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

Decision No. [2018] NZEnvC 109

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an application under s 314 of the Act
	BETWEEN	VIVIENNE THERESSE TAUEKI
		(ENV-2018-WLG-000037)
		Applicant
	AND	HOROWHENUA DISTRICT COUNCIL
		Respondent

Court:	Environment Judge BP Dwyer sitting alone under s 309 of the Act
Hearing:	20 June 2018 at Levin
Appearances:	L Thornton for the Applicant D Randal and L Cowper for the Respondent S Johnston for the Manawatu-Wanganui Regional Council
Date of Decision:	20 June 2018
Date of Issue:	12 July 2018

ORAL JUDGMENT OF THE ENVIRONMENT COURT

Introduction

[1] This is my decision in these proceedings. As with any oral decision I reserve the right to amend the written record to correct any errors or misquotations which do not affect the outcome of or rationale for the decision.

[2] Vivienne Theresse Taueki (Ms Taueki) has applied for an enforcement order prohibiting Horowhenua District Council (the District Council) from undertaking works in the Queen Street drain situated in the vicinity of Kowhai Park, Queen Street West in Levin. Orders are sought in the following terms:

1. Prohibit the Horowhenua District Council and any person or persons acting on its behalf, from commencing any proposed works on the Queen Street storm water drain, including excavation of earth and the laying of about 55 metres of large concrete drainpipes) causing destruction, harm and modification, all to accomplish discharge of water and other liquids into Lake Horowhenua via the drain commonly known as the Queen Street Drain.
2. The proposed work violates the following:
    a. Resource Management Act sections 6(e), 7(a), 8, and 15(1)(a) and (b) and supporting regulations,
    b. Horizon Regional Council One Plan provisions providing criteria for discharge of contaminants into water or onto land, including without limitation, Rules 14-18, 14-19, as well as Methods 5-6, 6-8, among others.
    c. Horowhenua District Plan Rule prohibiting modification, removal, or demolition of sites of significance to tangata whenua; and
    d. Historical Places Trust Act 1993, section 11, prohibiting damage, modification, or destruction of archaeological site; the site subject to the application is NZ Archaeological Association Site Record No S25/88,

    among other violations as may be identified as this matter proceeds.

[3] During the course of the hearing Ms Thornton advised the Court that her client did not seek an absolute prohibition on the works, only that they not proceed until such time as the District Council had obtained an authority to undertake them from Heritage New Zealand under the Heritage New Zealand Pouhere Tāonga Act 2014 (the Heritage Act), which she contended was required. I will address that issue in due course.

[4] The District Council opposes the application. Manawatu-Wanganui Regional Council (the Regional Council) the regional authority responsible for administration and application of the relevant regional plan has joined the proceedings pursuant to s 274 Resource Management Act 1991 (RMA/the Act) and also opposes the application.

[5] Evidence in these proceedings came into the Court by way of three affidavits from Ms Taueki and one affidavit from Mr G J O'Neill, the Council's Project Manager. Neither Ms Taueki nor Mr O'Neill were cross-examined on their affidavits.

Background

[6] The Queen Street drain is a public drain conveying stormwater from Levin to Lake Horowhenua. It was constructed by the Levin Borough Council (a predecessor of the District Council) during the 1970s and follows the approximate path of an historic open water course. The section of drain which is subject to these proceedings is situated on road reserve vested in the District Council which adjoins an area known as Kowhai Park, a recreation reserve also vested in the District Council. The park is about 500 metres away from Lake Horowhenua.

[7] The work which the District Council wishes to carry out is to lay 1.65 metre diameter drain pipes in a 55 metre long section of existing open drain. A concrete wingwall will be constructed at one end of the pipes. There was no challenge to the evidence of Mr O'Neill that less than 15 cubic metres of earthworks would be required to complete this work which will connect to an existing section of piped drain.

[8] Mr O'Neill deposed that the flow of stormwater in the open drain is currently eroding the edge of the road which runs alongside it, as well as destabilising nearby trees. He said that if the erosion is allowed to continue a portion of road and some of the trees are likely to collapse, causing safety issues for road users and the general public. Redirecting the stormwater through a closed pipe in this vicinity will prevent the erosion process and improve the quality of water in the drain.

[9] Mr O'Neill explained that the proposed works would neither increase nor decrease the flow of stormwater in the drain from its present volumes. Once the stormwater exited the 55 metre piped section it would simply continue on its course along the existing drain to the point where it discharges into Lake Horowhenua approximately 500 metres to the west. That is the extent of the works which are the subject of these proceedings.

[10] Ms Taueki's affidavits covered a range of issues. I record that her evidence satisfies me that she and her whānau have a genuine interest in matters pertaining to Lake Horowhenua and its surrounds including Kowhai Park which is an area previously known to Māori as Poutahi. The District Council's submission formally recorded its acknowledgement of Ms Taueki's interest in the area.

[11] Ms Taueki deposed as to the history of attempts by the District Council to undertake a wetland project at Kowhai Park commencing in 2004, a project which she opposed. In the course of investigations for that project an archaeological site was identified in Kowhai Park and recorded in the records of (then) New Zealand Historic Places Trust as Site 25/88. Site 25/88 was found to contain a mixture of shell middens, fire-cracked rocks, scattered bone, stone and artefacts.

[12] My understanding from perusal of the information before the Court is that the site is of some significance as it was the first (and possibly only) archaeological site to be recorded on the eastern side of Lake Horowhenua and has a rarity value for that reason. It appears from the information I considered that Site 25/88 was a site of transitory use along a forest track.

[13] Site 25/88 was discovered when the District Council opened a 100 metre long trench at Kowhai Park in 2004. According to a draft 2016 archaeological report prepared for the Council and produced in Ms Taueki's third affidavit, Site 25/88 extends into the road reserve and can be observed in the profile of the Queen Street drain.

[14] It seems from the information before the Court that Site 25/88 was in fact confined to Kowhai Reserve but that subsequent to its identification a midden site known as Midden 4 was found within the drain. Midden 4 is clearly visible in a photograph in the report and whether or not it is part of Site 25/88 it is accepted that it is an archaeological site as defined in the Heritage Act:

> **archaeological site** means, subject to section 42(3),—
>
> (a) any place in New Zealand, including any building or structure (or part of a building or structure), that—
>
> (i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and
>
> (ii) provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand; and
>
> (b) includes a site for which a declaration is made under section 43(1)

It is the potential for Midden 4 to be affected by the works which the Council wishes to undertake which is the issue before the Court.

Ms Taueki's case

[15] Ms Thornton advised that Ms Taueki's application was founded on the provisions of s 314(1)(a)(i) RMA which she summarised as providing:

> Section 314(1) provides the scope of the order sought:
>
> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 or more of the following:
>
> (a) require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the court,—
>
> contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); ...

She explained that Ms Taueki's application contained two limbs. The first was protection of an archaeological site. The second was protection of sites of interest to Māori.

[16] Ms Thornton referred to the provisions of s 42 Heritage Act which in summary prohibits the modification or destruction of an archaeological site unless an authority has been granted by Heritage New Zealand under any one of ss 48, 56(1)(b) or 62 of the Act.

[17] Ms Thornton contended that the proposed pipe installation is within an archaeological site as defined in the Heritage Act and referred to the archaeological report appended to Ms Taueki's third affidavit which described the entire area to the east of Lake Horowhenua as being an archaeological site. I understood her position to be that if that was the case the Court might exercise its jurisdiction under s 314(1)(a)(i) in order to protect the archaeological site, more particularly in this case Midden 4.

[18] Insofar as the issue of protection of sites of importance to Māori was concerned, Ms Thornton contended that Ms Taueki had repeatedly made the District Council aware of the significance of the area to her hapū.

[19] The heart of Ms Thornton's submission was that there is an element of risk that the works which the District Council proposes to undertake might destroy or modify Midden 4 in some way so that work should not commence until the Authority responsible for protection of archaeological sites under the Heritage Act (Heritage New Zealand) has considered this matter and put any necessary controls in place.

The District Council's case

[20] The District Council's position was that it was aware of the presence of Midden 4, that it was not its intention that the works should destroy or modify it, that the works would be supervised by an archaeologist and that if it was found to be necessary to obtain an authority to destroy or modify the midden, an application to Heritage New Zealand would be made accordingly.

[21] The District Council contended that there was no jurisdiction for the Court to make an enforcement order under s 314(1)(a)(i) based on alleged non-compliance with the Heritage Act as that did not involve any contravention of RMA or its associated planning instruments or provisions.

[22] The District Council addressed the relevant provisions of both the Regional and District Plans. It submitted that the works would comply with permitted activity standards under both Plans.

[23] Ms Johnston who represented the Regional Council confirmed that the works as proposed were a permitted activity under the Regional Plan.

[24] Mr Randal advised that the relevant provisions in the District Plan are found in Chapter 20 of that document. He identified that the relevant rule is Rule 20.1(g) which provides that the construction, operation, maintenance and upgrading of network utilities (including stormwater pipes) are permitted activities, provided that relevant standards in Rule 20.6 and Chapters 21 to 24 of the Plan are complied with. He confirmed that the District Council intended to meet those standards.

[25] Mr Randal pointed to a rule of particular relevance in these proceedings, namely Rule 20.6.21 which provides that:

> No activity or development shall modify, demolish or remove any site of significance to Māori where such site has been identified to Council and recorded by the Council in a register of sites prior to the time that any activity or development is proposed.

It was common ground between the parties that the District Plan does not contain a register of such sites so that the rule is not triggered in this case.

[26] I did not understand Ms Thornton to challenge the submission that the works in question are permitted activities under both the identified Plans as contended by the District Council.

[27] Finally, and for the sake of completeness, Mr Randal addressed the provisions of s 314(1)(a)(ii) RMA, even though Ms Thornton had not advanced that provision as the basis for an order. He submitted that no order ought be made in reliance on that provision in any event and similarly for the sake of completeness I will address that issue.

[28] Those comments and background description bring me to my determination in this matter.

Discussion

[29] Section 314(1)(a)(i) and (ii) RMA relevantly provide as follows:

> **314 Scope of enforcement order**
>
> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:
>
> (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Environment Court,—
>
> (i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20A (certain existing lawful activities allowed); or

(ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:

[30] In summary, subsection (i) authorises the Court to make an anticipatory order prohibiting a person from commencing something if it is of the opinion that the thing to be done contravenes either the Act itself or any of the various instruments or provisions identified in the subsection.

[31] I am satisfied that laying the drain does not contravene either the Act or any of the identified instruments or provisions. I am satisfied from the information before me that the proposed works are permitted activities under both the Regional and District Plans. Accordingly there is no basis for the Court to make an order based (relevantly in this case) on breach of the Act or a rule in a plan.

[32] Further than that, even if I found that the works will breach s 42 Heritage Act, (and I am far from satisfied that is the case) that would not provide jurisdiction to make an order under s 314(1)(a)(i) which is directed at contravention of the Resource Management Act and the various identified instruments or statutory provisions created under it. Section 92 Heritage Act enables Heritage New Zealand to apply for an order in this Court prohibiting persons from breaching duties or obligations under the Heritage Act but that provision does not allow other persons such as Ms Taueki to bring such an action under s 314(1)(a)(i).

[33] Accordingly, to the extent that Ms Taueki's proceedings are founded on potential breach of the Heritage Act then they must fail for want of jurisdiction under s 314(1)(a)(i).

[34] That finding brings me to the matter of s 314(1)(a)(ii) which authorises the Court to make an anticipatory order prohibiting a person from commencing something if it is of the opinion that the thing to be done "is or is likely to be noxious, dangerous, offensive or objectionable to such an extent that it has or is likely to have an adverse effect on the environment." This particular provision enables the Court to make an enforcement order prohibiting even permitted activities if the joint "noxious, dangerous, offensive or objectionable" and "adverse effect on the environment" tests are met. If I was satisfied in this instance that the tests were met I consider it would be open to me to make an enforcement order preventing the laying of the pipes

pursuant to s314(1)(a)(ii). Before considering whether I should do so in this case I make the following general observations.

[35] I do not consider that s 92 Heritage Act precludes persons other than Heritage New Zealand from making an application pursuant to s 314(1)(a)(ii) relating to an archaeological site. Such sites may be subject to controls under both RMA and the Heritage Act. What s 92 does is give Heritage New Zealand a specific and direct power to control breaches of the Heritage Act by enforcement proceedings without having to satisfy the joint tests of s 314(1)(a)(ii).

[36] Section 92 effectively extends the ambit of s 314(1)(a)(i) to include Heritage Act considerations and makes that remedy available to Heritage New Zealand but not to others. Again I record that I have previously found that the Court has no jurisdiction to make an enforcement order pursuant to this provision on Ms Taueki's behalf.

[37] Secondly I record that the word "environment" is defined in s 2 RMA as "including people and communities" and the "social,..., aesthetic and cultural conditions" which affect them, so that an action which is so offensive as to have an adverse cultural impact might potentially be the subject of an enforcement order pursuant to s 314(1)(a)(ii) even though that action is a permitted activity (as I have found the District Council's proposed works to be).

[38] Thirdly I make the point that whether or not any particular action is offensive or objectionable is to be determined objectively by the Court, discarding any prejudices or fixed positions which may influence any particular view. The offensive and objectionable test requires something more than just simply that some people may be offended by an action or object to it.

[39] In the *Tasman Action Group*[1] case the term "offensive" was defined as meaning disgusting, nauseous, repulsive, causing anger or annoyance and "objectionable" as meaning unpleasant, offensive, repugnant. I consider that these terms require there to be a certain degree of gravity to the offensive or objectionable test when objectively applied. Nor is it enough for me just to find that laying the drain causes anger and is repugnant to Ms Taueki. The test is wider than that.

[1] *Tasman Action Group v Inglis Horticulture Ltd* Decision No. C126/2007.

[40] Finally in these general remarks, I note that the issue of an enforcement order is a discretionary remedy which the Court may or may not apply, having regard to all relevant circumstances. For example, I could determine that laying the drain pipes is so offensive and objectionable as to cause an adverse effect on the environment but nevertheless I might not prohibit the Council from doing it because the works are necessary for public safety. I do not suggest I have reached that conclusion in these proceedings but simply give that as an example. I note further that the matters to which I am to have regard in reaching a conclusion are identified in the *Watercare*[2] case to which Mr Randal referred in his submissions for the District Council.

[41] Turning to the application of the various considerations I have referred to in the particular circumstances before the Court, I am not satisfied that the Council's proposed works meet the requirements of s 314(1)(a)(ii) to enable the Court to make an enforcement order. I am not satisfied on the basis of the evidence before me that it is likely that the work will damage Midden 4 in any way. I use the word "damage" deliberately as encompassing the concepts of destroy or modify used in the Heritage Act but in an RMA context.

[42] The District Council has advised that it is aware of the presence of the midden, will have an archaeologist present during the works in its vicinity and if it becomes apparent that it may be modified will seek the necessary authority under the Heritage Act. The only hard evidence before me as to the likelihood of the works causing damage to Midden 4 is the statement recorded in the draft archaeological report attached to Ms Taueki's third affidavit that "Infilling of the drain should not modify any portion of the M4 provided care is taken with the filling."

[43] Ms Thornton submitted that it is implicit in this statement that there is an element of risk of modification if care is not taken. I accept that. However, I am unable to find on the balance of probabilities that it is more likely than not that damage to Midden 4 will occur. The evidence before me suggests that it will not as long as care is taken and the District Council is aware of the need for that.

[44] Because I cannot be satisfied that it is likely that laying the pipes as the District Council proposes will damage the midden, I cannot be further satisfied that it is likely that the works will be offensive or objectionable or have an adverse effect on the

[2] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294, [1998] NZRMA 113, (1997) 3 ELRNZ 511.

environment when applying the tests that I am required to apply in determining that question.

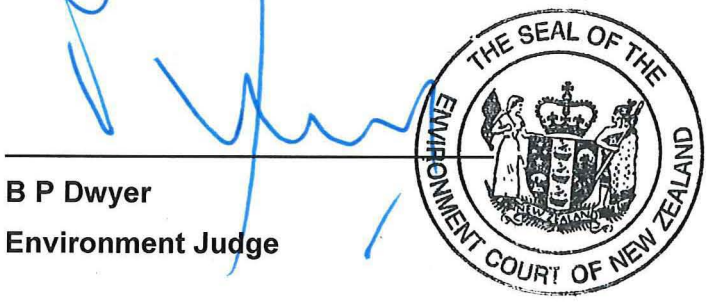
[45] Accordingly, I determine that the grounds for making an enforcement order pursuant to s 314(1)(a)(ii) have not been made out.

Outcome

[46] As neither of the grounds contained in s314(1)(a)(i) or (ii) is made out the application for an enforcement order is declined.

[47] I have considered the question of costs. I note Ms Thornton's advice that Ms Taueki is not able to meet any costs award of substance and that the Registrar waived the filing fee in this case. My usual observation in that situation is that the time to have regard to those considerations is at the commencement of proceedings, not at their conclusion. If costs are not awarded they are borne by the ratepayers of the District. It is the Court's almost invariable practice to award costs to the successful party in enforcement proceedings.

[48] I therefore reserve costs in accordance with the usual practice but suggest to the District Council that there is little point in pursuing them in this case. That, however, is the Council's decision not mine.



B P Dwyer
Environment Judge