms of the Criminal Justice Amendment Act 1993 and then moved to argue that that definition should be extrapolated from that Act into the Transitional District Plan. Following from that, it was argued that the definition did not require such a centre to be situated in a residential area. The answer to that particular proposition is that the definition in that Act does not require it to be situated in any particular area. We do not accept that the Criminal Justice Act 1985 and/or its 1993 amendment was intended at any stage of its passage through Parliament, to be directed at the provisions of the RMA as to the siting of such facilities. Nevertheless if it were, then the reference in that Act to it being a residential centre would not be supportive of the suggestion that it should be in rural, industrial or commercial zone.

We agree with the submission that the operating specifications and schedules issued by the Department of Justice are more concerned with the quality of the programme than its location, but nevertheless we accept the evidence of the Trust that its location in a residential environment is of importance in improving the quality and relevance of the programme.

The second submission was directed at the fact that the Criminal Justice Amendment Act 1993 post dated the operative date of the Transitional Plan. Our response is that a Plan in terms of the RMA is not to be construed as a document carrying with it elements of prohibition by omission. We simple reiterate our view that the RMA is largely effects based, and repeat that the proposal comes clearly within the definitions we have previously quoted. We are not impressed with the submission that an habilitation centre is in some ways akin to a prison. It is no more akin to a prison than would be a house where one or more parolees may for the time being be resident, as is presently permitted by the law of this country.

In further support of his argument, counsel referred to the objectives of the Residential zone in the Transitional Plan, which was to encourage and provide the establishment in appropriate locations of facilities of a community nature *"where they serve and are compatible with surrounding residences."* (emphasis added).

In respect of that argument, we would tend to agree were this activity proposed within a single housing unit on an average sized residential section. It is however, proposed on the first floor of a very large building, contained within a very large site, which largely divorces it from surrounding activities. The site has in the past been used for purposes of psychiatric case and patients have from time to time disturbed neighbours. Therefore residents in the area have lived in proximity to an activity of an institutional nature and could have no reason to expect replacement by purely residential activities.

Contrary to the submissions placed before us, we have concluded in terms of the Transitional Plan that the activity does fall naturally within the general class of uses authorised in respect of the zone, provided conditions can be imposed which negate or mitigate its effects upon the surroundings. Also in looking at its effects, and whether they be beyond that which would normally be expected, one cannot look at the Transitional Plan, its objectives, policies and rules in isolation, because the effects of the designation must also be taken into account. The hospital authorities could, for instance, move a psychiatric unit back onto this site as of right.

It was submitted that the activity as a non-conforming use (a proposition with which we do not agree) would not pass the tests of s.105(2)(b) of the RMA. We do not intend to address further whether it is contrary to the policies and objectives of the Plan, because we have reached the conclusion that when policies, objectives and rules are taken together, the activity proposed is a discretionary activity. We find it convenient however, to discuss whether the effects of this activity upon the environment are in fact minor, that being one of the elements contained in the threshold tests of s.105(2)(b).

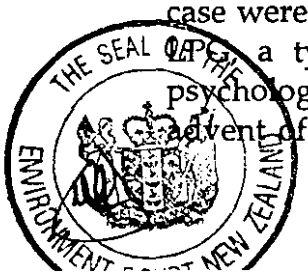
It is perhaps apt to paint a scenario for the purpose of ascertaining the environmental effects of this activity. The effects are largely based upon the fears of the neighbourhood in respect of criminals on parole, with a fairly hardened background of criminal activity being housed on parole within Tabor House. Ten such persons can be accommodated upon this site within this building. The first point to remember is that they have qualified for parole; the second point is that they have volunteered to undergo a 12 week training programme with the knowledge that

failure will breach parole conditions and could result in a recall to prison. In contrast, let us envisage the same 10 criminals qualifying for parole but not volunteering for a 12 week regime of intensive training. Under the laws of this country, the 10 who do not elect the habilitation course can be released into the community without the rigorous regime imposed by the Trust programme. The 10 who are released, subject to the habilitation programme, may well be released earlier but face recall if they do not observe the habilitation centre rules and regulations. Therefore, the only difference in community effect is that the parolees within the centre will be concentrated together but under supervision.

Mr Brown, one of the resident witnesses, questioned whether the Department of Corrections could guarantee a 100% success from the rehabilitation centre programme. The answer to that, of course, is that it could not be expected to give such a guarantee. However, from the evidence we have heard, the establishment of pilot habilitation centres may well prove successful. The failure rate if significant would be a matter to consider when appraising the value of these courses in the future. It is nevertheless clear to us that the habilitation centre course offers a better opportunity for successful rehabilitation than does the present parole system of release into the community. Because the course is designed for those who already have affinity with the Taranaki area, the potential number of criminals being released back into the Taranaki community with a Taranaki background, is not increased. For all the residents in this area know, there may be many parolees without benefit of a rehabilitation programme, already in their midst. The Court must therefore ask itself whether this particular type of controlled release has an effect upon the community greater than the effect which could follow from release into the community under normal parole situations. Our conclusion is that the effect upon the community by releasing 10 persons into a supervised and controlled environment, is likely to be very much less than the present system of parole release.

Therefore, in the context of a normal residential community, we have reached the conclusion that the effects of the activity are minor. In reaching that conclusion, we have also taken into account the issues of noise, visual effect, etc as given to us. On the question of noise, the occasional haka performed on site can hardly be said to be of great moment and nor could normal activities involving musical instruments etc. Noise control officers have ample powers to deal with such matters. We are however, a little more concerned at the advent of pneumatic drills on site if used in connection with large rock carvings. In our opinion, that can adequately be controlled by a condition of consent, whereby the carving of rock using such implements, be prohibited. No resident should be expected to undergo the spasmodic noise of a pneumatic drill, such noise not presently being covered by the provisions of the District Plan, which do not contain noise level requirements relating to Lmax.

We therefore do not consider it necessary in the present circumstances, to examine at any length the authorities submitted to us concerning psychological fear. That line of case were largely concerned with the advent of potentially dangerous fuels, such as LPG, a type of fuel not fully understood by the community in general. For psychological fear to be of relevance, there must be the opportunity to prevent the advent of the activity into a community, either in scattered or concentrated forms.



As recorded, this Court has no power to prevent the advent of parolees or released prisoners into the community in scattered form, therefore the danger of reoffending is ever present. In our opinion, the concentration of 10 such persons in a controlled environment lessens the chance of reoffending rather than increases it, therefore, whilst sympathising with those who have fears, we must in this case, set them to one side. As a comment and to assist, particularly the elderly who are greatly fearful of the advent of the habilitation centre, we would make clear that an inmate of the centre, should he chose to abscond and should crimes take place in the vicinity shortly after the inmate has been found to abscond, would know in his own mind that detection, apprehension and reincarceration would be virtually inevitable. For what it is worth, the Court is of the opinion that should any inmate abscond, the inmate would make sure he is well clear of the general area as soon as possible. We are satisfied from the evidence that escape or absconding would be a rare occurrence and should that be accompanied by a car conversion or burglary for money, then the advent of the centre does not increase the risk to the community in general surrounding the Barrett Street Hospital from such activities.

We were however, concerned during the course of the case to find a vagueness between the Trust, the Department of Corrections and the Police (who were not represented) as to the steps to be followed in the case of an inmate being found to be missing. A condition must be imposed that in the event of an inmate absconding, an authorised officer of the Department of Corrections and Police be advised immediately by the person in charge for the time being of the habilitation centre.

Lastly, on the question of impact upon the community we were referred, amongst other cases, to the Christchurch case of Babbington v Invercargill City Council (1993) 2 NZRMA 480. This case related to a daycare facility for discharged psychiatric patients. It must however be remembered in that case, that they were under no supervision once they left the site and that a daily attendance of between 18 and 25 people would be expected. The Court in that case made various comments, some of which were directed at Part II of the Act. The Court stated:-

> *"We fully respect the views of the residents, particularly those concerning safety and security. We also respect their concerns about bringing into the neighbourhood a group of people, as distinct from individuals, who are suffering from mental health disabilities."*

Nevertheless, in that case the activity obtained the consent of the Court, subject to conditions. In the present case we make perfectly clear that there are but 10 people coming onto this site and, in terms of the District Plan, eight would be permitted as of right. An extra two is, in our view, totally inconsequential.

Section 104

We have already traversed potential adverse effects on the environment in terms of s.104(1)(a). Unlike s.105, the effects to be considered can be both positive and negative. We have already found that the adverse effects are minor, but from the evidence we have heard, we tend to the view that the establishment of this activity upon the site in question, could in the long-term prove beneficial to people and

communities in general and to overall amenity values and social conditions as set forth in the definition of *"environment"*. We accept that the District Plan in its residential objectives and policies is more concerned with those closer to the particular activities than a district wide or regional wide environment, but nevertheless in terms of s.104, that wider aspect is relevant.

We have had regard to relevant objectives, policies and rules and have found them to be largely supportive of the present activity. There is nothing in the Regional Plan to prevent the activity. We can see nothing in terms of s.104(1)(i) which is relevant to the present proceedings.

Turning to Part II of the Act. In a general way s.5 is supportive when taken in combination with s.7, relating to natural and physical resources. Residents in this neighbourhood must realise that they have chosen to live beside a large and substantial complex, previously used for hospital purposes with a variety of members of the community inhabiting that complex, some with serious psychiatric disorders. That resource is of value to the community and must have some use made of it. Residents cannot expect to freeze it in perpetuity for non-institutional type activities, provided institutional activities can have conditions imposed to mitigate any adverse effects they may have. We have in particular set forth in the course of this decision, the fact that the premises remain effectively designated for activities similar to those presently proposed.

Having considered Part II and s.104 and the statutory force to be accorded those provisions, we have concluded that consent should be granted.

Treaty of Waitangi

The applicant urged upon us in respect of Part II of the Act, the recognition of the principles of the Treaty of Waitangi. It has not been necessary for us to determine this issue, but we would make perfectly clear that had the Court found there to be an adverse effect upon the environment of those resident in this area, which could not be mitigated or which in any way we considered unacceptable, then the consent would have been refused, and the Treaty invocation would not have been accepted as a reason for the granting of consent.

Conclusion

The Court accordingly confirms the decision of the respondent Council, subject however to the imposition of the following additional conditions:-

- A Certificate shall be lodged with the District Planner by the Department of Corrections at the commencement of each intake of trainees, certifying that no person in the intake is disqualified by reason of offences under s.105 of the Criminal Justice Amendment Act 1993.

- That the hedge plants to be planted in accordance with condition 1.7 are to be Pittosporum eugenordes (lemonwood) with a minimum grade of pb5 with a

minimum plant height of 450mm. They shall be planted at 1 metre to 1.25 metre centres.

- That in the event of the supervisor or person in charge for the time being of the habilitation centre discovering that any inmate has absented himself from the centre, he shall forthwith notify an authorised officer of the Department of Corrections and the Sergeant in Charge of the Central Police Station, New Plymouth.

- That any hobby or educational activities such as rock carving shall not be conducted using power tools with an Lmax exceeding the permitted L_{10} or L_{95} levels permitted by the plan.

The parties are to agree on conditions and failing agreement conditions will be set by the Court.

The question of costs is reserved.

DATED at WELLINGTON this 2nd day of April 1997

W J M Treadwell
Environment Judge

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