

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2019] NZEnvC 008

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s 120 of the Act
BETWEEN DG SCHMUCK
(ENV-2018-AKL-351)
Appellant
AND NORTHLAND REGIONAL COUNCIL
Respondent

Court: Environment Judge JA Smith

Hearing: Judicial Teleconference, 22 January 2019

Participants: C Prendergast for Mr Schmuck
G Mathias for Northland Regional Council
M Rashbrook and J Johnson For Opuia Coastal Preservation
Incorporated (the Society)
No appearance for J Kidman and T Dunn

Date of Decision: 24 January 2019

Date of Issue: 24 JAN 2019

DECISION AND DIRECTIONS OF THE ENVIRONMENT COURT

Decision

A: The Society properly represents the interests of individual submitters who have the right of appeal in any event in respect of this matter. At least eight submitters are also members of the Society. It appears that the Society may have the authority to represent other submitters also.

B: The interests of the Society is greater than the public generally under s 247(1)(d). In particular:

(i) the Society appears to have been formed specifically in relation to issues

Schmuck



surrounding the operation of the boat yard in this area, and has been involved in court action in relation to this area; and

- (ii) it is in the overall interest of justice that the relevant parties be represented by one body in order to enable the advancement of the case in an orderly and pragmatic way.

C. Costs are reserved for the substantive hearing.

Directions

[1] Directions are made for the exchange of evidence as follows:

- (a) that the evidence of the applicant is to be filed by **5.00pm, Wednesday 13 March 2019**;
- (b) the reply evidence for the Society and the Regional Council, if any, is to be filed by **5.00pm, Wednesday 27 March 2019**;
- (c) reply evidence for the applicant is to be filed by **5.00pm, Wednesday 3 April 2019**;
- (d) copies of all proceedings are to be filed with the Court by **5.00pm, Monday 8 April 2019**, to be filed at the commencement of the hearing week;
- (e) the matter is likely to occupy five days, including a site visit, and will either be reached at the end of the week of **8 April 2019**, or the following week;
- (f) the Court may not have time to pre-read the evidence. This issue will be addressed at the commencement of the sitting week, **8 April 2019**.

[2] Evidence bundles are to be filed in the following format:

- (a) four hard copies of all evidence, tabulated, paginated and compiled into A4 lever-arch folders; and
- (b) an electronic copy on a USB flash drive of all the evidence, contained in electronic folders equivalent to the physical volumes of the hard copy.



REASONS

Introduction

[3] This is the latest stage in ongoing issues relating to the operation of a boatyard at Opuia and an associated former road, now esplanade reserve, adjacent to it. The appeal is not helpful in understanding the issues in relation to this matter, but it appears to relate to three separate issues:

- (a) the renewal of discharge consents, which expired on 30 March 2018 and which are being preserved in operation pending resolution of appeals under s 124 of the Act;
- (b) applications for new consents that can then be broken into two parts:
 - (iii) those applications for consent for activities that may require amendment to other consents, including the discharge consent, by modification of existing consents; or
 - (iv) extensions to existing consents to cover new activities;
- (c) those activities that are entirely new, and do not affect and are not affected by the various discharge consents.

[4] Attempts during the telephone pre-hearing conference to clarify this matter did not assist.

The renewal of the existing consents

[5] The Court is concerned that the consents that expired in March 2018 have continued only by nature of an application for renewal being filed six months prior to their termination. Section 124(3) notes that the holder may continue to operate under those existing consents until a new consent is granted and all appeals are determined, or a new consent is declined and all appeals are determined. Thus, there is potential for consents to continue well past their expiry date.

[6] In this case the last set of consents relevant was granted in 2008 for a period of ten years, and it must be said, therefore, that time is of some importance in reconsidering the renewal. In addition, the consent application for renewal was refused at first instance.



[7] All parties agree that renewal of these consents should be considered at an early stage. To that end the Court, with the agreement of the parties, makes directions to hearing in June of this year.

Other matters on Appeal

[8] In relation to the balance of matters, it is at this stage difficult to isolate these clearly, and the Society, at least, was concerned at the potential overlap with the renewal issues. After some discussion between Ms Prendergast and Mr Mathias, the suggestion was put forward by Ms Prendergast that they may withdraw all other aspects of the application (excepting renewal of the existing coastal consents, ie those consents that were to expire on 30 March 2018). Thus, it was the intention of Mr Schmuck to withdraw, without prejudice, the balance of the applications in order that these could be re-formulated and filed for a further consent.

[9] Indication was given that it is likely that an application would be made for direct referral. The legal effect of s 87D was explained to the Society to understand that this was a process very similar to the standard application process but with referral direct to the Environment Court.

[10] Accordingly, at this stage the Court anticipates that the issue of the balance of the appeal will not need to be dealt with, however if a withdrawal is not filed, the Court will address this matter in a further pre-hearing conference in the week of **4 March 2019** at Whangarei. A notice will be issued if necessary. Nevertheless, Ms Prendergast indicates that a withdrawal will be filed within the next five working days.

Disposition of the appeal from decline of renewal of existing resource consents expired 30 March 2018

[11] The parties agree that this matter can proceed to hearing, subject only to the status of the s 274 parties. I therefore make directions for the hearing of the matter as follows. It is noted that there are four witnesses for the applicant; the Regional Council does not intend to call any evidence. The Society indicates that either it or, subject to the decision of the Court, the original submitters, plan to call planning, engineering, stormwater, ecology/natural character, potentially air quality and contaminated sites evidence and four lay witnesses.



[12] Directions are made for the exchange of evidence as follows:

- (d) that the evidence of the applicant is to be filed by **5.00pm, Wednesday 13 March 2019**;
- (e) the reply evidence for the Society and the Regional Council, if any, is to be filed by **5.00pm, Wednesday 27 March 2019**;
- (f) reply evidence for the applicant is to be filed by **5.00pm, Wednesday 3 April 2019**;
- (g) copies of all proceedings are to be filed with the Court by **5.00pm, Monday 8 April 2019**, to be filed at the commencement of the hearing week;
- (h) the matter is likely to occupy five days, including a site visit, and will either be reached at the end of the week of **8 April**, or the following week;
- (i) the Court may not have time to pre-read the evidence. This issue will be addressed at the commencement of the sitting week, **8 April 2019**.

[13] Evidence bundles are to be filed in the following format:

- (j) four hard copies of all evidence, tabulated, paginated and compiled into A4 lever-arch folders; and
- (k) an electronic copy on a USB flash drive of all the evidence, contained in electronic folders equivalent to the physical volumes of the hard copy.

[14] I should add that the Society indicates that if it does not have status to appear in its own right, it would seek to have original submitters in their own right substituted as parties, or seek leave in their own right under s 274. Given the issue is only raised by virtue of the objection of the applicant, I am satisfied that consent to late filing of s 274 notices by any of these particular submitters would be acceptable in the circumstances, if the Court concludes that the Society does not have status.

[15] A Notice of Hearing is to be issued in due course.

Status of the s 274 parties

[16] I now go on to address the issue of the status of the s 274 party, the Society.



[17] I note in the first instance that the Society representatives advise that they have at least eight people who were submitters who are also members of the Society, and to that extent a decision was made for single representation to assist with the preparation and conduct of a hearing before the Environment Court. As Ms Johnson noted, this had the advantage of reducing the number of parties required to conduct the hearing, and streamlined preparation and filing of evidence and the hearing itself. I acknowledge that.

[18] Both the Society and the appellant have filed written submissions in relation to standing issues. Mr Mathias for the Regional Council says that the Council abides the decision of the Court in this instance, and does not seek any opportunity to make submissions.

[19] In her written submissions, Ms Prendergast acknowledges that Opua Coastal Preservation Incorporated (the Society) was formed in 2014 and has purposes as follows:

- (a) to develop an awareness and encourage an interest in preserving the natural environment relating to the shores and waters amongst its members and the community;
 - (i) to ensure territorial and regional authorities uphold the interests and welfare of ratepayers, public and tourists alike;
 - (ii) to ensure territorial and regional authorities perform their statutory duties and exercise their powers in accordance with the relevant legislation; and
 - (iii) to ensure that local authorities act to preserve existing esplanade reserves and create further public reserves.

[20] It was further noted by Ms Prendergast for the Appellant that the Society has taken judicial proceedings in the High Court and Court of Appeal challenging decisions of the Far North District Council in matters related to Schmuck boatyard and use of the adjoining Wall's Bay esplanade reserve. She notes that a number of members were submitters to the Northland Regional Council, but says that the Society itself did not lodge a submission.

[21] She notes that the body was formed prior to the submission process for this hearing, and therefore says that they have no status under s 274, nor is the Society a successor under s 273 or subsection 2A.

Section 274(1)(d) participation

[22] The initial issue seems to turn on the appellant's understanding of s 274. Ms Prendergast argues that only a person who made a submission may participate in an



appeal. The exceptions are in s 274(1), particularly as subsection (d). Ms Prendergast states that (da) and (d) are for a person who is a trade competitor that has an interest greater than members of the public generally. With respect, this is a mis-reading of the relevant section (s 274(1)(d)), which clearly provides a limitation only in respect of competitors, but no general limitation otherwise. Therefore, a person who has an interest in the proceedings that is greater than the interest of the public may participate. However, if that person is a competitor, then those rights are restricted.

[23] Subsection (da) does seem to provide that, where the person's right is limited through being a competitor, in certain circumstances they may participate if their interest is greater than the general public. However, there is nothing in s 274 that limits the right of a person who has an interest in the proceedings greater than the general public from giving notice under s 274. In this regard, they are not required to have been an original submitter. Section 274(1)(d) provides that any person who becomes a party may appear and call evidence, but those rights are limited if that person was an original submitter under subsection 274(1)(e) or (f). Clearly, a person includes the Society, and therefore the question is whether the Society has an interest in this matter greater than the public generally.

[24] We must say that we find the suggestion that the Society does not have such a direct interest somewhat surprising, given the history of this matter. The Society appears to have been created, and is largely constituted of persons having particular interest in this issue. In Ms Prendergast own submission, they undertook major action in the High Court and Court of Appeal.

[25] The Society has an interest in this area and site greater than members of the public generally, and seeks, in particular, to preserve public access over Wall's Bay esplanade, reserve and other esplanades in the Opua area. The Society includes direct interest of residents and other users who are personally affected.

[26] There are a number of other indicators to me that this is a case where the Society should properly be involved. These include:

- (a) that a number of the original submitters were, in fact, members of the Society;
- (b) that Ms Johnson tells me that other submitter groups, including local iwi and others, also have an interest in the matter but would prefer to work through a single organisation rather than multiple counsel and multiple witnesses;



(c) as the Council does not oppose the appeal, there is no proper contradictor.

[27] I was pointed to several decisions in this matter, including the seminal decision of *Purification Technologies v Taupo District Council*¹ and *Manukau City Council interlocutory application*.² It must be said that over the past twenty years there has been some development in this thinking in cases such as *HB Land Protection Society v Hastings District Council*,³ and *Viaduct Harbour Holdings Limited v Auckland Council*.⁴ In *HB Land Protection Society* the Court stated:

[10] I accept that, of course, there is an emphasis on public participation in the decision-making process under the RMA. That emphasis, however, has never been taken as an open house. For a would-be 274 party to come within paragraph (d), there must be some identifiable aspect of the public interest which the person or body through, some office or particular pursuit, can be seen to represent.

[28] Again, in *Viaduct Harbour Holdings*, at paragraph [28] the Court noted:

... the particular subject matter relating to the mainland is about getting "to, over and across" it, and maintaining and enhancing recreational opportunities in accessible areas of it.

[29] In the case of *Sandspit Yacht Club Marina Society v Auckland Council*, issues arose in respect of two 274 parties, one being KIAO – the Kawau Access Organisation Incorporated, and the other being the Sandspit SOS Incorporated. The Court concluded that the first group had no particular mandate in respect of the area the subject of the application, and that notice was struck out. However, in the case of SOS many of the members were also submitters to the Council at the initial stages. It is correct that the group was formed after the hearing process, and in particular to relate to the appeal itself. The Court in that case concluded that there were a number of grounds in which it should allow the participation of the Society.

[30] The critical grounds, set out in paragraphs [19] – [21] were:

[19] Furthermore, it appears to me that there is strong theme of resident interest within this group. It is not purported that all members are residents, but certainly a number appear to be parties that are directly affected. The ratepayer and resident interest in this area is, of course, an aspect of the public interest that will represent not only passive and active recreational uses, overlooking, walking, but also interests in noise and amenity generally. It is difficult to see how one could exclude the group on this basis.

[20] Finally, it is also arguable that persons who have already made a submission earlier (being the individuals), should be entitled to subsume those submissions within a group approach.

¹ [1995] NZRMA at [197]

² NZRMA 2002 at page 170

³ [2009] NZEnvC 57

⁴ [2010] NZEnvC 17



[21] This Court regularly recommends and encourages parties to consolidate their interests to obtain clear advice and a cohesive approach to case law. This significantly reduces the Court hearing time and usually leads to better outcomes for all parties. The SOS approach is entirely consistent with that view.

Evaluation

[31] Looking at the situation in this case, it is very similar to that in the SOS Sandspit case. Whilst the organisation in that case was formed after the initial hearing, I consider, in the circumstances of this case, little turns on that. I am particularly minded to take into account the fact that a number of the original submitters (who have a right of appeal) were also members of the Society. It would be difficult for this Court to refuse their joinder if it is subsequently found that the Society cannot conduct the appeal. To that end, I would grant leave for the late filing of s 274 notices by these submitters, if the Court found that the Society could not conduct the appeal.

[32] However, I have concluded that there are compelling grounds, in this case, for the Society to continue the action on behalf of the submitters in order to provide a cohesive approach to the appeal, its preparation and conduct.

Successors in title

[33] Given my decision under s 274(1)(d), it is not necessary for me to determine the succession issue in this case, and accordingly I do not do so. Questions of succession may go beyond simply a body to represent the interests of others formed subsequently. It appears to me that there may be cases (and I am not concluding that this is one) where, for the purposes of an RMA hearing, the Society, of which the parties have made submissions individually, may be entitled to continue as a successor. However, I consider the better position to be that the Society represents an aspect greater than the public generally in this case, and therefore should participate directly as of right.

Having an appropriate opposition party

[34] The difficulty in an appeal such as this is that the Regional Council officers supported the grant of consents, and the Commissioner decided to the contrary. In the absence of any opposing party, the Court would feel compelled to consider the appointment of *amicus* or take other steps to ensure that the contrary arguments in relation to this important subject were addressed. In that regard, it is likely that the Court would have wanted participation at least of some of the residents, to understand their concerns in relation to the renewal of the consents. Inevitably, I am left in the position



that this would further support the granting of status to a third party to oppose the application, given the Council's decision to abide the decision of the Court and not produce evidence.

Outcome

[35] To that end, I have already made directions that would apply to the Society and/or the individuals if I reach the contrary conclusion. I am satisfied that continuing the Society as a s 274 party proper will lead to the resolution of this appeal, and it is in the overall interests of justice that they should be a party in order to form an alternative position to the Appellant.

[36] Accordingly, orders are made as follows:

- A: The Society properly represents the interests of individual submitters who have the right of appeal in any event in respect of this matter. At least eight submitters are also members of the Society. It appears that the Society may have the authority to represent other submitters also.
- B: The interests of the Society is greater than the public generally under s 247(3). In particular:
- (i) The Society appears to have been formed specifically in relation to issues surrounding the operation of the boat yard in this area, and has been involved in court action in relation to this area; and
 - (ii) It is in the overall interest of justice that the relevant parties be represented by one body in order to enable the advancement of the case in an orderly and pragmatic way.

[37] Costs are reserved for the substantive hearing.



JA Smith
Environment Judge

