IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2020-425-000002
[2020] NZHC 1647

BETWEEN	TRILANE INDUSTRIES LIMITED Applicant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Respondent
AND	NATURE PRESERVATION TRUSTEE LIMITED Second Respondent

Hearing: 22 June 2020

Appearances: M R Walker and B B Gresson for Applicant
A H Balme for First Respondent
J M G Leckie and A R C Hawkins for Second Respondent

Judgment: 10 July 2020

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 10 July 2020 at 11.00 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date: 10 July 2020

[1] The applicant, Trilane Industries Ltd (TIL), owns Whare Kea Lodge, a luxury visitor accommodation facility on the shores of Lake Wanaka. The second respondent, Nature Preservation Trustee Ltd (NPTL) owns a 7.6 hectare property adjacent to TIL's property, which also fronts the lake.

[2] NPTL applied, in 2018, to remove the existing 650 m² two-level, schist clad residential building which was constructed on the site in 1998, and erect, in its place, a new two-level residential building with a footprint of 1,166 m² along with an accessory building of 410 m². Although much larger, the new building is intended to be more sympathetic to the landscape with approximately 68 per cent of the proposed built form to be constructed below ground level to integrate it into the land.

[3] NTPL sought, and obtained, resource consent to undertake these works on a non-notified basis. TIL challenges the Council's decisions both on non-notification and on the grant of consent on the ground that the legal test for non-notification was not met. Consequently, TIL seeks the resource consent be set aside because the proposal should have been publicly notified and was not.

[4] Both the Council and NTPL oppose the application for judicial review saying there were no errors in the Council's notification decision.

Background

[5] Both TIL's and NTPL's properties are located on Wanaka-Mount Aspiring Road, approximately five kilometres from the Wanaka township. The land they occupy is zoned rural and is in an area classified as an outstanding natural landscape (ONL) in both the operative and proposed district plans of the Queenstown Lakes District Council (the Council). The area is described as having high aesthetic value and a moderate-high level of naturalness.

[6] To the north of both properties is the Millennium Track, a popular pedestrian and cycle way running along the edge of Lake Wanaka between Wanaka township and Glendhu Bay. Both properties look out to Ruby Island, a small undeveloped island, situated less than a kilometre from the shore.

[7] In August 2018 NTPL lodged an application with the Council for the construction of the new dwelling along with an accessory building, and to undertake associated earthworks and landscaping on NTPL's property. The earthworks are

extensive, requiring 22,500 m³ of cut which will be re-used across the site as fill, giving a total volume of earthworks of 45,000 m³ over an area of 32,000 m³.[1]

[8] The application required consent under both the Council's operative and proposed district plans. It was classified as a non-complying activity under the operative plan and a discretionary activity under the proposed plan.

[9] The application was advanced as implementing what NTPL describes as the "Sanctuary Project". The project has, as its overall goal, "enhancing the lakeside flora and fauna for existing and future generations" and, as part of that goal, it seeks to "reduce the visual impact on the landscape of the existing residential unit by replacing it with a more subservient built form architecturally designed to be sympathetic with the landscape". Accompanying the application was a landscape and visual assessment report prepared by Rough and Milne Landscape Architects, which took account of the extensive ecological planting which formed part of the proposal and concluded the proposed replacement dwelling would have a "negligible or neutral effect on landscape and visual amenity values".

[10] The Council engaged a registered landscape architect, Ms Helen Mellsop, to review the Rough and Milne landscape assessment. In her review, she was asked to address the following questions:

(a) whether the assessment methodology is appropriate and robust;

(b) whether the analysis and classification of the landscape context of the site is robust and corresponds to the landscape attributes and values;

(c) whether any key issues or considerations have been missed in the assessment;

(d) whether the assessment has correctly interpreted the nature and magnitude of visual and landscape effects; and

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1 Both plans allow only 1,000 m³ of earthworks as a permitted activity.

(e) whether the conclusions of the assessment are credible and justifiable.

[11] Ms Mellsop produced a report on 23 October 2018. In it she explained the terminology she would use to describe the magnitude of landscape and visual effects, saying she would use the terms "very high, high, moderate-high, moderate, low-moderate, low and very low". She explained that "[a]n effect which is determined to be low or very low could be considered to be less than minor in extent". She does not otherwise equate her terminology with the terms "minor" or "more than minor" used to describe a magnitude of effects in the RMA.

[12] Under the heading "Landscape Effects" she noted that the proposed development "replaces an existing dwelling on the site and is largely contained within an already domesticated part of the site". She accepted that the accessory building, which was set low within the land form and has a green roof, would have adverse effects which were "low in extent".

[13] In discussing the proposed earthworks she said they would "adversely affect the natural character and integrity of the landscape to a moderate extent … [but] … the effects would be adequately mitigated if the earthworks were minimised in extent, if fill on the ridge avoided existing schist outcrops, and if fill earthworks were shaped to mimic the natural landform and were revegetated".

[14] Under the heading "Visual Effects" she considered that the height, bulk and rectangular shape of the above ground portion of the dwelling, as well as the proposed colour of the wall cladding and potential reflection from the upper story windows, meant that the new dwelling "would be more prominent than the existing house". For this reason, "the magnitude of adverse effects on visual amenity from some of the viewpoints has been underestimated." Further on, she expressed the view that construction of the new dwelling including the associated earthworks. "… would result in a high level of adverse visual effect until the earthworks were grassed, particularly from closer viewpoints on the Millennium Track and the lake."

[15] She considered the finished development would be visible from the foreshore and would be visually prominent from the end of Ruby Island Road, from parts of the Millennium Track and from the lake (including Ruby Island) and would:

> detract from the naturalness, pleasantness and coherence of the views to a moderate (more distant viewpoints) to high degree (closer view points …). These effects would be greater than those of the existing dwelling.

[16] However, she considered that:

> [o]ver time the existing and proposed indigenous planting would enhance the naturalness of views to the site and mitigate adverse visual effects on users of the Millennium Track to a low or very low level. This is likely to take about 8 - 10 years if the planting on the site and around the track establishes and grows well. This is a reasonably long period of adverse effect.

[17] In response to Ms Mellsop's peer review assessment, NPTL produced an amended proposal. It reduced the extent of earthworks to retain identified schist outcrops, made changes to the design of the proposed dwelling, and increased mitigation planting on the subject site. That amended proposal was provided to the Council on 23 May 2019.

[18] The amended application was referred to Ms Mellsop for comment and she produced an addendum to her report on 27 May 2019. In it, she stated that while she still considered that the proposed development would be more visually prominent than the existing house on the site, "the increased visual effects are likely to be moderate in extent when the construction is completed and to reduce to a low level over time as the planting matures." She noted that stage one and stage two of the proposed indigenous planting was:

> …likely to have matured for 1 – 3 years before construction on any new dwelling commences and that this would reduce the time required for effective mitigation of adverse visual effects from close viewpoints on the Millennium Trail. The duration of adverse effects could be 5 – 7 years, rather than the 8 – 10 years indicated in my original review.

[19] In respect of the earthworks she noted that the substantial earthworks "would still adversely affect the natural character and integrity of the landscape to a moderate extent", but she considered the effects would be "adequately mitigated by the retention

of the schist outcrops and by remediation of finished cut and fill slopes through re-grassing and revegetation with grey shrubland species."

[20] On 2 July 2019, the Council made both its decision as to notification under s 95A and s 95B of the Resource Management Act 1991 (RMA), and its substantive decision to grant resource consent under s 104 RMA. In making its decision on whether the application needed to be publicly notified it acknowledged that a consent authority must publicly notify an application if it decides, in accordance with s 95D, that the proposed activity will have, or is likely to have, adverse effects on the environment that are more than minor.

[21] In carrying out that assessment it noted that Ms Mellsop had undertaken a peer review of the landscape assessment and updated that by providing a further memorandum following the amendments made to the application. The Council then said "Ms Mellsop's assessment is adopted for the purpose of this report, the findings of which are incorporated in the assessment below".

[22] In respect of the potential of the landscape to absorb the development, the decision records that completing stage one and stage two of the indigenous planting before construction on any new dwelling commences:

> …would reduce the time required for effective mitigation of adverse visual effects from close viewpoints on the Millennium Trail. Ms Mellsop considers the duration of adverse effects would be 5 – 7 years, ….

[23] Similarly, in respect of the proposed earthworks, it is recorded that:

> Ms Mellsop considers that, whilst this would adversely affect the natural character and integrity of the landscape to a moderate extent, the effects would be adequately mitigated by the retention of the schist outcrops and by remediation of finished cut and fill slopes through re-grassing and revegetation with grey shrubland species. Given the mitigation proposed, Ms Mellsop considers that 5 – 7 years after construction, these effects would be low.

[24] At the conclusion of that part of the assessment it was said "[e]ffects in this respect are therefore considered to be no more than minor". All other effects on the environment were considered to be minor or less than minor and so public notification

was not required. Consequently, the Council went on to consider, and then grant, the substantive consent under s 104 RMA.

Principles of judicial review

[25] This is an application for judicial review of the Council's decision. There is no dispute over the principles that apply. These were recently summarised by Whata J in *Ennor v Auckland Council*:[2]

> [30] It is necessary to reiterate that judicial review is not an opportunity to revisit the merits of a decision made by the Council to proceed on a non-notified basis or to grant a consent. As Harrison J stated in *Auckland Regional Council*:
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> > "The High Court does not exercise an appellate function on review. It is the decision-making process followed by the consent authority and its lawfulness, not the decision itself which is under consideration."
>
> [31] Thus, an applicant on review must identify an error of law, failure to have regard to a relevant consideration, regard to an irrelevancy or procedural unfairness …

[26] TIL says in this case that the Council erred in law, or failed to have regard to a relevant consideration, in that it did not apply the key test for public notification under the RMA, being that the activity will have or is likely to have adverse effects on the environment that are more than minor.[3] It says here, Council's own expert held there would be moderate adverse effects on landscape and visual amenity for a period of several years. It either ignored this evidence or erroneously treated it as a minor effect when determining not to publicly notify the application. The consent which subsequently was granted must therefore be set aside as a matter of law.[4]

TIL's submissions

[27] TIL says the Council made reviewable errors in its decision not to publicly notify the application under s 95A(8)(b) by:

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2 *Ennor v Auckland Council* [2018] NZHC 2598, [2019] NZRMA 150.
3 Resource Management Act 1991, s 95A(8)(b).
4 Section 104(3)(d).

(a) failing to properly assess the adverse landscape and visual effects of the proposal;

(b) misdirecting itself in law by misinterpreting s 95D of the RMA, and interpreting "minor" to be synonymous with "moderate", or alternatively

(c) misdirecting itself in law by failing to correctly apply the definition of "effect" under s 3 of the RMA in regard to the duration of effects and determining moderate (being more than minor) effects to be no more than minor if they eventually become low (minor); and

(d) misdirecting itself in law and taking into account irrelevant considerations, namely by placing undue reliance on mitigation measures when determining whether landscape and visual amenity effects would be more than minor.

[28] Mr Gresson points out that Ms Mellsop considered the adverse visual effects would be "moderate" for a period of five to seven years. He submits that "minor" and "moderate" are not synonymous. "Moderate" inherently means "middling", "average" or "medium". He says this is reflected in Ms Mellsop's seven point scale where moderate is in the middle of the scale. "Minor", on the other hand, means "small", "negligible" or "insignificant". This is confirmed in case law where it has been said that "minor" means:

(a) at the lower end of the scale of major, moderate and minor effect, but it must be something more than de minimis;[5]

(b) "… "petty", "comparatively unimportant", "relatively small or unimportant" …";[6]

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5 *King v Auckland City Council* [2000] NZRMA 145 (HC) at [29].
6 *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 at [54].

[29] The Council's interpretation of Ms Mellsop's evidence is, in Mr Gresson's submission, a reviewable error, as if it had correctly understood "moderate" to mean "more than minor", this would have led to public notification of the application.

[30] Alternatively, if the Council did not treat the word "moderate" and "minor" as synonymous, it erred in finding the "moderate" landscape effects were "minor" on the basis that, over time, they would become "low". This is because the Council determined that moderate adverse effects on landscape and visual amenity would only last until the effects were mitigated by the proposed revegetation and would therefore be minor.

[31] Section 3 of the RMA defines "effect" as:[7]

> (a) any positive or adverse effect; and
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> (b) any *temporary or permanent* effect; and
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> (c) any past, present or future effect; and
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> (d) any cumulative effect which arises over time or in combination with other effects
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> regardless of the scale, intensity, duration or frequency of the effect, and also includes–
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> (e) any potential effect of high probability; and
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> (f) any potential effect of low probability which has a high potential impact.

[32] Mr Gresson points out the definition of "effect" under s 3(b) includes any effect, irrespective of its duration. While it might be relevant to consider the duration of effects when making an overall assessment under s 104, it is not appropriate to do so when forming a view as to whether such effects are moderate or minor for the purpose of a notification decision under s 95. By way of example, Gordon J held in *Kawau Island Action Inc Society v Auckland Council*, "an effect is not necessarily minor because it is temporary or for limited duration".[8] The failure, in that case, to take account of temporary effects of helicopter noise was held to be an error of law.

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7 Emphasis added.

8 *Kawau Island Action Inc Society v Auckland Council* [2018] NZHC 3306, (2018) 20 ELRNZ 848 at [143]

[33] Mr Gresson also says the Council has relied on Ms Mellsop's opinion that "the adverse effects of the earthworks would be moderate initially but that these effects could be adequately mitigated" to reach its view on notification. However, he submits that Council's reliance on the efficacy of mitigation measures was an error of law and conflated the two distinct legal tests under s 95D and s 104 of the RMA. In doing so the Council has failed to take account of the principle articulated by the Court of Appeal in *Bayley v Manukau City Council*, where it was said:[9]

> …a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, [but] it is not to be undertaken when non-notification is being considered, save to the extent that the possibility of an adverse effect can be excluded because the presence of some countervailing factor eliminates any such concern, for example, extra noise being nullified by additional soundproofing.

[34] Here, the proposed mitigation measures would not exclude the moderate adverse visual effects of the proposal from the outset. It will take several years for the mitigation measures to be fully implemented, and the Council has incorrectly ignored the adverse effects that will be present in the interim.

[35] Given the above errors of law, the Council contravened s 104(3)(d) of the RMA by not notifying an application that should have been notified. The resulting consent ought now be set aside on review.

Submissions for the Council

[36] The Council does not accept that its assessment of the landscape and visual effects of the proposal was flawed in the ways alleged by TIL. It says that on receipt of Ms Mellsop's landscape assessments, and other information, the Council carried out an assessment of the proposal for the purpose of notification, applying the statutory test set out in the RMA. In its decision, the Council acknowledged the findings of Ms Mellsop and concluded:

> … that the landscape within which the application site sits has the potential to absorb development, providing the recommendations … with regard to earthworks and landscaping are adhered to. Effects in this respect are therefore considered to be no more than minor.

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9 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580.

[37] The Council also considered all other effects on landscape and visual amenity and reached the conclusion that the proposal was not likely to have adverse effects on these values that were more than minor. Miss Balme submitted this was an entirely orthodox and lawful assessment of the landscape and visual effects of the proposed activity on the environment.

[38] In respect of the alleged misinterpretation of the word "minor" in s 95D of the RMA, to be synonymous with "moderate", the Council says:

(a) it has correctly interpreted the meaning of the word "minor" in applying the statutory test for notification;

(b) it was open to Ms Mellsop to use any language that would usefully assist the Council's ultimate assessment, including whether the effects on the landscape and views would be anywhere on the seven point scale commonly used by landscape architects, but it was not for Ms Mellsop to make the statutory notification decision;

(c) Ms Mellsop's conclusion was that effects of the proposal on views would be low.

[39] The assessment of whether an effect is "minor", "less than minor" or "more than minor" is, in the Council's submission, a matter of fact and degree to be informed by context.[10] That is reinforced by the fact that case law definitions of what is "minor" often refer to a scale or comparator. For example, in *Progressive Enterprises Ltd v North Shore City Council*, Baragwanath J said:[11]

> "Minor" is not defined. The dictionary definitions of "minor" include "petty" and "comparatively unimportant" … "relatively small or unimportant … of little significance or consequence."

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10 *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC) at 445.
11 *Progressive Enterprises Ltd v North Shore City Council*, above n 6, at [54].

[40] Similarly, the High Court in *Gabler v Queenstown Lakes District Council* held that "less than minor" when making a limited notification assessment means:[12]

> That which is insignificant in its effect, in the overall context, that which is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons.

[41] In light of these authorities, the Council says that whether an effect is minor is informed by the nature of the proposal, the information available to a consent authority, and the context in which the consent authority is making its notification assessment.

[42] In addressing the allegation that Council wrongly equated Ms Mellsop's finding of a moderate effect, to being a minor effect, for the purpose of notification, the Council says it is important to note that she concluded that effects would be "low" and otherwise able to be mitigated. It also needs to be borne in mind that she was not being asked to express a view on notification and the statutory tests under the RMA. It is for the Council to apply the correct statutory test having regard to the experts' opinions.[13]

[43] In reaching its decision on notification, the Council considered:

(a) the context of the site which, while being within the outstanding natural landscape of the Mt Alpha range, is in a part which is more modified by rural living;

(b) the proposed dwelling is replacing an existing dwelling and is contained within an already domesticated part of the site;

(c) the nature of the dwelling, its components, and the elements of the site which will serve to make the building recessive in the surrounding environment;

(d) the potential for glare from some elements of the building;

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12 *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086 at [94].
13 See, at [90] and [95].

(e) the extent to which planting will mitigate the adverse effects of the proposal; and

(f) the degree of modification of the landform.

[44] Having considered all the above matters, the Council concluded that the landscape within which the building sits had the potential to absorb the proposal and that effects on views would be adequately mitigated over time. Consequently, effects were considered to be no more than minor.

[45] In terms of the allegation that the Council ignored temporary effects, the Council reiterates that it does not accept that the finding of a moderate effect by an expert automatically equates to a more than minor effect for the purpose of notification. It then submits that when assessing the effects of a proposal, it is tasked with carrying out an assessment at a point in time of an activity that will endure for perhaps many years. It must consider the broad range of effects encompassed by s 3 of the RMA and how they might change over time. Having considered all of those effects it must decide whether a proposal has effects on the environment that are more than minor and, here, it ultimately concluded that in the context of a number of relevant matters, the effects of the proposal were no more than minor and public notification was not required.

[46] Finally, it says it did not err in relying on the mitigation proposed. It is well established that conditions which mitigate effects can be taken account of when assessing the magnitude of effects for the purpose of notification.[14]

Submissions for NPTL

[47] NPTL emphasises that the Council must assess the effects of the proposed activity against the existing legal environment. In this case, NPTL's current dwelling is an existing activity carried out under existing consents. In its view, TIL has essentially ignored the current development on NPTL's property and proceeded as if

[14] Citing *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009 at [140] and *Montessori Pre-School Charitable Trust v Waikato District Council* [2007] NZRMA 55 (HC) at [12].

NPTL's application was for an entirely new dwelling on a vacant site. NPTL submits that it is not the role of the Court, on review, to choose between competing expert opinions, criticising the expert evidence of Mr Espie which is filed in support of the application and which considers the proposal will have adverse effects on landscape character and visual amenity to at least a moderate degree.

[48] In terms of Council's reliance on the proposed mitigation of adverse effects through planting, NPTL say it is well established that the determination of whether adverse effects of an activity on the environment be more than minor, is to be made after having regard to any mitigation of effects, for example, by way of consent conditions. NPTL therefore says it was entirely appropriate and lawful for the Council to take into account the proposed mitigation effects in reaching its conclusion as to the level of adverse landscape and visual effects of the replacement dwelling.

[49] In terms of the duration of the adverse effects of the replacement dwelling before those effects are reduced by native planting, NPTL submits that TIL has both factually overstated this issue and incorrectly applied the relevant legal principles.

[50] Here, Ms Mellsop's peer view confirmed the adverse visual and landscape effects of the replacement dwelling would reduce from moderate to low over a five to seven year period. Thus, there will be a transitioned reduction in adverse effects from the "moderate" towards the "low" and, as some of the planting needs to be established before the replacement dwelling can be constructed, it would provide effective screening within a short timeframe.

[51] In terms of whether the Council incorrectly understood "moderate" to mean "minor", NPTL says the Council did not make this error. The Council's conclusion that the landscape and visual effects of the proposal would be no more than minor "was an overall conclusion informed by Ms Mellsop's assessment that the effects would be moderate initially then reduced to low over time". Furthermore, it appears Ms Mellsop's comments relate to the visual prominence or visual effects as viewed from the Millennium Track. This is only one viewpoint of the replacement dwelling and at other viewpoints the dwelling would not be able to be seen or would be seen to a lesser extent, especially compared to the current dwelling.

[52] In short, NPTL says it is the overall assessment that leads to the decision-maker's conclusions, not one specific visual effect or viewpoint that determines the outcome of the application.

Did the Council err in law in deciding the adverse effects of the proposal would be minor?

[53] In addressing the question of whether the adverse effects of the proposal were all minor or less than minor, I take no account of the expert evidence subsequently filed to suggest that the landscape and visual effects were either more, or less severe than were outlined in Ms Mellsop's report which the Council accepted. It is not appropriate, on an application for judicial review of a notification decision under the RMA, to produce further expert evidence to support or reject the evidence relied upon by the relevant consent authority. If the Council relied on evidence which was prepared by someone with appropriate expertise, and expressed a view that was reasonably available to that person on the proposal before them, the Council will not have erred. Furthermore, no party here takes issue with Ms Mellsop's evidence. The real issue here is whether the Council correctly took into account that evidence to decide that public notification was not required.

[54] In this case, the Council expressly relied on, and adopted Ms Mellsop's evidence on the amended proposal. Her conclusions included:

(a) the substantial proposed earthworks would have a high level of adverse visual effect until re-grassed and would adversely affect the natural character and integrity of the landscape to a moderate extent, but these effects could be adequately mitigated by avoiding existing schist outcrops, re-grassing and undertaking revegetation with shrubland species;

(b) the proposed dwelling would be more visually prominent than the existing dwelling, but the increased visual effect was likely to be moderate in extent when construction was completed and reduce to a low level over a five to seven year period as planting matured (reduced from an eight to 10 year period in her initial assessment by taking

account that both stage one and two planting would have been implemented before building commenced).

[55] In my view, a conclusion that there would be moderate adverse effects imports a clear finding that the effects would not be minor or less than minor. This is not a case, as in *Gabler*, where the descriptors used by the expert to describe an adverse noise effect, being "reasonable" and "acceptable", along with evidence the relevant noise effects would comply with noise limits, justified a conclusion that the effects were minor or less than minor.[15] On Ms Mellsop's own evidence, "moderate" comes midway in the hierarchy of effects from most serious to insignificant and the Council could not (and expressly says it did not), interpret this to mean minor.

[56] That leads on to the question of whether, despite a temporary moderate adverse effect on landscape character and visual amenity, the Council was able to conclude that the effects, for notification purposes, were minor.

[57] While I accept that whether an effect is "minor", "less than minor" or "more than minor" is a matter of fact and degree to be informed by context, it is clear that Ms Mellsop took the context into account. Her initial report discussed the fact the application site was located within the ONL of the Mount Alpha range, but that it was in an area which was more modified by rural living. She also acknowledged that the proposed development would be "largely contained within an already domesticated part of the site". Her analysis compared the effects of the proposed dwelling with the existing building (which she considered was "particularly recessive in the surrounding environment"), and her observations prompted modifications to the design of the building to reduce its visual impact. Her conclusions, therefore, were clearly aimed at describing the effects in context and having regard to the receiving environment.

[58] Although the Council repeatedly points to Ms Mellsop's conclusion that effects would be able to be mitigated and would then be low, that is the situation that would be reached over time. A consent authority cannot ignore temporary effects in undertaking its notification assessment. It also cannot average out effects over time to say that a temporary moderate adverse effect which will, in due course, reduce to a

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15 *Gabler v Queenstown Lakes District Council*, above n 12, at [12].

low or extremely low effect is therefore a minor or less than minor effect. While the Council says that the assessment must necessarily consider the broad range of effects and how they might change over time, that does not justify ignoring a temporary adverse effect, on the grounds it will be ameliorated in a relatively short timeframe having regard to the life span of the proposed activity. That may, of course, be appropriate in deciding whether to grant the resource consent, but it is not appropriate when making a notification decision, which is intended to allow the public a right of audience if any adverse effects, whether temporary or permanent, will be more than minor.

[59] I therefore consider the Council erred in ignoring a temporary adverse effect which was moderate in scale by taking account that it would be mitigated in due course. Each adverse effect, whether temporary or permanent, had to be assessed. They could be discounted if they fell within the permitted baseline (being effects of an activity which are permitted under a district rule or regional plan). They could also be discounted if proposed mitigation would reduce the extent of effect to minor from the outset. However, neither of those scenarios were relevant here.

[60] Here, the Council appears to have taken a global view of the effects on landscape and visual amenity, including over time, to reach the view that effects on landscape and amenity are minor. That is not the correct approach. It would be the equivalent of saying that temporary construction noise effects could be ignored, simply because, once built, the noise effects of the activity would be negligible.

[61] Similarly, when relying on mitigation, it is correct to say that conditions which directly mitigate adverse effects of an activity can be taken into account when assessing adverse effects, for notification purposes. However, in this case, there was an identified delay before the primary mitigation, being revegetation, would be effective. Whether or not, those timeframes were acceptable for the purpose of granting consent, they did not mitigate the more than minor adverse visual effects which arose in the interim, for the purpose of public notification.

[62] As a result, the Council erred in law when it reached the view that all the adverse effects of the proposal were no more than minor, and it did not require public notification, by failing to have proper regard to the acknowledged temporary adverse effects of the proposal.

[63] I now turn to the question of whether to grant relief.

Exercise of the discretion to grant relief

TIL's submissions

[64] Mr Gresson submits that, where a fundamental error of law has been made, the starting point is relief ought to be granted and the application sent back to the decision-maker for reconsideration.[16] There must be "extremely good reasons" not to grant relief.[17] Good reasons might include delays in filing proceedings, the conduct of the party seeking relief, or substantial undue prejudice to a consent holder as a result of granting relief.

[65] In this case, TIL argues there are no such reasons to decline relief. TIL became aware of the decision in September 2019. It signalled its intention to file proceedings on 7 October 2019 and filed its proceedings early in 2020. Any prejudice to NPTL in granting the relief would be substantially outweighed by the prejudice to TIL in being unable to participate in a process from which it is directly affected, along with the public generally.

The Council's submissions

[66] While the Council accepts that relief would normally follow from a finding that there was an error in decision making, it says I should consider:

(a) the materiality of any error established;

(b) delay in bringing the proceeding; and

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16 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112].

17 *Air New Zealand Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60] and [61].

(c) prejudice to third parties

which in this case, are sufficient for the Court to exercise its discretion not to grant relief.

NPTL's submissions

[67] NPTL opposes relief being granted. While it acknowledges this is not a case involving significant delay, it says TIL's proceedings should have been filed promptly after its solicitors wrote to the Council and NPTL on 7 October 2019 stating that a judicial review application would be filed, but they were not filed until early 2020.

[68] NPTL also says TIL has conceded it will not be directly affected by the proposal, which points against relief being granted. In addition, NPTL says this is a "shovel ready project" that will provide builders and contractors with much needed work in a difficult period for the region, and this, too, points against relief being granted. Finally, NPTL points out that it has already planted 4,000 natives on its property and these have grown considerably. This means any adverse effects of the replacement dwelling would already be reduced were construction to commence now. It says TIL does not challenge that the purported temporary landscape effects will eventually reduce to a low level. Thus, the utility of granting a remedy in this case would be low.

[69] For these reasons, NPTL argues that I should exercise my discretion not to grant relief in this case.

Discussion

[70] Even when an application has succeeded in establishing a ground for review, the Court retains a discretion whether to grant relief. That said, there must be good reasons to decline to grant relief, particularly where an error of law is involved.[18]

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[18] At [60]-[61].

[71] In my view, the relief sought, being to set the decisions aside, should normally follow when there has been a failure to notify an application for resource consent. This is because, despite the amendments to the notification provisions in the RMA in 2009 and subsequently, which removed the presumption as to public notification, the RMA still provides for a public and participatory process unless the test for non-notification is met. Furthermore, there has been nothing in the conduct of TIL which would disentitle it to relief. I am satisfied it acted promptly to notify NPTL and the Council of its intention to mount a legal challenge and issued proceedings reasonably promptly thereafter.

[72] While I accept there will be cost and inconvenience to NPTL in having to go through a notified consent process (if that is the ultimate decision), that is the inevitable consequence of reaching a view that the application should have been publicly notified and was not. Other conditions may be developed during that process which better mitigate the adverse effects and that is, of course, the point of public notification.

[73] While I accept circumstances have changed in the interim while these proceedings have been pursued, that should not preclude proper processes being followed. If, as NPTL says, there will be reduced adverse effects of the proposal now that the planting is more advanced in growth, then that could influence on the notification decision. Similarly, if there are now more positive effects of the proposal that will be taken into account in the decision on whether to grant consent.

Outcome of the hearing

[74] The notification decision of the Council dated 2 July 2019 and the decision to grant RM181171 on the same date, are both declared invalid. Those decisions are set aside. The Council is to reconsider whether to publicly notify NPTL's resource consent application, and then to make the decision afresh in light of its notification decision.

[75] My provisional view is that costs should follow the event on a 2B basis, with the primary burden for costs falling on the Council as decision-maker.

[76] If the parties are unable to agree on costs, I reserve leave for submissions on costs of no more than five pages in length to be filed within 20 working days with any reply in a further 10 working days. Costs will be determined on the papers unless I need to hear from counsel.

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