

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 160

IN THE MATTER OF

an appeal under s 120 of the Resource
Management Act 1991

BETWEEN

TE MANA MOANA O NGĀTI
IRAPUAIA TRUST

(ENV-2023-AKL-000079)

Appellant

AND

BAY OF PLENTY REGIONAL
COUNCIL

Respondent

AND

ŌPŌTIKI MARINA AND
INDUSTRIAL PARK LIMITED

Applicant

Court: Environment Judge D A Kirkpatrick sitting alone under s 279 of
the Act

Hearing: On the papers
Last case event: 19 July 2023

Date of Decision: 4 August 2023

Date of Issue: 4 August 2023

DECISION OF THE ENVIRONMENT COURT

A: The application for waiver is granted.

B: Ngāi Tamahaua is joined as a s 274 party to the appeal.



REASONS

Introduction

[1] On 23 June 2023, Te Mana Moana o Ngāti Irapuaia Trust (**Ngāti Ira hapu**) lodged an appeal against a decision of Bay of Plenty Regional Council granting resource consent to Ōpōtiki Marina and Industrial Park Limited to construct a new marina and industrial park on land at 1631 State Highway 2, Ōpōtiki.

[2] The s 274 party notice period ended on 17 July 2023. A total of five parties filed notices to join this appeal under s 274 RMA, namely:

- (a) Ngāi Tamahaua;
- (b) Ngai Tamahaua Hapu Committee;
- (c) Ngāti Ngāhere;
- (d) Ngāti Patumoana; and
- (e) Whākatōhea Māori Trust Board.

Application for waiver of time

[3] The s 274 notice of Ngāi Tamahaua was filed with the Court on the morning of 18 July 2023. The notice was one day out of time. Accordingly, Ngāi Tamahaua filed an application for a waiver of time under s 281 RMA.

[4] The waiver is sought on the grounds that:

- (a) the delay in filing the notice was minor; and
- (b) no party will be unduly prejudiced by granting the waiver.

The parties' responses to the application

[5] Ngāti Ira hapu will abide the decision of the Court.

[6] Bay of Plenty Regional Council does not oppose the waiver application.

[7] Ōpōtiki Marina and Industrial Park Limited consents to the Court granting the application for waiver.

[8] Ngai Tamahaua Hapu Committee appear to oppose the application for waiver of time, stating: “Acceptance of the s 274 filings by the clients of Messrs Pou and Ulrich would seem to run against the Court’s recent decisions on lateness. I note that the filing on that matter is 5pm apopo.”

[9] No comment was received from Ngāti Ngāhere, Ngāti Patumoana, and Whākatōhea Māori Trust Board.

Section 281 of the Act

[10] Under s 281(1)(a)(iia) 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:

281 Waivers and directions

- (1) A person may apply to the Environment Court to—
 - (a) waive a requirement of this Act or another Act or a regulation about—
 - ...
 - (iia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings; or
 - ...
- (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.

[11] 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).¹

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

Discussion

[13] In considering the first part of the test, I must determine whether there is any undue prejudice to any party in granting the waiver. Undue prejudice means prejudice greater than that which would necessarily follow in every case from granting a waiver.²

[14] Having considered Ngai Tamahau Hapu Committee's objection to the waiver being granted, I am not satisfied that it addresses how the Committee would be unduly prejudiced by Ngāi Tamahau joining the appeal. Although I acknowledge the objection, that in itself is not enough to meet the threshold of the test that joining the party would be unduly prejudicial. Previous decisions of the Court are not simply to be treated as firm precedents: while previous decisions can offer guidance, every case, including every application for a waiver, must be considered in its own context and on its own merits.

[15] In this case, the length of the delay in filing has been minimal; one working day late. Given the shortness of the delay I cannot see how the granting of the waiver could prejudice any other party.

[16] There being no undue prejudice established, I turn to the second part of the test which is whether the application for waiver should be granted on its merits.

¹ *Shirtcliff v Banks Peninsula District Council* EnvC C17/99, 19 February 1999.

² *Reilly v Northland Regional Council* (1992) 2 NZRMA 414.

[17] In *Omaha Park Ltd v Rodney District Council*^B a number of guideline criteria for the granting of a s 281 waiver in relation to new parties were established. These included what has happened in the proceeding in the meantime and what effect introducing new parties might have on progressing the appeal to resolution.

[18] In this case, on 12 July 2023 the Court issued case management directions directing that the parties advise by 24 July 2023 whether they are agreeable to Court-assisted mediation. Ngāi Tamahaua filed the s 274 notice on 18 July 2023. The s 274 notice was therefore filed before parties had to respond to the case management directions. All parties confirmed they are agreeable to mediation either by email or within their s 274 notice. No further actions have been taken on this appeal.

[19] I find that the delay is of no real moment given the stage of the proceeding, where a referral to alternative dispute resolution or timetabling directions for evidence exchange have yet to be made. I do not consider Ngāi Tamahaua joining the proceeding as a s 274 party will negatively impact the progress towards resolution of this appeal.

[20] I am satisfied there is no reason to decline the waiver application.

Decision

[21] The application for waiver is granted.

[22] Ngāi Tamahaua is joined as a s 274 party to the appeal.



D A Kirkpatrick
Environment Judge

