BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 100

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for a declaration under s 311 of the Act
BETWEEN	COASTAL RATEPAYERS UNITED INCORPORATED
	(ENV-2016-WLG-000028)
	Applicant
AND	KAPITI COAST DISTRICT COUNCIL
	Respondent

Court:	Environment Judge B P Dwyer
Heard:	At Wellington on 23 November 2016
Interim decision:	3 March 2017
Date of Decision:	7 July 2017
Date of Issue:	7 July 2017

FINAL DECISION OF THE ENVIRONMENT COURT

A: Amended Declaration 2 made

B: Costs reserved

REASONS

Introduction

[1] On 3 March 2017 the Court issued an Interim Decision in these proceedings[1] (the Interim Decision) declining to make Declaration 1 sought by Coastal Ratepayers

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[1] [2017] NZEnvC [31].

United Incorporated (CRU) but making findings which might support the making of Declaration 2.[2] The Interim Decision ought be read in conjunction with this Final Decision, which is intended to finalise the outcome of the application for Declaration 2 in light of the findings made in the Interim Decision.

[2] In the Interim Decision, I directed the parties to consider the findings of that Decision further and submit memoranda on issues which I had identified relating to Declaration 2. Additionally, I requested amicus to submit any further observations which he might wish to make.

[3] The Court has received memoranda from:

- Amicus, dated 24 March 2017;
- Kapiti Coast District Council (the Council), dated 24 March 2017;
- CRU, dated 27 March 2017;
- The Council, dated 20 April 2017;
- The Council, dated 8 May 2017.

I have had regard to the comments/submissions made by counsel in the various memoranda although I will not repeat them in full in this decision.

Paragraphs [57] and [58]

[4] Paragraphs [57] and [58] of the Interim Decision contained the following observations:

> [57] In his amicus brief, Mr Slyfield contended that four of the changes identified in the CRU Memorandum of 12 September 2016 (provisions 5, 6, 7 and 9) involved general provisions that would now apply to Coastal Hazard Management Areas when formerly they did not and that two (provisions 2 and 4) involved provisions that were specific but now apply more broadly. He submitted that although these changes may be regarded as minor in nature by the Council witnesses, they are changes to the PDP of a kind that might readily be of interest to submitters (and, I suggest, potentially to other parties who had not submitted). I concur with that assessment and also consider that these changes introduce new elements into the PDP.
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> [58] At first blush, these changes are alterations to the PDP of the sort which the West Coast decision requires to be undertaken by variation. That finding supports the making of Declaration 2 in respect of provisions 2, 4, 5, 6, 7 and 9. However I hesitate to do so at this point as I consider that in a practical sense it is important that all other possible resolutions to

[2] Interim Decision, para [58].

> the shortcomings in the Council process are fully considered before putting the ratepayers of the Kapiti District to the further expense inherent in undertaking variations of the PDP.

[5] The reference in paragraphs [57] and [58] to "provisions 2, 4, 5, 6, 7 and 9" was a reference to various provisions of the proposed Kapiti Coast District Plan (PDP) which CRU contended constituted alterations to the PDP brought about by the withdrawal by the Council of what are referred to as the "coastal hazards provisions" from the PDP. CRU contended that the alterations identified ought properly to have been undertaken by way of variation of the PDP. It will be apparent from consideration of paragraphs [57] and [58] that I wished to give the parties the opportunity to determine whether or not the failure to undertake a variation could be remedied in some way other than putting the ratepayers of the Kapiti District to the expense of undertaking such variation or variations.

[6] In its memorandum of 24 March 2017, the Council advised that rather than undertaking a variation, it "considers that the most practical way forward is for it to undertake a further withdrawal of the six provisions referred to in paragraphs [57] and [58] of the Court's interim decision (provisions 2, 4, 5, 6, 7 and 9)".[3] It requested further time to prepare a report and recommendations in that regard. It further submitted that "given the Respondent's intention to withdraw the six provisions in issue from the PDP, no such declaration is necessary and there would be no utility in making such a declaration".

[7] In its memorandum of 20 April 2017, the Council advised:[4]

> The Respondent considered this matter at its meeting on 13 April 2017, and resolved to withdraw those six provisions from the proposed district plan (as well as two other provisions).

It submitted again that on the basis that the issues under Declaration 2 had been resolved, there was no need for the declaration to be made.

[8] The Council's memorandum of 8 May 2017 included a copy of the public notice of withdrawal of the six provisions referred to as well as two other provisions which had also been withdrawn. The Council submitted again that there was no need for a declaration for Declaration 2 to be made as the issues before the Court under that part of the application had been resolved.

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3 Council Memorandum of 24 March 2017, para 10.
4 Council Memorandum of 20 April 2017, para 3.

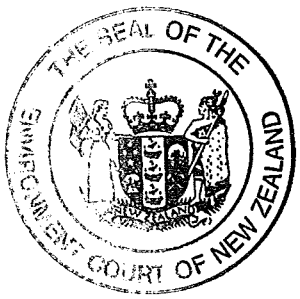
Outcome

[9] It will also be apparent from consideration of the provisions of paragraphs [57] and [58] that I tentatively ("at first blush") concurred with the position advanced by CRU and by amicus that the identified provisions constituted alterations to the PDP which ought properly to have been undertaken by variation and I now confirm that tentative view.

[10] As I understand it, the Council accepts the Court's tentative finding in that regard and has sought to remedy the shortcomings in its process by undertaking a withdrawal of further provisions from the PDP. I make two observations in that regard:

- CRU did not claim to have identified every alteration to the PDP which might have been improperly brought about as a result of the Council's initial withdrawal of the coastal hazards provisions. It was not its function to do so. It may or may not be the case that further provisions of the PDP, similarly affected, emerge in future;
- It is not the Court's function as part of these proceedings to determine whether or not the withdrawal of further provisions of the PDP has achieved the Council's objective of remedying its failure to deal with provisions 2, 4, 5, 6, 7 and 9 by way of variation. CRU offered no comment in that regard but submitted that "the Court should not endorse or require specific actions – and apart from any jurisdictional constraints, it simply does not have adequate information to do so".[5] I concur with that statement.

[11] CRU concluded its memorandum of 27 March 2017 by submitting that it disagreed "with the Court's interim approach at [58] to find a solution which avoids a declaration". That mis-states the Court's position. The approach in paragraph [58] was not intended to avoid a declaration, but was rather intended to give the Council some opportunity to find a solution other than the expense of having to undertake a variation. The reasons why I thought it desirable to avoid that situation if reasonably possible, are to be found in paras [7] and [34] - [39] of the Interim Decision. Forcing a variation of the PDP in a situation where such a document might itself be seriously deficient for the reasons identified in paragraph [7] does not seem to be a productive way forward.



5 CRU memorandum of 27 March 2017, para 4.

[12] I consider that CRU has made out grounds for the making of a declaration similar to that which it has requested under Declaration 2. Although the Council contends that there is no need for the Court to make a declaration in light of the remedial action which it believes it has undertaken, that remedial action arose as a consequence of these proceedings and it is appropriate that the tentative findings of the Court be formally confirmed by way of a declaration.

[13] I propose to make a modification to the declaration requested as I am entitled to do.[6] In light of the findings which I have made in the Interim Decision, I declare that:

> **In withdrawing the coastal hazard provisions under Clause 8D of Schedule 1 of the RMA, the Council changed the meaning of provisions 2, 4, 5, 6, 7 and 9 identified in the Interim Decision in these proceedings**

Costs

[14] Costs are reserved. CRU may make any application for costs and the Council may respond in accordance with paragraph 6.6 (f) of the Environment Court Practice Note 2014.

B P Dwyer
Environment Judge

6 RMA s 313(a) and (b).