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HOW MINOR IS "MINOR"?

DO THE NEW NOTIFICATION PROCESSES IN THE 2003 AMENDMENT ACT CREATE MORE PROBLEMS THAN THEY SOLVE?

The thesis of this article, is the phrase "the adverse effects of the activity on the environment will be minor" in section 93(1)(b) as introduced by the Resource Management Amendment Act (No 2) 2003 and in particular the word "minor" cannot have the same meaning as that word was given in *Bayley* v *Manukau City Council.' Bayley* held that a requirement that effects are no more than minor under section 93 (prior to amendment) meant the effects could be no more than *de minimis*. It was a serious deficiency in drafting that it was not made plain that the meaning given to minor in *Bayley* was not to be applied to the notification provisions introduced in 2003.

The consequence of the *Bayley* decision is that sections 93 and 94 (prior to the 2003 amendment) in respect of discretionary (unrestricted) and discretionary (restricted) and non-complying activities are to be interpreted against the following principles:

(a) 'Minor' effect means a *de minimis* effect.

(b) For a discretionary (restricted) activity effects on the environment do not include those effects that are not capable of being considered because of the restricted discretion provided in the plan.

(c) Effects include only effects other or further than those permitted as of right by a plan.

(d) Effects on persons who have given their consent may be disregarded.

After disregarding effects as required by paragraphs (b), (c) and (d) above, if an effect is more than *de minimis*, written consent of the affected party was required. In the absence of that consent, an application had to be publicly notified.

De minimis is an extraordinarily low threshold of effect. *De minimis* refers to the Latin phrase *de minimis non curat lex* and encapsulates the principle that law is not concerned with trifling matters or matters of negligible significance. In the *Bayley* case, the proposed ground floor external closets extending approximately 0.8 metres into the minimum sideyard were described as *de minimis*.

The Amendment Act 2003 is intended amongst other things to eliminate processing

inefficiences in the Act. One of the areas obviously in need of improvement was the area of public notification. In particular, streamlining was required where effects are more than *de minimis*, but insufficiently significant to warrant public notification as opposed to service on those people directly affected. In an urban context the situation happens every day.

Example **A:** There is an encroachment of the building envelope in the residential zone as a result of a structure exceeding maximum height by 2 metres. This makes the activity discretionary (restricted) with the consent authority's discretion, limited to the effects of shading, visual dominance and amenity effects. Adjoining neighbours A and B give consent and adjoining neighbour C refuses. Assume even applying the permitted baseline and excluding matters over which the Plan retains no discretion, the effects are more than *de minimis* but less than significant.

Under sections 93 and 94 before amendment, public notification was required even though neighbour C was the only person with a legitimate interest in the process. It is in these types of cases that the idea of limited notification was conceived. Limited notification provides for neighbours A, B and C

to be served personally without the need for public notification.

The Amendment Act enacts a new section 93 which specifies when public notification is required and enacts a new section 94 specifying when public notification is not required.

The key point is that before a consent authority can contemplate limited notification, it must conclude the activity does not require public notification under the new section 93. In respect of discretionary (restricted) and discretionary (unrestricted) and non-complying activities, the consent authority can only reach that conclusion if the effects are minor.

At first blush one might consider that "minor" in the new s.93(1)(b) must mean the same as in *Bayley*. This is because largely the same terminology is used in both the 'new' and 'old' provisions. Also, s.94A that specifies how principles applicable to the calculation of an effects magnitude is a statutory codification of *Bayley* principles and therefore apparently an endorsement of it. If Parliament intended to alter the meaning established by the Court of Appeal, one would have expected this to be made explicit in the new wording or at the very least in the explanatory notes. This hasn't happened.

Nevertheless, 'minor' in the new s.93(1)(b) must have the same meaning as 'minor' in s.105 2A(a). Minor in the context of s.105 2A(a) means less than significant but is certainly more than *de minimis*. It is to be judged on the particular facts of the case and is a question of fact and degree. As was stated in *Elderslie Park Ltd v. Timaru District Council:* [2]

"The word 'minor' is not defined in the Resource Management Act. It means lesser or comparatively small in size or importance. Ultimately an assessment of what is minor must involve conclusions as to facts and the degree of effect. There can be no absolute yardstick or measure."

There are three reasons to support this view. First, the wording is almost exactly the same in s.93 and s.105 2A. There is no reason why Parliament would have intended the word minor to mean different things in sections relating to the processing and substantive disposition of the application particularly where the phraseology is similar. Support for this view is found in *Smith Chilcott Ltd v. Auckland City Council*[3] where Tipping J emphasised the linkages between processing and substantive *disposition*. At para 23 the Court said:

"That brings us back to the process and grounds for the making of resource consent decisions and in particular to the difference between the decisions made under s.94 and those made under ss 104 and 105. As Mr Harrison contended, the first have a preliminary character and are not informed in the way that the second are by a hearing involving evidence and submissions. It is also true, especially when the terms of s.104 and Part II are considered (as they are in the answer to question 3), that a wider range of material will in general bear on the final substantive assessment. But that does not break the conceptual link between the process to be followed and the substantive hearing. The obligation to notify under s 94(2) relates to the "activity for which consent is sought': That activity is that which cannot be pursued without consent. It is the same proposed activity and the effects related to it which must be assessed by the consent authority both at the notification stage and the substantive stage. The legislation implies a match between the process of notification and the substantive consideration. That particularly applies to the threshold test in s.105(2A). The "effects" and "activities" to which it refers are the same as those contemplated by s.94(2)."

Secondly, the new ss.93 and 94 are framed differently from the existing provisions. Under sections 93 and 94 before amendment, people with a legitimate interest in being heard on effects that are not significant would be excluded from participation and decision making if the term minor was defined as anything more than *de minimis*. This is because the Act as it was structured provided only two alternatives; either no notification or full public notification. The 2003 amendment however does not create these two alternatives. It provides a halfway house whereby service is on persons who are affected by means of limited notification.

Thirdly, to interpret "minor" under the new section 93 as meaning *de minimis* leads to a nonsense. It would mean that Parliament intended the new section 94 to require service on affected people only in circumstances where the effect is less than *de minimis*. This is a nonsense because *de minimis* by definition means that it doesn't require any legal process and is trifling.

It is also odd that the 2003 Amendment Act doesn't entitle a consent authority to exclude a consideration of the effects on a property whose owner has given consent determining whether the adverse effects on the environment are more than minor. Prior to amendment s.94(4) stated:

"In determining whether or not the adverse effect on the environment of any activity will be minor for the purposes of subsection (2)(a) or subsection (3)(b) a consent authority shall take no account of the effect of the activity on any person whose written approval has been obtained in accordance with subsection 2(b) or subsection (3)(c)."

This omission in the 2003 Amendment makes no sense. Let us assume in Example A the adverse effects are minor if the effects on neighbours A and B are excluded but more than minor if the effects on neighbours A and B are included. The Amendment Act does not entitle the consent authority to exclude effects on **A** and B so full public notification is required. It is difficult to see how effects on a person who has given consent should tip the balance so that full public notification is required not simply limited notification.

In summary, there are problems including some lack of clarity with the new notification provisions. These problems were avoidable and are to be regretted. In the meantime, a workable application of the new provisions will need to be implemented by consent authorities and one must hope increased litigation will not ensue,

The Ministry for the Environment has recently updated their guide to include limited notification - check it out on www.qualityplanning.co.nz
What are your thoughts on this issue? Forward comments to: PO. P O Box 52046, Kingsland, AUCKLAND or email nzpi@ihug.co.nz and place PQ Comment in the subject line

FOOTNOTES

1. [1998] NZRMA
2. [1995] NZRMA 455
3. [2001] NZRMA 503