"C"

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. C 1 /2008

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN MEADOW 3 LIMITED

(ENV-2007-CHC-233)

Appellant

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Hearing: Queenstown on 17 December 2007

Court: Environment Judge J R Jackson (presiding)
Environment Commissioner C E Manning

Appearances: Mr P J Page for Meadow 3 Limited
Ms J Macdonald for Queenstown Lakes District Council
Mr M.E Parker for F P M van Brandenburg (section 274 party)

Date of Issue: 16 January 2008

PRELIMINARY JURISDICTIONAL DECISION

A: Application to strike out Mr van Brandenburg's section 274 notice is declined;

B: Costs reserved; any application should be lodged and served within 20 working days and any reply within a further 20 working days;

C: Substantive proceeding adjourned for a prehearing conference.

REASONS

Judgement of Judge Jackson

[1] Meadow 3 Limited ("M3L") has applied to strike out a notice given under section 274 of the Resource Management Act 1991 ("the RMA" or "the Act") by Mr F P M van Brandenburg. The ground for the application is that Mr van Brandenburg does not have an interest greater than the public generally in an appeal by M3L against the refusal by the Queenstown Lakes District Council to grant consent to construct a dwelling and undertake earthworks at the southwestern corner of Lake Hayes.

[2] The application to strike out is supported by an affidavit by Mr A R Martin, a project manager from Dunedin, who deposed that he had been appointed to manage the resource consent application for M3L. Mr van Brandenburg has lodged and served an affidavit in reply. The Council abides the decision of the Court.

[3] Mr van Brandenburg's section 274 notice does not say so but his affidavit claims[1] that he has concerns about views from his own property. M3L must be aware – as the Court is from previous proceedings[2] between the same parties – that Mr van Brandenburg lives across Lake Hayes from the site of the development proposed by M3L. In my view that matter in itself entails that Mr van Brandenburg clearly has a greater interest than the public generally. Thus his notice should not be struck out on that ground alone.

[4] In addition Mr van Brandenburg has further grounds for having an interest greater than the public generally. He is a registered architect and as such he was the successful applicant for an enforcement order against M3L on adjacent land to its current proposal, when M3L failed to comply with its resource consent to develop that

[1] Mr F P M van Brandenburg, affidavit para [14].
[2] Decision C85/2007 at para [61].

land. He is concerned that development on the land in question in this proceeding may have effects on the values he is seeking to protect in those other proceedings.

[5] I adopt the approach stated many years ago by the High Court in *Keam v National Water and Soil Conservation Authority*[3]:

> When determining questions of locus standi the Courts should interpret the statutory provisions in a benevolent spirit rather than restrictively and should aim at giving those who have merit on their side an opportunity to be heard.

That approach is even more appropriate under the RMA given the emphasis on public participation endorsed by the Supreme Court in *Westfield (New Zealand) Limited v North Shore City Council*[4].

[6] The Court being unanimous the application fails.

Judgement of Commissioner Manning

Introduction

[7] This jurisdictional decision concerns an application by Meadow 3 Limited to strike out Mr F P M van Brandenburg as a section 274 party to M3L's appeal against a decision of the Queenstown Lakes District Council to refuse consent to the construction of a dwelling on a 1.369 hectare site at the south-western end of Lake Hayes in the Queenstown Lakes District.

[8] On 7 September 2006, M3L applied to the Queenstown Lakes District Council for consent to construct a dwelling on its site. After a request for information by the Council and a response from the applicant, the applicant requested that the application be publicly notified. Public notice was given on 25 October 2006.

[9] As for personal service under section 93(2)(b) of the RMA, notes from the processing officer's report attached to an affidavit sworn by Mr T T Williams, a planner employed by Lakes Environmental Limited, indicate that the only neighbours identified

3 (1981) 7 NZTPA 289 at 292 (Davison CJ).
4 [2005] NZRMA 337 at para [27].

as to be served with the application were S P and K Strain, whose property is on the same side of the lake as that of the applicant. Mr Williams noted that since notification of the application had been requested, the processing planner did not give detailed consideration to whether persons other than landowners in the immediate vicinity needed to be served with the application, although the planner did indicate that a check-list had shown that a number of organisations were to be served.

[10] The final day for lodging submissions was 22 November 2006. Mr Martin stated that submissions in support of the proposal were made by the Strains and the Queenstown and District Historical Society, and that no submissions were received from the Department of Conservation, which administers the margin of Lake Hayes, from the Wakatipu Environmental Society Incorporated or from any resident of Lake Hayes.

[11] The Council duly heard the application, and issued a decision to decline consent, which the applicant received on 18 September 2007. M3L subsequently filed an appeal against the Council's decision on 1 October 2007.

[12] On 5 October 2007 Mr van Brandenburg, through his counsel, gave notice that he intended to be a party to the proceeding. The notice states that he has an interest in the proceeding greater than the public generally. M3L considers that he does not and has applied to the Court for an order striking him out as a section 274 party to the appeal.

Section 274 of the RMA

[13] Section 274 provides that the following persons may be a party to any proceedings before the Court:

(a) the Minister;

(b) a local authority;

(c) a person who has an interest in the proceedings greater than the public generally;

(d) a person representing a relevant aspect of the public interest;

(e) a person who made a submission in the previous proceedings on the same matter[5].

Any of these classes of person may become a party by giving notice to the Environment Court and to all parties within 30 working days after a notice of appeal has been given[6]. The notice given under section 274 must state whether the person supports or opposes the relief sought in the appeal, and the reasons for the position taken. In the case of those seeking to appear either as persons with an interest in the proceedings greater than the public generally, or persons representing a relevant aspect of the public interest, the notice must state the grounds for seeking representation[7].

[14] The Act does not define who is to be regarded as having an interest in the proceeding greater than the public generally. Nor am I aware of any decision of a Superior Court on the matter. However the question was dealt with extensively by the Planning Tribunal in *Purification Technologies Limited v Taupo District Council*[8]. After considering the interpretation of the phrase by Superior Courts in Commonwealth jurisdictions, the Tribunal (Judge Sheppard presiding) held[9]:

> ... that on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs. In our view a more liberal interpretation of the phrase "*interest in the proceedings*" would not be giving effect to the new regime of the Resource Management Act but would be reverting to the more liberal regime of the former legislation which Parliament has chosen not to continue.

5 Section 274(1) of the RMA.
6 Section 274(2) of the RMA.
7 Section 274(3)(b) and (c) of the RMA.
8 [1995] NZRMA 1975.
9 [1995] NZRMA 1975 at p. 204.

This approach was adopted in *Paihia and District Citizens Association v Northland Regional Council*[10] *and Northland Port Corporation (NZ) Limited v Whangarei District Council*[11], where the Tribunal said:

> ... the reference to an interest in the proceedings that is contained in section 274 is not a reference to a party being interested in the proceedings but to a party having an interest in the proceedings ... an interest as a matter of principle, intellectual or emotional concern, or to achieve the objectives or values of an association, does not qualify.

The Tribunal's successor, the Environment Court, took a similar view in *G Bodle v Northland District Court*[12]. I discuss later the significance of the phrase "such as" in the passage from *Purification Technologies* cited above.

[15] The Court in *Bodle*[13] also noted another passage in *Purification Technologies*:

> Each person seeking to appear and call evidence ... is entitled to have eligibility according to the statutory tests judged in his, her or its individual circumstances. It is the responsibility of each person seeking to appear to provide evidence of that eligibility.

Applying that to this case, it is Mr van Brandenburg's responsibility to provide satisfactory evidence of his eligibility to take part in these proceedings.

The notice of intention to appear

[16] Mr van Brandenburg, through his counsel, gave notice of his intention to appear in the following terms:

> **TAKE NOTICE** THAT **FREDERIKUS PETRUS MARIA VAN BRANDENBURG** gives notice hereby that he is a party to the above proceeding before the Environment Court.
>
> [1] **FREDERIKUS PETRUS MARIA VAN BRANDENBURG** has an interest in the proceeding that is greater than the public generally as the land and activity the subject of this proceeding is part of a Visual Amenity Landscape in which is located the adjoining and/or surrounding Threepwood development, also owned by the Applicant/Appellant,

[10] A71/1995.
[11] A17/1995.
[12] A50/2002 paras 10-11.
[13] A50/2002 para 9, citing p. 204 of the earlier decision.

MEADOW 3 LIMITED, and which adjoining and/or surrounding development has been the subject of proceedings resulting in the substantive declaratory Decision of the Environment Court C85/2007, which itself related to Land Use and Subdivision Consents granted by the Respondent under a Consent Order of the Environment Court in *van Brandenburg and Another v Queenstown-Lakes District Council* dated 6 May 2004 and in which Mr van Brandenburg was an appellant.

[2] Mr van Brandenburg opposes the relief sought in this appeal and the reasons for that opposition is that, among other things:

(a) the site is an inappropriate location for residential activities

(b) the receiving environment is either close to, at, or beyond, the threshold at which the landscape cannot absorb further residential development;

(c) the Threepwood development precludes proposed development;

(d) the proposed landscape is inappropriate in the context of the Visual Amenity Landscape, particularly given the factual findings of the Environment Court in C85/2007;

(e) the development will be highly visible or visible to an extent whereby it will constitute over-domestication of the landscape when viewed from many public viewpoints;

(f) the proposed development will inappropriately affect the adjacent Outstanding Natural Features of Lake Hayes and/or Slope Hill;

(g) adverse effects on the environment caused by the proposal cannot be mitigated by conditions;

(h) the proposal is contrary to the purpose of the Resource Management Act 1991 and contrary to the Objectives and Policies in the Queenstown-Lakes Partially Operative District Plan.

[17] Mr Page submitted that, in broad terms, paragraph 1 of the notice set out the grounds for seeking representation under subsection (1)(c) and paragraph 2 details Mr van Brandenburg's position on the relief sought in the appeal, as required by subsection 3(b). I consider that is generally the case, but consider it would be over-legalistic to ignore any factors in paragraph 2 that may constitute grounds for seeking representation.

[18] The first paragraph of Mr van Brandenburg's notice relies on his participation in two sets of proceedings relating to land adjacent to the site of the land subject to appeal in these proceedings, and in the same landscape. In terms of the *Northland Port Corporation* case this certainly tends to confirm that Mr van Brandenburg is interested

in the landscape which constitutes part of the subject of these proceedings, but whether it confirms that he has an interest is a different matter. I describe briefly those proceedings to see if they help to elucidate the matter.

[19] The proceedings which resulted in the Environment Court issuing declarations in June 2007[14] stemmed from a concern on the part of Mr van Brandenburg that the conditions of a previous resource consent, granted pursuant to a consent order issued by the Environment Court in 2004, to permit subdivision and building platforms on land known as Threepwood Farm were not being complied with. While I do not doubt that Mr van Brandenburg's involvement in that case was motivated in part by a general interest in the maintenance of the visual amenity landscape, an interest which might fall under the category of "an interest in the preservation of a particular environment", there is also a paragraph in the declaration decision which suggests that at least *prima facie* Mr van Brandenburg has an interest, and is personally affected by development on the Threepwood land. I cite the relevant paragraph[15]:

> Mr Boult attached a photograph of the view from the opposite side of the lake – 'basically the view from Mr van Brandenburg's property' and comments:
>
> > It is possible to just make out in that photograph some of the trees that we have planted in amongst the larger trees in an effort to meet the concerns of Mr van Brandenburg.
>
> We can see the plantings that Mr Boult refers to in his Exhibit 'B'. We can also see the pasture beyond underneath the 'limbed up' conifers. What Mr Boult does not refer to here is that if houses are built on Lots 18 and 19 and on the lots behind those, they will be visible just as the Lot signs are visible from his photograph point (or near it) at present.

I deduce from this that at least in the case of development on the Threepwood land, inasmuch as the amenity of Mr van Brandenburg's outlook from his property may be affected by that development, he has an interest greater than that of the public generally in the Threepwood development.

[14] C85/2007.
[15] Paragraph 61.

[20] For Mr van Brandenburg, Mr Parker relied on five factors which constituted a greater interest in these proceedings on the part of Mr van Brandenburg than of the public generally:

> (i) This proposal is immediately adjacent to (and apparently surrounded by) the Threepwood development and therefore is part of the Visual Amenity Landscape in which the Threepwood development is placed;
>
> (ii) Mr van Brandenburg is a resident of the eastern shore of Lake Hayes and a regular user as a member of the public of the numerous public places which have views into the abovementioned landscape;
>
> (iii) He was the Appellant in van Brandenburg and Another v Queenstown-Lakes District Council resulting in the Consent Order of this Court dated 6 May 2004 which Order in substance sought to preserve the VAL characteristics of the landscape;
>
> (iv) Mr van Brandenburg was the applicant for Declarations and Enforcement Orders which resulted in the Decision of this Court dated 28 June 2007 which found that this applicant was substantially in breach of the terms and spirit of the resource consents the subject of the abovementioned Consent Order (albeit that that Decision is now subject to appeal to the High Court);
>
> (v) The Court accepted Mr van Brandenburg as having a landscape architectural expertise in the course of the proceedings referred to in (iv) above.

[21] Before analysing these factors, I record two other elements of Mr Parker's submissions. Mr Parker submitted – and I agree – that there is no basis in the Act or in case law for the position that status as a section 274 party must be founded on one single factor, it can be derived from a number. Secondly, relying on the use of the phrase "such as" in the *Purification Technologies* decision, he submitted that "a right in property directly affected but not remote is but one example of what might constitute an interest greater than the public generally".

[22] Dealing with that last submission first, I accept that the circumstances in which an interest in proceedings greater than that of the public generally arises are not closed or prescribed, nor is it necessarily restricted to a property right. However, the circumstances that may be put forward as creating such an interest are not capable of infinite expansion, and I note that an interest arising from an intellectual or emotional concern is specifically excluded in *Purification Technologies*. A concern about

landscape issues, even a well-founded concern, if held simply in an abstract or intellectual way, does not constitute such an interest.

[23] I turn to the matters raised in Mr Parker's submissions. Submissions (i), (iii) and (iv), taken together, produce an argument that Mr van Brandenburg's involvement in various proceedings relating to the Threepwood land give him an interest greater than the public generally in an application for the use of land that is both adjacent to and in the same landscape as Threepwood Farm. I note that Mr van Brandenburg's involvement in those proceedings did not depend on him having an interest greater than the public generally in the land. He was entitled to be involved in those proceedings out of intellectual or emotional concern, or interest in the preservation of a particular landscape. There may also have been other reasons, and I return to that question later in the decision, but involvement in the earlier Threepwood cases does not of itself constitute an interest in proceedings concerning land neighbouring the Threepwood property, although the circumstances of involvement might assist in founding such an interest.

[24] Nor do I think Mr van Brandenburg's landscape expertise gives him an interest greater than the public generally in this proceeding. The qualifications that might found status as an expert witness are not those that found status as a party, nor do I think Parliament intended the Court to conduct an inquiry into a person's aesthetic sensitivities before deciding whether that person should be afforded status under section 274(1)(c).

[25] The second ground on which Mr van Brandenburg relies for status as a party draws attention to his residence on the eastern shore of Lake Hayes and his regular use of the numerous public places which have views into the visual amenity landscape. I do not consider the second element of this ground gives Mr van Brandenburg an interest beyond that of the public generally. The very fact that the places from which Mr van Brandenburg views the landscape are public suggest that any adverse effects created by changes to it are changes which have at least a potential effect on members of the public generally. Moreover the visual amenity landscape itself extends broadly around the vicinity of Lake Hayes, and I would be reluctant to suggest that Mr van Brandenburg has an interest in every part of it greater than that of the public generally.

[26] I turn to the opening phrase of the second factor. Mr van Brandenburg is a resident of the eastern shore of Lake Hayes. It is a matter of record that he has views from his residence into the property adjacent to the subject of this application[16]. We also refer to the initial decision of the Environment Court in *van Brandenburg v Queenstown Lakes District Council*[17] from which the 2004 consent order ultimately resulted. In the opening paragraph of that decision, the Court said:

> These proceedings raise the question as to what is appropriate residential development in a rural zone on the western side of Lake Hayes in the Queenstown Lakes District. The proposed site is a component of many chocolate box or postcard views of Lake Hayes from the vicinity of the public look-out on State Highway 6 (above the eastern side of the Lake); from the Showgrounds on the terrace above the south eastern side of the Lake; from the Bendemeer Bay Reserve; and from many residences along the Lake.[18]

Mr van Brandenburg provided an affidavit to the Court stating that he is the owner of one of the residences referred to in the passage cited.

[27] That is sufficient, in my view, to demonstrate that Mr van Brandenburg has an interest in proposals for the Threepwood land greater than the public generally. It does not necessarily do so in the case of the property the subject of these proceedings. But there are two passages in Mr van Brandenburg's affidavit that suggest an interest may exist.

[28] The first of these passages suggests that the proposal which is the subject of this appeal relies on access through the Threepwood development. It expresses the opinion that such an access will be clearly visible and will not be able to be screened from view[19]. The second passage is contained within the paragraph in which Mr van Brandenburg records his ownership of a residence along the lake. He goes on to express the opinion that there is a wider public interest in retaining the chocolate

16 See para [12] above.
17 C212/2001.
18 C212/2001 para [1].
19 F P M van Brandenburg, affidavit 10-11. F P M van Brandenburg affidavit 12.

box/postcard views of Lake Hayes from the viewpoints mentioned in the first Threepwood decision. He then states[20]:

> [t]he appellant has removed or has been party to having the Willow trees removed in front of this proposed development before and after its hearing, thereby exposing the development in full view from the lake and the newly formed public walkway.

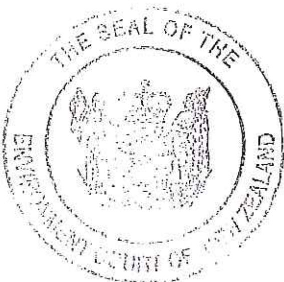
This does not expressly state that the development will be included in views from Mr van Brandenburg's property. I note however the submission of his counsel:

> ... the disadvantage of Mr van Brandenburg not being able to be involved would be to remove not only his involvement based on the abovementioned status arising out of the previous proceedings, but also the position based on his private enjoyment arising from being a property owner on the shores of Lake Hayes which is specific and relevant, and also his public enjoyment of the relevant public views which are a significant part of his amenity.

The implication is that there are, at least arguably, private effects on Mr van Brandenburg as a property owner which are distinct from effects on him as a user of public places in the vicinity. Whether there are such effects and the extent of them are matters appropriately determined at a substantive hearing where evidence can be fully evaluated, rather than as a preliminary matter.

[29] In terms of access, the Court notes part of an affidavit sworn by Mr A R Martin, a project manager with day to day responsibility for managing the resource consent in this proceeding. Mr Martin attested that part of the reason for M3L's acquisition of the property the subject of this proceeding was to allow an access easement that crosses the front lawn to be extinguished and to remove the overhead power lines that serve the cottage on the application site. I accept that evidence, and if I ultimately decide that Mr van Brandenburg be struck out as a party, it would be in reliance on that evidence. I consider it should give rise to a proffered condition that access will not be provided via the easement referred to and that the easement allowing it will be extinguished.

[30] If the extinction of that easement is not part of the application as it stood on 5 October 2007, when Mr van Brandenburg gave notice of his intention to be a party in



[20] M E Parker, submissions 8.

the proceedings, then Mr van Brandenburg has an interest greater than the public generally in the proceedings on the basis that he has an interest greater than the public generally in development on the Threepwood land. He has no guarantees that a decision-maker would not prefer that access to the one proposed, nor that an eventual owner of the development proposed in that application would not seek to use it.

[31] Mr Martin also stated his belief, based on his knowledge of the location of Mr van Brandenburg's residence, that no part of the proposed development will be visible from Mr van Brandenburg's property. Mr Parker submitted that Mr Martin is not qualified as a landscape architect and is not in a position to give expert evidence on the matter. He considered these comments no more than speculation. I accept that submission. The possibility of an adverse effect on the property of Mr van Brandenburg cannot be discounted on the evidence we have.

[32] For M3L, Mr Page submits that Mr van Brandenburg's right to participate under section 274 can only rely on the section 274 notice, and that this does not claim any effect peculiar to Mr van Brandenburg. In consequence he contends the application should be struck out.

[33] I accept that the notice of intention to become a party does not substantiate a claim to an interest greater than the public generally. But parts of the evidence submitted by Mr van Brandenburg to this preliminary hearing suggest there may be a legitimate claim to such an interest. I consider it would be wrong to exclude Mr van Brandenburg from the proceedings on the basis of an inadequate justification for his status in his section 274 party notice if he can genuinely establish an interest greater than the public generally. In so saying I note the Court's view that jurisdiction to strike out appeals is to be used sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain conclusion, and that the general principle is also to be applied in determining questions of status. I note such an approach finds authority in the judgement of Justice Randerson in *Hauraki Maori Trust Board v Waikato Regional Council* when the learned Judge held that public participation

in the resource management process and ensuring that the process is not bound by undue formality support allowing a defective appeal to be amended[21].

[34] As things stand, it is far from clear whether Mr van Brandenburg can claim an interest greater than the public generally. I have made clear what in my view could found such an interest. In doing so, I also wish to draw attention to a decision of the Environment Court in *Brian D Gargiulo v Christchurch City Council*[22]. In that case Judge Skelton referred in his judgement to a decision of the then Supreme Court (now High Court) in *Blencraft Manufacturing Company Limited v Fletcher Development Company Limited*[23]. In that case Justice Cooke, as he then was, held that a person claiming status as an objector under the Town and Country Planning Act 1953 on the grounds that he or she was affected, had to provide evidence of a degree of affection greater than the public generally. Relevantly, in that case Justice Cooke held that it may not be possible to determine status ahead of a substantive hearing. Judge Skelton held that that remains the position under the RMA.

[35] I find:

(1) that participation in proceedings relating to Threepwood Farm does not of itself constitute an interest in this proceeding greater than the public generally;

(2) that Mr van Brandenburg's use of public places in the vicinity of the Threepwood site is not an interest in the proceeding greater than the public generally;

(3) that Mr van Brandenburg's expertise in landscape architecture does not qualify as an interest in the proceedings greater than the public generally;

(4) that the above factors in combination do not constitute an interest greater than the public generally;

[21] HC Auckland, CIV-2003-485-999, 4 March 2004, cited in *Te Kura Pukeroa Maori Incorporation v Waikato Regional Council*, W26/2007, para 79.

[22] C47/1999.

[23] [1974] 1 NZLR 295 at p. 313.

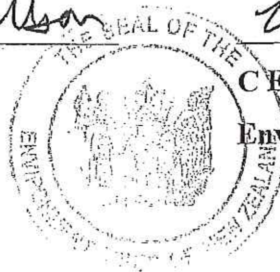
(5) that the evidence presented by affidavit to the preliminary jurisdictional hearing suggests that Mr van Brandenburg may have an interest greater than the public generally on the basis that he resides on the opposite side of Lake Hayes to the application site. This is particularly so if the application as it existed at the time of the lodging of the section 274 notice did not include the extinction of the access easement across the front lawn of the Threepwood property;

(6) that I am unable to determine on the evidence before me whether such an interest exists, and that the question may not be capable of determination prior to a substantive hearing.

Outcome

[36] In my view the outcome should be that on the basis of (5) and (6) above Mr van Brandenburg's notice is not struck out.

Dated at Christchurch 15 January 2008



J R Jackson
Environment Judge

C E Manning
Environment Commissioner

"D"

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. [2011] NZEnvC 025

IN THE MATTER	of an appeal under Section 279(4) of the Resource Management Act 1991 (the Act)
BETWEEN	SANDSPIT YACHT CLUB MARINA SOCIETY INCORPORATED (ENV-2010-AKL-000216) Appellant
AND	AUCKLAND COUNCIL Respondent
AND	KAWAU ACCESS ORGANISATION INCORPORATED/SANDSPIT SOS INCORPORATED Section 274 Party

Court:	Environment Judge J A Smith
Submissions:	Mr A Webb for Sandspit Yacht Club Marina Society Incorporated **(the Society)** Mr H R Coleman for Kawau Access Organisation Incorporated **(KIAO)** Ms J Haswell for Sandspit SOS Incorporated (**SOS**)

APPLICATION FOR STRIKE-OUT

Introduction

[1] The appellant has made application for strike-out two Section 274 notices. Given the public and participatory nature of the Act, this is not a course that is generally encouraged.

[2] Directions the presiding Judge made were made that KIAO and SOS were to file any affidavits and submissions in relation to the strike-out by 17 January 2011, and the appellant would then serve submissions in reply. This has occurred.

APPLICATION TO STRIKE OUT

[3] Prior to the pre-2009 amendment, Section 274(1) if the Act allowed relevantly:

[a] A person who has an interest in the proceedings that is greater than the public generally;

[b] a person representing a relevant aspect of the public interest; and

[c] any person who made a submission in the previous proceedings on the same matter.

All of these persons may give notice and participate in an appeal hearing.

[4] In long submissions in support of the application, Mr Webb states that KIAO's participation would amount to an abuse of process. This seems to rely upon the fact that an important part of the appellant's appeal relating the effects of the barge landing facility are no longer relevant because that appeal has been withdrawn. The actual concerns are difficult to make out from the submissions in relation to KIAO.

[5] In respect of SOS, the application was originally filed in September 2008 but was not advanced until mid-2009. It also appears that SOS did not form as a group until around the time of the Council hearing, or just after it. Again, it is difficult to make out the actual concerns that are raised.

[6] Essentially, I have treated the submissions on the basis that neither parties make out the grounds under Section 274(1) of the Act to appear at the hearing. I will deal with each of the parties concerned. Firstly, KIAO and then SOS.

KIAO

[7] Under Section 274(1)(c) of the Act, the question arises as to whether KIAO has "*an interest in the proceedings that is greater than the public generally.*" This issue is not addressed in Mr Webb's submissions. Mr Coleman essentially addresses the issues under ss (d).

[8] Relying on ***Purification Technologies Limited v Taupo District Council,***[1] the test being whether a person is directly affected in the sense that there is some advantage, or disadvantage, such as that arising from a right in property.

[9] The rules of this test do not assist the KIAO and support their participation. KIAO is established to maintain and enhance access to, over and around Kawau Island. There were amendments to objections in 2007 and 2009 to address particular court cases at the time. The most relevant is to maintain and enhance public access generally to, and over, and across other islands in the mainland. I struggle to see how those provisions could apply to the marina being established at Sandspit. Applying the test for ***Purification Technologies,*** I have concluded that KIAO does not have "*an interest in the proceedings that is greater than the public generally.*"

[10] Mr Coleman essentially argued that KIAO represents a relevant aspect of the public interest under subsection (d). In The HB Land Protection Society Incorporated v Hastings District Council[2], the Court states:

> I accept that there is an emphasis on public participation in the decision-making process under the RMA. That emphasis however has never been taken as an open house. For a would-be party to come within paragraph (d) there must be some identifiable aspect of the public interest which the person or body through ... some office or particular pursuit can be seen to represent.

[11] Again, a difficulty for the Court in this case is identifying what aspect of the public interest KIAO represents. Although it might be said that it represented an aspect of recreational users of Kawau Island, this is not the purpose set out in its objectives. Nor could it properly be said that that would give a relevant aspect, having an interest in the marina. I may very well have had a different view in respect of the barge landing area, but that is no longer before the Environment Court.

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[1] [1995] NZRMA 197 at [204]
[2] W021/2009

[12] I have therefore concluded that KIAO has no proper interest in the proceedings which should be supported by allowing them to participate in circumstances where they were not an original submitter.

[13] I note in particular in the recent decision of ***Viaduct Holdings Limited v Auckland City Council***[3] the Court concluded that:

> [28] ... [the] subject matter relating to the mainland is about getting "*to, over and across*" it, and maintaining and enhancing recreational opportunities in accessible areas of it ...

[14] In the end, I conclude that the creation of a marina is not a matter for which KIAO is particularly mandated, or is in the areas of interest specified in their objectives. Accordingly, the notice of KIAO is struck-out.

SOS

[15] The situation for SOS is that many of the members were also submitters to the Council at the initial stages. When it appeared that the proceedings were going to go to the Environment Court, the incorporated society was formed in or around July 2009. Apparently many of the members are local residents and it is asserted that some at least are directly affected. This does not appear to be denied by the appellant who says that their interests can be pursued individually in any event. The concern of the appellant seems to be to preclude the members from applying for legal aid funding, perhaps in the hope that the participants will not continue with their interest in the proceedings.

[16] The argument for the appellant appears to be that SOS did not file a submission in respect of the application. I find this argument difficult to follow given that SOS wasn't in existence at the time and appeared to be formed at a stage when it seemed the appellant was then intent upon proceeding with its applications.

[17] There seems to be a number of grounds upon which SOS should be involved in these proceedings. Firstly, it is arguable that they are a successor under Section 2A of the Act. In ***Quetta Street Protection Society Incorporated v Wellington City Council***[4] the Court took a liberal view of what constitutes an unincorporated body of persons. It held

[3] [2010] NZEnvC17 at [28]
[4] W055/08

that a group of individuals who personally lodged submissions were acting in concert, at least sufficiently to be regarded as a body or group, and that accordingly, the incorporated society was able to succeed to the rights of the group of individuals who lodged submissions. Given the larger size of this group, not all of the persons were submitters, but it appears that most of the submitters eventually became part of the group.

[18] Moreover, I have concluded that SOS has "*an interest in the proceedings that is greater than the public generally*". This is not to be compared with the members who have already filed submissions, but the general public. Given that individuals within it clearly are being disadvantaged, it follows that the group representing those persons is also similarly disadvantaged. I do not think it is an answer as Mr Webb suggests that that interest is already represented through the individual submissions.

"A relevant aspect of the public interest"

[19] Furthermore, it appears to me that there is a strong theme of resident interest within this group. It is not purported that all members are residents, but certainly a number appear to be parties that are directly affected. The ratepayer and resident interest of this area is of course an aspect of the public interest that will represent not only passive and active recreational uses, overlooking, walking, but also interests in noise and amenity generally. It is difficult to see how one could exclude the group on this basis.

[20] Finally, it is also arguable that persons who have already made a submission earlier (being the individuals), should be entitled to subsume those submissions within a group approach.

[21] This Court regularly recommends and encourages parties to consolidate their interests to obtain clear advice and a cohesive approach to case law. This significantly reduces the Court hearing time and usually leads to better outcomes for all parties. The SOS approach is entirely consistent with that view.

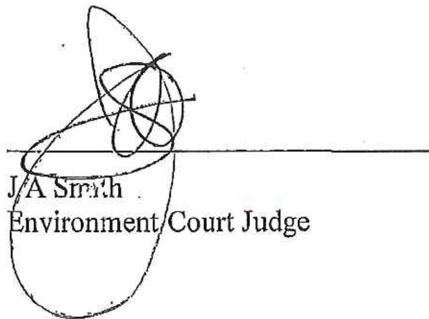
Costs

[22] I reserve the question of costs. It appears to me on a prima facie basis that SOS have grounds to make an application for costs on the strike-out application. Parties are to

advise whether they seek to address that issue now or await the outcome of the substantive hearing.

[23] The appellant and SOS are to advise whether they are prepared to attend mediation, and if so, the Registrar will contact the other parties.

DATED at AUCKLAND this 2nd day of February 2011



J A Smith
Environment Court Judge

"E"

BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 8

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN P W & J D LINDSAY

(ENV-2012-CHC-112)

Appellants

AND DUNEDIN CITY COUNCIL

Respondent

Hearing: In Chambers at Christchurch
Submissions from B Irving for P W and J D Lindsay
Submissions from M Henaghan for The Currie Road Residents and Friends Society Inc

Date of Decision: 30 January 2013

Date of Issue: 30 January 2013

PROCEDURAL DECISION

A: Under section 279(1)(a) of the Resource Management Act 1991, the Environment Court declines to order that The Currie Road Residents and Friends Society Incorporated's section 274(1)(d) notice is invalid;

B: Costs are reserved. Any costs application is to be lodged and served by 8 March 2013; any reply is to be lodged and served by 5 April 2013.

REASONS

Introduction

[1] On 26 September 2012 P W and J D Lindsay ("the appellants") lodged with the Registrar of the Environment Court a notice of appeal against conditions attaching to a decision of the Dunedin City Council granting land use consent[1] to operate a function venue and garden tours at 95 Currie Road, Outram, Dunedin.

[2] On 24 October 2012 The Currie Road Residents and Friends Society Incorporated ("the Society") lodged a notice of its wish to become party to the proceeding under section 274 of the Resource Management Act 1991 ("the RMA" or "the Act"). The Society's section 274 notice states that it wishes to become a party on the basis it is a person who has an interest in the proceedings greater than the interest that the general public has. The Society goes on to say that it has an interest greater than the general public based on its purposes which are as follows:

- To protect the amenity values of Currie Road for the residents and their friends and families;
- To foster and maintain the rural lifestyle of Currie Road, Outram;
- To ensure Currie Road remains a tranquil, peaceful environment; to share that environment with close friends and family.

I have no direct evidence that those are the objects of the Society. But nor has that been challenged. I accept Professor Henaghan's metaphor that the residents believed that the Society "… would amplify their voices".

[3] On 26 November 2012 the appellants lodged an application under section 279 of the Act, seeking an order that the section 274 notice is invalid and that the Society has not established standing to be heard. That application follows the procedure approved by the High Court in *Meadow 3 Ltd v van Brandenburg*[2].

[4] By way of minute dated 28 November 2012 the court directed that any notices of opposition and supporting affidavits were to be lodged by 5 December 2012. The Society was also to confirm whether it agreed with the matter being dealt with on the papers and if so it should lodge any legal submissions by 14 December 2012. The appellants and the Council (if it wished to be heard) were to lodge any legal submissions in reply by 21 December 2012. The parties have complied with the timetable and agreed that the issue of standing should be determined on the papers. The Society also lodged an irregular[3] affidavit (actually sworn by K P Warrington) dated 5 December 2012 which I have also read in accordance with section 276 of the Act, which allows the

[1] LUC-2009-116.
[2] *Meadow 3 Ltd v van Brandenburg* (2008) 14 ELRNZ 267 at [16] et ff.
[3] Affidavits must be sworn by a real person not an artificial one like an incorporated society.

Environment Court to read anything relevant to a decision even if it is put forward in a way that does not comply with the law of evidence.

[5] The Dunedin City Council abides[4] the decision of the court.

[6] The Society's was not the only section 274 notice lodged in this proceeding. On 15 October 2012 the Registrar had received section 274 notices which are identical except for the names[5]. Each states that the person wishes to become a party to the proceeding as a submitter on the subject matter of the proceeding. They claim that the amenities of the neighbourhood may be affected by the operating conditions of the function venue. It is not contested that these individuals have standing to be parties under section 274(1)(e) of the Act. All of these people are members of the Society.

Section 274 and the authorities on it

[7] In 2009 section 274(1) was amended to read[6] (relevantly):

> **274 Representation at proceedings**
> (1) The following persons may be a party to any proceedings before the Environment Court:
> (a) the Minister:
> (b) a local authority:
> (c) the Attorney-General representing a relevant aspect of the public interest:
> (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, ...
> (e) a person who made a submission to which the following apply:
> (i) it was made about the subject matter of the proceedings; and
> ...

That wording is different from the previous section 274(1) in two ways. First, and most obviously, the right for a person to be heard if representing "... a relevant aspect of the public interest" has gone. Only the Attorney-General has that right now[7]. Secondly, and more subtly, a person may now only be a party if they have an "interest in the proceedings that is greater than the interest that the general public has". That compares with section 274 in its earlier versions which all required a person to have an interest "greater than that of the public generally". It is unclear whether that new wording makes any significant change. However, I received no submissions on the issue, so will assume it does not.

[8] A leading case – on a similar wording of section 274 – referred to in submissions here is *Purification Technologies Ltd v Taupo District Council*[8]. That decision was concerned with an appeal against refusal of a certificate of compliance[9] in respect of an

4 Memorandum of counsel (M R Garbett) 7 December 2012.
5 Karen Warrington, Kathryn Gray, Greg Gray, David Marsh and Pauline Shefford.
6 By the Resource Management (Simplifying and Simplifying) Amendment Act 2009.
7 Section 274(1)(c) RMA.
8 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197.
9 Under section 139 RMA.

irradiation plant[10] proposed for Mangakino. The Planning Tribunal first carefully pointed out the case was different "... from the more familiar kind of appeal against grant or refusal of resource consent"[11]. It then observed that, unlike a resource consent appeal where the Planning Tribunal (or the Environment Court) has to decide the appeal on the substantive merits in a discretionary exercise, the issue is quite different when it is considering a certificate or compliance. In the latter case " ... the Tribunal does not have a discretion or choice to exercise"[12].

[9] It is in that context that the passage relied on by counsel for the appellants has to be read. The Planning Tribunal wrote[13]:

> ... we hold that, on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, **or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote**, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs. In our view a more liberal interpretation of the phrase "interest in the proceedings" would not be giving effect to the new regime of the Resource Management Act but would be reverting to the more liberal regime of the former legislation which Parliament has chosen not to continue. (My emphasis).

[10] Thirteen persons had given section 274 notices including three incorporated societies[14]. The Planning Tribunal found that none of these societies had an interest in the proceedings greater than that of the public generally because they would achieve no greater advantage (or disadvantage) than the public generally in knowing whether a certificate of compliance should be refused or issued.

[11] There is one aspect of *Purification Technologies Ltd v Taupo District Council* with which I respectfully disagree. The Tribunal stated that for a society to join a proceeding "as part of an endeavour to achieve the objects of [its] association ..."[15] would not "be an interest in the proceedings greater than that of the public generally". With respect, I consider that is an over-generalisation – that statement should be qualified by the words "... depending on what those objects are". For example, if the objects are general, such as "... to protect the native forest and birds of New Zealand" or "to campaign for and support both rural communities and the agricultural industry" then any society with those objects could be seen as representing an aspect of the public

10 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197.
11 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 at 200.
12 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 at 200.
13 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 at 204.
14 Actually one – Friends of the Earth Ltd – was a limited liability company
15 *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 at 204.

interest and thus should not – in the absence of more specific purposes – be let in the back door under section 274 as having an interest greater than that of the general public.

[12] Later cases are of more relevance because they concern notices given under section 274 in respect of appeals on resource consents. In a High Court decision, *Ngatiwai Trust Board v New Zealand Historic Places Trust*[16], Greig J referred to *Purification Technologies*, but emphasised that "a proprietorial interest" in the relevant land, or site, was not essential:

> If the meaning is to be restricted in some way to some proprietorial interest in the land or the site then that puts a focus on European concepts and ignores the particular and special Māori relation and association with land ...

[13] In *Meadow 3 Ltd v van Brandenburg*[17] Panckhurst J explained that he saw *Ngatiwai* as an application of the *Purification Technologies* test, rather than as a criticism or qualification of it[18]:

> Judge Sheppard referred to "a right in property" which was directly affected, by way of example, not as a governing prerequisite.

On the facts of the *Brandenburg* case the judge came to the view that:

> The *Purification Technologies* test is generally unfavourable to Mr van Brandenburg's position. His involvement in the Threepwood litigation impresses me as motivated by a desire to uphold values in which he has a passionate belief. But, that "intellectual or emotional concern" is insufficient, absent an interest in the proceeding based on some genuine advantage or disadvantage, often of a proprietorial nature, and which is not remote.

However, the High Court found that "the somewhat skinny reference to visual amenity in Mr van Brandenburg's affidavit was just enough to provide a basis for a greater interest finding"[19] and that the Environment Court had not made a mistake of law in giving him status.

[14] Ms Irving has relied on a passage in another relatively early case under the RMA: *Electricity Corporation of New Zealand Ltd v Wellington City Council*[20] ("the *Makara Guardians case*"). There Judge Kenderdine was concerned with the status of the Makara Guardians Society Incorporated. She wrote[21]:

> It was clear from that case law that a distinction must be drawn between the interests of the Society (in this case) and the interests of its members. While the members individually may have an interest greater than the public generally, particularly where property interests are affected, the Society itself is a representative body, and those interests are not provided for by this criterion.

16 *Ngatiwai Trust Board v New Zealand Historic Places Trust* [1998] NZRMA 1 (HC) at 13.
17 *Meadow 3 Ltd v van Brandenburg* (2008) 14 ELRNZ 267 (HC).
18 *Meadow 3 Ltd v van Brandenburg* (2008) 14 ELRNZ 267 (HC) at [33]-[35].
19 *Meadow 3 Ltd v van Brandenburg* (2008) 14 ELRNZ 267 (HC) at [42].
20 *Electricity Corporation of New Zealand Ltd v Wellington City Council* Decision W72/98.
21 *Electricity Corporation of New Zealand Ltd v Wellington City Council* Decision W72/98 at [16] and [17].

> While such an approach is regarded as legal pedantry by Mr Burley (and I do appreciate the context in which that was said), it is still the way the law is written and interpreted in respect of representative bodies.
>
> ...
>
> Therefore, in respect of this criterion, I determine that the Society itself does not have an interest greater than the public generally, and cannot rely on this part of s.274 to provide it with standing in these proceedings.

In fact the only decision referred to by Judge Kenderdine is *Royal Forest and Bird Protection Society Inc v Minister of Conservation*[22]. I have looked through that decision and the cases referred to in it and it is difficult to find a reliance on a distinction between the interests of a society and those of its members. While I accept that the interests of a society (or a group or a company) are nearly always at least slightly different from those of individual members, I fail to see the relevance of that.

[15] With respect, the *Makana Guardians* case is looking the wrong way. I consider that the question for the court under section 274(1)(d) is whether the interest of a society is different from (greater than) that of the general public. That appears to be confirmed by a recent decision of Environment Judge Smith on whether a society might come within section 274: *Sandspit Yacht Club Marina Soc. Inc v Auckland Council*[23]. There Judge Smith was concerned with an appeal about a proposed marina at Sandspit on the mainland west of Kawau Island. In a procedural decision Judge Smith held that a body, called in the decision "KIAO"[24] and "... established to maintain access and enhance access to, over and around Kawau Island"[25], did not have an interest greater than that of the public generally[26] on the question of a marina on the coast of greater Auckland.

[16] However, a second society called Sandspit SOS Incorporated ("SOS") was held to have status. In the *Sandspit* case the judge found[27]:

> When it appeared that the proceedings were going to go to the Environment Court, the incorporated society was formed in or around July 2009. Apparently many of the members are local residents and it is asserted that some at least are directly affected. This does not appear to be denied by the appellant who says that their interests can be pursued individually in any event [as submitters originally].

Judge Smith then held that SOS had an interest that is greater than the public generally and continued[28]:

> This is not to be compared with the members who have already filed submissions, but the general public. Given that individuals within it clearly are being disadvantaged, it follows that the group

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22 *Royal Forest and Bird Protection Society Inc v Minister of Conservation* Decision A92/97.

23 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZRMA 300 at [18].

24 While not identified in the decision I believe this stands for "Kawarau Island Access Organisation".

25 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZMRA 300 at [9].

26 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZRMA 300 at [9].

27 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZRMA 300 at [15].

28 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZRMA 300 at [18].

> representing those persons is also similarly disadvantaged. I do not think it is an answer ... that that interest is already represented through the individual submissions.

I respectfully agree with that passage.

The context and purpose of section 274(1)(d)

[17] Any person may lodge a submission on a generally notified resource consent application[29], and if they do they may subsequently appeal[30] or lodge a section 274 notice as of right[31]. However, if a non-submitter to the council wants to join an appeal to the Environment Court then they must establish that they have an interest in the proceeding greater than that of the public generally.

[18] The purpose of section 274(1)(d) appears to be to make persons with a general interest (the same as that of the general public) put their case to a local authority by making a submission. They cannot hang back and wait for a possible appeal to the Environment Court unless they have a greater interest. On the other hand, if a person does have a greater interest than that of the general public then they will qualify under section 274(1)(d). The effect of the recent cases is that a person with a direct personal interest in the amenities of an area (e.g. the effect on their views) comes within section 274(1)(d): *Meadow 3 Ltd v van Brandenburg*[32]; and that a society with specific objects about the amenity or environment of an area might also have such a greater interest: *Sandspit Yacht Club Marina Soc. Ltd v Auckland Council*[33] - even though some of its members had lodged submissions originally and were entitled to lodge notices under section 274(1)(e) of the RMA.

Consideration

[19] In this case the objects of the Society include "to protect the amenity values of Currie Road". It is directly interested in how the amenities of Currie Road may be affected by Mr and Mrs Lindsay's application. It claims it will be advantaged by a refusal of resource consent and disadvantaged by a grant of consent to the appellants.

[20] Ms Irving submits that the Society's interest is general compared with that of SOS in the *Sandspit Marina* case. I accept that a society for the protection of the amenities of a road has a slightly more general interest than a society for the protection of a particular place (such as a sandspit) or a building (a heritage building for example). However, the interest is still very specific compared with that of the general public. I consider it is very unlikely that the general public knows (on average) where Outram is, let alone has an interest in the amenities of Currie Road. I consider that the Society has an interest in, as in a concern about, the proceeding greater than that of the general public, and accordingly it had standing to lodge its section 274 notice. Equally, the

29 Section 96 RMA (unless they are a "trade competitor").
30 Section 120(1)(b) RMA.
31 Section 274(1)(e) and (f).
32 *Meadow 3 Ltd v van Brandenburg* (2008) 14 ELRNZ 267 (HC).
33 *Sandspit Yacht Club Marina Soc. Inc v Auckland Council* [2011] NZRMA 300.

Society has a greater relationship with the potential advantages or disbenefit of the proceeding because at least five of its members are property owners who reside in or near the street[34]. If the appeal is successful without the Society being heard, then the amenities of Currie Road may be affected and the Society will not have achieved its purpose.

[21] Accordingly I consider the Society has status to be heard.

J R Jackson
Environment Judge

Jacksoj\Jud_Rule\d\2012-chc-112 lindsay v dcc proc dec-28 Jan 2013.doc

34 Affidavit of K P Warrington dated 5/12/12 at para [9].

"F"

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2017] NZEnvC 199

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under clause 14 of the First Schedule of the Act
BETWEEN	M & C TOOMEY and S NATHAN QC
	(ENV-2016-AKL-000127)
	Appellants
AND	THAMES-COROMANDEL DISTRICT COUNCIL
	Respondent

Environment Judge D A Kirkpatrick sitting alone under s279(2)(a) of the Act

Date of Decision: 13 December 2017

Date of Issue: 13 DEC 2017

DECISION ON APPLICATION FOR WAIVERS BY INTENDING PARTIES

A. The applications by Coromandel Watchdog of Hauraki Incorporated and Waikawau Bay Guardians Trust for waivers of time to file notices under s274 of the Act to be parties to this appeal are **REFUSED.**

B. There is no order as to costs.

REASONS

[1] Coromandel Watchdog of Hauraki Incorporated (**CWH**) and Waikawau Bay Guardians Trust (**WBGT**) seek waivers under s281 of the Act of the time for lodging notices under s274 of the Act to become parties to this proceeding. Their submissions are set out in and accompanying their waiver applications dated 18 October 2017 and also in submissions dated 21 November 2017.

[2] Their applications are opposed by several parties, including the respondent, the Thames-Coromandel District Council (**TCDC**), Blackjack Farms Ltd, Sue Edens, PD & KJ Sieling, KM Rabarts Family Trust and Coromandel Property Owners Alliance Incorporated. The appellants do not oppose the applications.

[3] TCDC, in two detailed submission documents dated 26 October 2017 and 6 December 2017, raises several issues in opposition arising from the questions:

(a) whether this appeal is within the scope of the submissions lodged by the appellants;

(b) whether CWH has standing under s274 to be a party;

(c) whether WBGT has standing under s274 to be a party; and

(d) whether the grant of waivers would cause undue prejudice to the parties to the appeal.

[4] The other parties in opposition focus on the issue of whether the granting of waivers under s281 would cause undue prejudice to them or others.

Background to the Appeal

[5] The proposed Thames-Coromandel District Plan was notified in December 2013. In March 2014 S Nathan QC, C Toomey and M Toomey each lodged a separate submission on the proposed District Plan. The Nathan submission commences by stating:

> *I wish to object to the proposals in the draft District Plan in relation to the area of Little Bay (Appendix Maps 7 and 7A)*

The submission then particularises that by identifying an "Objection Area" being the area lying broadly to the south of Little Bay and consisting of three properties at 879, 891 and 867 Tuateawa Road.

[6] The Toomey submissions do not include this identification of an objection area: instead, each commences with personal statements about the submitter's relationship with the land at 879 Tuateawa Road and then both state:

> *I wish to object to the proposals in the draft District Plan in relation to the area of Little Bay (Appendix Maps 7 and 7A).*

[7] All three submissions include the following text, including reference to the Objection Area, as the grounds of submission:

> *(i) The published plans Nos 7 and 7A on TCDC's website relating to Waikawau Bay and Little Bay are confused, confusing and misleading because they do not properly or accurately disclose the various overlays to which TCDC propose, in reality, to subject the Objection Area.*
>
> *(ii) TCDC has failed to give any, or any proper, consideration to the Objection Area under the relevant legislation, as required by law.*
>
> *(iii) The designation of "Coastal Environment" in the draft District Plan is confused, imprecise and unclear, because the draft District Plan fails to specify exactly how it affects the planning considerations set out in the proposed District Plan.*
>
> *(iv) Subject to the identified exceptions set out below, the proposed Natural Landscape Overlay in respect of most of the Objection Area is inappropriate and wrong: most of it should be designated instead as Outstanding Landscape so as to protect outstanding landscape and seascape views of Waikawau Bay and undeveloped areas of regenerated native bush.*
>
> *(v) The areas which are proposed to be designated only as Amenity Landscape are also wrongly designated; they should not be designated with any overlay at all (other than Coastal Environment). Also and in any event, the specific areas proposed to be designated as only subject to the Amenity landscape Overlay need to be enlarged so as to correspond with existing use.*
>
> *(vi) The proposed restrictions on managing land with indigenous vegetation and on harvesting timber and firewood are wholly unjustified and wrong and do not properly respect existing user of property, as required by law.*

[8] There is no further substantive text in either of the Toomey submissions. The Nathan submission continues by elaborating on each of the grounds of objection.

[9] The natural character provisions and associated overlay in the proposed Plan were withdrawn in March 2015 in response to the collective scope of relief sought in submissions relating to these provisions. Variation 1 was notified to propose new provisions and overlay maps. It appears that the submitters may also have lodged

submissions on Variation 1, but I have not been provided with copies of those, nor have I been able to locate them on the TCDC website. I note that Report 31 of TCDC's hearing commissioners on Variation 1 does not refer to any appearance by these submitters or to any matter concerning Waikawau Bay; it does refer to a submission by CWH.

[10] TCDC notified its decisions on submissions on the proposed District and on Variation 1 on 6 April 2016. The appeal period closed in June 2016.

[11] The notice of appeal in this proceeding is in the names of all three submitters and is dated 12 June 2016. It states in paragraph 6 that the parts of the TCDC decision that are being appealed are:

> *a.* *Recommended Decision Report 6 (Landscape), addressing Section 9 Landscape Overlays, Section 32 Landscape Overlay Rules;*
>
> *b.* *Recommended Decision Report 4 (Coastal Overlay) addressing Section 7 Coastal Overlay*
>
> *c.* *The Decisions Version of the Planning Maps (specifically Maps 7 and 7A Overlays) showing of areas of Outstanding Natural Landscape, in particular the decision not to extend the proposed Waikawau Bay Outstanding Natural Landscape as proposed in our submission.*
>
> *d.* *Variation 1 Natural Character Decisions set out in Report 31.*
>
> *e.* *The Decisions Version of the Planning Maps (specifically Maps 7 and 7A Overlays) as a result of not reviewing the definition of Natural Character and applying the appropriate natural character attributes to the Natural Character Overlay to the Coastal Environment Line or to extent sought for Waikawau Bay Natural Character Units.*

[12] The relief sought in the notice of appeal was set out as follows in paragraph 8:

> *a.* *Establish the inland extent of the Coastal Environment Overlay in accordance with the line shown in the WRPS.*
>
> *b.* *Remove the artificial divisions of ONL & ONF and ONF & HNC at Waikawau Bay within the Coastal Environment (as redefined in (a) above) and create a properly holistic, single area (whilst recognizing there may be slight variations in perceptual qualities within the larger area).*
>
> *c.* *Alter Planning Maps 6, 7 and 7A Overlays to show the following:*
>
> - *the ONF&L for Waikawau Bay as produced by Dr Michael Steven in the Hearing on Landscape Overlays (see Figure 6 of his statement of evidence presented at the Hearing and included in Attachment C).*

- *The HNC for Waikawau Bay to accord with the ONF&L as amended above or alternatively by application of the complete set of correct attributes to units 45, 46 and 48 taking account of them in the wider context of Waikawau Bay in a holistic sense.*

d. *Retain the Amenity Landscape Overlay to ensure the appropriate buffer areas are provided for ONF&L and ONC and HNC overlays.*

e. *Make alterations to the rule sets for the overlays in accordance with and to give effect, or like effect, to the Table providing for appropriate scale development which was produced by Mr Graeme Lawrence in the Hearing on Landscape Overlays and Rules (Attachment C).*

f. *Amend 7A.3 Natural Character of the Coastal Environment Objectives and Policies Objective 2 and Policy 2a to prevent the creation of any development within an ONC or HNC area.*

Where subdivision of or within an ONC or HNC area is being carried out to create legal protection, development must be relocated outside the ONC or HNC Overlay and only be provided for if the ONC or HNC area is being enlarged or added to.

Reword Policy2a to ensure that development within an ONC or HNC area is avoided.

In Policy 2a ensure subdivision or development that restores or enhances attributes or qualities of natural character of land in order to expand an existing Natural Character Overlay Area; and is only provided for only where:

- *the development occurs outside the Natural Character Area when combined with the additional area to be protected; and*
- *legal protection is put in place to achieve an offset of adverse effects of subdivision or development within the coastal environment, that is when avoidance, remedy and mitigation measures have been fully implemented.*

g. *Amend the conservation lot policy and rules in Section 16 and Section 38 to prevent new lots which provide development opportunities within an ONF, ONL or area of HNC or ONC.*

h. *Make the necessary consequential amendments or alterations changes that may be required.*

i. *In the alternative or in addition to any one or more of the above make the alteration set out in the relief sought on pages 13-17 of the Toomey and Nathan submission on Variation 1 (See Attachment A).*

Scope of the Appeal

[13] I address the issue raised by TCDC concerning the extent to which this appeal is based on the appellants' submissions only for the purpose of dealing with the applications by CWH and WBGT for waivers to become parties to it. I go no further in relation to the scope of the appeal and the apparent discrepancies between the submissions and the notice of appeal as the appellants appear to have had no or only limited opportunity to address the challenge raised by TCDC so far as it may affect their own position. If there is to be a challenge to the appeal itself, that should be squarely raised in an application on notice to the appellants.

[14] An appeal from a decision on a submission on a proposed plan must be on a provision or matter referred to in that submission.[1] The scope of the relief sought on appeal must be fairly and reasonably within the scope of the original submission or the proposed plan provision or somewhere in between.[2] There is a well-known dictum that expresses the manner in which such a fair and reasonable assessment should be undertaken:[3]

> *... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.*

[15] Counsel for TCDC initially filed submissions treating the submissions by the Toomeys as being of the same scope as that of Mr Nathan. Counsel then filed amended submissions with an explanatory memorandum acknowledging that the because the Toomey submissions did not repeat the particularly identified Objection Area, it was at least arguable that, read on their own and independent of the Nathan submission, those submissions were potentially broader in scope. On the other hand, counsel noted that the identical grounds set out by each submitter included reference to the Objection Area and to the area of Little Bay shown on Maps 7 and 7A.

[16] In my view, it is clear beyond doubt from their identical grounds that the three submissions all seek the same outcomes in respect of the submitters' property at 879 Tuateawa Road and the neighbouring properties at 891 and 867 Tuateawa Road which form the "Objection Area" as described in Mr Nathan's submission and as referred to in all three submissions. I do not see any reasonable basis on which to interpret the two

1 Clause 14(2)(a), Schedule 1 to the RMA.

2 *Re Vivid Holdings Ltd* [1999] NZRMA 467.

3 *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413 *per* Panckhurst J.

shorter submissions by the Toomeys as being substantially broader than the submission by Mr Nathan or otherwise creating some separate foundation for different relief.

[17] Turning to their joint notice of appeal, and allowing for the possibility that Variation 1 and their submissions on it may afford scope for those parts of the Notice of Appeal that relate to Variation 1, it seems to me that a number of the items of relief sought may go beyond the scope of the original submissions. In particular, the relief sought must be limited to the Objection Area particularised in Mr Nathan's submission, subject only to the degree to which the mapping of any zone or overlay on immediately neighbouring land might be adjusted to maintain the coherence of the spatial extent of such provisions, on the basis that such adjustments could be said to be foreseeable consequences of the changes sought in the submissions.[4]

[18] I also note that the extent to which the notice of appeal challenges the location of the Coastal Environment Line does not appear to be supported by the text of any of the submissions, including Mr Nathan's elaboration of ground (iii) in his submission. The focus of the submissions appears to be on the effect of the Coastal Overlay rather than the location of the Coastal Environment Line.

[19] For those reasons, I accept the submissions of counsel for TCDC that both the applications by CWH and WBGT for waivers must be considered in light of the limits on the scope of this appeal as I presently consider them to be.

Basis of seeking to be parties and applications for waivers

[20] The basis on which both CWH and WBGT seek to become parties to this appeal under s274 of the Act is that they are both *a person who has an interest in the proceedings that is greater than the interest that the general public has* within the meaning of s274(1)(d). CWH also says that it made a submission on some of the matters included in the appeal, which would enable it to be a party in terms of s274(1)(e). I note that none of the trade competition provisions referred to in s274 are applicable to CWH or WBGT.

[21] CWH says that its interest is in the parts of TCDC's decision which is the subject of this appeal in relation to:

4 *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [72] – [74] *per* Fisher J.

(a) the extent of areas of outstanding natural landscape at Waikawau Bay, *in particular the the decision not to extend the proposed Waikawau Bay Outstanding Natural Landscape as proposed in ou[r] submission*;

(b) the failure to review the definition of *natural character* and apply appropriate attributes to the Natural Character Overlay to the Coastal Environment Line or to the extent sought for Waikawau Bay Natural Character Units;

(c) the mapping of the Coastal Environment Line; and

(d) the proposed new policy 10W in Chapter 15.

It does not say in its notice how it has an interest greater than the public generally in any of those matters. It acknowledges that it will confine its arguments to the issues identified in existing mediation agreements and issues lists for this appeal.

[22] Notices under s274 in respect of appeals against decisions of the Council on submissions on its proposed District Plan were required to be filed within 15 working days after the period for lodging a notice of appeal ended, that is, by 18 July 2016. These applications were filed on 18 October 2017.

[23] In its application for a waiver of time, CWH did not address the reason why its notice was 15 months late. Counsel's submissions acknowledge that it is a public interest group with limited resources and could not afford to become party to all appeals which might raise issues overlapping with its own but that it made a strategic decision as to which appeals it wished to join. Now that issues had been narrowed, it says it can afford to participate in more localised issues. Counsel noted that CWH had lodged its own appeal[5] but that the scope of that appeal had been challenged, particularly in relation to the location of the Coastal Environment Line (**CEL**) on which it acknowledged it had not made any specific submission. It had lodged notices under s274 on other appeals in an effort to participate in any hearing about the location of the CEL but it now appears that those other appeals may not be sufficient for that purpose. It says that this appeal does relate to the CEL generally, and refers to the notice of appeal at paragraph 7(c). It also refers to other relief sought in this appeal and says that these are all relevant to its appeal concerning direct and indirect controls on mining.

[5] In ENV-2016-AKL-145

[24] Paragraph 7 of the notice of appeal sets out the grounds of appeal rather than the parts of the decision that are the subject of appeal or the relief sought. Sub-paragraph (c) refers to the CEL and says that it delineates the extent of the Coastal Environment Overlay but cannot be interpreted with accuracy and that there is no reason why it is not located in the position shown in the Waikato Regional Policy Statement. Further, it fails to give effect to the natural character provisions of the Waikato RPS. Paragraph 6(b) of the Notice of Appeal, setting out the parts of the TCDC's decision under appeal, refers to the decision on the Coastal Overlay, and the relief sought in paragraph 8(a) seeks to establish the inland extent of the Coastal Environment Overlay "in accordance with the line shown in the WRPS." As noted above, however, this detail in the notice of appeal does not appear to have a clear foundation in any of the submissions on which the appeal is based.

[25] In its submissions, CWH also asserts other jurisdictional and procedural issues with the decisions version of the CEL. It is impossible to address, let alone determine, such issues on an interlocutory application for leave to lodge a s274 notice out of time. If CWH wishes to pursue these issues, it may need to persuade an existing party to this appeal or another appellant to take them up or else take some other steps to challenge the provisions as being unlawful.

[26] WBGT says in its application that its interest is the same as CWH's in relation to items (a), (b) and (d) above, but it does not state any interest in item (c) and instead states an interest in TCDC's decisions on Variation 1 Natural Character as set out in Report 31. WBGT also does not say in its notice how it has an interest greater than the public generally in any of those matters. It also acknowledges that it will confine its arguments to the issues identified in existing mediation agreements and issues lists for this appeal.

[27] In its application for a waiver of time, WBGT notes that it was established in May 2016, two years after submissions closed on the proposed District Plan and a month after TCDC issued its decisions on submissions. WBGT refers to its trust deed which sets out the purpose of WBGT, being generally to protect and preserve the visual catchment area and natural coastal landscape of Waikawau Bay for the benefit of New Zealanders and visitors and, as part of that, to purchase the property at 891 Tuateawa Road to maintain it free from housing.

Becoming a party to the appeal

[28] The well-established test of whether a person has a greater interest than the public generally in a proceeding before this Court is as set out in the following passage from the Court's decision in *Purification Technologies v Taupo District Council*:[6]

> *Parliament has chosen to limit those who may be heard in Planning Tribunal* [now the Environment Court] *proceedings to the classes of persons described in section 274. Parliament is to be taken to have intended the established meaning at law of reference to an interest in proceedings. The section has to be construed to give meaning to Parliament's evident intent to restrict the classes of persons entitled to appear and call evidence in proceedings before the Tribunal.*
>
> *... [W]e hold that on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs. In our view a more liberal interpretation of the phrase "interest in the proceedings" would not be giving effect to the new regime of the Resource Management Act but would be reverting to the more liberal regime of the former legislation which Parliament has chosen not to continue.*

[29] Applying the test of whether the Court can identify an interest of some advantage or disadvantage which is not too remote, as explained in that passage, I do not find anything in either CWH's or WBGT's application which could be said to amount to such an interest. Rather, the matters raised by them are of a kind held by the Court not to amount to such an interest, such as a belief that activity of a particular kind (mining) ought to be prevented or an endeavour to achieve the objects of WBGT's trust or uphold the values which it was formed to promote.

[30] It is also relevant to having a greater interest than the general public that WBGT did not exist when the proposed District Plan was notified and the period for making submissions was open. It came into existence subsequently on 24 May 2017. It therefore lacks a record of participation in resource management matters that can give some

[6] *Purification Technologies Ltd v Taupo DC* [1995] NZRMA 197 at 204.

organisations standing as true representatives of the public interest.[7] CWH, founded in 1980, may have the sort of history that could provide a foundation to represent some aspect of the public interest, but in this case there appears to be no nexus between the focus of that history on mining issues and the scope of this appeal. Counsel submitted that CWH's members may have various interests that CWH could assert as its own, relying on *Sandspit Yacht Club Marine Soc Inc v Auckland Council.*[8] That case is about successors under s2A of the Act, and in particular the position of a group of submitters who form an incorporated society in the course of participating in an application for resource consent and the appeal from the decision on that. It is not authority for the proposition that an organisation formed for particular purposes can later claim different purposes or interests based on the personal positions of its members. As noted above, CWH has lodged its own appeal to address its concerns about TCDC's decisions on its submissions in relation to mining. This appeal does not appear to have any relationship to the issue of mining.

Grant of waiver

[31] Assuming, notwithstanding the foregoing discussion, that this appeal is within the scope of the submissions of the appellants and that CWH and WBGT do have standing to be parties under s274, I now address whether it would be appropriate to grant them waivers of time to lodge notices under s274 and become parties to this appeal.

[32] Section 281(1)(iia) expressly authorises the Court, in its discretion, to waive a requirement of the Act about the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings. This power is subject to the limitation in s281(2) that the Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced. The latter limitation is usually treated as a threshold and therefore considered first.

[33] Even if the prejudice is not undue, the Court has a general discretion whether to grant or refuse a waiver and there are a wide range of factors that may result in that discretion being exercised against grant.[9]

[34] The Court has on numerous occasions noted that the question of whether there would be undue prejudice means that there must be prejudice beyond what would

[7] *Trustees of Neville Crawford Family Trust v Far North DC* [2013] NZEnvC 141; *Federated Farmers of NZ Inc (Mackenzie Branch) v Mackenzie DC* [2016] NZEnvC 80.[2016] NZEnvC 80.
[8] *Sandspit Yacht Club Marine Soc Inc v Auckland Council* [2011] NZEnvC 25.
[9] *Stapylton-Smith v Banks Peninsula* DC C85/2004 at [7].

necessarily follow in every case from the granting of a waiver.[10] The qualifier "undue" connotes something more than what is merely incidental, as would follow from any waiver of a statutory requirement.[11] It also connotes a prejudice that is unwarranted. It is often considered in light of the fundamental principles that litigation should be conducted as expeditiously as practicable in the interests of justice and that certainty and finality are desirable goals of the litigation process.[12] The Court will also take into account whether a waiver would adversely affect other interests of the parties, such as contractual commitments,[13] although it does not appear that such factors are in play here. On those bases, the Court may grant a waiver where that would not disrupt the course of an appeal but is likely to refuse one where its effect would be to put the course of the appeal back.

[35] The length of the waiver required in this case and the lack of any cogent explanation why waivers are sought at this late stage both count against grant in this case. TCDC submits that there have been extensive negotiations, mediations and pre-hearing processes in relation to this appeal and other related appeals. Indeed, CWH has been involved in some of the same processes, given the common issues arising in its appeal and this one. TCDC submits that significant progress has been made towards resolving the appeals and the issues that remain outstanding are limited, as identified in the series of case management memoranda that have been filed with the Court. I accept those submissions.

[36] Reversing the view and considering the effect on CWH and WBGT if waivers are not granted, it is unclear why either or both of them could not be involved by assisting these appellants. The position might be different if there were no means by which the CEL at Waikawau and Little Bays could not be reviewed (if that is indeed within the scope of this appeal) or if either of them had some clear existing interest of the kind discussed above that could not be considered in this appeal in any other way. Had there been any significant prejudice to them, that might offset the prejudice to others so that it might not be described as undue. But in the absence of any clear prejudice to them, there is no basis on which to grant them waivers.

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10 For example, *Pukekohe HIAB Transport Ltd v Auckland Council* [2012] NZEnvC 142 at [7]-[8].

11 *Noel Leeming Appliances Ltd v North Shore CC* (1992) 2 NZRMA 113; *Reilly v Northland RC* (1993) 2 NZRMA 414.

12 For example, *Robinsons Bay Trust v Christchurch CC* C128/07; *Omaha Park Ltd v Rodney DC* A120/09; *Hedley v Wellington RC* W048/99.

13 For example, *Harris v Tasman DC* W099/00.

[37] For those reasons, even if there were no other impediments to CWH and WBGT in their attempt to join this appeal as parties, I would conclude that waivers ought not to be granted on the basis that to do so would cause undue prejudice to the conduct of this appeal and the positions of the current parties.

[38] I also note that there is presently a proposal being advanced by TCDC for reconsideration of the location of the CEL using the procedure available in appropriate cases under s293 of the Act. That is not formally underway and therefore is not a material consideration in terms of these applications for waivers, but if the Council does pursue its proposal, that could also provide CWH and WBGT with a fresh opportunity to participate in such a review of the location of the CEL.

Decision

[39] It will be apparent that there are significant issues in relation to several of the factors that are relevant to whether I can or should grant waivers to CWH and WBGT to lodge notices under s274 out of time. It appears to me (without deciding the issue because the appellants have not been heard on it) that this appeal raises a number of issues, including the location of the Coastal Environment Line, in a way that goes beyond the scope of the submissions on which the appeal is based. I do not consider that either CWH or WBGT is a person with an interest in this appeal greater than the interest that the general public has which would give them standing under s274. I consider that there would be undue prejudice to the other parties to this appeal if a waiver were to be granted under s281.

[40] In relation to the power to grant waivers under s281 of the Act, on the primary basis that to do so would cause undue prejudice to other parties for the reasons discussed above, I refuse the applications by CWH and WBGT for waivers of time in which to lodge notices under s274 of the Act to be parties in this appeal.

[41] I make no order as to costs.

D A Kirkpatrick
Environment Judge