

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2020] NZEnvC 48

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under clause 14 of the First Schedule to the Act
BETWEEN	TRANSPOWER NEW ZEALAND LIMITED (ENV-2019-WLG-000108) Appellant
AND	GREATER WELLINGTON REGIONAL COUNCIL Respondent

Court: Environment Judge B P Dwyer sitting alone under s 279 of the Act
Hearing: In chambers
Date of Decision: 20 April 2020
Date of Issue: 20 April 2020

**DECISION OF THE ENVIRONMENT COURT
ON WAIVER APPLICATION PURSUANT TO SECTION 281 RMA**

A: Application for waiver granted

REASONS

Introduction

[1] Greater Wellington Regional Council (the Council) has notified a Proposed Natural Resources Plan (the Proposed Plan). A number of appeals in respect of the Proposed Plan are currently before the Court going through pre-hearing (primarily mediation) processes.



[2] Those appeals include an appeal by Transpower New Zealand Limited (Transpower) which was filed on 17 September 2019.

[3] On 13 March 2020 Kāinga Ora Homes and Communities (Kainga Ora) filed a s 274 notice in respect of the Transpower appeal together with an application for waiver for late filing of the notice pursuant to s 281 RMA. Transpower opposes the waiver application.

The Kāinga Ora Application

[4] The basis on which Kāinga Ora sought waiver was set out in the following terms in its application:

- 3 The application for waiver is made on the following grounds:
 - (a) The period for filing the s 274 notice ended on 9 October 2019. Kāinga Ora's s 274 notice is filed approximately 5 months out of time.
 - (b) Kāinga Ora is interested in Topics 6, 7 and 8 as they relate to the National Grid and the implications for Kāinga Ora's ability to develop land. Kāinga Ora opposes the relief sought by the appellant because the amendments sought will restrict the future efficient development of land by Kāinga Ora.
 - (c) Kāinga Ora is already an appellant on decisions on the Proposed Plan and a s 274 party on eight other Proposed Plan appeals.
 - (d) Kāinga Ora's appeal and other 274 notices raise issues relating to the integration of infrastructure with the efficient development of land for residential purposes.
 - (e) Counsel for Kāinga Ora understands that negotiations between the parties are at a relatively early stage with Environment Court mediations on the Proposed Plan only just underway but scheduled through to June 2020. Kāinga Ora is involved in those mediations through its appeal and other s 274 notices and Kāinga Ora joining this appeal will not result in any delay to the proceedings.
 - (f) Kāinga Ora understands that the parties are hopeful that the appeal can be resolved without hearing time and no evidence exchange timetable is proposed at this stage. Kāinga Ora is similarly hopeful that a negotiated or mediated settlement can be achieved.
 - (g) Kāinga Ora considers that it is desirable from an integrated management perspective for Kāinga Ora participate in negotiations and the upcoming mediations. This will give the parties an opportunity to work together to devise a solution that recognises the importance of both the national grid



and the need to ensure that land can be efficiently developed for residential purposes.

- (h) There will be no prejudice to the parties were a waiver to be granted as all of the concerns of and relief sought by Kāinga Ora are already known to the other parties.
- (i) On this basis there will be no undue disruption to the course of the appeal and no other parties will be unduly prejudiced by the late filing of the section 274 notice.

[5] The application was referred to other parties for comment. The Council advised that it abided the Court's decision in this regard. Transpower opposed the application.

The Transpower Opposition

[6] The basis of Transpower's opposition to the waiver application was set out in these terms in a memorandum which its counsel filed on 23 March 2020:

- 3 Transpower opposes the application pursuant to s 281(2) of the Resource Management Act 1991 on the basis that it will be unduly prejudiced by the granting of the waiver. In particular:
 - a Kāinga Ora has given no reason for seeking to lodge the section 274 notice at such a late stage:
 - i The Court's Minute of 26 July 2019 required section 274 notices to be lodged by 9 October 2019. Kāinga Ora's section 274 notice is 5 months late.
 - ii Transpower did not serve a copy of its appeal on Kāinga Ora because neither Kāinga Ora nor its predecessors submitted on the PNRP.
 - iii Transpower's notice of appeal has been publicly available on the Greater Wellington Regional Council website since September 2019.
 - iv On 9 October 2019, Kāinga Ora lodged a number of section 274 notices. Kāinga Ora did not seek to join Transpower's appeal at this time.
 - b It is difficult to identify Kāinga Ora's exact interest in Transpower's appeal, as the section 274 notice simply seeks to join in relation to 'Topics 6, 7, and 8,' without specifying any particular provisions. Transpower's appeal relates to objectives O12 and O13 and policies P12 and P13A allocated to Topic 6, and policy P24 allocated to Topic 7. Transpower's appeal does not relate to any provisions allocated to Topic 8.



- c Ten parties have lodged section 274 notices in relation to Transpower's appeal points allocated to Topics 6 and 7. Only two of those parties oppose any of the relief sought by Transpower in Topic 6 and 7.
- d Transpower undertook direct discussions with a number of the section 274 parties ahead of the scheduled mediation.
- e Topics 6, 7 and 8 were mediated by all parties on 10-12 March 2020. While these mediations have not yet concluded, substantial progress was made. Transpower is confident that the appeal points can be resolved by agreement.
- f Introducing new parties at this late stage would require issues which are close to resolution to be addressed once again.
- g Kāinga Ora states that it opposes all of the relief sought by Transpower. It is therefore submitted that, in light of paragraphs b-f above, Transpower will be unduly prejudiced by granting of the waiver sought.

Kāinga Ora's Response

[7] In its response to the Transpower notice of opposition Kāinga Ora advised that its interest in the Transpower appeal related only to matters P13A (Topic 6) and P24 (Topic 7). It advised that it is a Crown Entity, which has an interest in the proceeding that is greater than the interests of the general public because of its significant housing and urban development interests in the Greater Wellington Region, including in the vicinity of the national grid and areas of outstanding natural character. It set out its statutory functions in relation to urban development.

[8] Kāinga Ora expanded on the reasons for the delay in filing its s 274 notice. It advised as follows:

3 Reason for the delay

- 3.1 Kāinga Ora was established as a Crown Entity when the Kāinga Ora Act came into force on 1 October 2019. Kāinga Ora was formed by the consolidation of Housing New Zealand Corporation, HLC (2017) Limited, and parts of the KiwiBuild Unit of the Ministry of Housing and Urban Development. Kāinga Ora has a broader area of responsibility than those predecessor entities combined.
- 3.2 Section 274 notices on appeals were due to be filed by 9 October 2019, only 6 working days later. In that short timeframe, Kāinga Ora was able to identify its interest in, and file section 274 notices on, eight appeals, but Kāinga Ora's interest in the present appeal was regrettably overlooked.
- 3.3 An associated difficulty with this timing was that Kāinga Ora has a much broader function in relation to urban development generally (outlined above), than any of



the three entities that were merged to form Kāinga Ora. We also note that Kāinga Ora's interests in urban development generally (beyond properties or developments in which Kāinga Ora has a direct interest) were and are evolving, with the Urban Development Bill still before the Environment Select Committee.

- 3.4 The initial oversight of Kāinga Ora's interest in the Transpower appeal came to light only during mediation on 6 and 10 March 2020. Kāinga Ora filed the present application for waiver filed as soon as was possible.

[9] Kāinga Ora then went on to address the issue of undue prejudice to Transpower in these terms:

4 There will be no undue prejudice to Transpower

- 4.1 Kāinga Ora now only seeks to join the appeal in relation to two provisions, P13A and P24. Kāinga Ora's representatives have been present at mediation on these provisions, and are up to date on the discussions between the parties. There will be no delay from any need for Kāinga Ora to 'come up to speed'. If the application is granted, Kāinga Ora's representatives will be able to contribute to and hopefully conclude those discussions.
- 4.2 Transpower's appeal has been joined by other section 274 parties, in relation to both provisions, so it cannot be said that Kāinga Ora becoming a party to the appeal will expand the scope of the issues to be resolved.
- 4.3 It is Kāinga Ora's wish to continue to participate in mediation discussions, and to contribute to a mediated settlement that best gives effect to the statutory and planning framework.
- 4.4 For the reasons above, Kāinga Ora respectfully requests that the Court grant its application for waiver. In the alternative, should the Court not yet be in a position to make a definitive ruling on the application, Kāinga Ora requests that the Court grant the application to allow Kāinga Ora to participate in mediation and, to the extent that Kāinga Ora's interests have not resolved in mediation, make a final determination on the application at the substantive hearing.

Determination

[10] Section 281(1)(a)(iia) RMA enables the Court to waive a requirement as to the time within which a person must give notice under s 274 of their wish to be a party to proceedings before it. The Court's power to do so is subject to the provisions of s 281(2) which provides as follows:

- (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.



[11] The provisions of s 281(2) which I have set out above leave no discretion to the Court to grant a waiver (“shall not grant an application under this section”) unless it is satisfied that none of the parties to the proceedings will be “unduly prejudiced” by the grant of the waiver.

[12] I think it is inherently the case that enabling another party to join proceedings as late as Kāinga Ora seeks to do in this case inevitably involves an element of prejudice to other parties who/which complied with statutory timeframes. Transpower says that it and those other parties have been in discussion and participated in mediation. It appears that Kāinga Ora was present at mediation, although I am uncertain as to the capacity in which that was the case.

[13] Significantly in this instance, it further appears that there has been no resolution of the matters at issue between Transpower and the other parties. Kāinga Ora is apparently aware of the matters that have been “up for debate” and assures the Court that its representatives are in a position to contribute to and conclude the discussions which have taken place to date. It assures the Court that its participation will not expand the scope of the issues yet to be resolved.

[14] I accept that Kāinga Ora is a responsible body with important statutory functions to fulfill. I accept its assurance as to its ability to contribute to and conclude the discussions which are ongoing between Transpower and other parties and that Kāinga Ora’s participation in the appeal will not expand the scope of the issues to be resolved between the existing parties.

[15] Accepting the assurances and advice of Kāinga Ora regarding those matters, I consider that its formal addition to the process at this time will not create a prejudice which is excessive to the extent that it must be regarded as undue, even recognising that there must be some degree of prejudice. Accordingly, I determine that it is appropriate to grant the waiver to enable Kāinga Ora to join the proceedings. However that is subject to a caveat.

[16] The Registrar is to advise Commissioner Edmonds, who is managing the mediation proceedings, that waiver has been granted to Kāinga Ora and to give the Commissioner a copy of this decision. I direct that if at any time during the mediation process the Commissioner forms the view that Kāinga Ora seeks to expand the scope of issues to be resolved at mediation beyond those presently at issue between the

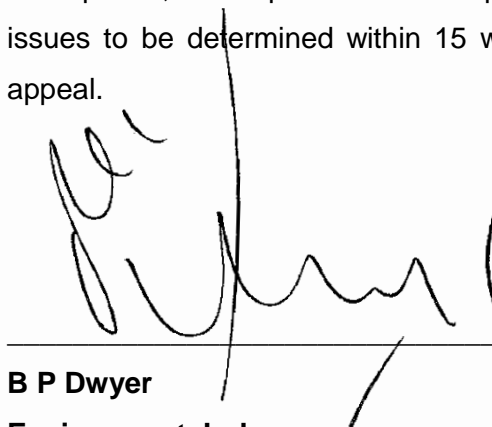


existing parties, contrary to the assurance which it has given, the matter is to be referred back to me as a matter of urgency.

[17] Should I concur with the Commissioner's view in that regard, I will consider exercise of my power pursuant to s 279(4)(c) RMA to strike out Kāinga Ora's case in these proceedings as an abuse of process.

Outcome

[18] The waiver application is approved. Costs are reserved in favour of Transpower, whose position in these proceedings was entirely reasonable. Any costs issues to be determined within 15 working days of resolution of the topics under appeal.



B P Dwyer

Environment Judge

