

BEFORE THE ENVIRONMENT COURT OF NEW ZEALAND
AT AUCKLAND

I MUA I TE KOOTI TAIA O AOTEAROA
TĀMAKI MAKĀURAU

ENV-2018-AKL-000078

UNDER the Resource Management Act 1991 (**RMA**)

A N D

IN THE MATTER of direct referral of an application for resource consents
for the necessary infrastructure and related activities
associated with holding the America's Cup in Auckland

BETWEEN **PANUKU DEVELOPMENT AUCKLAND**

Applicant

A N D **AUCKLAND COUNCIL**

Regulatory Authority

MEMORANDUM OF COUNSEL

Dated 6 July 2018

Director
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MAY IT PLEASE THE COURT

1. This Memorandum of Counsel is filed on behalf of a number of Mana Whenua groups we represent in relation to the direct referral of an application for resource consents made by Panuku Development Auckland Limited (“the Applicant”), for the necessary infrastructure and related activities associated with holding the America’s Cup in Auckland (“the Application”).
2. Six Mana Whenua groups we represent filed submissions opposing the Application.¹ Section 274 applications are currently being prepared by these Mana Whenua groups.
3. This Memorandum of Counsel is in response to the decision of the Court to grant an application for direct referral sought by the Applicant. Counsel seeks to place on the record the Mana Whenua concerns about the lack of engagement about the application for direct referral.
4. Counsel submits that the Applicant has not engaged with Mana Whenua in a meaningful way nor to the extent necessary to recognise and give effect to Mana Whenua values that relate to the Application for resource consent. In order to ensure that Mana Whenua values are adequately considered Mana Whenua request that a Māori Land Court Judge, as an alternative Environment Judge, is added to the Bench.
5. An affidavit is being prepared to support the matters raised in this Memorandum. The affidavit will highlight the concerns Mana Whenua have with the process leading to the direct referral application being granted as well as supporting the request for an alternative Environment Judge.

The First Applications

6. On 15 January 2018 the Applicant lodged two applications (“First Applications”) for the necessary infrastructure and related activities for the America’s Cup and the construction, use and associated activities for a new Fishing Industry and Sealink ferry.

¹ Submissions opposing the Application were filed by Ngāti Maru Rūnanga Trust, Ngāi Tai ki Tāmaki Trust, Te Patukirikiri Iwi Trust, Ngāti Tamaoho Trust, Te Ākitai Waiohū Waka Taua Incorporation and Ngaati Whanaunga Incorporated Society.

7. Mana Whenua made submissions on the First Applications on 14 March 2018. The submissions identified the ineffective engagement process undertaken by the Applicant.
8. The First Application regarding the America's Cup proposal was subsequently withdrawn while the application regarding the Fishing Industry and Sealink ferry was put on hold.
9. Mana Whenua characterised the engagement process and level of consultation undertaken by the Applicant in regards to the First Applications unsatisfactory.
10. The Applicant was made aware of this view.

The Second Application

11. On 13 April 2018, the Applicant lodged a new resource consent application for the location of the America's Cup, team bases and supporting infrastructure in Auckland ("Second Application").
12. The Applicant has accepted that it did not engage with Mana Whenua prior to lodging the Second Application. Despite this, the Second Application misrepresented that the Applicant had engaged with Mana Whenua about the Second Application.
13. Mana Whenua lodged submissions opposing the Second Application on 28 May 2018. The key issue raised was that no engagement occurred prior to lodging the Second Application.
14. Counsel submits that the statements about engagement with Mana Whenua in the Assessment of Environmental Effects that accompanied the Second Application were in fact incorrect as engagement did not occur.

Application for Direct Referral

15. The Applicant made an application to the Auckland Council for direct referral of the Second Application to the Environment Court. Mana Whenua were not involved in or notified of the application for direct referral.

16. On 6 April 2018 Judge Newhook issued an Informal Minute (“the Minute”) outlining the proposed dates for the direct referral process. Mana Whenua were not advised of the Minute by the Applicant until 11 May 2018.
17. On 10 May 2018 Judge Newhook issued an anticipatory decision (“the anticipatory Decision”) granting waivers and directions in relation to the direct referral application. Mana Whenua became aware of this through the Auckland Council website on 21 May 2018.
18. On 22 June 2018, Mana Whenua were notified by Auckland Council that the request for direct referral had been granted by the Council.
19. On 25 June 2018 the Applicant made an application to the Court under section 87G RMA for the Second Application to be decided by the Environment Court. Mana Whenua were made aware of this through an Environment Court decision on 26 June 2018.
20. On 26 June 2018 Judge Newhook issued a decision (“the Decision”) allowing the Second Application to be decided by the Environment Court. Mana Whenua were notified of this by the Environment Court on the 26 June 2018.
21. The Applicant was aware of Mana Whenua interests in the Second Application. Counsel submits it was therefore inappropriate for the Applicant to delay notifying Mana Whenua of the directions and Draft Timetable.
22. Counsel submits that providing early notice would have allowed more time for Mana Whenua to adequately assess and determine their position in relation to the directions to ensure Mana Whenua interests were protected, especially in light of the lack of engagement acknowledged by the Applicant in relation to the Second Application.

Appointment of Māori Land Court Judge

23. Given the above context and in order to achieve the purposes of the Act counsel submits that the composition of the Court is fundamental to ensure cultural issues are adequately considered and addressed as part of the Application.

24. To that end, Mana Whenua are seeking the appointment of a Māori Land Court Judge to be added to the Bench as an alternative Environment Judge under section 252 of the RMA.
25. This appointment is appropriate given that:
- (a) There was no engagement with Mana Whenua about the Second Application before it was lodged and therefore assessing Mana Whenua engagement will be a key issue for the Court;
 - (b) There was no cultural impact/values assessment undertaken by the Application prior to lodging the Application and with a comprehensive assessment now being undertaken by Mana Whenua at significant speed will require due consideration by an appropriate expert on these matters; and
 - (c) With the truncated hearing process including direct referral, it is important that important Mana Whenua considerations are given the appropriate attention and consideration and having an expert lens of a Māori Land Court Judge through this fast tracked process is appropriate.

Conclusion

26. Counsel can address any matters further at the upcoming pre hearing conference set down for 18 July 2018.

Dated: 6 July 2018



Counsel Acting