IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TAMAKI MAKAURAU

Decision [2024] NZEnvC 021

IN THE MATTER OF	an appeal against an abatement notice under s 325(2) and an application for stay under s 325(3D) of the Resource Management Act 1991
BETWEEN	BRO TONGANUI LIMITED
	(ENV-2024-AKL-000017)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Environment Judge J A Smith
Hearing: Last case event:	In chambers, 22 February 2024
Appearances:	A Paterson for BRO Tonganui Limited R Russ and H Russell for Auckland Council
Date of Decision:	23 February 2024
Date of Issue:	23 February 2024

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR STAY AND DIRECTIONS FOR HEARING OF ABATEMENT APPEAL

A: A stay is granted until the conclusion of the hearing of the Abatement Appeal in the week of 10 June 2024 ,or further order of this court, upon the following terms:

(a) that a report, preferably joint, is to be provided to the Court by **28 March 2024** as to progress in respect of addressing the issues of concern, and in particular identifying what, if any, applications for consent have been made and by whom, and any other preliminary steps to meeting the requirements for the 26 April 2024 memorandum;

(b) that a memorandum, preferably joint, is to be filed by **26 April 2024** advising the witnesses for each parties, the time required for hearing, the prospects of resolution and the steps to that resolution if necessary, and finally whether hearing time will be required in the week of **10 June 2024;**

(c) the Council is to file all its evidence in support of the application by **17 May 2024;**

(d) the Appellant is to provide all its evidence in response by **31 May 2024;**

(e) the Council is to file with the Court the evidence, any common bundle of documents, and any other documents relevant (i.e., affidavits) by **5.00pm on 3 June 2024** in the following formats:

(i) four single-sided hard copies of the evidence bundle (labelled as EB), and four hard copies of the common bundle (labelled as CB), tabulated, paginated, indexed and compiled into A4 lever-arch folders; and

(ii) an electronic copy of the bundles in corresponding files, on a USB drive.

(f) the matter is to be set down for hearing in the week of 10 June 2024 (nominally at this stage for two days). A Notice of Hearing will follow in due course; and

(g) leave is reserved for any party to seek to cancel or modify the stay on three days' notice to the Registrar.

B: Costs are reserved.

REASONS

Introduction

[1] On 14 February 2024 the Appellant, BRO Tonganui Limited, filed both an appeal against abatement notices and an application for stay in respect of those notices. The application for stay was accompanied by an affidavit of Ulrik Olsen, and further information in relation to soil sample testing was provided to the Court and circulated to the Council.

[2] At the hearing of the stay application and directions application the Council acknowledged that it had received both the appeal of the abatement notices and the stay papers, together with the affidavit and ancillary documents.

Application for stay of abatement notices

[3] As this is an application for stay and is considered under s 325(3D) RMA, This process which has been described on many occasions by the Court as being akin to an interim injunction.

[4] The requirements set out in s 325(3D) RMA, require the Court to consider

(a) the effects on the environment of granting the application for stay,

(b) whether it is unreasonable to comply with the abatement notice in the meantime,

(c) whether it should hear from both parties. In this case the Court concluded it should hear from both parties given that over a week had elapsed between service and when counsel was able to appear.

Abatement notice ABC21706805

[5] Both abatement notices are expressed in general terms, and in themselves seem to have some issues. It is clear that BRO Tonganui Limited is the landowner, and the

property at 1121 Great South Road Drury is zoned Future Urban Zone.

[6] Apparently, a number of businesses operate on this site, and the assertion contained in abatement notice ABC21706805 (annexed hereto as "**A**") is that BRO Tonganui Limited are operating unconsented businesses. The notice requires them to cease "operating all unconsented business including industrial activities at 1121 Great South Road…". Furthermore, BRO Tonganui Limited is to cease further earthworks on the property in breach of the Act and AUP(OP).

[7] The notice initially refers to ss 9(2) and (3) of the RMA. What Ms Russ explained to the Court is that, as Future Urban Zone, any industrial-type activity (and many other activities) require a resource consent to operate. Although there are some permitted uses, she understands that none of the activities fit within that category.

[8] There is no identification of the particular businesses in question, although one that was subject of some evidence both for the Appellant and for the Council was Vernon Developments Limited. No notice has been served on them and they were not before the Court.

[9] A fuller explanation of the reasons for the notice are contained on the second page and this explains in some more detail that it relates to new industrial trade activity, and also that crushing, grinding or separation works and log storage yards outside the forested area in an area of more than 5,000m is a high-risk activity. Similarly, general earthworks greater than 2,500m^2 are listed as a restricted discretionary activity, and Standard E12.6.2(10) of the AUP(OP) states that only clean fill material may be imported.

[10] It must be inferred from the front page of the notice that these are the particular activities that the Council is concerned about. However, they do not identify which particular businesses this relates to.

[11] In response, the Appellant says it has tried to meaningfully engage with the Council to identify the issues and resolve these. Unfortunately, it appears that the Council's view is that those discussions relating to the abatement notice are of no

moment and it is for the Appellant to apply for resource consents to regularise the activity.

[12] The fundamental problem, it appears to me, is that BRO Tonganui is not the operator of any of the businesses, nor can it interfere directly with the operation of the businesses which hold the leases. It has already terminated one lease (R. L. Denton Limited, a logging company) and others have vacated including Johnstone Construction Limited and Dealer Net Auctions.

[13] For this Court it is difficult to see on what basis the landowner could terminate the lease of other parties unless they were in breach of the lease conditions. This is not a matter that is within the purview of this Court, and I simply identify this as an ongoing matter if this matter goes to hearing.

[14] The earthworks had to be ceased immediately and the cessation of all operations in breach of the RMA and/or AUP(OP) by 28 February 2024.

Abatement notice ABT21706806

[15] The other notice given was ABT21706806 (annexed hereto as "**B**"). This required

(i) the Appellant to provide a detailed site investigation by a suitably qualified and experienced practitioner related to the quality of the soils and other fill materials that have been placed on the property, and any leachate discharging from them. That was to be complied with by 28 February 2024.

(ii) The notice further required that if the investigation indicated the presence of non-compliant soils and other fill materials, the Appellant was to provide the Council with a removal methodology for approval. This was to be undertaken by 28 February 2024.

(iii) The next requirement was that non-compliant soils and fill must

be removed by 30 March 2024 in accordance with the approved methodology. Then, by 18 April 2024, provide a site validation report and if any further remedial works are required these are to be carried out to the Council's satisfaction.

(iv) Finally, the Council required the landowner to remove all vehicles (including commercial and private vehicles), diggers, stockpiles of aggregates, equipment and materials related to Vernon Developments Limited, R. L. Denton Limited, Johnstone Construction, Dealer Net Auctions and all other contractor yards on the property by 30 March 2024.

[16] The basis for such requirements were not set out in the document and it is unclear on what basis the Council can require somebody to undertake inspections of this nature. The Council, of course, has powers to undertake inspections but it is clear from discussion with the Council at this hearing that they have not been exercised.

[17] In fact, the Appellant has undertaken some sort of testing that demonstrates that there are no contaminants in those samples. As Ms Russ pointed out this does not mean that there are not problems, but it is indicative that there is no evidence of such at the current time.

Evaluation

[18] Overall, I am not satisfied that the notices spell out any known problem beyond the breach by various companies of the Plan in not obtaining resource consent.

[19] Whether the activities operating on site are existing uses under previous plan provisions has not been explored as none of those parties are before the Court. Some activities may have been operating been continuing for at least six years, if not considerably longer.This influences my view as to the extent of the threat to the environment.

[20] That being the case, it is difficult to see what changes have occurred in the

immediate past that require the abatement notices to be complied with at this stage. I amcurrently without evidence as to any particular effects on the environment, and the assertions that there could be effects on the environment does not demonstrate grounds to oppose a stay, at least at this stage.

Is it unreasonable to require compliance

[21] As it relates to the next test, which is whether it is unreasonable for the Appellant to comply, the Appellant in fact does not operate any of the businesses. Notwithstanding that, it has sought to discuss with the Council regularisation of the consenting requirements.

[22] The Court is not aware that any notice has been issued, for example, to Vernon Developments Limited. The Court is also not clear whether the areas involved (5,000m^2 for contractors and 2,500m^2 for earthworks) have been breached. Overall, it appears to me that it would be unreasonable to require the landowner to comply with conditions that may put him in breach of his leasehold obligationsor are existiong uses, although we have not seen those, or may in the end be held to be beyond the scope of abatement notices.

[23] I have concluded that the landowner, in being reasonable, should seek to engage with the Council to address both the abatement notices and also any concern by the council as to particular tenants who may require consents. When I enquired as to which tenants required consent, I was advised that it is unlikely that any have permitted activity status, but some may hold various forms of consent.

[24] I conclude this gives no certainty to either the company or this Court as to the particular breaches that are alleged and by whom. Certainly, I am not able to see that the landowner has vicarious liability for the operation of the activities on their site.

Hearing from counsel

[25] I have heard from both parties and recognise Ms Russ felt that they needed more time to prepare and respond to the assertions. Nevertheless, Auckland Council

and others frequently apply for *ex parte* interim enforcement orders and the like where no notice is given to other parties.

[26] I take on board the concerns of the Council and for that reason I consider that the matter can be addressed by providing leave for the Council to seek a variation of the stay order if the ongoing environmental consequences are far more significant than appear at the current time.

Conclusion

[27] I am therefore satisfied that the stay will not have any further deleterious effect on the environment beyond that which might have already occurred from the operation of the activities, and that there is no evidence of soil contamination at the present time. Furthermore, I would consider it unreasonable for the landowner to comply at this point in time.

[28] On the other hand, I do believe conditions should be imposed to ensure that the landowner progresses this matter as promptly as is reasonable and set the matter down for hearing in due course. I have also provided that Auckland Council can seek to cancel or vary the stay if circumstances are different to those on which the Court proceeded.

Outcome

[29] A stay is granted until the conclusion of any hearing in the week of 10 June 2024 upon the following terms:

> **A: (a) that a report, preferably joint, is to be provided to the Court by 28 March 2024 as to progress in respect of addressing the issues of concern, and in particular identifying what, if any, applications for consent have been made and by whom, and any other preliminary steps to meeting the requirements for the 26 April 2024 memorandum;**
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> **(b) that a memorandum, preferably joint, is to be filed by 26 April 2024 advising the witnesses for each parties, the time required for**

hearing, the prospects of resolution and the steps to that resolution if necessary, and finally whether hearing time will be required in the week of 10 June 2024;

(c) the Council is to file all its evidence in support of the application by 17 May 2024;

(d) the Appellant is to provide all its evidence in response by 31 May 2024;

(e) the Council is to file with the Court the evidence, any common bundle agreed between the parties, and any other documents relevant (i.e., affidavits) by 5.00pm on 3 June 2024 in the following formats:

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B: Costs are reserved

JA Smith
Environment Judge