

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2021] NZEnvC 22

IN THE MATTER

of the Resource Management Act 1991

AND

of appeals under clause 14 of the First
Schedule of the Act

BETWEEN

TIMBERLINK NEW ZEALAND
LIMITED

(ENV-2020-CHC-30)

and all other appellants
concerning the proposed
Marlborough Environment Plan

(as set out in the Schedule
attached)

Appellant

AND

MARLBOROUGH DISTRICT
COUNCIL

Respondent

Before: Environment Judge J J M Hassan

Held: at Blenheim on 5 March 2021

Appearances: J Ironside for Friends of Nelson Haven and Tasman Bay
Incorporated
J Maassen and K McIlveney for the Marlborough District
Council
Q Davies and E Deason for the Aquaculture Interests
M Pemberton for the Minister for Conservation
M Hardy-Jones for Colonial Vineyard Limited
S Wadworth for Trustees of the Carlton Corlette Trust



Date of Decision: 8 March 2021

Date of Issue: 8 March 2021

PROCEDURAL DECISION OF THE ENVIRONMENT COURT

A: Application for adjournment is declined.

B: Costs are reserved.

Introduction

[1] This determination also serves as a record of pre-hearing conference ('PHC') as it concerns a contested application for adjournment. The PHC was convened, at short notice, to consider an application by Friends of Nelson Haven and Tasman Bay Inc ('Friends') an appellant in appeal proceedings on the proposed Marlborough Environmental Plan ('pMEP').

[2] The application seeks directions that matters concerning its appeal be deferred "until such time as Variations 1 and 1A to the [p]MEP merge with and become part of the [p]MEP pursuant to clause 16B of schedule 1". It was made on 24 February 2021 following several rounds of case management direction that have now resolved a detailed schedule for sequential processes for alternative dispute resolution ('ADR') and in preparation for an anticipated sequence of topic-based hearings on the appeals.

[3] I will traverse the various points made in support of and in opposition to the application shortly. In summary, the positions of those parties who filed memoranda and/or attended is as follows:



Supports	Opposes
Friends, Kenepuru and Central Sounds Residents' Association and Clova Bay Residents' Association, McGuinness Institute	Marlborough District Council ('MDC'), the Aquaculture Interests, Minister of Conservation, Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu, Mr Dallas Hemphill

Background

Appeals including Friends' appeal

[4] Over 50 appeals have been filed on the pMEP and there are many more related s274 notices.

[5] Friends' notice of appeal¹ was filed in May 2020. By way of general overview, the appeal is in relation to the Natural Character and Landscape chapters of the pMEP. It says those chapters do not sufficiently respond to s6, RMA or give effect to the New Zealand Coastal Policy Statement 2010 ('NZCPS') or achieve integrated management. As an aspect of that, it says the pMEP fails to address the conflicts between the "inextricably connected" issues of aquaculture development, the protection of ONFLs² (including seascapes) and the preservation of the natural character of the coastal environment. The appeal expresses related concerns about the technical assessments that underpin the Natural Character and Landscape chapters.

Aquaculture beyond the scope of the appealed pMEP but the subject of two variations

[6] Notably, the pMEP does not encompass aquaculture, quite deliberately. Rather, those matters are the subject of two pMEP variations notified just prior to Christmas 2020 and on which the closing date for primary submissions closed on



¹ Notice of appeal against decisions on the pMEP for Friends of Nelson Haven and Tasman Bay Incorporated dated 6 May 2020.
² Outstanding Natural Features and Outstanding Natural Landscapes, within the meaning of s6(b), RMA.

26 February 2021, namely Variation 1: Marine Farming and Variation 1A: Finfish Farming.

[7] Briefly, that staged plan-making approach is related to the timing of the Resource Management (National Environmental Standards for Marine Aquaculture) Regulations 2020 ('Regs.'). Those Regs were made by Order in Council on 27 July 2020 in response to Pol 8, NZCPS under ss43 and 43A, RMA and came into force on 1 December 2020.³

Case management engagement and directions before this court

[8] Since approximately mid-2020 there has been a relatively extensive process of engagement with MDC and parties on case management. That has included the filing of several memoranda by MDC proposing approaches to the sequential consideration of topics in the appeals and responses to these from several parties (including Friends and the other participants in the conference). That has informed the making of several case management directions by Minute. In essence, that has provided a relatively detailed road map for all parties on the ordering of initial ADRs in preparation for the court's later consideration of topics in the appeals.

[9] In this sequence of engagement, Friends filed a memorandum of counsel dated 6 August 2020. It responded to MDC's case management memorandum of 31 July 2020 in which MDC set out its initial thinking on the sequenced consideration of appeal points. Friends then raised concerns on several matters of substance in regard to the Natural Character and Landscape chapters including mapping and "nested" landscapes and methodology. Their memorandum commented:



Affidavit of H M Marr concerning MEP and its relationship to Variation, dated 3 March 2021.

Further, there is an elephant in the room which is the missing aquaculture chapter. The council's memorandum ... refers to the need to deal with policy 11, 13 and 15 matters before planning for aquaculture. This is confusing and seems to negate the Council's overall combined planning exercise for the MEP under section 80 of the Act... Nevertheless, the Council's natural character assessment and landscape studies did take into account existing marine farms and so it is not readily apparent what has been achieved by removing the aquaculture chapter shortly before the proposed plan was notified. In any event, it is understood that notification of the aquaculture chapter is imminent and there now exists an opportunity to consider natural character and landscape provisions in conjunction with the aquaculture chapter.

[10] By Minute, following consideration of the various positions put by parties, the court made directions that confirmed the various topics and sub-topics and the sequence by which they would be addressed in case management. I refer, in particular, to the Minute of 29 October 2020. That Minute records the court's:

- (a) endorsement of a "top down" approach to the consideration of topics in the appeals (albeit on a basis where MDC's confirmed sequence does not religiously apply that in all cases); and
- (b) satisfaction with MDC's explanation for why the Natural Character and Landscape chapter issues should be part of Group 1 and "should not be delayed while the marine aquaculture variations (yet to be approved and notified) 'catch up'". Furthermore, it recorded that "All interested parties agree" (referring to MDC's "case management memorandum No. 2" dated 4 September 2020 at [24]).

[11] In effect, the court made those case management directions on a basis that duly considered the various positions put forward by parties, including in particular the noted input from Friends.

[12] More recently, by Minute dated 19 February 2021, earlier case management directions for mediations were refined. This followed a meeting between MDC and the Environment Commissioners assigned to facilitate those mediations. In



essence, those refinements were made to allow for some greater generosity in the timetable to account for the logistics being faced by participants and pressures on the court's resources.

[13] Against that background, the Minute of 26 February 2021 in preparation for the conference records:

Mediations are due to commence for the natural character topics on 16 March 2021 (and given the variation was notified in December 2020 and counsel could have raised this issue earlier, I am not minded to vacate those dates at this stage) so the court will need to hear and determine this issue at short notice.

Submissions

Friends

[14] Friends has filed a notice of application to defer consideration of appeals on natural character and landscape provisions, dated 24 February 2021 and in reply, dated 4 March 2021. Mr Ironside presented a synopsis of points made and spoke to these.

[15] The essence of Friends' position is as follows:

- (a) Friends' appeal is broadly concerned with the scale at which coastal natural character, and features and landscape of the Marlborough Sounds are identified and mapped;
- (b) the natural character and landscape provisions included within the pMEP have been influenced by existing aquaculture development within the Marlborough coast environment and the Variation provisions will control and regulate future aquaculture development within that environment;
- (c) to achieve integrated management of the natural and physical resources of the region it is necessary to consider the natural character and landscape assessments in conjunction with the Variations for



future aquaculture development, particularly with regards to the mapping exercises Friends says is required by Policies 13 and 15 of the NZCPS.

Parties in support

[16] Kenepuru and Central Sounds Residents' Association and Clova Bay Residents' Association,⁴ and the McGuinness Institute⁵ filed memoranda in support but did not seek to address the court orally.

MDC

[17] MDC filed a memorandum dated 3 March 2021, setting out why it opposes the application.⁶ Mr Maassen spoke to key points, in essence:⁷

- (a) MDC's approach to dealing with the Variations and appeals before the court has always been consistent and this application is made very late, close to the commencement of mediation;
- (b) Friends is not prejudiced and can run their case without need for adjournment. The delaying of one set of appeals for one appellant makes no sense;
- (c) other parties would stand to be materially prejudiced, for example East Bay Conservation Society Inc⁸ which seeks extension of mapped landscape areas but endorses MDC's landscape methodology;
- (d) the court does not have jurisdiction concerning the Variations as these are not before the court. To assume the Variations will come before the court in the form notified would be to pre-judge something

⁴ Notice of support for the Associations dated 25 February 2021.

⁵ Memorandum of counsel for McGuinness Institute in support dated 2 March 2021.

⁶ MDC also filed two affidavits: H M Marr sworn 3 March 2021 and J Bentley affirmed 3 March 2021.

⁷ Memorandum of counsel for MDC dated 3 March 2021 at [4].
ENV-2020-CHC-78.



- currently before the public;⁹
- (e) the parties, including Friends, had agreed to a “top-down” approach when considering the appeals on the pMEP; and
 - (f) to ensure integration, all appeals on a topic need to be addressed.

[18] Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu, and Mr Dallas Hemphill both sought leave to be excused from the hearing but support MDC’s position.

Aquaculture Interests

[19] A memorandum of counsel, dated 3 March 2021, was filed for this group of parties.¹⁰ Mr Davies spoke briefly to the key points for why they oppose the application. In essence, he endorsed MDC’s position noting that his clients would also stand to be significantly prejudiced by an adjournment given their related interests.

Minister of Conservation

[20] The Minister’s memorandum of counsel dated 3 March 2021, sets out why, on balance, it opposes the adjournment application. Mr Pemberton simply recorded the Minister also supports MDC’s position.

Friends in reply

[21] Prior to the morning recess, I invited Mr Ironside to check whether his client would still wish to participate in mediation. I noted to him that, given the

⁹ Notes for Oral Argument for MDC dated 5 March 2021 at [3]-[5].

¹⁰ The New Zealand King Salmon Co Limited, Marine Farming Association Inc and Aquaculture New Zealand, AJ King Family Trust and SA King Family Trust, Aroma (N.Z.) Limited and Aroma Aquaculture Limited, Beleve Limited, RJ Davidson Family Trust and Treble Tree Holdings Limited, Just Mussels Limited, Tawhitinui Greenshell Limited and Waimana Marine Limited, KPF Investments Limited and United Fisheries Limited, and Clearwater Mussels Limited and Talley’s Group Limited.



nature of Friends appeal being a substantive challenge to the design of the pMEP's approach to natural character and landscape protection, Friends could have grounds to be granted leave not to take part. Mr Ironside informed the court that Friends continued to wish to participate.

Discussion

[22] As I signalled to parties at the close of the hearing, I am overwhelmingly satisfied that it would not be appropriate to revisit the case management directions or grant the application. In particular, my reasons are:

- (a) Friends remains able to advance their case in appeal and is not significantly prejudiced by the directed timetable for the sequential mediation and consideration of appeal topics. Depending on the merits of cases heard by the court, the court has ample capacity both to grant relief and to maintain procedural flexibility such as to avoid any incoherence issues with the resultant planning instrument (bearing in mind that appeals are being addressed in topic sequence);
- (b) adjournment could not be cleanly confined to Friends, in any case, in that they are one of several parties with inter-related interests in the Natural Character and Landscape chapters. It would not be fair and would cause substantial prejudice to other parties to entertain any adjournment as proposed;
- (c) the Variations are not before the court. Rather, they are proceeding through MDC processes and there can be no assurance that they will remain substantially unchanged by MDC decisions or as to what, if any, appeals would arise. In any event, the court has no jurisdiction concerning them and it would not be appropriate to adjourn present proceedings in anticipation the court may be seized of such jurisdiction in future; and
- (d) there is a significant public interest importance in fairly and efficiently determining the plan appeals and the case management directions in

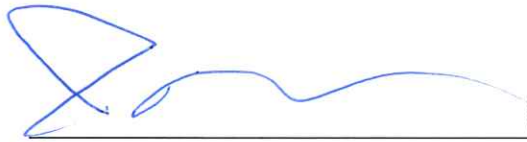


force are duly informed and designed to those ends. There is no need to revisit the directions at this time.

Result

[23] Therefore:

- (a) the application for adjournment is declined;
- (b) costs are reserved.



J J M Hassan
Environment Judge



Schedule – List of Appellants

ENV-2020-CHC-30	Timberlink
ENV-2020-CHC-32	Talley's Group Limited
ENV-2020-CHC-33	Friends of Nelson
ENV-2020-CHC-34	Omaka Valley
ENV-2020-CHC-35	Fish & Game
ENV-2020-CHC-36	Heritage
ENV-2020-CHC-38	Okiwi Bay Ratepayers
ENV-2020-CHC-39	Te Rūnanga a Rangitāne o Wairau
ENV-2020-CHC-40	Haro Partnership
ENV-2020-CHC-41	KPF Investments Limited & United Fisheries Limited
ENV-2020-CHC-42	Minister of Conservation
ENV-2020-CHC-43	Te Ātiawa o Te Waka-a-Māui Trust
ENV-2020-CHC-44	Beleve Ltd, RJ Davidson Family Trust & Treble Tree Holdings Ltd
ENV-2020-CHC-45	Aroma (N.Z.) Limited and Aroma Aquaculture Limited
ENV-2020-CHC-46	Te Rūnanga o Kaikōura and Te Rūnanga o Ngāi Tahu
ENV-2020-CHC-47	Goulding Trustees Limited and Shellfish Marine Farms Limited
ENV-2020-CHC-48	McGuinness Institute
ENV-2020-CHC-49	Port Marlborough NZ
ENV-2020-CHC-50	Trustpower Limited
ENV-2020-CHC-51	The New Zealand King Salmon Co. Limited
ENV-2020-CHC-52	Matthew Burroughs Broughan
ENV-2020-CHC-53	Cochran
ENV-2020-CHC-54	OneFortyOne
ENV-2020-CHC-55	Clearwater Mussels Limited and Talley's Group Limited
ENV-2020-CHC-56	New Zealand Transport Agency
ENV-2020-CHC-57	KiwiRail Holdings Limited
ENV-2020-CHC-58	Federated Farmers of New Zealand
ENV-2020-CHC-59	Colonial Vineyard Limited



ENV-2020-CHC-60	Sanford Ltd
ENV-2020-CHC-61	Villa Maria Estate Limited
ENV-2020-CHC-62	Oldham & Others
ENV-2020-CHC-63	Apex Marine Farm Limited
ENV-2020-CHC-64	Forest & Bird
ENV-2020-CHC-65	Levide Capital Ltd
ENV-2020-CHC-66	Brentwood Vineyards Ltd
ENV-2020-CHC-67	Environmental Defence Society
ENV-2020-CHC-68	Transpower New Zealand Limited
ENV-2020-CHC-69	Jeffrey Val Meachen
ENV-2020-CHC-70	Te Rūnanga o Ngāti Kuia Trust
ENV-2020-CHC-71	Horticulture New Zealand
ENV-2020-CHC-73	AJ King Family Trust and SA King Family Trust
ENV-2020-CHC-74	Marine Farming Association Inc and Aquaculture New Zealand
ENV-2020-CHC-75	Delegat Limited
ENV-2020-CHC-76	Minister of Defence
ENV-2020-CHC-77	Just Mussels Ltd, Tawhitinui Greenshell Ltd & Waimana Marine Ltd
ENV-2020-CHC-78	East Bay Conservation
ENV-2020-CHC-79	Rebecca Light