KATZ v AUCKLAND CITY COUNCIL

The Planning Tribunal: His Honour Planning Judge Moore, presiding, Mr J Dart and Dr A H Hackett.

15 July; 19 August 1987 Decision No A 68/87

Lapsing of consent — Within two-year period imposed by s 70, application lodged under s 71 — Consent given under s 71 — Appeal lodged against that consent — Effect if any of the s 71 proceedings on the running of time under s 70 — Town and Country Planning Act 1977, s 70.

Conditions — Application by soccer club to erect clubrooms on council reserve — Consent given subject to conditions requiring clubrooms to be used by compatible club in summer — Such conditions inappropriate — Town and Country Planning Act 1977, s 71.

Where consent was given to a soccer club to erect clubrooms on reserve land to be leased from the council, and, before any work had been started, the club applied for consent under s 71 for cancellation of certain conditions attached to the consent, the proceedings under s 71 did not have the effect of stopping time running against the club under the two-year limitation period imposed by s 70 in respect of the initial consent. Hence, when an appeal against consent given by the council under s 71 came to be heard, the Tribunal had no jurisdiction to determine it, since the original consent had by then lapsed under s 70 by reason of the club not having yet commenced work on the building for which consent had been given.

(obiter) The Tribunal observed in the course of their decision that the conditions which had been the subject of the club's s 71 application were inappropriate. These conditions had been based on the expressed and genuine intention of the soccer club to be associated with an athletics club which would use the clubrooms in the summer. The conditions in effect required the soccer club to arrange such a continuing association. When the athletics club pulled out of the arrangement, the soccer club had to seek cancellation of these conditions. Land use planning, said the Tribunal, is permissive; and such conditions should not have been imposed.

Appeal

This was an appeal under s 69 of the Town and Country Planning Act 1977.

R E Bartlett for the appellants
M A Ray for the respondent
D K Wilson for the applicant.

The decision of the Tribunal was delivered by His Honour Judge Moore.

DECISION

These are appeals against a decision by the Auckland City Council ("the council") varying conditions of a planning consent granted to the Eastern Suburbs Association Football Club ("the soccer club") on 26 February 1985. It became apparent in the course of the opening submissions by counsel for the soccer club that the consent may have lapsed. The Tribunal heard all parties on that issue. By consent the Tribunal had placed before it a substantial bundle of correspondence which enabled a ready understanding of what had happened and why. The Tribunal reserved its ruling on the submissions made. A hearing of evidence as to the planning merits was not commenced.

[On 26 February 1985 the council gave consent to the soccer club erecting clubrooms on land in a council recreation reserve where the soccer club had played its games in winter and a local athletics club had operated in summer. There was an understanding between the two clubs (disclosed to the council) that the planning consent and construction of the clubrooms were to be the soccer club's responsiblity, but once the building was complete the premises would be under the control of a joint committee of both clubs, and the athletic club would make use of the rooms in the summer. Conditions imposed on the council consent included the following:]

(b) The management and administration of the building shall be through a joint control body having equal representation from the parties concerned and be to the satisfaction of the Director of Parks and Recreation;
(c) Approval to lease the site shall be authorised by the Minister of Lands;
(g) Club rooms shall not be available to or used by any organisation other than the Eastern Suburbs Association Football Club and the Eastern Suburbs Amateur Athletic Club.

Thereafter the project stalled because the council took the view that use of the premises by the athletic club was, in effect, a condition of the planning consent. In particular if the athletic club were not involved condition (b) (read in context with condition (g)) could not be complied with.

The problems which have since arisen are the result of the inclusion, in a planning consent, of conditions which belong in a lease. In land use planning terms it is appropriate to avoid a proliferation of clubrooms on land zoned for active recreation by requiring that, subject to appropriate safeguards, a clubroom building for a winter sports club should also be able to be used by a summer sports club which enjoys the right to use the adjacent sports ground area in an organised way. But that is not the same thing as requiring that the club rooms *must* be used by the athletic club in the soccer club's off-season. Land use planning is permissive. The Tribunal is unable to perceive what land use planning purpose is achieved by the condition requiring a joint control body having equal representation from the parties concerned.

Condition (c) "approval to lease the site shall be authorised by the Minister of Lands" was also inappropriate. It appears that what was intended was a condition that no building permit be issued until a lease or licence of the clubroom site had been completed.

In November 1985 the soccer club made a notified application seeking a variation

of the conditions of the planning consent given on 26 February 1985 [Numerous objections were received.]

On 8 July 1986 the council's planning committee resolved to grant (in part) the application to vary by:

1. Deleting condition (b) and replacing it with: "The club rooms shall be available for use by any sporting club authorised by the executive manager at the Parks Department, to use the park as its headquarters during the summer months."; and
2. Deleting condition (g) and replacing it with: "The club rooms shall not be used by any organisation other than the Eastern Suburbs Soccer Club and any other club authorised pursuant to condition (b)".

These appeals followed the council's decision on the application to vary. . . . . They came before the Tribunal on 10 November 1986. By consent they were then adjourned sine die for a later fixture. One of the parties had not been notified of the hearing. One of the appellants in appeal 440/86 had a commitment in the High Court.

The appeals came on for hearing again on 13 July 1987. It is not clear what progress (if any) has been made towards the completion of an appropriate lease of, or licence to occupy, the proposed clubhouse site. What is accepted by all parties is that no work has been done on site to give effect to the consent granted on 26 February 1985. That consent did not contain any provision which had the effect of extending the two year period prescribed by s 70 of the Act. The time within which an application could be made under s 70(b) has expired. No such application has been made. Therefore, by reason of s 70, prima facie the consent has lapsed.

In the circumstances of this case it is unnecessary to embark upon an exhaustive analysis of how a council may allow a period of longer than two years within which effect may be given to a planning consent. It is appropriate that the Tribunal sound a cautionary note by recording its very grave doubts that such a period may be allowed other than as a term of a consent or on a s 71 application. Assuming for the moment that (in the case of a consent which does not expressly provide for a period longer than two years within which to give effect to that consent) the provisions of s 70 constitute a "condition, restriction, or prohibition imposed in respect of the consent" an applicant would still have to demonstrate that "a change in circumstances has caused the condition, restriction, or prohibition to become inappropriate or unnecessary".

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 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 ever-changing present.

The council's decision on the application to vary the conditions of consent was

given in July 1986. The consent was then extant. It was given on 26 February 1985. The council's letter, advising the outcome of the s 71 application, after setting out the resolution of the Town Planning Committee, went on to state:

> Please note that unless a specific time limit is stated in the conditions imposed by the council when granting this consent, all conditions must be complied with before the use to which the consent relates is established.
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> Your attention is drawn to the provisions of s 70 of the Town and Country Planning Act 1977 that the consent shall lapse after the expiration of two years from the date when the consent was given unless the use has been established within that period, or in the opinion of the council, substantial progress is continuing to be made towards establishing that use.
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> Your attention is also drawn to the provisions of s 69(1) of the Town and Country Planning Act 1977, which sets out the rights of appeal against the committee's decision. This section requires that any appeal be lodged with the Tribunals Division of the Department of Justice in Wellington within one month of your receiving notification of this decision.

This additional material is not part of the committee's decision (which by virtue of delegated authority is the decision of the council). It is an additional explanatory note by a member of the council staff. It cannot constitute an allowing of additional time for the purposes of s 70. In any event the Tribunal is satisfied that it does not constitute an allowance of additional time. The decision of 8 July 1986 is not, despite the first of the quoted paragraphs, a grant of consent. It is a variation of an existing consent, not a new consent. Looked at as a whole the letter advising of the committee's resolution draws attention to the fact that *the consent* (ie the substantive consent, not the variation) would lapse after two years. It is necessary to keep in mind that the consent had over seven months to run when the committee made its decision upon the s 71 application.

The s 71 application did not seek further time. Nothing before the Tribunal indicates that the matter of further time was ever raised at the hearing on 24 June 1986. Given the unfortunate history of this case there may have been grounds upon which further time could properly have been allowed, but there may also have been changes in circumstances which rendered it inappropriate to allow further time. It is clear that the objectors/appellants would have opposed the allowing of further time. It is plain from the material before the Tribunal that their attitude is that the clubrooms should not be constructed, and that they will take any point of law or fact which will assist to that end. The Tribunal has no discretion in the matter. Further time was not one of the things sought by the s 71 notified application. The Tribunal is satisfied that as a matter of fact the council did not, in its decision on the s 71 application, allow further time. As a matter of law the Tribunal is satisfied that it was not open to the council, on that application, to allow further time. It was a notified application in clear and specific terms. The council's jurisdiction and powers were limited accordingly; so are those of the Tribunal.

Time for the purposes of s 70 runs from the date on which consent was given. The substantive consent was not subject to appeal. Where application is made for conditions of consent to be varied or cancelled the time within which effect must be given to that consent continues to run. Likewise where a decision under s 71 is taken on appeal time continues to run in respect of the substantive consent. What then goes on appeal is the decision under s 71. An appeal against a s 71 decision does not convert the substantive grant of consent (in this case under s 72) into

a "consent given or upheld on appeal".

It is inherent in the language of s 71(1) that the jurisdiction there conferred may be exercised only in respect of a subsisting consent. A condition of a consent which has lapsed cannot be said to have become inappropriate or unnecessary. It no longer has any effect because the consent to which it relates can no longer be acted upon.

Reluctantly the Tribunal finds itself forced to the conclusion that the substantive consent in favour of the soccer club has lapsed and that there is no means by which it can be revived. When the consent lapsed the conditions attaching to it lapsed with it. The lodging of appeals against the council's decision on the s 71 application had the effect of suspending that decision but not the earlier substantive grant of consent.

The determination of the Tribunal is that it has no jurisdiction in respect of these appeals. The decision under appeal is no longer of any effect. This is not a case for any award of costs.