

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

**Decision No. [2018] NZEnvC 064**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the proposed direct referral of application for resource consents for the necessary infrastructure and related activities associated with holding the America's Cup in Auckland

AND

IN THE MATTER of an originating application under sections 281 and 291 RMA for waivers and directions

BETWEEN PANUKU DEVELOPMENT AUCKLAND LIMITED

(ENV-2018-AKL-78 )

Appellant

AND

AUCKLAND COUNCIL

Regulatory Authority

Court: Principal Environment Judge Newhook

Counsel: MC Allan for Auckland Council

Date of Decision: 10 May 2018

Date of Issue: 10 May 2018

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**DECISION ON *EX PARTE* NOTICE OF MOTION BY AUCKLAND COUNCIL UNDER  
ss 281 and 291 RMA FOR WAIVERS AND DIRECTIONS**

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A: Waivers granted as applied for, on anticipatory basis.

B: Directions given on anticipatory basis as applied for with leave granted to later amend same in case of exigencies arising.



## REASONS

### Introduction

[1] On 13 April 2018 Panuku Development Auckland Limited ('Panuku') applied to Auckland Council for necessary resource consents to host the America's Cup 36 ('AC36') sailing regatta at Wynyard Basin Auckland, inclusive of bases and other infrastructure for defender and challengers.

[2] The Court, while having no extant file in recent months because proceedings were yet to be lodged with it, has previously received carefully-prepared memoranda from those two parties, and issued one Minute on 6 April 2018, in anticipation of possible direct referral proceedings being lodged<sup>1</sup>. The Court has been careful to stress to the two parties that all such communications have been undertaken with no substantive pre-determination involved. This decision on anticipatory waivers and directions is issued on the same basis.

[3] The grounds of the present application included that:

(a) There is a high level of public interest in AC36 generally, but also in relation to the consenting process associated with the event and related infrastructure. It is submitted that this public interest extends to ensuring that the consent processes for delivery of the AC36 event and infrastructure are advanced as expeditiously as possible, **without of course any substantive pre-determination**. [Bolded words inserted by me].

(b) The timeframe for the construction of infrastructure required to host AC36 is extremely tight, if the supporting infrastructure to accommodate syndicates is to be ready from late 2019. It is understood from Panuku that a decision from the Court is required by mid to late October 2018 if construction targets are realistically to be achieved.

[4] I have been informed that Panuku lodged a request with the Council under s 87D RMA to allow the application to be referred directly to the Environment Court, such

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<sup>1</sup> A file has been opened today given the resolution passed by the council on 7 May 2018 to directly refer the proceedings to the Court under s87E. The file reference is to be found in the intituling above.



lodgement occurring on 17 April 2018. I am also informed that the Council approved that request under s 87E RMA on 7 May 2018.

[5] The substantive application was publicly notified for submissions on 30 April 2018, as I am aware from having seen the newspaper advertisement. Submissions will close on 28 May 2018.

[6] I am informed that the application is presently being processed by the Council in accordance with s 87F RMA, and the Council has indicated that it is endeavouring to complete the reporting required by that section, by 22 June 2018.

[7] I have been told that Panuku will lodge a notice of motion and supporting affidavit for direct referral of the application with the Court on 25 June 2018, and serve it on submitters and the Council immediately thereafter.

[8] On this basis, it is my understanding that the s 274 RMA period for submitters to join the Court proceedings should end on 16 July 2018, all going to plan.

[9] Further grounds advanced, included in summary:

(a) In light of the above, the Council considers it highly desirable that the dates for certain key initial case management steps, namely for a pre-hearing conference, mediation, and expert witness conferencing, are confirmed by the Court in advance, and communicated by the Council and Panuku to submitters / potential section 274 parties at the earliest possible stage. The Council acknowledges and concurs with the Court's statement that the earliest possible notice of dates is desirable, *"to ensure that all parties have the greatest amount of notice possible to ensure adequate preparation and quality of participation, in the interests of natural justice"*<sup>2</sup>.

(b) The directions proposed will ensure that at least 3 weeks' notice is given to submitters of the relevant dates (and the proposed waivers / directions generally). Both the Council and Panuku would be required to serve a copy of the Court's Order and draft timetable on submitters, while the Council will also be required to publish the Order and draft



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<sup>2</sup> Paragraph 6 of the Minute.

timetable to its website.

- (c) Provided that the pre-hearing conference, mediation and expert conferencing dates are clearly communicated to potential section 274 parties well in advance in the manner proposed, no parties will be unduly prejudiced by the proposed directions.
- (d) For completeness, it is noted that the Council has already written to the categories of persons identified in regulation 10 of the Resource Management (Forms, Fees, and Procedures) Regulations 2003, foreshadowing the potential timetable dates to those persons<sup>3</sup>, notifying them that the Joint Memorandum of Counsel and Minute have been uploaded to the Council's website<sup>4</sup>, and advising of the Court's appointment of three process *advisors*. On the same date, the Council also sent an email to submitters on the previous resource consent applications<sup>5</sup>, advising previous submitters that they would be receiving a separate notification letter providing information on the key steps associated with the direct referral / Environment Court process, including details of a draft timetable through to hearing, and advising of the Court's appointment of three process advisors.

### Jurisdiction

[10] Mr Allan has diligently, and in my view accurately, addressed me on the subject of jurisdiction to make these anticipatory waivers and directions. Because I have looked carefully at his reasoning and fully accept it, it is appropriate to take the unusual step of cutting and pasting into this decision the relevant parts of his submissions, which I then confirm as the decision of the Court on the points raised:<sup>6</sup>

The Environment Court has previously confirmed in several decisions that it has jurisdiction to consider and determine applications for anticipatory waivers and directions (i.e. in respect of a matter not otherwise before the Court). The Council relies on these authorities. For instance:

<sup>3</sup> Including the proposed dates for the pre-hearing conference, mediation, and expert witness conferencing.

<sup>4</sup> At the following link: <https://www.aucklandcouncil.govt.nz/have-your-say/have-your-say-notified-resource-consent/notified-resource-consent-applications-open-submissions/Pages/ResourceConsentApplication.aspx?itemId=147&applNum=BUN60318372>

<sup>5</sup> Including the application relating to the ferry and fishing industry.

<sup>6</sup> Paragraphs 17 – 25 of the Memorandum of Counsel for the Auckland Council in Support of Notice of Motion under section 291 of the RMA Applying for Waivers/Directions.



- (a) In the 2016 decision **Re Auckland Council**<sup>7</sup> the Court held that it had jurisdiction to make directions / grant waivers in relation to appeals on the Auckland Council's decisions on the Independent Hearing Panel's recommendations on the then proposed Auckland Unitary Plan. The Auckland Council in that case similarly sought to waive certain requirements of section 274 of the RMA and allow for the electronic filing of documents.
- (b) In the 2017 decision **Re Auckland Council** (concerning an application for waivers and directions in respect of a network discharge consent application), the Court provided an overview of the various authorities<sup>8</sup>, and found that it was appropriate for such an application to be initiated as an originating application under section 291 of the RMA<sup>9</sup>.

The Council seeks the various directions and waivers set out in paragraph 4 of the Notice of Motion in reliance on sections 267, 269 and 281 of the RMA.

Starting with section 269 of the RMA, subsection (1) of that provision states that, except as expressly provided in the RMA, the Court:

*... may regulate its own proceedings in such manner as it thinks fit.*

Subsection (2) provides that the Court:

*... must regulate its proceedings in a manner that best promotes their timely and cost-effective resolution.*

Section 267 of the RMA relates to conferences. Section 267(1)(a) provides that an:

*... Environment Judge... must, as soon as practicable after the lodging of proceedings, consider whether to convene a conference presided over by a member of the court.*

While this provision refers to consideration being given to whether to convene a conference after proceedings are lodged, this does not preclude the Court from considering or making a direction about conducting a conference on an anticipatory basis. Rather, its purpose is to ensure that a Judge turns her or his mind to the need for a conference early in the life of the proceedings (but not to prevent earlier consideration being given to this matter).

Section 281 (1) of the RMA relevantly provides that a person may apply to the Court to:

- (a) *waive a requirement of this Act or another Act or a regulation about –*
- (i) *the time within which anything shall be served; or*  
...
- (ii) *the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings; or*
- (iii) *the method of service; or*  
...
- (v) *the persons on whom anything shall be served or*



<sup>7</sup> [2016] NZEnvC 153, see paragraph [9].

<sup>8</sup> [2017] EnvC 2017, at paragraph [14] onwards.

<sup>9</sup> *Ibid*, at paragraph 12

- ...
- (b) give a direction about-
- (i) the time within which or the method by which anything is to be served; or
  - (ii) the time within which or the method by which anything is to be served; or
  - (iii) what shall be served, whether or not the direction complies with this Act or any other Act or a regulation; or

Section 281 (2) provides that the 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. With reference to section 281(3), we note that Panuku has approved the waivers and directions sought in this Notice of Motion.

### ***Ex Parte Nature of Application***

While the Council's Notice of Motion has been served on Panuku, it is otherwise filed on an *ex parte* basis.

It is submitted that *ex parte* consideration of the Notice of Motion is acceptable for the following reasons:

- (a) The waivers and directions proposed to facilitate electronic case management and simplify 274 processes (at paragraph 4.1 of the Notice of Motion), are intended to make the direct referral process more 'user friendly' for potential section 274 parties, and reduce the potential burden of strict compliance with some of the RMA's usual requirements. From the Council's perspective, those waivers and directions can only be seen as benefiting potential section 274 parties.
- (b) The proposed directions relating to early scheduling of initial case management steps can appropriately be made on an *ex parte* basis, provided that ample notice is given to submitters, and therefore potential section 274 parties, of the dates in question. For the reasons stated at paragraph 16(d) to (f) above, the Council considers that ample notice will be given to potential section 274 parties.

The Council acknowledges the Court's proviso, stated at paragraph 11 of the Minute, that "*should s 274 parties raise aspects for consideration of the Court for good cause, they will need to be considered by the Court, however expeditiously*". The Council considers it would be appropriate for any directions / waivers made by the Court to be prefaced by a statement to that effect.

[11] I particularly affirm the Court's requirements stated in the last paragraph of the material quoted above.

### **Waivers and Directions Issued**

[12] Subject to the preface set out in the paragraph above, I **order and direct** as follows:

- (a) A waiver of the usual requirement to lodge a signed original and 1 copy of any section 274 notice with the Court, and a direction instead that



submitters may, as an alternative to complying with the usual requirements of section 274 and Form 33 in that regard, be allowed to file an electronic copy (i.e. by email) of any section 274 notices with the Court, which may be signed or unsigned, in which case no hard copy need be filed with the Court.

- (b) A waiver of the usual requirement to serve copies of any section 274 notices on "all other parties" other than the Applicant (Panuku) and the Council. Instead, it is proposed that service of section 274 notices on "all other parties" be effected by the Court uploading copies of section 274 notices received to a website / webpage specific to the Application. For the avoidance of doubt, submitters would still need to serve Panuku and the Council with copies of any section 274 notices preferably by email (or alternatively by post) at the following addresses:

	The Applicant (Panuku)	The Council
<b>By Email</b>	<a href="mailto:americas.cup36@simpsongrierson.com">americas.cup36@simpsongrierson.com</a>	<a href="mailto:allan@brookfields.co.nz">allan@brookfields.co.nz</a>
<b>By Post</b>	Panuku Development Auckland c/ Simpson Grierson Private Bag 92518 Auckland 1141 New Zealand Attn: Bill Loutit – Partner	Auckland Council c/ Brookfields Lawyers PO Box 240 Shortland Street Auckland 1140 New Zealand Attn: Matthew Allan - Partner

- (c) For those submitters who decide to file a hard copy of their section 274 notices with the Court, a waiver of the usual requirement to file an extra copy of the notice.
- (d) A direction that otherwise all section 274 notices shall meet the requirements of section 274 of the RMA, including the requirement in subsection (3)(b) to state "whether the person supports or opposes the proceedings and the reasons for that support or opposition".
- (e) A direction that, unless hard copies are subsequently specifically



required to be filed and/or served by the Court, all other documents relating to the Application filed by any party may be:

- (i) filed electronically with the Court by email, and
- (ii) served electronically on Panuku and/or Council, as appropriate, by email (addresses above);

with service of all other parties deemed to be effected by the Court uploading the document(s) to its dedicated website / webpage.

[13] I also make the following directions (intervening exigencies apart):

(a) A direction that a pre-hearing conference be scheduled for Wednesday 18 July 2018 (two working days following the close of the section 274 period).

(b) A direction that two days be allocated for Court-assisted mediation on Thursday 19 and Friday 20 July 2018.

(c) The following directions relating to expert witnesses conferencing:

(i) Agreed statements of issues are to be prepared by Tuesday 24 July 2018 (with no requirement for pre-exchange of 'will say' statements); and

(ii) Court-facilitated expert conferencing is to be scheduled for Wednesday 25 July - Monday 30 July 2018, with the technical experts conferencing on Wednesday - Friday, and the planning witnesses conferencing on Monday (with the benefit of the technical experts' Joint Witness Statements).

(d) A direction that the draft timetable **attached** to this Decision ("**Draft Timetable**") be provided to submitters in accordance with subparagraph (e) below, as a tentative indication of the timetable through to hearing in September 2018 (subject to further discussion at the pre-hearing conference).

(e) The following directions to ensure early notice is provided to



submitters, and therefore potential section 274 parties, of the waivers / directions and the Draft Timetable:

- (i) The Council is to provide a copy of this Decision containing the waivers / directions and Draft Timetable to submitters when it serves its section 87F report on submitters under section 87F(5)(b) of the RMA;
- (ii) Panuku is likewise required to provide a copy of the Court's Decision containing the waivers / directions and Draft Timetable to submitters when it serves notice of its direct referral application on submitters under section 87G(2)(b)(ii) of the RMA;
- (iii) The Council is to publish this Decision setting out the waivers / directions and the Draft Timetable to its website<sup>10</sup>.

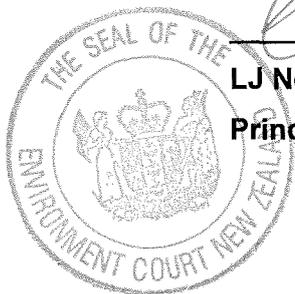
In each instance above, the Council / Panuku, as the case may be, is also to provide contact details for the three Court-appointed process advisors.

Leave is reserved to amend or add to these orders and directions on short notice if necessary.



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**LJ Newhook**  
**Principal Environment Judge**



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<sup>10</sup> The Court has today opened a page on its website for administration of these proceedings, and is publishing this Decision there.

## ATTACHMENT

### Amended Draft Proposed Timetable

Note 1: The new steps are highlighted with light blue shading.

Note 2: Comments in brackets comparing the timing of steps with a previous iteration of the timetable have been left in.

<b>Lodge Revised Full AC36 Application</b>	Friday, 13 April 2018
<b>Formal Acceptance of Application</b>	Monday, 23 April 2018 (6 wd from lodgement)
<b>Public Notification of application</b>	Monday, 30 April 2018 (10 wd from lodgement, including ANZAC Day)
<i>Note: assume that the request for direct referral and Council decision can occur during the notification period</i>	
<b>Submissions Close</b>	Monday, 28 May 2018 (20 wd from public notification)
<b>Preparation of Council Report</b>	Friday, 22 June 2018 (18 wd from submission close, including Queen's Birthday).
<b>Notice of motion filed with Environment Court</b>	Monday, 25 June 2018 (next working day)
<b>Initial Common Bundle of Documents</b>	Friday, 13 July 2018
<b>Close of Interested Party Period</b>	Monday, 16 July 2018 (same 15 wd period as for previous timetable) (5 wd to serve)
<b>Pre-Hearing Conference</b>	Wednesday, 18 July 2018 (this has been shortened from 5 wd period in previous timetable, to 2 wd)
<b>Mediation</b>	Thursday 19 / Friday 20 July 2018 (this has been shortened from 4/5 wd period in previous timetable, to next wd)



<b>Agreed Statements of Issues</b> (replaces previous requirement for Will Say Statements)	Tuesday 24 July 2018 (same 2 wd period as for previous timetable)
<b>Expert Conferencing (facilitated by Court)</b>	Wednesday 25 July – Monday 30 July 2018: <ul style="list-style-type: none"> <li>• Technical experts Wednesday –Friday</li> <li>• Planners on Monday (with benefit of technical experts' JWSs)</li> </ul> (same period as for previous timetable, save that one additional day has been allocated for conferencing)
<b>Applicant Exchange of Evidence</b> (together with copies of any documents referred to that are not in the initial Common Bundle of Documents)	Tuesday, 7 August 2018 (same 6 wd period as for previous timetable)
<b>Applicant's Evidence Filed in Court, together with Joint Witness Statements (soft copy only)</b>	Wednesday 8 August 2018 (new step)
<b>Section 274 Party and Council Exchange of Evidence</b> (together with copies of any documents referred to that are not in the initial Common Bundle of Documents)	Tuesday, 21 August 2018 (same 10 wd period as for previous timetable)
<b>Section 274 Party / Council Evidence Filed in Court (soft copy only)</b>	Wednesday 22 August 2018 (new step)
<b>Updated Common Bundle of Documents (soft copy only)</b> (incorporating any additional documents supplied with evidence)	Monday 27 August 2018 (new step)
<b>Rebuttal Evidence Exchanged</b>	Tuesday, 4 September 2018  (this has been extended to 10 wd, was 5 wd in previous timetable)
<b>Rebuttal Evidence Filed in Court (soft copy only)</b>	Wednesday, 5 September 2018  (same 1 wd period as for previous timetable)
<b>Hard Copies of All Evidence and Common Bundle of Documents Filed in Court</b>	Thursday, 6 September 2018 (new step)



<b>Hearing</b>	Monday-Friday, 10 - 21 September 2018  (3 wd from lodgement of rebuttal evidence – was 5 wd from lodgement of all evidence in previous timetable)
<b>Indicative Decision Date</b>	Mid-late October 2018  (i.e. same 20 wd period as for previous timetable)

