

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO
AT AUCKLAND**

ENV-2020-349-051

UNDER

the Resource Management Act 1991

IN THE MATTER

of appeals under clause 14 of the First Schedule to the Act in relation to the package of Urban and Services plan changes to the Operative Whangarei District Plan

BETWEEN

**NORTHPORT LTD
(ENV-2020-AKL-109)**

Appellant

AND

WHANGAREI DISTRICT COUNCIL

Respondent

**JOINT MEMORANDUM OF THE APPELLANT AND RESPONDENT
REQUESTING AN ORDER UNDER SECTION 293 OF THE ACT**

18 December 2020


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MAY IT PLEASE THE COURT

1. This memorandum relates to the Port Noise topic of appeals on the Urban and Services plan changes to the Operative Whangarei District Plan. The appeal in this topic is by Northport Ltd (“Northport”).

Background

2. The Council’s first reporting memorandum (14th August 2020) recorded:

In the Northport appeal, an issue at hearing and on appeal is whether Northport’s submission provided adequate scope for the introduction of new noise and vibration controls on surrounding properties. The question of scope is not agreed as between the Council and Northport.

3. A section 293 application from the parties was signalled in the first reporting memorandum.
4. At callover on 18th September 2020 the Court directed that the Port Noise topic be separately timetabled.

Relevant plan change

5. The relevant plan change, from the suite of twenty Urban and Services plan changes, is plan change 144 (“PC144”) which introduced the Port Zone and made consequential amendments to the operative Noise and Vibration (“NAV”) chapter, as outlined in the affidavit of Ms McGrath and Mr Burgoyne.

Current status of the appeal

6. Following extensive direct discussion between planners and acoustic experts for Northport and the Council, Northport has prepared a set of proposed provisions with respect to Inner and Outer Control Boundaries and a Port Noise Management Plan to establish port noise controls in accordance with the New Zealand Standard 6809:1999 Acoustics- Port noise management and land use planning (“the Port Noise Standard”).
7. Those provisions have now been procedurally formalised by Northport amending its Notice of Appeal on 15th December 2020.

Section 293 Application

8. In order to move past the issue of alleged issue of scope and progress the appeal, Northport and the Council have agreed to seek an order from the Court under section 293 of the Resource Management Act 1991 (“the Act”) to direct that the Council publicly notify Northport’s amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries, so that any interested parties may file a s274 notice with the Court.
9. This memorandum outlines the grounds for seeking an order under section 293 before summarising the applicable law and the reasons supporting the request.

Grounds for the application

10. This request for an order under section 293 is made on grounds that:
 - a) the application to notify the amended Notice of Appeal is made jointly by Northport and the Council;
 - b) an order under section 293 would avoid further delay and be more efficient and effective than the alternatives (being a Variation or a resource consent);
 - c) no person would be unduly prejudiced by the order; and
 - d) upon the further grounds detailed in the affidavits of Ms McGrath and Mr Burgoyne for the Council and Mr Hood for Northport.

Section 293

Legal tests

11. Section 293 of the Act empowers the Court to direct changes to a proposed plan or plan which are not otherwise within its jurisdiction due to the scope of the appeal before it.¹ Section 293 provides:

293 Environment Court may order change to proposed policy statements and plans

(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:

¹ *Federated Farmer of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616, at [120].

- (c) submit the changes to the Court for confirmation.
- (2) The Court –
 - (a) must state its reasons for giving a direction under subsection (1); and
 - (b) may give directions under subsection 1 relating to a matter that it directs to be addressed.

12. The primary purpose of section 293 is to provide the Court with a mechanism for expanding the nature and extent of the relief sought beyond the scope of the appeal where appropriate.² However, there must be a nexus between the resource management issue raised by the relevant submission and the relief sought³, and the relief must be “on” the proposed plan.⁴
13. The power granted to the Court must be used cautiously and sparingly.⁵ In exercising its power under section 293, a relevant consideration for the Court will be whether the proposed amendments serve the overall purpose of the RMA.⁶

Nexus

14. The parties submit that the issue of management of Port noise was clearly raised in Northport’s submission. The alleged issue of scope between the parties is confined to whether potentially interested parties would have been aware of the nature of the Port noise provisions proposed. The amended Notice of Appeal now particularises that relief.

“On” the plan change

15. The parties agree that the issue of Port noise was “on” PC144, which introduced the Port Zone and made consequential amendments to the NAV chapter.

Relevant factors

16. The following matters have been identified as supporting an order under section 293:
- a) where the application has been jointly made, particularly where it involves many or most of the main parties or the main landowner;⁷

² *Hamilton City Council v New Zealand Historic Places Trust/Pouhere Taonga & Anor* [2005] NZRMA 145 (HC) at [25].

³ *Apple Fields Ltd v Christchurch City Council* [2003] NZRMA 1 at [40].

⁴ *Auckland Council v Byerley Park Ltd* [2013] NZHC 3402, at [42].

⁵ *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Court* at [121].

⁶ *Apple Fields Ltd v Christchurch City Council* [2003] NZRMA 1 at [37].

⁷ *Gardez Investments Ltd v Queenstown Lakes District Council C111/04* at [31].

- b) where there has already been a Council submission and hearing process addressing the provisions and where it is unlikely there are interested parties who are not already involved in the proceedings;⁸
- c) where the amendments proposed relate to a discrete piece of land and not to a rule affecting the whole district or district wide policies and objectives;⁹
- d) where there has already been consultation over what is being proposed;¹⁰
- e) where the amendments proposed are supported by evidence from witnesses for more than one set of parties, particularly where that evidence shows that the amendments may achieve the purpose of the RMA or the objectives of the relevant plan;¹¹ and
- f) to avoid further delay, particularly where the delay has already been considerable.¹²

17. Factors that might count against the Court exercising its jurisdiction under section 293 include:¹³

- a) the larger scale and more complex the proposed amendments are, the less likelihood the Court will exercise its discretion;
- b) where prejudice to a party exists; and
- c) where there are potentially a large number of persons affected greater than the public generally.

Supporting factors

18. The parties submit that there are a number of relevant factors that support the Court making an order under section 293.

- a) *The application is made jointly.*

The application to notify the amended Notice of Appeal is made jointly by Northport and the Council. Both parties support notification of the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries.

⁸ *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249, at [170].

⁹ *Gardez Investments Ltd v Queenstown Lakes District Council* C111/04 at [31].

¹⁰ *Gardez Investments Ltd v Queenstown Lakes District Council* C111/04 at [31].

¹¹ *Apple Fields Limited v Christchurch City Council* [2003] NZRMA 1 at [40].

¹² *Thacker v Christchurch City Council* C026/09 at [92].

¹³ *Apple Fields Limited v Christchurch City Council* [2003] NZRMA 1 at [40].

- b) *There has already been a Council submission and hearing process addressing the provisions.*

The affidavits of Ms McGrath and Mr Burgoyne and of Mr Hood set out the process for PC144 including notification, submissions and further submissions, and hearing. Potential for introduction of Inner and Outer Control Boundaries and a Port Noise Management Plan was addressed at the hearing.

The alleged issue of scope is whether there are potentially interested parties who are not already involved in the proceedings. Northport and the Council agree that this alleged issue would be resolved by notifying the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries.

- c) *The amendments proposed relate to a discrete piece of land and not to a rule affecting the whole district or district wide policies and objectives.*

The proposed provisions and Port Noise Management Plan would deal with the relationship between activities at the Port (a discrete mapped area) and the Port's residential neighbours (proposed to be mapped by the Inner and Outer Control Boundaries).

- d) *There has already been consultation over what is being proposed.*

Since filing the appeal, Northport and the Council have worked together for several months on potential District Plan provisions in accordance with the Port Noise Standard. The only issue preventing progression of the appeal is the alleged issue of scope.

- e) *The amendments proposed are supported by evidence from witnesses for more than one set of parties.*

Northport has formally amended its Notice of Appeal to particularise the proposed provisions as its relief sought on the advice of its planning and acoustic experts, as outlined in the affidavit of Mr Hood.

The affidavits of Ms McGrath and Mr Burgoyne and of Mr Hood detail that the Council's acoustic consultant, Mr Styles, prepared a report for the s42A report where he agreed in principle with the relief sought by Northport to establish port noise controls in accordance with the Port Noise Standard, subject to refinement of effects assessment and the provisions.

Notification of the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries would resolve the alleged scope issue so that the parties and their experts could progress their discussions on the provisions.

- f) *An order under s293 would avoid further delay.*

Northport's appeal was filed in July 2020. As set out in the affidavit of Ms McGrath and Mr Burgoyne, notification of the amended Notice of Appeal would enable the parties to progress direct discussion or move into formal mediation approximately 8 months sooner than if the Council were to agree to prepare and notify a Variation.

- g) *An order under s293 would be more efficient than the alternatives.*

The affidavit of Ms McGrath and Mr Burgoyne outlines the alternatives to notification of the amended Notice of Appeal by s293 process (Variation and resource consent), and the timeframes associated with those alternative processes. Ms McGrath and Mr Burgoyne depose that an order under s293 would be more efficient than a Variation and more effective than a resource consent.

Negating factors

19. The parties submit that there are no factors working against an order under s293 directing the Council to notify the amended Notice of Appeal. In particular:

- a) *Scale and complexity*

The proposed provisions do not apply on a large scale in the context of the Whangarei District, and are spatially defined.

Port Noise provisions by their nature are technically complex. The proposed provisions are however detailed in the amended Notice of Appeal which, together with a map of proposed Inner and Outer Control Boundaries, would enable any interested parties to take advice if they wished to do so.

- b) *Prejudice*

No party will be unduly prejudiced by the making of the order. On the contrary, making the order will resolve potential prejudice. Northport and the Council will be able to progress resolution of the appeal without further reference to the alleged issue of scope, and any interested parties will have an opportunity to join the appeal.

- c) *Number of persons affected*

The application of the proposed provisions is spatially confined.

“After a Hearing”

20. Section 293(1) provides that the Court may direct a local authority to make changes to a proposed Plan “after hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan...”
21. The Court has set the s293 application down for a one day hearing in the week of 1st February 2021.

Consultation and notification

22. Section 293 provides that where a Court decides to exercise its discretion it may direct the Council to consult with the parties and other persons that the Court directs.¹⁴
23. In this instance Northport and the Council are jointly seeking the s293 order, which is to notify the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries.
24. Currently the only 274 party to Northport’s appeal is Kāinga Ora – Homes and Communities (“Kāinga Ora”). Kāinga Ora has been informed of the s293 application and will be served with a copy of the application. Kāinga Ora has also been served with a copy of the amended Notice of Appeal.
25. The parties submit that notification of the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries is consistent with s293(1)(b), and that in the circumstances of this joint application no further consultation is necessary prior to making the order.

Conclusion

26. The parties submit that making an order pursuant to s293 that the Council notify the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries will result in:
 - a) the most efficient resolution of the alleged scope issue; and
 - b) the parties progressing with direct discussion or formal mediation approximately 8 months sooner than when compared with the alternative process of preparing, notifying and hearing a Variation (if the Council were to agree to do so).

¹⁴ Section 293(1)(b).

27. Accordingly, the parties respectfully request that the Court exercise its power and discretion under section 293 of the RMA and direct that the Council notify the amended Notice of Appeal together with a map of proposed Inner and Outer Control Boundaries.

DATE: 18 December 2020



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