

BEFORE THE ENVIRONMENT COURT

IN THE MATTER of the Resource Management Act 1991
(RMA) and the Local Government
(Auckland Transitional Provisions) Act 2010
(LGATPA)

AND of appeals pursuant to clause 14 of
Schedule 1 to the RMA and an appeal
pursuant to section 156 of the LGATPA

Proposed Private Plan Change 372
(PC 372) and proposed Auckland Unitary
Plan

BETWEEN NGATI TE ATA WAIOHUA and
NGATI TAMAHOHO TRUST

(ENV-2015-AKL-158)

SOUTH EPSOM PLANNING GROUP
INCORPORATED and
THREE KINGS UNITED GROUP
INCORPORATED

(ENV-2016-AKL-001)

(ENV-2016-AKL-224)

Appellants

AND AUCKLAND COUNCIL

Respondent

AND FLETCHER RESIDENTIAL LIMITED

Applicant

MINUTE AND DIRECTIONS OF THE ENVIRONMENT COURT

(18 July 2017)



Introduction

[1] There have been a number of documents filed in this matter, and the Environment Court issued a Minute on 5 July 2017.

Original decision

[2] The Court has issued two decisions in relation to the substantive matters in this case. The first decision ([2016] NZEnvC 140 dated 29 July 2016) concluded that a modified form of PC 372 was appropriate. Modifications involved matters conceded by the Applicant, both at the commencement and during the hearing, and also a number of changes sought by the appellants and adopted by the Court. In Part D of the decision the Court noted that it had not made a final conclusion as to the adequacy of the plan provisions, and gave directions for the parties to file further memoranda.

Further conference

[3] Subsequent to the decision a further conference was held in September, with further directions made. It was clear by this stage that the matters of the proposed Auckland Unitary Plan had now reached a stage where decisions were issued and appeals had been filed. The question was, therefore, whether or not it would be necessary for the Court to finalise its decision. If the relevant provisions of the proposed PAUP were made operative, they would substitute for the existing operative Plan and relevant provisions of PC 372.

[4] The Court noted at the conference that Schedule 1 to the Resource Management Act, clauses 8D and 29, provide that once an appeal hearing has commenced in relation to a private plan change it cannot be withdrawn. Three options were put to the Court by Mr Loutit for Fletchers at that stage:

- (a) finalise the decision;
- (b) adjourn the process and await the outcome of the PAUP process; or
- (c) require a report after the High Court callover on 14 October 2017 and manage a process to ensure the matter is moved forward.

[5] All parties, with the exception of the Housing Corporation, acknowledged the third option as being the most appropriate (see paragraph [6] of the directions of



26 September 2015). The Court then considered the scope of the remaining issues and considered that there was very little further evidence that it would require to hear, depending on the nature of the amendments made.

Second decision

[6] By decision [2017] NZEnvC 32 (wrongly named [2016]), the Court concluded that it had sufficient evidence to finalise the decision without a further hearing. It went on to note a number of changes to PC 372 and required the wording to be finalised by Auckland Council and forwarded to the other parties. The Court noted it would then decide whether to proceed to issue a final version of PC 372 at that point. It noted that any application for costs was to be filed within twenty working days; any reply ten working days and a further five working days thereafter. Further memoranda were filed demonstrating wording was being progressed.

Current position

[7] There has been no application for costs filed within time. Instead, a series of documents have been filed with the Court which indicate that the appeals before the High Court have been resolved by the withdrawal of those appeals (CIV-2016-404-2302).

[8] There are also proceedings before the Environment Court (ENV-2016-AKL-224). An undated memorandum filed in June 2017 appears to be signed by Mr CJ Lucas. The memorandum says that it is a memorandum of counsel for the respondent, but the document itself appears to relate to the appellants. It is signed as counsel for the appellants, although undated. On the face of it that document amounts to a withdrawal of the PAUP appeal (ENV-AKL-2016-224). It also purports to withdraw the remaining relief sought in appeal ENV-2017-AKL-001, the matter the subject of the PC 372 appeal.

[9] We acknowledge the withdrawal of the appeal ending -224 (being the PAUP appeal) and these proceedings are at an end but for costs. Court enquiries have been made, and there is no indication that any party seeks costs in relation to the withdrawal of the PAUP appeal.

[10] Although the Housing Corporation advised they seek costs, they are stated to be in relation to the plan change. Given that any application for costs in respect of



PC 372 was required to be filed within twenty working days of the Court decision issued on 3 March 2017, such application is well out of time and would require leave of the Court. That cannot relate to the PAUP, and could only refer to PC 372.

[11] The Court will address this issue as follows: The PAUP appeal proceedings in appeal -224 are now withdrawn and at an end. The correspondence indicates that no party seeks costs in respect of the withdrawal of the PAUP proceedings, and the email from the Housing Corporation is clear that it relates to the plan change only. Accordingly, this Court directs that the appeal against the PAUP is withdrawn and there is no order for costs. The file may be closed.

The proceedings under PC 372

[12] There are two appeals under PC 372 that were the subject of the two decisions before the Court. The first is that of South Epsom Planning Group (ENV-2016-AKL-001); the other is Ngati Te Ata Waiohua and Ngati Tamaoho Trust (ENV-2015-AKL-158). There seems to be some suggestion that the Court should now proceed to finalise the Ngati Te Ata Waiohua and Ngati Tamaoho Trust appeal, but not that for South Epsom Planning Group.

[13] The issue turns on the role of this Court in circumstances where the operative Plan has now been replaced by the Unitary Plan. Although the parties have not given us the provisions of the PAUP that apply, nor advised us whether those provisions have been made operative by the Council, there is no doubt that the PAUP provisions now have replaced, or will shortly replace, those for the operative Plan.

[14] In such circumstances the function of the Court in determining the provisions of the operative Plan can no longer be fulfilled. It was clear, throughout these proceedings, that there has always been the prospect that the Unitary Plan provisions would supersede those for the operative Plan and thus PC 372. It was on this basis that the appellants sought that this appeal be delayed until such time as the Unitary Plan provisions had been finalised or until the position was overtaken by the Unitary Plan.

[15] That position is discussed by the Court in its Minute of 26 September 2016 as already cited. In such circumstances it appears to us that the Court no longer has any proper function in finalising PC 372. Its existing decisions, of course, stand; but the



Unitary Plan provisions have now superseded any potential provisions that might have been inserted. In any event, it is clear from the second decision of the Court that those provisions were very close to finalisation and simply required re-drafting and final approval.

[16] It is therefore the Court's view that it is now functus officio and its task has been completed. There is no need to finalise the wording of PC 372 or the appeals given that the Unitary Plan has now substituted for the former operative Plan.

[17] As a corollary to this, it appears that these proceedings should be discontinued, and that would include both appeals given the status of the Unitary Plan.

Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915

[18] The Volcanic Cones Society acknowledges the Unitary Plan provisions are resolved. However, it asks the Court to issue a decision in relation to the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915, which was not addressed by the Court in its decisions. There can be no basis for this Court to resolve this issue as part of these proceedings. It was not considered necessary to address it for the purposes of PC 372.

[19] This issue turns on a comment by the Commissioner hearing the original PC 372 changes at:

8.3.31 the Act is administered by the Department of Conservation.

Given the Operative Plan and now PC 372 have been superseded, there is no basis for the Court to consider this matter as part of an appeal on PC 372. The Court did not consider it necessary to address the issue in either decision.

[20] This is a matter for a separate application for declaration. Whether it is within the jurisdiction of this Court turns on whether it fits within s 310 of the RMA. On the face of it, it is unlikely to be within the Court's jurisdiction as the interpretation does not relate to the RMA. In any event, we are not required to determine that issue currently, given the appeal under PC 372 is superseded.



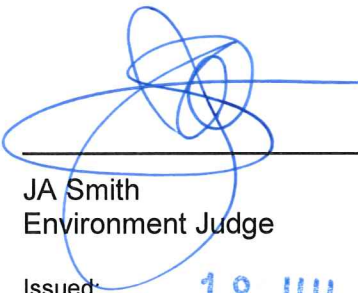
Costs and directions

[21] The Court required parties to file applications for costs in relation to PC 372 appeals within twenty working days of 3 March 2017. No applications were filed.

[22] However, Ms Kirman for the Housing Corporation has indicated that the Corporation wishes to apply for costs (one assumes in relation to the PC 372 appeal). Such application is now well out of time and would require leave. It would need to be supported by an originating application for leave, together with affidavits in support explaining in particular the reasons for the failure to comply with the directions of the Court contained within decision NZEnvC 032 of 3 March 2017.

[23] Given the novel position that the parties are in, and the lack of information supplied by the parties, the Court directs:

- (a) any submission in relation to the status of the PC 372 appeals, or any application for leave to apply for costs, is to be filed, with supporting documentation if necessary, within **ten working days**;
- (b) in the event that there are any issues arising in relation to the PC 372 appeals, the Court will consider whether it should convene a telephone conference, a pre-hearing conference or proceed to issue further directions or decisions.
- (c) failing the filing of any submissions or applications within the ten working day period, the Court will proceed to discontinue the proceedings with no order for costs.



JA Smith
Environment Judge

Issued:

18 JUL 2017

