

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

BETWEEN                      ALL PARTIES IN UNITARY PLAN APPEAL AND  
JUDICIAL REVIEW PROCEEDINGS

Appellant

AND                              AUCKLAND COUNCIL

Respondent

Hearing:        14 October 2016

Minute:        17 October 2016

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**MINUTE OF WHATATA J**  
**As to the first case management conference**

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[1] This minute records the outcome of the first case management conference held in relation to the Auckland Unitary Plan (AUP) appeals.

[2] In my first minute I identified a number of matters to be addressed. I turn now to record the approach to be taken in relation to those matters and other matters relevant to case management.

### **Appropriate groupings**

[3] The Council identified three categories, or groupings, of appeals and review proceedings, namely:

- [a] Category 1 – appeals benefitting from settlement discussions.
- [b] Category 2 – scope and/or zoning changes.
- [c] Category 3 – issue specific appeals.

[4] The Council also identified high, moderate and low priority fixtures. Disagreement with the categorisation and rankings was voiced by the following parties:

- [a] Belgiorno-Nettis (CIV-2016-404-2333 and CIV-2016-404-2335) did not consider that his appeal and review should be prioritised ahead of other appeals;
- [b] A number of parties consider that the “scope” appeals could be heard together, in terms of resolution on matters of general principle, with any fact-specific enquiry, if necessary, undertaken at a later date;

[c] A number of quarry operators<sup>1</sup> agreed that the appeal by Royal Forest and Bird Protection Society of New Zealand Incorporated (CIV-2016-404-2343) is a high priority issue-specific matter but that its appeal would benefit from settlement discussions and should be placed on the same track as those appeals in Category 1.

[5] Following discussion with counsel about categorisation and priority, I have resolved that the proceedings should be categorised as Category 1, Category 2 or Category 3, as set out in Annexures A, B and C respectively.

[6] I address timetabling of these matters below at [28].

### **Issues of high precedent value**

[7] The Council submitted that appeals and review proceedings dealing with the scope of the Hearing Panel's recommendations, particularly by Character Coalition Inc, Auckland 2040 Inc and Belgiorno-Nettis should rank as high priority matters of precedent value because they affect the ability to finalise the planning maps. Character Coalition Inc, Auckland 2040 Inc and Belgiorno-Nettis disagreed with this description. However, it was agreed by most parties that the issue of scope and, in particular, whether or not the Hearings Panel had jurisdiction to make recommendations on specified matters should be given priority and determined as soon as possible.

[8] I have resolved to proceed by way of the preliminary question procedure,<sup>2</sup> and to have a test case or test cases prepared by the Council and the parties for the purpose of resolving the issue of the scope of the jurisdiction of the Hearings Panels to make recommendations. The objective of the test case(s) will be to provide a principled framework for the resolution of the individual claims. Individual parties will be directed to indicate whether the resolution of the test case will resolve their claims as to scope, and, if not, why not. Given the urgency expected by the provisions of the

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<sup>1</sup> Interested parties in proceedings CIV-2016-404-2343.

<sup>2</sup> High Court Rules, r 10.15.

Local Government (Auckland Transitional Provisions) Act 2010, parties will be expected to cooperate to achieve an expeditious resolution of the scope issue.

### **Issues-specific or site-specific appeals**

[9] The Council's Category 3 was not disputed in terms of issues-specific and site-specific appeals. However both Man O'War Farm (CIV-2016-404-2331) and South Epsom Planning Group Inc (CIV-2016-404-2302) identified that aspects of their proceedings raise issues of scope and should form part of both of the priority lists.

[10] During the conference, there was some disagreement voiced between the parties as to how the issues in Royal Forest and Bird Protection Society of New Zealand's appeal (CIV-2016-404-2343) should be heard and whether only some of the specific issues on appeal should attract priority status. I proceeded on the basis that the entire proceeding will be set down as a priority matter, but it is open to counsel to reach an agreement as to whether further refinement of the issues to be heard at the priority fixture is needed, as it is with all of the matters.<sup>3</sup>

[11] Democracy Action, an interested party to the proceedings commenced by the Independent Maori Statutory Board (CIV-2016-404-2261), submitted that there was nothing particularly special about the Board's proceedings to warrant priority and that more time was needed to prepare for this proceeding than that contemplated by the Council in its proposed directions. Allegations of partisan behaviour by the Council are also made and a direction that the Council pay Democracy Action's costs is also sought.

[12] Timetabling directions below deal with Democracy Actions concerns in relation to preparation. Democracy Action is directed to file an application in the proper form, citing appropriate authority, in respect of its claim for costs. It will be set down for hearing on the first available fixture date.

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<sup>3</sup> Man O'War Farm and Federated Farmers (CIV 2016-404-2299 ) noted that aspects of their appeals are currently before the Court of Appeal awaiting hearing and determination. It may be sensible for these aspects to be adjourned.

## **Overlapping appeals currently before the Environment Court**

[13] The Council has produced a schedule of appeals and review proceedings that overlap with matters before the Environment Court.<sup>4</sup> The Council indicated:

- [a] Where the subject matter is the same, the Council will be asking the Environment Court to put such appeals on hold, pending the outcome of the appeal before the High Court.
- [b] Where the High Court decision will influence the Environment Court, the Council will be asking the Environment Court to place on hold any relevant Environment Court appeals, pending the outcome of the appeals in the High Court. The Council identified the South Epsom Planning Group appeal (CIV-2016-404-2302) as falling into this category.
- [c] The Transpower appeal (CIV-2016-404-2330) may proceed independently.
- [d] As to cases before the Environment Court raising issues of “scope”, the outcome in the High Court appeals on the question of scope may require the validity of some of the appeals at the Environment Court to be revisited.

[14] The position of the appellants and other parties is as follows:

- [a] Waste Management NZ Limited, the appellant/applicant in CIV-2016-404-2347 and CIV-2016-404-2348, did not consider its appeal to the Environment Court to be an overlapping appeal with the High

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<sup>4</sup> Albany North Landowner’s Group (CIV-2016-404-2336); Bunnings Ltd (CIV-2016-404-2351); Howick Ratepayers and Residents Ass Incorporated and W Moffat (CIV-2016-404-2321); North Eastern Investments Ltd and Heritage Land Ltd (CIV-2016-404-2324 and CIV-2016-404-2325); South Epsom Planning Group Incorporated and Three Kings United Incorporated (CIV-2016-404-2302); Strand Holdings Ltd (CIV-2016-404-2350); Wallace Group Ltd (CIV-2016-404-2316); Waste Management NZ Ltd (CIV-2016-404-2347 and CIV-2016-404-2348); Malcolm Woolmore and Alastair and Sonya Morris ((CIV-2016-404-2460).

Court appeal and the judicial review. It was noted that the High Court proceedings relate to the zoning of its site, while the Environment Court appeal is against the Council's decision to reject the Panel's recommendation to delete the Auckland Ambient Air Quality Standards from the proposed plan.

[b] Ryman Health Care, the appellant in CIV-2016-404-2328, agreed with the Council that the issues in its appeal should be determined before the related Environment Court appeal proceeds.

[c] Transpower does not agree that its appeal falls into the category suggested by the Council. It says that its High Court appeal relates to the detail of the rules or management regime that applies within the National Grid Corridor, whereas the Environment Court appeal relates to the width of the National Grid Corridor. It argues that the High Court appeal should be determined first so that there is certainty about the rules that will apply within the National Grid Corridor, which will have relevance to the Environment Court issue. But Transpower acknowledges that if its High Court appeal is given priority status, then there may be no need to put the Environment Court appeal on hold.

[15] It transpires that all but one of the matters identified by the Council as overlapping with the Environment Court appeals will be adjourned to enable settlement discussions to occur. This means that those matters will not be heard until the second quarter of next year. This will provide the parties with the opportunity to more specifically identify the overlapping issues and whether those issues are better resolved in the Environment Court on jurisdictional or substantive grounds.

[16] As to jurisdiction, issues raised in this Court that are identical to the issues raised in the Environment Court (and properly subject to the jurisdiction of that Court) may need to be reviewed in light of the effect of s 296 of the Resource Management Act 1991 (the RMA).

[17] As to substance, if the issue raised involves a substantive evaluation of evidence, then consideration will be needed to be given as to whether the High Court is the proper forum for resolution. Only one appellant, South Epsom raised this prospect, but was content to proceed to resolution of the priority issues in this Court.

[18] On matters of law which do not involve matters of substantive evidential evaluation, it may be of some assistance to the Environment Court to have the view of this Court. This could have the added benefit of avoiding further appeals. But the programming of the Environment Court's very substantial book of work is a matter for that Court.

### **Service**

[19] In my minute of 23 September 2016, I waived the requirement to serve all parties within the 5 day period set down at s 300 of the RMA, preferring to hear the parties on the proper approach to be taken to service. There are also several applications for substituted service.

[20] The Council advised that it will continue to post all notices of appeal and statements of claim filed in the High Court on its website. But the Council does not anticipate any future involvement with further High Court documentation.

[21] As to service proper, the Council does not agree that the uploading of a notice of appeal on the Council's website is an adequate substitute for service, but is prepared to abide by the decision of the Court.

[22] In terms of applications for review, the Council submitted that those proceedings are required to be served on all persons "directly affected", irrespective of whether they were submitters who appeared before the Panel or not. It also recommends public notification in relation to the Character Coalition Inc proceedings.

[23] The following appellants have provided their views on service:

- [a] **Belgiorno-Nettis** – service of notice of appeal occurred on all submitters and further submitters on topics 080 and 081. Service for application to review should not extend further than those contemplated for service of notice of appeal in s 300(4) of the RMA. That group is co-extensive with persons “directly affected”.
- [b] **Auckland Coalition** – service of notice of appeal occurred on all submitters and further submitters on topics 080 and 081. Public notification through the Council’s website, in tandem with other publicity, has been sufficient to draw proceedings to the notice of interested parties. Publication in *New Zealand Herald* is not opposed in relation to judicial review proceedings.
- [c] **Ryman Health Care** requests that service be deemed to have been effected by way of publication of the notice of appeal on the Auckland Council website. If publication on the Council website is not sufficient, then service could be achieved by way of public notice in *The New Zealand Herald*.
- [d] **Transpower** considers that it has satisfied service by providing for serving all persons who appeared in respect of the National Grid issues.
- [e] **Waste Management NZ Limited** submits that service should be deemed to have been effected by publication on Council’s website and that, in addition to deemed service through the website, Waste Management NZ Limited propose to serve its application for review on owners of the property that directly adjoin its site at 117 Rosedale Road. Waste Management NZ Limited also suggest specific categories of people be served, if additional service is required, and primarily those who submitted on topic 081 and the owners of neighbouring property in relation to the land subject to the judicial review proceedings.



[f] **Man O'War Farm** considers that service can be effected by using the Council's website, which is how service is effected in respect of the Environment Court appeals.

[g] **Independent Maori Statutory Board** has served by email 1,200 separate submitters and a notice of appeal has also been posted on the Auckland Council website. It seeks directions that the steps taken constitute substitute service pursuant to High Court Rule 6.8.

[24] For the reasons expressed by the Environment Court, I am satisfied that notification by way of the Council's website satisfied the requirements of s 300(4). These matters have attracted significant public attention and the Council website has been the primary vehicle for disseminating information about the AUP process.

[25] But, for avoidance of doubt, I have resolved that a uniform approach should be taken to finalising service of High Court proceedings in these matters. Some parties have gone to considerable lengths to achieve direct service, while others have simply utilised the Council's website. Given the significance of these proceedings to potentially affected persons, I direct that substituted service be completed by:

[a] Publication of the proceedings on the Council's website (as has happened).

[b] A public notice in *The New Zealand Herald* notifying the public that appeals and judicial review proceedings in relation to the AUP decisions have been filed with the High Court. Any persons interested in those proceedings should refer to the Council website to view the relevant notice(s) of appeal and/or the statement(s) of claim.

[c] The public notice should state that persons directly affected by a proceeding may file with the High Court a notice of intention to be heard in relation to that proceeding within five working days of the notice.

[d] The public notice is to be published by no later than **Wednesday 19 October 2016**.

[26] The Council is to prepare a draft notice for approval by the Court.

[27] On the completion of the finalisation of all interested parties, the normal procedures for the service of documents will apply. To the extent necessary, leave is granted to do service by email.

### **Timetabling**

[28] The Council suggested a number of directions, including proposed timetabling orders. I propose to use those directions as a base.

#### *The Category 2 proceedings*

[29] The Court has set aside 5 days for hearing of the priority fixtures dealing with scope set out in Annexure B, commencing **28 November 2016** before me. The following timetabling orders shall apply:<sup>5</sup>

[a] The Council is to prepare a test case(s) on scope, including a proposed statement of agreed facts, issues to be resolved and list of core documents within **9 working days, by 28 October 2016**;

[b] The parties are to provide comments on the proposed test case(s), including the extent to which the test case will address their respective claims in whole or in part, within **5 working days, by 4 November 2016**;

[c] The Council is to file an updating memorandum setting out the test case(s) (including any points of disagreement) for approval by the

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<sup>5</sup> At the conference incorrect dates were noted. The timing has been amended to account for working days. This has caused a slight truncation of the time for the Council at step 1 and the others parties at step 5. But it has overall effect of extending the periods for completion of the tasks.

Court on the papers within **5 working days, by 11 November 2016**. Any decision required will be released shortly after receipt of the Council's memorandum;

[d] The Council is to file and serve submissions on the test case together bundle of core documents within **5 working days, by 18 November 2016**; and

[e] The parties are to file and serve submissions within **4 working days, by 24 November 2016**. The parties are to collaborate and identify lead counsel on points of commonality.

[30] The Category 2 proceedings will otherwise be adjourned to a further case management conference in December, after the decision on the test case(s) has been released.

*The Category 3 priority fixtures*

[31] The Court has set aside 10 days to resolve the Category 3 matters set out in Annexure C marked as priority, commencing 13 February 2017. The following timetabling orders shall apply:

[a] Any applicant evidence in relation to the judicial review proceedings must be filed within **10 working days, by 31 October 2016**;

[b] Any notices of reply and or statements of defence by Council, together with evidence in relation to the judicial review proceedings and an index for a common bundle must be filed and served within **10 working days by 14 November 2016**;

[c] Any comments on the common bundle are to be made within **5 working days by 21 November 2016**;

[d] Any application for interlocutory orders are to be filed within a **5 working days by 28 November 2016**;

- [e] The Council is prepare and serve a common bundle within a further **5 working days** by **5 December 2016**; and
- [f] A further case management conference is to be set down to address any remaining issues with final timetabling for the hearing of the priority fixtures to be made then.

### **Other matters**

[32] The other matters are to be adjourned as follows:

- [a] Proceedings listed in Annexure A be adjourned to a case management conference in December, to enable the parties to discuss possible early resolution of those matters.
- [b] The non-priority proceedings listed in Annexure C be adjourned to a case management conference in December.

### **Joinder**

[33] No later than **27 October 2016** (being 5 working days from public notification) any relevant notices of intention to appear or applications to be joined as a party are to be filed and served by any submitters or further submitters served by the appellants/applicants.

### **Security for costs**

[34] I heard submissions on the issue of security for costs during the case management conference:

- [a] The Council's position is that all appellants should be required to pay security costs in the usual way in accordance with Clause 5 of Schedule 6 to the High Court Rules. If any parties object to paying security for costs, the Council submits that they must make an application for waiver. However, the Council said that except for

those proceedings that are progressed as priority matters, the setting of security for costs can be deferred to later case management conferences.

- [b] Mr Minhinnick, Mr Brabant and Mr Enright formally opposed security for costs highlighting that their clients' appeal and judicial review proceedings were in the public interest and, in Mr Brabant's case, were being brought by community-based organisations for no fiscal or pecuniary gain. They also noted that the AUP process is unique and the legislation provides limited rights of merit-based appeals to the Environment Court.

[35] I have resolved that if the appellants/applicants object to paying security for costs, they are to file an application for waiver with the Court. As I noted during the conference, my preliminary view is that security for costs should be waived, but I reserve my position on this matter until applications for waiver have been made.


#### **Case management memoranda for all matters**

[36] Other case management matters to be addressed are to be set out in memoranda filed by all parties **3 working days** before the next conference.

#### **Other matters to be dealt with**

[37] Leave is reserved for parties to apply to the Court for further directions. This Court will not be minded to revisit the matters in this memorandum unless it is absolutely necessary to do so.

[38] A copy of this minute is to be uploaded to the Council website.

A handwritten signature in blue ink, appearing to be 'R. H. Jones', is written in the bottom right corner of the page.