

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 048

IN THE MATTER of an appeal under s 156(1) of the Local
Government (Auckland Transitional
Provisions) Act 2010

BETWEEN OKURA HOLDINGS LIMITED
(ENV-2016-AKL-000211)

Appellant

AND AUCKLAND COUNCIL

Respondent

Principal Environment Judge L J Newhook on the papers under s 279 of the RMA

Date of Decision: 3 April 2017

Date of Issue: 4 APRIL 2017

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR WAIVER

A. The application for waiver is granted.



REASONS

Introduction

[1] On 16 September 2016 Okura Holdings Limited filed an appeal against part of a decision by Auckland Council to reject a recommendation by the Independent Hearings Panel in relation to the proposed Auckland Unitary Plan.

[2] On 3 March 2017 Weiti Development Limited Partnership ("WDLP") filed a notice to become an interested party under s 274 of the RMA. An amended notice was filed on 13 March 2017 refining WDLP's interest. As the notices were filed outside the timeframe to do so, they were accompanied by an application for waiver.

The application for waiver

[3] The grounds on which the application was made are as follows:

- (a) WDLP is currently involved in High Court proceedings in relation to the Unitary Plan provisions applying to WDLP's land.
- (b) The assimilative capacity of the Okura catchment, which includes both WDLP's land and the appellant's land and ultimately the capacity of Long Bay – Okura Marine Reserve, to sustain residential development is relevant to both sets of proceedings.
- (c) WDLP understands that further modelling is now proposed by the Council in relation to this appeal. That modelling is also likely to relate to WDLP's land.
- (d) To the extent that further capacity modelling is undertaken for the purposes of these proceedings, WDLP understands that the modelling may materially affect the Council's position in relation to the supportable level of development on WDLP's land. Accordingly, WDLP seeks the opportunity to be involved in this appeal in relation to that capacity modelling.
- (e) No party (including the appellant) will be prejudiced by the waiver as the proceedings are at a very early stage, with no substantive steps of



any sort (e.g. mediation or evidence exchange) having been taken as yet.

- (f) WDLP is neutral in relation to the ultimate issue before the Court. Therefore, to the extent that WDLP's interest is limited to any further capacity modelling that may take place, WDLP's involvement will not result in the broadening of the scope of issues that are under appeal.

The parties' positions

- [4] Auckland Council and the appellant Okura Holdings Limited both consent to the waiver being granted.
- [5] Section 274 parties Long Bay – Okura Great Park Protection Society and the Royal Forest and Bird Protection Society Of New Zealand Incorporated (**the Society and Forest and Bird**) filed a joint memorandum opposing the waiver.

Reasons for opposition

- [6] Given the relative early stage of case management, the Society and Forest and Bird do not claim to be unduly prejudiced by introduction of a new party to the proceedings at this time.
- [7] They are nevertheless concerned that there is already a complex range of issues needing to be addressed, and significant resources will need to be committed to progressing those issues through cases management, the preparation of evidence and ultimately to substantive hearing.
- [8] The Society and Forest and Bird are concerned that introduction of a new party may compound the issues needing to be resolved by the Court, the amount of evidence which they need to contend with in the case, and the amount of evidence they will need to generate themselves.
- [9] They do not consider that WDLP's involvement as a party to the case is necessary to enable the Court to be properly informed on the modelling issue.
- [10] The Society and Forest and Bird also questioned whether WDLP and the appellant are trade competitors, stating that both are directly engaged in the business of developing rural land for urban purposes, the express purpose of their respective Court proceedings being to enable more intensive



development than provided for under the Unitary Plan decisions made by the Council.

- [11] They submitted that they do not wish to be caught up in litigation over which areas of land potentially affecting Long Bay – Okura Marine Reserve can be developed and to what extent.

Responses by WDLP and the appellant

- [12] Both WDLP and the appellant responded to the Society's and Forest and Bird's submissions.
- [13] WDLP submitted that the purpose of the current waiver application is to join these proceedings, at the Council's suggestion, in order to be part of a collaborative process in relation to the modelling exercise.
- [14] It asserted that the suggestion by Forest and Bird and the Society that its participation is not necessary fails to recognise the significance of WDLP's interest as a major landowner within the catchments draining into the Long Bay – Okura Marine Reserve.
- [15] Both WDLP and the appellant were adamant in their submissions that they are not trade competitors.

Section 281 of the Act

- [16] Section 281 of the Act provides for waivers of time to join a proceeding under s 274 as follows:

281 Waivers and directions

- (1) A person may apply to the [Environment Court] to—
- (a) Waive a requirement of this Act or another Act or a regulation about—
 - ... (ia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings; or.]
- (2) The [Environment 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.
- (3) Without limiting subsection (2), the [Environment Court] shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the [Environment Court] (to which subsection (1)(a)(ii) applies) unless it is satisfied that—
- (a) The appellant or applicant and the respondent consent to that waiver; or
 - (b) Any of those parties who have not so consented will not be unduly prejudiced.
- ...

- [17] Under s 281(1)(a)(ia) of the Act a person may apply to the Court for a waiver of the time within which a person may lodge a notice of interest under s 274 of the Act.



[18] There are two tests to be met by an applicant relying on s 281. The first test, derived from s 281(1), is whether the Court should exercise its discretion to grant the waiver or directions sought. The second test relates to whether there is any undue prejudice to the parties to the proceeding as set out under s 281(2) and (3).¹

[19] Therefore, the consideration of applications under s 281 is a two step process. Firstly the Court is required to make a determination as to whether or not the parties to the proceedings will be unduly prejudiced if the waiver is granted. Secondly, if no party is unduly prejudiced, the Court must determine the waiver application on its merits.

Discussion

[20] In *Omaha Park Ltd v Rodney District Council*² a number of guideline criteria for the granting of a s 281 waiver in relation to new parties were established. The guidelines were:

- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) The scheme of the Act relating to public participation;
- (d) What has happened in the proceedings in the meantime; and
- (e) What effect introducing new parties would might have on progressing the appeal to resolution.

[21] In this case the parties in opposition to the waiver have acknowledged that they will not be unduly prejudiced if the waiver is granted. Instead they have requested that the Court exercise its discretion and decline the waiver on its merits.

[22] In considering the application on the merits, the Court is satisfied that WDLP is not a trade competitor. WDLP's interest is focussed on the modelling undertaken in these proceedings, and the potential impacts of that modelling on the development capacity of its own land.

[23] Considering the potential for this impact on WDLP's land, that the proceeding is still at a relatively early stage of its case management and the benefits of the

Shirtcliff v Banks Peninsula District Council EnvC C17/99, 19 February 1999.



joining party working collaboratively to resolve this appeal, the Court is satisfied that there are no compelling reasons to exercise its discretion to decline the waiver sought.

[24] In reaching this decision the Court has also given weight to the fact that the appellant and respondent do not oppose the application.

Decision

[25] The application for waiver is granted.



A handwritten signature in black ink, appearing to read "J Newhook", is written over a horizontal line.

J Newhook
Principal Environment Judge