ORIGINAL

Decision No.	A16/94
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an application under section 311
BETWEEN	**NGATARINGA BAY 2000 INC**
	(ENF 107/93)
	Applicant
AND	**THE ATTORNEY-GENERAL**
	First Respondent
AND	**THE NORTH SHORE CITY COUNCIL**
	Second Respondent

BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard sitting alone pursuant to section 309.

HEARING at AUCKLAND on 21 and 25 January and 4 February 1994

APPEARANCES

Mr J.K. Cayford for the applicant
Mr P.T. Cavanagh QC and Mr K. Robinson for the first respondent
Mr J.N. Savage for the second respondent

DECISION

INTRODUCTION

The Royal New Zealand Navy is moving accommodation for training from premises at Narrow Neck, Devonport, to the part of the main Navy base at Devonport known as the North Yard, located at the head of Ngataringa Bay. In recent years the North Yard had not been a scene of great activity, being primarily a storage facility, a vehicle workshop and garages, and providing premises for the Defence Scientific

Establishment. There had however been complaints by residents from time to time about noise and dust from various activities in the area. The proposed introduction to the North Yard of accommodation and facilities for training has given rise to concerns by some residents about intensification of the level of activity there, and that the quality of the environment of their homes would be significantly affected.

The applicant is an incorporated society of residents of the Ngataringa Bay area. The first respondent, the Attorney-General, was cited for and on behalf of the Ministry of Defence which has responsibility among other things for the Royal New Zealand Navy and its base at Devonport. The second respondent, the North Shore City Council, is the territorial authority for the district that includes Devonport.

On this application for certain declarations, some issues have been isolated for separate hearing, other issues having been combined with remaining issues in an earlier application (ENF 101/92) by the same applicant for declarations on related matters, and left for hearing at a later fixture. Some issues in the earlier proceedings have already been heard and were the subject of Decision A158/92 given on 3 December 1992 and reported at 2 NZRMA 318. Although that decision is the subject of an appeal by the applicant to the High Court alleging that it contained errors of law, the appeal has not yet been brought on for hearing.

The issues the subject of this decision are:

> "(a) ...whether plans presented on 2 April 1993 under section 420 of the Act by the first respondent to the second respondent on behalf of the Royal New Zealand Navy as they apply to current gymnasium and relocatable classrooms development...in the North Yard area at Ngataringa Bay, Devonport, and the planning process which ensued were sufficient to comply with the duties imposed by section 125 of the Town and Country Planning Act 1977 including in particular whether the outline plan and the manner in which it was presented gave sufficient particulars of the height, shape, and the bulk of the work, its location on the site, the likely finished contour of the site and vehicular access, circulation and landscaping provisions.
>
> (b) ...the extent of the first respondent's duty to adopt the best practicable option to avoid unreasonable noise pursuant to section 16 of the Act in respect of the activities the subject of the application including in particular:
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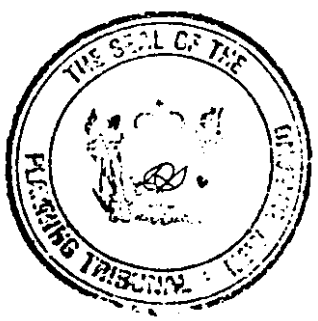
> i) Whether it is appropriate to adopt the performance standards for noise emissions which apply to the underlying zoning of the land or whether more stringent performance standards are required having regard to the low noise level of background noise in the locality.



ii) Whether the duty extends to relocating to other sites in Devonport or redesigning proposed buildings and/or creating a buffer zone in relation to residential properties in the locality.

iii) Whether a limitation on the hours during which such activities may take place is required and, if so, the hours which would be appropriate having regard to existing activities at the site and the likely affect on the amenities of the district.

iv) Whether particular measures and routes are required for traffic circulation and parking in order to ensure that noise is kept to a reasonable level and, if so, the measures which should be adopted.

(c) ...the extent of the first respondent's duties under section 17 of the Act to avoid, remedy or mitigate adverse effects on the environment arising from the activities the subject of the application including the measures required in order to avoid, remedy or mitigate:

i) Adverse visual effects.

ii) Adverse traffic and parking effects.

iii) Adverse social and amenity effects arising from extended hours in the evenings and weekends.

iv) Adverse social consequences arising from continuing uncertainties over the Royal New Zealand Navy's plans for the area; changes in the timing and nature of the Navy's proposals as outlined in its five and fifteen year indicative plans; and the lack of definition of the designations relating to the Navy's activities under the second respondent's transitional district plan."

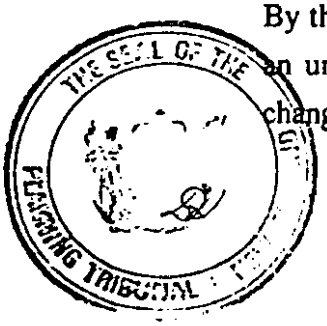
For the present purpose the evidence is that given in 11 affidavits, 5 lodged for the applicant, 5 for the first respondent, and 1 lodged for the second respondent; and in evidence given in cross-examination of the four deponents of affidavits who were cross-examined before me at the hearing. In my view not all of that evidence bears on the issues that I have to decide in this part of these proceedings.

BACKGROUND

Transitional District Plan

The relevant section of the transitional district plan is the Devonport Borough district scheme (second review) which became operative on 1 October 1986. Under that plan the North Yard is subject to a designation "Defence Purposes".

By the district scheme as it was approved and became operative, the North Yard had an underlying zoning of Industrial B. Subsequently, in about May 1989, by scheme change 16, the Industrial B zone was deleted from the district scheme, and replaced



by the Commercial Services zone. However the map accompanying the scheme change did not show the lands at the Navy base, for which the planning map continued to show the underlying zoning as Industrial B (a zoning for which there were no longer any ordinances.) The Council sought to correct that by proposed scheme change 51 which was notified in mid 1992, by which the Industrial B zoning would be replaced by Commercial Services zoning. About 50 submissions were lodged in respect of scheme change 51, but at the time of the hearing of these proceedings it had not progressed to hearing and decision on the submissions.

The Council proposes to prepare a new district plan under the Resource Management Act. To that end it has published an issues document, on which it has received submissions; and is now in the process of preparing a draft plan, which it hopes to publish in September or October 1994.

Indicative Plans

In 1989 a firm of engineering and planning consultants, KRTA, made a study of the efficient and cost effective use of land occupied by the Navy in Devonport, with a view to consolidating the activities and disposal of surplus holdings. The study considered various options and ended with indicative plans showing recommendations, including consolidation of all principal naval functions on the North and South yards, provision of a new gymnasium at South Yard and of a large car park at North Yard.

Indicative plans were produced by the Ministry of Defence to indicate likely development in Devonport within 5 and 15 years in various areas of the naval base. They were not statutory plans but were purely indicative, and were given on the basis that they could be superseded by operational requirements. The indicative plans were displayed at the Devonport Public Library.

Outline Plan

In March 1993 the Navy made an informal submission to the Council of a draft proposal for redevelopment of the North Yard to accommodate functions and activities relocated from Narrow Neck. Following consideration at an informal meeting attended by members of the Devonport Community Board Town Planning Committee as well as by the Council's Devonport Senior Planner and representatives

of the Navy, on 2 April 1993 the Navy delivered to the Council a description of the proposal accompanied by several plans. The covering letter stated: "The following is forwarded pursuant to s. 420 of the Resource Management Act 1991."

The plans showed classrooms on an area at the North Yard that had been shown on the indicative plans as intended for carparking.

The Council informed residents considered to be affected, and invited them to make submissions. Residents who made submissions were informed that formal consideration was to be given to the proposals at a meeting of the Community Board Town Planning Committee on 29 April 1993. The proposal was also discussed at a meeting of a Navy and residents liaison group held on 22 April 1993. A report on the proposal was prepared for the committee by the Council's Planner, Devonport, which summarised the residents' submissions and contained the planner's assessment of the proposal by reference to building heights, noise, traffic flows, carparking and landscaping, and recommending that more information be sought about impact on the 5- and 15-year indicative plans and likely traffic impacts, and details of noise mitigation measures proposed for the gymnasium; and also recommending that compliance with the 9-metre building height limit of the underlying zoning be investigated.

At its meeting on 29 April the Town Planning Committee allowed one of the submitters, Mr W. Freeman, to speak on his submission, and received comment from the Navy about items in the planner's report, including an explanation that the proposal was an interim step towards achieving the 15-year objective: that the gymnasium would remain, and the functions housed in the relocatables would move to the South Yard when facilities are constructed in accordance with the 5- and 15-year plans. There was concern expressed by a member of the committee to the effect that the plans bore no relationship to the building that was going to be built. The committee (having delegated authority) resolved to request the Minister of Defence first, that a joint traffic management study be completed and its recommendations taken into consideration prior to implementation of the outline plan of works; secondly, that the Navy be urged to work towards a height limit of 8 metres for the gymnasium but otherwise comply with the 9-metre height limit of the underlying zone; and thirdly, that the Navy provide details of the noise mitigation measures proposed for the gymnasium, and that before completion of the design, an acoustic design

certificate be provided. The resolution also contained advice to the Navy on landscaping and carparking, hours of use of the gymnasium, hours of construction work, and avoidance of illumination causing annoyance.

The decision was sent to the Navy and copies sent to residents who had made submissions, and on 30 June the Council received the Navy's response. The first request was rejected, as the traffic management study was outside the scope of the proposal; and the second and third requests were accepted, it being stated that the gymnasium would comply with the 9-metre height limit of the underlying zoning, and that details of noise mitigation measures and an acoustic design certificate would be provided. The Community Board decided not to appeal to the Planning Tribunal; and the residents who had made submissions were advised of that.

A building consent application for eight new classrooms and four relocated classrooms (and also for a temporary single-storey command works building) was received by the Council on 7 July 1993 and was issued on 27 July 1993; and a building consent application for the remaining two classrooms was received on 6 October 1993.

COMPLIANCE WITH SECTIONS 420 AND 125

The applicant's summary of its contentions in support of its submission that section 420 had not been complied with was that the Navy was uncertain whether the gymnasium plans submitted were of the gymnasium the Navy intended to build; that specific outline plans submitted did not comply with duties imposed by section 125; that other outline plans were not included with the application; and that there was uncertainty associated with the outline plan for the gymnasium during its consideration.

The applicant accepted that the plans of the proposed gymnasium that had been submitted to the Council were outline plans of a gymnasium, but contended that the manner in which they had been presented by the Minister of Defence led to Community Board members who considered the application being uncertain whether the outline plans were plans of the gymnasium that was to be constructed, so that the Board's Town Planning Committee was unable to make requests for changes to specific aspects of the gymnasium other than as to its height.

In respect of the classrooms, the applicant challenged the outline plan because it contained this text:

> "Typical plan and elevation details of the new buildings will be similar to those detailed at Annex C."

The applicant submitted that the plan does not comply with section 125 because it does not show the actual buildings to be built; and also because it does not show the length and bulk of each of the buildings.

The applicant also made a submission about reference in the outline plan to a command works building. However that building is not within the part of the proposed development that is the subject of the present part of these proceedings, which are confined to the gymnasium and relocatable classrooms development.

On the uncertainty point, the applicant relied on evidence that at the liaison meeting on 22 April 1993 representatives of the Navy had made comments that the plans were based on a gymnasium at Wanganui, that they were not necessarily what they planned to build, and that they would not ask for a canteen (there being a canteen shown on the plan). (Commander Hutton deposed that if it had been raised by the Council's request for changes, the Navy would consider deleting the canteen from the design.) The applicant also relied on evidence (already mentioned) that a member of the Community Board commented at the meeting on 29 April 1993 to the effect that he accepted that the plans they were looking at bore no relationship to the building that was going to be built. In addition the applicant relied on the comment by the Navy on the planner's report for the committee that it was difficult to provide noise mitigation measures at that stage, a comment that is better understood by reference to a subsequent communication from the Navy that the design of the gymnasium had not been fully developed at the time of serving the outline plan, but had been incorporated in order to enable the Council to assess the overall impact of the development. However the Navy has since informed the Council that there is no need to serve a revised outline plan for the gymnasium.

For the first respondent it was contended that the plan submitted to the Council as amended pursuant to the Council's recommendations gave all relevant information, in that sufficient particulars of the height, shape and bulk of the work, its location on the site, and vehicular access, circulation and landscaping provisions were clearly identified. Likewise counsel for the Council submitted that the planning process

followed by the Council in considering the outline plan was sufficient to comply with the duties imposed on the Council by section 125. Mr Savage observed that the Council is not empowered by section 125 to require further information on an outline plan of works, nor to require public notification of an outline plan of works. In particular he submitted that the limited scope of section 125 does not extend to allow consideration of off-site traffic effects, or noise mitigation.

Section 420 is one of the transitional provisions of the Resource Management Act. The material effect of section 420 for this case was that designations in operative district schemes immediately before the commencement of the Act were deemed to be included in the relevant district plans (subsection 2(a)); and that section 125 of the Town and Country Planning Act 1977 continues to apply to those designations (subsection (4)). Section 420 was amended by section 201 of the Resource Management Amendment Act 1993 (which came into force on 7 July 1993), but the only relevant effect of the amendment was to omit time limits for the continued application of section 125, which are not material for the present purpose.

The relevant parts of section 125 of the Town and Country Planning Act 1977 (incorporating amendments) are:

> "125. **Outline plans to be submitted to Council** -(1) Outline plans of works to be constructed by or on behalf of the Crown of by any local authority on designated land shall be submitted to the Council for its consideration before construction is commenced unless they have been otherwise approved under this Act. An outline plan shall show the height, shape, and build of the work, its location on the site, the likely finished contour of the site [vehicular access and circulation, and landscaping provisions].
>
> ....
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> (5) The Council, after considering the proposals included in an outline plan, may, within 1 month after receipt of the plan, request the Minister or the local Authority, as the case may be, to make changes to all or any of the proposals contained in the plan.
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> (6) The Minister or the local authority may accept or refuse the Council's request; or the Minister may, in any case where a requirement for the work is to be referred for inquiry for inquiry pursuant to section 119 of this Act, refer the Council's request to the Tribunal for its report and recommendation in accordance with that section.
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> (7) If the Council's request is refused, the Council may, within 1 month after the [date of notification of the decision] appeal to the Tribunal against that refusal.
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> ...."

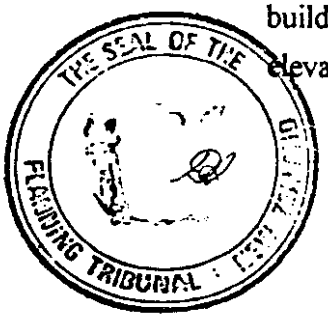
In the absence of direct evidence it is difficult for me to gauge the true effect on the minds of the members of the Community Board's committee of the reported comments by a representative of the Navy at the liaison meeting. However the committee had before it the documents supplied by the Navy and, as its Senior Planner Ms C.H. Prendergast said in cross-examination (in my view correctly), if the Navy decided that the outline plans that had been submitted to the Council did not describe the buildings that were to be built, it would have been necessary for a further outline plan to be served. The only qualification to that would have been if modifications were made to the plans to meet requests by the Council under section 125.

The procedure under section 125 is permissive, like other procedures for authorising works under that Act. Therefore if, after the section 120 procedure had been completed, the Navy decided to build the gymnasium but to omit the canteen, it does not appear to me that any further procedure would be required.

I do not accept the applicant's claim that uncertainty in the minds of committee members about what was to be built precluded the committee from requesting changes to the gymnasium other than in respect of its height. There is no direct evidence that the committee felt constrained from doing so by the reported comments by Navy representatives. The committee resolutions specifically referred to the submitted plans and supporting documentation, from which it appears that, whatever may have been said during debate, when it came to decision the committee focused (as it should have done) on the outline plan of works, rather than on comments made at the liaison meeting. The question of noise mitigation measures was addressed by the committee's third request, which was accepted by the Navy.

The outline plan contains a site plan showing locations for 14 classrooms, and drawings of typical plan and elevation detail. There is also a colour scheme. As mentioned, the drawings show the scales, and in the case of the floor layout, figured dimensions are also given. The advocate for the applicant, Mr Cayford, accepted that the plans show scales from which dimensions could be derived.

The question raised by the applicant's submission is whether an outline plan, to be valid, is required to show individually the dimensions of each of a number of similar buildings, or whether it is sufficient to provide a site plan and typical plans and elevations for the buildings. The answer must depend on whether the latter provides



the relevant council with sufficient information on the aspects of the work listed in section 125(1) to enable it to understand the proposal and request changes to the proposal within the scope of the section.

In this case the committee had the benefit of a report from its planner. Although that report raised some questions, it contained nothing to indicate that the planner had experienced any difficulty in understanding the proposal from perusal of the plans, nor is there any evidence that any member of the committee was unable to understand the proposal from examination of the plans. The applicant did not bring to my attention any respect in which I might not be able to do so with the assistance of a scale rule. Scale rules are common devices used in reading plans of proposed works, and in my experience are readily available at council offices where plans are to be considered.

In the circumstances, it does not appear to me that providing individual drawings for each of the 14 similar classrooms would have placed the committee in any better position to perform its function under section 125. To have done so would have involved additional cost without corresponding benefit. I do not consider the provision of a scaled site plan and typical plans and elevations drawn to scale fell short of the duty imposed by section 125.

The applicant did not bring to my attention any respect in which it was alleged that the Council's procedure in processing the outline plan of works failed to comply with the requirements of section 125, and I have not myself found any. Rather, the Council went beyond its duty by notifying residents in the vicinity and receiving and considering submissions by them.

I am unable to find that the first respondent or the second respondent failed in duties imposed by section 125 in any respect, and the declaration sought to that effect must be declined. The question whether that declaration would have been within the scope of one or more of the classes listed in section 310 does not, therefore, need to be decided.

EXTENT OF FIRST RESPONDENT'S SECTION 16 DUTIES

The applicant's summary of the second issue was the extent of the first respondent's duties under section 16 to avoid unreasonable noise in respect of activities associated with the proposed buildings. It was submitted that the Tribunal should make declarations that the first respondent has duties under section 16 to establish a noise

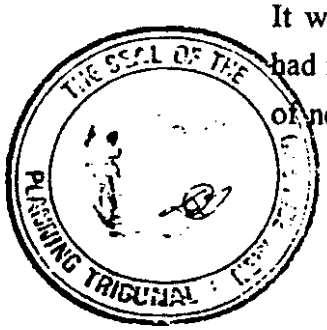
level rule for the land within the designation which takes into account noise of existing activities; to consider best practicable options for each noise-emitting activity on the land separately (including traffic and parking activities and activities associated with buildings) to ensure that the total noise does not exceed that level; and that consideration of the best practicable option for an activity requires consideration of alternative sites, buffer options to minimise noise emission, and design of works to incorporate the best practicable option for noise mitigation features so as to minimise noise emissions due to activities.

The applicants submitted that sections 16 and 17 apply to activities and works on the land described as the North Yard which is designated "defence purposes" because the Act binds the Crown; the purpose of the Act promotes sustainable management including the avoiding, remedying or mitigating of any adverse effects on the environment; the duties required to achieve that purpose include sections 16 and 17; section 176 does not exempt the Crown from duties imposed by those sections; and the duties imposed by section 420 relate to construction works but not to related activities or their effects.

It was contended for the applicant that the best method for preventing or minimising an emission of noise implies consideration of alternative locations on the subject land for the proposed activities, because the level of the noise at the boundary of the land due to emission from an activity on the land will vary depending on where the activity is carried out on the land.

I was referred to statements in the evidence recognising that the proposed gymnasium is to be used during evenings and weekends; that a gymnasium can have a noise impact; that there is a potential of relatively high noise levels from any sporting activity; and that additional traffic would result in some noise for residents in the area. I was also referred to evidence that background noise levels had been measured in the vicinity of the North Yard during working hours as having an L_{95} of less than 40 dBA; and at 9.00 pm as having an L_{95} of 30 dBA, which was described as extremely quiet for an urban residential area; and that there is an adequate gymnasium at the Navy's Officer Training School at Takapuna Point (between 1 and 2 kilometres from the North Yard) which is to be retained for the foreseeable future.

It was contended for the applicant that noise mitigation options for the gymnasium had not been specified in detail, nor had their cost been given; that a reasonable level of noise from the North Yard is that generated by existing activities there, and that



expected from the classrooms and carparking shown for the area on the indicative plans. The applicant also contended that an option open for the Navy is for North Yard trainees to use the gymnasium at Takapuna Point, and that public money spent on the proposed gymnasium at the North Yard would be wasted; that when the Navy does vacate the Takapuna Point property then the best option to prevent unreasonable noise affecting residents would be to locate the gymnasium at the South Yard as originally envisaged in the indicative plans; but that if the gymnasium needs to be at the North Yard for operational reasons, then the best practicable option to avoid unreasonable noise would be arrived at by considering a balance of options which include noise mitigating measures for the gymnasium itself and a noise buffer between the gymnasium and its associated carpark and the residential boundary, having regard to the relatively higher cost of noise mitigation if the gymnasium and parking is located close to the boundary, and alternative locations on the site to allow a buffer zone.

In response to my enquiry Mr Cayford accepted (as do I) that it is not for the Planning Tribunal to review how the Navy spends its money.

Counsel for the second respondent submitted that section 16 imposes a duty on all occupiers of land, including designating authorities; that in the particular circumstances compliance with standards for noise emissions applicable to the underlying zoning may not meet the duty; that in the present case emission of noise that does not contravene the rule may well result in disturbance to local residents because the background noise levels are significantly lower than those envisaged in the district plan, and would not comply with the duty imposed by section 16. Mr Savage also submitted that section 16 envisages an assessment of the best practicable option in relation to particular land and the sensitivity of the specific environment which would receive any adverse effects from that land; and that the duty to adopt the best practicable option is capable of including consideration of alternative building designs, creating a buffer zone, limitation on hours, measures and routes for traffic circulation and parking.

In response, counsel for the first respondent submitted that a declaration is a discretionary remedy, and a court will not usually make a declaration unless satisfied that there is some justifiable reason for doing so. I was referred to a passage in Dr GDS Taylor's work *Judicial Review* at paragraph 2.28, and it was submitted that there was no credible evidence of unreasonable noise likely to result, in that the Navy had accepted the Council's requests about noise and had agreed to comply with rule

8.1.3 of the transitional district plan applicable to the Commercial Services zone (which requires a day-time corrected noise level (L_{10}) of 55 dBA and a background level L_{95} of 50 dBA; night-time levels (also applicable on Saturday afternoons, Sundays and public holidays) of 45 dBA and 40 dBA respectively.) Mr Cavanagh contended that where anticipated noise emissions would meet the standards for the underlying zoning, there is no basis for controlling noise by reference to some other undefined standard. Counsel also referred to Planning Tribunal decisions in *Port Otago v Dunedin City* C97/92 and *NZ Rail v Malborough District Council* (1993) 2 NZRMA 449 to the effect that section 16 sets out a general obligation and does not limit a local authority from prescribing noise emission standards in a district plan.

Mr Cavanagh argued that the only basis for determining "unreasonable noise" would be that the noise was a danger to health, or a rule in a plan, or the NZ Standard *Assessment of Environmental Sound* (NZS 6802:1991); and that on the evidence there was no basis for finding that making the declarations sought in paragraph (b) is required.

The first respondent relied on the evidence of an experienced acoustical engineer, Mr NI Hegley, who had been engaged to consider the noise aspects of the proposal to upgrade and redevelop the North Yard. Mr Hegley doubted whether noise from the classrooms would be audible at the closest residential boundary; and in respect of the gymnasium, he considered that with minor changes that would not affect the basic design or appearance of the building, the noise rule 8.1.3 would be complied with at all times. The witness had also considered traffic noise, and had concluded that an appropriate measure to minimise noise nuisance for residential uses would be an 18-hour L_{10} of 65 dBA. He deposed that the noise from traffic on the streets would be well below that level, and that traffic moving in the site would not influence the values stipulated by rule 8.1.3 at the residential boundary.

In cross-examination Mr Hegley deposed that the rule was a particularly stringent control, having both L_{95} and L_{10} levels; that although final design of the gymnasium had not been undertaken, there had been sufficient design for him to be satisfied that the complex would achieve the design goal; that he considered that music for jazzercise at around 85 dBA could be catered for; affirmed that he was confident that the design would achieve the level proposed; and that the residents would have more protection than he would normally expect. He agreed that distance from the noise source, is the easiest, most efficient buffer; confirmed that the design would be to

achieve a night-time L_{10} level at the residential boundary of 40 dBA; and deposed that with a background level of 30 dBA, noise measuring 55 dBA L_{10} would be readily perceivable, but still within the level of acceptability.

The relevant parts of section 16 read:

> "16. Duty to avoid unreasonable noise - (1) Every occupier of land .... shall adopt the best practicable option to ensure that the emission of noise from that land ... does not exceed a reasonable level."

The term "best practicable option" is defined in section 2(1) as follows:

> " 'Best practicable option', in relation to a discharge of a contaminant or an emission of noise, means the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to -
> (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
> (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
> (c) The current state of technical knowledge and the likelihood that the option can be successfully applied: "

Section 4(1) declares that, except as provided by subsections (2) to (5), the Act binds the Crown. None of the exceptions in those subsections bears on this case, though I note that subsection (5) provides, among other things, that no excessive noise direction shall be issued against the Crown. Excessive noise directions are provided for by section 327.

I have read the Planning Tribunal decisions referred to by counsel for the first respondent. The parts of them about noise control were given in the context of the Town and Country Planning Act 1977. I agree with the remarks made to the effect that section 16 of the Resource Management Act sets out a general obligation and does not limit a local authority from prescribing noise emission standards in a district plan. However that does not assist me in this case, where the power of the second respondent to make rules in its district plan prescribing noise limits for the underlying zoning of the North Yard is not questioned.

Another Planning Tribunal decision in which the duty imposed by section 16 was considered was *Auckland Kart Club v Auckland City Council* A124/92. That was an appeal against an abatement notice in respect of go-kart racing. The Tribunal observed that what is reasonable in terms of section 16(1) is what is reasonable to the receiver of the noise (see page 13); that what is reasonable is a question of fact and

degree (see page 21); that it was necessary to consider separately the technical options and the financial implications (see page 22); and after having done so, found that the best practicable option was the optimum combination of all the methods available to limit the noise to the residents to the greatest extent achievable (see page 22), and that the 60 dBA noise level was the best option available to protect the residents (see page 23).

There is also an oral decision in *Cox v Kapiti Coast District Council* W5/94 in which the Tribunal remarked that section 16 might even enable termination of a permitted use if the best practicable option is not adopted.

The only other case I have found which dealt with section 16 is an unreported decision of the District Court at Tauranga, *Groot v Tauranga District Council*, given on 19 October 1992 by Judge JR Callender. That was an unsuccessful application for cancellation of an interim enforcement order made under the Resource Management Act. In the course of his reasoning, the learned Judge observed that the various enforcement procedures under the Act may be employed to enforce the general duty under section 16 to ensure the avoidance of unreasonable noise.

The first respondent did not question the Tribunal's authority to make a declaration about the extent of a duty under the Act (see section 310(a)); and did not contest the submission that section 16 applies to the Navy in its occupation of the North Yard. The first matter I should address is the conflict between the submissions for the second respondent and those for the first respondent on whether compliance with noise limits prescribed in the district plan for the relevant land would necessarily fulfil the duty imposed by section 16; and the associated contentions for the first respondent about other bases for determining whether emission of noise exceeds a reasonable level.

Quite apart from section 16, occupiers of land in general have to keep noise emissions from it within the limits prescribed by applicable district rules on noise control. That general statement does not, of course, apply to works and activities defined in section 4(2) to (4), which are exempt from complying with the Act; and there may exceptions from that general statement in the cases of noise from activities authorised by designations or existing uses (although Mr Cavanagh submitted that the section 16 duty cannot be avoided by a claim of existing use rights).

In general, designations should be subject to district rules governing the conduct of the public work to avoid, mitigate or remedy adverse effects on the environment. That could be achieved either by rules either accompanying the designation and expressly designed for that work, or by incorporation by reference of general district rules, such as those governing activities authorised by the underlying zoning.

The designation of the North Yard is not subject to any such rules, being simply a designation "defence purposes". Whether that situation should be continued in the regime of the Resource Management Act is a question that may arise in the context of the forthcoming new district plan, but is not a matter for consideration in these proceedings. For the present purpose, I accept that, although the Navy may not have been bound to do so, it has stated that it will ensure that the development the subject of these proceedings will comply with the noise control rule of the proposed underlying zoning for the North Yard.

I return to the submission to the effect that if noise emission from an activity does not contravene the relevant district noise control rule, there would be no basis for controlling noise by reference to some other undefined standard. In that regard, I note that section 16(1) is not focused directly on the level of noise emitted, but on taking the best practicable option to ensure that emission of noise does not exceed a reasonable level. If Mr Cavanagh's submission is correct, there would be little place left for the operation of section 16. It might have effect in respect of continuation of existing uses (authorised by section 10) yet, as the Tribunal observed in the *Port Otago* case, the language of the section indicates a general obligation. There are no words to create an exception where a noise control rule is not contravened, nor to indicate that noise emissions that complied with such a rule would be deemed not to exceed a reasonable level. Nor is the there anything to indicate that the duty does not fall on occupiers of land carrying on an activity authorised by a designation.

I prefer the interpretation advanced for the second respondent for the following reasons.

District rules on noise control usually have general application to all land in the zones for which they are made. Those rules often provide for measurement of noise emissions at boundaries of the zone, or at the boundaries of a more sensitive zone. Rule 8.1.3 of the Devonport district scheme is an example. It applies to the Commercial Services zone, but stipulates maximum permissible noise levels "as measured on or near to the boundary of any residentially zoned site." Even so, district

rules of that kind have general application, and are not responsive to circumstances of a particular locality that might affect the impact which particular noise emissions may have on the specific environment affected.

District rules commonly provide that noise levels are to be measured and assessed in accordance with the New Zealand Standards 6801:1991 and 6802:1991 or their predecessors. Those standards provide for some response to be made for local conditions and for particular characteristics of the noise emission. For example, although the statistical measure L_{10} is recommended as the general descriptor for intrusive sound, it is recognised that it may not always adequately describe fluctuating sound, and other measures, such as L_{max} and L_{peak}, are indicated for use where appropriate. Adjustments for tonality and impulsiveness in the sound are also provided for. Another example is the reference to the higher degree of protection expected for a residential area in a quiet environment than for a residential area in an already relatively noisy environment, and suggestions of methods of responding to that.

Yet even where a district rule, by providing for noise measurement at the boundary of a more sensitive zone and incorporating those standards, makes some allowance for the characteristics of the subject noise and the particular local conditions affected, it may not be responsive to specific circumstances of a particular locality. The present case may provide an example. The proposed underlying zoning is the Commercial Services zone. That zone applies to part of the central business area of Devonport, adjoining land zoned Commercial B, a locality in which there is substantial activity during business hours. Although there is no evidence to that effect, it may be supposed that the background noise levels experienced by residential properties adjacent to that Commercial Services zone would be significantly higher than the reported background noise levels enjoyed by residents near the North Yard. Another example might arise where the landform or microclimate in a particular locality may affect the way in which sound pressure waves disperse.

In summary, even sophisticated district noise control rules cannot be fully responsive to local circumstances to ensure that noise emissions do not exceed reasonable levels. That is where the duty imposed by section 16 has its place. The section does not impose an undefined noise level standard. Rather it places a duty on every occupier of land (among others) to adopt the best practicable option to ensure that the emission of noise does not exceed a reasonable level. The focus is not on what is a reasonable level, but on the duty to take the best practicable option. However the duty is not

necessarily avoided by compliance with a district rule on noise control. Nor is it necessarily avoided by an assessment that a particular noise emission is not deemed to be a danger to health, nor by reference to the general standards contained in the NZ Standard *Assessment of Environmental Sound.*

Having reached that conclusion on the general submission made by counsel for the first respondent, I now turn to the submissions made for the applicant on the application of that duty to the circumstances of this case. It will be remembered that the applicant contended that the Tribunal should make declarations that the first respondent has duties under section 16 to establish a noise level rule for the land within the designation which takes into account noise of existing activities; to consider best practicable options for each noise-emitting activity on the land separately to ensure that the total noise does not exceed that level; and that the best practicable option for an activity requires consideration of alternative sites, buffer options to minimise noise emission, and design of works to incorporate the best practicable option for noise mitigation features, so as to minimise noise emissions due to activities.

I have found nothing in section 16 that supports the claimed duty on the first respondent to establish a noise level rule. In my understanding of the pattern of the legislation, that would generally be the responsibility of the territorial authority (in this case the second respondent), to be effected by district rule. Whether that should be done in respect of the designation of the subject land is a question to be determined in the context of the forthcoming district plan (or possibly on a proposal to make a relevant change to the transitional district plan).

The duty imposed by section 16 is to adopt the best practicable option to ensure that the emission of noise from the land does not exceed a reasonable level. The wording and the context contemplate a best practicable option that would ensure that result in respect of all the noise emissions from the land, so to that extent noise of existing activities would need to be considered; but I find nothing to indicate that each source of noise emission is necessarily to be considered separately, as Mr Cayford urged.

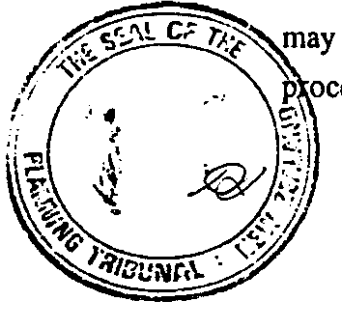
I can accept that in some circumstances, finding what is the best practicable option to ensure that noise emissions from particular land do not exceed a reasonable level may involve consideration of alternative sites, of buffers to minimise noise emission, and of design of buildings or other works to incorporate the best practicable option for noise mitigation features. However, the applicant urges that I declare that finding what is

the best practicable option in respect of the subject land and the current works necessarily requires consideration of all of those matters. The basis of the argument is that finding the best method requires consideration of all possible methods, including those listed.

In my opinion, the extent of the matters that have to be considered will be a question of fact and degree for the particular circumstances. In some cases, identification and comparison of all possible methods may be required. In other cases, it may be apparent that the statutory goal of ensuring that the emission of noise does not exceed a reasonable level can be readily attained without so elaborate a consideration. If so, then a full process of identifying and comparing all possible methods would be wasteful, and would achieve nothing. I do not think that can have been intended. Rather, I consider that the extent of the methods to be considered may be assessed by reference to the statutory goal.

In this case, Mr Hegley's evidence (summarised above) was tested in cross-examination by counsel for the second respondent as well as by the representative of the applicant, but his opinions were not shaken; nor were they contradicted by evidence from another expert in his field of knowledge. I have heard evidence from Mr Hegley and other acoustic experts in a variety of cases over a number of years. From that experience I have gained some understanding of the techniques used in the measurement and assessment of noise, and of the basis on which certain noise levels are used for controlling noise to protect the amenity values of residential environments. I accept the validity of the witness's evidence in this case, and I also accept his ability to contribute to the design of the proposed gymnasium so that he could responsibly give a reliable acoustic design certificate as requested by the Community Board committee and as accepted by the Navy.

Mr Hegley had given consideration to design of the buildings and works by reference to their specific environment, including the relative elevation of some nearby houses. He may not have considered alternative sites; and he may not have given specific consideration to buffers. However, I find that the result of the consideration he has given is the adoption of a method that he believes would ensure that the noise emission does not exceed a reasonable level. It is possible that once the gymnasium has been constructed and occupied, Mr Hegley's expectation will not be fulfilled. In that event, the question whether the duty imposed by section 16 has been performed may arise for determination. However on the evidence before me in these proceedings, I am not able to find that the methods proposed by Mr Hegley would fail



to meet the statutory goal. Therefore I do not consider that the Tribunal should make a declaration that the first respondent's duty remains undischarged until the Navy has considered the other possible methods asserted by the applicant.

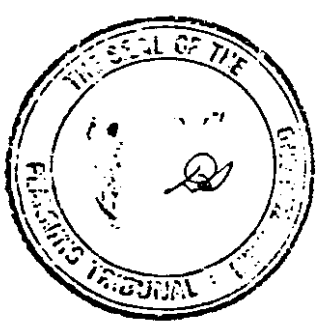
On the second respondent's contention that emission of noise that does not contravene the rule may well result in disturbance to local residents because the background noise levels are significantly lower than those envisaged in the district plan, counsel explained that he was referring to the background level being lower than the rule allows. However the background noise levels prescribed in the rule are described as "permissible background noise levels"; and the rule is that the L_{95} noise level as measured on the boundary of any residentially zoned site "shall not exceed" the limits prescribed. They are maxima, not minima. The rule places no duty on an occupier to emit noise that reaches those levels.

Yet although I do not accept counsel's submission in the way in which it was explained, I do accept, as I have indicated, the general thrust of the submissions for for the second respondent that the fact that the level of a noise emission does not contravene a general rule in the district plan will not necessarily mean that the duty imposed by section 16 is discharged.

EXTENT OF FIRST RESPONDENT'S SECTION 17 DUTIES

The applicant's summary of the remaining issues was the extent of the first respondent's duties under section 17 to avoid, remedy or mitigate adverse effects arising from the proposed buildings and activities associated with them, including the measures required to avoid, remedy or mitigate any such adverse environmental effects, and the measures required to avoid, remedy or mitigate adverse social consequences arising from uncertainties over the Navy's plans for the area. The applicant sought that the Tribunal declare that the first respondent has the following duties under section 17:

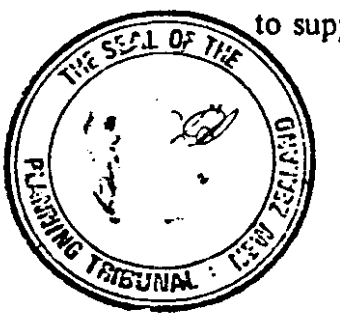
> "(i) To review the 'defence purposes' designation at North Yard so that it contains a succinct description of the activities authorised by the designation, and environmental controls which relate to those activities:
>
> (ii) To carry out an assessment of effects on the environment as set out in s 1 of the fourth schedule to the Act in respect of a proposed work or activity with the potential to generate significant adverse effects."



The applicant referred to residents' concerns about noise from use of the gymnasium and associated traffic noise, especially from after-hours use; adverse visual effects from the height and bulk of the gymnasium, blocking outlook over the bay, dominating, and denying privacy; parking congestion due to loss of the planned Navy carpark; adverse social and amenity effects arising from use of the gymnasium in evenings and weekends; and adverse social consequences from uncertainty about the Navy's plans for the North Yard, what activities the Navy is permitted to carry out there, and the type and magnitude of the environmental effects those activities might generate.

For the applicant, it was contended that a major cause of the lack of certainty is the lack of definition in the "defence purposes" designation for the land, which allows the Navy to change plans or intention at will; and it was claimed that a string of section 420 outline plans for redevelopment, and the departure from the indicative plans, had caused uncertainty and stress, fear, worry and concern by residents at their powerlessness, and that those were adverse social effects.

Mr Cayford submitted that avoiding, remedying or mitigating adverse environmental effects requires compliance with some controls which establish minimum standards and which effectively define, or provide a touchstone for, adverse effects; and that to avoid adverse social effects the first respondent has a duty to identify the potential adverse effects of the proposal on the environment, assess those effects in accordance with clause 1 of the Fourth Schedule, establish specific controls for the activity (noise, building height, on-site parking, control of lighting glare, hours of use, and description of types of activities for the North Yard), and to define the permitted activities so that local residents can know what to expect. Mr Cayford argued in his reply that the touchstone for avoiding adverse effects is the existing use patterns and the controls associated with the proposed underlying zoning. He referred to apprehensions expressed by one witness of pressure for carparking spaces and traffic noise associated with after-hours use of the gymnasium, and argued that the stress of uncertainty about, and opposition to, Navy developments are adverse social effects. He also contended that there is a split in the community between residents, and a split or rift between residents and the Navy, of which the existence of the applicant society is a symptom, and that the split is evidence of an adverse social effect. In response to my inquiry, Mr Cayford acknowledged that the only evidence on which he could rely to support a claim that the uncertainty had caused a split in the community was the

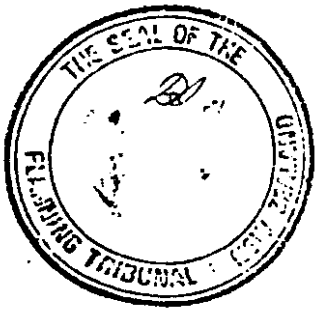


existence of these proceedings; and he accepted that free and open expression of differences is part of a healthy community, but maintained that the legal proceedings showed a level of social effect.

The applicant contended that an environmental impact assessment carried out by Mr Putt, the planning consultant engaged for the Navy, did not fulfil the duty imposed by section 17 because it had not been made prior to the section 420 application, but after half of the buildings had been constructed, so restricting the options for locating the gymnasium; and because it relied on the district rule for noise control in the Commercial Services zone, and made no reference to the loss of the proposed carpark and consequential on-street parking.

For the second respondent it was contended that section 17 applies to designating authorities; that there is continuing uncertainty over the Navy's plans for the area; that the timing and nature of the Navy's proposals outlined in its indicative plans can change; that the designation in the district plan gives no clue to what may be constructed at the Navy base and when or where construction may occur; and that the lack of certainty has real consequences for the local community, so that the proposal affects both amenity values and the natural and physical resources (in terms of investment in them); and thereby has social, economic and aesthetic consequences.

Mr Savage submitted that the duty is to be performed prior to construction of works, lest identification and assessment of options to find the best method of preventing or minimising adverse environmental effects is rendered negatory; that because the word "effect" is by section 3 to be read as including any cumulative effect, assessment should extend to effects of other Navy development in the area (whether existing or proposed) which in combination with the subject development may have an effect on the receiving environment; and that the duty extends to consideration of alternative building design and the position of structures on the property. Counsel also submitted that the extent of the duty will depend on the circumstances of the particular case; but contended that in this case the duty is to make an assessment of the potential adverse effect of the proposed 14 classrooms and the gymnasium, including cumulative effects due to existing and proposed naval development in the vicinity, on the environment of the surrounding residential area.



Mr Savage added that if sections 16 and 17 cannot be applied as he had submitted, that would leave a major gap in the legislation because the process under the combination of section 420 of the 1991 Act and section 125 of the 1977 Act is limited in scope and only applies to designations under transitional district plans, so that in other cases no environmental assessment could be required.

For the first respondent counsel submitted that there is no basis on the evidence for making the declarations sought in paragraph (c); and contended that activities at the Navy base may change from time to time. The first respondent relied on Mr Putt's second affidavit that there is no particular environmental impact not already contemplated or controlled by the Community Services zone performance standards, and that the proposed gymnasium required no further environmental assessment. Mr Cavanagh also submitted that there was no evidence to support the claim of adverse social effects, and that such an effect needs to impact on the way in which people relate to or behave towards one another, relying on *Stop Action Group v Auckland Regional Authority* (High Court Wellington M 514/85 31 July 1987 Chilwell J). Counsel also submitted that it is social effects of the particular proposal that would be relevant, not social effects of the designation or of the existence of the naval base.

Mr Cavanagh contended that there was no evidence of adverse effects other than noise, and in particular no evidence of any parking problem that would justify making a declaration; and observed that land which is in the long term to be a carpark has classrooms on it temporarily.

The relevant part of section 17 is subsection (1) which reads:

> " (1) Every person has a duty to avoid, remedy, or mitigate any adverse social effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, section 10 (certain existing uses protected), or section 20 (certain existing lawful activities allowed).

(The amendment made to section 17(1) by section 15(1) of the Resource Management Amendment Act 1993 is not material for the present purpose.)

The term 'environment' is defined in section 2(1) as follows:

> "Environment' includes-
>
> (a) Ecosystems and their constituent parts, including people and communities; and
>
> (b) All natural and physical resources; and
>
> (c) Amenity values; and
>
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

The term 'amenity values' is defined in the same subsection as follows:

> 'Amenity values' means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.'

A meaning for the term "natural and physical resources" used in the definition of "environment" is also defined in that subsection, but is not material to the present case.

Section 17 was referred to in the Tribunal's decision in *Sayers v Western Bay of Plenty District Council* (1992) 2 NZRMA 143 in which the Tribunal observed (at page 152):

> ".... s 17 is critical for ensuring that, at the end of the day, particularly in cases where no district plan is apt for calling in aid to avoid, remedy or mitigate an adverse effect on the evnt caused by an activity carried on by an owner of land, a person is not able to claim that no public law duty is owed to take such rectifying steps as the case may warrant. While the duty is not of itself enforceable by virtue of subs (2), and while no action has been set in motion pursuant to subs (3), we see no reason why we cannot determine and declare whether or not the landowner in this case is under a duty imposed by the section."

In line with that decision, I hold that the combined effect of section 310(a) and section 313 is that the Tribunal has power to make a declaration on the extent of the first respondent's duty under section 17(1). The application of section 17 to the first respondent's occupation of the North Yard was not contested, and I accept that the Navy's occupation and activities there are not exempt from that duty.

The duty imposed by section 17(1) is to avoid, remedy or mitigate any adverse effect on the environment arising from the activity. The language of section 17(1) may be compared with that of section 16(1): unlike the latter, the former does not import the concept of best practicable option. For that reason I do not find support in the wording of section 17 for the applicant's submissions about requirements for a

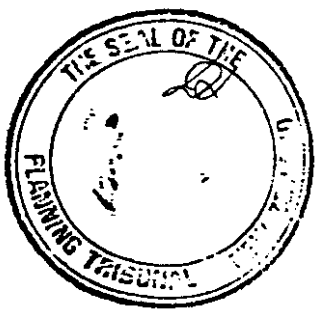
description of authorised activities, for environmental controls, and for an assessment of potentially adverse environmental effects; or for the first respondent's submissions about the timing and extent of the duty.

I do not accept, either, the applicant's submissions that the standard for avoiding adverse effects is the existing use patterns and the controls associated with the underlying zoning. If an activity has an adverse effect on the environment (as defined), then the person carrying on the activity has a duty to avoid, remedy or mitigate that adverse effect. The duty only arises if there is such an effect; but if it does arise, there is no exemption for effects that are no different in kind or degree from those of existing activities, nor for those that would not contravene controls applying to the underlying zoning.

Assessments of effects are required by section 88 for proposals that require resource consents. That requirement would extend to proposals for designated land that require resource consent. But there is nothing in the Act that was brought to my attention, nor anything of which I am aware, that applies that requirement for assessments of effects to proposals for designated land that are authorised by the designation and therefore do not require resource consent. I do not find anything in section 17 from which such a requirement could be inferred.

I do not doubt that making an assessment of effects of the kind contemplated by the Fourth Schedule would be helpful to anybody addressing whether an activity creates or could create an adverse effect on the environment, so that if there is an affirmative answer, the duty to avoid, remedy or mitigate the adverse effect may be performed. Indeed Mr Putt has made such an assessment for the Navy in respect of the subject proposals, and despite the applicant's criticisms of that assessment, I apprehend that it will have assisted the Navy to assess whether a section 17 duty arises in respect of the proposals.

However the duty occurs only if an adverse effect on the environment arises from the activity. If such an effect does not arise, then there is no duty. I have therefore to consider whether, on the evidence, there is an adverse effect on the environment (as defined) arising from the construction and use of the relocatable classrooms and the proposed gymnasium.

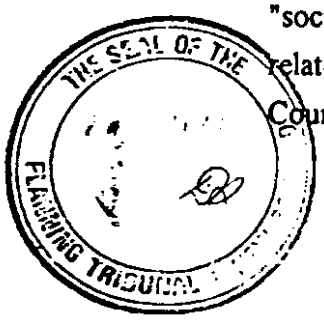


I do not accept the argument about uncertainty based on inconsistencies between the indicative plans and the current proposals. The indicative plans were not published by any method which required or implied that they were to be adhered to strictly; their title "indicative" showed that they were not intended to be firm proposals; and the publication of them was accompanied by a statement that they could be superseded by operational requirements. Further, if there had been any doubt about the Navy's intentions, that doubt should have been dispelled by the Navy's written explanation to the community committee that the proposal was an interim step towards achieving the 15-year objective: that the gymnasium was to remain, but that the functions housed in relocatable buildings would be moved to the South Yard when facilities were constructed there. In other words, the classrooms at the North Yard were only there temporarily, but the gymnasium would be permanent. As the indicative plans described intentions for 5 and 15 years in the future, the temporary location of relocatable classrooms at the North Yard in the meanwhile should not have caused any uncertainty. It was only the location of the gymnasium at the North Yard instead of the South Yard that was inconsistent with the indicative plans. I infer that the new location reflects a change of mind.

The Navy was not obliged to publish its indicative plans. It is to be commended for having done so. In my opinion it would be wrong to allow its having done so to become a basis for granting relief against it.

Nor do I accept the applicant's claim that such uncertainty about future activities and development of the North Yard as residents of the locality may have experienced has affected social conditions that contribute to the amenity values of the area. First, the uncertainty is little different from that which might be experienced by residents near a new industrial estate, or even a recreation zone. District plans are permissive, and generally allow a variety of activities on land in the various zones. Indeed, in district plans prepared under the Resource Management Act, zoning may not necessarily be used at all.

Secondly, whatever uneasiness or apprehensions may have been experienced by individual occupiers of properties in the vicinity of the North Yard, I accept the first respondent's submission that the evidence does not establish that there have been social effects, or that social conditions have been affected. In planning law, the word "social" carries its ordinary dictionary meaning, relating to the way in which people relate to or behave towards one another. That approach was upheld by the High Court in the *Stop Action Group* case, and was consistently applied by the Tribunal



under legislation replaced by the Resource Management Act (see for example *CR Development Trust v Otahuhu Borough* (1992) 9 NZTPA 407 under the Town and Country Planning Act 1977; and *Re application by Newmont Pty Ltd* A 11/84 under the Mining Act 1971). Apprehension about, or opposition to, future activities or effects are not themselves social effects.

It is my understanding that Parliament is to be taken to have intended that meaning in the replacement Act, in the absence of some indication to the contrary.

I do not consider that the existence of the applicant society, nor the existence of these proceedings, provide evidence of adverse social effects. No expert evidence from a sociologist was called, so I am left to make my own judgment on the matter. It is my understanding that changes in the use of land, redevelopment of land, and opposition to those processes by those who consider their interests affected, are consistent with healthy social conditions; and so are the formation of societies and people with common interests to represent those interests in public forums, and resort to an independent tribunal for resolution of differences that may arise about the extent of duties imposed by the law. I do not accept that any of those are indicative of adverse social affects or of unsatisfactory social conditions.

Further, I do not consider that those opposed to the way in which the Navy proposes to redevelop and use the North Yard can create persuasive grounds for relief by choosing to form a society, or by the society choosing to make an application for declarations. The existence of the applicant, and the existence of these proceedings, may be indicative of nothing more than a determination by a number of local residents to obtain appropriate resolution of their difference with the Navy about the lawfulness of the way in which it is proceeding with the redevelopment of the North Yard.

The second respondent argued that lack of certainty has affected both amenity values, and investment in natural and physical resources, and has had social, economic and aesthetic effects. In response to my inquiry about the evidence relied on to support those submissions, counsel referred to the evidence of two residents as establishing that their ability to enjoy their own homes had been affected. I have not found in their affidavits evidence of probative value of any adverse social, economic or aesthetic effect from the construction and use of the classrooms or of the proposed gymnasium.

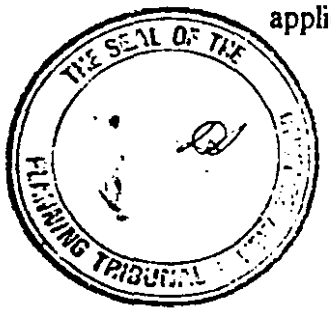
In summary, the applicant has not established that there is an adverse effect on the environment arising from the construction and use of the classrooms and gymnasium; and has not made out a case for relief in these proceedings based on uncertainty due to the absence of detail in the designation of the land, or the absence of environmental controls governing the designated activity.

That will not preclude the applicant or others from seeking a more detailed description of the designated activities, and application of environmental controls, in the forthcoming new district plan (or on a relevant plan change) as, of course, could have been sought in respect of the designation in the existing district plan at the time when it was published for objections under the Town and Country Planning Act 1977. Yet that is no more than a recognition that the possibility exists, and should not be taken as an expression of opinion about the desirable outcome of any submission to that effect.

I accept the validity of Mr Savage's observation that the process under sections 420 and 125 is limited in scope. However it is not clear there has been an inadvertent oversight in drafting the 1991 Act. Activities authorised by designations have in the past commonly been free of many of the controls governing other activities. That may change for designations in plans under the new regime, but in the meanwhile designations in transitional plans, such as that applying to the subject property, continue to be effective. The policy reasons that underlay the exclusion of government works and activities from normal controls in the past, and which presumably underlie the exemptions in section 4(2) to (4), may also have informed the continuation of the limited control of works authorised by designations provided by section 420. Those occupying designated land and responsible for activities on designated land are now subject to sections 16 and 17 (unless one of the exemptions in section 4(2) to (4) applies). However that does not warrant inferring a duty of making environmental impact assessments that is expressly imposed where resource consents are required, but is not even indirectly referred to for designated works or activities that do not require resource consent.

DETERMINATIONS

For the foregoing reasons I will not make any of the declarations sought by the applicant.



However by section 313(a), in these proceedings the Tribunal may make a modified declaration. The first respondent joined issue with the other parties on the significance for section 16 of a district rule on noise control, and I have not accepted the first respondent's submissions and have held that the second respondent's submissions in that respect are correct. That involves a modification of the declaration sought by the applicant in paragraph (b)(i). In the circumstances, I consider that the applicant is entitled to have a modified declaration.

Therefore the Tribunal makes the following determinations:

1. It is hereby declared that the first respondent's duty under section 16 in respect of the current classroom and gymnasium development at North Yard, Ngataringa Bay, Devonport is not necessarily discharged by compliance with the district rule on noise control applicable to the proposed underlying Commercial Services zone.

2. The application is granted only to the extent of the foregoing declaration, and subject to that, the declarations sought by the applicant within the scope of the present proceedings are declined (without prejudice to the issues and relief sought in the composite proceedings in Application ENF 101/92 yet to be heard).

3. The question of costs is reserved.

DATED at AUCKLAND this 11th day of March 1994.

DFG Sheppard
Planning Judge