IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

NO. CIV-2023-485-

UNDER THE	Resource Management Act 1991 (**RMA**)
IN THE MATTER	of an appeal against a decision of the Environment Court in accordance with section 299 of the RMA
BETWEEN	**KĀPITI COAST DISTRICT COUNCIL** a territorial authority under the Local Government Act 2002 having its offices at 175 Rimu Road, Paraparaumu
	Appellant
AND	**WAIKANAE LAND COMPANY LIMITED** a company incorporated under the Companies Act 1993 having its registed office at BDO Manawatu Limited, 32 Amesbury Street, Palmerston North
	Respondent

NOTICE OF APPEAL

Dated: 24 April 2023

Simpson Grierson
Barristers & Solicitors

Matt Conway / Katherine Viskovic / Sam Hart
Telephone: +64-4-499 4599
Email: matt.conway@simpsongrierson.com /
katherine.viskovic@simpsongrierson.com / sam.hart@simpsongrierson.com
PO Box 2402
Wellington

To: The Registrar of the High Court at Wellington

And

To: The Registrar of the Environment Court at Wellington

And

To: The Respondent

This document notifies you that –

1. The Kāpiti Coast District Council (**Council**) will appeal to the High Court against the decision of the Environment Court (Wellington Registry) in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 052, dated 30 March 2023 (**Decision**).

2. The Decision is being appealed in its entirety.

Alleged error of law

3. The Environment Court erred in law in finding that the Council acted *ultra vires* by using its intensification planning instrument (**IPI**) to add Kārewarewa urupā to Schedule 9 "Sites and Areas of Significance to Māori" of the Kapiti Coast Operative District Plan (**District Plan**).

Questions of law to be resolved

4. The appeal raises the following questions of law to be resolved:

(a) Can the provisions in Plan Change 2 to the District Plan (**PC2**) that provide for Kārewarewa urupā to be added to Schedule 9 "Sites and Areas of Significance to Māori" of the District Plan (**PC2 urupā provisions**) lawfully be included in an IPI under the Resource Management Act 1991 (**RMA**)?

(b) If so, did the Council act lawfully by including the PC2 urupā provisions in its IPI as notified?

(c) Can the PC2 urupā provisions lawfully be included in a plan change under Schedule 1 of the RMA?

(d) Did the Environment Court err procedurally, by considering the lawfulness of the Council including the PC2 urupā provisions in

its IPI as a preliminary question of law in the context of an application for resource consent, rather than requiring that this question be raised in an application for a declaration?

Grounds of Appeal

5. The Environment Court erred in law for the following reasons:

(a) The Decision incorrectly interprets and applies the provisions introduced into the RMA by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021, particularly in light of:

(i) the purpose and scheme of the RMA; and

(ii) the parliamentary materials that specifically demonstrate Parliament's intent when passing the 2021 Amendment Act;

(b) The Decision incorrectly interprets the effect of section 77I of the RMA, including by:

(i) failing to interpret section 77I in a manner consistent with the purpose and principles of the RMA and section 6 in particular, and section 77J(4)(b), which anticipates new qualifying matters being included in IPIs;

(ii) inferring that an IPI cannot remove rights that a landowner presently has under the operative district plan to undertake various activities as permitted activities, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non-complying;[1]

1 At [31].

(c) The Decision takes an erroneously narrow interpretation of the scope of an IPI in section 80E, and in particular incorrectly determines that addition of the Kārewarewa urupā to Schedule 9 is not in accordance with section 80E.

(d) The Decision erroneously treats the concept of MDRS as being confined to the density standards set out at clauses 10-18 of Schedule 3A of the RMA, instead of applying the RMA's definition of the MDRS;[2]

(e) The Decision fails to properly consider the relevance of contextual factors that the Council was required to consider when preparing its IPI, including:

(i) that the Council's operative district plan includes protections for wāhi tapu sites that the Council has identified;

(ii) the information that was available to the Council on Kārewarewa urupā's existence, when it was preparing its IPI for notification; and

(iii) the relevance of the Council's requirement to carry out a suitable evaluation under sections 32 and 77J, and through this evaluation to examine whether the provisions in the IPI are the most appropriate way to achieve the objectives of the district plan, and in turn, the RMA's purpose;

(f) The Decision fails to consider the Council's ongoing obligation to implement the MDRS (section 77G), and the potential for the restrictive interpretation of section 77I to unduly constrain a future plan change that would otherwise include new qualifying matters; and

(g) The Decision errs in providing relief in the form of a determination that the wāhi tapu listing was *ultra vires.*

2 At [15] and [31].

(h) The Court erred by not requiring the matter to be heard under the Environment Court's declaratory jurisdiction. In particular, the procedure followed prevented persons interested in (and/or directly affected by) the outcome of this question from joining and participating in the proceedings.

Relief Sought

6. The Appellant seeks the following relief:

(a) that the appeal be allowed;

(b) that the four questions of law set out at paragraph 4 above be answered "yes";

(c) that the finding in the Decision that listing the Kārewarewa urupā in Schedule 9 of the Plan using the Council's IPI was *ultra vires* be overturned; and

(d) costs.

7. This notice of appeal is filed pursuant to rule 20.8 of the High Court Rules 2016 and in reliance on section 299 of the Resource Management Act 1991.

8. A copy of the Decision is attached as **Appendix A**.

Dated: 24 April 2023

M G Conway / K E Viskovic / S B Hart
Counsel for the Appellant

This notice is filed by **MATTHEW GRANT CONWAY**, solicitor for the Appellant, of the firm Simpson Grierson. Documents for service on the Appellant may be:

(a) left for the solicitor at the offices of Simpson Grierson, level 24, 195 Lambton Quay, Wellington;

(b) posted to PO Box 2402, Wellington 6140, New Zealand; or

(c) emailed to matt.conway@simpsongrierson.com, katherine.viskovic@simpsongrierson.com and sam.hart@simpsongrierson.com.

Appendix A: Copy of Decision