BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 163

IN THE MATTER of a Notice of Motion under section 87G of the Resource Management Act 1991 (**the Act**)

BETWEEN WAIHEKE MARINAS LIMITED (ENV-2013-AKL-000174)

Applicant

Decision made on the papers

Court: Principal Environment Judge L J Newhook

Date of Decision: 25 July 2014

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR WAIVER BY NGATI PAOA IWI TRUST

A. Order granting leave to lodge s274 notice out of time.

B. Directions in relation to the service of documents being limited to parties that have indicated a wish to be heard on the appeal.

C. Direction that Ngati Paoa Iwi Trust comply with the existing timetable for exchange of evidence (qualified in the manner indicated in the decision).

D. Costs reserved.

[1] On 2 July 2014 Ngati Paoa Iwi Trust applied under s 281 RMA for a waiver of time for filing a notice under s 274 RMA, and certain consequential directions. The consequential directions included a waiver in relation to service of documents so that service of the application and the s 274 notice (if leave was to be granted) be limited to parties that have indicated a wish to be heard in the proceedings, and a direction that the Trust comply with the existing timetable for the exchange of evidence by s 274 parties by 2 July 2014.

[2] The grounds of the application were, in summary, that the Trust is a mandated representative of the Mana Whenua of Waiheke Island; that in terms of preparation for the substantive hearing in October 2014, there is an "information gap" in relation to cultural effects of the marina proposal as articulated by the applicant's cultural expert and the evidence of the planning witness called by the Council; that the Trust has an interest greater than the public generally in the proposal as Mataiatia Bay forms part of the cultural landscape and important ancestral lands for Ngati Paoa, containing a number of Waahi Tapu and Urupa sites, and longstanding ancestral relationships.

[3] The Trust pleaded as planning instruments central to its interest, ss 6-8 of the Hauraki Gulf Marine Park Act 2000, Objective 3 and Policy 2 of the NZCPS, and Objective 3.3 and Policy 3.4 of the Auckland Regional Policy Statement.

[4] The Trust asserted that there was no undue prejudice to any party given that cultural effects are already at issue in the proceedings, expert witnesses have identified the need for the issue to be adequately considered by the Court, that the Trust would comply with the existing evidence exchange timetable, and the applicant would have the opportunity to file rebuttal evidence. In addition, the Trust pointed out that conferencing of experts is not to be completed until August 2014 and that court assisted conferencing was not directed in relation to cultural witnesses; that the Trust would not add unduly to the length of the hearing; further, that important Part 2 RMA issues are triggered in relation to cultural effects and these go to the proportionality of any claimed prejudice.

[5] The Trust also asserted that it had carefully particularised the issues of concern to it and undertook not to go beyond them. These issues are:

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(a) Tangible and intangible adverse cultural effects of the proposal under s 5 (cultural wellbeing), s 6(e) and (f), s 7(a), and s 8, RMA and ss 6-10 of the Hauraki Gulf Marine Park Act 2000;

(b) process concerns relating to consultation and assessment of cultural impacts;

(c) planning instruments in relation to cultural effects; and

(d) inability of the application to meet s 104 and s 104D statutory requirements in relation to cultural effects.

[6] The Trust lodged an affidavit of Morehu Anthony Dean Wilson, a Mandated Tribal Negotiator of Ngati Paoa in relation to Treaty of Waitangi settlements claims processes.

[7] Of note in the current context, he recorded that the Trust was established in October 2013 through a normal ratification process and a vote of Ngati Paoa Iwi. Settlement negotiations are in hand, and the Trust is intended to operate as a post settlement government entity on behalf of the Iwi.

[8] The deponent was aware of potential criticism from other parties in the case, that an entity called Ngati Paoa Trust Board ("the Board") might have had some early involvement with the application and omitted, or elected not to, become a party in the proceedings.

[9] Counsel for the Council has helpfully assisted by providing further information on that score, a matter that I shall come to shortly.

[10] Mr Wilson recorded that the Trust did not make a submission or seek to join the hearing process in January 2014 when the direct referral processes were getting under way, because it was unaware of its ability to do so. The first knowledge that it had, he claimed, was on seeing an article in the NZ Herald on Saturday 14 June 2014. The Trust immediately took legal advice and the present application followed.

[11] Mr Wilson prepared an attachment to his affidavit concerning the allegedly strong cultural associations between Ngati Paoa and Matiatia Bay. The Trust subsequently lodged a pair of "will say" statements of evidence, by Mr Wilson and another potential witness, on the

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basis that those could be the statements that the Trust would lodge by the date for the exchange of evidence by the s 274 parties, 22 July 2014, if the Court were to admit the Trust to the proceedings.

[12] I have considered the attachment to Mr Wilson's affidavit which is addressed to the claim by the Trust to have an interest greater than the public generally in the proposal, and its claim about strong cultural and ancestral relationships on the part of the Iwi, with the Bay. I have deliberately refrained from more than glancing at the two "will say" statements so as not to let the sheer detail of substantive evidence cloud the interlocutory matters relevant under s 281 RMA, and the exercise of the discretion.

[13] The attachment to Mr Wilson's affidavit records the history of involvement of Ngati Paoa with Waiheke Island since the time of the Great Migration, through several layers of Iwi interests at varying levels of strength and distance, through the 17th, 18th and 19th centuries, and into the 20th century. The statement speaks of violence, warfare, attacks, Utu, times of peace, religious influence, burials in the Bay, interaction with the Crown, and other (possibly less culturally important) activity such as living and cultivation.

[14] As already noted, Mr MC Allan, counsel for the Council, filed an extremely helpful memorandum. First, advising that the Council would abide the Court's decision on the waiver application. Secondly, however, he had taken the trouble to research three elements that he considered might be of importance for the Court:

(a) The presence in the factual matrix of two Ngati Paoa entities;

(b) reference in the Notice of Opposition filed by the applicant, to a 2011 submission of the Ngati Paoa Trust, which required clarification; and

(c) issues as to the status of Ngati Paoa Iwi Trust.

[15] As to the first of the matters, counsel advised that the Council's records show that a letter was sent to "Ngati Paoa Trust" at around the time of notification of the application (June 2013). This must have been the Board because the Trust was not in existence at that

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time. There have been some difficulties with extracting inormantion from a crashed computer system, but the Council is reasonably certain of these facts.

[16] Neither the Trust nor the Board was notified of the release of the s 87F report by the Council, which I consider to be logical given that the Trust could not know of the application and the Board had not lodged a submission (given that the statutory requirement is for the report to be served on every person who made a submission).

[17] As to the second matter, and as to a submission made by Mr Brabant on behalf of the applicant, a suggestion that the Ngati Paoa Trust had made a submission on behalf of the Iwi in August 2011, was first, in relation to a previous application for a marina in Matiatia which was not pursued, and secondly, must have been made by the Board because the Trust was not in existence.

[18] As to the third matter, the status of the Ngati Paoa Iwi Trust, the council was advised in writing about its formation in November 2013, and as to its mandate and status as Iwi Authority and Post Settlement Governance Entity of Ngati Paoa. The council accordingly updated its records to identify the Trust as Kaitiaki contact for Ngati Paoa for resource consent engagement purposes under the RMA.

[19] There have been notices of support for the application from four organisations or entities, including a major submitter representing many individuals, Direction Matiatia Inc. No details or reasons are advanced in any of these notices and the Court can place little weight on them when considering matters under s 281.

[20] As already recorded, a Notice of Opposition was received from the applicant, Waiheke Marinas Limited.

[21] On its behalf Mr Brabant wrote: *"If a hearing to resolve this matter is necessary, an affidavit from Pita Rikys will be filed in support of the Notice of Opposition"*. No further steps have been taken to file such affidavit (Mr Brabant's communication was received on 11 July) and a moderately tight timetable having been set for preparation for the substantive hearing in October (the urgency largely being at the request of his client), it would not seem appropriate for all parties to down tools and for an interlocutory hearing to be conducted.

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More importantly, Mr Brabant has not expressly requested a hearing. I consider that this is a matter appropriate for determination on the papers.

[22] The Notice of Opposition asserts that the Trust is not a mandated representative of the Mana Whenua of Ngati Paoa on resource management matters, but has authority only in relation to "Treaty of Waitangi claims and settlement of Ngati Paoa's claims". This would not appear to be correct in view of advice from the Trust to the Council that the Trust also had mandate for post-settlement governance. I do not close that avenue of inquiry for the purposes of the substantive hearing but for present purposes Mr Brabant's submission does not appear correct.

[23] Mr Brabant next submitted that the Ngati Paoa Trust had made a submission in relation to applications for resource consent by his client in August 2011, but I think that matter has been adequately answered by Mr Allan.

[24] Next, Mr Brabant submitted that there is not in fact an *"identified information gap in relation to cultural effects of the marina proposal"*, because his client's expert witness Pita Rikys, "*an acknowledged expert in respect of cultural effect issues before the Court*", has offered evidence, and a major party, Direction Matiatia Inc, has advised the Court that it will be presenting evidence on cultural matters from three Kaumatua. My view is that these submissions stray too far into substantive matters which are not yet adequately before the Court, and will not be until all evidence is lodged and the relevant witnesses sworn in at the hearing and questioned.

[25] On Mr Brabant's further point that "Ngati Paoa", while undoubtedly having Mana Whenua status, had the opportunity to be a party but elected not to do so, is explained by the information now before me about the existence of the two entities and the differing histories of involvement with the proposal by each of them.

[26] Mr Brabant submitted that there had been no satisfactory explanation for the delay. In this, he is probably on strongest ground, because the new entity having made itself known to the Council in November last year, there should in theory have been opportunities for it and the Council to take steps enabling it to become involved. I must factor this issue into the ultimate exercise of discretion.

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[27] Mr Brabant submitted that undue prejudice will arise because the Court held a pre-hearing conference in February of this year and made detailed orders for the conduct of the case. Pursuant to these, the applicant completed and lodged its evidence on 29 April, and the Council did the same on 13 June. Mr Brabant submitted that this meant that his cultural witness Mr Rikys was not able to address in his evidence issues that the waiver applicant might have raised.

[28] Mr Brabant is technically right in that submission, but overlooks that the time for s 274 parties to lodge their evidence has only just expired; that the Trust has made its evidence available by that deadline; and that the whole of the period for the preparation of the rebuttal evidence is now available to his client. Any difficulties arising can of course be placed before the Court and there may be many procedural ways in which they could be addressed.

[29] Finally, Mr Brabant criticises the Trust's complaint that it has not been consulted, but my view at this stage is that such issue reaches into the substantive aspects of the case and is not appropriate for adjudication at this stage.

[30] In reply, Mr Enright for the waiver applicant lodged submissions and an affidavit of Lucy Anne Tukua exhibiting a copy of its Trust Deed, and pointing to powers that it has as a post-settlement governance entity, including the ability to protect the spiritual wellbeing of Ngati Paoa including the maintenance of places of cultural and spiritual significance to Ngati Paoa.

[31] The reply covers the issues of the existence of two separate entities and the 2011 submission, in line with the submissions received from the Council. Mr Enright then lodged the two "will say" statements that I have mentioned.

Outcome

[32] I will not unduly extend the length of this decision by reiterating findings that I have made throughout it, particularly in relation to the matters raised in the submission of Mr Brabant. It will be clear by this juncture that I favour granting relief.

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[33] In saying this, I am particularly mindful of subss (2) and (3) of s281 to the effect that the Court shall not grant an application of the present sort unless it is satisfied (s 281(3)(a)) that the applicant and respondent consent to the waiver – the applicant does not; or unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced. In view of my findings above, I have decided that undue prejudice of that sort will not occur.

[34] No party has assisted the Court by citing authority, but in coming to my decision I have considered some decisions of the Court both granting and refusing time waiver consent for s 274 notices. Those decisions include: ***Frasers Papamoa Ltd v Tauranga City Council***,[1] ***Rait v Wellington City Council***,[2] ***JB Farms Ltd v Dunedin City Council***,[3] and ***Man O War Station Ltd v Auckland Council***.[4]

[35] The waiver application is granted.

[36] I direct, as requested by the Trust, that service of documents in connection with this application having been brought, and the s 274 notice, is limited to parties that have sought to be heard in the proceedings.

[37] I also direct that the Trust comply with the evidence exchange timetable, in particular the dates for lodgement of evidence by s 274 parties, 22 July 2014. I acknowledge that we are three days past that date but note the fact of the Trust having lodged its evidence in the form of "will say" statements already. This direction is therefore made on the basis that the Registrar will circulate those statements to the parties through the electronic and other means established for this case, along with a copy of this decision, forthwith.

[38] Costs are reserved.

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[1] Environment Court, Decision W097/06.
[2] Environment Court, Decision W059/04.
[3] Environment Court, Decision C006/06.
[4] [2011] NZEnvC 345.

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DATED at AUCKLAND this 25th day of July 2014

LJ Newhook
Principal Environment Judge