BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 178

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 358 of the Act
BETWEEN	JOHN LEONARD SHIRTCLIFF & ROSEMARY JEAN SHIRTCLIFF
	(ENV-2018-CHC-165)
	Appellants
AND	TIMARU DISTRICT COUNCIL
	Respondent

Court:	Environment Commissioner C J Wilkinson (Sitting alone pursuant to s 280(1) of the Act)
Hearing:	In Chambers at Christchurch
Date of Decision:	20 October 2020
Date of Issue:	20 October 2020

DECISION OF THE ENVIRONMENT COURT

A: The appeal is dismissed.

B: There is no order as to costs. Costs are to lie where they fall.

REASONS

Introduction

[1] This proceeding concerns an appeal against a decision on an objection to costs in relation to a subdivision application at 584 Orari Station Road, Geraldine. Mr J L and Mrs R J Shirtcliff applied to the Timaru District Council ("Council") on 22 December 2016

for resource consent to subdivide the rural zoned 22.34ha property[1] to create 12 new allotments. The subdivision was assessed as a discretionary activity (although it had been initially assessed by the Council as a non-complying activity).

[2] On 15 June 2017 the Council publicly notified the land use consent application. It received 13 submissions, nine of which were opposed, one was neutral, two supported the proposed development and one supported it in principle.

[3] On 16 November 2017 the application was heard in Timaru by an Independent Hearing Commissioner ("Hearing Commissioner"). It was attended by Mr Shirtcliff representing himself and his wife; Ms G Conlon (a planner on behalf of the Council); five submitters and their representatives and/or witnesses. On 19 December 2017 the application was declined.

[4] Mr and Mrs Shirtcliff subsequently appealed that decision to this court[2] which ultimately led to a consent order being granted on 1 February 2019 to subdivide the property into five separate allotments subject to conditions.

[5] On 19 January 2018 Mr and Mrs Shirtcliff were invoiced $27,855.07 (including GST and a $4,000 deposit already paid at the lodgement of the resource consent application). This was based on the report[3] of Ms T Tierney, the Group Manager Environmental Services at the Council, which detailed the actual costs incurred for the processing of the consent of $34,171.17 (including GST) from which she deducted $6,316.10 which was not considered reasonable due to an error associated with the s 95 report and other legal costs.

[6] Mr and Mrs Shirtcliff lodged an objection as to costs on 5 February 2018 seeking remission of the $27,855.07 (including the $4,000 deposit) under the discretion provided by s 36(AAB)(1) Resource Management Act 1991 ("RMA").

[7] On 10 May 2018 the costs objection was heard in Timaru by an Independent Hearing Commissioner ("Costs Commissioner"). It was attended by Mr Shirtcliff representing himself, and Ms Tierney on behalf of the Council. On 20 June 2018 the

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1 Legally described as Lot 1 DP 82810.
2 ENV-2018-CHC-4.
3 T Tierney affidavit sworn 6 November 2018, Annexure 1.

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objection was accepted in part and the fees reduced by $3,929.79 (including GST).

[8] Mr and Mrs Shirtcliff subsequently appealed the Costs Commissioner's decision to this court pursuant to s 358 RMA.

[9] On 23 April 2020 the court issued a minute confirming that this matter would be heard on the papers. The evidence has been considered and the parties have filed submissions. The court's de novo role in determination of the appeal concerns whether that extent of costs is fairly recoverable, on an actual and reasonable basis according to the RMA.

[10] The disputed amount is $23,925.28 (including GST). Mr and Mrs Shirtcliff seek full remission.

Position of the parties

[11] Mr Shirtcliff's submissions[4] went into considerable detail being "much more than a petty disagreement over the quantum of costs" traversing into a "lack of accountability and access to natural justice". He has spent some considerable effort addressing issues of procedural unfairness, breach of natural justice, the perceived existence of "unmanaged and undeclared conflicts of interest", "failure to meet the appellants' legitimate expectations of a level of support for the consent proposal" and general "unreasonable behaviour by the respondent".

[12] Without dismissing what he has to say in this regard, the court in determining this appeal on the papers must decide whether or not the charges (he has claimed full remission of all charges) are actual and reasonable (under s 36 RMA).

[13] The Council's position is that the charges are authorised, fair and reasonable, and that even if there was any evidential basis of bias, predetermination or conflict of interest (which it refutes) those matters had no bearing on the decision of the Hearing Commissioner.

[4] Submissions for the appellant dated 15 May 2020 at [1].

The statutory basis for cost recovery – s 36

[14] The relevant parts of s 36 RMA[5] provide:

> **36 Administrative charges**
>
> (1) A local authority may from time to time, subject to subsection (2), fix charges of all or any of the following kinds:
>
> …
>
> (b) charges payable by applicants for resource consents, for the carrying out by the local authority of any 1 or more of its functions in relation to the receiving, processing, and granting of resource consents (including certificates of compliance and existing use certificates):
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> …
>
> Charges fixed under this section shall be either specific amounts or determined by reference to scales of charges or other formulae fixed by the local authority.
>
> (2) Charges may be fixed under subsection (1) only –
>
> (a) in the manner set out in section 150 of the Local Government Act 2002; and
>
> (b) after using the special consultative procedure set out in section 83 of the Local Government Act 2002; and
>
> (c) in accordance with subsection (4).
>
> (3) Where a charge fixed in accordance with subsection (1) is, in any particular case, inadequate to enable a local authority to recover its actual and reasonable costs in respect of the matter concerned, the local authority may require the person who is liable to pay the charge, to also pay an additional charge to the local authority.
>
> (3A) A local authority must, upon request by any person liable to pay a charge under this section, provide an estimate of any additional charge likely to be imposed under subsection (3).
>
> (4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:
>
> (a) the sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates:
>
> (b) a particular person or persons should only be required to pay a charge –
>
> (i) to the extent that the benefit of the local authority's actions to which the charge relates is obtained by those persons as distinct from the community of the local authority as a whole; or
>
> (ii) where the need for the local authority's actions to which the charge relates is occasioned by the actions of those persons; or
>
> (iii) in a case where the charge is in respect of the local authority's monitoring functions under section 35(2)(a) (which relates to monitoring the state of the whole or part of the environment), to the

[5] Whilst section 36 was amended in April 2017 by the Resource Legislation Amendment Act 2017 under the transitional provisions this resource consent matter (application for subdivision consent was made December 2016) is to be determined as if these amendments had not been enacted.

> extent that the monitoring relates to the likely effects on the environment of those persons' activities, or to the extent that the likely benefit to those persons of the monitoring exceeds the likely benefit of the monitoring to the community of the local authority as a whole, —
>
> and the local authority may fix different charges for different costs it incurs in the performance of its various functions, powers, and duties under this Act —
>
> (c) in relation to different areas or different classes of applicant, consent holder, requiring authority, or heritage protection authority; or
>
> (d) where any activity undertaken by the persons liable to pay any charge reduces the cost to the local authority of carrying out any of its functions powers, and duties.
>
> (5) A local authority may, in any particular case and in its absolute discretion, remit the whole or any part of any charge of a kind referred to in this section which would otherwise be payable.
>
> (6) Sections 357B to 358 (which deal with rights of objection and appeal against certain decisions) shall apply in respect of the requirement by a local authority to pay an additional charge under subsection (3).
>
> (7) Where a charge of a kind referred to in subsection (1) is payable to a local authority, the local authority need not perform the action to which the charge relates until the charge has been paid to it in full.
>
> …

The Council's administrative charges under the RMA policy

[15] The Council's Long Term Plan 2018-2028 provides for a fixed charge lodgement fee that acts as a deposit and states that the Council may refund part of this fixed fee if the work required to process the application is less than usual; or where the total cost to process an application exceeds the fixed charge lodgement fee then additional fees will be charged at the rates specified in the fee schedule.

[16] The hourly rates for staff are the rates (unchanged since being adopted as part of the 2015-2025 Long Term Plan) published in the Council's Fee and Charges Schedule.[6] Those rates include senior planner and 'other Council staff' at $130 per hour, planning officer at $110 per hour, and administration staff at $90 per hour. Hearing Commissioner rates are "at cost".

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[6] T Tierney affidavit sworn 6 November 2018, Appendix 5 to Annexure 1 .

Consideration

[17] The High Court in *Porirua City Council v Ellis*[7] ('*Porirua*') upheld the Environment Court's decision which outlined the statutory basis for costs recovery under s 36 and followed established legal steps[8] for fixing an additional charged under s 36(4). Using that approach I now apply the following steps:

(a) what are the Council's actual costs incurred in relation to the activity (including costs charged to it by external consultants)?
(b) are those costs reasonable in relation to the activity, that is, do they meet the s 36(4)(a) threshold?
(c) are those costs satisfied by the fixed charge?
(d) if not, what 'additional charge' should be levied to recover the balance of the actual and reasonable costs?
(e) can the person who initiated the activity be required to pay that charge because they satisfy one of the criteria in s 36(4)(b)?
(f) is it a case where in the exercise of the local authority's absolute discretion under s 36(5) either the whole or part of the fixed charge or the additional charge should be remitted?

What are the Council's actual costs incurred in relation to the activity (including costs charged to it by external consultants)?

[18] The Council prepared a timesheet report detailing the breakdown of the work undertaken by each Council officer involved in the resource consent process which was set out in the report attached to Ms Tierney's affidavit.[9] The report records the time Council spent on the application that was charged to Mr and Mrs Shirtcliff as well as time spent on the application that was not charged to them. In addition to this were two contributing invoices to the Council for the Hearing Commissioner charges.

[19] In summary the breakdown of the charges as invoiced (GST included) are:[10]

7 *Porirua City Council v Ellis* [2017] NZHC 784.
8 See *Hill Country Corp Limited v Hastings District Council* [2010] NZRMA 539.
9 T Tierney affidavit sworn 6 November 2018, Appendix 3 to Annexure 1.
10 T Tierney affidavit sworn 6 November 2018, Annexure 1.

Charges for Commissioner (two invoices)	$15,502.57
Council processing charges	$12,352.50
Total cost	$27,855.07
Less lodgement fee/deposit	$4,000.00
Total to pay	$23,855.07

[20] On objection, these costs were reduced by the Costs Commissioner to $23,925.28 (including GST) which allowing for the lodgement fee/deposit paid leaves a balance claimed to be owing to the Council of $19,925.28. The appellant is seeking full remission of this total amount including reimbursement of the lodgement fee/deposit paid.

[21] The appellants' case raised general matters in terms of the setting of user charges and the recovery of actual and reasonable costs "where entitled, having been appropriately considered, reviewed and decided".

[22] The appellant is not disputing either the ability of the Council to levy additional charges or its entitlement to recover actual and reasonable costs.[11] Whilst being somewhat critical of the process of setting the fees and charges in the Long Term Plan process, any challenge to that process and to the fees and charges should have been made by way of judicial review. This court does not have the jurisdiction to look behind or review that process or amend Council charges policies.

[23] There is no question that actual costs were incurred by the Council. The Council has advised those actual costs. The more pertinent issue is the reasonableness of those costs and to ensure that there is not "over-recovery" of those costs.

Are those costs reasonable in relation to the activity, that is, do they meet the s 36(4)(a) threshold?

[24] The total cost was nearly six times more than the amount in the first invoice with the appellant being given no prior warning that costs would have escalated to this extent. At the time of acceptance by the Council of the resource consent application, Mr Shirtcliff was advised by letter dated 12 January 2017 (annexure 4 Tierney affidavit) that "Please

[11] Submissions in reply for the appellants dated 31 August 2020 at [1].

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note that in accordance with the Act, Council is able to charge additional fees to cover the actual and reasonable costs where the lodgement fee is inadequate".

[25] The charges can be broken down into the two categories of Council processing charges and charges for the Hearing Commissioner. I will deal with these separately below.

Council processing charges

[26] The Council has produced a timesheet record[12] with a detailed breakdown of the time and tasks undertaken by the respective Council officers which shows a total of 108.25 hours of work undertaken although of that only 98.25 hours was actually charged. The charge out rates varied between $90 and $130 per hour depending on the Council officer involved.

[27] The Council sought advice from Mr Rogers, an experienced legal practitioner, from Adderley Head Environmental Law Specialists, to obtain his view as to the reasonableness of the fees and costs charged. He concluded[13] that the hourly rates and costs were in keeping with costs schedules of other councils and that the time allocated to the tasks identified was reasonable having particular regard to the nature of the application being reported on.

[28] The Costs Commissioner also considered[14] that the Council's hourly rates and costs were in keeping with (even somewhat less than) those of other councils and that the time taken by Council staff was in line with an application of similar nature and scale.

[29] In the absence of any compelling evidence to the contrary it is difficult to disagree with the conclusion of the Costs Commissioner that the Council's processing charges totalling $12,352.50 were reasonable.

Charges for the Hearing Commissioner

[30] In relation to the charges for the Hearing Commissioner the Council was furnished

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12 T Tierney affidavit sworn 6 November 2018, Appendix 3 to Annexure 1.
13 T Tierney affidavit sworn 6 November 2018, Appendix 6 to Annexure 1.
14 Decision of the Costs Commissioner dated 20 June 2018 at [65].

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with two accounts.[15] The first one rendered in November 2017 totalled $8,027.57 for 22 hours at $250 per hour (being $5,500 plus GST) for work including: reviewing the application documents, submissions and section 42A report, reviewing the evidence for the hearing, attending the hearing on 16 November 2017, site visit, reviewing planners' review, reviewing Mr and Mrs Shirtcliff's reply and closing the hearing on 30 November 2017. Disbursements totalling $480.50 were also charged.

[31] The second account was rendered in December 2017 and totalled $7,475 (including GST) for 26 hours at the same above charge-out rate for work involved in reviewing the evidence and preparing and releasing the decision.

[32] As with the Council processing charges Mr Rogers concluded that the Hearing Commissioner's hourly charge out rate was reasonable and that the Hearing Commissioner's time and attendance was also appropriate.

[33] The Costs Commissioner also addressed the issue of using an Independent Hearing Commissioner rather than local authority councillors[16]. Whilst not raised by either the appellant or the respondent in this appeal, for the sake of completeness it is noted that the Costs Commissioner took this issue into account and reduced the charges by $3,417.20 after assessing and comparing the time and costs of both situations.

[34] I am not looking into whether the decision to appoint an Independent Hearing Commissioner was reasonable, but whether the costs (as reduced) of that Independent Hearing Commissioner were reasonable.

[35] The Costs Commissioner did not conclude that the Hearing Commissioner's costs were unreasonable and in the absence of any compelling evidence to the contrary it is difficult to disagree.

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15 T Tierney affidavit sworn 6 November 2018, Appendix 2 to Annexure 1.

16 Section 100A provides that where a local authority receives a request under subsection (2) it must delegate under s 34A(1) its functions, powers and duties required to hear and decide the application to one or more Hearing Commissioners who are not members of the local authority. Section 36 provides that where such a request has been made, but not by the applicant, the local authority may fix (ab)(i) charges payable by the applicant for the amount that the local authority estimates it would cost for the application to be heard and decided if the request had not been made.

Evaluation

[36] Undertaking an assessment of what is reasonable involves making a genuine and intelligent decision about what resources are required to deal with the issue at hand.[17]

[37] I recognise and accept the difficulty of determining what is reasonable in the absence of agreed scales or time frames for undertaking particular tasks.

[38] Mr Shirtcliff did not propose a specific amount as reasonable or unreasonable in terms of either the Hearing Commissioner's costs or the Council processing charges other than requesting remission. Nor did he propose a specific time frame for the processing of the application as reasonable or unreasonable.

[39] The Council provided advice from Mr Rogers that the Council charges and the Hearing Commissioner based fees were both fair and reasonable. The Costs Commissioner agreed (subject to the reduction of charges based on the comparison between using an independent hearing commissioner or local authority councillors).

[40] For the reasons above I conclude that both the Hearing Commissioner costs (as reduced) and the Council processing charges were reasonable.

Are those costs satisfied by the fixed charge?

[41] The fixed charge was $4,000 (including GST). The Council's actual and reasonable costs were $23,925.28. Clearly the costs are not satisfied by the fixed charge.

If not, what "additional charge" should be levied to recover the balance of the actual and reasonable costs?

[42] The High Court in *Porirua*[18] stated that:

> The way in which the legislation works is that s 36(3) enables local authorities to recover additional charges where their actual and reasonable costs are not covered by the fixed

17 *Barton v Wellington Regional Council* [2004] NZRMA 337 at [18].
18 *Porirua City Council v Ellis* above n 7 at [35].

> charge. Section 36(4) sets the criteria to which local authorities must have regard, in fixing the additional charges. Importantly s 36(4)(a) reinforces that the sole purpose of an additional charge is 'to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates'.

[43] As set out above the I consider the amount charged by both the Council officers and the Hearing Commissioner to be reasonable which falls well short of the fixed charge, so it is appropriate the balance of the additional charges should be paid by the appellants. I conclude that the additional charge to be levied to recover the balance of the actual and reasonable costs is $19,925.28 including GST (being $23,925.28 less the $4,000 already paid).

Can the person who initiated the activity be required to pay that charge because they satisfy one of the criteria in s 36(4)(b)?

[44] Under s 36(4) the sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity (processing of the subdivision consent application) to which the charge relates. A person should only be required to pay a charge if they satisfy one of the criteria in s 36(4)(b). Under the criteria in s 36(4)(b)(i) the work must be done for the appellant's benefit as distinct from the community.

[45] I do not understand there to be any appetite for suggesting that the work undertaken by the Council was for the community as a whole.

[46] Under the criteria in s 36(4)(b)(ii) the need for the Council's actions to which the charge relates was occasioned by the actions of the appellants. Accordingly the charges satisfy both subparagraphs s 36(4)(b)(i) and (ii).

[47] I conclude that the actual and reasonable additional charges are occasioned by and resulted from the application for resource consent.

Is it a case where, in the exercise of the local authority's absolute discretion under s 36(5), whether the whole or part of the fixed charge or the additional charge should be remitted?

[48] The appellant has submitted in reply that the outstanding balance of the fees

charged ($19,925.28) be remitted or "quashed" on the basis that:[19]

> …
> (b) our process complaints had been made clearly and consistently from very early in the process and were, with the exception of the flawed s 95 notice, ignored;
> (c) the [Council] has failed, despite multiple requests, to demonstrate that the cost recovery fees levied are 'actual and reasonable' in their foundation and calculation;
> (d) the [Council] has not exercised a genuine and intelligent decision in arriving at the quantum of the cost recovery fees; and
> (e) has not rebutted either the reasonably held perception or actuality of unfair process due to conflict of interest, bias and/or predetermination.

[49] The Council has submitted that:

(a) the costs have already been reduced by $6,316.10 for work undertaken to correct an error in the first notification report and staff attendance at the hearing that was not required;
(b) in addition legal costs and staff time "attempting to address the appellants' concerns through the process" were not charged;[20]
(c) it is unrealistic for an applicant to not pay for the cost of processing his/her application as it would otherwise put the costs on the ratepayers;[21]
(d) Council planning staff were not biased or predetermined nor was there a conflict of interest;[22] and
(e) the decision to decline the consent was made by an Independent Hearing Commissioner. There is no allegation that the Hearing Commissioner was "biased, predetermined anything, or had a conflict of interest."[23]

[50] It may have been prudent for the Council to have kept Mr Shirtcliff updated at intervals throughout the resource consent process as to the actual costs incurred and as to the likely future costs. This may have given Mr Shirtcliff a realistic idea or at least a better understanding of what he could be expected to pay. Mr Shirtcliff himself could also have asked to be updated regularly or if he thought the costs may have been getting out of hand he could have asked the Council at any stage throughout the process for an estimate of any additional charges.

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19 Submissions in reply for the appellants dated 31 August 2020 at [20].
20 Submissions for the Council dated 21 May 2020 at [16].
21 Submissions for the Council dated 21 May 2020 at [22].
22 Submissions for the Council dated 21 May 2020 at [25]-[33].
23 Submissions for the Council dated 21 May 2020 at [34(c)].

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[51] Having said that, Mr Shirtcliff appears to be less concerned with the quantum of the charges and more concerned that as the process was in his view "flawed" and that all outstanding charges (being $19,925.28) levied should be "quashed". It also appears from his submissions[24] that Mr Shirtcliff is also seeking a refund of the deposit (fixed charge) of $4,000 already paid by him.

[52] It is apparent that the resource consent process has been somewhat frustrating for Mr Shirtcliff. This frustration seems to have been exacerbated by Mr Shirtcliff attempting to progress the application as a lay person and without the objectivity and expertise of professional advisors. That is not to say that lay persons should not be able to progress a resource consent application by themselves but this case is illustrative of the disadvantages of doing so without having independent and objective professional assistance and advice. Where Mr Shirtcliff perceived there to be a conflict of interest, bias and/or predetermination, seeking professional advice may have been able to allay those perceptions.

[53] Whilst I do not find any actual evidence of conflict of interest, bias and/or predetermination it is important to consider whether the behaviour of the Council was such as to render the charges unreasonable – whether unreasonable as to the hourly rates charged for the respective tasks or unreasonable as to the time taken to complete those respective tasks.

[54] Under s 290A RMA I am to have regard to the decision of the Costs Commissioner on the costs objection. I have done that and see no reason, on the evidence and submissions made, to come to a different conclusion.

[55] After evaluating the factors involved I have reached the conclusion that the costs charged by the Council are fair, reasonable and appropriate.

Result

[56] The appeal is dismissed for the reasons set out in this decision. Mr and Mrs Shirtcliff are required to pay the Council the remainder of the amount outstanding. The total amount is $23,925.28 (including GST). Mr and Mrs Shirtcliff have already paid the

[24] Submissions for the appellant dated 15 May 2020 at [49].

fixed charge of $4,000 and so now owe the Council $19,925.28 (including GST).

Costs

[57] In these circumstances I do not consider an award of costs to be appropriate. Accordingly, I will make an order that costs are to lie where they fall.

C J Wilkinson
Environment Commissioner