IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 264

IN THE MATTER	of an appeal under s 358 of the Resource Management Act 1991
BETWEEN	TRACY ANN FLEET
	(ENV-2022-CHC-033)
	Appellant
AND	ASHBURTON DISTRICT COUNCIL
	Respondent

Court:	Environment Judge L J Semple sitting alone under s 279 of the Act
Hearing:	at Christchurch on 2 October 2023
Appearances:	Ms Fleet in person
	A J Schulte for the Respondent
Last case event:	2 October 2023
Date of Decision:	6 December 2023
Date of Issue:	6 December 2023

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused. The Respondent's invoice (INV-44991) in the sum of $9,092.03 constitutes a fair and reasonable additional charge under s 36 of the Act and is required to be paid by the Appellant.

B: Costs are reserved. Any application for costs is to be filed within 10 working

days and any response within five working days of receipt of any application.

REASONS

Background

[1] This matter concerns additional charges levied by the Respondent under s 36 of the Act in relation to a non-complying activity consent application filed by the Appellant, Ms Fleet.

[2] Ms Fleet applied for consent to undertake works on a protected tree located on her property at 30 Queens Drive, Ashburton. That application was ultimately declined although that is of no moment to these proceedings.

[3] Ms Fleet paid the sum of $1,332 by way of a non-notified non-complying status application fee (INV-43154) on 25 May 2021. This was in accordance with the minimum charge set out for such an application in part 8 of the "Fees & Charges" section of the Council's Annual Plan 2020/21 (fees schedule).

[4] When the decision was ultimately made that the application would require full notification, Ms Fleet paid a further $5,118 (INV-43452) to bring the total to $6,450. This was close to (although not entirely) the minimum charge for a fully notified non-complying status application as set out in the fees schedule, being $6,627.

[5] Subsequent to the hearing and determination of the consent application, the Council invoiced Ms Fleet for a further $9,882.66 in additional charges (INV-44991) pursuant to s 36(5) of the Act. This amount was subsequently reduced to $9,092.03 when an error was discovered.

[6] Ms Fleet lodged an objection to the additional charges pursuant to s 357B of the Act, principally on the basis that she had sought an estimate of the full charges prior to proceeding with the consent application and the amount ultimately charged

was significantly in excess of that estimate.

[7] The objection was determined by independent commissioner, David Mountfort. Commissioner Mountfort issued a decision on 8 June 2022 disallowing the objection on the grounds that the additional charges were "fair and reasonable for an application of this nature, scale and complexity". It is this decision which is the subject of the appeal now before the Court.

The Appeal

[8] The appeal was lodged on 30 June 2022 and alleges:

(a) the objection was "dismissed and ignored by Ashburton District Council (ADC) staff";

(b) inadequate information was given regarding the objection process;

(c) the initial advice given by the Council in relation to the resource consent application was "wrong";

(d) the choice to delegate the matter to a hearings commissioner was made by the Council and accordingly should be at their expense;

(e) the Council had not provided an accurate quote despite repeated requests to do so. .

The Law

[9] Section 36 provides inter alia:

> (1) A local authority may from time to time fix charges of all or any of the following kinds:
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> …
>
> (aa) charges payable by an applicant who makes a request under section 100A in relation to an application for a resource consent, even if 1 or more submitters also make a request, for the cost of

> the application being heard and decided in accordance with the request.
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> …
>
> (b) charges payable by applicants for resource consents, for the carrying out by the local authority of any 1 or more of its functions in relation to the receiving, processing, and granting of resource consents (including certificates of compliance and existing use certificates) …

[10] In addition to the fixed charges set out above, s 36(5) of the Act provides:

> Except where regulations are made under section 360F, if a charge fixed under this section is, in any particular case, inadequate to enable a local authority to recover its actual and reasonable costs in respect of the matter concerned, the local authority may require the person who is liable to pay the charge to also pay an additional charge to the local authority.

[11] A specific right of objection to such charges is found in s 357B of the Act. The statutory procedure for dealing with such objections is found in s 357C(4) of the Act which provides:

> (4) In the case of an objection made under section 357B, the person or body to which the objection is made must—
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> (a) consider the objection as soon as reasonably practicable; and
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> (b) if the objection has not been resolved, give at least 5 working days' written notice to the objector of the date, time, and place for a hearing of the objection.

[12] In this instance, a hearing was not held, a significant procedural deficiency which I address below.

The Court's powers on appeal

[13] The relatively recent decision of the Court in *Country Lifestyles Ltd v Auckland Council,* traverses the scope of the Court's powers on appeal under s 358 of the Act, specifically the extent to which the Court can, and should, conduct a *de novo* determination.[1]

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1 *Country Lifestyles Ltd v Auckland Council* [2022] NZEnvC 247 (*Country Lifestyles*).

[14] In *Mawhinney v Auckland Council* the Court noted that the decision making power in s 358 of the Act:[2]

> … occurs in a suite of miscellaneous provisions in Part 14 including section 357 and sections 357A to 357D RMA. These all relate to objection and appeals for various procedures. Their place in the scheme of the RMA suggests a relatively quick review for error rather than a comprehensive view of the merits (which does not make much sense in relation to a procedural error anyway).

[15] Put another way:[3]

> We consider it is likely that Parliament did not intend the Environment Court to substitute its judgment on all the procedural issues which are the subject of section 357 objections, to be subject to a full "*de novo*" assessment by the Environment Court. We consider the "review" type tests and an ultimate "fairness and reasonable" assessment are likely all that is required in most circumstances under section 357.

[16] "Most circumstances" does not, of course, mean all. The Court accepted in *Mawhinney* that some circumstances may call for a different approach and made reference to the decision in *Far East Investments Ltd v Auckland City Council* where the Court determined that it had "the same power and discretion to impose a condition for a financial contribution of land as the primary consent authority had".[4] Moreover the Court in *Mawhinney*, despite contending a "fair and reasonable" assessment was all that was required, conducted a *de novo* assessment in accordance with the parties' preference.

[17] Conversely, in *Country Lifestyles*, the Court determined that a "fresh view" of the Council's decision in that instance was neither "helpful [nor] appropriate" and as such adopted a fair and reasonable test.

[18] In this case, counsel for the Respondent identified that the Court was entitled to conduct its own *de novo* assessment such that "[a]ny purported unfairness to an appellant from a consent authority's decision can be *cured* on appeal and is not relevant to the appeal". Specifically, counsel submitted that "while, from a natural justice

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2 *Mawhinney v Auckland Council* [2017] NZEnvC 162 at [101] (*Mawhinney*).

3 *Mawhinney* at [104].

4 F*ar East Investments Ltd v Auckland City Council* A048/01 at [41].

perspective, a hearing of the objection should have been conducted to enable Ms Fleet to further air her issues with the charges, the fact of this appeal and the opportunity it provides for her to now make her case, cures that omission".[5]

[19] I accept that a *de novo* assessment is both helpful and appropriate in the circumstances of this case where no hearing has previously been held. I have approached my determination in this way, although having regard to the Commissioner's decision as required by s 290A of the Act.

Issues on Appeal

[20] The issues outlined in the Notice of Appeal were wide ranging and not all matters were pursued by Ms Fleet at the hearing. In answering questions from the Court, Ms Fleet confirmed that there were two primary areas of concern:

(a) the appointment of a hearings commissioner (and the fees associated with that); and

(b) the accuracy of the fees schedule and the estimates given.

[21] As set out by counsel for the Respondent in opening, there was no suggestion in the notice of appeal or evidence "that the fees charged are not, in and of themselves, actual and reasonable".[6] Rather, the concern is the process by which they were incurred and the perceived difference between the fees schedule and the estimates given and what was ultimately rendered.

The use of a hearings commissioner

[22] Ms Fleet correctly drew the Court's attention to s 100A(2) of the Act which provides that:

> The applicant, or a person who makes a submission on the application, may request in writing that a local authority delegate its functions, powers, and duties required to

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5 Submissions at [97].

6 Submissions at [18].

hear and decide the application in accordance with subsection (4).

[23] The Court was provided with evidence that by email dated 25 June 2021 from Ms Fleet to Mr Hyde (the Council's District Planning Manager), Ms Fleet confirmed that she intended to proceed with her resource consent application and "I want to formally request that the application is heard by an independent commissioner".

[24] Ms Fleet accepts that she made such a request but argues that the Council's response to that request is of relevance. In that regard, Ms Fleet produced an email from Mr Hyde in reply (dated 25 June 2021) which states "[w]e had already engaged a Commissioner for the application so there is no further action required by you on that front, however I acknowledge your request in any event".

[25] Ms Fleet considers that Mr Hyde's email confirms that the Commissioner was engaged by the Council of its own volition, not in response to her request and therefore the cost of that should be borne by the Council.

[26] Mr Hyde gave evidence that he had previously engaged in several conversations with Ms Fleet regarding the processing of the consent application including the use of an independent commissioner. His evidence was that "[t]his approach [using a commissioner] was anticipated given Ms Fleet's apparent concerns regarding the Council's independence. On this basis, I had made preliminary [enquiries] with likely Commissioners, given that the availability of commissioners had, and has, been an ongoing issue for the Council".[7]

[27] I accept Mr Hyde's explanation and find that Ms Fleet did request that the matter be heard by an independent commissioner under s 100A of the Act. As such, pursuant to the fees schedule, the Council was entitled to on-charge the Commissioner's actual costs plus 10 per cent to Ms Fleet.

[28] The attachment to INV-44991 shows the Commissioner's fee to be $7,615.65. This has been on-charged to Ms Fleet at cost, that is without the 10 per cent additional

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7 Hyde evidence dated 21 December 2022 at [23]-[24].

charge the fees schedule identifies. I am satisfied that this is an actual and reasonable expense which was appropriately signalled in the fees schedule.

[29] Moreover, I note that the fees schedule clearly states that "Hearing Panel Charges" including those for a commissioner are "additional to [the] fee for full/limited notification". In answer to questions from the Court, Ms Fleet acknowledged that she "hadn't read that" although she had read other parts of the fees schedule.

[30] It is also relevant that Mr Hyde produced an email to Ms Fleet dated 22 February 2021 that estimated a cost of $5,750 plus disbursements for a hearings commissioner based on 23 hours at $250 per hour. Mr Hyde's email states that it is "difficult to estimate costs" as there are a number of variables "so you should not rely on it to be specific to your situation".

[31] However, with a "plus 10%" as outlined in the fees schedule, Mr Hyde's estimate amounted to $6,325 plus disbursements. The invoice ultimately received from the Commissioner identifies 32 hours at $210 per hour totalling $6,720, a difference of only $395 given the Council choose not to utilise the option to add 10 per cent.

[32] On the basis of the above I find the fee to have both been fairly estimated and fairly and reasonably incurred and charged to Ms Fleet.

Accuracy of the Fees Schedule and Estimates

[33] Ms Fleet's evidence confirmed that she had asked on several occasions for an estimate of the likely charges for processing her resource consent application. A review of the email exchanges between the Council and Ms Fleet produced as part of that evidence discloses a clear level of frustration that the Council was not able to provide a "specific cost".

[34] Despite that, the email from Mr Hyde dated 22 February 2021 attempts to set out in some detail the likely charges for processing the consent. Those comprised:

- the notified hearing fee of $6,627 as per the fees schedule; and
- an estimated hearings commissioner fee of $5,750 plus disbursements.

[35] In addition, Mr Hyde indicated that "there are a number of variables which come into play, for example if the Council needed to commission a report about the condition of the tree".

[36] I have already traversed the difference between the actual cost for the hearings commissioner and the estimate which I find to be minimal.

[37] The processing fee of $6,627 identified as a "minimum fee" in the fees schedule compares to $6,882.75 in planning fees (Avanzar) invoiced to Ms Fleet. Again, I find the difference between the minimum fee in the fees schedule and the fee actually charged to be minimal.

[38] That leaves an additional charge of $1,043.63 for services provided by arborist, Brad Cadwallader.

[39] Mr Hyde's email of 22 February 2021 identified that a report on the condition of the tree might be necessary and that the cost of that would be borne by Ms Fleet. In answer to questions from the Court, Ms Fleet stated that she did not think that such a report would be necessary because one had already been prepared in relation to the same tree for another proceeding and she anticipated that could be used.

[40] A review of Mr Cadwallader's invoice indicates that no new report was in fact prepared but rather that Mr Cadwallader spoke to the consultant planner about the existing report, reviewed five other reports on the condition of the tree and attended the hearing.

[41] It was Mr Hyde's evidence that "Mr Cadwallader's input was essential in these circumstances. His involvement was clearly necessary because parts of his report were being relied upon by Ms Fleet to justify her position. In addition, the Commissioner

was unable to rely on any other expert evidence provided by any other party".[8]

[42] I am satisfied that Mr Cadwallader's services were an actual and reasonable cost incurred as part of the processing of the consent application. I accept that this was a cost that Ms Fleet was not expecting and that having identified that Mr Cadwallader had prepared a report, she gave no thought to any other cost that might be incurred in Mr Cadwallader reviewing that report or attending the hearing. I also accept that Mr Hyde's estimate did not set this out.

[43] However, while I can appreciate Ms Fleet's position, I am satisfied that the prospect of additional fees being incurred from experts such as Mr Cadwallader had been appropriately signalled by Mr Hyde on behalf of the Council even if the exact nature of that work was not clearly identified. I am further satisfied that such fees are a fair and reasonable expense and are able to be on-charged by the Council to Ms Fleet pursuant to s 36(5) of the Act.

Commissioner's Decision

[44] Putting to one side issues of process which I address next, I have had regard to the decision of Commissioner Mountfort. As I have done, Commissioner Mountfort paid careful attention to the email from Mr Hyde of 22 February 2021 setting out the likely costs. Commissioner Mountfort noted that Mr Hyde "was asked a difficult question and gave the best answer he could". I agree but further find that answer to be very close to the actual costs incurred.

[45] Commissioner Mountfort has also carefully examined the various invoices and reaches the conclusion they are "fair and reasonable for an application of this nature, scale and complexity". I have reached the same conclusion.

Processing of the Objection

[46] Counsel for the Respondent and Mr Hyde accepted in legal submissions and

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8 Hyde evidence dated 21 December 2022 at [31].

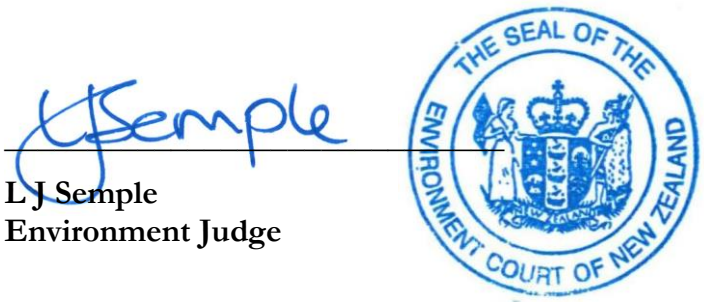
evidence that the processing of Ms Fleet's objection by the Council was unsatisfactory. There was a lengthy delay between Ms Fleet indicating that she was unhappy with the fees charged and the Council initiating an objection (from 16 February 2022 to 5 April 2022) and no hearing was held despite a statutory obligation to do so.

[47] While the hearings commissioner may well have reached the same conclusion if a hearing had been held, there is no way to be certain of that. Moreover, Ms Fleet should not have been required to lodge and pursue an appeal simply to be able to present her argument and evidence. That ought to have occurred at Council level.

[48] While I accept that a *de novo* hearing can cure that defect and that I have arrived at the same conclusion as the Commissioner, there can be no doubt that Ms Fleet has incurred additional costs in having to pursue her case on appeal to this Court when the matter might have been resolved at Council level had the correct statutory process been followed.

Costs

[49] Given the above, costs are reserved. I note that the failure to hold a hearing on the objection and the costs subsequently incurred by Ms Fleet in bringing this matter forward on appeal will be a factor in any costs awarded.



L J Semple
Environment Judge