

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAU**

Decision [2023] NZEnvC 253

IN THE MATTER OF

appeals under Clause 14 of the First
Schedule to the Resource Management
Act 1991

BETWEEN

SEAPORT LAND COMPANY

(ENV-2023-AKL-083)

AND

PORT TARANAKI LIMITED

(ENV-2023-AKL-098)

Appellants

AND

NEW PLYMOUTH DISTRICT
COUNCIL

Respondent

Court: Environment Judge MJL Dickey

Last case event: 1 November 2023

Submissions: M Slyfield for Port Taranaki Limited
M Williams and A Cameron for Seaport Land Company Limited
H Harwood and S Hart for New Plymouth District Council
A Arthur-Young and N Ali for KiwiRail Holdings Limited

Date of Decision: 23 November 2023

Date of Issue: 23 November 2023

**DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY
DETERMINATION OF SCOPE ISSUES**



Seaport Land Company Limited v New Plymouth District Council

- A: The application by Port Taranaki Limited for a preliminary hearing on scope issues is declined.
- B: The proceedings are referred to mediation.
- C: Costs are reserved.

REASONS

Introduction

[1] These appeals challenge the decisions of the New Plymouth District Council on the proposed New Plymouth District Plan and concern the zoning of a parcel of land at 20 Hakirau Street (Part Lot 1 Deposited Plan 17360 and Section 1 Survey Office Plan 364519).

[2] Port Taranaki Limited (**PTL**) and Seaport Land Company (**SLC**) have each appealed the Respondent's decision to zone land owned by SLC as a bespoke Commercial Zone. PTL opposes the rezoning decision, whereas SLC supports the rezoning but seeks amendments to aspects of the provisions.

[3] PTL asserts that the decision to rezone the site exceeded the scope of the submissions and was not available to the Respondent. PTL seeks to have that jurisdictional issue resolved through a preliminary hearing.

[4] This decision is made on the papers and determines whether the issue of scope should be heard on a preliminary basis.

Background

[5] The land is no longer required for port activities and contains a disused coolstore.

[6] The land is part of the Port Zone. The proposed plan as notified retained this zoning.

[7] At the Council hearing, SLC sought a mixed use zoning for the site with a site-specific precinct including bespoke provisions (Ngā Motu Marine Precinct).

[8] PTL asserts that this was outside the scope of SLC's submission. The Independent Hearings Panel found that the outcome sought was within scope but it determined that the land should be zoned Commercial, with bespoke provisions for the site and an additional Precinct.

[9] SLC's appeal supports the decision to rezone the site Commercial but seeks to amend various aspects of the site-specific rules in the framework of the Ngā Motu Precinct. PTL's appeal opposes the rezoning of the site.

Scope issue

[10] PTL asserts that there is a preliminary issue of scope that needs to be determined because:

- (a) the outcomes sought by SLC before the Hearings Panel were not within scope; and
- (b) Council's rezoning decision was not within scope.

[11] PTL's challenge is not against the outcomes SLC is seeking in its appeal as such, but it raises jurisdictional flaws in the Council's processes. The focus is the Council's decision and the outcomes sought by SLC before the Hearings Panel. PTL contends that both of those exceeded what was reasonably and fairly raised in SLC's original submission. PTL submits that if the Court agrees that this process was out of scope the appeal is also out of scope.

Should the issue of scope be heard on a preliminary basis?

Parties' positions

Port Taranaki Limited¹

[12] PTL submits that it is more efficient to determine the scope issues on a preliminary basis, rather than subsume them within the appeal hearing. Its reasons are:

- (a) scope is a discrete matter that is able to be assessed separately from the wider merit-based questions raised by the appeals;
- (b) the evidence the Court requires to address the scope issue is not new, and is confined largely, if not entirely, to matters of record from the Council processes prior to the filing of appeals;
- (c) if the Court determines the scope issues in favour of PTL, that will dispose of the central issue in dispute between PTL and SLC, namely the appropriate zoning for the site, which would avoid the need for a full scale substantive hearing on that matter.

For completeness, PTL acknowledges that there is another matter in dispute between PTL and SLC aside from zoning, namely the location of the Inner Port Noise Control Boundary. PTL submits that if a preliminary decision on scope is determinative of the zoning dispute, that could also affect the noise boundary dispute; but even if the noise boundary dispute remains to be resolved, that is a matter that will turn on evidence confined to noise and planning; and

[13] PTL also made submissions on the role of s 293 RMA. The submissions were pre-emptive, arguing that the Court should be disinclined to view any process under s 293 as providing a way forward. It argues that the complexity of the provisions is

¹ Memorandum of Port Taranaki Limited, dated 18 October 2023.

high, not specifically sought in SLC's submission, that it is difficult to identify all those who might have an interest in the outcomes, and that the parties to the appeals do not represent all the parties with a potential interest.

Seaport Land Company Ltd²

[14] SLC submits a preliminary determination of scope would serve no useful case management purpose, be wasteful of the Court's and parties' resources, and would not be helpful to either expedite proceedings or avoid the need for a hearing.

[15] It submits the central issue as to the appropriate zoning was fairly and reasonably raised in its submission.

[16] SLC submits a preliminary ruling on scope would not dispose of the central matter in dispute; the matter of appropriate zoning for the site would remain at large.

[17] It submits the real issue is instead one of planning detail; which is the specific planning framework to implement the base finding of the Hearings Panel, that the requested rezoning was appropriate.

[18] In response to the issue of prejudice to potential interested parties in resolving that planning detail, SLC submits that PTL was directly involved as a party as were mana whenua and a number of oil companies with diverse respective interests in subsidiary issues raised by SLC's zoning request. These parties, along with KiwiRail, have joined the appeals under s 274 RMA.

[19] SLC submits that even if determined on the existing record, the argument on scope at the level of planning detail would be extensive. It would likely involve a "blow by blow" assessment of specific objectives, policies, development standards and other methods applied to the SLC site in their current form. It would also require consideration of the interrelated issue of the location of the Inner Control Boundary (**ICB**). SLC submits that significant Court and party time and resources would

² Memorandum of Seaport Land Company Ltd, dated 1 November 2023.

therefore be required to hear and determine scope as a preliminary issue.

[20] It submits the zoning and ICB location are inextricably linked. The question of scope over zoning (which is challenged) cannot be divorced from the ICB location (which is not challenged). This factor alone renders problematic preliminary determination of scope regarding the zoning.

[21] SLC submits it would be more efficient and reflective of established Environment Court practice to progress the appeal issues through case management including mediation, between the parties already involved.

[22] SLC submits that if a scope issue is identified with the detail of the planning framework in contention for the SLC site after case management and mediation, the Court can then consider whether to exercise its discretion to engage s 293 RMA. Scope is not necessarily determinative.

New Plymouth District Council³

[23] The Council opposes the request for a preliminary hearing on scope and submits that the appeals be managed towards mediation in the usual way.

[24] It notes it is motivated to achieve a set of provisions for the site that sees it being put to a positive use that contributes to New Plymouth. Crafting those provisions is the primary and substantive resource management issue between the parties. The Council is concerned that PTL's approach seeks to leave that discussion to another day.

[25] The Council is also concerned that the site will suffer from planning blight as the retention of the notified Port Zone provisions for the site would not reflect its likely future use. It would be an inefficient use of resources of this land to remain disused.

[26] The Council submits the most efficient way to achieve a set of provisions for

³ Memorandum of New Plymouth District Council, dated 1 November 2023.

the site is for the appeal to be managed in the usual way, and for the appeal to be allocated a fixture for mediation in the first instance to explore whether there is a set of provisions that the parties can agree to. To date the appellants, the Council and s 274 parties have not had an opportunity to have such a discussion.

[27] If full agreement cannot be achieved, the Council is optimistic that, at the very least, the issues between the parties can be refined so that the appeals can be disposed of in a single (and ideally, relatively confined) hearing. The Council submits that process would represent the most efficient use of the Court's limited resources, as well as the parties. It would also mean that if the disagreement on scope remains, that argument can be had in the context of a more refined dispute with the benefit of evidence which may assist the Court in understanding the context for the jurisdictional argument.

[28] The Council notes that a preliminary determination on scope would not resolve the appeals, the balance of SLC's appeal (at the very least) would need to be addressed.

*KiwiRail*⁴

[29] KiwiRail does not wish to be heard in relation to matters of scope raised by PTL but agrees it would be more efficient for all parties to determine that issue in advance of the substantive matters on appeal. KiwiRail therefore supports PTL's request to resolve the issue of scope by way of preliminary hearing.

Legal framework

[30] Section 278 RMA provides that the Environment Court has the powers of a District Court in its civil jurisdiction. Rule 10.21 of the District Court Rules 2014 states:

10.21 Orders for decision

The court may, whether or not the decision will dispose of the proceeding, make orders for—

⁴ Memorandum of KiwiRail Holdings Limited, dated 1 November 2023.

- (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
- (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[31] The Court in *Southland Fish and Game New Zealand v Southland Regional Council*⁵ summarised that the underlying purpose of the rule is to expedite proceedings by limiting or defining the scope of the trial in advance or obviate the need for a trial altogether.⁶

[32] The relevant factors for the Court to consider include:⁷

- (a) the delay in finally resolving the question;
- (b) the length of the hearing of the preliminary question;
- (c) whether a decision would end the litigation;
- (d) whether any subsequent hearing time would be shortened by disposing of the preliminary question; and
- (e) overall, balancing the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by the party opposing.

Discussion

[33] For the reasons outlined by SLC and the Council I am not minded to agree to the request for a preliminary determination.

⁵ [2015] NZEnvC 135.

⁶ *Innes v Ewing* (1986) 4 PRNZ 10.

⁷ *Southland Fish and Game New Zealand v Southland Regional Council* [2015] NZEnvC 135, at [7] – [8] relying on *Accident Rehabilitation & Compensation Insurance Corporation v Queenstown Medical Centre* (1996) 9 PRNZ 638.

Delay

[34] It is clear that a further process would be required in order to make a preliminary determination. The parties accept that documents would need to be provided and arguments made, in a hearing, on the issue of scope. While it is possible that mediation could occur at the same time or prior to any hearing on scope, it seems to me that would be delaying a progression towards hearing and arguably adding cost.

Length

[35] I envisage a preliminary hearing would take at least one day, perhaps two days. Time would then be needed to make a decision.

Would a decision end litigation? Would the hearing be shortened?

[36] In the Court's experience finalising appropriate plan provisions and zoning is rarely straightforward – the thinking and the approach to the most appropriate zoning for a site can evolve. Mediation can assist with clarifying the parties' thinking. Except in the most stark cases, the Court is loath to put unnecessary impediments in the way of achieving the most appropriate RMA outcomes for a site or area. I tend to the view that mediation and preparation for a merits hearing will refine the matters at issue between the parties better than would a decision on scope at this time.

Balancing of interests

[37] I am not convinced at this time that the issue of zoning is properly discrete and not intertwined with other questions of fact or law. I am not convinced that determining the scope issue will result in resolution of the dispute. Parties' efforts may be better spent on resolving or narrowing the substantive matters. I consider the issues would benefit from mediation and further discussion between the parties. It is not uncommon for an appropriate approach or even a resolution to appear during the course of mediation. Mediation may curb the need for any party to prepare evidence and/or reduce the scale of a hearing. I also consider referring the matter to mediation is in the nature of the public and participatory context in which this matter is being

considered.

Outcome

[38] The application by Port Taranaki Limited for a preliminary hearing on scope issues is declined.

[39] The proceedings are referred to mediation.

[40] Costs are reserved.



MJL Dickey
Environment Judge

