IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 272

IN THE MATTER	of the Resource Management Act 1991
AND	appeals under clause 14 of the First Schedule of the Act
BETWEEN	BARNHILL CORPORATE TRUSTEE LIMITED and all other appellants concerning Topics 25 and 30 of Stage 2 of the proposed Queenstown Lakes District Plan
	(ENV-2019-CHC-086)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan
Hearing:	In Chambers on the papers
Last case event:	12 May 2023
Date of Decision:	14 December 2023
Date of Issue:	14 December 2023

DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s285 Resource Management Act 1991, the Anderson Lloyd parties are to pay Queenstown Lakes District Council the sum of $12,000.00, as a contribution towards its costs.

B: Under s286 Resource Management Act 1991, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

REASONS

[1] On 12 April 2022, the court issued its First Interim Decision[1] in the staged review of the Queenstown District Plan concerning appeal points allocated to Topics 25 and 30, Stage 2, pertaining to the Wakatipu Basin Rural Amenity Zone ('WBRAZ') provisions.

[2] In the First Interim Decision, the court made both final and provisional determinations on relief and the drafting of provisions, and issued directions that afforded parties the opportunity to file supplementary submissions on drafting and jurisdictional issues. These are recorded in summary on page 2 of the decision as follows:

> A: Part B sets out final determinations on provisions 3.1B.5 in relation to 'Rural living', 3.2.5, policies 24.2.1.11 and 24.2.1.14, rules 24.4.6, 24.4.7A, 24.5.1.4 and 24.5.1.5 and parts of rules 24.5.1.6 and 27.5.18C.
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> B: Part B sets out provisional findings on SO 3.2.5.8, a new policy 24.2.1.1X and associated mapping and policies 24.2.1.1, 24.2.1.1A, 24.2.1.1B and 24.2.1.1XX, and assessment matters 24.7.5, 24.7.7, 24.7.8, 24.7.8B, 24.7.9 and 27.9.3.3 reserving capacity for supplementary submissions.
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> C: Determinations are reserved on other matters, including 24.1 Zone Purpose and potential further mapping of landscape capacity areas within Landscape Character Units, with directions for supplementary submissions on these matters to be made in due course.

[3] As for the provisional findings, the decision recorded:[2]

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1 [2022] NZEnvC 58.

2 [2022] NZEnvC 58 at [173].

> Our findings on each of the following provisions are provisional in that our directions allow opportunity for supplementary submissions on their drafting and any issues as to jurisdictional scope (but not on our related evidential findings).

[4] Following receipt of those submissions, the court issued its Second Interim Decision determining the drafting of all remaining PDP provisions.[3] Following a further process for checking on minor errors and omissions, the court approved a set of final provisions for inclusion in the PDP in its final decision issued on 12 May 2023.[4]

[5] This decision determines an application for costs by QLDC against the Anderson Lloyd parties.[5]

QLDC's application for costs

[6] The application, made on 28 April 2023, is for an award of $29,000.00 comprising:

(a) $21,500.00 for expert witness and legal costs for the hearing phase, amounting to 19% of QLDC's total incurred costs in this phase of $113,014.83; and
(b) $7,500.00 for the post-hearing phase, amounting to approximately 50% of its legal costs of $14,642.95 in the preparation of supplementary submissions.

[7] Essentially one case was presented by the Anderson Lloyd parties. As such,

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3 [2023] NZEnvC 41.

4 [2023] NZEnvC 91. It is noted that some provisions are on hold and not to be included in the Proposed District Plan ('PDP') until after the determination of the relevant Topic 31 appeals.

5 Barnhill Corporate Trustee Limited and DE, ME Bunn and LA Green (ENV-2019-CHC-086); Crown Investment Trust (ENV-2019-CHC-066); Morven Ferry Limited (ENV-2019-CHC-088); S Williamson (ENV-2019-CHC-084); Wakatipu Equities Limited (ENV-2019-CHC-065), and A, S and S Strain (a s274 party) (collectively, 'the Anderson Lloyd parties').

I agree with QLDC that any costs award should be made jointly against the relevant parties.

Costs for the hearing phase

[8] I confirm the preliminary indication given in the First Interim Decision that costs should lie where they fall for the hearing phase. I acknowledge that QLDC was put to greater than usual cost by reason of the lateness of the Anderson Lloyd parties' election not to pursue aspects of their relief. Furthermore, QLDC fairly observe that our findings in the First Interim Decision reveal aspects of those parties' argued position lacked substance. There is some force in QLDC's complaint that, whilst their relief encompassed changes to provisions that would apply zone-wide, their evidence was largely site-specific in focus. In general terms, it was self-serving in seeking greater enablement of additional residential development on land owned by those parties (with that land also subject to Topic 31 – Rezoning Relief).

[9] However, on balance, I find this does not take matters outside the normal range in Sch 1 RMA plan appeal proceedings whereby section 10.7(f) of the Environment Court Practice Note 2023 (Practice Note) signals that costs will not normally be awarded. That reflects the long-established recognition of the importance of not deterring participation in resource management processes through the threat of costs awards. In particular, Sch 1 RMA appeal processes are part of an intended contestable procedure for the formulation of district and regional plans as regulatory instruments for and on behalf of related communities. Their quality and effectiveness as regulatory instruments relies on this process of contestable formulation, including as to the consideration of options to derive the most appropriate plan outcome.

[10] In essence, it is not out of order for a participant to seek to be self-centred or self-serving in their pursuit of relief even on provisions that are plainly designed to consider a broad frame of interests.

[11] The lateness of the Anderson Lloyd election to significantly narrow its focus is somewhat more open to consideration as justifying costs for this phase. Whilst this could have been better case-managed, it is not uncommon, in multi-issue plan appeals of this nature, for parties to belatedly decide to not pursue part of their relief. Hence, I adjudge that the Anderson Lloyd parties did not step significantly beyond the norm. Nevertheless, in the overall interests of justice, I bear these case management shortfalls in mind as part of a context within which QLDC incurred costs, due to more serious infractions by the Anderson Lloyd parties, in the post-hearing phase.

Abuse of process in the post-hearing phase

[12] QLDC submits that, in their supplementary submissions in the post-hearing phase, the Anderson Lloyd parties failed to adhere to the court's directions and sought to relitigate the court's findings in the First Interim Decision. As such, it seeks higher than standard costs, namely $7,500.00 of the $14,642.95 incurred.

[13] The Anderson Lloyd parties deny that they put QLDC to 'unnecessary' expense. They argue that their supplementary submissions were constructive in that they led to further changes to PDP provisions.

[14] Parties traverse relevant principles. These are well-settled. Under s285 RMA, the court has a broad discretion on an application to order any party to pay to another a contribution to their incurred reasonable costs and expenses. The purpose of an award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[6] The Practice Note sets out guidelines (not an inflexible rule or practice).[7] As noted, section 10.7(f) guides me to consider whether the Anderson Lloyd parties' actions in the post-hearing phase take them beyond the norm. Section 10.7(j) of the Practice Note gives further guidance on so termed "aggravating factors" for the consideration of whether an award is

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6 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385.
7 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 at [21].

appropriate and, if so, as to its quantum.

[15] In terms of those factors, I determine that there was an abuse of process in the fact that, without leave, the Anderson Lloyd parties' supplementary submissions went materially beyond the permissible ambit of the directions made in the First Interim Decision. In particular, those submissions amounted to an attempt to relitigate evidential findings in the First Interim Decision.[8] That abuse of process directly and unreasonably added to the costs incurred by QLDC, and hence ratepayers. As the respondent planning authority, QLDC was already having to incur costs for the purposes of responding to the court's directions. The Anderson Lloyd parties unfairly added to that burden and the associated costs incurred.

[16] As noted, that was against the background of the hearing phase, including the poor case management of the Anderson Lloyd parties' late narrowing of the relief it pursued. Whilst that infraction is not in itself warranting of a costs award, nevertheless it is in the interests of justice that I consider the costs incurred in the post-hearing phase in light of it. In essence, QLDC and its ratepayers incurred an unreasonably inflated overall burden of costs as a result of abuse of process built on poor case management.

[17] I find the actual sum incurred for the post-hearing phase, i.e. $14,642.95, reasonable. That bears in mind the inherent costs of preparing, drafting and filing supplementary submissions within the scope of the court's directions and the additional costs arising from the extraneous matters raised by the Anderson Lloyd parties.

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8 See for example, the court's comments in the Second Interim Decision at [8], [56], and [72] and [80].

[18] Therefore, within the scope of QLDC's overall claim for $29,000.00, I determine that an appropriate costs award, in the overall interests of justice, is $12,000.00.

Outcome

[19] Under s285 RMA, the Anderson Lloyd parties are to pay Queenstown Lakes District Council the sum of $12,000.00, as a contribution towards its costs.

[20] Under s286 RMA, this order may be filed in the District Court at Queenstown for enforcement purposes (if necessary).

J J M Hassan
Environment Judge