IN THE COURT OF APPEAL OF NEW ZEALAND

CA174/06

	BETWEEN	DAVID NEIL BALFOUR, NEIL MOIR AND KIRSTY REID Applicants
	AND	CENTRAL HAWKES BAY DISTRICT COUNCIL Respondent

Hearing: 4 December 2006

Court: William Young P, Glazebrook and Arnold JJ

Counsel: D N Balfour in person for the Applicants
B W Gilmour for Respondents

Judgment: 13 December 2006 at 2.15 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay the respondent $1,500 in costs, together with usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

[1] In a decision delivered on 27 June 2005 the Environment Court granted enforcement orders against the present applicants, David Balfour, Neil Moir and

Kirsty Reid associated with the keeping of dogs on their property at 4 Cemetery Road, Waipawa. Subsequently the Court made a substantial order for costs against them. By the time their appeal to the High Court was heard the substantive issue was largely moot as they had already sold their property. Still very much alive, however, was the issue of costs. In the High Court Miller J concluded that the enforcement order made against them had been inappropriately extensive but that a more limited enforcement order would have been appropriate. He significantly reduced the order for costs. The applicants now seek leave to appeal against the High Court judgment. They maintain that no enforcement order should have been made.

[2] Since the High Court judgment, the parties have agreed on the quantum of costs on the basis that the High Court judgment is sustained. But if leave to appeal is granted and the judgment is later set-aside, the applicants will be entitled to a refund. So the proposed appeal is not moot.

[3] Before the Environment Court there were two key issues which are relevant to the present application for leave:

(a) The materiality to the enforcement proceedings of a resource consent which Messrs Balfour and Moir had obtained in May 1983 to erect a dwellinghouse and to keep dogs for breeding and showing. This resource consent provided that no more than forty animals were to be housed on the property.

(b) A contention that subsequently (at a time when boarding kennels were a permitted activity) they obtained existing use rights to have up to 160 dogs on the property.

[4] The Environment Court concluded that the resource consent permission to have forty dogs on the property was not a controlling consideration in light of s 16 of the Resource Management Act 1991 and it rejected, apparently on the facts, the claim to existing use rights. It restricted to ten the number of dogs which could be

kept on the property. In the High Court, Miller J treated the resource consent as critical but on the existing use issue he rejected the challenge to the findings made in the Environment Court as involving essentially factual questions. In his view, the conclusion of the Environment Court on this aspect of the case was fairly open to it. So if the substantive issue had not been moot he would have ordered that applicants keep no more than 40 dogs on the property.

[5] If leave is granted, the applicants will challenge the findings of the Environment Court and High Court as to existing use rights.

[6] The applicants' resource consent was obtained in 1983. Between 1992 and 1999 the keeping of dog kennels was a permitted use and there was no scale limitation. Mr Balfour's argument in the Environment Court, the High Court and this Court is that during this period, the applicants acquired existing use rights to accommodate up to 160 dogs on their property. The Environment Court did not accept Mr Balfour's evidence on this point but did not make an explicit finding as to the number of dogs which the appellant's kept between 1992 and 1999. It did, however, note that during this time the applicants had never registered more than 40 dogs under the Dogs Control Act 1996. This last point is not necessarily decisive as on one inspection (in December 2003) 80 dogs were found on the property even though only 40 were registered. On that basis it seems plausible to assume that between 1992 and 1999, the number of dogs on the property sometimes exceeded 40. That this is so is consistent with a letter of the respondent dated (although apparently incorrectly) 8 February 2004. Accordingly the legal issues raised by the applicants cannot simply be brushed aside as being unsustainable on the factual findings.

[7] The applicants' legal arguments are along these lines. The 1983 consent did not address noise levels associated with barking. The measured levels of noise emanating from the property did not exceed those prescribed in the current district plan. The dogs lawfully on the property between 1992-1999 (and the noise they generated) formed a "permitted baseline" and in any event it was not open to the Environment Court to make an order which in effect terminated existing use rights. Mr Balfour did not seem to be arguing that noise associated with an existing use

could not be controlled under ss16 and 319 but rather that the method of control adopted must not be inconsistent with the existence of the existing use entitlement.

[8] We do not see the expression "permitted baseline" as material or helpful in this context, cf *Queenstown Lakes District Council v Hawthorn Estates Ltd* CA44/05 12 June 2006 at [27]. Section 10 provides that existing use rights prevail over rules in a district plan or proposed plan. Section 10 does not provide that existing use rights prevail over statutory duties such as the duty imposed by s 16. So s 10 does not, in itself, provide an answer to enforcement action associated with an alleged breach of s 16. If there is a defence, it must be found in s 319.

[9] Section 319(2) provides

> **319 Decision on application**
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> (2) Except as provided in subsection (3), the Environment Court must not make an enforcement order under section 314(1)(a)(ii), (b)(ii), (c), (d)(iv), or (da) against a person if—
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> (a) that person is acting in accordance with—
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> (i) a rule in a plan; or
>
> (ii) a resource consent; or
>
> (iii) a designation; and
>
> (b) the adverse effects in respect of which the order is sought were expressly recognised by the person who approved the plan, or granted the resource consent, or approved the designation, at the time of the approval or granting, as the case may be.

This section does not explicitly provide a defence based on existing rights as in the case of current rules, resource consents and delegations. Further, if the reference to "a rule in a plan" in s 319(2)(a) can be read as encompassing the rules in the 1992 plan (which the applicants rely on for their existing use right claim), the further condition in s 319(2)(b) was not satisfied as there is no evidence that those who approved the 1992 plan "expressly recognised" the "adverse effects" in question. Given the limitations on the s 319(2) defence, we can see no legal bar to the

conclusion reached in the Environment Court that the applicants were in breach of s 16.

[10] Accordingly the application for leave to appeal is dismissed. The applicants are to pay the respondent costs of $1,500 and usual disbursements.

Solicitors:
Bannister and von Dadelszen, Hastings for Respondents