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

Decision No. [2018] NZEnvC 115

IN THE MATTER	of the Resource Management Act 1991
AND	of a review of an interim enforcement order under s 320(5) of the Act
BETWEEN	AUCKLAND COUNCIL
	(ENV-2018-AKL-102)
	Applicant
AND	KI BRAINES
	Respondent

Court:	Environment Judge JA Smith
Hearing:	11 July 2018
Appearances:	Mr Collins for the Council Mr Braines for himself
Date of Decision:	11 July 2018
Date of Issue:	23 JUL 2018

ORAL DETERMINATION OF THE ENVIRONMENT COURT

A: Until further order of this Court, or relevant resource consents are granted, Respondent Kenneth Ian Braines (Mr Braines), in respect of the property at 20 Fowler Access Road, Puhoi, being part Lot 2 on deposited plan 167491 (the site):

(i) pursuant to ss 320(1), 314(1)(a)(i) and 314(1)(a)(ii) of the RMA is prohibited from establishing or undertaking any works for the purpose of establishing any additional dwellings on the site;

(ii) pursuant to ss 320(1), 314(b)(i), 314(1)(b)(ii), 314(1)(c) and 314(1)(da) of the RMA, must continue to empty and de-sludge all septic tanks at the site, with the waste material removed and properly disposed of by an appropriate operator.

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B: The Council agree that two orders can be discharged. These are orders A(b)(iii) and A(b)(iv), which relate to installation of earth bunds downhill and temporary fencing.

C: Furthermore, the following orders now only apply to Buildings B, D and E, so the relevant orders are:

(i) pursuant to ss 321, 314(1)(a)(i), 314(1)(a)(ii) of the RMA, until further order of the Court or a resource consent being granted, Mr Braines is prohibited from using or permitting the use of the toilet facilities in Buildings B, D and E on the site;

(ii) pursuant to ss 320(1), 314(1)(b)(i), 314(1)(b)(ii), 314(1)(c) and 314(1)(d)(a), Mr Braines is required to undertake and maintain:

a) the disconnection and securing of the toilet facilities in Buildings B, D and E at the site so they can no longer be used until such time as any on-site disposal of domestic wastewater is certified as complying with either a resource consent or with the relevant permitted activity standards of the Auckland Unitary Plan in relation to toilet facilities at the site; and

b) at Buildings B, D and E provide and maintain alternative safe and sanitary portable toilet facilities at the site (at least one per household) for the use of any occupants.;

(iii) pursuant to ss 320(1), 314(1)(a)(i) and 314(1)(a)(ii) of the RMA, until further order of this Court or resource consents are granted:

a) Mr Braines is prohibited from allowing or granting any new, replacement or extended tenancies in respect of Buildings B, D and E onsite;

b) Building C may continue to be used as temporary accommodation only; and

c) for clarity, these orders do not apply to Building A (the main house).

D: Costs are reserved for seven days. Any application for costs are to be filed within 10 working days; any reply 10 working days after that and any final reply, if any, five working days thereafter. I do not encourage any application for costs.

REASONS

Introduction

[1] This application for change follows Environment Court Judge DA Kirkpatrick making ex parte interim enforcement orders against Mr Braines in respect of a property at 20 Fowler Access Road, Puhoi, being Part Lot 2 DP 167491. The concern in broad terms related to a multiple number of tenancies over some five properties on the site, and, in particular, concerns around the disposal of effluent, wastewater and stormwater from the site.

[2] The orders were granted without notice to Mr Braines. Upon being served, he made an application to change or cancel the orders under s 320(5) of the Act, which provides:

> A person against whom an interim enforcement order has been made and who was not heard by a Judge before the order was made, may apply, as soon as practicable after the service of the order, to an Environment Judge or a District Court Judge to change or cancel the order; and, after hearing from the person against whom the interim enforcement order was made, the applicant, and any other person the Judge thinks fit, the Environment Judge or the District Court Judge may confirm, change, or cancel the interim enforcement order.

Interim enforcement orders

[3] Interim enforcement orders in themselves are intended to deal with urgent situations relating to escape of sewage effluent and the like before the Court. More general issues about improper placement of houses and the like are matters that can be dealt with by more general enforcement orders, although sometimes interim orders are required in the meantime.

[4] This application was made ex parte, which is highly unusual. Almost inevitably, the Court seeks to proceed by way of *Pickwick notice* at the very least, in order that it is apprised of all the facts in this case. The obligation on the Council in such an application is high, and in this case a very extensive affidavit was filed by Mr Randall supporting the application for an ex parte interim order.

[5] Mr Braines at the time was living in Australia and has returned to deal with these proceedings once he learnt of them.

The change application

[6] In these circumstances, the Court has sought to progress the application for

change or cancellation promptly in the first instance by convening a telephone conference on 29th June. A second date was made to allow the parties to negotiate the position, given that the Council seemed to indicate that there was room for settlement.

[7] Unfortunately, I was not available again until Monday 9 July and at that time it appeared that settlement was even more remote than it had been at the time of the first telephone conference. At that stage, I also learnt that there were prosecution proceedings in relation to the same events against Mr Braines, and I had these consolidated so that they could be dealt with on the same day, Wednesday 11 July.

The judicial telephone conference of 11 July

[8] When the matter was called, it was clear that the parties had still not been able to reach any agreement. The Court has adjourned the District Court proceedings and those are being dealt with separately. However, it stood down the enforcement proceedings to allow the parties to have further discussions to see if it was possible to reach any accommodation.

[9] The parties reported back to the Court at 2.30pm that they have not been able to advance the matter, and I then started to investigate the matters of difference between the parties. As it transpired, the orders that were made by the Court are, in large part, now amenable to agreement between the parties. Some of these involve the retention of the original orders, for example (a)(i) and (b)(v). Others simply require a modification in relation to the particular buildings they relate to. Further, several of them, b(iii) and b(iv), can be removed by agreement of the parties.

[10] In the end, the sticking point between the parties was what use might be made of the main house (**Building A**) and the relocatable temporary accommodation subject of the 2013 enforcement order (**Building C**). To assist with guiding the parties as to which of the buildings we are talking about, I am utilising the identification used by Mr Randell in his affidavit and a copy of that picture is annexed hereto and marked **A**.

Subsequent action

[11] It appears that during the time the parties have been in discussion, Mr Braines has engaged meaningfully with the Council, and has undertaken further works on the site. As I understand it, he has disconnected toilet facilities to **Buildings B**, **D** and **E** on the site, and provided alternative sanitary portable toilet facilities at the site for those

buildings (B, D and E). He has had the septic tanks emptied and de-sludged, and assures the Court that these are now up to standard and able to cope with the effluent from Buildings A and C.

[12] The Council acknowledges the work that has been done, and had hoped to reach agreement with Mr Braines. Nevertheless, they are, perhaps not unnaturally, reticent to withdraw the proceedings given the history on the site and their concerns as to its continuing use. In reading the decision of His Honour Judge Kirkpatrick, it is clear that the major concern of the Court at that stage related to health risks and potential contamination of groundwater. Although other matters were advanced in the affidavits, it appears that the Judge largely discounted these. It is also fair to say that this must be examined in the context of a concern by the Council officers and the Judge himself as to the level of occupancy on this site. Clearly, the issues as to wastewater are directly relevant to the number of household units being accommodated on the site and people.

A change or cancellation

[13] It is clear under s 320(5) that the Court's powers, in relation to review of interim orders, is very broad. The clear intent of this is to recognise that, where an ex parte order is made, many of the facts may not be known fully to the Court, and it has not had the opportunity to hear from the respondent.

[14] Mr Braines was concerned that the Council had not made it clear to the Court that earlier enforcement orders were made by consent in 2013, and that he understood that this permitted not only the occupation and use of the house (apparently including for extra tenants), but two other buildings on a temporary accommodation basis. On reading the evidence of Mr Randall, filed in support of the application for interim ex parte enforcement orders, I am satisfied that these matters were fully and fairly put to the Judge, with copies of the relevant orders, background documentation, and a full explanation as to the relevance of each.

[15] Given the position now reached by the parties, the only remaining issue that I see outstanding in respect of Mr Braines' concerns in this light is what level of ongoing tenancy at the main house was envisaged. There was nothing in the abatement appeal order that identifies the issue of the use of the main house. Whether this was commented on in passing or not in 2013 is unclear at this stage. The agreement reached between the parties in 2018 was one simply recorded by the Court, rather than being a deliberation

on the evidence before it.

The matters agreed

[16] I understand that the following orders are confirmed by consent:

A: Until further order of this Court, or relevant resource consents are granted, Respondent Kenneth Ian Braines (Mr Braines), in respect of the property at 20 Fowler Access Road, Puhoi, being part Lot 2 on deposited plan 167491 (the site):

(i) pursuant to ss 320(1), 314(1)(a)(i) and 314(1)(a)(ii) of the RMA is prohibited from establishing or undertaking any works for the purpose of establishing any additional dwellings on the site;

(ii) pursuant to ss 320(1), 314(b)(i), 314(1)(b)(ii), 314(1)(c) and 314(1)(da) of the RMA, must continue to empty and de-sludge all septic tanks at the site, with the waste material removed and properly disposed of by an appropriate operator.

B: The Council agree that two orders can be discharged. These are orders A(b)(iii) and A(b)(iv), which relate to installation of earth bunds downhill and temporary fencing.

C: Furthermore, the following orders now only apply to Buildings B, D and E, so the relevant orders are:

(i) pursuant to ss 321, 314(1)(a)(i), 314(1)(a)(ii) of the RMA, until further order of the Court or a resource consent being granted, Mr Braines is prohibited from using or permitting the use of the toilet facilities in Buildings B, D and E on the site;

(ii) pursuant to ss 320(1), 314(1)(b)(i), 314(1)(b)(ii), 314(1)(c) and 314(1)(d)(a), Mr Braines is required to undertake and maintain:

a) The disconnection and securing of the toilet facilities in Buildings B, D and E at the site so they can no longer be used until such time as any on-site disposal of domestic wastewater is certified as complying with either a resource consent or with the relevant permitted activity standards of the Auckland Unitary Plan in relation to toilet facilities at the site; and

b) At Buildings B, D and E provide and maintain alternative safe and sanitary portable toilet facilities at the site (at least one per household) for the use of any occupants.;

(iii) pursuant to ss 320(1), 314(1)(a)(i) and 314(1)(a)(ii) of the RMA, until further order of this Court or resource consents are granted:

a) Mr Braines is prohibited from allowing or granting any new, replacement or extended tenancies in respect of Buildings B, D and E onsite;

b) Building C may continue to be used as temporary accommodation only;

c) For clarity, these orders do not apply to Building A (the main house).

[17] The Council also agrees that two orders can be discharged. These are A(b)(iii) and A(b)(iv), which relate to installation of earth bunds downhill and temporary fencing.

[18] Furthermore, the following orders now only apply to Buildings B, D and E, so the relevant order under A will be:

> Pursuant to ss 320(1)1, 314(1)(a)(i), 314(1)(a)(ii) of the RMA until further order of the Court or a resource consent being granted, Mr Braines is prohibited from using or permitting the use of the toilet facilities in Buildings B, D and E on the site.

[19] In respect of orders under B, pursuant to ss 320(1), 314(1)(b)(i), 314(b)(ii), 314(1)(c) and 314(1)(d)(a), Mr Braines is required to undertake and maintain:

(i) the disconnection and securing of the toilet facilities in Buildings B, D and E at the site so they can no longer be used until such time as any on-site disposal of domestic wastewater is certified as complying with either a resource consent or with the relevant permitted activity standards of the Auckland Unitary Plan in relation to toilet facilities at the site; and

(ii) at Buildings B, D and E provide and maintain alternative safe and sanitary portable toilet facilities at the site (at least one per household) for the use of any occupants.

[20] Of the original orders, this means that the only one remaining in dispute between the parties is order A(ii), reading:

> Mr Braines is prohibited from allowing or granting any new replacement or extended tenancies in respect of any dwellings at the site.

[21] That clause is agreed to apply to Buildings B, D and E. Accordingly, the order can be modified to this extent:

> Mr Braines is prohibited from allowing or granting any new replacement or extended tenancies in respect of any of Buildings B, D and E on the site.

[22] The issue then remains as to what might be done in respect of Buildings A and C.

The tenancies in Buildings A and C

[23] In respect of Building C, Mr Braines tells the Court and Mr Collins does not dispute, that this is still used as temporary accommodation only. Mr Collins acknowledges that, pursuant to the 2013 order, an order allowing the continuing use of Building C for temporary accommodation only would be permissible. Accordingly, I would add to (a)(ii):

In respect of Building C this may continue to be used as temporary accommodation only.

The main building (the house)

[24] Mr Braines tells the Court that the main house is a relatively modern building, built in the 1990s, of three levels and with a total of 6 bedrooms. At the current time Mr Braines is residing in Australia, and he has an elderly couple who look after the house and grounds who occupy the ground floor. That is an area of three bedrooms. He tells me that the female resident has some mobility difficulties, and that they have been extremely stressed by the events of the making of the orders. Mr Collins acknowledges this, and stated to the Court clearly that the Council had no issue with the elderly couple remaining at the site, being the ground floor of the main house (Building A). The concern Mr Braines has is that, given that he has now had several of the buildings essentially rendered untenantable, he will need to rent out the house itself to enable him to maintain mortgage payments.

Consideration of the orders in the context of the main house

[25] It would indeed be unusual for this Court to be seeking to constrain a householder from utilising their own property, especially where there is a substantial modern house built. However, Mr Braines has, through his own actions, put himself in a position where he has multiple tenancies on the site which, on the face of it, are clearly in breach of the current District Plan. Although Mr Braines has argued about existing use rights, that is not a matter I can address in any detail today. Suffice to say that is disputed by the Council.

[26] The purpose of enforcement proceedings in the Resource Management Act is to ensure that the environmental outcomes sought are maintained. The Plans themselves are simply methods that are intended to achieve that outcome. The Council, not unnaturally, is concerned at the potential for this type of multiple tenancy to undermine the provisions of the Plan. Multiple tenancies can have serious environmental consequences as has been noted in recent prosecutions such as *Auckland Council v Lau*.[1] We have an existing and ongoing situation on the site that has been the subject of attendance by the Court previously, and clearly the Council are concerned to try and maintain a clear line in the sand as to how far the tenancies can go here.

[1] [2018] NZDC 29282.

[27] Neither the Council nor this Court has any desire to terminate the existing tenancy of the elderly couple on the ground floor of the main house. In practical terms, what arrangements might be made in respect of the main household is always a matter of difficulty, but I am satisfied that the impact of that couple on the environment through the use of the wastewater and water systems is minimal.

[28] Given that the house already has six bedrooms it is clearly intended to have a significant number of occupants, and it is easy to conceive of a household that may consist of many more members than are currently utilising the main house. Nevertheless, I accept that the Council cannot be seen to be granting, through an enforcement order, a resource consent for Mr Braines to have multiple tenancies.

Evaluation

[29] Faced with this difficult situation before the Court, I must take into account that this is an application for an interim enforcement order. The reasons for exercising a power of constraint should be clear, and should be exercised for a clear environmental purpose. I point the parties to the provision in s 320(3) of the Act, which requires the Court to consider the effect not making the order would have on the environment. It appears to be agreed that, at this stage, an additional tenancy in the form of this elderly couple is not having any impact.

[30] The Council is not concerned about their impact but about the potential for further tenancies to take place in the future. In the end, I have concluded that the only proper course of action I can take is to refuse to make any order in respect of Building A. This, of course, leaves the matter for either further enforcement or abatement proceedings if the Council considers fit, but certainly does not entitle Mr Braines to breach the Act.

Comment

[31] In saying that, I want to make it very clear that neither the Court nor the Council is in any way suggesting that the continued occupation of the ground floor by this elderly couple is inappropriate. The Council was at pains to make that point, and this Court is not, by this refusal to make an order, indicating that this tenancy must be terminated. It was always the Council's intention that this tenancy would continue in any event, given the wording of the order that was made. The issue that would arise is, if and when those tenants leave the site, what course Mr Braines can undertake. It also raises the issue, which Mr Braines will need to discuss with the Council, as to whether he can, in fact, re-

tenant the main house, if he needs to, to meet mortgage payments.

[32] One obvious course that Mr Collins suggests is that Mr Braines can apply, as a restricted discretionary activity, for the occupation of the main house. Given the question of effects would be addressed at this stage, it seems to me likely that, provided other tenancies at the property were being regulated in the correct way, the Council would find it difficult to refuse such a consent. Nevertheless, they have their own plan rules and criteria that would need to be considered in that event.

Conclusion

[33] I consider that all of the orders made as a whole are a fair reflection of the position reached by the parties and take a reasonable approach to the operation of this site. My refusal to make any orders in respect of the tenancies in Building A has been set out in some detail, and accordingly to that extent I have varied the order by excluding Building A from any of those orders. Building C is covered through the agreed position that I have discussed earlier in this decision.

[34] Overall, I am satisfied that this order should remain in force until it is either replaced by another order, if one is sought by the Council, or a resource consent is obtained. Accordingly, I have altered all of the orders to indicate that is a potentiality, and Mr Braines may want to consider making a resource consent application to try and regularise the activity on this site and avoid further abatement or enforcement proceedings in the future.

[35] It doesn't appear to me to be an appropriate case for an order of costs given the orders were obtained ex parte, and Mr Braines has acted promptly to try and bring the matter back to the Court. I will reserve costs for seven days. Any application for costs are to be filed within 10 working days; any reply 10 working days after that and any final reply, if any, five working days thereafter. I do not encourage any application for costs.

JA Smith
Environment Judge

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