IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-465

IN THE MATTER OF	The Resource Management Act 1991
AND	
IN THE MATTER OF	an appeal from a decision of the Environment Court pursuant to s 299 of the Act
BETWEEN	FRASERS PAPAMOA LIMITED Appellant
AND	TAURANGA CITY COUNCIL Respondent

Hearing: 9 and 10 June 2009

Appearances: K Barry-Piceno and A Braggins for appellant
H Ash and D Hartley for respondent
T Richardson for interested parties

Judgment: 30 September 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 1 pm on Wednesday 30 September 2009

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Introduction

[1] This appeal from interconnected decisions of the Environment Court requires this Court to consider the scope of the so-called *Augier* principle, first enunciated in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD), by which parties to environmental proceedings may be held to their undertakings given in the course of those proceedings. The Environment Court invoked the principle when imposing a condition upon the appellant developer requiring it to vest land in the respondent for use as a public walkway. The appellant maintains that the case does not fall within the *Augier* principle and that the Environment Court had no jurisdiction to impose the condition. On appeal this Court is asked to delete it.

Background

[2] The appellant is the owner of a substantial tract of land at Papamoa, a rapidly growing area adjacent to Tauranga City, which falls within the jurisdiction of the respondent. The land is zoned Residential A, the principal residential zoning under the respondent's Operative District Plan. The appellant formulated a proposal to develop the land for residential and commercial uses. For that purpose it applied to the respondent for resource consents (but not initially for subdivisional consent). The initial proposal for 741 residential dwelling units was later reduced to 711 units in the Environment Court. The overall development also incorporated four buildings designed for commercial uses.

[3] The appellant's development, known as the Papamoa Gateway Proposal, comprised seven separate precincts known as Neighbourhoods 1A, 1B, 2A, 2B, 3A, 3B and 4. The appellant applied to the respondent for seven individual land use resource consents, one for each proposed Neighbourhood. The applications were heard together by the respondent under s 103 Resource Management Act 1991 (the Act). The respondent granted consent to five of the proposed Neighbourhoods but declined consent in respect of Neighbourhoods 1B and 4.

[4] The appellant appealed to the Environment Court against the decision of the respondent to decline consent to those Neighbourhoods. Other interested parties appealed to the Environment Court against the respondent's decision to grant consents to the remaining five Neighbourhoods.

[5] In an interim decision dated 26 October 2007 the Environment Court upheld the Council's decision to grant consent to the five Neighbourhoods and to decline consent to Neighbourhoods 1B and 4. In that decision the Environment Court left over the question of the imposition of appropriate conditions for consultation among the parties.

[6] In a subsequent decision given on 23 April 2008 (the conditions decision) the Environment Court imposed a number of conditions, most of which had been the subject of prior agreement. But the Court also determined a strongly contested issue: namely, whether the appellant should be required to vest land in the respondent for the purpose of widening an existing access way linking Papamoa beach with its hinterland. The Environment Court ruled that the land should be so vested. The appellant disagrees. It contends that the Environment Court had no jurisdiction to require vesting. The present appeal is concerned with that jurisdictional issue.

[7] The land falling within the Papamoa Gateway Proposal is contained in Certificate of Title 191043 South Auckland Land Registry, comprising two separately identified allotments. The two allotments are separated by Papamoa Beach Road. Neighbourhood 4 occupies the whole of the allotment which lies on the seaward side of Papamoa Beach Road (known as Papamoa 5B Block). The remaining Neighbourhoods lie inland of Papamoa Beach Road on the larger of the two allotments (known as Papamoa 4B2 Block). There is currently an existing two metre wide public access way from Papamoa Beach Road to Papamoa beach which affords pedestrian access to the beach. It is vested in the respondent and is adjacent to the eastern boundary of the seaward allotment which is intended to become Neighbourhood 4.

[8] As part of its overall proposal, the appellant indicated to both the Council and the Environment Court an intention to provide an enhanced public access way to

Papamoa beach. In its conditions decision, the Environment Court held that it was appropriate to impose a condition requiring the appellant to provide an enhanced public access way by vesting in the Council an additional strip 2.7 metres wide. (Figures of 2.67m and 2.7m appear to have been used interchangeably by the parties. Nothing turns on the difference. I will use 2.7m throughout).

[9] Vesting of the additional land would produce a public access way some 4.7 metres in width. The Court left it to the parties to agree on the precise mechanism by which that would be achieved.

[10] In its final decision of 30 May 2008, the Environment Court made detailed orders as to the mechanism and timing of the vesting of the enhanced public access way. In particular, the Environment Court determined that the condition as to the vesting of the enhanced access way should be applicable as from the time of development of Neighbourhood 2A. The result was that the condition was to be brought down onto the consents for Neighbourhoods 2A, 2B, 3A and 3B.

[11] The generic condition imposed in respect of the resource consents for those four Neighbourhoods reads as follows:

> The consent holder shall, prior to issue of Code Compliance Certificate, establish walking and cycling routes in this neighbourhood in accordance with Traffic Design Group Figures 13 and 14, dated March 2007; and shall vest and construct a widened public access way of 2.7m to the beach (across 5B ML 342919), all to the satisfaction of Council.

This Court's appellate jurisdiction

[12] The principles governing appeals from the Environment Court to this Court are well established and are not in dispute. Section 299 of the Act provides that appeals to the High Court from the Environment Court lie in respect of a point of law only. A successful appellant must demonstrate that a material question of law has been erroneously decided by the Environment Court: *Smith v Takapuna City Council* (1988) 13 NZTPA 156. The applicable principles were summarised in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153 by the Full Court:

> We now deal with the various issues raised before us. Before doing so, we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
>
> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.
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> See *Manukau City v Trustees of Mangere Lawn Cemetery* (1991) 15 NZTPA 58, 60.
>
> Moreover, the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise: see *Environmental Defence Society v Mangonui County Council* (1987) 12 NZTPA 349, 353.
>
> Any error of law must materially affect the result of the Tribunal's decision before this Court should grant relief: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76, 81-82.

[13] As was pointed out by Fisher J in *NZ Suncern Construction Ltd v Auckland City Council* [1997] NZRMA 419 at 426, the Court must be vigilant in resisting attempts by litigants disappointed before the Environment Court to use appeals to this Court as an occasion for revisiting resource management merits under the guise of questions of law.

Questions of law

[14] As the appeal was originally constituted, the appellant raised 13 separate questions of law. These have subsequently been refined and reduced to three, only one of which requires an answer in this judgment.

[15] The first question is: apart from the *Augier* principle, did the Environment Court have jurisdiction to impose a condition requiring the appellant to vest land in the respondent in order to create a widened pedestrian access strip? Counsel are agreed that the answer to this question is "no", in that the provision of the access strip was neither a financial contribution for the purposes of s 108(9) of the Act nor a development contribution for a reserve under the provisions of the Local

Government Act 2002. It is therefore unnecessary to say anything more about this first question.

[16] The second question is: was the Environment Court correct in concluding that the appellant's offer to vest the enhanced access way was subject to the rule in *Augier* when the Court had declined the Neighbourhood 1B and Neighbourhood 4 applications? That question is the nub of this appeal.

[17] The third question is: did the Environment Court err in its conclusion that the intensity of development allowed by the consents exceeded the intensity of development allowed by the District Plan as a permitted activity? During the course of the hearing in this Court counsel agreed that question 3 did not require an answer at this stage. The appeal accordingly turns upon the answer to question 2.

The conditions decision

[18] An understanding of the Environment Court's approach to the widened access way issue can best be gleaned by reference to a lengthy passage from the conditions decision:

> [13] Part of the Applicant's initial proposal involved an enhancement of this 2 metre wide access strip. The Applicant proposed a wide landscaped access way between the road and the beach.
>
> [14] The issue which is in contention insofar as conditions are concerned is whether or not the Applicant ought still be required to provide an additional strip of land to be added to the existing public access way thereby giving an enhanced level of access to the beach, notwithstanding that the Applicant's proposed development of Papamoa 5B (Neighbourhood 4) was declined.
>
> [15] The Council seeks that a strip of land 2.67 metres wide be added to the existing public access way (giving a total width of access way in this area of 4.67 metres). This additional strip of land will come from Papamoa 5B. Other parties to the proceedings (Hadley Holdings Ltd and D & D J Holland and Others and Collingwood Trustees Ltd and Another) appear to seek an even more substantially enhanced access way again however it appears to the Court that the appropriate level of enhanced access way to be discussed is that sought by the Council, namely an additional width of 2.7 metres. An additional 2.7 metre wide strip had been proffered by Frasers as part of a subdivision proposal.

[16] The 10 metre enhanced strip which formed part of the application before us included a substantial amenity component to compensate for overheight buildings proposed in Neighbourhood 4 which were declined.

[17] In considering the appropriate condition to be imposed in respect of the access way width we have broadly looked at two issues:

- Does the Court have jurisdiction to impose a requirement that there be an enhanced access way as sought by the Council;

- If the Court has jurisdiction does the imposition of an enhanced access way requirement meet the tests identified in *Newbury DC v Secretary of State for the Environment* [1981] AC 578.

Jurisdiction

[18] In determining the jurisdictional issue we have looked at two matters.

- Scope of the initial application;

- The provisions of s 108 RMA.

[19] Insofar as the scope of the initial application is concerned there can be no doubt that an enhanced access way between Papamoa Beach Road and the beach was a part of the proposal initially put to the Council and heard by the Court. At the time of the Court hearing that enhanced access way was to have a total width of some 10 metres (including the 2 metre Council access strip).

[20] Ms Barry-Piceno for the Applicant contends that as consent for Neighbourhood 4 was declined that aspect of mitigation contained in Neighbourhood 4 (an enhanced access way) must also have been removed from the *package*.

[21] We consider that contention goes to the issue of reasonableness rather than jurisdiction and we shall consider that point in that context. Our starting point however is that the application itself has always proposed an enhanced access way as part of the development master plan and the matter of the enhanced access way was before both the Court and the Council.

[22] Although Frasers' proposal was advanced by way of seven separate resource consent applications, the application site in respect of each of those seven individual applications was all of the land in Certificate of Title 191043. Although (for example) Neighbourhood 1A was situated at the southern end of the title it was part of a comprehensive development proposal for the entire title extending over all of the lands in CT 191043, including Papamoa 5B. The fact that consent was declined for Neighbourhood 4 does not remove Papamoa 5B from the Court's jurisdiction to impose conditions applicable to other neighbourhoods, to the extent that the land comprised in Papamoa 5B is required to achieve the integrated development proposal advanced by Frasers.

[23] The second jurisdictional issue arises from the fact that the Court assumes that the enhanced 2.7 metre access way is to vest in the Council

> pursuant to the Council proposal. In accordance with the provisions of s 108(2)(a), (9) and (10) the contribution of land in these circumstances constitutes a financial contribution which must meet the requirements of s 108(10)(a) and (b). There has been no argument at all directed to us in that regard. However it appears that because the provision of an enhanced access way was always part of the Applicant's proposal irrespective of the requirements of s 108(10) its provision must be regarded as an *Augier* condition proffered by the Applicant and by which the Applicant might be bound irrespective of whether or not the requirements of s 108(10) are met.
>
> ***Reasonableness***
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> [24] The tests for validity of conditions in a resource consent identified in *Newbury* are:
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> - The condition must be for a resource management purpose, not for an ulterior one;
>
> - The condition must fairly and reasonably relate to the development authorised by the consent to which the condition is attached;
>
> - The condition must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have approved it.
>
> We consider those three issues separately.

[19] It will be seen that the Court set aside a consideration of s 108 of the Act (as have counsel on appeal) and concluded that the provision of an enhanced access way "… must be regarded as an *Augier* condition proffered by the Applicant and by which the Applicant might be bound irrespective of whether or not the requirements of s 108(10) are met".

[20] Earlier the Court ruled that, because an enhanced access way had always been proffered by the appellant as part of the development master plan, Ms Barry-Piceno's argument that the appellant could not be required to provide the widened access way because the master plan as a whole was not approved, went to the issue of reasonableness rather than jurisdiction (see [20]-[21]).

[21] The Environment Court simply referred to the proffered enhanced access way as "…an *Augier* condition …" without legal analysis. In order to understand the appellant's argument in this Court, it is necessary to consider the genesis and scope of the *Augier* principle.

The *Augier* principle

[22] In *Augier*, the second respondents had applied to the local planning authority for permission extract sand and gravel from land owned by them. Permission was refused. On appeal, a public inquiry was held. At that inquiry, a formal undertaking was given to write to the Kent County Council offering an agreement concerning the taking of additional land for traffic splays designed to improve visibility at a nearby road junction. The Court held that the undertaking was enforceable. Sir Douglas Frank QC, sitting as a Deputy Judge of the Queen's Bench Division, said at pp 226-227:

> It seems to me beyond argument that the undertaking given by Halls was a promise intended to be acted on whatever their rights under planning law, and I think that the Secretary of State acted to his detriment in granting a planning permission that he would not have granted but for the undertaking. It is true that he suffers no immediate pecuniary or material loss, but, as his function is to permit the development of land only in circumstances where it should be permitted, it seems to me that he suffers detriment if it is carried out in other circumstances…
>
> In my judgment, where an applicant for planning permission gives an undertaking, and, relying on that undertaking, the local planning authority, or the Secretary of State on appeal, grants planning permission subject to a condition in terms broad enough to embrace the undertaking, the applicant cannot later be heard to say that there is no power to require compliance with the undertaking.

[23] In *Hearthstone Properties Ltd v Waitakere City Council* (1991) 15 NZTPA 93, the appellant had been carrying on business in breach of one of the conditions of an earlier consent despite Council threats of injunction proceedings. In order to quell concerns that the appellant would be unlikely to comply with the conditions of a consent sought before the Planning Tribunal, the applicant's counsel gave an undertaking to the Tribunal, recorded by the Tribunal at 96 as follows:

> Fortunately in this case counsel for the applicant was able to give us some basis for expecting that if conditional consent is granted the conditions would be observed. He did that by announcing that the applicant would accept consent limited to a term of two years, to the intent that a fresh application would then have to be made on which the applicant might be expected to demonstrate that it had adhered to the conditions. Counsel considered that there might be some doubt about the Tribunal's authority to impose such a condition on an unwilling applicant. Therefore, to give assurance that the applicant or a successor would not later question the condition, Mr Dormer expressly announced that, to the intent that they

> would be estopped from doing so in the manner described in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD), the condition was advanced by the applicant as an integral part of the proposal the subject of its application. We proceed with our consideration of the proposal on that basis.

[24] So the *Augier* principle was applied there in order to instil a measure of confidence that the applicant would indeed comply with the terms of the Tribunal's decision. Of particular importance for present purposes is the fact that the undertaking given in *Hearthstone* was formal and certain in the sense that it was unequivocal and made by counsel for the applicant in open Court for the purpose of being relied upon by the Tribunal.

[25] More recently the *Augier* principle was subjected to detailed analysis in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. There, the respondents had applied for planning consent for the removal of an historic home from a site they had purchased. The application was declined by the Takapuna Community Board and an appeal to the Planning Tribunal followed. During the course of the appeal the respondents reached an agreement with the objectors. The appeal was allowed by consent subject to conditions, the first of which read at 556:

> We the Trustees confirm that it remains the intention of the Trustees, on the removal of the existing house, to construct a new single family dwelling house on the site.

[26] Subsequently the historic home was removed from the site. Several months later the respondents applied for the site to be subdivided, indicating that cost increases had made the original plan to build a single dwelling uneconomic. The applicant applied for declarations and an enforcement order to the effect that the first condition in the consent order restricted the respondents to building a single dwelling house. The respondents defended the proposed subdivision, arguing that the condition was simply a promise as to future conduct from which they were free to resile.

[27] The respondents were held to have been bound by their representation. The Tribunal noted that the *Augier* principle had been adopted and applied in *Hearthstone*, and then turned to a detailed analysis of the *Augier* judgment. The Judge concluded the principle that underpinned the judgment in *Augier* was that of

equitable estoppel, which will catch assurances as to future conduct. In support of his analysis, Judge Willy in the Planning Tribunal referred to three New Zealand decisions: *Burbery Mortgage Finance and Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Gillies v Keogh* [1989] 2 NZLR 327; and *Morton-Jones v RB & JR Knight Ltd* [1992] 3 NZLR 582.

[28] In the last of these cases Doogue J referred to the judgment of the Court of Appeal in *Goldstar Insurance Co Ltd v Gaunt* (1992) 7 ANZ Insurance Cases 77,393 at 77,396-97, where the elements of an equitable estoppel were outlined as being: (a) the creation or encouragement of a belief or expectation; (b) a reliance by the other party; and (c) detriment as a result of the representation. Judge Willy held in *Mora* that the first respondents were unable to resile from the representations they had earlier given to the Planning Tribunal. Again, of significance for present purposes is the fact that in that case the undertaking given was formal and precise, and had earlier been recorded by the Tribunal as a condition of its consent.

[29] In *Springs Promotions Ltd v Springs Stadium Residents Association Inc* [2006] 1 NZLR 846, Randerson J had occasion to review the principle in the context of an argument that the Act constituted a code. Unsurprisingly, he held that while portions of the Act might be regarded as constituting a confined code, the Act is not comprehensive in respect of all matters touching land. He said that it was going too far to describe the Act as a code if that description was intended to exclude the application of the common law and replace it with a set of statutory rules that are the exhaustive and exclusive source of the law: at [60]. But, having said that, Randerson J noted that it was in general inappropriate to introduce doctrines such as those relating to estoppel into the field of planning law: see the observations contained in the judgment of the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 601, 616, 617; and those of Lord Scarman in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 at 140.

[30] There are, however, qualifications to the principle that equitable concepts, such as the doctrine of estoppel, have no place in environmental disputes. They are

discussed by Randerson J in his judgment. Among the identified exceptions was the *Augier* principle, as to which Randerson J said:

> [76] Next Mr Williams relied strongly on the decision of the Environment Court in *Mora v Te Kohanga Reo Trust* [1996] NZRMA 556. Judge Willy held that an estoppel by representation arose in consequence of a statement by parties to a consent order of their intention to construct a new single family dwelling on a site once the existing historic house was removed. This statement was included in the consent order as one of its "terms, conditions or undertakings". The parties making the statement were found to be estopped from applying to subdivide the site to establish more than one dwelling. The decision makes no reference to *Newbury* or *Pioneer Aggregates*, but proceeds on the basis of a decision by Sir Douglas Frank QC sitting as a Deputy Judge in the Queen's Bench Division in *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD). That case is authority for the proposition that an applicant for planning permission who gives an undertaking to a planning authority which is relied upon in granting the permission is estopped from later asserting that there was no power to grant the permission subject to a condition based on the undertaking.
>
> [77] There are obvious differences between *Mora* and the present case. *Mora* was concerned with a specific representation made by one party to the Court and the other parties. It was relied upon to settle an appeal and was incorporated into a consent order as a "term, condition or undertaking". I view *Mora* as an example of the exceptional case envisaged by Lord Scarman, where reliance on a principle of private law is necessary in order to give effect to the purpose of the legislation. It is difficult to conceive how the Environment Court could proceed effectively if parties giving specific undertakings or making specific representations as a foundation for its orders are not to be held to their word. But *Mora* should not be taken as authority for any more general proposition beyond its specific factual setting.

[31] His Honour's reference in [77] to "the exceptional case envisaged by Lord Scarman" stems from the analysis at 140 of *Pioneer Aggregates* where Lord Scarman said:

> But I am satisfied that the Court of Appeal in the *Slough* case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion.
>
> Planning control is the creature of statute. It is an imposition in the public interest of restrictions on private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly

> authorised by Parliament or necessary in order to give effect to the purpose of the legislation. Planning law, though a comprehensive code imposed in the public interest, is, of course, based on land law. Where the code is silent or ambiguous, resort to the principles of private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

[32] I endorse, with respect, Randerson J's characterisation of the *Augier* principle as being concerned with "specific undertakings" or "specific representations" made as a foundation for orders of the Environment Court. It is in that formal setting that the cases earlier discussed have enforced *Augier* undertakings. Great care is required, in my view, in the application of the principle lest it be extended beyond its proper role.

[33] The Court is told that the principle is widely relied upon in determining resource consent appeals which are able to be settled by agreement; it assists in enabling applicants to offer attributes or mitigation beyond the jurisdiction of the Court in order to settle appeals; and it provides security for other parties in that undertakings and representations subsequently embodied in Court orders can thereafter be enforced by resort to standard enforcement mechanisms. But all of that occurs in the context of formal agreements and undertakings. None of the cases to which I have referred involved a representation or undertaking determined simply by inference or an assessment of the evidence as a whole.

[34] I accept Ms Barry-Piceno's submission that in order to activate the rule in *Augier* four separate elements must be established:

a) a clear and unequivocal undertaking to the Court and/or the other parties;

b) receipt of the grant of resource consents in reliance on that undertaking;

c) the imposition of a condition on those resource consents which broadly encompassed the undertaking; and

d) detriment to the Court or other parties if the undertaking is not complied with.

Was the *Augier* principle engaged here?

[35] The *Augier* principle applies only to clear and unequivocal undertakings. Such undertakings must be unambiguous and precise having regard to the context and all the surrounding circumstances: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 1 All ER 665 at 677. The meaning of the undertaking is to be assessed objectively: *Travel Agents Association of NZ Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553 at 555.

[36] In assessing the Environment Court's decision that the appellant had given an *Augier* undertaking it is necessary to consider all of the relevant circumstances. The five land use consents granted by the respondent did not include a beach access way as a condition. Only the interested parties represented by Mr Richardson appealed against those decisions. Their appeal did not specifically refer to the absence of a beach access way condition.

[37] The first set of draft conditions following the Environment Court's interim decision was prepared by Mr Raeburn, the respondent's planning witness. The draft conditions made no reference to a widened access way. Neither was there any requirement for such a condition in the evidence lodged by Mr Richardson's clients.

[38] The appellant's own proposed conditions included a condition 34, providing for an enhanced access way of 10 metres. But that proposed condition was associated with the grant of a consent for Neighbourhood 4 and was intended as mitigation in respect of the impact of Neighbourhood 4 upon the neighbouring Pacific Shores development. Consent to Neighbourhood 4 was, of course, refused.

[39] A requirement for a 2.7 metre enhanced access way first appeared in submissions of counsel for the respondent preceding the conditions decision, in which it was claimed that a widened access way of 4.67 metres (including the existing 2 metres access way) had always be seen by Council "… as mitigation of the extent of development in the consented neighbourhoods". However, there was no evidence-in-chief or cross-examination on any condition with respect to a 2.7 metre enhanced walkway. It is correct that documentation in support of the overall application referred to a 10 metre strip but, as the Court accepted, that was proposed in order to compensate for over-height buildings in Neighbourhood 4. There had also been an earlier reference to an enhanced walkway of an additional 2.67 metres in documents related to a subdivision consent, but that was later superseded.

[40] Against that background, I return to the conditions decision, where the Environment Court said:

> ***Reasonableness***
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> [31] In her memorandum of 27 February 2008 Ms Barry-Piceno contends as follows:
>
> > 6 *An expansion of the existing public beach access way was 'consistently offered' by Frasers in its applications and through the appeals, in the context of being an integral part of a comprehensive design for the entire site area, through 7 Neighbourhood consents as sought, which included 741 dwellings. It was part of an extensive mitigation package of offering public benefits, such as landscaping, parks, reserves and 'borrowed' private space for public viewing, due to the proposed significant development, including 100 units and high rise Apartments on the beach front Neighbourhood 4 area.*
> >
> > 7 *It is Frasers' position that now Neighbourhood 4 appeal was declined, and this part of the overall development has been taken out of the Master Plan, the associated Neighbourhood 4 mitigation is also taken out, and cannot be included or relevant to the land use consents granted.*
>
> [32] In its submissions the Council relied quite heavily on the fact that the application was presented as an integrated overall development governed by the master plan. Ms Barry-Piceno contends that Neighbourhood 4 was in fact distinct and separate and should not be regarded as an integral part of the development. We do not accept that proposition. We consider that it runs directly counter to the basis on which the seven applications were presented as a comprehensive development with the master plan linking them together.

[33] The Court accepts that the character of Neighbourhood 4 is substantially different to the character. of the remaining parts of the development situated on the southern side of Papamoa Beach Road. We found that Neighbourhood 4 was situated in the *coastal environment* a finding which we did not extend to the balance land across the road. However that, in our view does not remove Papamoa 5B from being part of the overall development proposal advanced by the Applicant and in respect of which the master plan provided for an enhanced access way to the beach.

[34] The application document identified:

> ***1 Background –*** *1.1 Overall Development* – that the development proposed (inter alia):
>
> - *Neighbourhoods connected to each other and Papamoa Beach by a central 'spine road' and open space.*

It is the Court's understanding that the *open space* connecting the various neighbourhoods to Papamoa Beach was the enhanced access way provided on Papamoa 5B (Neighbourhood 4).

[35] We disagree with Ms Barry-Piceno's contention that because consent for the apartment development on Neighbourhood 4 was declined then the enhanced access way serving the remaining neighbourhoods must also be taken out of the proposal. We consider that she is wrong in describing the enhanced access way as *associated Neighbourhood 4 mitigation.* It is correct that the 10 metre planted access way proposed by the Applicant along the eastern side of Neighbourhood 4 was intended in part to provide mitigation for the five storey apartment building proposed in Neighbourhood 4. We are however satisfied that the enhanced access way was also to have the function identified in the application documents of connecting the remaining neighbourhoods to Papamoa Beach. The application states that.

[36] If it was the Applicant's position (as now contended) that should the Neighbourhood 4 apartment development be declined then the enhanced access way provided in the master plan was to be removed then that position should have been spelt out clearly and unequivocally at the appeal hearing. It was not.

[37] We consider that the imposition of an enhanced access way as sought by the Council is not unreasonable. A 10 metre access way was part of the Applicant's proposal heard by the Court and was to provide a linkage between the various neighbourhoods and Papamoa Beach, as well as protecting the amenity of the adjoining Pacific Shores complex from an overheight building. Because of the increased density of development permitted by the applications granted to date (over and above permitted activity standards) the development has the potential to lead to a higher demand for access to the beach than would a permitted activity development.

[38] We accordingly hold that it is appropriate that the conditions of consent provide for an enhanced access way of an additional 2.7 metres as sought by the Council. We leave it to the parties to resolve the mechanism by which that is achieved.

[41] It will be observed at [36] of the conditions decision that the Environment Court appears to have imposed an onus upon the appellant to spell out "clearly and unequivocally at the appeal hearing" the supposed undertaking. There is, in law, no such onus. The question is simply whether a clear and unequivocal undertaking exists. Only if it does can the *Augier* principle apply. The Court was not entitled to visit upon the appellant the consequences of the absence of a sufficiently clear and unequivocal undertaking. In doing so, it fell into error.

[42] Moreover, the Environment Court at [37] rests its decision upon a *Newbury* reasonableness test. As counsel agree, reasonableness is not a relevant consideration in determining the jurisdiction of the Environment Court to impose the augmented access way condition. Instead, the question is whether the appellant gave a clear and unequivocal undertaking capable of assessment. If it did not, then a consideration of reasonableness does not assist. Again, the Court's approach was in my opinion erroneous. The issue for the Environment Court was whether the material relied upon was capable of amounting to an undertaking to provide an enhanced access way of 2.7 metres otherwise than in the context of a grant of consent to the whole of the proposed development. Only if there was a clear and unequivocal undertaking to that effect could it be incorporated into the decision of the Environment Court as a condition.

[43] In [31]-[38] of the conditions decision, the Environment Court appears to have determined that an enhanced access way condition ought to be imposed because it was reasonable to do so. That conclusion seems to rest upon the integrated character of the development proposed in the master plan, the reference in the application document to an "open space" which the Court took to relate to an enhanced access way, and on its finding that the 10 metre access way proposed by the appellant along the eastern side of Neighbourhood 4 was intended in part to provide mitigation for the five storey apartment building proposed in Neighbourhood 4, but in part also to fulfil the function identified in the application documents of connecting the remaining neighbourhoods to Papamoa beach. The Court's discussion of these factors appears under a section of the conditions decision headed "Reasonableness".

[44] During the hearing in this Court, counsel identified a number of other references in the documents to access ways. It was contended by counsel for the respondent and for the interested parties that such references supported the conclusion that it was reasonable to impose the condition. It is, however, unnecessary to consider these references or indeed to analyse further the Environment Court's conditions decision. The question of whether it was reasonable or even desirable for an enhanced access strip to be provided falls outside the *Augier* principle and has no bearing on establishing the scope of the Environment Court's jurisdiction. The Court was not entitled, in my opinion, to pick through the appellant's documents for the purpose of constructing what could be no more than an implied undertaking. The *Augier* principle is significantly narrower than appears to have been assumed in this case. It applies only to clear and unequivocal undertakings intended to be relied upon and so to provide a measure of security for those who subsequently act to their detriment. The circumstances of this case are quite different from those arising, for example, in *Augier*, *Hearthstone* and *Mora*, each of which involved the provision of specific and unambiguous undertakings in circumstances where consent was granted.

[45] By way of answer to the second question posed, I conclude that the Environment Court was not correct to find that the appellant's proposal to vest an enhanced access way in the respondent was an undertaking falling within the *Augier* principle in circumstances where the Court declined the appellant's applications for Neighbourhoods 1B and 4.

Result

[46] As noted earlier, counsel were agreed that the Environment Court did not have jurisdiction to impose the condition in issue unless the *Augier* principle is engaged. I have found that principle does not apply here. It follows that the appeal must be allowed. The condition requiring the appellant to vest and construct a widened public access way to Papamoa Beach of 2.7 metres is quashed for want of jurisdiction.

[47] Ms Barry-Piceno urged me not to remit the proceeding to the Environment Court. But I am satisfied that it is appropriate to do so. There may be intensity implications (see [17] above). The proceeding is accordingly remitted to the Environment Court for further consideration in the light of this judgment.

[48] Costs are reserved. Counsel may file memoranda if they are unable to agree.

C J Allan J