

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2022] NZEnvC 206

IN THE MATTER of the Resource Management Act 1991

AND an application for declarations under s316 of the Act

BETWEEN J J COSSENS

(ENV-2022-CHC-21)

Applicant

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Court: Environment Judge J J M Hassan
Hearing: Sitting alone on the papers under s279 of the Act
Submissions: Dr J Cossens for himself
M E Davenport for Queenstown Lakes District Council
M Baker-Galloway and R Hill for Darby Planning LP
Last case event: 22 July 2022
Date of Decision: 11 October 2022
Date of Issue: 11 October 2022

DECISION OF THE ENVIRONMENT COURT

A: The application for the declarations and orders in the notice of motion dated 17 May 2022 is struck out in part namely as to the relief in paragraphs 48a, c, d and e.

COSENSS v QLDC – STRIKE OUT DECISION



- B: The balance of that application is declined.
- C: Costs are reserved and a timetable direction made.

REASONS

Introduction

[1] This decision concerns:

- (a) an application by Dr John Cossens for “declaration and enforcement” against Queenstown Lakes District Council (‘QLDC’) in regard to matters in relation to the processing of proposed variation to its Proposed District Plan (‘Proposed Variation’, ‘PDP’) (‘Declaration and Enforcement Application’); and
- (b) an application by QLDC for strike out of that application (‘Strike Out Application’).

Background

Declaration and Enforcement Application

[2] This application concerns pre-notification consultation undertaken by QLDC ahead of the proposed variation to its Proposed District Plan (‘Proposed Variation’, ‘PDP’). The Proposed Variation is in response to the court’s decisions in Topic 2. Those decisions included directions to include policies in the PDP (using Sch 1) for the identification of landscape values for 29 priority areas.

[3] The application seeks that the court direct QLDC to cease its community consultation on the Proposed Variation.¹ In substance, the application seeks declarations and related directions, as follows:²

¹ Notice of Motion seeking declarations dated 17 May 2022.

² Notice of motion seeking declarations dated 17 May 2022 at [48].

- 48 Respectfully the Court is asked:
- a. To declare that the Council research methodology used in the development of the landscape values schedules is neither good or best practice and does not meet the specific directions as set down in the Court's decisions relating to the PDP appeals.
 - b. To declare the Council's attempt to include non-priority area landscape value schedules in the PDP as being invalid.
 - c. To direct the Council to immediately stop its landscape values schedule development until such time as a more reliable, robust, and representative research methodology is developed, and accepted, to establish landscape values.
 - d. To direct the Council to correct any misleading statements used in its landscape value questionnaires and that it is accurate in providing background and reasons for the landscape study and value schedules.
 - e. To direct the Council to, as soon as practically possible, produce a best practice landscape assessment methodology which includes reliable, statistically valid qualitative and quantitative research of community and public attitudes and perceptions of priority area landscape values.
 - f. To confirm a new timeline for values schedule development and to set a new date for notification of such schedules.

[4] Dr Cossens also filed an *ex-parte* application for an interim enforcement order to prohibit QLDC from notifying or processing the Proposed Variation pending the determination of the substantive application.³ That application was declined on 29 June 2022.⁴

³ *Ex-parte* application for interim enforcement order dated 27 June 2022.

⁴ *Cossens v Queenstown Lakes District Council* [2022] NZEnvC 115. See also *Cossens v Queenstown Lakes District Council* [2022] NZEnvC 139 for the reasons why this application was declined.

The Strike Out Application

[5] QLDC's Strike Out Application filed on 3 June 2022 is on the following grounds:⁵

- 3.1. the application for declarations discloses no reasonable or relevant case in respect of the proceedings (s 279(4)(b) of the Act); and
- 3.2. it would be an abuse of the Environment Court's process to allow the case to be taken further (s 279(4)(c) of the Act).

Related directions and responses

[6] Directions were made for both applications to be determined together on the papers and for parties to join in support or opposition and file submissions.⁶ Darby Planning LP ('Darby Planning') joined the proceeding as a party under s274 RMA.

Statutory framework and legal principles

The court's declaratory powers

[7] The court's declaratory powers on an application are in ss 310-313 RMA. Within the scope of available declarations in s310, the power is discretionary. The court may make or modify any declaration applied for, modify or decline it. Relevantly, a declaration can be made inter alia, as to:

- (a) the existence or extent of any RMA function, right, power or duty (s310(a)); or
- (b) any other issue or matter relating to the interpretation, administration or enforcement of the RMA (s310(h)).

⁵ Notice of motion seeking strike out of application for declarations dated 3 June 2022.

⁶ Minute of the court dated 23 June 2022.

[8] The court has no inherent declaratory powers (for instance in relation to defects of an administrative law nature).⁷ Nor is the court empowered to make declarations as to whether the requirements of other legislation (such as the Local Government Act 2002 ('LGA')) have been satisfied.

[9] The court has no jurisdiction to make orders or directions to require compliance with its declarations. However, the court has enforcement order powers as is next discussed.

The court's enforcement order powers

[10] The Declaration and Enforcement Application does not expressly seek enforcement orders. However, in a substantive sense, the application appears to seek orders pertaining to the matters in ss314(1)(a)(i) and (1)(b)(i). That is insofar as it alleges that QLDC is not abiding RMA requirements concerning its approach to the Proposed Variation.

[11] The court's relevant powers as to the making of an enforcement order on an application are in ss 314 and 316-319. The powers are discretionary in that the court may grant or decline an application (s319). However, the discretion generally favours an order being made in the face of a finding of breach of the RMA.⁸

Section 279(4) RMA

[12] Section 279(4) RMA relevantly provides:

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

⁷ *Berryman v Waitakere City Council* A046/98.

⁸ *Rangiora New World Ltd v Barry* (1992) 1 NZRMA 133.

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.

[13] While used sparingly, s279(4) provides the court with the ability to strike out a person's case in certain circumstances. As the court said in *Federated Farmers (Wairarapa Division) v Wellington Regional Council*:⁹

...if those [jurisdictional] boundaries are exceeded...then there is no discretion to be exercised "sparingly". The case must simply be struck out as legally frivolous or vexatious".

[14] If an application for declarations is considered to not be within scope, the court has historically struck it out.

The evidence

[15] Extensive documentation is provided on the matters pertaining to the applications. In addition, the affidavit evidence is briefly summarised as follows.

Dr Cossens

[16] In his affidavit, Dr Cossens offers opinions on the various ways in which he alleges that QLDC has failed to comply with the court's Topic 2 decisions and RMA and LGA requirements as to plan change preparation and consultation. He

⁹ *Federated Farmers (Wairarapa Division) v Wellington Regional Council* C192/99 at [17]. See also *Atkinson v Wellington Regional Council* W13/99 at [16].

also offers opinions in response to the affidavit of the QLDC witness, Ms Picard.

Sarah Picard

[17] QLDC's Strike Out Application is supported by an affidavit from Sarah Picard, a Senior Policy Planner involved in work for the Proposed Variation. She explains the approach QLDC is taking to the Proposed Variation including in regard to consultation and professional landscape input.

Christopher Ferguson

[18] Christopher Ferguson is a planning consultant who gave expert evidence before the court in regard to Topic 2. As Decision 2.2 records, his evidence was influential in the court's findings to the effect that so-termed values' identification framework policies and provisions be added to the PDP (these provisions instigating the Proposed Variation). He opines that in various ways QLDC has not followed sound practice in its approach to preparing the Proposed Variation. That included perceived weaknesses in its approach to consulting with the community to inform identification of landscape values. In his view, declarations a., c., d. and f have merit.

Submissions

Dr Cossens

[19] Dr Cossens makes the following representations in support of his application and in opposition to strike out:

- (a) the Declaration and Enforcement Order Application is entirely within scope of the originating appeal and the court's jurisdiction under ss 310-312 of the RMA and is founded on factual evidence;
- (b) QLDC's approach to consultation on the Proposed Variation was incorrect and focused on narrow statutory obligations rather than

- ensuring its Landscape Value Schedule Development Methodology was best practice;
- (c) QLDC misled the public over the inclusion of non-priority areas in the Plan Schedules, as the schedules in the PDP are confined to priority landscapes as per the court’s Topic 2 decisions;
 - (d) QLDC has not met the requirements as to community consultation under s82 of the LGA and cl 3 Sch 1 RMA;
 - (e) QLDC failed to adequately consider the principles of the Treaty of Waitangi in their development of landscape value schedules;
 - (f) Ms Picard’s s32 RMA analysis is flawed as it is based upon the notion that best practice methods were used in the identification of landscape values whereas they were not given lack of public feedback;
 - (g) there is no substance to QLDC’s pleadings and the Strike Out Application is without foundation and is frivolous, vexatious, an abuse of court processes and “bullying” by a well-resourced local authority of one of its ratepayers.

Darby Planning

[20] In summary, Darby Planning submits that making declarations could serve to provide important insight for QLDC regarding how it could improve on, or add to, the Proposed Variation itself.

QLDC’s submissions

[21] Counsel for QLDC submits that the Declarations and Enforcement Order Application seeks to effectively usurp QLDC’s administrative and decision-making powers, and by extension its functions, duties and powers under the RMA. Counsel submits that QLDC’s pre-notification consultation process was in accordance with its obligations under s82 LGA and was adequate for the purpose of gathering views in preparation of the Proposed Variation and the public notification process. Moreover, counsel points out that QLDC was not obliged

to consult the public in preparing a plan change or variation. Further, as the Proposed Variation has now been notified, counsel submits that any defects can be remedied in the Sch 1 RMA processes for public participation. As for Dr Cossens' representations concerning non-priority areas being included in the Proposed Variation, counsel submits that the Declaration and Enforcement Order Application does not disclose a reasonable or relevant case. That is in the sense that the notification of a plan change is a Council-led process and does not require court directions.

Analysis

Community consultation on landscape schedules

[22] The declarations and orders or directions sought in 48.a, c, d, and e each relate to the overarching issue of consultation on landscape issues.

[23] Effective community consultation is plainly integral to sound practice particularly for the proper identification of landscape values. Mr Ferguson's opinions as an experienced planner give force to that proposition. Effective consultation is an important underpinning for the sound identification of landscape values. That is in the sense that it can help inform appreciation of predominant community values. It can also assist fact-checking.¹⁰ For example, NZILA's recently published guidelines, *Te Tangi a te Manu* comments that a landscape assessor "should remain aware of the range of opinions and perceptions of landscape matters in the community and draw on available sources of information".¹¹

[24] However, the RMA does not require such consultation to be undertaken (except to the narrow extent that cl 3(1) Sch 1 prescribes that consultation with

¹⁰ Submissions on behalf of Darby Planning LP dated 8 July 2022 at [9].

¹¹ *Te Tangi a te Manu*, Aotearoa New Zealand Landscape Assessment Guidelines, NZILA, July 2022.

certain named parties be undertaken). Nor is this prescribed in any direction in any of the court's Topic 2 decisions (including in the prescribed values identification framework policies).

[25] The court is not a planning authority and I should resist any invitation to interpret the court's declaratory or enforcement order powers on such a basis. Therefore, I do not accept Darby Planning's proposition that there would be value in making declarations for direction or guidance purposes at this time.

[26] What QLDC has elected to do in regard to consultation and other input into its Proposed Variation falls within the legitimate scope of its planning authority discretion. In terms of s310, nothing undertaken or not undertaken constitutes any identifiable misuse of any RMA function or power or breach of duty or denial of any identifiable RMA right. Nor do the circumstances call for any declaration as to how QLDC has interpreted its planning authority functions, powers or duties.

[27] Insofar as Dr Cossens or Darby Planning have concerns about such matters, their proper recourse is to make a submission under Sch 1 RMA and, if not satisfied with the outcome, to appeal.

[28] It follows that I find these aspects of the Declaration and Enforcement Application misconceived and disclosing no reasonable or relevant case. Therefore, I strike out the declaratory and enforcement relief sought in paragraphs 48.a, c, d, and e of the Declaration and Enforcement Application.

Non-priority areas

[29] Dr Cossens' declaratory relief in 48.b and f relate to the issue of the inclusion of non-priority areas in the Proposed Variation. Dr Cossens' submission is that the landscape schedules' feedback form used by QLDC appears to include non-priority areas, despite his understanding that the court's previous decision

determined that all-inclusive schedules were inappropriate.¹²

[30] I do not need to decide whether s310 RMA allows for declarations as to whether an exercise of a function or power accords with directions made by the court in the context of plan appeal decisions. That is because I find it would not be an appropriate exercise of any available discretion for me to intervene in Sch 1 processes within the proper auspice of QLDC. That is particularly given the potential for these matters to be before the court on appeals arising from decisions on the Proposed Variation.

Outcome

[31] For those reasons:

- (a) the declaratory and enforcement relief sought in paragraphs 48.a, c, d, and e of the Declaration and Enforcement Application are struck out;
- (b) the remaining relief in that application is declined.

[32] Costs are reserved. Any party wishing to apply for costs must file their application within 10 workings days of this decision, replies within a further 10 working days and final reply (if any) from the applicant within a further five working days thereafter.



J J M Hassan
Environment Judge



¹² Notice of motion of John Cossens dated 17 May 2022 at [20].