

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

Decision No. [2018] NZEnvC 172

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under s 120 of the Act
BETWEEN DRINKROW INDUSTRIAL ESTATES
LIMITED
(ENV-2018-AKL-000107)
Appellant
AND AUCKLAND COUNCIL
Respondent

Court: Environment Judge D A Kirkpatrick
Hearing: on the papers at Auckland under s 279 of the Act
Date of Decision: 20 September 2018
Date of Issue: 20 SEPTEMBER 2018

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR WAIVER

- A: The application for waiver is granted.
B: Derek Stannard is joined as a s 274 party to the appeal.

REASONS

Introduction

[1] This appeal relates to a decision refusing an application to establish a mixed-use development comprising a childcare centre, office units and retail uses at 11 Cryers Road, Highbrook, Auckland.



The application for waiver

[2] On 19 September 2018 Mr Derek Stannard lodged a notice to become a party to this appeal under s 274 of the Act. The Council's decision having been issued on or about 21 May 2018, the notice was some 56 working days out of time in terms of the requirement in s 274(2) that such a notice be given within 15 working days after the period for lodging the notice of appeal ended.

[3] Mr Stannard accordingly seeks a waiver of that time requirement under s 281 of the Act. In support of his application for a waiver, Mr Stannard says that he was a submitter on the original application but did not receive notice of the appeal as required under s121 of the Act.

Section 281 of the Act

[4] Under s 281(1)(a)(iia) of the Act a person may apply to the Court for a waiver of the time within which a person may lodge a notice of interest under s 274 of the Act. The relevant parts of s 281 provide:

281 Waivers and directions

- (1) A person may apply to the Environment Court to—
- (a) Waive a requirement of this Act or another Act or a regulation about—
 - ...
 - (iia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings;
 - ...
- (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
- ...

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

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



¹ *Shirtcliff v Banks Peninsula District Council* EnvC C17/99, 19 February 1999.

The parties' responses to the application

[7] The respondent supports the waiver application by Mr Stannard, as do the David Levene Foundation, Lewis Holdings Ltd and Waste Management New Zealand Ltd which are other parties under s 274.

[8] The appellant does not oppose the application for waiver. It does contest the grounds of the notice under s 274 and there is some correspondence on the Court's file about that disagreement. These matters appear to relate to some of the substantive issues that may arise on appeal rather than on the matters which are presently for consideration in relation to a waiver.

Discussion

[9] In considering the first part of the test under s 281(1)(a)(iia), I must determine whether there is any undue prejudice to any party in granting the waiver. Undue prejudice means prejudice greater than that which would necessarily follow in every case from granting a waiver.²

[10] There will always be some prejudice to other parties if a further party is added to the proceedings. That of itself cannot amount to undue prejudice, otherwise it would never be possible to grant a waiver.³

[11] The lack of any objection to the application for waiver indicates that none of the existing parties consider themselves to be unduly prejudiced. From my review of the file, I can discern no other basis on which undue prejudice might be said to arise.

[12] There being no undue prejudice established, I turn to the second part of the test which is whether the applications for waiver should be granted on their merits.

[13] In *Omaha Park Ltd v Rodney District Council*⁴ a number of guideline criteria for the granting of a s 281 waiver in relation to new parties were established. These included what has happened in the proceeding in the meantime and what effect introducing new parties might have on progressing the appeal to resolution.

[14] At this stage of the proceeding, Court-assisted mediation is scheduled to occur on 27 September 2018, so Mr Stannard will be able to participate in that. Had his

² *Reilly v Northland Regional Council* (1993) 2 NZRMA 414.

³ *Kapiti Environmental Action Inc v Kapiti Coast District Council*, Environment Court Wellington W042/07.

⁴ EnvC A046/08.



application been made after mediation, then the passage of time might have meant that progress in the proceeding would be undermined or jeopardised by the waiver application being granted. That is not the case here. Nor is it the case that granting the waiver will introduce a new party into the process that has not previously been involved in the appeals.

[15] I am satisfied that there is no reason to decline the waiver application.

Decision

[16] The application for waiver is granted.

[17] Derek Stannard Campbell is joined as a s 274 party to the appeal.



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

D A Kirkpatrick
Environment Judge