IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2023] NZEnvC 216

IN THE MATTER OF	an appeal under s 120 of the Resource Management Act 1991
BETWEEN	ISOBEL ESTHER CURRIE and BEVAN PHILIP CURRIE (ENV-2021-WLG-000040) Appellants
AND	PALMERSTON NORTH CITY COUNCIL Respondent
AND	TOLLY FARM LIMITED (trading as SOUL FRIEND PET CREMATIONS) Applicant

Court:	Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing:	In Chambers at Wellington (on the papers)
Last case event:	28 April 2023
Date of Decision:	10 October 2023
Date of Issue:	10 October 2023

DECISION OF THE ENVIRONMENT COURT
AS TO COSTS

A: Costs awarded

REASONS

Introduction

[1] This costs decision arises in respect of an application made by a party (initially) described as Soul Friend Pet Cremations (the Applicant) which sought resource consent from Palmerston North City Council (the Council) to establish what was described in the application documents as being … "operation of a pet cremations business, memorial garden open to the public to visit, woodworking workshop, and spray booth for urn finishes on land zoned Rural". The land subject to the application was at 94 Mulgrave Street, Ashhurst (the Site).

[2] The Appellants (Isobel Esther Currie and Bevan Philip Currie) are mother and son. Mrs Currie owns a parcel of land at 83 Winchester Street, Ashhurst, which adjoins the Site. The Appellants jointly undertake activities on this land which is currently also in the Rural zone. Half of the Appellants' land is used as a wholesale plant production nursery and half for livestock grazing. The Appellants have been involved in discussions with the Council over several years about the potential rezoning of their land for residential use. Their concerns were that if their land is rezoned Residential as they envisaged:

- The proposed crematorium and workshop would generate adverse noise and visual effects on them and future residents;
- The Applicant's proposal would be a strategically disorderly development which would frustrate the release of their land for development.

[3] The Court issued three decisions in these proceedings:

- The first was a jurisdictional decision dated 17 March 2022 addressing the Appellants' contention that the Applicant had not made a valid

application for resource consent;[1]

- The second was a merits decision on the application dated 9 March 2023, dismissing the Appellants' appeal;[2]

- The third was a decision dated 28 April 2023 approving conditions applicable to the consent which the Court directed the parties to discuss and agree on at the time of issue of the merits decision.[3]

Costs were reserved on all three decisions. Both the Applicant and the Council have sought costs awards against the Appellants.

The Jurisdictional Decision

[4] The jurisdictional decision arose because the Applicant's planning advisor had prepared and lodged the application for resource consent which described the Applicant as being "Soul Friend Pet Cremations", the trading name used by a limited liability company called Tolly Farm Ltd. The Appellants' notice of appeal contended that the application for resource consent was "invalidly made" because no legal person called Soul Friend Pet Cremations actually existed and the application was accordingly void ab initio. The Appellants sought an initial determination by the Court on this matter. The Court found that the application was validly made, a finding upheld by the High Court on appeal. The appeal then went to hearing on the merits.

The Merits Decision

[5] Insofar as issues of noise and visual effects of the proposal on future use of the Appellants' adjoining land was concerned, other than ensuring that appropriate conditions were imposed to control such effects (which were not seriously in dispute) these matters were of no determinative consequence in our decision.

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1 *Currie v Palmerston North City Council* [2022] NZEnvC 32.
2 *Currie v Palmerston North City Council* [2023] NZEnvC 37.
3 *Currie v Palmerston North City Council* [2023] NZEnvC 74.

[6] The strategic planning issue arose out of the Appellants' contention that development of the type proposed by the Applicant on land identified in Council documents as being required for future residential development would be bad administration. The Appellants claimed that allowing this proposal would sterilise the Site and would compromise work being undertaken by the Council to meet housing capacity bottom lines. The Court rejected those contentions for reasons which will be briefly addressed further in this decision.

The Applicant's Costs Application

[7] Costs were reserved on the issue of each of the decisions. The Applicant sought total costs award of $63,017.89 being 100 per cent of its costs (GST exclusive) in respect of the jurisdictional decision and in respect of noise and visual effects evidence which it was required to provide in respect of the merits aspect of the decision and 66 per cent (GST exclusive) in respect of its costs for the remaining aspects of the merits hearing.

[8] The Applicant's costs submission referred to the guide as to costs awards contained in the Court's Practice Note 2023 and in particular to the factors identified at clause 10.7(j) of the practice note, including:

- Arguments advanced by the Appellants were without substance;
- The Appellants conducted their case in a way that unnecessarily lengthened the case management process and hearing;
- The Appellants failed to explore reasonably available options for settlement rejecting several such offers by the Applicant;
- The Appellants took a technical and unmeritorious point and failed;
- The Appellants required the Applicant to prove facts which the Appellants should have admitted.

[9] The Applicant described the Appellants' case on the jurisdictional matter as "blatantly technical and lacking in merit".[4]

[10] The Applicant gave a detailed description of offers which were made by it in an attempt to settle proceedings. It described those offers as "manifestly reasonable (indeed generous)".[5]

[11] The Applicant submitted that it was put to proof on issues of noise and landscape which were in essence uncontested, with the Appellants' planner acknowledging that these issues did not provide a basis to decline the application. It referred to the Court's finding that … "none of the evidence we heard established that the proposal would prevent future Residential rezoning and development on the Appellants' land".[6]

[12] The Applicant contended in summary that the Appellants' case lacked any substance or merit and represented a clutching at straws approach rather than a responsible and proportionate one.

The Council Costs Application

[13] The Council sought a costs award totalling $58,464.11 made up as follows:

- $5,305.37 being full recovery of legal costs incurred by the Council relating to determination of the preliminary legal issue;
- $28,784.71, being full recovery of landscape ($16,999.51) and noise ($11,785.20) expert witness costs incurred by the Council following the failure of mediation;
- $24,374.03, being half recovery of expert planning ($9,487.50) and legal costs ($39,260.55) incurred by the Council from failure of mediation to resolve the appeal until the filing of closing submissions by the Council.

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4 Applicant's costs submissions at [16].
5 Applicant's costs submissions at [22].
6 *Currie v Palmerston North City Council* [2023] NZEnvC 37 at [111].

[14] The Council noted that the total sought by the Council represented 71 per cent of its total costs. The Council submitted:

> [4] The Council seeks costs on the basis that it was a successful respondent in this case and a costs award would be appropriate. As to quantum (in summary):
>
> (a) full legal cost recovery is appropriate in respect of the hearing of the preliminary legal issue, in which the applicant unsuccessfully argued a purely technical and unmeritorious issue, which involved no prejudice to the appellants;
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> (b) The Council was unnecessarily put to the cost of calling technical evidence on the topics of noise and landscape effects, and its experts were unreasonably required to attend the hearing for cross-examination;
>
> (c) Except as above, [increased costs] are appropriate here in relation to a proceeding where the appellants case was unfocussed as to key issues, and overall lacking in merit.

[15] The Council referred to the principles as to costs which have been identified in decisions of this Court over a long period of years and referred to the various matters identified in the Practice Note 2023. It contended that:

- The jurisdictional matter involved arguing an unnecessary and technical point and that having chosen to challenge the validity of the resource consent application in the way they did, the Appellants ought bear the full costs of doing so;

- As did the Applicant, the Council understood that noise and landscape were contested issues when in fact they were not. The Appellants did not brief witnesses on these topics and (as noted previously) their planner acknowledged that the effects of the proposal overall were no more than minor. It challenged the necessity of having to call witnesses on these topics.

[16] The Council referred to the belated emergence of what was referred to as the strategic planning element of the Appellants' case, including legal issues arising out of interpretation of the National Policy Statement on Urban Development 2020 and the Council's "spatial plan" from its long-term plan.

[17] The Council contended that if the Court found that it was the case that reasonable settlement offers were made by the Applicant and rejected by the Appellants that was a factor relevant to an award of costs to it.

The Appellants' Response

[18] The Appellants accepted that a costs award was justified but submitted that the appropriate costs award was between 25-33 per cent of actual costs incurred.

[19] The Appellants disagreed with the proposition that the other parties were put to the costs responding to a spurious jurisdictional matter. They contended that it was necessary to determine a fundamental issue as to whether or not a resource consent had been validly granted and disputed that they failed on a technical and unmeritorious point. They contended that the argument advanced by them that the term "person" did not apply to a trading name was entirely reasonable but acknowledged the finding made by the Court (and the High Court) that it was "permissible" to consider the entirety of an application to ascertain the identity of Applicant.[7]

[20] Insofar as the matter of noise and landscape witnesses were concerned, the Appellants acknowledged that they did not call contrary evidence to those witnesses. The Court notes that an initial indication was given that such witnesses would not be cross-examined. That indication was changed by the Appellants who contend that it was necessary for them to test the expert witness to provide clarity on matters of noise and landscape conditions. The Appellants contended that the noise and landscape witnesses "clarified a number of matters for the Court".[8]

[21] The Appellants contended that submissions about negotiation and settlement offers should be disregarded in this instance.

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7 Appellants' submissions at [29].

8 Appellants' submissions at [38].

The Applicant's Reply

[22] In its reply memorandum, the Applicant referred to the finding in the High Court regarding contended technical defects in the initial application.

[23] The Applicant referred to the Appellants' contentions that the Appellants required to question the Applicant's witnesses on noise and landscape "to educate the Court and Council". It suggested that if they considered that the Court needed educating the Appellants could have called their own witnesses to do so. Having chosen to rely on the Applicant's witnesses to educate the Court rather than produce their own, they should bear the witness costs.

[24] The Applicant referred to settlement negotiations and says that the provision of a buffer zone which apparently formed part of those negotiations was raised for the first time two working days before the hearing. It contended that this was never an outcome available under the appeal and that the Appellants would have been better off under any of the settlement offers made by Ms Morrison (the Principal of the Applicant) than they were under the Court's decision.

[25] In conclusion, the Applicant contended:

> 18. This is not simply a case where the appellants were unsuccessful as *"a natural consequence of litigation"* but because their position on both the interlocutory and substantive proceeding were fundamentally flawed and lacking in merit. In short, Soul Friends should not have had to incur the costs it did to defend the consent properly granted by the Council. It is appropriate that the appellants make the contributions to costs sought by Soul Friends.

Discussion

[26] The issues pertaining to costs on both the jurisdictional and merits decisions come down to (largely) indisputable and easily identified considerations.

[27] In the jurisdictional decision the Court identified that the determinative legal issue was whether the application for resource consent was actually made by a "real" person and found that the identity of that real person could be ascertained from a close reading of the application documents. Appendix E of the application was a management plan identifying that Tolly Farm Ltd operated (inter alia) a cremations division under the name Soul Friend and was lessee of the existing Soul Friend cremation premises then operating at 80 Tennent Drive, Palmerston North. Tolly Farm Ltd is a NZ registered limited liability company and is indisputably a real person who/which was able to make the application for resource consent.

[28] Having reached the conclusion above this Court did not go any further and seek to determine whether or not the contended jurisdictional failure might be remedied by exercising the Court's discretionary powers. It was not necessary for it to do so in light of that initial finding. The Appellants appealed this Court's decision to the High Court.

[29] The Appellants had contended (in summary) that Appendix E was not a document which could be used to identify the Applicant. The High Court found that the correct approach was to have regard to all of the application documents (including Appendix E) in their entirety as the Environment Court had done.

[30] In their costs submissions the Appellants contended that there was a dearth of authority on the point which they had raised and that the Environment Court and the High Court had clarified that it was permissible to consider the entirety of an application in order to ascertain the identity of an applicant. In my view this was not a point which required any clarification in the first place. I note the finding in the High Court that it had "… no difficulty in accepting as a matter of statutory interpretation that the application is properly understood as being all the material provided".[9] It is difficult to imagine any logical basis to contend otherwise.

[31] The Appellants' case on the jurisdictional issue involved advancing arguments which were without substance and taking a technical or unmeritorious point. The

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9 *Currie v Palmerston North City Council* [2022] NZHC 2909 at [42].

Appellants sought a preliminary hearing on that matter. Having failed on this issue it is appropriate (if not inevitable) that they should meet the costs of the other parties in having to participate in that process. As the Court noted "…determining the application to be void would be a significant triumph of form over substance".[10] The Appellants' failure was so egregious as to warrant full reimbursement of the other parties' costs regarding this aspect of the appeal.

[32] Turning to the merits case, there are two separate issues to be determined in terms of costs:

- The first is costs incurred by the Applicant and the Council due to having to call their noise and landscape witnesses at the hearing;

- The second relates to wider costs of the hearing.

[33] Insofar as the costs of the noise and landscape witnesses are concerned, these witnesses were called at the direct request of counsel for the Appellants who claimed that it would be an unfair process and contrary to the Bill of Rights should the witnesses not be made available for cross examination.

[34] The Appellants' questioning of the witnesses did not advance their case in any respect. The Appellants acknowledge that no contrary evidence was called by them but contend that does not render the evidence of the witnesses as being unnecessary. It was contended that they were questioned to provide clarity on matters of noise and landscape, that their evidence was utilised in the advancement of the strategic planning argument and served to educate the Court and Council.

[35] None of these contentions are correct. The witnesses' evidence established that noise and landscape effects of the proposal would not impede residential development on the Appellants' property should identified conditions be imposed. The Court had pre-read the witnesses' statements which were not controverted in cross-examination, were consistent with the Court's experience in these matters and the observations made by the Court during its Site visit. The Appellants' planning

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10 Jurisdictional decision at [15].

advisor acknowledged that the proposal would not preclude or interfere with residential development on the Appellants' property.

[36] I find that evidence of the noise and landscape witnesses did not advance the Appellants' case in any way and did not assist in educating the Court on these topics (to the extent that it might be considered that the Court needed education on matters of noise and landscape - topics with which it is very familiar). Requiring these witnesses to be called ipso facto unnecessarily lengthened the hearing and imposed unnecessary costs on other parties. It is appropriate that the Appellants meet the full costs of calling these witnesses.

[37] Turning to the merits decision itself, the heart of the Appellants' case on merits related to contentions which they advanced as to the wider planning consequences of approving the application on strategic planning to advance residential development in the district. The strategic planning issues were summed up in these terms in the Court's decision.

> [96] The heart of the Appellants' concerns on the strategic issue can be summarised in these terms:
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> - Objective 1 and Policy 1.1 are of particular significance and elevated in our considerations because they implement national and regional policies and are reinforced by the need to meet housing capacity bottom lines that cannot be achieved if peri-urban locations are used for incompatible activities. The Appellants submit that the force and weight of policy supporting the strategic imperatives of the Rural Zone is explained in *King Salmon*, with the factors: the particularity of the policy in the hierarchy of instruments, the text and strength of the direction and the RMA, Part 2 provenance.
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> - The Appellants' land and part of the Applicant's land has been identified in Council strategies as potentially suitable for future urban growth for residential purposes;
>
> - The Applicant's proposal constitutes an urban activity whose expansion onto rural land is incompatible with the Council's need to meet housing capacity bottom lines;
>
> - The Appellants contended that … "It would be bad administration for non-rural activities to establish in that locality of the type proposed and thereby sterilise or compromise the considerable work being undertaken by the Council as part of its implementation of its strategic planning to increase housing

> capacity. Put simply, the Council can't make individual consent decisions of the type it has in Ashhurst and expect its policy to coherently be applied elsewhere".
>
> (footnotes omitted)

[38] For the purposes of discussion the Court accepted a number of debateable contentions and assumptions made on behalf of the Appellants regarding propositions that the proposal constituted urban expansion onto land which had been adequately identified in the Council's strategic planning documents for future residential use and that such use would be established.

[39] The Court made the following findings as to the impact that allowing the proposal might have on the strategic planning issue.

> ***Finding***
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> [113] In summary, we find on the strategic planning issues:
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> - Allowing the application does not prevent or interfere with future Residential rezoning and development of the Appellants' land;
> - The Proposal does not preclude the potential future use of the Applicant's land for urban purposes nor prevent its rezoning for Residential development;
> - The Proposal is reversible, involving a rural type building which could be removed or otherwise used and readily removable equipment;
> - The Proposal does not generate any effects from which the current rural land requires "protection". Should some future land owner wish to proceed with Residential development on the site it remains available for that purpose;
> - Categorising the crematorium activity as either rural or urban does not make any difference to our findings.
>
> For these reasons the Proposal is not contrary to either Objective 1 or Policy 1.1. when considered in the strategic context.

[40] In short, even accepting all of the various propositions which the Appellants advanced as to strategic planning etc, they failed to establish on a factual basis how allowing the proposal might in some way frustrate the Council's long-term planning intentions by preventing, interfering with or precluding future residential use of either the Appellants' or Applicant's land. That should have been a basic component of the

case which the Appellants advanced for the Court to consider. The Appellants' failure to adequately address that basic issue was so integral to the outcome of these proceedings as to bring its case into the advancing arguments without substance and/or the taking of technical or unmeritorious points categories. Costs ought be awarded accordingly.

[41] The Applicant seeks costs on the merits case (excluding costs for the noise and landscape witnesses where full recovery was sought as previously discussed) at the rate of 66 per cent of the remainder. The Council seeks recovery of one half of its legal and planning costs. Having regard to the matters discussed above costs should be awarded accordingly.

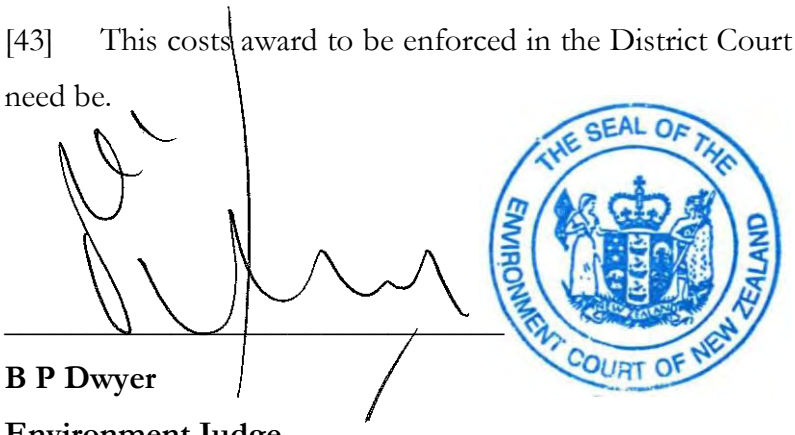
Outcome

[42] Isobel Esther Currie and Bevan Philip Currie are jointly and severally ordered to pay:

- Tolly Farm Ltd, the sum of $63,000;
- Palmerston North City Council, the sum of $58,400 –

in reimbursement of costs incurred by them in these proceedings.

[43] This costs award to be enforced in the District Court at Palmerston North if need be.



B P Dwyer
Environment Judge