BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 106

IN THE MATTER	of Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") and the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	of an appeal under s156(3) LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearings Panel ("Hearings Panel") on the proposed Auckland Unitary Plan ("Proposed Plan" or "PAUP:OiP")
BETWEEN	WALLACE GROUP LTD (ENV-2016-AKL-000241) Appellant
AND	AUCKLAND COUNCIL Respondent

Court: Principal Environment Judge LJ Newhook sitting alone under s 279 RMA

Appearances: J Brabant for Appellant
M Wakefield for the Respondent
C Kirman and A Devine for **Housing New Zealand Corporation** ("HNZ"), an intending party under s 274 RMA

Decision made on the papers

Date of Decision: 12 July 2017

Date of Issue: 12 July 2017

DECISION OF THE ENVIRONMENT COURT CONCERNING THE STATUS OF HNZ AS INTENDING PARTY UNDER S 274 RMA

A: HNZ does not have the right to become a party to this proceeding under section 274 RMA.

B: Costs reserved.

REASONS

The Issue

[1] On 7 April 2017, HNZ lodged a notice with the Court that it wishes to be a party in these proceedings lodged in September 2016 and then placed on hold pending decisions by the High Court concerning matters of scope.

[2] These proceedings having been re-activated as a result of a decision of the High Court, ***Albany North Landowners and Others v Auckland Council***[1], the issue before this Court is presently whether HNZ has the right to become such party.

[3] The Respondent has advised it will abide the Court's decision; the Appellant opposes HNZ having status.

Introduction

[4] Upon the re-activation of the appeal and receipt of HNZ's notice, the Court directed that the then parties advise within a set short period:

(a) Whether or not there had been any submitters or further submitters on the Proposed Plan who would need to be advised of the High Court Ruling and that they might become parties to the appeal; and

(b) Whether or not the parties agreed with HNZ's claim to status as an interested party.

[5] As already indicated, opposition was brought by the Appellant.

[6] The Court called for submissions.

[7] The Council having indicated that it would abide the Court's decision on the issue, reiterated its earlier advice that only two submitters had specifically addressed the zoning of the site at the heart of the appeal, 55 Takanini School Road. It noted

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1 [2016] NZHC 138.

however that if the Court were to hold in favour of the HNZ claim to status, that it (the Council) would need to review its position about the identity of potential parties because in such eventuality there might be other submitters and further submitters who should be notified of the appeal and advised that they could join.

[8] The two submissions presently identified by the council are a primary submission by Takanini Central Residential Ltd and the further submission in opposition to that by the present Appellant giving rise to this appeal.

Factual Background

The submissions

[9] In the proposed plan as notified, the site was zoned Light Industry as to a northern portion, and Single House to the south, essentially a "split zoning". (The operative zoning for the site had been split between industrial over the north portion and residential over the south).

[10] TCL submitted opposing the proposed plan provisions, seeking retention of the split, but with the northern portion supporting a broader range of activity outcomes than provided for by Light Industry, and intensification of the southern residential zoning.

[11] The present Appellant lodged a further submission in opposition to the site-specific activity standard changes sought by TCL, but did not oppose Light Industry zoning.

[12] There was no other submission directly addressing the zoning of the northern portion of the site; and there was no submission seeking re-zoning of the entire site to Residential – Mixed Housing Suburban Zone.

[13] The appeal opposes the decision of Auckland Council to accept the recommendation of the Hearings Panel that the site be re-zoned Residential – Mixed Housing Suburban Zone. The basis upon which an appeal of that sort has been directed by the High Court to be considered by this Court, need not be discussed here.

HNZ's notice under s 274

[14] HNZ claims to be a person who "made primary and further submissions on the proposed plan about the subject matter of the proceedings, being the need for further re-zoning of land for residential purposes in the Region".

[15] It also claimed that it was a person with an interest in the proceedings greater than the general public, for reasons including that it is a major landowner in the region, and that the proposed plan sets the planning framework for enabling and managing future development, including residential development of the Auckland Region.

[16] The grounds for opposing relief in the appeal were stated in the s274 notice in very general terms, with no reference to any particular points in primary or further submissions relied on. HNZ claimed that if the appeal were to be allowed, the outcome would:

(i) be contrary to the sustainable management of natural and physical resources and be otherwise inconsistent with the purpose and principles of the RMA; and

(ii) in those circumstances impact on the ability of people and communities to provide for their social, economic and cultural wellbeing; and

(iii) not represent the efficient use and management of natural and physical resources.

The grounds of opposition by the Appellant

[17] As to the claim by HNZ that it had made "*primary and further submissions about the subject matter of the proceedings, being the need for further rezoning of land for residential purposes in the region*", the Appellant asserted:

(a) The subject of the appeal is not general intensification;

(b) HNZ made no submission directly relating to the site;

(c) To the extent HNZ made submissions seeking general intensification on property other than HNZ property in the region, those submissions sought up-zoning of notified residential zones;

(d) HNZ did not lodge submissions supporting general re-zoning of industrial land to residential; and

(e) Many of the submissions identified by HNZ in the course of its involvement

in the High Court proceedings as establishing scope for general intensification with the region were not submissions lodged by HNZ.

[18] As to the claim by HNZ that it has a greater interest than the general public, the Appellant asserted:

(a) HNZ is a large corporate landowner; it is not a public interest group;

(b) HNZ does not stand for a relevant aspect of the public interest in the context of this proceeding, the subject of which is a site-specific consideration of the appropriate zoning of a relatively small portion of land located at 55 Takanini School Road.

HNZ's claim: "interest greater than the general public"

[19] I will deal with the second HNZ ground first, as submissions to the Court on behalf of the parties on it referred to considerably more case law than for the other.

[20] In its Counsels' submissions, HNZ set out the relatively settled jurisprudence concerning subsection (1)(da) [now] of s 274 RMA – *"as a person who has an interest in the proceedings that is greater than the interest that the general public has".*

[21] Counsel for the Appellant indicated agreement with the HNZ description of the jurisprudence, and I have no difficulty accepting the submissions which I summarize in following paragraphs.

[22] The Courts have accepted that the circumstances in which an interest in proceedings might be greater than that of the public generally is not closed or prescribed; also that it is not necessarily restricted to the holding of a property right.[2]

[23] It has been held that the interest must be one of some advantage or disadvantage which is not remote.[3]

[24] An interest in property which would be affected by the proceedings, or in close

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2 See for instance *Meadow 3 Ltd v Queenstown-Lakes District Council (2008) ELRNZ 267 (HC)* and *Schippers Cleanfill Ltd v Auckland Council* [2011] NZEnvC 74, [2011] NZ RMA 305.

3 See *Purification Technologies Ltd v Taupo District Council* [1995] NZ RMA 197 at 204.

proximity to land affected by the dispute, is usually enough to establish standing,[4] and an interest in land is a good example of the kind of interest which might qualify.[5] However, in that regard the "mere fact of owning land in a district" is not sufficient interest to give the right to join pursuant to this part of s 274, that having been held as likely to defeat the purpose of the standing requirements set out in the section.[6] The case cited in support of that proposition concerned plan provisions proposed for regulation of GMOs, with the Court holding that while the s 274 claimants' notices suggested that their interest was generally in GMOs and the ability of Councils to regulate them, none of them suggested that they had any plans present or future to release GMOs that might be thwarted by the proposed instrument which could be said, in terms of the ***Purification Technology*** jurisprudence, an advantage or disadvantage.

[25] It is the relationship between the interest and the consequent effect of the proceedings on the interest, rather than the actual interest itself, which is important. Picking up once again on the key theme of *"some advantage or disadvantage",* such must be direct and not just emotional or intellectual.[7]

[26] A party with a specific interest which can be clearly defined and identified is more likely to qualify.[8]

[27] In recent decisions such as ***Sandspit Yacht Club Marina Society Inc v Auckland Council***[9] and ***Lindsay v Dunedin City Council,***[10] the Environment Court held that the appropriate test to be applied under s 274(1)(d) [as it was at that time], is whether the interest of the claimant for status is different from (as in greater than) that of the general public, and whether this interest is specific when compared to that of the general public.

[28] I now proceed to consider whether HNZ meets these standards or any of them.

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4 See *Gargiulo v Christchurch City Council*, Decision No C 47 by 1999, Environment Court.

5 See *Remarkables Park Ltd v Queenstown-Lakes District Council* Decision No C 26/2005, Environment Court.

6 See *Federated Farmers of New Zealand Hawkes Bay Province v Hastings District Council* [2016] NZEnvC 141 at [17].

7 See *Remarkables Park Ltd v Queenstown-Lakes District Council*, already cited.

8 See *Trustees of the Neville Crawford Family Trust v Far North District Council*, [2013] NZEnvC 141, where the Court held that the Russell Protection Society Inc had a specific interest in Russell and development in the area, and that its interest was greater than that which the general public had, whether as a cross section of New Zealand, or as general public living in the Russell area.

9 [2011] NZ RMA 300.

10 [2013] NZ EnvC 8.

[29] Its Counsel submitted (and perhaps this was not controversial and therefore not needing proof by affidavit) that the Corporation manages a portfolio of approximately 27,900 dwellings in the Auckland region, providing housing to over 94,300 people, approximately six percent of the population of the region. Its tenants were said to be people who faced barriers to housing in the wider rental and housing market.

[30] It was also submitted that the Corporation had lodged extensive submissions on the provisions in the proposed plan, including on provisions relating to residential zoning of land throughout the region.

[31] Counsel made extensive submissions about the importance to it of Unitary Plan provisions in terms of its "directive" of providing efficient and effective affordable and social housing for the most vulnerable members of society, requiring it to have the ability to construct and develop quality social housing and maintain this housing throughout the region. It wishes to reconfigure its portfolio and deliver additional housing. It asserted that the notified proposed plan provided HNZ with up to 19,000 additional dwellings to be developed; that its submissions on the plan sought that constraints be reduced, providing development capacity for up to 39,000 additional social and affordable dwellings on its land.

[32] Counsel described HNZ's active acquisition programme. It complained that it might face the prospect that land it owns might be compromised if challenges similar to the appeal were made to the appropriateness of residential zoned land located next to Light Industrial. It did not however, offer any evidence about this, whether concerning the neighbourhood of the land the subject of this appeal, or elsewhere. Indeed, it acknowledged through counsel that it does not have an ownership interest in the site, or in the "immediate vicinity" of the site. It did, however, claim that it has a proprietary interest in blocks of residentially zoned land with a combined area of 20.1 ha that are adjacent to industrial zoned land, and further blocks with a combined area of 37.2 ha not immediately adjacent to, but within 30 m of industrial zoned land. The Court was however provided with no evidence about this, and the submission did not identify even in general terms, the localities within the region the subject of its assertion.

[33] HNZ seemed to place some importance on the fact that it was a s 301 party in the related High Court proceedings. I cannot place any weight for present purposes on HNZ having given notice of intention to appear in the High Court and having actively

participated in the scope hearing.

[34] The Appellant submitted as follows:

- HNZ does not establish any interest of either advantage or disadvantage with respect to this site-specific matter;
- If the Court were to find that there was some advantage or disadvantage, then it must be remote;
- HNZ does not identify any clearly defined or identified specific interest of relevance;
- HNZ does not establish any interest in property which would be affected by the proceedings;
- HNZ does not establish any interest in property in "close proximity " to land affected by the dispute;
- HNZ does not establish any relevant relationship between an interest it has and the consequent effect of the proceedings on that interest; and
- In the context of the site-specific nature of these proceedings, HNZ does not have an interest which is different from (as in greater than) that of the general public.

[35] In more detail, the Appellant submitted that the HNZ submissions on the proposed plan relating to residential zoning of land did not generically seek up-zoning of land notified as Industrial, to Residential, nor did those submissions specifically address the location in question in this proceeding. There is no evidence before me to the contrary, and I find in favour of the Appellant on them.

[36] While acknowledging that HNZ's broad goals and objectives might distinguish it as a Corporation with particular goals in comparison to the general public, the Appellant submitted that such distinction is of no relevance in the context of this site-specific matter, because those broad directives and goals of HNZ are not engaged in any material way in this proceeding. I agree, and can find no relevant advantage or disadvantage, let alone one that is not remote, on the evidence (to the extent that it can be said there is any). Furthermore, HNZ has not established any relevant relationship between its high level directives and goals with any possible consequent effect of potential outcomes on them.

[37] The Appellant submitted that there is no evidence before the Court regarding

HNZ's "active acquisition programme", including in the area subject to the appeal; noting that the area subject to the appeal is limited to a site-specific location and land adjoining where there might interface issues. The Appellant, unsurprisingly, seized on the acknowledgement by HNZ that it currently does not have an ownership interest in the site or in the immediate vicinity. That much is abundantly clear from the record.

[38] The Appellant next addressed the proposition that HNZ "now faces the prospect that land it owns may be compromised if challenges similar to the appeal are made to the appropriateness of residentially zoned land located next to Light Industry". The Appellant complained that this was an assertion completely unsupported by facts in evidence before the Court, which again on the face of the record is undeniable.

[39] The Appellant submitted that the assertion was completely generic and seemed to be based upon some sort of precedent concern, then submitting that precedent issues are not relevant in the context of plan reviews, citing ***Canterbury Fields Management Ltd v Waimakariri District Council***[11], where the Court held:

> As the proposed rules and methods must implement the policies and in turn objectives of the District Plan, and must also give effect to the operative Regional Policy Statement, we do not see how this issue can arise on a Plan Change request.

I agree with the generality of that statement. I find that each and every district plan method, including mapping, will invariably derive from the hierarchy of instruments and provisions (regional and district) above it, and it is hard to conceive of any one circumstance not standing significantly on its own when assessed for appropriateness within the hierarchy. This must particularly be so under the PAUP:OiP, having regard to its complex structure including regional provisions and its 27 topic-specific Overlays in Chapter D.

[40] The Appellant reiterated that the proceeding is site-specific and relates to a specific factual matrix; that if any "challenge" were to arise, it would be determined on its merits; that the timeframe for lodgment of appeals in the context of the proposed Unitary Plan has expired, and therefore no additional challenges can be commenced in relation to that instrument. This must be correct in the context of my finding in the last paragraph.

[11] [2011] NZEnvC 199 at para [94].

[41] The site-specific nature of the appeal is important in the present circumstances, but not absolutely determinative on its own. I acknowledge the importance of HNZ's broad goals and objectives; that it is a major landowner; and that it has particular responsibilities for the provision of social and affordable dwellings on its land. However, the lack of evidence of advantage or disadvantage in relation to the current proceedings, particularly of a non-remote kind, must in the result count against HNZ establishing its claim. I consider that the apparent need for HNZ to pray in aid a concern about precedent is to illustrate how long a bow it has had to draw in making the current claim. I also agree with the Appellant that in addition to the proceeding being very site-specific, any future challenge of the sort that concerns the Corporation would fall to be determined on its own merits.

[42] HNZ's first claim to participate in this case under s274 must fail.

HNZ's claim: "submissions about the subject matter of the proceedings"

[43] In contrast to their submissions under the last head, counsel for HNZ did not under this head discuss general jurisprudence, perhaps reflecting that the case law is somewhat less extensive than in relation to the other head. Likewise in the submissions on behalf of the Appellant. Instead, HNZ focused heavily on, and quoted extensively from the decision of the High Court that gave rise to reactivation of the present proceedings. I refrain from here quoting as extensively from the High Court decision because I do not think the passages quoted by HNZ assist it in establishing its present claim. What the quoted passages do signal[12] is something of a statement of the obvious, that HNZ submitted extensively on the proposed plan, seeking fairly significant changes, particularly provision for residential intensification. What they also do however, in a way that runs against the Corporation's claim to status under section 274(1)(e), is to show requests for comprehensive zoning changes throughout Auckland based on proximity criteria, together with requests for zoning changes to enable site-specific up-zoning of its land holdings,[13] samples of which Counsel quoted in submissions to this Court on the present aspect, which clearly illustrate the description

12 *Albany North Landowners* Decision, paragraphs [114], [115], [118], [167], [169], and [170].

13 Paragraph [169] of *Albany North Landowners.*

applied by the High Court Judge.

[44] Counsel's submissions also point to generic submissions on the proposed plan seeking significant greater residential intensification.

[45] Two paragraphs of the ***Albany North*** decision merit recording here, and analysis, to see if they support the present claim by HNZ. They are paragraphs [268] and [269]:

> [268] I agree with Mr Brabant that the generic submissions relied upon by the IHP, such as the HNZC submissions addressing residential zones, do not obviously signal the potential for residential up-zoning in locations such as the TCL site which were notified as Light Industrial. I also consider that Mr Brabant makes a cogent point that WCL had no reason to thoroughly review submissions seeking up-zoning of residential sites, but the TCL submission does raise the prospect of Mixed Use in an adjacent location. This would appear to confer jurisdictional scope on the basis that rezoning the whole site, instead of only part of it, is a reasonably foreseeable consequence of an integrated planning approach. But, the matters raised by Mr Brabant (though largely in reply) bring into play broader considerations of fairness, and in particular whether in the particular circumstances of the case, being the limited basis upon which TCL sought to up-zone the northern portion of its site, together with the TCL expert's primary expert evidence and position adopted by the Council Planning team, WGL was effectively misled into assuming that the northern portion of the site was never at risk of up-zoning to MHU. While not as stark as the SHL case, the disenabling effect of the recommended change, combined with the TCL submission and primary evidence raises natural justice considerations.
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> [269] While, as counsel submits, this is not a "scope" case, I am nevertheless satisfied that it was not fair and reasonable in the specific circumstances of this test case to treat the extension of the Mixed Use Zoning to the northern portion of the TCL site as appropriate without affording WGL an opportunity to submit on the consequences of that up-zoning for its site.

[46] While Counsel for HNZ placed emphasis on paragraph [269] while also reciting [268] in its submissions to me, I consider that taken together, but particularly drawing on [268], there is a pointer to resolving the present issue against HNZ. In particular, in para [268], it is clear that the HNZ submissions addressing residential zones were generic, and indeed were described by the learned Judge as "not obviously signal[ling] the potential for residential up-zoning in locations such as the TCL site which were notified as Light Industrial". I also interpret the paragraph, and on this I am in agreement with the Judge, that it points to the TCL submission and WGL further

submission as being very site-specific. I consider that to be in strong contrast with what I now know of the submissions of HNZ on the proposed plan, and Counsel for HNZ has not quoted any of the submissions on the proposed plan for the purpose of demonstrating otherwise.

[47] I agree with Counsel for the Appellant that the pattern is that, to the extent HNZ made submissions seeking general intensification on property other than HNZ property in the region, those submissions sought "up-zoning" of notified residential zones. There is no indication that it lodged submissions seeking general re-zoning of industrial land to residential, whether or not it had property holdings in the vicinity.

[48] HNZ's second claim also fails.

Outcome

[49] Both of HNZ's claims seeking the right to participate under s274 fail.

[50] Costs are reserved. Any application is to be lodged within 15 working days of the release of this decision, with any response within a further 10 working days. Any claim will be resolved on the papers.

For the court:

L J Newhook
Principal Environment Judge