IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAURAU

Decision No. [2023] NZEnvC 248

IN THE MATTER OF	an appeal under clause 14(1) of Schedule 1 to the Resource Management Act 1991 against a decision on Proposed Plan Change 21 to the Auckland Unitary Plan
BETWEEN	EDEN-EPSOM RESIDENTIAL PROTECTION SOCIETY INCORPORATED (ENV-2020-AKL-079) Appellant
AND	AUCKLAND COUNCIL Respondent
AND	SOUTHERN CROSS HOSPITALS LIMITED Requestor
AND	KĀINGA ORA – HOMES AND COMMUNITIES s274 Party
AND	TUPUNA MAUNGA O TAMAKI MAKAURAU AUTHORITY s274 Party

Court: Alternate Environment Judge L J Newhook

Hearing: On the papers
Last case event: 9 November 2023

Submissions: B Tree and H Noone for Southern Cross Hospitals Limited
J Caldwell and N Summerfield for Kāinga Ora
D Hartley and A Buchanan for Auckland Council
M Savage for Eden Epsom Residential Protection Society Incorporated

Date of Decision: 14 November 2023

Date of Issue: 14 November 2023

DECISION OF THE ENVIRONMENT COURT ON RECUSAL APPLICATION

A: The recusal is refused.

B: Subsequently however, the Chief Environment Court Judge has granted my request to be released from the case for reasons which appear at the end of the decision.

REASONS

Introduction

[1] Southern Cross Hospitals Limited ("Southern Cross") and Kāinga Ora, have made a formal application to this Court that I recuse myself from hearing this proceeding on reference back from the High Court. The Environment Court's Recusal Guidelines require that the Judge against whom recusal is sought make the decision after receiving submissions and/or affidavits from the parties. (This is a feature of the Recusal Guidelines of all Courts in New Zealand, each having been settled between the relevant Court's head of bench and the Chief Justice).

[2] In April 2022, a panel of this Court presided over by me, issued a decision overturning a decision of council hearing commissioners, and refusing a request by Southern Cross for a plan change (**PC 21**) to rezone land in and around a hospital it owns and operates in Epsom, Auckland[1]. The proceeding before us was an appeal by Eden-Epsom Residential Protection Society Incorporated ("**the Society**").

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[1] *Eden-Epsom Residential Protection Society Incorporated v Auckland Council* [2022] NZEnvC 060.

[3] On appeal by Southern Cross Hospitals, the High Court referred the case back to the Environment Court for re-hearing[2].

[4] One issue in the cases before the High Court and this Court, was the application in the circumstances of PC21, of provisions of the National Policy Statement on Urban Development 2020 ("**NPS-UD**").

[5] Subsequent to the decision of this Court, Auckland Council promulgated a plan change, PC78, for the purpose of implementing the NPS-UD among other things. PC78 is an instrument providing for residential intensification across many parts of urban Auckland.

[6] In a judicial telephone conference about timetabling of preparation for the re-hearing, I told counsel the following: that I, along with 10 others (neighbours in an inner-city suburb – not Epsom), had lodged a submission against some aspects of PC78 in our suburb; and that we later lodged a further submission supporting some prime submissions and opposing others.

[7] The present applicants shortly afterwards approached me through the Registrar, suggesting I recuse. I considered matters in detail and advised them I maintained my earlier (then tentative) view I should not recuse, and saying that if they wished to pursue the request, they should make a formal application. The subsequent formal application and supporting inputs, has seen Kāinga Ora appear to take the lead.

[8] The content and nature of those PC78 submissions (and another to which I was not a signatory) are the subject of the recusal application and submissions by all parties. In summary by way of introduction (more discussion below), the applicants contend that there is a real possibility that my involvement in PC78 submissions would create a reasonable apprehension of bias to a fair-minded objective and fully informed observer. The recusal application is opposed by Auckland Council and the Society, who disagree with that contention.

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[2] *Southern Cross Hospitals Limited v Eden-Epsom Residential Protection Society Incorporated* [2023] NZHC 948.

The relevant submissions to PC78

[9] The unincorporated group of 11 lodged a prime submission (411) which I shall describe here in summary but with care, as opposing planning maps and overlays in a confined "enclave" of our inner-city suburb of Parnell driven by allegedly flawed mapping of "walkable catchments" there. The submission noted (and supported) some limited parts of PC78 including some explanatory notes and parts of the s32 report which it said offered good reasons for the opposition to the zonings.

[10] The submitters employed a surveyor's ranging wheel the results of which they said offered ground-truthing which had been missing from the council's preparation of the plan change in and around the enclave. In addition, they noted the presence of physical features such as significantly adverse topography and an arterial heavy transport route ("**modifying features**"), which made the measured distances (and the mapped distances) less than truly walkable. In consequence, they sought imposition of Residential: Low Density Zone in the enclave.

[11] The further submission (279) by the 11 supported some prime submissions and opposed others. Particular features of those opposed were requests to increase walkable catchment sizes and continuation of themes of the plan change criticised by them of employing blanket sizes without engaging any modifying features. While in the schedule to the further submission their "summary of decisions requested" offered a generic summary/ description of the prime submission supported or opposed, the final column, headed "decision sought", together with reasons recorded in the penultimate column, confined matters to the enclave and distances for walking to it, and relevant necessary modifying features. One of the submissions opposed was by Kāinga Ora, No. 873.

[12] The applicants have characterised the submission and further submission as "*[giving] a strong view on the extent of walkable catchments, the appropriate methodology for determining Special Character values, and the appropriate application of the NPS-UD where matters of intensification and special character intersect'*.

[13] Submissions by the recusal applicants, focus on the "summary of decisions

requested" column in the further submission, but omit the narrowing of support or opposition in the penultimate and final columns of the schedule.

[14] Nine of the 11 lodged another further submission (256), opposing Kāinga Ora's submission 873 on broad policy grounds. I record that I knew they wished to do that, and with one of the others in the 11, refused involvement. Our two names are not on the further submission, and we had nothing to do with its drafting.

Recusal in the Environment Court

[15] The Recusal Guidelines provide that a Judge is disqualified from sitting if, in the circumstances, there is a real possibility that in the eyes of a fair-minded, objective and fully informed observer, the Judge might not be impartial in reaching a decision in the case. This will include instances where a Judge has a material interest in the outcome of the case but there may be other circumstances in which the appearance of bias arises.

[16] Aligning with recognised and settled case law[3] the Guidelines anticipate a two-step test, first of the circumstances relevant to the possible need for recusal because of apparent bias, and secondly whether those circumstances might lead to a reasonable apprehension that the Judge might decide the case other than judicially on its merits.

[17] The Guidelines require the Judge to consult with the Chief Judge of the Court. That has occurred in detail in this case, although the ultimate decision must be, and is, my own.

Application of the two steps

[18] The applicants assert that within step one, I have been seen to make submissions of quite a broad and general nature (geographically and in policy terms) about walkable catchments and the Special Character Overlay ("**SCAO**") in PC78. They stress something they call an "intrinsic link" between PC21 and PC78, and strongly submit

[3] See for instance the decision of the Court of Appeal in *Muir v Commissioner of Inland Revenue and another* [2007] NZCA 334.

about the character of further submission 279 in the manner I describe above in paragraphs [11] to [13] above.

[19] Within step two, the applicants discuss what the Supreme Court has described as constituting a "fair-minded, objective and fully informed observer"[4], as: "*intelligent, objective, neither unduly sensitive or suspicious nor complacent about what might influence a Judge's decision…non-lawyer but reasonably informed about the workings of the judicial system…as about the workings of the case and the facts pertaining*".

[20] In paragraphs 5.9 and 5.10 of the applicants' legal submissions, the theme of their complaint that the PC78 submissions were about walkable catchments and the SCAO in broad and general terms is maintained and amplified.

[21] The council and the appellant Society lodged submissions that were similar to each other, succinct, and in opposition to the recusal application. For the avoidance of undue repetition, I focus on those of the Society, which characterises submission 411 as being a dispute about calculation of walkable distances in Parnell, well removed from Epsom, with further submission 279 being tied back to the terms of submission 411. They expressly record that I was not a party to further submission 256.

[22] Of some note, the Society submits that the extent of walkable catchment will not be the main issue in the rehearing, quoting from reply evidence lodged by a planner called by Southern Cross Hospitals (the other recusal applicant), Daniel Shaw:

Debating the validity of a 1000m or 1200m walkable catchment is not a key issue because the sites are around 800m from the [Newmarket] Metropolitan Centre. Relevantly, Mr Bradley [Council witness] confirms he supports a walkable catchment of around 800m.

[23] The Society expressly records that it accepts that position.

[24] Out of care, I have checked the Society's submission by running a key-word-in-context search through the filed evidence, on the word "walk", as being likely to cast

[4] *Saxmere Company Limited and others v Wool Board Disestablishment Company Limited* [2009] NZSC 72 at [8].

a slightly wider net than "walkable catchment" or "walkable distance". The submission by the Society seems well borne out by the results of my search. Further, the substantive evidence makes little or no reference to modifying features, with general acknowledgment by some witnesses, not controverted, that the terrain around the Epsom property, and from Newmarket, is flat or of an easy grade.

The "fair-minded, objective and fully informed observer"

[25] Taking the description of such a person from the words of the Supreme Court in *Saxmere* quoted in my paragraph [19] above, I consider such a person would know their way around the workings of plans, plan changes, submissions and further submissions, including s32 reports in connection with them.

[26] Such a person would in my view, examine submission 411 and further submission 279 in the round and in proper context, and have no difficulty characterising them as the Society and the Council have succinctly done. Equally, such a person would not seek to draw my name into further submission 256, but if he or she happened to have 411, 279 and 256 open for comparison at the same time, would acknowledge without difficulty that 2 names are missing from the list of submitters in 256 compared with the other two documents.

[27] Such a person would I believe characterise submission 411 and further submission 279 as being based on their own narrow fact matrix and submitter concerns, and not being about NPS-UD policy. He or she would not consider them referrable to Epsom, or more generally across the district. Such a person would also likely know of the geographical separation of the two suburbs and would have knowledge of the physical (topographical) and other differences between them.

[28] I consider that such a person reading the recusal application and related materials would consider them to offer serious misdescriptions of the relevant PC78 submissions, whether by negligent omission (in the manner I have noted in paragraphs [11] to [13] above), or deliberately.

Conclusion concerning the recusal application

[29] My findings mirror what I have held a fair-minded, objective and fully informed observer would believe. I decide that I do not need to recuse.

Sequel to my decision not to recuse

[30] I have asked the Chief Judge to release me from presiding in the rehearing, and he has granted my request. I take this difficult step because I consider that the recusal application was so strained and distorted, as to be likely to negatively impact the atmosphere of the hearing if I were to preside. Plus, there have been some highly inappropriate "off the ball" actions by the applicants that have added to my feelings of great discomfort[5].

[31] I realise the irony of my being released from the case is that the applicants have obtained the outcome they sought, but other than by correct application of the law to the facts. That is unfortunate. The council and the Society had expressed concern that if I were to recuse, a longer hearing might result from a new Judge having to come up to speed. One could add that the concern might extend to a need for greater preparation time and possibly a longer timeframe until the case could be rostered in contrast to my former readiness to have it proceed early in the new year. The applicants (correctly) identified that lengthened hearing time is not a factor in the law concerning recusals. The same could be said of the other possible adverse consequences. Again, they are unfortunate, but in the circumstances unavoidable.

L J Newhook
Alternate Environment Judge

[5] I prefer not to go into detail about those actions, which were not such as I would expect of senior counsel, or indeed any counsel.