

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

CIV-2019-404-2810

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of s 159 of Local Government (Auckland Transitional Provisions) Act 2010
BETWEEN	FRANCO BELGIORNO-NETTIS Applicant
AND	AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL First Respondent
AND	AUCKLAND COUNCIL Second Respondent

Hearing: 13 February 2020

Appearances: S J Ryan for the applicant
H T N Fong for the first respondent
M C Allan for the second respondent
A K Devine for Kainga Ora
R E Bartlett QC for the Emerald Group Ltd

Date of minute: 17 February 2020

MINUTE OF PALMER J

[1] Mr Belgiorno-Nettis applies for judicial review of recommendations by the Auckland Unitary Plan Independent Hearings Panel (the Panel), and decisions by the Auckland Council, in relation to two blocks of land in Takapuna. Predecessor proceedings have already been to the Court of Appeal.¹

¹ *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] NZRMA 535.

Parties

[2] The Panel abides the Court's decision and I excuse counsel's appearances.

[3] The other parties seek directions as to service which I grant, as per paragraphs [12] to [14] of their joint memorandum of 11 February 2020.

[4] Kāinga Ora Homes and Communities applies to intervene. Its predecessor, Housing New Zealand, was granted leave to intervene in the earlier proceedings. Mr Bartlett QC advises the Emerald Group Ltd will also apply to intervene and was an intervener in the Court of Appeal proceeding. If there is no opposition to these applications filed within 10 working days of their service, under r 7.24 of the High Court Rules 2016, I will grant them.

Interim orders

[5] Mr Belgiorno-Nettis applies for two interim orders. The first is an order prohibiting the Council from notifying as operative the height and zoning provisions in the Auckland Unitary Plan (AUP) (operative in part) which relate to the Promenade Block and Lake Road Blocks (the Sites) under cl 20 of sch 1 of the Resource Management Act 1991 (RMA). The Council consents to that and I so order.

[6] The second order sought would prohibit the Council from treating as operative the height and zoning provisions for the Sites in the AUP when performing its functions under the RMA, including when processing and assessing applications for resource consent or certificate of compliance applications. The Council opposes this order.

[7] At the call in the Judicial Review List, Mr Ryan for Mr Belgiorno-Nettis applied for interim interim orders until determination of the application for interim orders. He submitted the application may be rendered nugatory if consent is granted in the meantime and one month will not make a material difference to the situation. He submitted the orders are sought because of the risk that consent will be granted. He submitted it is apparent from the Council website that the plan is not operative so the public has some form of notice of that. He also submitted that the Court of

Appeal's decision contemplated the applicant will have the opportunity to consider further proceedings.

[8] An affidavit filed on behalf of the Council indicates it is aware of one consent application, concerning these provisions, that was put on hold due to the earlier proceedings and one that is on hold pending a request for further information. The Council is aware of two other consent applications that have not yet been lodged, one of which is expected to be submitted within six to eight weeks. Mr Allan, for the Council, submitted the Council's main concern is a jurisdictional issue as to whether the Court is able to override the effect of s 86F of the RMA. He says the Council has been advising that the plan is operative and people have been relying upon that.

[9] I have reviewed the statement of claim, the application for interim relief and notice of opposition and supporting affidavits. **I grant the interim interim relief sought until the end of the hearing on 25 March 2020.** There would be some prejudice to the applicant from the Council treating the height and zoning provisions as operative. The prejudice to the Council and third parties from interim interim relief is geographically confined to these particular sites. I do not consider s 86F of the RMA, which deems the relevant provisions operative, limits the Court's jurisdiction to restrain the Council from treating them as operative. Section 15(2)(a) of the Judicial Review Procedure Act 2016 confers sufficient jurisdiction on the Court to make the order sought.

[10] A particularly important consideration is that the hearing of the application for interim relief on 25 March 2020 is in only five weeks' time. I do not consider the merits of the substantive claim disclosed by the statement of claim or the prejudice to the applicant necessarily justify interim interim relief for longer than that, on the basis of the material before me. The judge who hears the application for interim relief on 25 March 2020 will be in a better position to determine whether the interim interim relief should be continued past the end of the hearing and, if so, on what terms.

Timetables

[11] I direct the Registry to set down a two-day hearing of the substantive proceeding after consultation (but not necessarily agreement) with counsel for the

parties. **I set the timetable to the substantive hearing as proposed** in the parties' joint memorandum of 11 February 2020 at paragraph [22]. I grant leave to the parties to apply to vary the timetable if necessary.

[12] In relation to the application for the interim order that is opposed, I set down a half day hearing for **10 am Wednesday 25 March 2020**. I invite counsel for the parties to file and serve a memorandum, by **5 pm Thursday 20 February 2020**, proposing a timetable leading to that hearing.



Palmer J

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