IN THE COURT OF APPEAL OF NEW ZEALAND CA64/00

	BETWEEN	BODY CORPORATE 97010
		Appellant
	AND	AUCKLAND CITY COUNCIL
		First Respondent
	AND	SOUTHERN TRADING COMPANY LIMITED
		Second Respondent

Hearing:	25 July 2000
Coram:	Richardson P Keith J Blanchard J
Appearances:	J A Farmer QC, D J Chisholm and R B Enright for Appellant W S Loutit and P M S McNamara for First Respondent R B Brabant and K R M Littlejohn for Second Respondent
Judgment:	17 August 2000

JUDGMENT OF THE COURT DELIVERED BY BLANCHARD J

Introduction

[1] Body Corporate 97010 appeals against a decision of Randerson J in the High Court at Auckland on 8 March 2000 refusing an application for judicial review of three decisions by the Auckland City Council under the Resource Management Act 1991 ("the RMA"). The decisions relate to a proposed high-rise residential development located on reclaimed land formerly occupied for railway purposes at The Strand, Parnell ("the site"). The appellant represents the owners of the Dilworth Terrace townhouses which are situated on a nearby cliff top overlooking the site.

The Council is named as first respondent. The second respondent is the developer, Southern Trading Co Ltd ("STC").

[2] In the first decision of which review was sought, dated 1 October 1997, the Council granted STC a resource consent to erect a single 30 metre high apartment block in a particular position on the site. In accordance with s125 of the RMA, the consent was to expire unless given effect within two years. The expiry date was thus 1 October 1999. The consent was granted in relation to the Council's Operative Transitional District Plan ("the Operative Plan").

[3] Eight days later, on 9 October 1997, the Council gave public notice of a Proposed District Plan ("the Proposed Plan"). Under a rule in the Proposed Plan a height restriction of 15 metres, instead of 30 metres, would apply to the site.

[4] By the second decision, dated 26 January 1999, the Council granted STC a variation of the original consent pursuant to s127 of the RMA. The effect of the variation was to permit the erection of two 30 metre high apartment blocks ("the twin towers") on the one foundation but separated by a narrow gap. Both blocks would be entirely situated within the location (the building envelope) previously approved for the single apartment block. In total there would be considerably fewer apartments in the twin towers than had been proposed for the single tower block, with a consequential reduction in parking spaces.

[5] In the third decision, dated 12 May 1999, pursuant to an application made after the variation consent was given, the Council granted STC a time extension under s125 of the RMA until April 2002 for the implementation of its development, i.e. an extension of about 2½ years beyond the previous expiry date.

[6] The appellant says that the first two consents were invalid because they were not publicly notified. It further says that the variation consent should not have been granted. Lastly, it is contended that the decision extending the period for implementing the consent (as varied) is invalid because the Council erred in law or could not reasonably have come to its decision. A focus of the appellant's arguments relating to the variation and the extension is the height limitation in the Proposed Plan, which has not yet become operative. STC cross-appeals, arguing that

because of delay by the Body Corporate in commencing its proceeding it has been prejudiced and therefore relief should not be granted.

Background

[7] There was previous litigation between the Body Corporate and the New Zealand Railways Corporation as the then owner of the site. They entered into a compromise agreement in 1993 which provided for a graduated view shaft limiting the height of buildings on the site so as to preserve views from Quay Street *towards* the town houses. Of course the views from the townhouses were also benefited, but that was not the purpose of the view shaft. The townhouses are of some historical and architectural significance and it was thought undesirable that they be hidden from view by surrounding buildings. The height limits agreed were between 6 and 15 metres, with development being permitted up to a height of 30 metres on a part of the site immediately adjoining The Strand. In addition, a triangular shaped piece of land at the northern end of the site was to be subject to a height restriction of 9 metres. The proposed development is partly on land subject to the 30 metre height limit and partly on the triangular piece. This has been possible because, unfortunately, when the Railways Corporation sold the site to the Ngati Whatua Orakei Trust Board it omitted to ensure that a restrictive covenant protecting the arrangements which had been agreed was registered against the title. The Trust Board and those who have subsequently obtained interests in the land, including STC, purchased without being aware of the restrictive covenant and therefore are not bound by the provisions agreed to by the Railways Corporation. Hence the only controls over height are now those to be found in a District Plan.

The original consent

[8] In its application dated 29 August 1997 STC applied for a land use consent for the construction of "an apartment building with 340 car parking spaces" and other facilities in accordance with specified architects' plans. Consent was sought for two options, one involving 224 apartments and 340 car parks, the other 242 apartments and 340 car parks. 190 of the car parks were to be provided in the form of "95 stacked pairs" (meaning, we understand, one behind the other).

[9] The assessment accompanying the application noted that the building would be 30 metres in height. A basement car park would be excavated to a depth of approximately 3 metres over most of the site. Over a smaller area there would be a ground level car parking structure which would create a podium from which the tower apartment building would rise close to The Strand road frontage.

[10] Under the Operative Plan two kinds of resource consent were required: a controlled activity consent for dwelling units in the residential 9C zone and a discretionary activity consent, which was needed because 190 of the car parking spaces were to be stacked.

[11] The Operative Plan provided for a controlled activity consent application to be made without notice unless the Council decided otherwise. The plan did not however dispense with the need to obtain approval from affected persons in accordance with s94(1) of the RMA. The parking arrangements required a discretionary activity consent because there was a prohibition against stacked parking, but a rule permitted the Council to grant exceptions to normal parking requirements where the safety and flow of vehicular and pedestrian traffic would not be unduly affected. The dispensation could be given for up to 80 percent of the required car parking spaces.

[12] The appellant argues that the application for the original consent should have been publicly notified. Section 94 of the RMA states when notification of a resource consent application is not required. The provisions relevant to the arguments made in this Court are:

> **94. Applications not requiring notifications**
>
> (1) An application for –
>
> …
>
> (b) A resource consent need not be notified in accordance with section 93, if the activity to which the application relates is a controlled activity and the plan expressly permits consideration of the application without the need to obtain the written approval of affected persons:
>
> (c) Any other resource consent that relates to a controlled activity need not be notified in accordance with section 93, if-

> (i) The activity to which the application relates is a controlled activity; and
>
> (ii) Written approval has been obtained from every person who, in the opinion of the consent authority, may be adversely affected by the granting of the resource consent unless, in the authority's opinion, it is unreasonable in the circumstances to require the obtaining of every such approval.
>
> …
>
> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and-
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[13] This Court has observed in *Bayley v Manukau City Council* [1999] 1 NZLR 568, 575:

> There is a policy evident upon a reading of Part VI of the Act, dealing with the grant of resource consents, that the process is to be public and participatory. Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power and in the interpretation of the section, however, the general policy must be observed. Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.

[14] In argument before us Mr Farmer QC, for the appellant, drew attention to the very recent decision of the House of Lords in *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420, 430 which, in a rather different legislative setting, takes a broadly similar approach to the participation rights of the public, "however misguided or wrong-headed its views may be".

[15] A report dated 25 September 1997 from Mr Appleyard, an Assistant Planner, to Ms Janine Bell, the Council's Manager, Central Area Planning, who had delegated authority to make decisions under s94, recommended that the application be dealt with on a non-notified basis. Mr Appleyard referred to s94(1)(c) but, in making an assessment of the proposal, spoke in an apparently more general way of the purposes of s94 and expressed the view, which is obviously referable to the words of subs(2), that "the adverse effect on the environment of the proposal will be not more than minor". His assessment included the car parking situation. He concluded that no person would be adversely affected and that no written approvals were necessary.

[16] Ms Bell endorsed on this report her decision that the application was to be dealt with on a non-notified basis "for the reasons given".

[17] The application was considered at a meeting of the Planning Fixtures Sub-Committee on 1 October and it was resolved:

> THAT THE APPLICATION TO ERECT EITHER OPTION 1, 224 APARTMENTS OR OPTION 2, 242 APARTMENTS AT 86-100 THE STRAND BE CONSENTED TO UNDER SECTIONS 104 AND 105 OF THE RESOURCE MANAGEMENT ACT 1991 ON THE GROUNDS THAT THE ACTIVITY WITH APPROPRIATE CONDITIONS OF CONSENT WILL HAVE NO ADVERSE EFFECT ON THE AMENITIES OF THE NEIGHBOURHOOD.
>
> THIS CONSENT SHALL BE SUBJECT TO THE FOLLOWING CONDITIONS PURSUANT TO S108 OF THE RESOURCE MANAGEMENT ACT 1991
>
> (A) THE DEVELOPMENT SHALL BE IN ACCORDANCE WITH THE INFORMATION AND PLANS SUBMITTED BY PLANNING NETWORK SERVICES, DRAWN BY PATTERSON, REGISTERED ARCHITECTS, AUGUST 1997, EXCEPT WHERE AMENDED BY CONDITIONS OF CONSENT.
>
> …

There followed reference to plan numbers and several pages of further conditions, including some relating to car parking, and advice notes.

[18] It was submitted in the High Court that, in accordance with what was said in *Bayley*, the Council had erred in failing to treat the whole application as a discretionary activity. Randerson J rejected that argument. He said that there were

no grounds for interfering with the view of Council's officer that the stacked parking proposal would comply with the criteria in the relevant rule and that no person would be adversely affected by the granting of the resource consent in that respect. The parking arrangements would have "no off-site effects". Even if the discretionary activity application were refused, the Judge said,

> …the evidence is that, at worst, one of the residential apartment levels would have been converted to provide additional complying parking. There would be no effect on the size, shape, or location of the building on the site and it could not be said that consideration of the parking issue would affect the outcome of the controlled activity consent for the building as a whole.

[19] Secondly, the Judge said, the plan did not permit the Council to require material changes to the form of the building, which complied with development controls for the site, and that it could not in this case require alteration of the shape or height of the building or dictate a materially different location on the site. He noted that the appellant's concern was with the height and bulk of the building, not its location on the site. "The Council had no power to prevent STC taking advantage of the development rights afforded for the site by the [Operative] Plan". Therefore, the Judge concluded, the Council was entitled to consider separately each of the two resource consents. Because the Council had no power to impose a condition about the height or bulk of the building or materially affecting its location, any adverse effects on the persons represented by the appellant could not have been addressed if the application had been notified. No purpose would have been served by requiring notification. Although the report did not refer explicitly to s94(2), the Judge said that it in fact addressed the matters which the Council was required to address under that provision.

[20] The appellant made essentially the same arguments in this Court. We agree with the Judge that in substance the Council's officer did address s94(2). We are not persuaded that Ms Bell failed to give consideration to the possibility of adverse effects on the environment. The report she endorsed did so, and said that they would not be more than minor, which was a clear reference to s94(2)(a). There was ample basis for the Council to reach the view that the car parking arrangements would not give rise to any adverse effects beyond the site.

[21] Mr Farmer also repeated the argument made to Randerson J that, in accordance with *Bayley*, the whole proposal should have been assessed for notification purposes as a discretionary activity. In *Bayley* it was said at p580:

> Section 94(1)(b) and the provisions of the council's proposed plan permit non-notification of such an application without written approval of affected persons but do not require the council to dispense with notification. (It "need not be notified".) Such a course may be inappropriate where another form of consent is also being sought or is necessary. *The effects to be considered in relation to each application may be quite distinct.* But more often it is likely that the matters requiring consideration under multiple land use consent applications in respect of the same development will overlap. The consent authority should direct its mind to this question and, *where there is an overlap*, should decline to dispense with notification of one application unless it is appropriate to do so with all of them. To do otherwise would be for the authority to fail to look at a proposal in the round, considering at the one time all the matters which it ought to consider, and instead to split it artificially into pieces. [Emphasis added]

[22] The answer to Mr Farmer's submission lies in the words which have been emphasised. The effects of the car parking in this case were distinct in the sense that, unlike the staircases and decks in *Bayley*, the arrangements proposed for it had no consequential or flow-on effects on the matters being considered under the controlled activity application, as Randerson J noted in the passage from his judgment quoted above (in para [18]). There was in this case no overlap and therefore no need for an holistic approach.

[23] The appeal relating to the Council's decision not to require notification of the original resource consent application must therefore be unsuccessful. In this Court there has been no challenge to its substantive decision to grant that consent.

The variation application

[24] STC began marketing apartments in its single tower block. But from early December 1997 it was facing a potential challenge to the granting of the resource consent from Ports of Auckland Ltd (POAL) which was worried that future residents in the apartments might be affected by activities at its nearby port (particularly, the noise those activities might make) and could seek legal restraint of those activities. STC gave POAL certain temporary undertakings, extending to February 1998, and

thereafter seems to have put its development on hold pending resolution of the dispute. It also pursued the possibility of selling or leasing the site or using its building for an hotel. Lengthy negotiations were unsuccessful until POAL issued proceedings in June 1998. That brought matters to a head and the next month a settlement agreement was entered into. This required STC to change its plans to include non-opening acoustic glazing on the exterior of the building, which in turn necessitated installation of air-conditioning for all areas which would be inhabited. It was agreed that a Land Information Memorandum would be registered on titles to the apartments so as to preclude purchasers from objecting to POAL's port activities.

[25] By October 1998 the twin tower building design was in contemplation. STC told its architects that it had been unable to achieve "the agreed sales threshold of 75% of apartments in the original scheme," and therefore it had decided not to proceed with the development as a whole. On 27 November 1998 the application to vary the resource consent was lodged in reliance on s127 of the RMA:

> **127 Change or cancellation of consent condition on application by consent holder-**
>
> (1) The holder of a resource consent may apply to the consent authority for the change or cancellation of any condition of that consent (other than any condition as to the duration of the consent)-
>
> (a) At any time specified for that purpose in the consent; or
>
> (b) Whether or not the consent allows the holder to do so, at any time on the grounds that a change in circumstances has caused the condition to become inappropriate or unnecessary.
>
> …
>
> (3) Sections 88 to 121 shall apply, with all necessary modifications, to any application under subsection (1) as if the application were for a resource consent, except that section 93 (notification of applications) shall not apply if the consent authority is satisfied-
>
> (a) That either-
>
> (i) The adverse effect (other than any effect on any person whose written approval has been obtained in accordance with paragraph (b)) of the activity after any change or cancellation of the condition will continue to be minor; or
>
> (ii) The degree of adverse effect (other than any effect on any person whose written approval has been obtained in accordance with

paragraph (b)) of the activity is likely to be unchanged or decreased as a result of any such change or cancellation; and

(4) The exception in subsection (3) applies whether or not-

(a) Notification is required by a plan or proposed plan; or

(b) The application relates to a resource consent in respect of a controlled, discretionary, or non-complying activity.

[26] The s127 application sought to:

> …change Consent Condition A stipulating that the development proceed in accordance with the information and plans submitted by Planning Network Services Limited and Patterson Partners Architects Limited. The amended plans involve the construction of two apartment towers on a common podium within the building profile of the approved development on the same site. The amended plans incorporate a total of 112 residential units and an associated 182 car parking spaces, tennis court and swimming pool, health gymnasium centre and extensive landscaping.

[27] The application stated:

> …the current proposal is not materially different in character from the original development and requiring the development to proceed generally in accordance with the original plans is inappropriate given the changed circumstances.

[28] It was proposed that:

> …Consent Condition A of the existing consent be amended to read as follows:
>
> (A) The development shall be in accordance with the information and plans submitted by Planning Network Services, drawn by Patterson, Registered Architects, November 1998, except where amended by conditions of consent.
>
> The relevant plans are dated November 1998 and referenced by Council as:
>
> PO/97/00131-2, November 1998, Sheets D.00 to D.07.

[29] The application was the subject of a report by Council's consultant, Mr Wren, dated 18 January 1999. The report noted that the proposal was "contained entirely within the envelope of the previous building apart from the fact that there

will be now two lift wells and two spires which the applicant advises are optional". (No point was pursued on appeal about these features.) The assessment concentrated on the car parking arrangements, noting that the Operative Plan required 229 spaces, but only 182 were proposed to be provided. However, the Proposed Plan allowed a maximum of one car park per residential unit. (Obviously there was here a situation of unavoidable tension between the two plans, which the Council would have to resolve.)

[30] The Council's Manager Transportation Services had advised that 80 spaces, including all stacked spaces, should be removed so as to comply with the Proposed Plan. Mr Wren was of the view, however, that the provisions of the Proposed Plan "do not effectively apply to this application which relates to a consent granted under the [Operative] Plan". The conclusions of the Manager Transportation Services were however "useful for making a judgement about whether allowing a lessor [sic] number of car parks than required by the [Operative] Plan is appropriate in this case".

[31] Addressing the statutory need for a change of circumstances (s127(1)(b)), the report said:

> The applicant states in the application that the change of circumstances requiring the change of condition relates to the litigation that has taken place between the applicant and the Ports of Auckland Ltd (POAL) concerning noise mitigation measures on the proposed building. The applicant states that the settlement reached with the POAL has meant a design review has had to take place.
>
> The applicant has also stated that the design delays experienced as a result of the litigation have delayed the project and the market has shifted to a different type of apartment.
>
> It is considered that the litigation and subsequent re-design of the building to cater for the requirements of the POAL have resulted in a legitimate change of circumstance. This change has meant that a smaller building is now appropriate in the eyes of the applicant and a condition requiring a larger building is no longer appropriate.

[32] Mr Wren considered that, as the building was now significantly smaller, the effects would also be reduced. He referred to the lesser amount of traffic and the reduction in the "visual extent of the buildings…from some viewpoints especially from The Strand".

[33] POAL had consented to the variation. In view of this, and because the proposed building was smaller and no-one would be adversely affected by the change of condition, it was considered that the application could be dealt with on a non-notified basis. Ms Bell endorsed her approval on the report.

[34] On 26 January 1999, the Planning Fixtures Sub-Committee approved the change of condition subject to the removal of two car parks. All other conditions (which included the expiry date of 1 October 1999) were to continue to apply.

[35] The appellant submitted, both in the High Court and in this Court, that the twin tower proposal should not have been dealt with under s127, saying that

[a] the new plans were for an entirely different building or buildings and represented a new development which required a fresh application under s88, notified under s93;

[b] there had been no "change of circumstances" and the building originally proposed had not become "inappropriate or unnecessary" in terms of s127; and

[c] the Council had failed to have regard to the Proposed Plan as required by the importation into s127(3) of s104, and particularly s104(1)(e), which requires that in considering an application the consent authority must have regard to any relevant objectives, policies, rules, or other provisions of a plan *or proposed plan*.

[36] In his judgment Randerson J said that whether an application is truly one for a variation or in reality seeks consent to an activity which is materially different in nature is a question of fact and degree to be determined in the circumstances of the case. Relevant considerations include a comparison between the activity for which the consent was originally granted and the nature of the activity if the variation were approved. The terms of the resource consent were to be considered as a whole. Artificial distinctions should not be drawn between the activity consented to and the conditions of consent. "The scope of the activity is not defined solely by the introductory language of the consent but is also delineated by the conditions which follow". From none of this did we understand counsel for the appellant to dissent.

[37] Randerson J said that the consent authority should compare any differences in the adverse effects likely to follow from the varied purpose with those associated with the activity in its original form. Where there was a fundamentally different activity or one having materially different adverse effects a consent authority "may decide the better course is to treat the application as a new application", particularly where it is sought to expand or extend an activity with consequential increase in adverse effects. Here the number of apartments was reducing and they would be located entirely within the profile of the original building. Adverse effects would remain but would be less. The Judge could see no grounds for review of the Council's decision to proceed under s127.

[38] Randerson J said that s127(3) creates a separate regime for dispensing with notification of variation applications which excludes s94. It was, he said, the effects of the change, not of the activity itself, which are relevant:

> The appropriate comparison is between any adverse effects which there may have been from the activity in its original form and any adverse effects which would arise from the proposal in its varied form. If the effects after variation would be no greater than before, then there is no requirement for written approvals to be obtained from persons who may be affected by the activity but not by the change to it.

[39] As it was accepted by the appellant that the adverse effects were less, STC was entitled to have the application treated as one not requiring public notification.

[40] The next argument addressed by the Judge was that the Council should have considered the Proposed Plan and its maximum height limit. However, he accepted the present respondents' argument that STC was already authorised to construct the apartment building in the form originally approved and that s9 permitted it to use the land in that way notwithstanding that it contravened any operative or proposed plan. Section 9(1) reads:

> **9 Restrictions on use of land-**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is-
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or

(b) An existing use allowed by section 10 or section 10A.

[41] The Judge observed that a land use consent is of unlimited duration unless a specific term is specified in the consent (s123(b)). Section 9(1) protects the consent holder, who is permitted to continue to exercise the rights expressly allowed by the resource consent notwithstanding any subsequent plan changes. Therefore on a s127 application the starting point is the existence of the present right defined by the resource consent which it is sought to vary. In the Judge's view

> …the legislature could not have intended that a subsequent plan provision could be used to cut down the right preserved by s9 to continue to use the land in the manner authorised by the original consent. Where the variation sought may properly be considered as falling within the scope of the original grant, the consent authority has no power to apply the proposed plan in a way which would limit the consent holder's ability to exercise the right in the terms originally granted.

[42] Randerson J was satisfied that the variation application did not take the proposal beyond the scope of the activity for which the consent was originally granted and that the Council was not entitled to apply the provisions of the Proposed Plan in a way which would restrict the exercise of the rights originally granted.

[43] The Judge was also of the view that the Council was entitled to consider that there had been a change in circumstances making the condition inappropriate or unnecessary. The dispute with POAL had led to a delay during which time changes in the market led to STC's conclusion that the proposal in its original form was not viable. The larger building was therefore no longer appropriate. It followed that a condition which required conformity with the plans for the larger building was no longer necessary or appropriate.

[44] We are not persuaded by the appellant's arguments that the Council could not approve a variation under s127 in this case. A resource consent is granted in respect of an "activity". This term is not defined in the Act but in *Bayley* (at p570) this Court said that in general it appears to have the same meaning as "use". A condition in relation to a resource consent includes a term, standard, restriction and prohibition (s2). A condition is thus a qualification to a consent to a particular use.

[45] Section 127 permits an alteration to a condition but not an alteration to an activity. The question of what is an activity and what is a condition may not be clear cut and will often, as the Judge recognised, be a matter of fact and degree. In differentiating between them the consent authority need not give a literal reading to the particular wording of the original consent. Mr Brabant pointed out to the Court that the exact wording may, as in this case, have been supplied by a planner who is not a lawyer and who has not really addressed the distinction.

[46] It is preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity, rather than simply asking whether the character of the activity would be changed by the variation. An activity may have been approved at a relatively high level of generality which, subject to stipulated conditions, may be capable of being conducted in different ways. Take, for example, the restaurant in *Warbrick v Whakatane District Council* [1995] NZRMA 303. It seems to us that the activity was the carrying on of a restaurant. The restriction on the hours of opening was simply a condition imposed by the terms of the consent upon the conduct of the activity. Thus the approach taken in *Warbrick* was, it seems to us, in error, although it may well have been that the result was justified because of the adverse effects of varying the opening hours.

[47] To return to the present case, an activity to occur within a building is the use which is to be made of it and should be distinguished from the structure or fabric of the building itself. The building does, however, define the place where the activity will occur and the manner in which it may occur (in the present instance in separate apartments).

[48] The approved activity in this case consisted of the use of a defined space (the original building envelope) for residential occupation in separate units or apartments. The exact shape and dimension of the units in which that activity could be carried on, including their number, was delimited by the conditions attaching to the approval of the activity. A change, for example, in the number of apartments is therefore merely a change to the conditions, so long as those apartments are to be constructed within the same overall space or envelope as was delineated by the original building plans. Accordingly the changes proposed in this case were changes to conditions

within s127 notwithstanding that a different (twin tower) building emerged. This did not of course mean that the applicant was free to seek under that section any necessary approval to re-position the building on the site or to change its use to something other than residential apartments. That would have involved a change in the activity, in the former example as to such part of the site as was not approved by the original consent for the locating of the single tower building. But within the building envelope changes could be made to the features and dimensions of the building and its component parts – apartments, parking spaces and common areas – including the creation of separate structures (if indeed the twin towers are to be viewed as such).

[49] Mr Farmer submitted that this could not be a mere variation because further discretionary consents were incidentally required under the Operative Plan relating to vehicular use and car parking – Randerson J had held that the application for the variation had to be taken to have embraced all necessary consents, which could be taken to have been implicitly granted. Counsel argued that this was contrary to s9(1)(a) which protects only such activities as are *expressly* allowed by a resource consent.

[50] We reject this argument. The exact form of an application is not determinative although it must suffice to put before the consent authority the matters which it is required to consider and decisions must be made on them. An application can include incidental matters which may technically require separate consents. The consents given will be valid notwithstanding deficiencies in the form of the application, provided that appropriate procedures are followed, including notification where necessary, and the substance of the matter is properly considered. It is undesirable that the law relating to resource consent applications should descend unnecessarily into procedural technicalities. Substance is to be preferred to form (*Sutton v Moule* (1992) 2 NZRMA 41, 47).

[51] It is plain that the Council Officer had regard to the parking situation which had already been considered when the original consent was given. The reality was that what was sought in this respect was a variation of the car parking conditions. There was seen to be a need to strike a balance between the Operative and Proposed Plans, and obviously, as there had been no off-site adverse effects detected in

relation to the original proposal's car parking arrangements, there was going to be none from the overall reduction in apartments and car parks. The Council rightly saw no need for notification of the application so far as it related to car parking and appreciated the need to strike a balance between the conflicting requirements of the two plans. Other things being equal, it would be ridiculous to set aside the variation consent on the basis of the technicality that there should have been separate applications. Where the subject matter was dealt with when the original application was considered and is incidental to the subject of the variation, the Council can properly deal with it under s127.

[52] In his submissions in this Court, Mr Farmer did not appear to dispute the Council's assessment that, as against the Operative Plan, the adverse effect of the activity after the proposed change of condition (i.e. to the dimensions of the building) would continue to be minor and that the degree of adverse effect was likely to be unchanged or, as the Council found, reduced. What was contended was that a comparison had also to be made, as required by s104(1)(d), with the Proposed Plan. It was said that the original consent does not protect the consent holder if it elects to seek a variation of a condition, no matter how minor it may be. Counsel went so far as to suggest that the protection is not available even in circumstances where the adverse effect of the original (consented) proposal is diminished. Mr Farmer said that even if the height of the building had been reduced to something less than 30 metres but more than 15 metres, the original consent would provide no protection in terms of s9(1). It is wrong, said counsel, to compare the adverse effects which would be present if a variation were to be granted and implemented against those which would exist if the unexercised original consent were to be exercised; the proper comparison being said to be with those effects which would occur from activities which can be carried on as of right.

[53] Again, we do not agree. Sections 88 to 121 apply to applications under s127(1), but "with all necessary modifications" (subs(3)). Without such modifications there would be little utility in s127 where, during the period allowed by a resource consent for its implementation, the planning context had changed. The section itself does not indicate any such limitation. A consent holder whose plans had changed might as well begin again and make a fresh application under s88 if the existence of the original consent provided no protection against a more restrictive

approach taken or foreshadowed by a new plan or proposed plan. We are satisfied that the protection afforded by s9(1)(a) to a resource consent is intended to extend to an applicant under s127 and that, unless there is also an extension sought for the period of implementation, effects of a variation of condition are to be considered only to the extent that they differ from those which have been taken into account in the granting of the original consent. Regard to a Proposed Plan is therefore required only to the extent that the variation would have an adverse impact upon its objectives etc. The proper comparison under subs(3) of adverse effects is between those which might occur if development proceeded pursuant to the original consent and those which may occur as a result of the variation. In the present case the Council was properly able to consider that there would be no greater impact on the Proposed Plan. Indeed, there would be a reduction in the effect upon that plan of an implementation occurring during the original two year period.

[54] The remaining matter relating to the s127 application is the appellant's argument that there had not been any "change in circumstances" causing a condition (compliance with the original building plans) to become "inappropriate or unnecessary". Mr Farmer submitted that the POAL litigation did not cause the building plans to become inappropriate or unnecessary. That is certainly correct, but the circumstance in question was not the litigation or the settlement which brought it to an end, but the change in market conditions which occurred during the period of delay caused by the litigation. That, it seems to us, is the justification which STC, a little clumsily, put to the Council and which the Council accepted. Mr Farmer recognised this, but said that the Council was wrong to rely upon STC's subjective belief that market conditions had changed; and that a change in market conditions is, in any event, not a "circumstance" for the purposes of s127 because it has nothing to do with the amenities or the environment, to which s104(1)(a) directs attention – there must be a nexus, counsel said, between the *planning* reasons for which the condition was originally imposed and the change in circumstances.

[55] We can, like the Judge, find nothing in s127 which compels such a restrictive interpretation of relevant circumstances. The requirement that the Council must have regard to the matters listed in s104 does not limit the matters which may be taken into account, as s104(1)(i) itself demonstrates ("Any other matters the consent authority considers relevant and reasonably necessary to determine the application").

If such a restriction had been intended one would have expected s124 to say so directly. "Circumstances" is a word which encompasses all relevant matters and causes making a condition inappropriate or unnecessary. If the market for a particular kind of apartment has diminished, that is capable of being a "change of circumstances". "Inappropriate" does not mean merely "inappropriate in planning terms".

[56] STC asserted to the Council that there had been a change in market conditions. It has not, even now, been suggested for the Body Corporate that STC was wrong in that assessment. Therefore no basis has been provided for the argument that there was in fact no change in circumstances. Whilst it might have been preferable for the Council to require further evidence concerning the market, there is no reason to consider that its failure to do so led it to grant a variation consent without the requisite factual basis for the operation of the section being present.

[57] The appeal in relation to the variation consent also fails.

Extension

[58] Section 125(1) provides:

> **125 Lapsing of consent-**
>
> (1) Subject to sections 357 and 358, a resource consent lapses on the expiry of 2 years after the date of commencement of the consent, or after the expiry of such shorter or longer period as is expressly provided for in the consent, unless-
>
> (a) The consent is given effect to before the end of that period; or
>
> (b) Upon an application made up to 3 months after the expiry of that period (or such longer period as the consent authority may fix in accordance with section 37), the consent authority fixes a longer period upon being satisfied that-
>
> (i) Substantial progress or effort has been made towards giving effect to the consent and is continuing to be made; and
>
> (ii) The applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the

> authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval; and
>
> (iii) The effect of the extension on the policies and objectives of any plan is minor.

[59] It will be observed that the section does not provide for any notification of an application for an extension.

[60] Some two weeks after receiving the variation consent STC's planning consultant, Planning Network Services Ltd, wrote to the Council reminding it of the duration of the resource consent and saying that it had been an oversight that an extension had not been sought along with the variation. It asked for a three year extension. The Council replied requiring a more formal application which was made on 11 February 1999. That application referred to the delay resulting from the POAL dispute and to the change in market conditions. It said that since the variation consent had been received STC had been actively marketing the development and had begun to mark out the site and buildings. The 1 October expiry date was clearly "insufficient time within which to make substantial progress towards giving effect to the consent". A 2½ year extension was sought:

> The settlement with the POAL and the fact that the applicant began extensively marketing the development the day after the variation was approved demonstrates that there has been continuous and substantial effort on the part of the applicant to progress this project. It is unfortunate that an extension to the timeframe was not sought at the same time the application for the variation was lodged and also that the expiry date was not highlighted at the time of Council processing that application. Despite this, the circumstances do not reflect any lack of effort or integrity on the part of the applicant and it would seem reasonable for Council to exercise its discretion in favour of the applicant in this matter.

[61] Later in the application, after a submission that the effect of the extension on the policies and objectives of the Operative Plan was no more than minor, it was said that STC's development plans had not been assessed under the Proposed Plan because it "had not been publicly notified when the original consent was lodged/approved" and it was "therefore not relevant to this proposal". But the Council nevertheless sought an assessment against the Proposed Plan, which STC provided.

[62] A report on the application was made by Ms Borich, a Senior Planner. On the question of whether there had been substantial progress or effort towards giving effect to the consent she commented that it was "generally accepted that while little or no construction may have been carried out on the site, as long as the consent holder has been doing their best efforts to get the work completed this can be taken into account". The settlement with POAL demonstrated that best efforts had been made. The "extensive marketing" of the project following that settlement made it evident that substantial effort or progress was continuing to be made. Ms Borich noted that the extension would not lengthen the period of construction, only delaying its timing. The additional 2½ years seemed to her a reasonable period of time within which to undertake the project and to give the neighbours some certainty about time-frames. She expressed the view that there were no "other persons" who would be affected by the granting of the time extension. As she had earlier referred to POAL and to parties involved in other construction projects in the vicinity of the site, as well as to neighbours, she seems to have been saying that no-one would be adversely affected.

[63] Ms Borich then turned to the question of the effect of the time extension on the policies and objectives in any plan (subs(1)(b)(iii)). She said that the proposal was not contrary to those of the Operative Plan. She then examined it in relation to the Proposed Plan, referring to several of its objectives and policies. With apparent awareness that s125 does not directly require measurement of the effect of the extension on any rule of a plan and that the height restriction is to be imposed by a rule of the Proposed Plan, Ms Borich observed that the method for achieving the policies in that plan is generally by applying building height and floor area ratio restrictions and requiring resource consent applications to be assessed against design guidelines. She then assessed the effect on the Proposed Plan in the following way:

> The applicant states in the application that the development includes extensive areas of landscaping and amenity within the site and a high standard of architectural design of the buildings themselves. The proposal is located some distance from the railway station building. The building complies with the special height control for the Museum and is located outside the control for the Dilworth Terrace houses. A comparison between the provisions of the Operative District Plan shows that it allowed buildings up to 30 metres in height which were also subject to a height in relation to boundary control, and a floor area ratio control. The proposal achieves a height of 30m. The

> Proposed District Plan has a 15m height limit and a maximum floor area ration of 2.5:1. The Proposed District Plan parking provisions differ from the Operative District Plan for this area. The Proposed Plan provides for a maximum of one carpark per residential unit. The proposal incorporates 182 carparking spaces for 112 units. The proposal does not comply with the height and parking provisions of the Proposed District Plan. As these provisions are subject to submissions which have yet to be heard, greater weight should be given at this stage to the provisions of the Operative District Plan which the original proposal was assessed against. Given this I consider that the effect of the time extension would be no more than minor on the policies and objectives of the Transitional and the Proposed District Plans.

[64] Ms Bell endorsed her approval on the report. There was a hearing on 12 May 1999 before three councillors appointed as Planning Commissioners. STC's consultant planner, Mr Warren, made submissions in which he said that work towards construction was progressing at pace but that it had been thought prudent to seek an extension at that time rather than wait until the consent expired.

[65] The same day the Commissioners resolved to approve the application, repeating as one of the grounds for doing so one of the recommendations in the report prepared by Ms Borich:

> Given the statutory infancy of the Proposed Plan whose parking and height provisions for this site are subject to submissions which have yet to be heard greater weight should be given at this stage to the provisions of the Operative District Plan for which the effect of the time extension would be no more than minor and does not cast doubt over the policies and objectives of the Proposed District Plan.

[66] In the High Court Randerson J heard a submission that STC had misrepresented its position to the Council but he concluded that the Council was in fact aware of all the factors, any misinformation having been corrected in Mr Warren's evidence to the Commissioners. He accepted STC's submission that the Commissioners were not misled either about the proportion of the apartments in the development that had been sold to that time or about the position relating to construction. The Judge said that Mr Warren's evidence had been supported by affidavit evidence before him demonstrating that at 12 May 1999 the company had sold 64% of Stage One of the development based on value or 73% of the total number of units available in that Stage (one of the twin towers). By that date, the

Judge said, STC had sold 41 units for a total value of over $12.5 million. Mr Warren's evidence had made it clear that construction contracts had still to be let.

[67] In our view Randerson J was correct in addressing the issue of alleged misrepresentation by STC to the Council as a factual matter. Having considered the evidence and the appellant's submissions on this point, we agree with the Judge that the Council does not appear to have been misled as to the facts in any material respect.

[68] The Judge held that under s125 it is not necessary to show that there has been continuous progress or effort. While continuity is required, there may be reasonable interruptions which do not break the overall picture of continuing towards the end in view. While no physical progress on site had been made, the Council was entitled to take into account the threat of proceedings which had effectively prevented STC from continuing with the development until the risk of litigation with the port company was removed. The evidence showed that there had been a change in market demand which caused STC to review the position and explore other possible uses of the site until it had concluded by the end of September 1998 that the apartment building in its original form could not realistically proceed due to lack of demand. Shortly afterwards, said the Judge, the plans were redrawn and the variation application was lodged.

[69] Randerson J said that the Council was entitled to take into account the practical and economic realities of constructing and completing a major development of this type, including fluctuations in market demand and the need to raise finance. A minimum level of sales was required before finance could be obtained and construction contracts could be let. In these circumstances the Council was entitled to treat the preparation of plans and the marketing of the apartments as progress or effort towards giving effect to the consent. It was significant that at the date the application for extension was considered STC had spent over $600,000 on the project (other than land cost) and had achieved the level of sales mentioned. The Judge also referred to the new marketing campaign after the variation was approved, which had achieved an average of $1m in sales per month. He considered too that the Council was entitled to treat the variation application as a step towards the implementation of the consent originally granted. Bearing in mind the scale of the

project, the funding method adopted, the progress actually made and all the relevant circumstances, Randerson J was satisfied that the Council could reasonably have concluded that substantial progress or effort had been made towards implementing the consent and was continuing to be made.

[70] Again, we agree with Randerson J that, for the reasons he gave, it was open to the Council to conclude that there had been substantial effort, and, more than that, arguably some substantial progress – in achieving sales off the plans - directed towards giving effect to the consent (as varied). We adopt the approach to s125(1)(b)(i) of Morris J in *Goldfinch v Auckland City Council* [1997] NZRMA 117, 125. The Council could properly take the view that there was not the kind of break in continuity which was one of the fatal problems for the developer in *GUS Properties Ltd v Blenheim Borough Council* (Supreme Court, Christchurch Registry, M394/75, 24 May 1976, Casey J). A lack of substantial "progress" is also no longer of the same significance now that substantial "effort" can be enough, provided it is directed to the end of giving effect to the consent.

[71] The Council's view on the matters to be considered under s125(1)(b)(i) was one which it could rationally take. STC's effort to avert litigation with POAL was an endeavour to advance the implementation of the resource consent it held. So was the application to vary the condition of that consent in light of market changes. So too were the marketing endeavours which had begun once the twin tower design had been decided upon. The sales levels in terms of percentage of apartments and prices were significant, even if confined to one tower.

[72] Turning to s125(1)(b)(ii), the Judge said that it is not concerned with the adverse effects of the activity itself but with the adverse effects of the extension of time to give effect to the activity authorised by the resource consent. The focus of the inquiry under s125 is, he said, upon the effects of the grant of the extension which include, in the case of a construction project, the effects of that construction taking place at a later time than originally envisaged. It was not submitted to him that the delay in the time of construction would have any adverse effect. The Judge accepted, however, that the effects of the extension are not confined to construction effects:

> For example, the extension sought may be such as to give rise to unacceptable uncertainty for those living or working in the vicinity or there may be changes to the physical environment or to activities in the vicinity since the grant of the original consent which require consideration when application is made under s125. Where such changes have occurred, a consent authority may be justified in concluding that the grant of the extension would adversely affect other persons. However, the focus of the inquiry still remains on the grant of the extension. Effects which would have occurred had the consent been given effect to within the statutory period of two years (or such other period as may be specified in the consent) are to be disregarded. An application for extension is not an opportunity to revisit the effects associated with the original grant except to the extent that they be necessary background to the effects of granting the extension.

[73] It had not been suggested that there had been any changes to the physical environment or the nature of activities in the area, nor did the length of the extension create unacceptable uncertainty. It had been submitted to the Judge that the Body Corporate would be adversely affected by the grant of the extension because, if it were not granted, then STC would either have to apply for a fresh consent (which would likely be notified) or not proceed with the activity. However, he said that while it was true that strategic advantage would accrue to the Body Corporate if the application were declined, the RMA was not concerned with that type of effect. It had not been shown to him that the Council erred in concluding that no persons would be adversely affected by the extension of time.

[74] We agree so completely with the Judge's views about what effects are to be taken into account under s125(1)(ii) that we do not find it necessary to prolong a lengthy judgment by restating them. An extension application is not an opportunity for the Council to consider again the adverse effects on neighbours and other persons of the activity for which it granted the resource consent. In relation to such persons it is confined to the adverse effects of the extension of the period for implementation of the consent. Here the Council could properly conclude that no person was adversely affected by that. Any strategic advantage to the Body Corporate was something the Council was not able to take into account.

[75] The final matter is the very important issue of the Council's approach to s125(1)(b)(iii), which requires the consent authority to be satisfied that the effect of the extension on the policies and objectives of any plan is minor.

[76] Subsection (1)(b)(iii) appears to have been enacted to give statutory confirmation of the philosophy found in the following passage from the Planning Tribunal's decision in *Katz v Auckland City Council* (1987) 12 NZTPA 211, 213:

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in the light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary. Sections 70 and 71 [now ss125 and 127] of the Act give legislative recognition and form to these matters of policy, which in the end do but recognise that planning looks to the future from an every-changing present.

[77] Thus, if permission is sought to extend the time limit for implementing a consent, s125 requires the Council to consider whether the planning situation has altered since the resource consent and, if so, whether, in the light of that changed situation, allowing the consent to be implemented after the expiry of the time limit will affect the policies and objectives of any plan. *Any* plan includes the plan in relation to which a consent was originally granted (unless it has already been replaced by a new Operative Plan). But the original plan is highly unlikely to be affected to any greater extent unless it has subsequently been amended. Therefore it must be the case that the concern of s125(1)(b)(iii) is with whether the grant of an extension will compromise the policies and objectives of a plan which has been so amended, or, as in the present case, those of a new plan which has been notified since the original consent.

[78] The new plan or amendment may necessitate an entirely new appraisal of the development, because what was considered appropriate in the former planning context may have thereby been rendered inappropriate. It is important for the Council to ensure that the granting of an extension while a Proposed Plan is under consideration does not pre-empt what the plan is proposed to achieve by undermining its objectives and policies before it has become operative. Although as

a result of the necessary process of public consultation those objectives and policies may be amended or even discarded altogether, it is meanwhile not to be assumed that this will occur.

[79] It follows therefore that when a consent authority comes to consider an extension application in circumstances where, since the original consent, a proposed plan or an amendment to an operative plan has been announced, it is not engaged in a weighting exercise as between outgoing and incoming plans (as it is under s104(1) where it may be appropriate to give decreasing weight to the outgoing plan as the process advances towards the moment when the proposed plan will become operative, or when s19 has operation in respect of a particular feature). In such circumstances, when an extension is sought the consent authority is required to assess all the features of a resource consent application against both operative and proposed plans.

[80] When the consent authority considers a variation application under s127 it does so on the basis that the decision made under s105 has already assessed the s104 considerations and has contemplated implementation within a period which has not expired. Therefore, as this judgment has already indicated, the assumptions underlying the original consent have not altered: it was intended that the consent could be implemented within the period despite the possibility of the arrival of a new plan. But, if consent is sought under s125 for implementation *after* the period contemplated by the consent, the position is quite different. It was not originally assumed that the developer would be able to proceed after that relatively limited period notwithstanding any change to the planning context. If the developer later seeks an extension it accordingly faces a renewed overall assessment of the effects of its proposal against a new plan (or an amendment to the plan in respect of which the consent was granted). That is not appropriately an exercise of weighing the proposed plan against the operative plan. The effect on the new plan must be considered independently, although some allowance can be made for uncertainties still surrounding it.

[81] Randerson J appeared to recognise this. He said:

> It is common ground that the Council was obliged to consider what impact the grant of the extension would have on the objectives and policies of the Proposed District Plan. This is a slightly different exercise from "having regard to" the provisions of a plan or proposed plan under s104(1)(d). The consent authority retains a discretion under that section as to the weight it will accord to a proposed plan in the circumstances of the case. However, under s125(1)(b)(ii), the consent authority must be "satisfied" that the effect of the grant of the extension on the policies and objectives of any plan (operative or proposed) is minor.

(The reference to (b)(ii) is an obvious error for (b)(iii)).

[82] He then rejected the argument that the Council was not obliged to consider the effect on the 15 metre height limit in the Proposed Plan, rightly saying that this was to take an unduly narrow view of s125(1)(b)(iii) because the rules in that plan are the means by which its objectives and policies are implemented and that, to the extent that the rules give substance to and define the objectives and policies, they ought to be considered.

[83] But where we respectfully part company from the Judge is in his conclusion that the Council properly considered this question. Having, as noted, distinguished the position from that under s104(1)(d) where account can legitimately be taken of the imminent disappearance of an operative plan, the Judge referred to Ms Borich's assessment that greater weight should be given to the Operative Plan. But he does not seem to have appreciated that in this respect Ms Borich was misdirecting herself, and therefore the Council when it relied upon her report, by according "greater weight" to the Operative Plan because of the "statutory infancy" of the Proposed Plan.

[84] For the reasons already given, we consider that in approaching s125(1)(b)(iii) in this way the Council erred in law. It should have addressed the effect of the extension on the policies and objectives of the Proposed Plan without comparing that plan with the Operative Plan. The developer was seeking to proceed with its development at a time beyond that originally fixed for implementation. In that situation the Council had to consider how the development might compromise the new plan. It was entitled to take into account the possibility that the policies and

objectives, and the height limit by which they were intended to be achieved, might not survive intact when the plan became operative, but it was not appropriate to give the Operative Plan greater weight and on that basis to say that the effect on the new plan was no more than minor. We agree with the submission of Mr Chisholm, who argued this part of the case for the appellant, that the assessment needed to be made independently of the Operative Plan, not by a process of weighting. Ms Borich's report reveals no identified basis on which any real weight was given to the Proposed Plan.

[85] We have therefore concluded that the Council's decision to extend the period for giving effect to the consent was not properly made. Mr Brabant accepted that, if this were the view of the Court, he could not say that relief should be withheld because of any delay by the Body Corporate after the extension was granted. It was unaware of the extension application and of the Council's decision under s125 until about two weeks before this proceeding was commenced. STC's cross-appeal therefore fails.

Result

[86] We allow the appeal in relation to the Council's decision to grant the s125 extension, grant judicial review of that decision and set it aside. It will be for STC to consider whether it will ask the Council to re-visit the application. In all other respects we dismiss the appeal. We also dismiss the cross-appeal.

[87] In circumstances in which the appellant has succeeded in part only, it is awarded costs of $2,000 against each respondent ($4,000 in total) together with its reasonable disbursements, including travel and accommodation costs of counsel, as fixed by the Registrar of this Court. The disbursements are to be borne equally by the respondents. Costs in the High Court are to be fixed in that Court in light of this judgment.

Solicitor
Kensington Swan, Auckland for Appellant
Simpson Grierson, Auckland for First Respondent
Martelli McKegg Wells and Cormack, Auckland for Second Respondent