

**IN THE ENVIRONMENT COURT  
AUCKLAND**

**ENV-2020-AKL-**

**I MUA I TE KOOTI TAIAO**

**I TE TĀMAKI MAKARAU ROHE**

**IN THE MATTER**

of the Resource  
Management Act 1991  
("RMA")

**AND**

**IN THE MATTER**

of an appeal under  
Clause 14(1) of Schedule  
1 to the Act

**BETWEEN**

**THE DIRECTOR-GENERAL  
OF CONSERVATION**

**Appellant**

**AND**

**WHANGAREI DISTRICT  
COUNCIL**

**Respondent**

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**NOTICE OF APPEAL TO THE ENVIRONMENT COURT AGAINST DECISION  
ON PROPOSED PLAN CHANGE TO THE WHANGAREI DISTRICT PLAN**

**14 JULY 2020**

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**To:** The Registrar  
Environment Court  
Auckland

I, Lou Sanson, Director-General of Conservation (“**DGC**”), appeal against part of a decision of Whangarei District Council (“**Council**”) on the proposed plan changes 82 A & B, 88 A-J, 109 115, 136, 143, 144, 145, 147 & 148 to the Whangarei District Plan (“**Urban and Services Plan Changes**”).

### **Background and decision appealed**

1. I made a submission on the Urban and Services Plan Changes on 2 July 2019 and a further submission on 26 August 2019. I also presented evidence to the Independent Hearing Commissioners on the urgent need for RMA plan-based action to be taken to help stop the spread of *Phytophthora agathadicida* (kauri dieback disease).
2. I am not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.
3. I received notice of the Council’s decision on the Urban and Services Plan Changes on 3 June 2020.
4. The part of the decision that I am appealing is Council’s decision to reject parts of my submission in relation to kauri dieback management. The Council has included some provisions in the Whangarei District Plan through the Urban and Services Plan Changes for the protection of kauri trees against the spread of kauri dieback but it has left significant gaps to be dealt with through future plan changes. The content of those future plan changes and the timing for notification is uncertain. In the meantime, kauri dieback disease is “not waiting around”<sup>1</sup>, and there are significant gaps in the Whangarei District Plan, including:
  - a. The Council has decided not to include new vegetation clearance rules within each Residential Zone for the protection of kauri trees against the spread of kauri dieback disease. The activity of vegetation clearance may result in the spread of kauri dieback disease through the disturbance of soil and the movement of traces of soil remaining on cleared vegetation and the equipment and clothing that was used for the vegetation clearance.

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<sup>1</sup> *Director-General of Conservation v Thames-Coromandel District Council* [2018] NZEnvC 133 at paragraph 122.

- b. The Council has decided not to include a new rule for earthworks associated with land use for the protection of kauri trees against the spread of kauri dieback disease. There is a rule for earthworks associated with subdivision but there is no rule for earthworks associated with other land uses. Other earthworks, associated with land use, are equally risky with respect to the spread of kauri dieback disease.
- c. The Council has decided not to include a policy setting out good kauri dieback hygiene procedures. Good kauri dieback hygiene procedures and a management plan approach is required because equipment that is used for vegetation clearance and earthworks can move from site to site and across zones.
- d. The Council has decided against the addition of a policy in respect of Kauri dieback in the Strategic Direction Chapter. Addressing kauri dieback disease is an urgent resource management matter that needs to be dealt with across all zones.

### **Reasons for the appeal**

5. The reasons for the appeal are as follows:

- a. The decision:
  - i. Does not promote sustainable management of natural and physical resources under section 5 of the RMA;
  - ii. Does not adequately recognise and provide for matters of national importance under section 6 of the RMA, in particular section 6(c);
  - iii. Represents a failure of the Respondent to fulfil its mandated functions under section 31 of the RMA, in particular the maintenance of biological diversity;
  - iv. Is contrary to policy 11(a) of the Coastal Policy Statement and policy 4.4.1(1) of the Regional Policy Statement.

- b. Kauri dieback disease has been confirmed in kauri trees located in and around the Whangarei District.<sup>2</sup> The disease is a lethal root rot disease caused by the pathogen *Phytophthora agathidicida*. There is no known cure for kauri dieback and all effort is needed to stop the spread of this disease to new sites.<sup>3</sup>
- c. The rapid spread of kauri dieback disease is responsible for the major shift in conservation status for kauri trees from Not Threatened to Threatened-Nationally Vulnerable.<sup>4</sup>
- d. The Environment Court has provided guidance on the approach to be taken for kauri dieback disease and it has confirmed that there is jurisdiction in the RMA to include provisions in a district plan to prevent the spread of kauri dieback disease.<sup>5</sup>
- e. The Independent Hearing Commissioners have noted that there is an urgent need for RMA plan-based action to be taken to help stop the spread of kauri dieback disease and Council has decided to include some provisions in relation to kauri dieback disease but in making its decision Council has:
  - i. left significant gaps to be dealt with as part of future plan changes; and
  - ii. not approached questions of scope in a realistic and workable fashion.
- f. In *Royal Forest and Bird Protection Society v Southland District Council*<sup>6</sup> the High Court confirmed that the assessment of whether any amendment was reasonably and fairly raised in a submission should be approached in a realistic and workable fashion.
- g. New vegetation clearance rules are required within each Residential Zone for the protection of kauri trees against the

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<sup>2</sup> Evidence of Antony Julian Beauchamp prepared for the Council Hearing and dated 7 November 2019.

<sup>3</sup> Evidence of Antony Julian Beauchamp prepared for the Council Hearing and dated 7 November 2019.

<sup>4</sup> Evidence of Antony Julian Beauchamp prepared for the Council Hearing and dated 7 November 2019 at paragraph 13 and De Lange PJ, Rolfe JR, Barkla JW et al., 2018, *Conservation Status of New Zealand Indigenous Vascular Plants, 2017*. Wellington, New Zealand: Department of Conservation.

<sup>5</sup> *Director-General of Conservation v Thames-Coromandel District Council* [2018] NZEnvC 133.

<sup>6</sup> *Royal Forest and Bird Protection Soc v Southland DC* [1997] NZRMA 408.

spread of kauri dieback disease because the activity of vegetation clearance has the potential to result in the spread of kauri dieback disease through the disturbance of soil and through the movement of traces of soil remaining on cleared vegetation, equipment and clothing that was used for the vegetation clearance.

- h. A new rule for earthworks associated with land use is required for the protection of kauri trees against the spread of kauri dieback disease because other earthworks, associated with land use, are as risky as earthworks associated with subdivision with respect to the spread of kauri dieback disease.
- i. A policy setting out good kauri dieback hygiene procedures together with provisions requiring a management plan approach is required to protect kauri trees against the spread of kauri dieback disease because equipment that is used for vegetation clearance and earthworks can move from site to site and across zones.
- j. The addition of a policy in respect of Kauri dieback in the Strategic Direction Chapter is needed to protect kauri trees against the spread of kauri dieback disease because addressing kauri dieback disease is an urgent resource management matter that needs to be dealt with across all zones.
- k. The Council has erred in deciding that it would be beyond the scope of my submission to include a new policy for kauri dieback in the Strategic Direction Chapter of the Plan. While I have set out specific amendments in a table at the end of my submission dated 2 July 2020, paragraphs 4, 6-8, and 11(b) of my submission record that I am seeking such additional amendments as may be necessary to ensure the effective management of kauri dieback disease. The inclusion of a policy to address kauri dieback issues in the Strategic Direction Chapter of the Plan is necessary and is within the scope of my submission.
- l. While the table at the end of my submission refers specifically to the Earth, Living and Open Space zones (Chapters 88I, 155 and 147) my submission more generally seeks the inclusion of provisions in the Whangarei District Plan to work alongside other measures to help stop the spread of kauri dieback disease. Not referring specifically to

the Strategic Direction Chapter in my submission does not, in itself, mean that amendments to that Chapter are beyond the scope of my submission.

- m. The inclusion of the provisions I have sought in the Whangarei District Plan through the Urban and Services Plan Changes are necessary to ensure the effective management of kauri dieback disease. It would also better enable Whangarei District Council to perform its mandated functions under section 31 of the RMA, in particular the maintenance of biological diversity which Council is to achieve through the integrated management of effects, including the adoption of controls to prevent or mitigate the actual or potential adverse effects of the use of contaminated land.<sup>7</sup>

### **Relief sought**

6. I seek the following relief:

- a. The inclusion of further provisions in the Whangarei District Plan through the Urban and Services Plan Changes to help fill the gaps and to work alongside the other measures that are required for the protection of kauri trees against the spread of kauri dieback disease. This includes the insertion of the following provisions (or provisions to similar effect):

- i. New vegetation clearance rules within each Residential Zone for the protection of kauri trees against the spread of kauri dieback disease as follows (or words to similar effect):

The cutting, disturbance, removal or destruction of indigenous or exotic vegetation within three times the maximum radius of the dripline of a New Zealand kauri is a discretionary activity.

- ii. A new rule for the Earthworks Chapter providing that any land use related earthworks within three times the maximum radius of the canopy dripline on a kauri requires a resource consent, either as a discretionary activity as would occur for subdivision earthworks in the same area; or as a restricted discretionary activity rule requiring a management plan for such earthworks similar to the rule approved by the

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<sup>7</sup> See *The Director-General of Conservation v Thames Coromandel District Council* [2018] NZEnvC at paragraph 45.

Environment Court in relation to the proposed Thames-Coromandel District Plan.<sup>8</sup> If the recommended 'earthworks' definition from the National Planning Standard is accepted, then it would be necessary to make any such land use rule apply as well to gardening, cultivation, and the disturbance of land for the installation of fence posts.

- iii. A policy setting out good kauri dieback hygiene procedures using a management plan approach and provisions that are similar to the provisions in the Thames Coromandel District Plan.
- iv. A policy in respect of Kauri dieback in the Strategic Direction Chapter which addresses the following matters:
  - 1. The overarching policy directive of avoiding adverse effects / no more than minor adverse effects from plant pathogens including kauri dieback disease;
  - 2. The existence of a risk area around each kauri tree;
  - 3. The need to treat all soil around each kauri tree as potentially contaminated;
  - 4. The need to ensure equipment, machinery and clothing is clean of soil before entering the risk area around a kauri for any activity that would disturb the soil;
  - 5. The need to ensure equipment, machinery and clothing is clean of soil on exiting the risk area around a kauri for any activity that would disturb the soil;
  - 6. The need to either retain soil in the risk area around a kauri or to dispose of it at an approved location for the disposal of potentially contaminated soil;

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<sup>8</sup> *Director-General of Conservation v Thames-Coromandel District Council* [2018] NZEnvC 133.

7. Where vegetation clearance occurs in the vicinity of kauri to ensure all equipment is clean before and after, that care is taken to minimise disturbance of soil, and that vegetation cuttings either remain in the vicinity of kauri or are disposed of to a secure facility;
8. Where kauri are pruned or removed, all wood and sawdust is either left within the risk area around the kauri or collected and disposed of at a secure facility; and
9. The circumstances when a management plan approach is able to be encouraged (more than one kauri, on-going or large-scale earthworks, potentially in urban areas) an outline of what needs to be addressed in a management plan.

b. Such further, consequential, or alternative relief to like effect, that the Court considers fit to address my concerns; and

c. Costs.

7. I agree to participate in mediation or other alternative dispute resolution proceedings.



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Natasha Hayward  
Director Planning Permissions and Land  
Department of Conservation  
Acting pursuant to delegated authority on behalf of the Director-General of Conservation<sup>9</sup>

Date: 14 July 2020

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<sup>9</sup> A copy of the Instrument of Delegation may be inspected at the Director-General's office at Conservation House (*Whare Kaupapa Atawhai*, 18/32 Manners Street, Wellington 6011).



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#### **Attachments**

I attach the following documents to this notice:

- a. A copy of my submission;
- b. A copy of my further submission;
- c. A copy of the decision; and
- d. A list of names and addresses of persons to be served with a copy of this notice.

#### **Advice to recipients of copy of notice of appeal**

*How to become party to proceedings*

You may be a party to the appeal if you made a submission or further submission on the matter of this appeal.

To become a party to the appeal, you must –

- (a) within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

*How to obtain copies of documents relating to appeal*

The copy of this notice served on you does not attach a copy of the appellant's submission or the part of the decision appealed. These documents may be obtained, on request, from the appellant.

*Advice*

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

**List of the names and addresses of persons to be served with this notice of appeal**

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