

IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision [2021] NZEnvC 069

IN THE MATTER OF

applications under ss 292 and 320 of the
Resource Management Act 1991 (the
Act)

BETWEEN

THE TREE COUNCIL
(AUCKLAND) INCORPORATED
(ENV-2021-AKL-047)
(ENV-2021-AKL-048)

Applicant

AND

AUCKLAND COUNCIL

First Respondent

AND

JIANHUA ZHENG

Second Respondent

AND

NGĀTI WHĀTUA ŌRĀKEI WHAI
MĀIA

Section 274 Party

Court: Chief Environment Court Judge D A Kirkpatrick sitting alone
under s 279 of the Act

Hearing: On the papers

Date of Decision: **21 MAY 2021**

Date of Issue: **21 MAY 2021**

DETERMINATION OF THE ENVIRONMENT COURT



A: The Court makes the following orders by consent under s 279(1)(a) and (b) of the Act:

- (a) The interim enforcement order made in ENV-2021-AKL-047 dated 30 April 2021 shall remain in force until the final determination of:
 - (i) a plan change to include the tree in Schedule 10 of the Auckland Unitary Plan (Operative in Part), if that plan change is notified by 1 October 2021; or
 - (ii) if no such plan change is notified by 1 October 2021, the application in ENV-2021-AKL-048 by The Tree Council (Auckland) Inc. under s 292 of the Act .
- (b) The application in ENV-2021-AKL-048 by The Tree Council (Auckland) Inc. under s 292 of the Act is adjourned to a date no later than 14 October 2021.
- (c) The hearing of these matters set down for 24 May 2021 is vacated with appearances excused.

B: Costs are reserved.

REASONS

Introduction

[1] On 29 April 2021 The Tree Council (Auckland) Inc. filed an *ex parte* application for an interim enforcement order under s 320 of the Act. The Court gave its decision on that application on 30 April 2021¹ and made the following interim order:

Jianhua Zheng of Auckland, together with his agents, contractors and anyone acting on his behalf, is prohibited from pruning, removing or damaging in any way the large pohutukawa tree situated at 8 Eglinton Avenue Mt Eden pending further order of this Court.



¹ *The Tree Council (Auckland) Inc. v Auckland Council and Zheng* [2021] NZEnvC 058.

[2] Also on 29 April 2021 The Tree Council filed an application under s 292 of the Act for an order directing the Auckland Council to remedy a mistake or defect in the Auckland Unitary Plan and in particular to include in Schedule 10 (being the schedule of notable trees) of the AUP the large pohutukawa tree situated at 8 Eglinton Avenue, Mt Eden, Auckland.

[3] Both applications were then set down for hearing on 24 May 2021.²

[4] On 14 May 2021 Ngāti Whātua Ōrākei Whai Māia gave notice under s 274 of the Act to be a party to both applications.

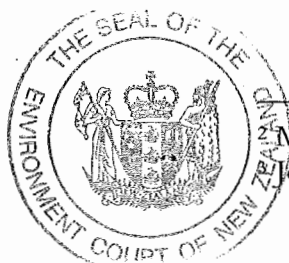
The agreement reached

[5] On 19 May 2021 counsel for The Tree Council, the Auckland Council and Mr Zheng advised the Court that they have reached an agreement as to how to progress the applications, which they summarised as follows:³

- (a) The application by the Tree Council (Auckland) Inc under s 292 of the Act is adjourned to a date no later than 14 October 2021.
- (b) In the interim, Auckland Council will seek approval from its Planning Committee to prepare and notify a bespoke plan change which seeks to include the tree at 8 Eglinton Road, Mt Eden in Schedule 10 to the Auckland Unitary Plan (Operative in Part) (the “**plan change**”).
- (c) Auckland Council is to notify that plan change by 1 October 2021.
- (d) If the plan change is notified by that date, the Tree Council will withdraw its application under s 292 of the Act.
- (e) The interim enforcement order made on 30 April 2021 is to continue in force until the plan change is finally determined, provided that the precondition in (c) above is met.
- (f) The second respondent will, on making of the consent orders, withdraw his application for a certificate of compliance and undertakes not to apply for another certificate of compliance to remove the tree pending final determination of the plan change (subject also to Auckland Council’s compliance with (c) above).
- (g) If the plan change is not notified by 1 October 2021, the Tree Council will seek to bring on its application under s 292 and the interim enforcement order will continue until that application is finally determined.

Minute of the Court, dated 5 May 2021.

Joint memorandum of the parties seeking orders by consent, dated 19 May 2021 at [3].



[6] Counsel for Ngāti Whātua Ōrākei Whai Māia gave notice of support for the orders sought.⁴

Evaluation

[7] It is clear that, in reaching the above agreement, the parties have come to a practical arrangement to address and progress both the application for interim enforcement orders and the application under s 292 of the Act.

[8] The proposal that the scheduling of the tree be the subject of a plan change in terms of Schedule 1 to the Act is appropriate. It will enable the status of the tree to be fully assessed and considered, with opportunity for submissions to be made and heard. The timing in the agreement appears reasonable for this purpose.

[9] Leaving the interim enforcement order in place in the meantime preserves the status quo and enables the proposed plan change to occur according to the statutory timeframes rather than under pressure of an interim application.

[10] Mr Zheng's withdrawal of his request for a certificate of compliance and undertaking not to seek another in the meantime likewise leaves the status quo in place and is a gesture of good faith to allow the proposed process to occur.

[11] The parties are to be commended for engaging with one another to reach this agreement. The Court is satisfied that the agreement promotes the purpose of the Act and is an effective way of resolving the issues in these two applications.

Orders

[12] The Court makes the following orders by consent under s 279(1)(a) and (b) of the Act:

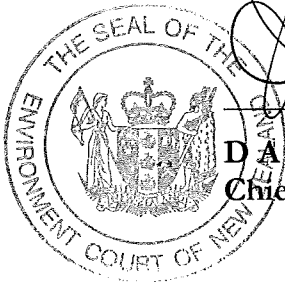
- (a) The interim enforcement order made in ENV-2021-AKL-047 dated 30 April 2021 shall remain in force until the final determination of:

_____ see email to Auckland Council from Andrew Brown dated 19 May 2021.



- (i) a plan change to include the tree in Schedule 10 of the Auckland Unitary Plan (Operative in Part), if that plan change is notified by 1 October 2021; or
 - (ii) if no such plan change is notified by 1 October 2021, the application in ENV-2021-AKL-048 by The Tree Council (Auckland) Inc. under s 292 of the Act .
- (b) The application in ENV-2021-AKL-048 by The Tree Council (Auckland) Inc. under s 292 of the Act is adjourned to a date no later than 14 October 2021.
- (c) The hearing of these matters set down for 24 May 2021 is vacated with appearances excused.

[13] No party has raised any issue of costs. Costs are accordingly reserved.




D A Kirkpatrick
Chief Environment Court Judge

IN THE ENVIRONMENT COURT
AT AUCKLAND

ENV-2021-AKL-0047 & 0048

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

IN THE MATTER OF

an application under s 320 of the Resource
Management Act 1991 (“Act”)

AND

an application under s 292 of the Act

BETWEEN

**THE TREE COUNCIL (AUCKLAND)
INCORPORATED**

Applicant

AND

AUCKLAND COUNCIL

First Respondent

AND

JIANHUA ZHENG

Second Respondent

Joint memorandum of counsel seeking orders by consent

Dated: 19 May 2021

Next Event date: Hearing, 24 May 2021, 10.00am
Judicial officer: Chief Judge Kirkpatrick

Solicitors acting:

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Barristers, Solicitors & Notary Public
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Counsel:

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Tel: 021 841 613 | 021 0437 482
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MAY IT PLEASE THE COURT:

1. Counsel refer to the hearing of this matter, set down for a half-day on Monday 24 May 2021.
2. Counsel are pleased to inform the Court that they have reached agreement on an alternative proposal that obviates the need for a hearing.
3. In summary, the proposal is that:
 - a. The application by the Tree Council (Auckland) Inc under s 292 of the Act is adjourned to a date no later than 14 October 2021.
 - b. In the interim, Auckland Council will seek approval from its Planning Committee to prepare and notify a bespoke plan change which seeks to include the tree at 8 Eglinton Road, Mt Eden in Schedule 10 to the Auckland Unitary Plan (Operative in Part) (the “**plan change**”).
 - c. Auckland Council is to notify that plan change by 1 October 2021.
 - d. If the plan change is notified by that date, the Tree Council will withdraw its application under s 292 of the Act.
 - e. The interim enforcement order made on 30 April 2021 is to continue in force until the plan change is finally determined, provided that the precondition in (c) above is met.
 - f. The second respondent will, on making of the consent orders, withdraw his application for a certificate of compliance and undertakes not to apply for another certificate of compliance to remove the tree pending final determination of the plan change (subject also to Auckland Council’s compliance with (c) above).
 - g. If the plan change is not notified by 1 October 2021, the Tree Council will seek to bring on its application under s 292 and the interim enforcement order will continue until that application is finally determined.
4. Counsel respectfully seek the following orders by way of consent pursuant to s 279(1)(a) and (b) of the Act:
 - a. The application by the Tree Council (Auckland) Inc under s 292 of the Act is adjourned to a date no later than 14 October 2021.
 - b. The interim enforcement order made on 30 April 2021 is continue in force until the final determination of:
 - i. a plan change to include the tree within Schedule 10 of the Auckland Unitary Plan (Operative in Part), if that plan change is notified by 1 October 2021;
or
 - ii. if no plan change is notified by 1 October 2021, the Tree Council’s application under s 292.

- c. The hearing of this matter on 24 May 2021 is vacated with appearances excused.
5. Counsel have approached Mr Makaore of Ngāti Whātua Ōrakei, who lodged a s 274 notice in this matter on Friday 14 May 2021, who has confirmed that he supports the orders sought.

Dated 19 May 2021



.....
M Lloyd
Counsel for the applicant

.....
S Quinn | K Rogers
Counsel for the first respondent



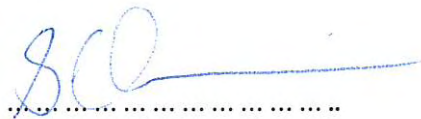
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R D Butler | A M Cameron
Counsel for the second respondent

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5. Counsel have approached Mr Makaore of Ngāti Whātua Ōrakei, who lodged a s 274 notice in this matter on Friday 14 May 2021, who has confirmed that he supports the orders sought.

Dated 19 May 2021

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M Lloyd
Counsel for the applicant



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S Quinn | K Rogers
Counsel for the first respondent

.....

R D Butler | A M Cameron
Counsel for the second respondent