

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

Decision No. [2021] NZEnvC 117

IN THE MATTER of the Resource Management Act 1991

AND of an appeal pursuant to s 120 and a second application under s 116 of the Act

BETWEEN NGĀTI WHĀTUA ŌRĀKEI
WHAIA MAIA LIMITED

Appellant

(ENV-2019-AKL-016)

AND AUCKLAND COUNCIL

Respondent

AND PANUKU DEVELOPMENT

Applicant

Court: Alternate Environment Judge L J Newhook, sitting alone in accordance with section 279 of the Act

Consideration: On the papers

Date of Decision: 9 August 2021

Date of Issue: 9 August 2021

**DECISION OF THE ENVIRONMENT COURT REGARDING
CONTINUATION OF RESOURCE CONSENT**

A: Continuation of the Project permitted in accordance with the conditions attached to the Decision dated 31 January 2019 (LUC60318164) as modified by the Appendix to this decision.

B: This order shall remain in place until a decision has been issued on



Ngāti Whātua Ōrākei's appeal.

C: There is no order as to costs.

REASONS

Introduction

[1] A resource consent was sought and obtained¹ from Auckland Council by Panuku Development Auckland (**Panuku**) to expand Auckland's Westhaven Marina by extending the north-western breakwater and causeway (via land reclamation) to create public open space, a carpark area for public and private use, and access to new marina berths (**Project**).

[2] The consent was appealed by Ngāti Whātua Ōrākei Whaia Maia Limited (**Ngāti Whātua Ōrākei**). The basis of the appeal is in relation to mana whenua issues and the following parties joined the appeal under s 274 of the Resource Management Act 1991 (**Act**):

- a) Te Ākitai o Waiohū, Ngaati Whanaunga, Ngāti Tamaoho, Ngāti Tamaterā, Te Patukirikiri, and Ngāti Maru;
- b) Ngāi Tai ki Tāmaki;
- c) Te Ara Rangatū o Te Iwi o Ngāti Te Ata; and
- d) Ngāti Te Ata.

[3] On 20 March 2019 Ngāti Whātua Ōrākei, Panuku and Auckland Council (**Applicants**) made a joint application under s 116 of the Act for a determination in relation to commencement of the resource consent.

[4] That application was made on a cooperative basis as the s 274 parties supported

¹ On 31 January 2019.

most of the physical grant of the consent.

[5] On 27 March 2019 I approved commencement of the consent under s116 RMA with modifications to conditions.

[6] Resolution of the substantive appeal is taking time, a first jurisdictional question having been answered by this Court, appealed to the High Court and upheld, with preparation for what could be a lengthy substantive hearing now being approached by the Court and parties.

[7] In these circumstances the Applicants applied on 23 July 2021 for a further determination to allow continuation of further aspects of the project in terms of Appendix A to that application.”²

[8] The parties advised as follows³:

- (a) All parties have agreed to further interim amendments to the conditions to allow certain work to proceed prior to the Appeal being resolved and to confirm that certain work cannot proceed. The parties agree that the conditions can be amended as shown in Appendix A, including the addition of the new Schedule 1 to the conditions and a new Advice Note 2.
- (b) All section 274 parties have confirmed that they do not oppose the section 116 application and signed the Joint Memorandum dated July 2021 to record the same, except for counsel for Ngati Te Ata (not responded).
- (c) There is no prejudice to any party if the continuation is allowed, as the Appeal is limited and does not oppose the granting of the resource consent. Appendix A however identifies the 'Stage 2' works that cannot be undertaken without prejudicing the appeal.
- (d) Allowing the commencement of 'Stage 1' Works will serve the purpose of the RMA and enable Eke Panuku to continue with the construction of the Project.

² Joint Application, paragraphs [4] to [8].

³ Paragraph [9(g) to (j)].

Consideration

[9] Section 116 of the Act authorises the Court to suspend a condition providing it is not the core of or essential to the resource consent.⁴

[10] In *Walker v Manukau CC*⁵ it was confirmed that there are two tests under s116(1):

- a) Whether allowing the consent to commence pending an appeal will serve the purpose of the Act; and
- b) Whether prejudice arises from either allowing or disallowing the consent to commence.

[11] The *Walker* tests were applied in *Armstrong v Central Otago DC*⁶. There, the Court ordered the commencement of a consent despite the wording of two conditions remaining unresolved, because those conditions did not go to the core of the decision.

[12] In applying the above tests, allowing the consent will serve the purpose of the Act as Ngāti Whātua Ōrākei and the other parties do not consider any ability to pursue the appeal will be prevented or constrained by the continuation now sought. In these circumstances, this is a practical solution to the existing situation while ensuring that the parties' positions are preserved on appeal.

[13] The Applicants and the parties have submitted in their joint memorandum⁷ that there is no prejudice to any party if the continuation is allowed, as the appeal is limited and does not oppose the granting of the resource consent.

[14] The application was premised on the basis that further 'temporary' amendments are made to certain conditions of the resource consent, which conditions are particularly referred to in Ngāti Whātua Ōrākei's appeal.

⁴ *Warren Fowler Ltd v Manukau City Council* C029/99 at [37].

⁵ *Walker v Manukau CC* EnvC C106/99.

⁶ *Armstrong v Central Otago DC* EnvC C132/09.

⁷ At para [9(i)].

Decision

[15] I conclude that it is appropriate to allow commencement of the Project in accordance with the conditions attached to the Decision dated 31 January 2019 (LUC60318164) temporarily amended as specified in Appendix A including new Advice Note 2.

[16] This order shall remain in place until a decision has been issued on Ngāti Whātua Ōrākei's appeal.

[17] Under s 285 of the Act, there is no order as to costs



L J Newhook

Alternate Environment Judge



APPENDIX A

The following amendments to the conditions of consent LUC60318164 are to be adhered to until the appeal by Ngati Whatua Orakei Whai Maia Limited is resolved (additions shown underlined).

New Advice Note 2: The addition to Condition 15. Condition 15A and Schedule 1 will operate on an interim basis, pending resolution of the appeal in ENV-2019-AKL- 00016. During this interim period, the Stage 1 Works described in Schedule 1 may be undertaken, but the Stage 2 Works described in Schedule 1 may not.

15. The consent holder shall operate in accordance with the PMRKEP except when undertaking the 'Stage1 Works' described in Schedule 1.

15A Procurement and design of Stage 1 Works described in Schedule 1 may be undertaken without engaging with (mana whenua / the groups identified in condition 10(c)). however, the consent holder agrees to:

_____ (a) Update (mana whenua / the groups identified in condition 10(c)j on progress with Stage 1 Works through the PMRKEP Forum referred to in condition 10(a): and

_____ {b) Provide regular updates on Stage 1 Works to any (mana whenua / the groups identified in condition 10(c)j on their request and outside of the PMRKEP Forum referred to in condition 10(a).

*New Schedule 1 to Conditions of
Consent Description of Stage 1 Works and
Stage 2 Works*

Stage 1 Works: The consent holder may proceed with the following works under the (Date 2021) Commencement Order:

1. Identify the appropriate location for the Starters Box (see the photos attached at

Figure 1 and Figure 2 below)

(a) The consent holder expects the Starters Box to move approximately 130 metres on the seaward side of the reclamation.

(b) The consent holder agrees that the location of the Starters Box may need to be moved in order to provide for the physical

expression of cultural identity through the Stage 2 works.

2. Identify the appropriate crossing point for the board walk along the southern / Marina side to the public open space
 - (a) The consent holder agrees that the location of the crossing point may need to be amended in order to provide for the physical expression of cultural identity through the Stage 2 works.

3. Detailed design of the car park layout, finish and associated infrastructure including the stormwater devices/ rain garden
 - (a) The consent holder agrees to provide updates on the detailed design to any Imana whenua / the groups identified in condition 10(c) that requests updates.
 - (b) The consent holder agrees that the associated infrastructure may need to be amended in order to provide for the physical expression of cultural identity through the Stage 2 works. however any such amendments will not include the relaying of the car park finish.

4. Future proof edge treatment (i.e. raised curb) of the carpark to integrate with the public open space
 - (a) The consent holder agrees that the edge treatment may need to be amended in order to provide for the physical expression of cultural identity through the Stage 2 works.

5. Enabling work to provide a temporary space for public prior to Stage 2 works commencing
 - (a) The public open space, as identified in Stage 2, may be contoured and grassed to enable public use in the interim period before Stage 2 Works are undertaken following an interim opening at (c).
 - (b) The temporary works may include installation of basic public amenities including temporary seating, rubbish bins and balustrades to make the space functional and safe.
 - (c) The consent holder agrees that the groups listed in condition 10(c) will be invited to conduct an interim opening and site blessing for the

temporary public open space. A formal opening will not occur until the Stage 2 works are complete.

- (d) The consent holder agrees not to organise, communicate/promote or otherwise allow or encourage any public events in the temporary public space. For the avoidance of doubt, this does not preclude spectators of yacht racing events organised by the Royal New Zealand Yacht Squadron from using the temporary public space in an informal manner following the interim opening at (c).

The consent holder agrees these temporary works will be removed as necessary to provide a 'clean slate' for the design and construction of Stage 2 Works.

Stage 2 Works

The consent holder may not undertake any of the following works until the Appeal ENV-2019-AKL-00016 is resolved:

6. Removal of temporary landscaping/design elements installed in Stage 1 (Item 1(a) and (b) in Stage 1 Works)
 - (a) Any required removal to provide a 'clean slate' for the design and construction of Stage 2 Works.

7. Procurement of iwi artist to work with the consent holder's design team in designing the Public Open Space
 - (a) Procurement is to be undertaken in accordance with the process outlined in the final consent conditions.

8. Detailed design of landscaping within the public open space
 - (a) Design work is to be undertaken with mana whenua input, in accordance with the process outlined in the final consent conditions.

9. Preparation of maintenance plan for the public open space

10. Identification of public amenity features as part of the Public Open Space

11. Adhere and work to fulfil requirements under Condition 27
12. Any other requirement that is outlined through the final consent conditions