BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 255

IN THE MATTER	of an application for interim enforcement orders under section 320 of the Resource Management Act 1991 (RMA)
BETWEEN	SAVE ERSKINE COLLEGE TRUST (ENV-2016-WLG-000069) Applicant
AND	ERSKINE DEVELOPMENTS LIMITED (FORMERLY KNOWN AS A GOOD DAY OUT CHARTERS LIMITED) SOUTHWARDS TRUST COMPANY LIMITED THE WELLINGTON COMPANY LIMITED Respondents

Court:	Principal Environment Judge Newhook sitting alone under s 279 of the Act
Hearing:	at Wellington on 20 December 2016; further submissions about undertakings received 20, 21 and 22 December 2016
Appearances:	P Milne and N Dunning for Applicant J Gardner-Hopkins and C Gubb for Respondents
Date of Decision:	22 December 2016
Date of Issue:	22 December 2016

DECISION OF THE ENVIRONMENT COURT RELATING TO INTERIM ENFORCEMENT ORDER

A: Undertakings of Respondents accepted by the Court.

B: Interim Enforcement Orders accordingly rescinded.

C: Costs reserved.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

SUMMARY OF REASONS CONCERNING DECLARATION ABOUT INTERIM ENFORCEMENT ORDER;[1] AND CONCERNING AN UNDERTAKING PROFFERED IN PLACE OF ANY CONTINUING INTERIM ENFORCEMENT ORDER

Introduction

[1] On 12 December 2016, Environment Judge CJ Thompson made an Interim Enforcement Order *ex parte* on the papers in Chambers in circumstances in which he was persuaded that the Respondents might imminently receive a resource consent from Wellington City Council, and undertake demolition or other activity in relation to a heritage listed property.[2]

[2] The Applicant is a duly appointed Heritage Protection Authority for a place known as Erskine College, located at 25/33 Avon Street, Island Bay, Wellington.

[3] There is no dispute that Erskine College is a heritage site, registered as a Category 1 Historic Place with Heritage New Zealand Pouhere Taonga, and includes at least three principal elements, a "Main Block", a chapel, and a garden. There is apparently a conservation plan in place identifying that the site has exceptional historic, architectural and social significance. This plan prepared in 2015 makes a number of recommendations for urgent essential conservation work.

[4] The Respondents are limited liability companies with common ownership of Mr I B Cassels of Wellington.

[5] In August this year one of the Respondents, The Wellington Company Limited (TWC) applied to the Wellington City Council for resource consent under the Housing Accords and Special Housing Areas Act 2013 (HASHAA) to develop the site. The application for resource consents was exhibited to the affidavit of Ms MM Kennedy, the secretary of the Applicant. It provided for major subdivision and development, the construction of 96 residential units, complete demolition of the Main Block and permanent removal of some allegedly key heritage landscapes; the chapel and part of a garden would remain.

[1] This is a short summary of reasons only; the legal argument heard in open Court is deserving of detailed reasons concerning legal interpretation of complex provisions, and those will issue early in the New Year.
[2] Decision [2016] NZEnvC 247.

[6] The Respondents have not applied to the Applicant for written consent to undertake any use of land, subdivide it, or change the character, intensity or scale of use of the land that might have the effect of wholly or partly nullifying the effect of the heritage order[3]. Further, the Respondents and Wellington City Council have not considered the Applicant as an effected person in relation to the resource consent application.

[7] On 13 December 2016 the Respondents applied to the Court to cancel the *ex parte* interim orders, and sought that this application be dealt with urgently. I conducted a telephone conference during which I gained the agreement of counsel that the core dispute was as to whether HASHAA impliedly removed the jurisdiction of heritage authorities under s 193. I set that matter down for argument in open Court on 20 December, and conducted a half day hearing on the topic.

[8] Again, generally agreed with counsel, I took the view that the argument essentially took on the shape of a hearing on an application for declaration.

[9] Some other aspects of the application to vary or cancel the *ex parte* interim enforcement order were left aside, for instance as to whether there should be an undertaking as to damages and/or security for costs, so the hearing was not one about whether there should be a full substantive enforcement order made at this time.

Discussion

[10] Detailed affidavits were filed on both sides, followed by focussed legal submissions about the quite complex interface between HASHAA and the RMA on these matters.

[11] Given that the hearing was being held just before Christmas, and under urgency, but recognising that the details of the legal arguments were quite complex, I refrained from issuing a full oral decision, and this decision is not to be regarded as the full reasoning. Instead, having heard from all counsel (including in reply), I adjourned briefly to assemble my thoughts, and had then delivered in Court a very short summary of what the reasoning would look like when I issue the reserved decision in the new year.

[12] In very much summarised form, the dispute appeared to be as to whether the

[3] To employ the wording of s193 RMA.

relevant provisions of HASHAA effected an implied repeal *pro tanto* of the provisions of s 193 (and s 195) RMA.

[13] In very much summarised form, Mr Milne for the Applicant advanced the following propositions:

- There is no express provision in HASHAA to the effect that a consent granted under its provisions overrides the need for approval under s 193 RMA (or under s 176 RMA either);
- Once a HASHAA consent has been granted, it has the identical effect of any other resource consent, and holders are still required to obtain approval under s 193 (or s 176) RMA;
- Section 22 of HASHAA and its reference to "an application, request, decision, or any other matter" does not (even in relation to the wide class of "any other matter") extend to exclude ss 176 or 193 RMA, and in any event, s 49 HASHAA expressly addresses the status of a HASHAA consent once granted;
- There is therefore no ambiguity that requires recourse to the purpose of HASHAA or any other material; the two pieces of legislation are not inconsistent with each other let alone repugnant to each other; they are perfectly capable of standing together and accordingly there is no need to determine which must prevail utilising the principle of statutory interpretation "implied repeal *pro tanto*".

[14] Mr Gardner-Hopkins submitted in summary on behalf of the Respondents:

- There is indeed no express provision in HASHAA that states that a HASHAA consent overrides the need for approval under s 176 or s 193 RMA;
- HASHAA should be interpreted as a later specific piece of legislation which establishes a regime or code inconsistent with the need to obtain approval under s 176 or s 193 RMA;
- HASHAA was intended to provide a shortcut process for obtaining all relevant regulatory approvals relating to the qualifying development, and "stands in the shoes" of the usual RMA provisions in terms of the

processing of the resource consent; also following the grant of a HASHAA consent (e.g. changing or reviewing conditions etc);

- It would undermine the entire purpose of HASHAA and its ability to deliver affordable housing and increase the supply of housing as required under the Wellington Housing Accord on a site, if a HASHAA consent could be frustrated by the requirement to then obtain a s 176 or s 193 approval;

- Arguments about the operation of s 49 HASHAA;

- The later special provision (HASHAA) is inconsistent with, indeed repugnant to, relevant provisions of the RMA; it takes away part of the earlier subject matter and deals with it specifically and has impliedly repealed the earlier provisions *pro tanto*, so far as its subject matter extends;

- Therefore ss 176 and 193 RMA do not apply; neither can they be "imported" into a HASHAA consent.

[15] After the brief adjournment I announced that the arguments on behalf of the Applicant were essentially correct, and those on behalf of the Respondents, not. I then provided a very short summary of the essence of my reasoning as it would appear in a detailed reserved decision in the new year. The indications were as follows (and expressly recorded as not being exclusive):

- The two pieces of legislation are not inconsistent or repugnant to the point where a Court would have to find them incapable of standing together;

- I cannot accept that the Court might need to undertake analysis by "necessary implication" around the HASHAA provisions as urged by Mr Gardner-Hopkins, in order to spell out a code that goes beyond that which is in fact reasonably clear: the HASHAA provisions are all about swift resource consents and plan changes; they do not encompass matters of the kind embraced by ss 176 and 193 RMA, so they are not a "one stop shop";

- It seems that Parliament, with quite considerable input from the Select

Committee, was quite deliberate in speaking to the interface of the RMA and HASHAA, to the point of possibly engaging the Latin maxim *expressio unius est exclusio alterius* in those circumstances. The two tables of statutory provisions advanced by Mr Gardner-Hopkins provide an overall analysis to similar effect, because they focus on resource consents and plan changes. He very properly conceded that there appeared to have been no submissions to the Select Committee about ss 176 and 193 RMA, and that this could "cut both ways". In my view that analysis falls in favour of the Applicant;

- The exercise of discretion by the "authorised agency" (here WCC) under s 29 in relation to whether applications for resource consent or proposed plan instruments, as to whether to notify certain bodies including NZTA, is to be considered within the framework of such consenting or planning, and cannot be stretched to exclude approvals required from NZTA as a requiring authority or approvals from any other requiring or heritage authority, however one might interpret all relevant provisions of HASHAA including s 49 as inserted late in its legislative history;

- Mr Garner-Hopkins understandably identified a risk that s 193 processes could negate a HASHAA consent in whole or in part, but that is the clear scheme of the legislative interpretation exercise I have undertaken, and it doesn't amount to inconsistency or repugnancy, but indicates two strings of approval or consenting that must be pursued.

Interim Enforcement Order, or Undertakings?

[16] At the conclusion of my indications, Mr Gardner-Hopkins offered submissions about whether an enforcement order should remain in place, or could instead be replaced by undertakings, at least pending resolution of the s 193 application that he announced his clients would be making forthwith. He read out a form of undertaking that Mr Cassels had recorded in a further affidavit against the eventuality that I would rule as I did.

[17] Mr Milne opposed that with reasons that he said he had been instructed to advance by his client.

[18] When I tested him about the usual approach of the Court to accept appropriate undertakings rather than make formal orders, the following exchange took place as is

recorded in the transcript:

> **Judge Newhook:** How about if I were to adjourn the proceedings rather than close the court file, and if an undertaking were given, and the interim order rescinded, but with leave for your client to apply if the undertaking were breached, what would be wrong with that?
>
> **Mr Milne:** Your Honour, from my perspective as Counsel assisting the Court there would be nothing wrong with that. From my clients perspective...
>
> **Judge Newhook:** that's an honest answer thank you.
>
> **Mr Milne:** I have clear instructions not to accept what's proposed.

[19] I directed that the Applicant could advance written submissions for me to consider on the papers in chambers the next day, and that the Respondents should have a right of reply.

[20] On 21 December I received lengthy submissions from Mr Dunning, solicitor for the Applicant. The bulk of the submissions unfortunately revisited a history of some discord between the Applicant and the Respondents, a flavour I had perceived during the hearing.

[21] The undertaking put forward by the Respondents (expressly subject to any modification to refine it or to provide clarity that the Court might direct), was as follows:

> The Respondents undertake to the Court not to commence any physical construction, demolition, earthworks or other associated activities to implement the HASHAA consent dated 19 December 2016 unless or until:
>
> (a) Section 193 approval is obtained from the Applicant (and then in accordance with any conditions that might be imposed on that approval by the Applicant); or
>
> (b) An appeal (if required) to the Environment Court under s 195 is determined (and then in accordance with any conditions that may be confirmed or modified by the Environment Court).

[22] Mr Dunning, having traversed the allegedly unhappy history between the

parties, submitted that the draft undertaking was only in relation to work to implement the "deemed resource consent", and was in "minimal form". He said that it did not cover subdivision. He submitted that the respondents would continue "other activities up until the time its undertaking expires, which might or might not partially nullify the heritage order if that includes works not covered by the resource consent"; also that his client's "abilities and resources are limited and it would be onerous to have to reapply to the Environment Court were there a breach of or marginal interpretation of the wording, which, given the timing, might be beyond it." He noted that the Court would close over Christmas. Intriguingly, he submitted that "protection of the site over which a heritage order is held should not be made to depend on the adequacy of the undertaking of a developer who has argued long and hard against the application of s 193".

[23] He then made application for a final enforcement order.

[24] Regrettably, I see that some "hard ball" is being played by both parties. For instance, I am aware from the written submissions of counsel on this point, including a brief further reply on behalf of the Respondents, that the Respondents are seeking very tight time limits on the processing of their s 193 application, even purporting to deem that want of any conclusion on it by 23 December 2016 would be interpreted as a refusal giving rise to rights of appeal to the Environment Court. I cannot rule on such matters.

[25] The undertakings offered above are appropriate. The Court accepts them and is now placing them on its file. The file will remain open should the Applicant perceive any breach of them and wish to raise such with the Court on an urgent basis. The *ex parte* interim enforcement order made on 12 December 2016 is rescinded, being now unnecessary in light of undertakings received.

[26] Detailed reasons for my ruling on the implied repeal point will issue as soon as possible in the New Year.

[27] Costs remain reserved.

DATED at AUCKLAND this 22nd day of December 2016

LJ Newhook
Principal Environment Judge