

**BEFORE THE ENVIRONMENT COURT
CHRISTCHURCH REGISTRY**

ENV-2022-CHC-32

IN THE MATTER of the Resource
Management Act 1991
(Act)

IN THE MATTER of an application for orders
under section 279(4) of the
Act, and in accordance with
rule 15.1 of the District
Court Rules 2014

BETWEEN **QUEENSTOWN LAKES
DISTRICT COUNCIL**

Applicant

AND **JOHN COSSENS**

Respondent

**LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT
COUNCIL IN RESPECT OF STRIKE OUT APPLICATION**

22 July 2022

Queenstown Lakes District Council

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MAY IT PLEASE THE COURT:

INTRODUCTION

1. These legal submissions address the Queenstown Lakes District Council's (**Council**) application for orders under section 279(4) of the Resource Management Act 1991 (**Act**) to strike out the Application for Declarations filed by the respondent and dated 17 May 2022 (**Declarations**).
2. The Declarations centre on pre-notification consultation undertaken by Council ahead of a proposed variation to Council's District Plan (**Proposed Variation**).

BACKGROUND

3. The Proposed Variation follows the direction of the Court and arose from interim decisions in respect of the Rural Landscape Topic before the same Court which directed Council to use the Schedule 1 process under the Act to introduce schedules setting out landscape values for 29 priority area landscapes into its District Plan.¹
4. The parties set down a timeframe for doing so and went about drafting the strategic policies accordingly. It must be said that Mr Ferguson, on behalf of the parties now joined to this matter, was a key driver of the recommended policy strategy including, the stipulated timeframes for notification, during the Appeal hearings and was involved in the associated expert caucusing that resulted in Council's draft strategic policies.
5. That evidence was accepted by the Court and led to the Direction that Council prepare a variation to include the schedules and undertake the task (including notification) within the agreed timeframes: *See Interim Decision of the Environment Court Decision 2.2 at para [70]*.
6. At no time did the Court seek to direct what process the Council should use outside the Schedule 1 process. There was no meaningful discussion arising from the Interim Decision(s) about pre-notification consultation, or about what status consultation, if undertaken, should have. The Act clearly sets out the hierarchy for

consultation, and it is with that lens that this Strikeout Application should be considered.

THE APPLICATION FOR DECLARATIONS

7. The respondent's Declarations include a number of specific declarations that can be distilled down to two discrete matters:

Theme 1: Council's pre-notification consultation for the Proposed Variation is deficient, where relief is sought to address this (declarations and relief sought at 48. a, c, d, and e in the Application for Declarations); and

Theme 2: The Proposed Variation is invalid because it includes landscape schedules for 'non-priority' areas that were not directed by the Court (declarations and relief sought at 48. b and f).

8. In the Court's letter acknowledging the Declarations proceedings, leave was reserved for parties to apply for further or other directions.²
9. Accordingly, Council respectfully made this application for an order to strike out the Declarations.

THE ISSUES BEFORE THE COURT

10. The issue for the Court to decide is whether Council's pre-notification consultation process is a matter that is subject to judicial intervention, and if it decides that there is no jurisdiction, whether the grounds for a strikeout of the Declarations are made out.
11. The matters for the Court to consider in its decision include the following:
 - a. The legal framework in respect of a strikeout application under s279(4) of the Act.
 - b. Council's functions, powers and duties as a Planning Authority under the Act, particularly in respect of the preparation of a District Plan or Plan Change set out at s73(1) and (1A) of the Act.

² Letter from the Environment Court re ENV-2022-CHC-21 dated 26 May at [d].

- c. The Environment Court's Powers in respect of Plans and Policy Changes under ss292-294 of the Act.
 - d. Section 74 matters for consideration when Council is preparing or changing its District Plan.
 - e. Schedule 1 requirements including the hierarchy of consultation set out at clause (3).
 - f. Local Government Act 2002 (LGA) requirements at s82.
12. Counsel respectfully requests that the Court focuses on the matter before it, namely the grounds for a Strike out Application and supporting affidavit, rather than the other material before the Court on the Topic 2 appeals.
13. As set out in the case of *Hern v Aickin* [2000] NZRMA 475(EnvC), "the Court does not consider material beyond the proceedings or uncontested material and affidavits".
14. The issue is not whether Council's consultation is adequate or not. The question for the Court is whether it has the jurisdiction to make directions on Council's pre-notification consultation.
15. Counsel also makes the point that the (now) notified Landscape Schedules are not before the Court, and no decision has been made by Council on the Proposed Variation.
16. If the Court does not strike out the Declarations, it would have the effect of usurping Council's administrative and decision-making powers, and by extension Council's statutory functions, duties and powers under the Act.

THE STRIKE OUT APPLICATION

17. The Council makes its application for a strike out order under s 279(4) of the Act on the basis that:
- a. The Application discloses no reasonable or relevant case in respect of the proceedings; and / or
 - b. it would be an abuse of the Environment Court's process to allow the case to be taken further.

18. Council also filed the affidavit of Sarah Picard affirmed on 3 June 2022 in support of its Strikeout Application.
19. The Court may consider this affidavit as part of the Strikeout Application given that the facts contained in the affidavit are 'incontrovertible' and the affidavit only contains material not open to dispute.³
20. The affidavit details the process that Council followed when it opted to undertake pre-notification consultation. It is a factual record of that process.
21. Counsel submits that the process itself was in accordance with Council's obligations under s82 of the LGA and was adequate for the purpose of gathering community views in its preparation of the Proposed Variation along with expert input, and publicly notify it in accordance with Schedule 1 process under the Act.
22. Such consultation does not require the "gold standard" approach set out by the Act (and demanded by the respondent) where mandatory consultation is a statutory requirement. This point will be addressed further in the submissions, but it appears to be at the root of the Declarations. Sufficed to say while Council had the "power" to consult, it was not mandatorily obliged to do so under the Act.

LEGAL PRINCIPLES FOR STRIKE OUT APPLICATION

23. The power to strike out the whole or any part of a case is provided by section 279(4) of the Act which states:

279 Powers of Environment Judge sitting alone

...

(4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers—

(a) that it is frivolous or vexatious; or

(b) that it discloses no reasonable or relevant case in respect of the proceedings; or

(c) that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

³ *Coldway Installation Ltd v North Shore CC* EnvC W118/96 (PT).

- b. The Court does not have the material before it to determine the issues contained in the Declaration. The Proposed Variation is not before the Court.
- c. The issues raised in the Declarations are not within the jurisdiction of the Court but are processes under the Act within the scope of Council's functions, duties and powers under the Act.

30. Counsel also submits that:

- a. The respondent is not a Council officer delegated to prepare a Plan Change. He has no power to direct Council in its preparation under the Act, and no greater status in the consultation process than the public at large;
- b. If the methodology is flawed as he alleges, and which the Council denies, the matter is better resolved through the plan change process under the Act. He will have full participatory rights under Schedule 1 process to make submissions to support his allegations, and appeal rights to this Court following Council's decision on the Proposed Variation;
- c. The opportunity for the Court to hear this matter is if appeals are filed with the Court, after the Proposed Variation has been heard by Council and a decision is delivered. The respondent's Declarations are an attempt to duplicate this process through the Court, are pre-emptive, and have no legal basis.
- d. No other parties will be affected by a strike out as the public have full participatory rights under the Schedule 1 process once the plan change is notified.
- e. The respondent would suffer no particular prejudice should his matter be struck out.

31. The test before the Court is a simple test that the Court should entertain under s274 without being distracted by the history and emotion of this matter. Even though the Act specifically makes provision for full public participation, it clearly reserves powers for the Planning Authority, and these should not be fettered by judicial intervention.

RELEVANT PROVISIONS UNDER THE ACT

Process for Plan Changes under the Act

32. The process for preparing a district plan begins with s74 of the Act which sets out matters to be considered by a Territorial Authority in its preparation. These matters include:
- a. The requirement that a plan be prepared in accordance with Council's functions under the Act at s.31.
 - b. Provisions of Part 2 of the Act;
 - c. An obligation to prepare an evaluation report in accordance with s32.
33. Section 31 sets out Council' key functions and includes:

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district

34. Schedule 1 of the Act sets out the plan making process which includes the process for proposed variations to district plans.

Consultation

35. As consultation is at the heart of the Declarations, Council submits that the following matters are relevant to the Application for Strike out.
36. Clause 3 of Schedule 1 states:

3 Consultation

...

(2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.

...

(4) In consulting persons for the purposes of subclause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.

37. The Schedule 1 process sets out a hierarchy in respect of consultation. Sub-section 1 sets out the parties that *must* be consulted with *during the preparation* of the plan change. These parties include: Minister for the Environment; relevant Crown Ministers and local or regional authorities; and Iwi Authorities.
38. Under ss 2, Council has a mere power to consult with “anyone else” (in the preparation of a Plan Change) if chooses to do so. If it chooses to consult with “anyone else”, it must do so in accordance with s82 LGA, which is what Council has done. However, even if it had not done so, the matter is not one for the Environment Court to decide.
39. In respect of the Court’s jurisdiction on this point, where there is a mere power to consult (as opposed to a mandatory duty to do so) the Court has no jurisdiction to declare whether consultation has been adequate: *Riddiford v South Wairarapa District Council (declaration) C075(PTT)*.
40. For clarification, Council has adhered to the requirements for public notice under Clause 5 of Schedule 1 in its notification of the Proposed Variation.

Powers of the Environment Court in respect of Plan Changes

41. The Environment Court powers are also relevant to the Application for Strike out, to the extent that the Act clearly sets out the extent of the Court’s powers in respect of Plan Changes. These are set out at ss 292-294 of the Act.
42. The Court’s powers in respect of remedying defects in a District Plan are set out at s292 of the Act, which states:
- (1) The [Environment Court] may, in any proceedings before it, direct a local authority to amend a regional plan or district plan to which the proceedings relate for the purpose of—*
- (a) Remedying any mistake, defect, or uncertainty; or*
 - (b) Giving full effect to the plan.*
43. The section sets out the extent to which the Court’s powers can remedy any defects. It is not relevant to the Declarations as there is not plan change before the Court, and no mistake, defect, or uncertainty that requires amendment.
44. Section 293 relates to the power of the Court to amend [plan changes] and states:

(1) After hearing an appeal against, or an inquiry into, the provisions of any [[proposed policy statement or plan]] that is before the Environment Court, the Court may direct the local authority to—

(a) prepare changes to the [[proposed policy statement or plan]] to address any matters identified by the Court;

(b) consult the parties and other persons that the Court directs about the changes;

(c) submit the changes to the Court for confirmation.

45. Powers under s293 are not relevant in this case as the Proposed Variation is not before the Court.

RELEVANT CASELAW ON STRIKE OUT APPLICATIONS

46. The Environment Court, in its decision in *Gisborne DC v Mackie*⁴ approved a strikeout on the basis of the test set out in *Norman v Mathews*⁵: The Court determined that it must appear that the cause of action on the face of it is clearly one that no reasonable person could purposely treat as bona fide.

47. In this case, the respondent's cause of action is not reasonable or tenable, it seeks intervention in a process that the Court has no jurisdiction to provide relief for.

48. In general, the Court exercises strike out orders sparingly. However, in *Federated Farmers (Wairarapa Division) v Wellington Regional Council*⁶ the Environment Court held that "when jurisdictional boundaries are exceeded then there is no discretion to exercise a strike out order 'sparingly'". As the Environment Court has no inherent jurisdiction, it must be able to dismiss proceedings that seek relief it has not been empowered to grant.⁷ (emphasis added).

49. In this case, if the Court has no jurisdiction to decide the Declarations, it must be struck out.

50. The Court is not prevented from exercising a strike out order on the basis that a strike out application raises a difficult question of law and requires extensive argument.⁸

⁴ *Gisborne DC v Mackie* EnvC W004/97.

⁵ *Norman v Mathews* (1916) 85 LJKB 857, [1916-17] All ER Rep 696 (CA)

⁶ EnvC C192/99, at [17].

⁷ *Kaimanawa Wild Horse Preservation Soc Inc v A-G* (1997) 3 ELRNZ 66; [1997] NZRMA 356 (EnvC).

⁸ *A-G v Prince & Gardner* [1998] 1 NZLR 262 at 267.

51. While there are no difficult questions of law in this case, the jurisdictional elements require careful exploration and sincere consideration.

NO REASONABLE OR RELEVANT CASE

52. Counsel submits that there is no reasonable or relevant case for the Court to hear for the reasons set out above. The Declarations are centred around Council's functions, duties and powers under the Act, and are beyond the jurisdiction of the Court in this case. On that basis there can be no reasonable or relevant case.

53. Strike out orders have previously been exercised under s 279(4)(b), 'no reasonable or relevant case' in the following situations:

a. *Paraparaumu Airport Coalition Inc v Kapiti Coast DC*:⁹

The Court, in holding that plan change processes are prescribed in Schedule 1 of the Act, struck out grounds of an appeal that sought to raise issues with decision making powers and principles under the LGA; and

b. *Winter & Clark v Taranaki RC*:¹⁰

The Court struck out parts of an appeal beyond the Court's jurisdiction even after the appellant was given a chance to remedy this defect but was unable to do so. In the present case, the respondent cannot remedy the defects. They are beyond remediation.

ABUSE OF PROCESS

54. If the Declarations sought by the respondent are not within the jurisdiction of the Court, it follows that they are also an abuse of process.

55. The respondent seeks to have the Court intervene in administrative decisions. Further, the respondent may more appropriately achieve his "relief" by participating in the public notification process.

⁹ *EnvC W077/08*

¹⁰ (1998) 4 *ELRNZ* 506

Concerns able to be addressed through process under Schedule 1 of the Act

56. Counsel further submits that the Theme 1 declarations raise matters that can (and will) be addressed under the Schedule 1 process. It would therefore be an abuse of Court process to take the application further.
57. The Theme 1 declarations raise concerns about the methodology behind the Proposed Variation. As the respondent had not considered the s 32 evaluation report containing Council's process and consideration of the matters that it is obliged to consider, his allegations that the process was "wrong" are unfounded. The substantive Landscape Schedules are now available to the public to consider and make submissions on. Council has no motivations at this time other than to consider the submissions carefully.
58. Now that the Proposed Variation has been notified under the Schedule 1 process, the respondent will be able to make a submission on the merits of the Landscape Schedules and follow through with an appeal to the Environment Court against the variation if his concerns remain unresolved. In other words, any alleged defects in consultation are remedied by the Schedule 1 process which expressly provides for and is designed around public participation, as was the approach endorsed in *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council*.¹¹
59. It is acknowledged that the Environment Court has been cautious to exercise strike out orders in order not to deprive a person of their 'day in Court'.¹² However, in this case a strike out would not deprive the respondent of his day in Court as the Schedule 1 process provides numerous opportunities for public participation as well as appeal rights. Rather, a strike out would mean the respondent's concerns are addressed at a more appropriate time, in a manner that is fair, along with other submitters, and in accordance with the processes set down by Parliament under the Act.
60. The result (of the Court hearing the Declarations) would be to amplify and prioritise the respondent's concerns above others who are following the usual course of the submissions process. Accordingly, parties interested in the Proposed Variation may be prejudiced if the Declaration is allowed to proceed.

¹¹ *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council* at [6], the Court agreed that any concerns or procedural defects with Council processes or the way in which the Commissioners conducted the hearing are cured by the Environment Court process.

¹² *Everton Farm Ltd v Manawatu-Wanganui RC EnvC W008/02*.

61. Counsel submits that hearing the Theme 1 declarations would circumvent the Schedule 1 process and would be an abuse of both the Court process and process under Schedule 1 of the Act if the case is taken further.

62. Strike out orders have previously been exercised under s 279(4)(c), 'abuse of Court process' in the following situations:

a. *Mawhinney v Waitakere CC*:¹³

The Court struck out the case of a plaintiff that argued three subdivision applications had to be processed when the High Court held the council was not required to proceed with the applications; and

b. *Wilding v Canterbury RC*:¹⁴

The Court struck out an appeal where a party resiled from an agreement to settle at mediation.

THEME 1: DEFECTIVE CONSULTATION

63. Counsel first addresses Theme 1 in the Declarations: that Council's pre-notification consultation for the Proposed Variation is deficient.

Jurisdiction of the Court and Discretionary Consultation Process

64. Discretionary consultation undertaken in accordance with the LGA is not within the Court's jurisdiction to consider or review. The Environment Court's jurisdiction does not extend to making declarations relating to defects of administrative law.¹⁵

65. The matter was considered in respect of a plan change in a decision of the Court in *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council*.¹⁶

66. This case concerned an appeal by Paraparauma Airport Coalition Incorporated (**PAC**) against a plan change of Kapiti Coast District Council (**KCDC**). Paraparaumu Airport Ltd (**PAL**) applied to strike out parts of PAC's appeal that alleged unfair council process, on the basis that the Court did not have jurisdiction to consider this matter.

¹³ [2007] NZRMA 173(HC)

¹⁴ EnvC C039/09.

¹⁵ *Awatea Residents' Assn Inc v Christchurch CC* EnvC C078/06 at [12].

¹⁶ *Ibid*

67. The Court made the strike out order sought and accepted PAL's submissions, which the Court endorsed and summarised as follows:

- *the Environment Court does not exercise a supervisory role over consent authorities;*
- *the Environment Court does not have jurisdiction to remit the matter back to the Council because of process concerns;*
- *any procedural defects can be cured by the de novo hearing in the Environment Court.*¹⁷

68. The Court went on to hold that:

[14] ... it seems apparent that this ground [of appeal] seeks to revisit process issues through the back door. RMA contains a code as to how local authorities (and the Court) hear and determine various proceedings within the ambit of the Act. Plan change processes are prescribed in Schedule 1 RMA. Schedule 1 creates statutory rights for various persons to participate in the process. The manner in which a local authority must conduct its hearings is prescribed by ss 39 - 42A RMA.

[15] In considering the Plan Change the Council and the Court are required to consider alternatives, benefits and costs in accordance with s 32 RMA. In a more general sense any decision on the Plan Change must promote the sustainable management of natural and physical resources as required by s 5 RMA. In determining whether or not the plan change achieves that purpose, appropriate consideration must be given to the provisions of ss 6, 7 and 8 RMA.

[16] Those are the statutory decision-making provisions which are relevant to the Court's considerations on this appeal. Our decision-making process is guided by the provisions of RMA not those of LGA.

69. While *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council* concerns a challenge to council process raised at the appeal stage of a plan change, Counsel submits that the relevant principles can be applied to the consultation and notification stage of a plan change. The case sets out the Court's position on administrative functions under the LGA clearly.

70. Counsel submits that the Environment Court has no ability to 'supervise' the Council in its Plan Change preparation, nor can it direct how Council must exercise its discretionary powers and functions under the LGA, or to remit an LGA power back to Council.

71. To do so would result in the Court acting as the de facto decision maker (i.e. as the Council) when it is the Council's plan change to prepare and make (in

¹⁷ *Ibid* at [8]

accordance with the processes set out under the Act). Council is the Planning Authority.

72. His Honour Justice Gallen discussed the consequences of judicial intervention in government processes relating to proposed roading policies and adequacy of consultation in *Christchurch City Council v Attorney-General CP76/98*, 4 September 1998.

73. His Honour set out the risks and consequences of judicial intervention in government processes. In that case, the relevant government department had consulted with the community in respect of reports that would be used for government decision-making. The consultation undertaken by NZTA was not undertaken as a mandatory requirement under the relevant legislation, but as a discretionary one.

74. The unintended consequences of judicial intervention were raised by the Court in respect of the status of non-mandatory consultation as follows:

"If the Government had not chosen to consult, there could have been no complaints; if consultation gives rise to legal challenge, then it is likely that a decision maker would be encouraged to [proceed without openness]"
(summary).

75. His Honour also stated:

"When Government or indeed any decision-making entity seeks consultative input of the formulation of future policy or action, there can be no justiciable issue unless the process itself in some way affects the rights or integrity of individuals, or has the unintended potential to do so"

76. In this case, the Council's process cannot possibly affect the rights of the respondent (or the public at large) nor have any rights been removed through the process. Council had (at the time the Declaration was filed) made no decisions on the proposal. It had merely undertaken preparation which included community views obtained through the process under the LGA for consultation.

77. Notwithstanding this, and without adding confusion to the discussion by analysing the adequacy of the consultation (which cannot be a matter for the Court), Counsel

submits that LGA consultation certainly does not require quantitate data to be obtained to prove that it that is statistically reliable and capable of trend analysis, as alleged in the Declarations.

RELIEF SOUGHT

78. Given that there is no jurisdiction to consider the declarations sought by Theme 1, it follows there is no jurisdiction to grant the associated relief sought which also relates to Council's consultation. Specifically, the Court is unable to grant the relief sought that:

- a. Council produce and use particular research methodology in its consultation;
- b. Council immediately stop consultation until a particular research methodology is developed; and
- c. Council correct alleged misleading statements in its consultation.

THEME 2: PROPOSED VARIATION INVALID

79. Counsel now addresses Theme 2 in the Declarations: that the Proposed Variation is invalid because it includes landscape schedules for 'non-priority' areas that were not directed by the Court.

No jurisdiction to limit scope of Proposed Variation

80. Counsel submits that the Court has no jurisdiction to make the Theme 2 declarations sought and that the case must be struck out as it discloses no reasonable or relevant case.

81. Council was directed by the Court to use the Schedule 1 process under the Act to introduce schedules setting out landscape values for 29 Priority Area landscapes into its District Plan. Although this direction came out of a decision by the Court on Council's Proposed District Plan, the notification of a plan change is a Council decision and Council led process. Schedule 1 does not require Council to seek directions from the Court or to consult with the Court under the Schedule 1 process before notifying a plan variation.

82. Rather, it is for the Council to prepare a s 32 evaluation report and decide whether or not to proceed with the Proposed Variation. If Council considers it is appropriate to introduce landscape schedules for other areas, or more generally to make any variation to the plan, it is free to do so after undertaking a s 32 evaluation report and deciding to proceed.

83. As mentioned above, a proposed plan is prepared by a local authority, not the Court. Accordingly, the Court is not able to declare the Proposed Variation (or any plan variation) invalid if Council has decided to proceed with it under the Schedule 1 process. Therefore, this declaration, and the associated relief seeking a new timetable for notification of the Proposed Variation, must be struck out.

STRIKE OUT ORDER SOUGHT

84. For completeness, and for the reasons stated above, Counsel respectfully requests that the Court make the following orders under s 279(4) of the Act:

- a. The Court strikes out all Theme 1 Declarations sought in the Application for Declarations (at 48. a, c, d, and e);
- b. The Court strikes out all Theme 2 Declarations sought in the Application for Declarations (at 48. b and f); and
- c. Any other orders the Court thinks fit.

85. Council reserves its position as to costs.

DATED 22 July 2022



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