

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

Decision No. [2018] NZEnvC 236

IN THE MATTER of the Local Government (Auckland
Transitional Provisions) Act 2010
and the Resource Management Act
1991 (the Act)

AND of an appeal under s 156(1) of the
LGATPA

BETWEEN STRATEGIC PROPERTY
ADVOCACY NETWORK (SPAN)

ENV-2017-AKL-000167

Appellant

AND AUCKLAND COUNCIL

Respondent

Court: Judge M Harland

Date of Decision: 12 December 2018

Date of Issue: 13 DEC 2018

DECISION OF THE ENVIRONMENT COURT

- [A] I decline to grant the consent order.
- [B] The applications for waiver are granted.



REASONS

Introduction

[1] This appeal was lodged on 31 October 2017 under s 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010, and relates to the default activity status for certain subdivision activities within parts of the Waitakere Ranges Heritage Area in the Auckland Unitary Plan (**AUP**).

[2] The default activity status for subdivision in these areas in the former Waitakere City Legacy District Plan was prohibited.

[3] The Independent Hearings Panel (**IHP**) explored the appropriate activity status for subdivisions exceeding the allocated entitlement, and concluded that non-complying activity status was appropriate in the context of a policy framework that seeks to limit subdivision, particularly its cumulative effects.¹

[4] The decision of the High Court in *The Waitakere Ranges Protection Society Incorporated v Auckland Council*² reinstated prohibited activity status for certain subdivision activities that failed to meet the prescribed controls in parts of the Heritage Area in the AUP. As a consequence of the High Court's decision, the default non-complying activity status for those subdivision activities was changed to prohibited in the following parts of the Heritage Area:

- (a) The southern parts of the former Swanson Structure Plan area;
- (b) The Oratia Ranges (the upper parts of the Oratia Valley);
- (c) The rural parts of Titirangi-Laingholm; and
- (d) The Rural – Waitakere Ranges zone (comprising privately owned land around the periphery of the Regional Park).

[5] In acknowledgement of the reinstatement of the prohibited activity status, affected submitters were notified of the High Court's decision. Submitters were also provided with a further s 156(1) LGATPA appeal right in respect of the activity status change, on the basis that this change effectively amounted to a rejection of the IHP's recommendation and an alternative solution under that Act.

¹ Auckland Unitary Plan Independent Hearings Panel Report to the Auckland Council Hearing Topic 075 Waitakere Ranges (22 July 2016) at 21.

² [2017] NZHC 2141.



[6] On 29 September 2017 the Auckland Council sent a letter to the submitters and further submitters advising of the appeal rights to the Environment Court and that the last day for filing appeals was 31 October 2017. The letter referred to and attached the High Court's decision of 6 September 2017³ and this Court's decision of 17 August 2016,⁴ which granted certain waivers and directions, including a waiver of the normal requirement to serve all submitters with a copy of any notice of appeal filed with the Environment Court.

[7] It is on this basis that SPAN made its appeal. The appeal sought to restore the non-complying status in the Waitakere Ranges Heritage Area which had been made prohibited by the High Court's decision.

[8] On 7 September 2018 draft consent documents filed. The parties advised the Court that they had reached an agreement that would resolve this appeal in its entirety. The agreed amendments to the AUP are set out below:

- (a) The allocation of one additional lot to enable a two lot subdivision at 49-51 Christian Road as a non-complying activity;
- (b) The allocation of two additional lots to enable a three lot subdivision at 70 O'Neills Road as a non-complying activity;
- (c) Appropriate subdivision controls and diagrams be included in Chapter D12 of the AUP to manage the effects of subdivision on these two properties and to provide for landscape and ecological enhancement;
- (d) A default activity status rule that stipulates that subdivision on these two properties that does not comply with the relevant subdivision controls will be a prohibited activity; and
- (e) A consequential amendment to Appendix 17 of the AUP regarding materials incorporated by reference.

[9] The Court considered the draft order and issued directions on 27 September 2018 requesting a further joint memorandum demonstrating how the draft consent order serves the purpose and principles of ss 5-8 of the Act, the purpose and objectives of the Waitakere Ranges Heritage Area Act 2008

³ *Bunnings Limited v The Auckland Unitary Plan Independent Hearing Panel* [2017] NZHC 2141.

⁴ *Auckland Council* [2016] NZEnvC 153.



(**WRHAA**) and gives effect to the higher order provisions of the Auckland Unitary Plan.

[10] The Judge had a tentative view that the proposal for the consent order may amount to simple expediency for the landowners represented by the appellant, even though the proposal seeks to elevate chances of subdivision no higher than non-complying activity status.

[11] On 2 October 2018 s 274 notices were filed by James Young and Glen Young to join this appeal out of the time. The notices were accompanied by an application for waiver to file the notices out of time.

[12] Accordingly, there are now two matters to be determined by this Court. The first is whether the draft consent order submitted by the parties should be granted. The second is whether the waivers filed by the Youngs to join the appeal out of time should be granted.

The consent order

[13] In response to the Court's directions the parties have advised the Court that the proposed limited subdivision provisions for the properties at 70 O'Neills Road and 49-51 Christian Road have been developed in full recognition of, and to give effect to, the objectives and policies of the Waitakere Ranges Heritage Area Overlay contained in Chapter D12 of the AUP. The relevant Overlay provisions in turn give effect to the AUP Regional Policy Statement (**RPS**), the **WRHAA** and the purpose and principles of Part 2 of the RMA.

[14] For example, they submit that the purpose and objectives of the **WRHAA** were translated into the AUP RPS and district plan policy framework. This approach was adopted to satisfy s 10 and s 11 of the **WRHAA** that require RPS, regional plans and district plans to be formed in accordance with the purpose and objectives of that Act.

[15] In addition, the Heritage Area provisions were developed to meet the prescribed statutory requirements in section 72-76 of the RMA, including the requirement for plan provisions to be developed in accordance with the provisions of the Part 2.

[16] The relevant policy framework for the Heritage Area is contained in the AUP RPS in Chapter B4.4 Waitakere Ranges Heritage Area and in the AUP District Plan Chapter D12. This policy framework places a strong emphasis on



protection, restoration and enhancement of the heritage features of the Waitakere Ranges which is also consistent with the purpose and statutory objectives of the WRHAA.

[17] Regarding Chapter D12 of the AUP, the parties have submitted that it does not require all subdivision to be avoided, however it provides a strong direction that adverse effects on the rural landscape and amenity of the Swanson South (Foothills) area should be avoided, remedied or mitigated. In particular, the objectives for the Swanson South (Foothills) area require that:

- (a) The Swanson South rural character is protected;
- (b) The ecological and landscape values of the Swanson South area are protected from inappropriate subdivision and development; and
- (c) Subdivision and associated development are managed so that the Swanson South area's function as a buffer between the bush and urban parts of the city are retained.

[18] Policies D12.3(8) and (9) were key to the Council's assessment of the activity status change for the two properties and the associated site-specific controls:

- (8) *Manage subdivision, use and development within the area to ensure all of the following:*
 - (i) *Areas identified in the Outstanding Natural Character and High Natural Character Overlay, the Outstanding Natural Features Overlay and Outstanding Natural Landscapes Overlay, and the Significant Ecological Areas Overlay are protected, restored or enhanced;*
 - (ii) *Heritage features are not adversely affected;*
 - (iii) *Rural landscape and character is retained; and*
 - (iv) *Degraded landscapes are is [sic] restored and enhanced.*
- (9) *Manage built development so that it is integrated and is subservient to the natural and rural landscape and the heritage features of the area.*

[19] Also crucial to the assessment of the non-complying activity status change was the specific Swanson South (Foothills) area Policy D12.3(16):

- (16) *Provide for limited subdivision and development that:*
 - (i) *Protects and enhances streams, watercourses and wetlands;*
 - (ii) *Avoids where possible the need to clear native vegetation and restores areas of vegetation or re-vegetates areas of land along watercourses;*
 - (iii) *Avoids, remedies or mitigates adverse effects on rural character and amenity values;*
 - (iv) *Retains or links native vegetation and fauna habitat areas; and*



- (v) *Avoids where possible development on natural landscape elements and heritage features.*

[20] The parties submitted that the Council essentially utilised policies D12.3(8), (9) and (16) as a checklist of factors for determining whether or not the proposed non-complying activity status and controls for 70 O'Neills Road and 49-51 Christian Road gave effect to the applicable AUP policy framework. The Council considers that the proposed non-complying activity status directly responds to these relevant policies by:

- (a) Only providing limited subdivision potential at these two properties through the use of the stringent, non-complying activity status and detailed site-specific development controls that are required to be secured in perpetuity. Many of the subdivision controls for the properties are also spatially defined in the planning maps produced for each site. Any subdivision that does not comply with the site-specific controls is prohibited. This approach is used elsewhere in Swanson South to manage subdivision on specific sites.
- (b) Development at both properties is also restricted to identified building areas and a limited number of new lots (two new lots at 70 O'Neills Road, one new lot at 49-51 Christian Road). No separate secondary (minor household) dwellings can be established on each new lot.
- (c) Subdivision of the properties in both locations avoids the need to clear native vegetation and will not have adverse effects on any Significant Ecological Areas (**SEAs**).
- (d) Adverse effects upon the landscape values, amenity values and rural character of the Swanson South (Foothills) area are avoided, remedied and mitigated through stringent limits on lot numbers, provision of vegetation screening and restrictions on the location and number of vehicle access ways. In relation to 70 O'Neills Road, further controls on building height, outdoor lighting, building reflectively and colour have also been prescribed.
- (e) Areas of existing native vegetation are required to be protected and maintained in perpetuity on both properties. In



addition to this, for 70 O'Neills Road, Indicative Enhancement Areas have also been identified as areas that are to be developed and maintained in perpetuity to link and expand the existing areas of native vegetation.

- (f) No specific heritage features (as identified in s 7 of the WRHAA) should be adversely affected by either subdivision or any dwellings that follow. The rural landscape and character will be retained, as will the 'buffer area' function of the Swanson South (Foothills) area.
- (g) In relation to 70 O'Neills Road, the controls relating to the protection and enhancement of the Indicative Enhancement Areas and Native Forest Areas are designed to provide the opportunity for the native vegetation on this property to be enhanced including through the removal of stock, fencing and pest plant/animal removal. None of the native vegetation on this property currently falls within an SEA and is therefore currently subject to animal grazing, with a number of pest plants present.
- (h) The location of the permitted building areas on the potential new lots is intended to ensure that any dwellings are integrated with the existing landscape. In particular, the building locations identified on figures D12.10.20 and D12.10.21 were sited so that visual screening is provided by surrounding vegetation, new planting requirements and hills. Both sites are subject to controls requiring the planting and maintenance of screening vegetation. The building height controls for 70 O'Neills Road also ensure that any new buildings do not exceed the height of surrounding screening vegetation.

[21] For the above reasons, the parties consider that the non-complying activity status and associated controls for 70 O'Neills Road and 49-51 Christian Road gives effect to the relevant AUP objective and policy framework for subdivision in Swanson South (Foothills) and the Heritage Area more generally.



The applications for waiver

[22] James and Glen Young filed applications for waiver to file their s 274 notices out of time. Both applied to join the appeal on the grounds that they have an interest greater than the general public in the proceedings due to their family interests in Youngs Futures Limited (the Trustee Company of the G & G Young Family Trust 2000), which owns 72 O'Neills Road.

[23] The basis for their waivers was that they had only recently become aware of the potential subdivision at the neighbouring property, 70 O'Neills Road.

[24] The parties to the appeal oppose the Youngs' waiver applications on the grounds that the applications are significantly out of time and late in the appeal process.

[25] The parties submitted that it would be unduly prejudicial to grant the waiver applications because they have expended considerable effort and resources to reach an agreed resolution of the appeal. This includes:

- (a) Attendance by all parties at three Court-assisted mediations this year;
- (b) The exchange of substantive further information from the Council addressing planning questions and other matters raised by the Appellant regarding the operation and application of the AUP rules across the Waitakere Ranges;
- (c) Numerous site visits by Council officers and the independent landscape and ecology experts engaged by the parties;
- (d) Negotiation of a detailed set of site-specific planning provisions for two identified sites, including mapping and identification of landscape requirements, ecological restoration and enhancement areas;
- (e) Preparation and filing of consent order documents to achieve settlement of this proceeding.

[26] They submitted that allowing the Youngs to join the appeal at this late point in time will very likely compromise the position agreed between the parties and add further substantive delay and cost to the resolution of this proceeding.



[27] The parties also submitted that the waivers should not be granted on their merits. They consider that the Youngs have not provided compelling reasons for the significant delay in filing their s 274 notices or why they did not take up the number of previous opportunities to participate in the AUP submission and hearing process.

[28] The parties also consider that the Youngs' have made these waiver applications on the mistaken assumption that this appeal concerns the grant of resource consent for subdivision of the property at 70 O'Neills Road, which neighbours the Young Family Trust property at 72 O'Neills Road.

[29] Instead this appeal relates to the use of prohibited activity status for subdivision above specified thresholds in parts of the Waitakere Ranges and does not concern a subdivision consent application in respect of 70 O'Neills Road. The consent orders do not seek authorisation for a subdivision consent at this time.

[30] Given that these proceedings are concerned with the AUP rules for potential subdivision opportunities rather than the statutory assessment and environmental effects of a particular subdivision application, the parties do not consider this appeal to be the appropriate forum for the Youngs to raise the arguments set out in their s 274 notices.

Discussion

The Consent Order

[31] In determining whether to grant the consent order, I have considered the draft order and consent memorandum, the tentative view of Principal Environment Judge Newhook and the memorandum of the parties in response to his directions.

[32] In reaching my decision on the issue I appreciate that the parties have gone to considerable time and effort to identify and evaluate whether non-complying status for subdivision is appropriate at 70 O'Neills Road and 49-51 Christian Road.

[33] However, the fact that only two properties have been identified as appropriate for non-complying status and that both properties are located in an area where subdivision is historically and currently a contentious issue, leads me to determine that it is more appropriate that the Court hear and determine this matter on its merits rather than issue a consent order.

[34] It is for these reasons that I decline to make the consent order.



The Applications for waiver

[35] Under s 281(1)(a)(ia) 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.

[36] 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).⁵

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

[38] In *Omaha Park Ltd v Rodney District Council*⁶ a number of guideline criteria for the granting of a s 281 waiver in relation to new parties were established. The guidelines were:

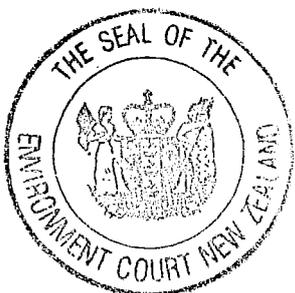
- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) The scheme of the Act relating to public participation;
- (d) What has happened in the proceedings in the meantime;
- (e) What effect introducing new parties would might have on progressing the appeal to resolution.

[39] Based on the length of time that has lapsed since the s 274 period closed and the fact that the appeal has been resolved by consent, I accept that allowing the waiver applications would normally be deemed to be unduly prejudicial.

[40] However, as I have declined to grant the consent order I conclude that the waiver applications should be granted. Although this will add a further dynamic to the case that the parties will have to contend with, I find that any prejudice they may experience is outweighed by the need for this contentious matter to be addressed in Court. As immediate neighbours to 72 O'Neill Road I

⁵ *Shirtcliff v Banks Peninsula District Council* EnvC C17/99, 19 February 1999.

⁶ EnvC A046/08.



also consider that the Young's should be given the opportunity to be involved in this appeal process.

[41] The fact that the s 274 notices are more concerned with the potential subdivision rather than the activity status of subdivision on 72 O'Neills Road is not a reason to decline the waiver. The scope of the Young's involvement in this appeal will be restricted to the issues raised in this appeal and will not go beyond that.

[42] Accordingly, I determine that James and Glen Young should be allowed to join the appeal under s 274 of the Act.

Decision

[43] I decline to grant the consent order.

[44] The applications for waiver are granted.



M Harland
Environment Judge

