**BEFORE THE ENVIRONMENT COURT**
**AT AUCKLAND**

**I MUA I TE KŌTI TAIAO O AOTEAROA**
**KI TĀMAKI MAKAURAU**

**Decision No. [2020] NZEnvC 118**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of two appeals against a decision on an alteration to designation pursuant to s 174 of the Act |
| BETWEEN | THI LAN ANH TRAN trading as HANOI VIETNAM CAFE<br><br>(ENV-2018-AKL-000090)<br><br>Applicant |
| AND | CITY RAIL LINK LIMITED<br><br>Respondent |
| AND | AUCKLAND COUNCIL<br><br>Unitary Authority and s274 party |

Court: Alternate Environment Judge L J Newhook
Environment Commissioner J A Hodges

Hearing: On the papers

Date of Decision: 6 August 2020

Date of Issue: 6 August 2020

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**DECISION OF THE ENVIRONMENT COURT ON APPLICATION UNDER s294 RMA FOR REVIEW OF DECISION [2019] NZEnvC 074**

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**Decision: Application refused.**

## REASONS

### Introduction

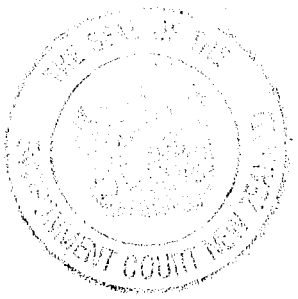
[1] The applicant Ms Tran has applied to review a decision of the Court as above, having been an appellant against a decision of the requiring authority City Rail Link Limited largely accepting the recommendations of independent hearing commissioners of Auckland Council in April 2018. The Notice of Requirement concerned amendments sought to be made to one designation within a suite of 6.

[2] The present application under s294 was lodged in mid-June 2020 and amended (mainly added to) on 8 July.

[3] The later version of the application requests that Judge Newhook's successor as head of the Court, Judge D A Kirkpatrick, consider the present application.

[4] Chief Environment Judge Kirkpatrick is aware of the application, but exercising his powers under s251(2) RMA has directed the original panel of the Court proceed to deal with it for two reasons. First, in the usual course such panel would deal with subsequent costs applications (there are 2 extant) and this kind of application.[1] It is the more appropriate in the present case given our knowledge of the enormous detail of material placed before the Court by Ms Tran previously, to enable us to compare it with what she has filed now. The other reason is that Courts resist "jurisdiction shopping" whereby parties endeavour to choose Judges to hear cases.

[5] It is not clear to us whether Ms Tran has served copies of the application on the other parties, as she ought. We suspect not, because nothing has been heard from them. After careful reflection we consider that we do not need to hear from them, because Ms Tran's arguments are in the main well known to us from the Court's earlier hearing and decision; the attitude to them of the other parties is also well known, having been recorded in the decision Ms Tran seeks to review, and in subsequent decisions on appeal by the High Court and Court of Appeal.



[1] The costs applications had been placed on hold while Ms Tran appealed to the High Court and then sought leave to appeal to the Court of Appeal, both now refused.

[6] After a fairly extensive review of this Court's decision, the High Court refused the appeal.[2] In a very short judgment approving the decision of the High Court, the Court of Appeal refused leave to appeal.[3] Given that the present application continues to challenge the entirety of the suite of designations for the City Rail Link as Ms Tran endeavoured to do in the previous proceedings, and given that a quite significant portion of the infrastructure has now been built at a cost to the public purse of many millions of dollars, it is trite, and the Court takes judicial notice of, what would be the undoubted opposition to the present application by the council and City Rail Link Limited.. Further, this Court is bound by the two higher Courts' findings (upholding this Court) that the full suite of designations was not open to challenge in the subject proceedings as Ms Tran continues to seek to do.

**Section 294**

[7] Section 294(1) RMA provides as follows:

> **294 Review of decision by court**
> (1) Where, after any decision has been given by the Environment Court, new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the decision, the court shall have power to order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.

[8] The essence of the provision is the option of pleading "new and important evidence" or "change in circumstances" or both, with the important qualification that either might have affected the [original] decision.

[9] The applicant does not approach "change in circumstances" but has focussed on the "new and important evidence" option. Decisions of the Courts about proceedings under s294 have invariably followed the decision of the Environment Court *Robinson v Waitakere City Council (No.13)*[4] where it was held there are three elements to the exercise of the power:

1) Does one of the two jurisdictional preconditions obtain – is there new and important evidence or has there been a change in circumstances?
2) Might that have changed the decisions?

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[2] *Thi Lan Anh Tran v City Rail Link Limited* [2019] NZHC 2739.
[3] *Thi Lan Anh Tran trading as Hanoi Vietnam Cafe v City Rail Link Limited* [2020] NZCA 174.
[4] [2010] NZEnvC 314; (2010) 16 ELRNZ 245 at [25].

3) If the answers to questions 1) and 2) are both positive, should the Court exercise its discretion to order a rehearing and if so on what conditions?

[10] The High Court delivered a strong statement about the "new and important evidence" consideration in *Shepherd v Environment Court*[5], where Heath J held:

> [37] I consider it is clear that the term "new and important evidence" is a composite phrase requiring both freshness and cogency to be considered. In many other areas of the law a retrial may be ordered if a Court were satisfied that course best serves the interests of justice. The more prescriptive terms of s294 are justifiable on the grounds that decisions of the Environment Court tend to affect not only the immediate parties but members of the public. The Court's public function adds emphasis to the need for finality in litigation, thereby providing a solid foundation for a rehearing rule that is focussed on the establishment of particular criteria and an assessment of materiality.

[11] The issue of potential consequences in the public domain we consider to be particularly apt in the present case, because of factors we record above.

[12] In a very recent decision of the High Court *SKP Incorporated v Auckland Council & Another*[6], Gault J discussed the above passage from *Shepherd* and agreed that Heath J's use of the term "cogency", could equate with "important".

[13] At paragraph [48] of the *SKP* decision, the High Court held that an applicant under s294 RMA should adduce evidence of what is alleged to be new and important.

[14] In paragraph [45] of the *SKP* decision, the High Court referring to the paragraph prior to the *Shepherd* paragraph quoted above, held that it is not the concept of "important" that invokes the concept of materiality, but rather that materiality is invoked in the s294 requirement that the new and important evidence "might have affected the decision".[7] If there is any difference of emphasis between the two judgments, it does not in our view impact on the outcome here.

**Discussion**

[15] Paragraphs 8 to 11 of Ms Tran's application document are extensive, comprise

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[5] HC Auckland CIV-2011-404-3091, 21 October 2011.
[6] [2020] NZHC 1390, 19 June 2020.
[7] *Shepherd* at paragraph [36].

the majority of it, and are headed "Ground of Evidence". They do not take the form of sworn evidence, but we have proceeded on the basis that they were self-evidently intended as evidence.

[16] The grounds can be categorised in two ways:

a) Criticisms of this Court's substantive decision in 2019; and
b) Allegedly "new and important evidence" that Ms Tran says she has found more recently.

[17] Arguments that the Environment Court was wrong in its earlier substantive decision cannot amount to new and important evidence. Review under s294 RMA is not a right of appeal. The applicant has already exercised her right of appeal to the High Court (dismissed) and sought leave to appeal to the Court of Appeal (refused). Ms Tran repeatedly alleges that both the 2019 substantive decision and an earlier decision approving the main designations[8] are variously "invalid", "wrong", "errors of law", "irrelevant", or "apply a wrong legal test". She also alleges that the decisions were wrong based on allegations that notices of requirement and the designations were in various ways "invalid", "irrelevant" and "misleading". She also continues her earlier themes of not having been consulted, not having been supplied many documents, and not having been convinced of the legal accuracy of many statements by the requiring authority and documents it issued.

[18] It would be time-consuming, unnecessary and irrelevant to quote and analyse the many passages from the application. We have considered them and compared them to the previous extensive litigation, and hold that they cannot found a claim that they comprise new and important evidence, let alone that they might have affected the decision.

[19] A small number of the detailed allegations in the present application might not have been covered in fine detail in the earlier decisions, but if they are not of the first of the two characterisations in paragraph [16] above, they are most certainly considered by Ms Tran as of the second. They include references by her to documents in the public domain during the time of the bringing together of the City Rail Link project, for instance

[8] [2015] EnvC 191.

descriptions of parts of the AEE allegedly written in very small font size and footnotes, and (allegedly) "draft" documents included in what she calls "Draft Legacy Designations in the Auckland Council District Plan (Central Area Section) 2005".

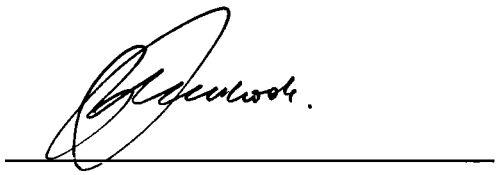
[20] It is not possible to categorise such documentation as new, and neither can any of it be considered as important in the sense that they "might have affected the decision".

**Conclusion**

[21] The application is dismissed.

[22] The issue of costs does not arise because the other parties appear not to have been served and therefore have not been involved.

For the court:



**L J Newhook**
**Alternate Environment Judge**