BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 126

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to clause 14 of Schedule 1 of the Act
BETWEEN	MICHAEL BERESFORD
	(ENV-2018-CHC-69)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Sitting alone pursuant to s279 of the Act
Hearing:	In Chambers at Christchurch
Date of Decision:	13 August 2020
Date of Issue:	13 August 2020

DECISION ON APPLICATIONS FOR WAIVER

A: The Attorney-General's application for waiver is granted and he is joined as a s274 party to this appeal.

B: Bike Wanaka Incorporated's application for waiver is declined.

C: Costs are reserved. Any application must be filed within 10 working days, any reply within a further 5 working days, and any final reply within a further 5 working days. Leave is reserved to seek amendment to that timetable.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

Introduction

[1] The Attorney-General[1] ('Attorney') and Bike Wanaka Incorporated ('Bike Wanaka') each seek to join as s274 parties to an appeal against a decision of the Queenstown Lakes District Council ('QLDC') made in its partial review of the Queenstown Lakes District Plan ('PDP').

[2] The appeal, by Michael Beresford, is in regard to some land[2] in Wānaka known as 'Sticky Forest'. This land is administered by Te Arawhiti (the Office of Treaty Settlements) and held on trust for descendants of the fifty-seven original intended owners, including Mr Beresford and his family.[3] Under Te Tiriti o Waitangi settlement arrangements, the Crown is to transfer the land to those owners, subject to certain legislative steps.[4]

[3] The PDP zones Sticky Forest Rural as Rural and overlays part of it with an Outstanding Natural Landscape ('ONL') notation. Mr Beresford's appeal seeks a rezoning to Low Density Residential and Large Lot Residential and changes to the ONL notation.[5] That is to enable part of Sticky Forest to be developed for residential purposes. As its name suggests, much of the land is an established Douglas Fir forest. Under the PDP, it is at least highly uncertain as to whether production forestry would be consentable. In any case, Mr Beresford does not consider production forestry would be a viable commercial use of the land.

[4] Currently, the only s274 party to Mr Beresford's appeal is Kirimoko No 2 Partnership ('Kirimoko'), an owner of adjacent land. It opposes Mr Beresford's relief. That is partly out of concern that the rezoning would make the zoning of its own land incoherent and impact on its amenity and enjoyment. In addition, Kirimoko's s274 notice expresses concern that development of Sticky Forest "would adversely affect the amenities of users of the public access network" around Sticky Forest and through

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1 Notice under s274 for the Attorney, application for waiver of time and memorandum in support all dated 16 June 2020.

2 Legally described as Section 2 of Block 5 XIV Lower Wanaka Survey District (CT OT18C/473).

3 First affidavit of M Beresford sworn 2 June 2020 at [11].

4 First affidavit of M Beresford sworn 2 June 2020 at [3].

5 Beresford notice of appeal, dated 18 June 2018.

Kirimoko's land.[6]

[5] The Attorney and Bike Wanaka have each filed their s274 notices outside the statutory time limit. Each makes application for waiver pursuant to s281 of the Resource Management Act 1991 ('RMA'). The Attorney's application is unopposed. Bike Wanaka's application is opposed by Mr Beresford (but not by other parties).[7] No party has sought to be heard on the applications. I am satisfied I can determine them on the papers.

Statutory framework and legal principles

Section 274 eligibility to be a party

[6] Section 274 specifies that any person qualifying as a party who seeks to join RMA appeal proceedings must give notice to join within 15 working days after the period for lodging a notice of appeal ends (s274(2)). If that is not complied with, the person is not entitled to join the proceedings unless waiver is granted under s281.

[7] Mr Beresford received notice of QLDC's decisions on his submission on 7 May 2018. The time period for lodging an appeal expired on the thirtieth working day after that, i.e. on or about 18 June 2018. Hence, the Attorney and Bike Wanaka each requires waiver in order to be joined as a s274 party to the appeal.

[8] Neither the Attorney nor Bike Wanaka made a relevant PDP submission. Hence, in terms of the classes of eligibility to become a party to an appeal under s274:

(a) the Attorney would qualify if he is "representing a relevant aspect of the public interest" (s274(1)(c)); and
(b) Bike Wanaka would qualify if it is "a person who has an interest in the proceedings greater than the interest that the general public has" (s274(1)(d)).

6 Kirimoko s274 notice, dated 5 July 2018.

7 Being the Council and Kirimoko No. 2 Limited Partnership. Both parties advised they did not oppose in emails to the registry on 16 March 2020.

Section 281 discretion to waive time limits

[9] Section 281, RMA relevantly provides as follows:

> 281 Waivers and directions
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> (1) A person may apply to the Environment Court to –
>
> (a) Waive a requirement of this Act or another Act or a regulation about–
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> …
>
> (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.
>
> (3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the court (to which subsection (1)(a)(ii) applies) unless it is satisfied that—
>
> (a) the appellant or applicant and the respondent consent to that waiver; or
>
> (b) any of those parties who have not so consented will not be unduly prejudiced.
>
> (4) Without limiting subsections (2) and (3), the Environment Court may waive a requirement as to time under this section whether or not an application is made under this section before the requirement has been breached.

[10] When considering a waiver application, the court is first required to determine whether any of the parties to the proceeding would be unduly prejudiced should the waiver be granted. In *Omaha Park Limited v Rodney District Council*,[8] the court considered the phrase "undue prejudice" in s281, stating:

> Any party who believes that the notice period has passed, but then has to face a late arriving opponent, will be prejudiced in the sense of having lost a position of advantage…the issue is whether the prejudice is undue. That means greater than that which would inevitably follow in every case from waiving compliance with the time limits.

[11] Second, if no party is unduly prejudiced, the court must determine whether it should exercise its discretion to grant the waiver. In *Omaha,* the court helpfully identified the relevant factors as the length of the delay, the reasons for the delay, the scheme of

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8 *Omaha Park Limited v Rodney District Council* (EnvC) A46/08 at [6].

the RMA relating to public participation, what has occurred in the proceeding in the meantime and what effect introducing new parties might have on progressing the appeal to resolution.[9] While *Omaha* assists in those terms, I am also mindful that I am to exercise that discretion in light of the particular facts and circumstances. For example, in the case of the Attorney's application, in the absence of any evident prejudice, there is a strong public interest justification for waiver.

The Attorney-General's application

[12] I can be brief in setting out why I am satisfied that the Attorney's application accords with the RMA and that granting it is appropriate.

[13] The application is in support of the relief sought by Mr Beresford, supported by a memorandum of counsel and an affidavit of Mr P D Green affirmed on 16 June 2020. The Attorney considers that rezoning may help unlock the land (currently landlocked) and give the future owners better options "to utilise and maximise this redress land which has become surrounded by residential development". Those, of course, are matters for determination in due course.

[14] The Attorney readily qualifies under s274(1)(c) in "representing a relevant aspect of the public interest". I accept the explanation of these matters in his s274 notice.[10] It explains that Sticky Forest is held by the Crown subject to the Ngāi Tahu Claims Settlement Act 1998 and Ngāi Tahu Deed of Settlement 1997. That is as "substitution redress land". In essence, it is in substitution for land which the Crown intended to transfer under the South Island Landless Natives Act 1906 at 'The Neck' of Lakes Hāwea and Wānaka (the Hāwea/Wānaka SILNA Land) but did not transfer. The land will be transferred to the successors of the original beneficiaries allocated the Hāwea/Wānaka SILNA Land, subject to the steps prescribed by s15 of the Ngāi Tahu Deed of Settlement 1997. I accept the Attorney's position that:[11]

> There is a public interest in ensuring that the value and utility of land forming part of a Treaty settlement is preserved for its future owners, particularly when the land the Crown contracted in 1997 to transfer has become landlocked prior to the Crown being able to effect transfer.

9 *Omaha Park Limited v Rodney District Council* (EnvC) A46/08.
10 Notice under s274 for the Attorney dated 16 June 2020 at [3].
11 Notice under s274 for the Attorney dated 16 June 2020 at [3.4].

[15] The notice is filed a considerable period of time after the statutory time period expired. However, it is unopposed and no steps have thus far been taken in the proceeding such as would be undone by having the Attorney join as a party at this time. As the notice is in support of Mr Beresford's relief, it would self-evidently not pose any prejudice for the appellant. As such, I am satisfied the prerequisite for waiver in s281, that waiver will not unduly prejudice any party, is satisfied.

[16] The Attorney gives the following explanation for the lateness in filing the notice:[12]

> Given the slow process of identifying the intended beneficiaries, and the limited hui and participation of those identified to date, the Attorney needed to be satisfied that joining was in the interests of the intended beneficiaries. This was against the background of the officials' working group commencing a process for the intended beneficiaries to consider their interim representation (including consultation with Te Rūnanga o Ngāi Tahu), as well as a growing concern that the value and utility of the land was being put at risk by a number of factors: the landlocking of Sticky Forest, the rapid pace of development on the surrounding land with an apparent assumption that Sticky Forest's existing backdrop amenity would not change, and the community's assumption that its current recreational community use of the land should continue indefinitely. The result was an expectation of, and pressure to maintain, the status quo. As the Appellant seeks to create options for future use beyond public recreational use, it is now apparent that joining is in the interests of the intended beneficiaries.

[17] Insofar as that explanation records the Attorney's position on the merits of the appeal, those matters are of course reserved for later determination. Nevertheless, I accept that the Attorney has provided a satisfactory explanation for why his notice is filed late.

[18] There is also a significant public interest rationale in granting the waiver. That is in the emphasis in pt 2 RMA to Te Tiriti o Waitangi and related matters.

[19] Hence, having considered relevant principles concerning waiver applications that I set out later in this decision, I find it appropriate and grant the waiver.

[12] Memorandum of counsel for the Attorney in support of application for waiver of time dated 16 June 2020 at [16].

Bike Wanaka's s274 notice and waiver application

Background

[20] Before traversing the parties' respective positions on Bike Wanaka's waiver application, it is helpful to set out some matters of background concerning Sticky Forest, QLDC's decisions on Mr Beresford's PDP submission and Mr Beresford's appeal.

[21] Sticky Forest is just over 50ha in area. It is helpfully described in the hearing commissioners' report[13] to QLDC on Mr Beresford's submission as:

> … an irregular rectangle of approximately 50.67 hectares of land located between the Northlake and Peninsula Bay developments on the northern margin of Wanaka. Planning Maps 18, 19 and 20 show the Wanaka UGB following the boundary of the Sticky Forest Block, so that the land sits outside the defined urban area with a Rural Zoning.

[22] Although presently in custodial Crown ownership for the beneficiaries, Sticky Forest has previously been held as QLDC Reserve. Much of it is in mature Douglas Fir which is considered a pest species. The PDP's Rural zoning and ONL overlay impose various controls, restrictions and prohibitions on any ability to use the land for production forestry. In any case, Mr Beresford explains that he seeks rezoning because he considers residential development on at least part of Sticky Forest would be more economically viable (although any commercial decision on that would be for the beneficial owners).

[23] Sticky Forest is presently landlocked. Mr Beresford explains that this was due to a neighbouring residential development. However, under the Property Law Act 2007 ('PLA'), there is capacity for an owner or occupier of landlocked land to apply to the court for an order granting "reasonable access" to that land (s327 and 328, PLA). This regime requires that an application for access be served including on the owner of the adjoining land. However, it does not require that an adjoining owner's consent to the order be secured. In essence, it is a regime to enable the court's intervention to resolve access impasse issues.

[24] On 7 May 2018, QLDC issued its decision declining Mr Beresford's submission. QLDC's hearing commissioners reported that they recognised the potential merit of

13 Report 16.1 as attached to the notice of appeal at 2.6 [81].

rezoning, subject to a need for clarity as to the nature and location of legal access rights. They also recorded that Sticky Forest is traversed by mountain bike trails that are used by members of the public.[14]

[25] Despite the extent of residential rezoning and development that has occurred in the vicinity of Sticky Forest in recent years (including on the immediately adjacent Kirimoko Block), there remain significant areas of undeveloped and reserve land. This is highly valued for recreational purposes, including walking and biking. There are numerous public tracks and trails, including alongside the Clutha River/Mata-Au and on the steeper land that surrounds Sticky Forest. Within Sticky Forest, several informal trails are available with links to the public trails. Those informal arrangements have been tolerated for many years, first by QLDC as administrator of the land as a reserve and more recently by the Crown. Informal terms of licence are signposted on the land.

[26] Within the scope of Mr Beresford's appeal, a range of potential planning outcomes are available more or less on the spectrum from retention of the Rural zoning status quo through to rezoning to a combination of Low Density Residential and Large Lot Residential. Within that spectrum, there is ample capacity for matters such as appropriate provision for maintenance or enhancement of formal or informal biking trails to be considered. In its capacity as respondent, QLDC is in a position to contest these matters. So too is Kirimoko as a s274 party opposing Mr Beresford's relief. As noted, Kirimoko's s274 notice specifically raises concerns that rezoning and development of Sticky Forest "would adversely affect the amenities of users of the public access network" around Sticky Forest and through Kirimoko's land.

Bike Wanaka

[27] Bike Wanaka is an incorporated society. It is one of Wānaka's largest community groups with well over one thousand members. It was formed in 2009 to "represent the interests of cyclists in" the Lake Wānaka/Upper Clutha Region including as to mountain biking. More specifically, its objects or aims include:[15]

> To liaise and maintain the links we have with private landowners, local councils and the Crown regarding access for all forms of cycling

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14 Report 16.15, as attached to the notice of appeal, at 1.2 [2] and 2.3 [13].

15 Affidavit of S A Telfer affidavit affirmed 14 May 2020 at [5].

> …
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> To be able to lobby to the necessary authorities for an increase in the public areas available for cycling
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> …
>
> To undertake projects that will have a positive outcome for cyclists in the Lake Wanaka region and to be able to apply for funding for such projects from the appropriate authorities.

[28] It has contractual arrangements with QLDC and the Department of Conservation for the maintenance of several public trails and construction of some new ones. It also maintains various informal trails within Sticky Forest and on land surrounding it for the benefit of its members and the public.[16] It has arranged for 'working bees' where members of the public have assisted in these matters. This includes work in removing unlawful structures that, contrary to the signposted licence terms, have been erected from time to time. As one example of Bike Wanaka's community leadership in these matters, PF Olsen Ltd (who manages Sticky Forest on behalf of the Crown) has corresponded directly with Bike Wanaka to seek its assistance in these matters.

Bike Wanaka's position and submissions

[29] Bike Wanaka's s274 notice, dated 13 March 2020, claims that it has an interest in Mr Beresford's appeal that is greater than the public generally for the following reasons:

> (a) Bike Wanaka is a registered charity that advocates for the recreational opportunities for Mountain Biking in Wanaka.
> (b) The land that is the subject of this appeal is locally known as "Sticky Forest".
> (c) Bike Wanaka has a license to occupy and develop land adjacent to Sticky Forest and currently offers recreational opportunities to the public on that land.
> (d) Bike Wanaka has historically had informal access to Sticky Forest, and has developed and maintained mountain biking trails in Sticky Forest.
> (e) Bike Wanaka has been in discussions with the Appellant regarding formal access to Sticky Forest for further recreational development.
> (f) The subject of this appeal seeks to provide for public recreation opportunities in Sticky Forest which Bike Wanaka is likely to have an ongoing role in managing in conjunction with adjacent land.
> (g) Bike Wanaka is therefore directly affected by the subject of this appeal.

[30] The notice identifies that Bike Wanaka is particularly interested in the following

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16 Application of counsel in support of application for waiver of time dated 13 March 2020.

issues in Mr Beresford's appeal:

(a) Rezoning parts of Sticky Forest to a combination of Low Density Residential Zone and Large Lot Residential Zone;
(b) Retaining the balance of Sticky Forest as Rural Zone for public recreation purposes.

[31] The notice states that it opposes the relief in the appeal for the following reasons:

(a) The relief seeks to zone for development land which has important long term amenity values for the whole Wanaka community.
(b) Sticky Forest has been zoned for the purpose of protecting the landscape values of Sticky Forest. Making any provision for residential development would make the zoning treatment of adjacent land incoherent and vulnerable to future change.
(c) Residential development of Sticky Forest could potentially adversely affect the amenities of users of the public access network surrounding Sticky Forest, including Bike Wanaka's members.

[32] The notice records that Bike Wanaka supports the appeal relief "insofar as it seeks to enable recreational opportunities at Sticky Forest" and that it agrees to participate in mediation or other alternative dispute resolution.

[33] Bike Wanaka supports its case with an affidavit of one of its members, Mr S A Telfer[17] and associated submissions (including in reply).

[34] Mr Page submits that Bike Wanaka is eligible to be a party to the appeal, under s274(1)(d). That is in view of the specific nature of its objects and related activities for the community in relation to Sticky Forest.[18] In those terms, he submits that Bike Wanaka would be directly affected by the outcome of Mr Beresford's appeal. Mr Page points out that Bike Wanaka's objects are sufficiently particularised to biking in Wānaka and it regularly maintains the trails within and around Sticky Forest for the benefit of its members and the community. In addition, he notes that Bike Wanaka has skills and experience in relation to the design, construction, and maintenance of public mountain bike trail networks that neither the public nor any other party to the proceeding has. He adds that Bike Wanaka would likely be engaged by QLDC to maintain the trail network within Sticky Forest if the relief is granted.[19]

17 Affidavit of S A Telfer affirmed 14 May 2020.
18 Referring to the affidavit of S A Telfer affirmed 14 May 2020 at [5].
19 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [3].

[35] Mr Page emphasises that Bike Wanaka does not claim any legal right to access Sticky Forest. However, he points out that proprietary interest is not a necessary prerequisite for standing under s274(1)(d), RMA. In those terms, he submits that Ms Steven QC has misconstrued observations about these matters in the Planning Tribunal decision in *Purification Technologies Limited v Taupo District Council,* particularly the Tribunal's observations that:[20]

> …on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs.

[36] Mr Page submits that those observations should be considered in light of the Environment Court's approach in *Lindsay v Dunedin District Council*.[21] There the court differed from *Purification Technologies* on whether a society may join proceedings "as part of an endeavour to achieve the objects of its association…" saying that, that statement should be qualified by the words "depending on what those objects are".[22]

[37] Mr Page also relies on the High Court's observations in *Meadow 3 Ltd v van Brandenburg*:[23]

> [33] In *Ngatiwai Trust Board v New Zealand Historic Places Trust* [1998] NZRMA 1 Greig J cited … *Purification Technologies*, but emphasised that a proprietorial interest in the relevant land, or site, was not essential; particularly as this would put a focus on European concepts and ignore the special and particular relation which Māori may have to sites and areas on account of their cultural association with them.
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> [34] I see this as an application of the *Purification Technologies* test, rather than as a

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20 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [12], referring to *Purification Technologies Limited v Taupo District Council* [1995] NZRMA 197 p 7.

21 *Lindsay v Dunedin City Council* [2013] NZEnvC 8.

22 *Lindsay v Dunedin City Council* [2013] NZEnvC 8 at [11].

23 Submissions on behalf of Bike Wanaka dated 25 June 2020, referring to *Meadow 3 Ltd v van Brandenburg* [2008] 14 ELRNZ 267 at [33] and [34].

> criticism or qualification of it. Judge Sheppard referred to "a right in property" which was directly affected, by way of example, not as a governing prerequisite.

[38] Mr Page submits that Bike Wanaka's objects are of the type that *Lindsay* considered would qualify under s274 as they are focussed on a specific locale and purpose.[24] In addition, he characterises Bike Wanaka as having an interest in the proceedings greater than the interest that the general public in the sense that it is not merely a track user. It also builds and maintains, or proposes to build and maintain trails on adjacent properties that are part of the trail network. As such, it will be directly advantaged or disadvantaged by the outcome of the appeal proceedings.[25]

Mr Beresford's position and submission

[39] Mr Beresford says that Bike Wanaka does not meet the prerequisites for eligibility under s274(1)(d). In any case, he says that waiver of the late filing of the notice should be declined. He has filed two affidavits as to his position, and associated submissions.

[40] Ms Steven submits that Bike Wanaka is not eligible to be a party as it does not have an interest greater than the public generally. Ms Steven relies on the above-quoted passage from *Purification Technologies*[26] and cites *Meadow 3*[27] for the proposition that:

> … intellectual or emotional concern is insufficient, absent an interest in the proceedings based on some genuine advantage or disadvantage, often of a proprietorial nature, which is not remote.

[41] Ms Steven observes that Bike Wanaka simply accesses the land under the general grounds of entry that are articulated to the public through notices at various entrances to the land. Furthermore, Ms Steven says that Bike Wanaka is not able to claim any affection in an environmental sense. In particular, she submits that QLDC's engagement of Bike Wanaka to maintain trails is not sufficient or relevant ground to allow it to join under s274(1)(d).[28]

[42] In addition, Ms Steven characterises Bike Wanaka's interests in Mr Beresford's

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24 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [8].
25 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [13] – [17].
26 Submissions for Mr Beresford dated 19 June 2020 at [2] – [6].
27 *Meadow 3 Ltd v van Brandenburg* [2008] 14 ELRNZ 267.
28 Submissions for Mr Beresford dated 19 June 2020 at [11] and [12].

appeal as conflicting with the public interest described in the Attorney's s274 notice.[29]

Bike Wanaka's reply

[43] In reply, Mr Page refutes the suggestion that Bike Wanaka's interest in the appeal conflicts with the public interest as set out in the Attorney's s274 notice. Mr Page says this is misconceived as the Attorney's notice does not speak on all potential aspects of public interest.[30] He observes that, even if Mr Beresford is successful in the relief he seeks, it is likely that land will then vest in QLDC for recreation purposes and Bike Wanaka will be asked to manage the trail network as it does now.

Discussion

[44] On the proper application of s274(1)(d), I am primarily guided by the High Court decision in *Meadow 3* but also find assistance in *Purification Technologies* and *Lindsay*. *Purification Technology* referred to proprietary interest as an example rather than a governing prerequisite. The High Court in *Meadow 3* confirmed that position. With respect, I do not find *Lindsay* to materially disagree with *Purification Technology*. Each decision is in the context of its particular facts. *Purification Technology* determined that mere interest in proceedings (including to achieve the objects of an association) was not sufficient to qualify under s274. *Lindsay* noted the importance of considering the substantive content of those objectives. The decisions reflect the judgment inherent in determining whether s274(1)(d) is satisfied.

[45] To be satisfied Bike Wanaka is an eligible party under s274(1)(d), in the absence of any proprietary interest, I must be satisfied that it would stand to procure genuine advantage or suffer genuine disadvantage. That advantage or disadvantage must not be too remote. My enquiry is as to what it may gain or stand to lose in terms of the potential outcomes in the appeal for the PDP provisions in issue. Hence, I consider:

(a) the potential PDP outcomes within the scope of Mr Beresford's appeal, particularly but not necessarily exclusively in regard to Sticky Forest; and
(b) the extent to which those outcomes could advantage or disadvantage Bike Wanaka, having regard to its objects, interests and activities.

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29 Submissions for Mr Beresford dated 19 June 2020 at [17].
30 Submissions for Bike Wanaka dated 25 June 2020.

[46] A partial relief option, whereby planning controls for bike access are imposed with rezoning, could be of significant advantage to Bike Wanaka in terms directly relevant to its aims and objects and activities.

[47] Full rejection of Mr Beresford's relief would likely mean continuance of the status quo in terms of its present amenity values. It would maintain the significant impediments to any capacity to use the land for any other purpose, whether that is productive forestry or residential development. That would mean that the present amenity values enjoyed by Bike Wanaka's members would likely remain intact. Overall, I find this would be significantly advantageous to Bike Wanaka.

[48] A full relief outcome could mean the land is rezoned and ONL arrangements are changed without any planning provision for continuance of bike access. Under such a scenario, Bike Wanaka would be left with having to rely on the goodwill of the owner in order for any access arrangements to continue. As that would no longer be on a basis continuance of the constraints on land development and change through the Rural zoning and the ONL, that would be a significant disadvantage to Bike Wanaka.

[49] I bear in mind that the amenity values of Sticky Forest, including in its usage for biking access, are in any case central to the appeal. As I have noted, such matters informed the hearings commissioners' recommendation, and hence QLDC's decision the subject of the appeal. QLDC and/or Kirimoko could elect to call evidence on such matters from Bike Wanaka. However, that could leave Bike Wanaka at some disadvantage. If Bike Wanaka's representative is called as a witness, there may not be the same opportunity to present Bike Wanaka's own position, such as to best secure the advantage it would seek or minimise an disadvantage it may incur.

[50] Overall I find that, across the range of potential outcomes of the appeal, there would be genuine significant advantage or disadvantage to Bike Wanaka such as would make it eligible to be a party under s274(1)(d).

[51] For completeness, I do not agree with Ms Steven that there would be any material "conflict" between Bike Wanaka's position and the public interest considerations in the Attorney's case. As Mr Page notes, those matters are not materially related.

[52] The more problematic question, however, is whether I should grant Bike

Wanaka's application for a waiver of time.

Waiver

Submissions for Bike Wanaka

[53] Mr Telfer does not give evidence as to why Bike Wanaka filed its s274 notice so late. Rather, Mr Page explains in his submissions:[31]

> … the reason for filing the section 274 notice out of time were [sic] that Bike Wanaka only recently became aware that legal access to Sticky Forest could be provided through an agreement apparently reached with an adjoining property owner. The fact that Sticky Forest is landlocked was one of the primary reasons that the Appellant's original submission was declined. Until that was resolved, Bike Wanaka was confident that the relief could not be granted and would be defended by the Council. That recent change has motivated Bike Wanaka to join the proceeding.

[54] Mr Page submits that, in any case, the "reasons for delay are not the critical factor". Rather, Bike Wanaka must establish that "any prejudice in the late filing … is not undue".[32] He submits that any perceived prejudice to Mr Beresford from the delay is insignificant because mediation has been put on hold pending the outcome of discussions between the appellant and Ngāi Tahu, and will not take place for a number of months.[33] Further, he submits Bike Wanaka's inclusion will not add to the scope of existing issues. That is in the sense that Bike Wanaka shares similar views to Kirimoko regarding the appropriate appeal outcome. Instead, allowing Bike Wanaka to join the appeal would be beneficial in that it would add "relevant expertise".[34]

Submissions for Mr Beresford

[55] Ms Steven submits that Bike Wanaka has failed to give an adequate justification for why its s274 notice was filed as late as it was. That is particularly given Mr Beresford's evidence that Bike Wanaka was aware of the original submission before it was heard by the hearing commissioners in March 2017. Ms Steven also points out the appeal was advertised on QLDC's website in June 2018.[35]

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31 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [24].
32 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [23].
33 Application of counsel in support of application for waiver of time dated 13 March 2020 at [17].
34 Submissions on behalf of Bike Wanaka dated 14 May 2020 at [26].
35 Memorandum in support setting out the grounds for opposition dated 23 April 2020 at [5] and [6].

[56] Ms Steven characterises Bike Wanaka's submissions on its lateness as "somewhat disingenuous and lacking in merit".[36] Counsel submits that is particularly so in relation to Bike Wanaka's claims regarding a recent discovery that legal access could be provided through an agreement with an adjacent owner. In particular, Ms Steven refers to the fact that an application for a reasonable access order can be made to a court under the PLA. She points out that this is expressly noted in Mr Beresford's notice of appeal. She submits that Bike Wanaka would or ought to have known that Mr Beresford advanced his case on that footing.[37]

[57] As for Bike Wanaka reserving its position on whether QLDC's Summary of Decisions Requested ('the Summary') was valid, Ms Steven points out that this is not relevant to the matters the court needs to decide. In any case, with reference to the second affidavit of Mr Beresford, Ms Steven submits that Bike Wanaka has been able to initiate a legal challenge to the Summary since as early as February 2017 but has elected against doing so.[38]

Discussion

[58] As I have traversed, lack of undue prejudice to other parties is a prerequisite to be satisfied before waiver is granted, but is not itself necessarily determinative. Rather, if there is a lack of undue prejudice, there is a discretion to determine whether or not to grant waiver. That discretion is to be exercised on a properly principled basis.

[59] As neither QLDC nor Kirimoko is opposed, I can safely leave them aside. The proceedings remain at a relatively early stage. Mediation has yet to take place. As such, no steps have thus far been taken in the proceeding such as would be undone by granting the waiver. Furthermore, Bike Wanaka's signalled position in qualified opposition to Mr Beresford's relief is comfortably within the scope of issues already before the court.

[60] Those factors lead me to find that there would not be undue prejudice, including for Mr Beresford, in granting the waiver.

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36 Legal submissions in opposition for Mr Beresford dated 19 June 2020 at [30].

37 Submissions for Mr Beresford dated 19 June 2020 at [30] and [31], with reference to the notice of appeal ([10.4] – [10.8]). Ms Steven refers to s129B, which I assume to be to the predecessor to s327, namely s129B of the Property Law Act 1952.

38 Submissions for Mr Beresford dated 19 June 2020 at [21] – [29] referring to M J Beresford second affidavit dated 18 June 2020.

[61] Nevertheless, I do not accept Mr Page's submission that granting waiver would only give rise to perceived or insignificant prejudice to Mr Beresford. Granting the waiver would add to the mix a further party that opposes Mr Beresford's relief. That party would be able to call its own evidence and take its own independent position on all matters it seeks to raise within the scope of the appeal. The only rider to that is that Bike Wanaka could not oppose withdrawal of the appeal. In addition, it would add a party capable of appealing any decision. QLDC can be anticipated to maintain consistency with its hearing commissioners' finding that there is merit in rezoning. Given that, and Kirimoko's somewhat confined position, I find that the prejudice to Mr Beresford of granting waiver, while not undue, would be significant.

[62] In the exercise of my discretion, I find it important to scrutinise Bike Wanaka's explanation for why it was so late in filing its s274 notice. That is to test both the credibility of what Bike Wanaka has asserted and whether it is sufficient.

[63] Bike Wanaka carries a responsibility to give a reliable justification for exercising the waiver discretion. That expectation is not at odds with the RMA's public participation principles. At least for participation in appeal proceedings, the RMA maintains and upholds fairness and natural justice principles, and associated responsibilities.

[64] On these matters, I find some assistance in *Kapiti Environmental Action Inc v Kapiti Coast District Council*.[39] In that case, notwithstanding his finding that there would be no substantial prejudice in granting waiver to the late filing of a s274 notice to join a resource consent appeal, His Honour Judge Dwyer declined the application. His reasons were as follows:[40]

> The complete absence of any substantive explanation as to why Forest and Bird did not act within the statutory time period gives the Court no basis to consider the merits of the waiver application. Forest and Bird's Kapiti/Mana Branch was served with a copy of the notice of appeal so that Forest and Bird (through that Branch) was aware of the appeal. The absence of any explanation whatsoever for the failure to act within the statutory time period and the lack of any supporting documentation means the Court is simply unable to establish the merits of the waiver request.

39 *Kapiti Environmental Action Inc v Kapiti Coast District Council* (EnvC) W042/2007.
40 *Kapiti Environmental Action Inc* at [9].

[65] Of course, the circumstances in the present case differ in several respects. I discuss relevant circumstances shortly. However, I concur with Judge Dwyer's approach of carefully testing whether the waiver is properly justified.

[66] I start by addressing Bike Wanaka's claim that QLDC's Summary was defective. It is of limited relevance as it concerns the QLDC submission processes not the filing of the s274 notice on Mr Beresford's appeal. In any case, Mr Page is not correct to characterise the Summary as simply referring to the legal description of, and record of title for, Sticky Forest. Rather, it also refers to the PDP's relevant planning maps. A check of those publicly available maps ought to have readily alerted a lay person to the fact that the submission concerned the land in issue. 'Sticky Forest' is what the land is colloquially called. On the other hand, the PDP maps more clearly and relevantly identify the land.

[67] In any case, the evidence clearly reveals that Bike Wanaka was aware of the fact that Mr Beresford was seeking residential rezoning of Sticky Forest from at least February 2017, and Bike Wanaka does not claim otherwise.

[68] In particular, Bike Wanaka hosted a public meeting on 14 February 2017. Mr Beresford explains that the meeting was attended by 400 people and was for the purpose of discussing "the issues of concern arising from" his submission. That meeting was facilitated by Bike Wanaka's deponent, Mr Telfer. It included panellists who asked and answered questions. These included Mr Beresford, QLDC officers including Chief Executive Officer Mike Theelan, and Mr Page. The meeting notes record that Mr Telfer specifically enquired as to Mr Beresford's rezoning submission and it was explained that this was to rezone it to Low Density Residential. The notes also indicate that the matter of access, its impediments to prospective development and the prospect of this being resolved, were specifically discussed.[41] The notes also record the following comments concerning recreational usage of Sticky Forest attributed to Mr Beresford:

> Looking to rezone and develop less than half. The southern half to be developed the northern half, from the area of Outstanding Natural Landscape to be kept as recreational. Mike would want to work with Bike Wanaka and Council to help keep the 'best bits' as is.

[69] I accept that Bike Wanaka may not have come to learn of those matters in time

41 Second affidavit of Mr Beresford sworn 8 June 2020, Annexure A.

to make a submission about them to QLDC in its plan review process. However, the evidence satisfies me that Bike Wanaka was informed of what Mr Beresford sought by his submission, well prior to when a s274 notice would have been due to have been filed.

[70] Indeed, the meeting notes reveal that Bike Wanaka was well briefed on Mr Beresford's related development intentions, including his wish to work with Bike Wanaka and QLDC on helping to "keep the 'best bits' as is".

[71] On these matters, I bear in mind that Bike Wanaka is established to represent cyclists' interests in the Lake Wānaka area. Furthermore its related aims and objects include liaising with landowners and QLDC and lobbying on such matters. As such, I infer that it was well positioned to stay abreast of the PDP processes, including in particular QLDC's decision on Mr Beresford's submission and appeal.

[72] In any case, Bike Wanaka does not claim that it did not file a s274 notice on time due to any lack of awareness of these matters.

[73] Turning to the reasons offered by counsel for Bike Wanaka, Mr Page's characterisation of QLDC's decision to decline Mr Beresford's submission as being "reliant in part on Sticky Forest being landlocked" is only partially correct. As I have noted, the hearing commissioners' report, on which QLDC based its decision, explicitly acknowledges the potential merit of residential rezoning (subject to a need for clarity as to the nature and location of legal access rights). Furthermore, Bike Wanaka ought reasonably to have known that the access issue was, in any case, remediable by recourse to the courts. Even if Bike Wanaka did not appreciate that to be the legal position, it is plainly recorded in the notice of appeal. As such, I find Bike Wanaka's assertion that it felt safe until it came to learn of a potential access agreement with an adjoining owner lacks credibility.

[74] In any case, it is well known that the Environment Court determines appeals de novo. Hence, a reasonable and well-informed organisation such as Bike Wanaka ought to have appreciated that it was not safe to rely on any assumptions as to the ability of Mr Beresford to secure access arrangements or how QLDC might conduct its case as respondent in the appeal.

[75] I am also mindful that none of those assertions through counsel are backed by

the evidence Bike Wanaka has called in support of its application. Without that evidence, for example, I do not know whether such matters were explicitly discussed amongst Bike Wanaka members or their leadership group or whether there was any process of discussion such as to inform any actual decision made by Bike Wanaka. Rather, they are simply put in submissions.

[76] I do not go as far as to characterise the reasons offered by Mr Page as disingenuous. However, I am not persuaded that they accurately or reliably represent what actually transpired in any decision-making by Bike Wanaka.

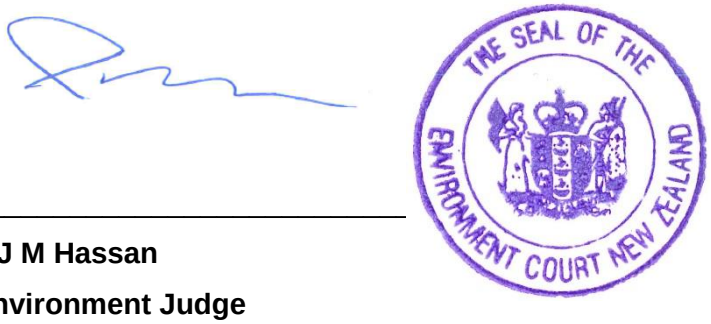
[77] The length of delay before Bike Wanaka filed its s274 notice is not itself fatal. Rather, it is the lack of any reliable justification or reason for doing so. Therefore, I find I do not have a proper basis for granting waiver and, in view of the prejudice that would ensue to Mr Beresford, decline the application.

[78] Insofar as there is any benefit in having Bike Wanaka expertise in the hearing, that can be realised by a witness being called by QLDC or Kirimoko (should either party elect to do so). In any case, there is not sufficient public interest benefit in that to overcome the reasons I have given for declining the application.

Outcome

[79] The Attorney's application for waiver is granted and he is joined as a s274 party to this appeal. Bike Wanaka's application for waiver is declined.

[80] Costs are reserved. Any application must be filed within 10 working days, any reply within a further 5 working days, and any final reply within a further 5 working days. Leave is reserved to seek amendment to that timetable.



J J M Hassan
Environment Judge