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

Decision No. [2018] NZEnvC 56

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to s 120 of the Act
BETWEEN	AUCKLAND COUNCIL (ENV-2017-AKL-190) Applicant/Appellant
AND	AUCKLAND COUNCIL Respondent

Court:	Environment Judge J A Smith Environment Judge D A Kirkpatrick
Hearing:	at Auckland on 9 April February 2018
Appearances:	J C Campbell and R J Wilson for Auckland Council as Applicant / Appellant D H Hartley and A F Buchanan for Auckland Council as Respondent S J Simons and K A Storer for I Inglis, M G Green and P Simunovich (s 274 parties) Dr P H Mitchell on behalf of himself and P Mitchell (s 274 parties) A G Webb as *amicus curiae*
Date of Decision:	2 May 2018
Date of Issue:	2 May 2018

DECISION OF THE ENVIRONMENT COURT
ON PRELIMINARY ISSUES AS TO
JURISDICTION AND PROCEDURE

A: The appeal shall proceed to a hearing unless otherwise resolved among the parties.

B: The parties are directed to confer to see whether they can agree on a joint memorandum setting out proposed terms and conditions for the hearing, including the extent to which Council staff may be involved in opposing roles.

C. A joint memorandum on procedural issues or, if agreement cannot be reached, separate memoranda shall be lodged with the Court by 21 May 2018.

D. The Court will then consider such memoranda and make further directions. If necessary, a pre-hearing conference will be convened to address any issues.

REASONS

Introduction

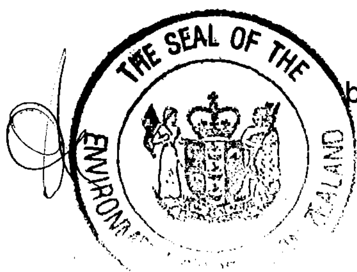
[1] The Auckland Council (through its Community Facilities department) applied for resource consent for works associated with a walkway on, and the protection of, the esplanade reserve which runs between Kohu Street and Marine View at Orewa Beach. This included the construction of a walkway, an adjacent sea wall and associated access structures. The Auckland Council (by its hearing commissioners) heard the application and submissions (both for and against the proposal) and refused to grant consent. The Council has now filed an appeal under s 120(1)(a) as the applicant for resource consent against its decision.

The preliminary issue

[2] A preliminary jurisdictional issue is whether a local authority which is both the applicant for resource consent and the consent authority can lodge an appeal against its own decision. If it cannot, then the Court must consider whether the appeal should be struck out as an abuse of process. If it can, then there are consequential procedural issues that should be resolved in advance of any substantive hearing of the appeal.

[3] In light of these issues, the Court (presided over by Judge Smith) convened a pre-hearing conference on 22 February 2018. The outcomes of that conference were:

a) to direct that the issues should be addressed at a preliminary hearing before a full Court;



b) to appoint Mr Webb as *amicus curiae*;

c) to direct counsel for the s274 parties opposing the appeal to draft and file a pro forma application to strike out the appeal under s 279(4) of the Act; and

d) to set a timetable for filing affidavits with a hearing on 9 April 2018.

Background

[4] Orewa Beach is exposed to easterly storms and may be subject to erosion, or at least littoral movement of sand, particularly in storm events. It is also subject to the effects of climate change and sea-level rise. Various things have been done over many years to address the effects of this, including a current annual programme of relocating sand which has moved along the beach.

[5] The Hibiscus and Bays Local Board of the Council considers that this problem is among its highest priorities. It is also concerned that pedestrian access along the existing esplanade reserve between Kohu Street and Marine View is inadequate. It has previously sought and been refused consent for works in this area.

[6] In 2017 the Community Facilities department of the Council prepared, with expert advice and assistance, a plan to create a concrete walkway along this portion of the esplanade reserve, protected by a seawall. This plan formed the basis of an application to the Council as consent authority for the resource consents which the proposed works required under certain district and regional rules in the Auckland Unitary Plan.

[7] The application was publicly notified and attracted 25 submissions, eight in support, 15 in opposition and 2 neutral. The application was heard by three hearing commissioners appointed by the Council as consent authority and given delegated authority under ss 34 and 34A of the Act to make the Council's decision on the application. After a hearing, the hearing commissioners decided to decline consent for the reasons set out in their decision.[1]

[8] To this point there is no issue identified or taken with the procedure followed by the Council in either of its roles:

[1] The decision does not appear to be with the hearing documents on the Council's website (as most resource consent decisions usually are) but is available at: https://cdn.newsie.co.nz/files/localmatters/Env_Seawall_Orewa_Beach_Esplanade_Reserve_Decision_30_November_2017.pdf

a) The proposed works which were the subject of the application could, with appropriate consent, be undertaken by the Council as the owner of the esplanade reserve;

b) The proposed works require resource consent for several reasons in terms of the rules in the Unitary Plan;

c) The Council is the appropriate consent authority in respect of any application for such consents;

d) The hearing commissioners were properly appointed, especially in light of the clear conflict of interest arising from the Council's roles as applicant and consent authority; and

e) (In procedural terms at least) the decision was lawfully made by those commissioners and is therefore the Council's decision.

[9] It is appropriate to note that circumstances such as these arise regularly throughout New Zealand. Local authorities have a broad range of functions (both under legislation and on their own initiative under their power of general competence[2]) and are the primary consent authorities established under the Act. As Mr James Hassall, the Council's Director – Legal and Risk, put it in response to a question from the Court, this was all "business as usual."

The Applicant's appeal

[10] After receiving the decision of the Council *qua* consent authority, the Council *qua* applicant met informally with members of the Local Board, staff of the Community Facilities department and external legal advisors to review the position. This applicant group wanted to pursue the project and were apparently advised by the lawyers that grounds existed on which an appeal could be based.

[11] At this point the record as presented in affidavits from Mr Ian Murray, the Council's Principal Project Manager: Coastal Assets, and from Mr Hassall offers at least two versions of events:

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2 Section 12(2)(a) Local Government Act 2002.

a) Mr Murray deposed that the applicant group resolved to pursue an appeal and this was approved by the Council's General Manager of Community Facilities, Mr Sheridan and subsequently discussed with and confirmed by Mr Hassall;

b) Mr Hassall deposed that he received the relevant information from Mr Moodie, a Principal Solicitor in the Council's Regulatory Litigation Team and, after discussion with Mr Moodie and with Mr Brown, the Council's Manager, Regulatory Litigation, he authorised relevant Council officers to proceed with the appeal.

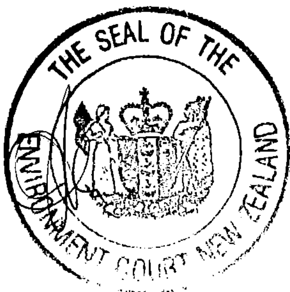
[12] It then emerged from the Court's questions of Mr Murray and Mr Hassall that there was an e-mail thread among several officers of the Council which chronicled these events. We were handed copies of the thread during the hearing. As might be expected from the usual way in which e-mail correspondence occurs, the messages could be read in more ways than one: parts corroborate Mr Murray's evidence and other parts corroborate Mr Hassall's evidence. Given the conclusions we have reached, it is unnecessary for us to undertake a forensic review of the messages or delve further in to what they may mean.

[13] Mr Hassell's affidavit helpfully attached a copy of the current register of delegations from the Council's Chief Executive to officers and local boards, updated to July 2017. This showed a number of relevant delegations from the Council via the Chief Executive:

a) to the Director Legal and Risk, the power to decide whether to take Environment Court actions; conditional on consultation with the Manager Litigation and Regulatory and reporting any court action taken to the relevant committee;

b) to the General Manager Property, the power to make resource consent applications;

c) to any officer at Tier 4 or above in the Legal and Risk department (the Director Legal and Risk being at Tier 3 and the Chief Executive being at Tier 1) the power to decide whether to commence or defend any action before a Court, tribunal, arbitral panel or other such body subject to, at the delegate's discretion, discussion with officers involved, discussion with Council's insurers and reports being made to relevant committees of the Council; and



d) to any officer at Tier 4 or above in the Property department, power to make

building and resource consent applications.

[14] As Mr Hassall pointed out, these delegations are subject to general rules listed in the register, including:

a) Responsibilities, duties or powers delegated to officers by the Chief Executive may not be sub-delegated;

b) The conferring of delegated authority means that the officer *may* exercise the responsibility, duty or power, but not that he or she *should* do so (either at all or in a particular case). Whether or not it is appropriate for an officer to exercise a delegated authority which they have will depend on their job description and instructions in particular circumstances.

[15] For present purposes, taking all of this material in to account, it appears sufficient to note that Mr Hassall holds the conditional delegated authorities from the Council *to decide whether to take Environment Court actions* and, separately, *to decide whether to commence or defend any action before a Court*. Either of these powers appears sufficient (adopting the presumption of regularity) to make the decision to lodge an appeal in this Court. It does not appear that either the Community Facilities manager nor any property manager holds any comparable delegated authority.

The decision to appeal

[16] It was unfortunate that no formal record was kept of how the decision to lodge the appeal was made. There is no document that gathers together the relevant information, including the basis of the decision to appeal with relevant reasons or grounds and an identification of the authority of the decision-maker to act. Mr Hassall, in his answers to the Court's questions, was aware that it is unusual for a council to appeal against its own decision.

[17] As this was no longer "business as usual", we would expect some documentation of the decision to appeal to exist. Various reasons were advanced by counsel for the paucity of documentation, mainly based on the combination of the shortness of the appeal period and the proximity of the Christmas break. Whatever those circumstances may have been, we think that a decision to appeal against its previous decision to refuse consent ought not to have been taken as lightly as it apparently was.

[18] It would have been possible to include such reasons in the notice of appeal itself, but that was not done. Rather, the notice of appeal refers, as reasons for the appeal, to:

a) a failure to recognise and provide for the matters in s6(d) and (h);

b) a failure to have particular regard to the matters in s7(b), (c), (f) and (i); and

c) an assertion that the decision is inconsistent with the *principle* (which we think should be *purpose*) of sustainable management which will be achieved by the proposed works.

[19] The reasons are stated in fairly general terms. Without predetermining the merits of the appeal, these reasons do not identify with any particularity any error of fact or law in the decision and do not address at all the circumstances in which the Council considers it appropriate to challenge its own decision.

[20] Beyond the unusual circumstances, it was this absence of any detailed explanation for what might be seen as a reversal of the Council's position which led the Court to raise these issues at the pre-hearing conference and to make directions to resolve these issues, including requiring the Council to provide by 9 March 2018, at a minimum:

i) Decider – details of the application and the delegation of the Council for decision-making powers, a copy of the decision and confirmation of its current position opposing the appeal,

ii) The status of the Applicant/Appellant, the decision-makers in respect of the decision to appeal; funding in respect of the appeal;

[21] Unfortunately this information was not addressed in the affidavits filed by the Council in accordance with those directions and did not arrive until Mr Hassall's affidavit was presented at the commencement of the hearing and the e-mail thread was handed up during the hearing.

Appealing against one's own decision

[22] The core issue at this preliminary stage is whether a council can appeal against its own decision.

[23] As noted above, there is no issue about a council being an applicant. Every local authority is conferred with many and various statutory powers to engage in activities and to undertake developments. In the absence of any explicit authority, a council can rely on its power of general competence under s12(2) of the Local Government Act 2002, which provides:

> *(2) For the purposes of performing its role, a local authority has—*
> *(a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and*
> *(b) for the purposes of paragraph (a), full rights, powers, and privileges.*

[24] That power is subject to the rest of that Act, any other enactment, and the general law.[3] It is therefore appropriate to have regard to the Council's role which is stated[4] to be *to give effect, in relation to its district or region, to the purpose of local government stated in section 10.* That purpose in turn refers, relevantly, to[5] *enabl[ing] democratic local decision-making and action by, and on behalf of, communities.*

[25] We also consider the principles of local government in s14 Local Government Act 2002, of which the most relevant in this case is the principle that *a local authority should conduct its business in an open, transparent, and democratically accountable manner.* [6] Reference should also be made to the council's duty to observe and, to the extent of its authority, enforce the observance of its operative plan.[7]

[26] There is also no issue about the council being the consent authority. It is the role effectively conferred by the definition of that term[8] and no other consent authority exists in these circumstances. We conclude that in order to address the issue of conflict of interest in determining its own application in accordance with the principle of openness and transparency, it should delegate its power of decision to independent hearing commissioners to make the final decision on its application.[9]

[27] Section 34(8) provides:

> *(8) Except as provided in the instrument of delegation, every person to whom any function, power, or duty has been delegated under this section may, without confirmation by the local authority, exercise or perform the function, power, or duty in like manner and with the same effect as the local authority could itself have exercised or performed it.*

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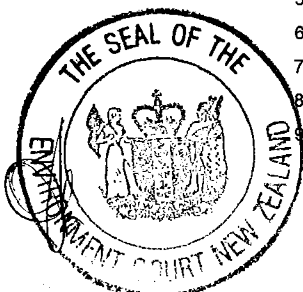
3 Section 12(3) Local Government Act 2002.
4 Section 11 Local Government Act 2002.
5 Section 10(1)(a) Local Government Act 2002.
6 Section 14(1((a) Local Government Act 2002.
7 Section 84(1) Resource Management Act 1991.
8 Section 2 Resource Management Act 1991.
9 Section 34A(1) Resource Management Act 1991.



This means that the hearing commissioners made the Council's decision and that nothing more needs to be done by the Council. Having followed that procedure, it is not open to the Council then to reconsider and reverse the decision of the Hearing Commissioners.[10] Once a decision is made on an application for resource consent, there is no provision in the RMA for the recall or review of that decision. We conclude that the reason for this is based on two things:

a) The need for transparency and the avoidance of any allegation of bias; and

b) The importance of upholding the role of independent commissioners who are appointed and paid by the council.

[28] The issue arises because the Council *qua* applicant was unhappy with the decision of the Council *qua* consent authority. What could it do? In simplistic terms, an applicant for resource consent has a right of appeal[11] and there is nothing explicit in the Act to indicate that there is any limitation on the class of applicants to exclude a local authority which is also the relevant consent authority. But that conclusion begs other questions stemming from the nature of the Council and the assumption in legal theory that a single entity has unity of intent or purpose.

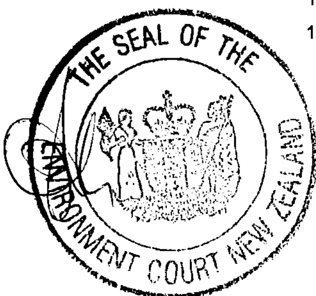
[29] In general, under the civil law of New Zealand you cannot sue yourself, essentially because you cannot be your own adversary: there is no real controversy to be adjudicated and no real basis on which you can enforce any right or duty against yourself. In contractual terms, you could waive any right you may have against yourself; in tort, you could permit the tortious act and rely on the doctrine that what happens willingly does not amount to injury.

[30] Having stated that, we conclude from the submissions made to us and our own research that there appears to be no clear authority for this basic proposition.[12] There is some case law in which arguments asserting natural (as distinct from legal) rights of personality have been raised in efforts to avoid the jurisdiction of the Family Court under

10 *Partington Properties Ltd v Auckland City Council* HC Auckland, A 62/85, 31 October 1985, Vautier J.

11 Section 120(1)(a) Resource Management Act 1991

12 Although there is a reference to two maxims: *Nemo agit in seipsum* (No-one acts against himself) and *Idem agens et patiens esse non potest* (The same person cannot be both the doer and the person to whom the thing is done); in an ancient case reported at 145 ER 29 (Case LXXVI; 45 Ass. pl. 3; Jenk. 40)



the Protection of Personal and Property Rights Act 1988[13] and the criminal law generally[14] but such arguments have been summarily dismissed.

[31] In public law, a fundamental principle is that the Crown speaks with one voice. While different Ministries or departments may have different objectives or responsibilities, the strict position is that all of their assets are owned by the Crown and all of their activities are undertaken for the benefit of New Zealand.[15] The doctrine of collective cabinet responsibility requires a Minister to support a cabinet decision regardless of their personal views and whether or not they were at the meeting concerned.[16] However, even in these circumstances there can be cases where separate representation is appropriate.[17]

[32] Ms Campbell for the Council *qua* applicant sought to distinguish the position of her client from the Crown, arguing that the breadth of the Council's responsibilities under various statutes required it to exercise legislative, adjudicative and executive functions without the separation of powers that is said to characterise the constitution of New Zealand's Westminster-style democracy. We doubt that is true: within the Crown's executive branch there are numerous instances of a mixture of the estates through subordinate rule-making (to which a council's bylaw- and rule-making powers are analogous) and administrative adjudication processes (to which a council's various hearing powers can be compared).

[33] In company law there can be little doubt that however complex the internal arrangements of a company, ultimately there is only one legal personality which is separate and distinct from its officers and shareholders.[18]

[34] Counsel for the Council *qua* applicant referred to the definition of "person" in s2 of the Act, which includes *a body of persons, whether corporate or unincorporate.* Counsel relied on *Cometa United Corporation v Canterbury Regional Council*[19] and *Discount*

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13 *Meenken v Family Court at Masterton* [2017] NZHC 2103.

14 *Martin v Chief Executive of Department of Corrections* [2016] NZHC 2500.

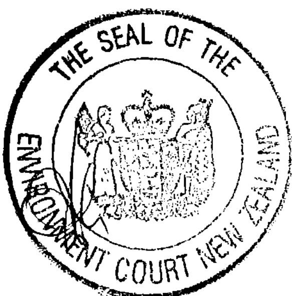
15 *Tamaki Reserve Protection Trust Inc v Minister of Conservation* HC Auckland, CP 600/97 & M1915/97, 17 March 1999, Anderson J at pp 30-31.

16 New Zealand Cabinet Manual, Cl. 5.25.

17 Waitangi Tribunal, *The Final Report on the MV Rena and Motiti Island Claims* WAI 2391 and WAI 2393, where iwi and hapū had separate interests to the Crown which required separate representation as part of the Crown's obligations under the Treaty of Waitangi.

18 *Salomon v A Salomon Ltd* [1896] UKHL 1.

19 *Cometa United Corporation v Canterbury Regional Council* [2007] NZCA 560; (2007) ELRNZ 20.



Brands Ltd v Westfield (New Zealand) Ltd[20] as cases where unincorporated groups were held to be persons for the purposes of the Act. On that basis she submitted that the application for resource consent here could have been made in the name of the Council's Community Facilities department.

[35] We respectfully do not consider those decisions to be apposite to the present case. In each of those cases, the Court of Appeal and the Supreme Court were considering the status of an unincorporated group made up of identifiable legal entities and held that such a group needed to have some form of internal structure (looking more to substance than to legal existence or form) enabling it to make and implement decisions collectively.[21] Neither decision is authority for the proposition that an identifiable legal entity with full capacity to make and implement its own decisions can be divided into two or more "persons" by disaggregating its structure into unincorporated bodies of persons. We do not think that the essentially procedural mechanism of readily enabling unincorporated groups to participate in matters under the Act should be extended to enable legal persons to split their personalities.

[36] We were referred to a number of cases as examples of councils acting in two roles in a single case. While none of them specifically addressed the issue before us, a number were submitted by counsel for the Council *qua* applicant to demonstrate that a council could act against itself. In response, both Mr Webb as *amicus* and Ms Simons for a number of s274 parties in opposition submitted that the decisions, properly considered, did not support the Council's submission. We agree with the latter submissions.

[37] It is unnecessary for us to address each case in detail, but we set out a summary list below. This list is grouped in categories, as presented by Ms Simons, which demonstrate why these cases are not precedents here and with which we generally agree:

a) Cases where two different parts of the same Council are separately engaged in the same proceeding but presented a unified position (generally where a council was the applicant but not the appellant):
    i. *Kiwi Property Holdings Limited and New Zealand Historic Places Trust v Auckland Council* [2013] NZEnvC 303

20 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).
21 *Cometa* at [32] – [34]; *Discount Brands* at [127] – [128] and [170] – [171].

ii. *Contact Energy Limited v Waikato Regional Council and Taupo District Council* EC Auckland A062/2001, 3 July 2001

iii. *Ngati Piako Ki Maketu v Bay of Plenty Regional Council* [2016] NZ EnvC 097

iv. *Southland Fish and Game New Zealand v Southland Regional Council* [2016] NZ EnvC 220

v. *Friends of Michael Avenue Reserve Inc v Auckland Council* [2016] NZ EnvC 113; [2016] NZEnvC 120

vi. *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC)

b) Cases where one part of an entity (local authority or requiring authority) challenged the decision of another part of the entity in order to rectify a technical error or issue in a decision and the conflict between the different parts of the entity was more apparent than real:

vii. *Matamata Piako District Council v Matamata Piako District Council* PT Auckland A41/96

viii. *New Zealand Transport Agency v New Zealand Transport Agency* [2015] NZEnvC 210

c) Prosecutions where the Council has determined that it must prosecute itself as a responsible public body and, as defendant, has pleaded guilty:

ix. *Bay of Plenty Regional Council v Bay of Plenty Regional Council (Whakatane)* DC Tauranga CRN 4087005972, 15 July 1994

x. *Wellington Regional Council (Planning and Resources) v Wellington Regional Council (Biosecurity)* DC Wellington CRN 7035005594, 6 October 1997

[38] In relation to prosecutions, in *Pahiatua Borough Council v Sinclair*[22] the Supreme Court refused to grant a writ of prohibition to prevent the Magistrate at Pahiatua from hearing a private prosecution lodged against the Council for failing to comply with its own district scheme. While noting that there was no earlier case where a local body had been prosecuted for failure to observe one of its own regulations or bylaws, Tompkins J held that there was no basis on which to say that a council was excluded from being

[22] *Pahiatua Borough v Sinclair* [1964] NZLR 499

prosecuted. Although decided under the Town and Country Planning Act 1953, the relevant statutory provisions have remained essentially the same so that this decision (which is binding on us) stands for the proposition that a local authority can prosecute itself.

[39] It is pertinent to note that no counsel before us could identify any subsequent case where a council had pleaded not guilty to a charge it had laid against itself. In both the *Bay of Plenty* and the *Wellington* prosecutions listed above, the sentencing notes record the efforts made by the Councils as defendants to co-operate with the prosecutors and to remedy the effects of their offending.

[40] Two cases do not fit into any of the three categories and so we consider them in more detail.

[41] In *Wellington Regional Council (Bulk Water) v Wellington Regional Council*,[23] the Wellington Regional Council had granted consent to a food processing company to abstract water for its operation directly, rather than acquire the water from the Bulk Water department of that Council. The Bulk Water department then appealed against that decision. The decision addresses several issues in relation to water rights and competition law and is authority for the proposition that it is not open to a consent authority to arbitrarily refuse an application for consent on the basis that hypothetical applicants may appear and be granted consent without further examination of the capacity of the resource. After allowing the appeal in part, imposing a further condition to limit abstraction when the relevant bore level fell below a certain depth, the Court said this:

> As a matter of record we are becoming concerned as a Court that the legal entity of various authorities in terms of their constitution is being to a degree ignored. We refer to the growing tendency for one limb of one authority to appeal against decisions of the authority as a whole and to the even more bizarre situation of an authority prosecuting itself. Whilst the legalities of this particular type of procedure has not yet to our knowledge been fully argued, we certainly do not regard the practice as particularly desirable. If an applicant has a benefit of a consent granted by an authority as a whole it does not seem to us to accord with natural justice that the managers and / or employees of an individual limb of that authority should be able to take the authority as a whole before the Environment Court on appeal.

[42] This passage, while apparently critical of a council appealing against its own decision or prosecuting itself, does not appear to suggest that either event is unlawful and notes that the issue had not been previously fully argued. Beyond the apparent criticism, there is no other discussion of the issue.

[23] *Wellington Regional Council (Bulk Water) v Wellington Regional Council* EC Wellington W3/98, 7 January 1998

[43] The decision in *Auckland Council v Auckland Council*[24] is not a reasoned decision, but is a consent order resolving an appeal. We were told by counsel for the Council as Respondent that the Council had applied to upgrade Marine Square at Devonport and attach a boardwalk to the eastern side of Devonport Wharf. Independent commissioners had granted consent to the upgrade but refused it to the boardwalk. The Council had appealed against the latter decision and to that extent the case appears to be comparable to the present situation. The Council then presented the draft consent order with support from two s274 parties, which the Court duly granted. While the order appears to be a substantive change to the first instance decision rather than the correction of an error or other technical matter, in the absence of reasons it is of little assistance in the present situation.

[44] Mr Webb as *amicus* covered the issues we have traversed but was unable to reach a conclusive view as to the law. We found his analysis helpful and have largely relied on it.

Conclusion on preliminary issue

[45] After that review of the most relevant case law, we conclude that there is no express authority that a council, as applicant for resource consent, may not appeal against its own decision as the consent authority. Counsel advised they had searched strenuously for direct authority and found none. The Court's own researches also indicate an absence of clear statements in New Zealand or United Kingdom case law about public bodies being on opposing sides of litigation.

[46] We have obtained some assistance from an article entitled *United States v United States: When Can the Federal Government Sue Itself?*[25] which guided us to a decision of the Supreme Court of the United States. In *United States v Interstate Commerce Commission et al.*,[26] the US Department of Justice, on behalf of the US Army, sought judicial review of a decision of the Interstate Commerce Commission, a regulatory agency of the US government, which had refused to direct railroad operators to refund wharfage charges where, during World War II, the Army had unloaded the trains itself. The US District Court for the District of Columbia dismissed the claim on the basis that one party

24 *Auckland Council v Auckland Council* EC Auckland ENV-2012-AKL-000068, 27 March 2013

25 Michael Herz, *United States v United States: When Can the Federal Government Sue Itself?*, 32 Wm. & Mary L. Rev. 893 (1991), http://scholarship.law.wm.edu/wmlr/vol32/iss4/4.

26 *United States v Interstate Commerce Commission et al.* 337 U.S. 426 (1949) (69 S.Ct. 1410, 93 L.Ed. 1451)

cannot bring suit against itself.[27] On appeal, the Supreme Court of the United States reversed that decision and made the following statements which are apposite to this case:

> There is much argument with citation of many cases to establish the long-recognized general principle that no person may sue himself. Properly understood the general principle is sound, for courts only adjudicate justiciable controversies. They do not engage in the academic pastime of rendering judgments in favor of persons against themselves. Thus a suit filed by John Smith against John Smith might present no case or controversy which courts could determine. But one person named John Smith might have a justiciable controversy with another John Smith. This illustrates that courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented.
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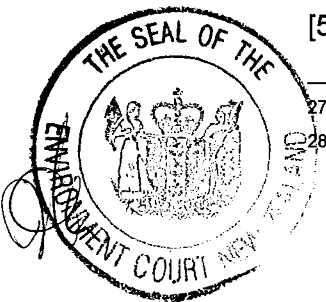
> ...
>
> In support of their contention that Congress did not intend for the Government to press its claims as a shipper, the Commission and railroads emphasize the anomaly of having the Attorney General appear on both sides of the same controversy. However anomalous, this situation results from the statutes defining the Attorney General's duties.

[47] That analysis, however brief, assists by focussing on the issue of whether a proceeding presents a justiciable case or controversy beyond the identities of the parties. It supports the view that an appeal such as this can proceed where there is a justiciable issue which requires resolution by the Court.

[48] No party before us sought to strike out the appeal. In particular, both Ms Simons, for the s274 parties in opposition to the proposal, and Dr Mitchell, on behalf of himself and his wife as s274 parties in support of it, sought that this matter proceed to a full hearing on the merits so that their respective interests could be put before the Court. Notwithstanding the unity of identity between the appellant and respondent, we can conclude that there is a real issue to be determined as to whether consent should be granted or not. That issue has parties other than the Council seeking to contend the core issue.

[49] Dr Mitchell noted that if we were to rule that the Council could not continue as the appellant for any reason, then it would fall to him and his wife to consider whether they, as submitters on the application and parties in support of the appeal, wished to be substituted as appellants.[28] Equally, if the Council *qua* respondent were to abide the outcome of this appeal, then the s274 parties represented by Ms Simons would have to consider whether they would take on that role.

[50] Given the positions of these interested parties we conclude that this is not a case



[27] *United States v Interstate Commerce Commission et al.* 78 F. Supp. 580 (1948).

[28] *Mullen v Parkbrook* [1999] NZRMA 23 (CA); *Prestons Rd Ltd v Canterbury Regional Council* [2012] NZRMA 269 at [20].

where we need to reach a final conclusion on the role of the Council. We accordingly determine not to take any step in this case to restrict the Council *qua* applicant from pursuing its appeal against the decision of the Council *qua* decision-maker and the appeal should proceed. We do this on the basis that there is a real controversy which parties other than the Auckland Council seek to resolve. We leave open the possibility that in other circumstances the issue of whether it is lawful or appropriate for a council to appeal against its own decision may need to be decided. This may particularly be so where no other party is involved or there is otherwise no party who acts as a contradictor to the council's case.

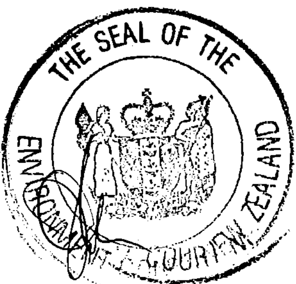
Procedural issues and directions

[51] We accept that any entity (and especially a local authority) may have many roles. However, we remain of the view that a council, as a single legal entity, must act with integrity and accountability. We do not see any basis on which a council can assert that it is able to split itself. If it is to act as both appellant and consent authority, then it must do so in a way that carefully addresses and avoids apparent conflicts and minimises procedural complications.

[52] On that basis, there are further issues arising which include determining what procedure should be adopted by the Court to ensure that the appeal is heard and determined in a way that ensures that justice is seen to be done.

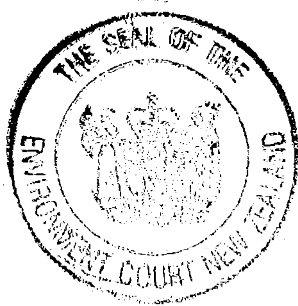
[53] In our view, justice includes ensuring that the Council is fully accountable as both applicant/appellant and as consent authority so that all other parties are fully informed about the Council's position or positions and able to present their cases effectively in support or response. The integrity of the consent process, including the appeal process, must be maintained. There may be grounds for a continuing role for *amicus curiae* or other steps to ensure appropriate transparency and accountability in the process.

[54] There was some discussion of this at the hearing. We **direct** the parties to confer and see whether they can agree on a joint memorandum setting out proposed terms and conditions for the hearing, including the extent to which Council staff may be involved in opposing roles, whether as witnesses or otherwise. If agreement cannot be reached, then parties should present their own memoranda with proposals.



[55] We **direct** that any such memorandum be lodged with the Court by **21 May 2018**.

[56] The Court will then consider these and make further directions. If necessary, a pre-hearing conference will be convened to address any issues.



For the Court

D A Kirkpatrick
Environment Judge