

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

Decision No. [2018] NZEnvC 003

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s 120 of the Act
BETWEEN AUCKLAND COUNCIL
(ENV-2017-AKL-000105)
Appellant
AND JANICE BUDDEN, MARK GITTOS AND
MICHAEL ROWE AS TRUSTEES OF THE
LONDON PACIFIC FAMILY TRUST
Respondent

Court: Principal Environment Judge LJ Newhook
Environment Judge JJM Hassan
Environment Commissioner RM Dunlop
Environment Commissioner IM Buchanan

Hearing: 13 & 14 December 2017

Appearances: L Muldowney and M Wakefield for Auckland Council
A Galbraith QC for HC Trust, Ollerton Trust and J Farmer QC
A Webb for London Pacific Family Trust
C Kirman and A Devine for Ministry of Education, Minister for
Environment, and Housing NZ Corporation
D Minhinnick for Auckland International Airport Limited, Brookby
Quarries Limited, Fulton Hogan Limited, Stevenson
Group Limited and Winstone Aggregates (a division of Fletcher
Concrete and Construction Limited)
R Enright for Wiri Oil Services Limited
S Janissen Amicus Curiae

Date of Decision: 23 January 2018

Date of Issue: 23 January 2018

SECOND INTERIM DECISION

A: A timetable is set for submissions on a form of wording for a declaration as set out at [9].



B: Directions are made for the Council to report back on certain matters at [10].

C: Costs are reserved, subject to observations on this matter at [11].

REASONS

Introduction

[1] On 19 December 2017, our first decision ('Interim Decision')¹ was issued in these proceedings. For the reasons it sets out, the Interim Decision:

- (a) declined the applications for 'Declarations B and C' by Auckland Council ('Council') (the Council's application for its 'Declaration A' having been withdrawn);
- (b) determined that a declaration should be made in materially similar terms to the following form of declaration put to the court during the hearing (and which it termed the 'finally postulated declaration'):²

Where a proposed activity is on a site located within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the partly operative Auckland Unitary Plan ("AUP") and requires a resource consent for a restricted discretionary activity in accordance with Activity Table D18.4.1 or, due to the infringement of a SCAR development standard pursuant to Rule C1.9(2):

- (a) It is a separate reason for resource consent pursuant to Rule C1.9(2) if the same activity infringes a SHZ development standard;
- (c) noted that a further decision would issue "making the declaration indicated, possibly expanding on these reasons, and possibly making associated directions to provide the follow up guidance",³ and
- (d) reserved costs on the basis that a timetable would be set by further decision or court Minute.

[2] The Council subsequently informed the court and parties that it has withdrawn the Practice Note that the Interim Decision found to be invalid.⁴ The Council also signalled that, early in the New Year, it would file a response to the observations made at [80] and [81] of the Interim Decision concerning the matter raised by counsel for the Government

¹ *Auckland Council v Trustees of London Pacific Trust* [2017] NZEnvC 209 ('Interim Decision').

² Interim Decision, at [52].

³ Interim Decision, at [82].

⁴ Memorandum of counsel for Auckland Council, dated 21 December 2017, at [2], [3].



s 274 parties, and the court's obiter observations, as to difficulties arising in accessing plan provisions as a consequence of the partly operative Auckland Unitary Plan ('pAUP') only being available in an electronic format.⁵ Such a response is welcomed and anticipated.

[3] By the same memorandum of counsel, the Council sought to clarify its position on an issue as follows:

4. The Council wishes to respectfully clarify one issue with the Interim Decision. At paragraph [32](e) the Court notes that the Council "abandoned declarations A – C". While the Council withdrew declaration A, it did not abandon either of declarations B and C.
5. In its reply the Council confirmed that it was seeking a decision from the Court in relation to both declarations B and C. While it is now clear from the Interim Decision that declarations B and C will be declined, with an alternative declaration likely to be made, the Council intended for declarations B and C to be formally determined by a final decision that would offer clarity and certainty for Council in its ongoing administration of the Unitary Plan.
6. In relation to the alternative declaration agreed between the parties, the Council collaborated on an amended version of that alternative declaration on the basis that if the Court declined the application for declarations B and C, the alternative declaration could instead be made. It was on that basis that it was presented to the Court by Council. The observation in the interim decision at paragraph [32](e) regarding Council not 'folding in' reflects the intended approach. Counsel regrets if any uncertainty has arisen on this point.

Response to the clarification matter

[4] The clarification made by the Council in its memorandum of counsel is accepted. The court's reference to 'abandoned', albeit somewhat unclear, was intended in the sense more fully explained in [32] as a whole, including [32](f) which quotes counsel's explanation of why the Council put forward the finally postulated declaration following discussion with parties during the recess. That is, the court understands that, by contrast to Declaration A, the Council did not withdraw its application for Declarations B and C but continued to seek a reasoned decision on those aspects of its application. The Interim Decision sets out those reasons, subject to the rider that they may be supplemented by a further decision.

⁵ Memorandum of counsel for Auckland Council, dated 21 December 2017, at [7].



Some issues with the wording of the finally postulated declaration

[5] The court means no criticism in making the following observations. To the contrary, we are grateful to the Council and other parties and Amicus for the cooperative way in which they worked during the course of the hearing in putting forward the finally postulated declaration (albeit with the rider noted by the Council as to its position). However, as is often the case with the benefit of further time for reflection following the hearing adjournment, it occurs to the court that there are some technical infelicities in the offered drafting that would benefit from refinement, given the public interest purposes of the declaration sought. We observe as follows:

- (a) there would be value in restructuring the declaration into subparagraphs to overcome a present lack of clarity in the very long compound preamble; and
- (b) the present subclause (a) is understood to be intended as the crux of the declaration. However, in its reference to "a separate reason for resource consent", it is not well directed to the central matter of interpretative dispute in the proceedings. That is as to the proper interpretation of the relevant rules where a restricted discretionary activity is on a site that is within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the pAUP.

Proposed revised declaration wording

[6] Subject to considering any further submissions on this matter (as per our direction at [7]), our present view is that the declaration should be as follows (or to closely similar effect) ('court's proposed declaration wording'):

Where a proposed activity:

- (a) is on a site located within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the partly operative Auckland Unitary Plan ("AUP"); and
- (b) is classed as a restricted discretionary activity either under Activity Table D18.4.1 or, due to its non-compliance with a SHZ development standard, under Rule C1.9(2) – then the relevant SHZ, SCAR and General Rules (and any relevant objectives and policies) apply, in the processing and determination of any resource consent application for the proposed activity, without any gloss to the effect that the SCAR rules prevail or cancel out other rules.



Council's wider pAUP analysis of Overlays and underlying zones

[7] The evidence of Ms Sanders and the Council's submissions referred to the wider pAUP analysis that the Council had then commenced of the relationship of various Overlays and underlying zones. The Council made the observation that what the court signals by way of direction could help influence the nature of this further inquiry.⁶

[8] We strongly urge the Council to complete and publish the outcomes of this comprehensive pAUP analysis. We observe that the case for it was strongly demonstrated by the submissions and evidence. For example, the rebuttal evidence of Ms Linzey for the Government's 274 parties served to show various subtleties concerning the interrelationship of particular Overlays to zone standards.⁷ More broadly, in light of our findings concerning the Council's now withdrawn Practice Note, there would appear to be an enhanced public interest purpose in the Council completing and publishing this pAUP-wide analysis. Given the Council's signalled intentions, we make a direction for the Council to continue and complete that analysis and file with the court and serve on the parties a progress report such that our final decision can record when parties can expect the analysis to be completed and published.

Directions and conclusion

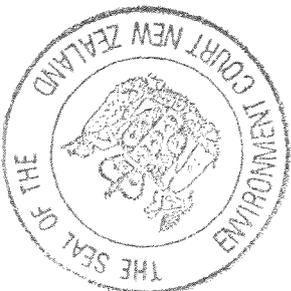
[9] We are satisfied that the reasons for our Interim Decision are now sufficient and complete, subject to the following:

- (a) it is directed that any supplementary submissions any party and/or Amicus wishes to make on the court's proposed declaration wording must be served and filed by **Friday 2 February 2018** (any changes to the court's proposed declaration wording to be shown by tracked change); and
- (b) subject to consideration of those submissions received, the declaration would be included in a third decision with any further reasons.

[10] The Council is directed to:

⁶ Affidavit of Rebecca Sanders for the Council, sworn 7 December 2017, at [6], Submissions on behalf of Auckland Council, dated 13 December 2017, at [166] – [175], Transcript, p 54.

⁷ Reply affidavit of Amelia Joan Linzey, dated 13 December 2017.



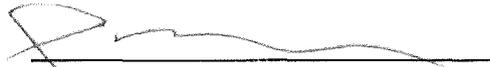
- (a) continue and complete its comprehensive pAUP analysis of the relationships of various Overlays and underlying zones; and
- (b) provide with its submissions under [9] or by memorandum of counsel filed by the same date, a progress report on that analysis, including details of how and when it will be published.

[11] The Interim Decision recorded that costs are reserved and a timetable for costs' submissions would be set in this decision or by Minute. It would now appear more appropriate that the timetable be set, if necessary, by the final decision. We say 'if necessary' as the court would encourage parties to discuss these matters. Clearly, if parties signal by joint memorandum that there are no issues as to costs, that would resolve this matter.

For the court:



L.J. Newhook
Principal Environment Judge



J.J.M. Hassan
Environment Judge



R M Dunlop
Environment Commissioner



I M Buchanan
Environment Commissioner

