

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

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under clause 14 of the First
Schedule to the Act
BETWEEN AURORA ENERGY LIMITED
(ENV-2018-CHC-277)
Appellant
AND DUNEDIN CITY COUNCIL
Respondent

Environment Judge J E Borthwick – sitting alone pursuant to section 279 of the Act

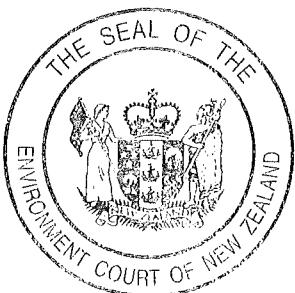
In Chambers at Christchurch

Date of Consent Order: 10 June 2020

CONSENT ORDER

**DCC Appeal Reference: 245
Earthwork Rules**

- A: Under section 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:
- (1) the appeal is allowed subject to the amended provisions marked Appendix A, attached to and forming part of this order; and
 - (2) the appeal otherwise remains extant.
- B: Under section 285 of the Resource Management Act 1991, there is no order as to costs.



REASONS

[1] Aurora Energy Limited lodged an appeal seeking, amongst other relief, an amendment to Rule 8A.5.1.1 of the proposed District Plan which addresses the type of earthworks that are always considered 'earthworks – small scale'.¹

[2] The parties have settled on an agreement which partially determines Aurora's appeal and seek that the court give orders amending the proposed District Plan.

[3] The court will only make orders if it is satisfied it is appropriate to do so and where there is no relationship between the provision as proposed to be amended by consent order and other appeal before the court.

[4] The City Council has identified the appeals that are related to the provision being amended² and appeals on an indirectly related strategic direction policy.³ All identified appellants have confirmed their agreement to the amendment sought.⁴ For completeness, and what is unclear from the City Council's memorandum dated 19 May 2020, our records show that the s 274 parties to those related appeals have not signed the memorandum.

[5] The parties to this consent memorandum asked for "the appeal to be otherwise dismissed".⁵ However, Aurora has appealed a number of points on the plan, so I have assumed that it does not wish that the balance of the appeal is dismissed. If I am wrong, Aurora is to give notice of the discontinuance of the appeal.

[6] That said, counsel for the City Council⁶ and City Council policy planner, Ms Hickey, have now satisfied me that notwithstanding appeals on related provisions, the relief sought is unlikely to impact the resolution of those appeals.⁷

¹ Consent memorandum dated 2 October 2019.

² 2GP Group 1 Report dated 3 June 2020 at [11]: BP Oil New Zealand and Others (ENV-2018-CHC-291); Blueskin Projects Limited (ENV-2018-CHC-276); KiwiRail Holdings Limited (ENV-2018-CHC-252); and Port Otago Limited (ENV-2018-CHC-247).

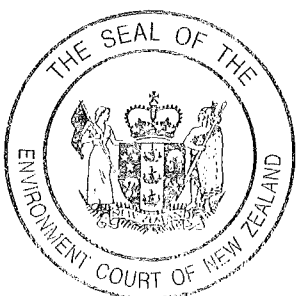
³ Being policy 2.3.1.7. The parties that have appealed this policy are BP Oil New Zealand and Others (ENV-2018-CHC-291); Federated Farmers of New Zealand Inc (ENV-2018-CHC-254); and Transpower New Zealand Limited (ENV-2018-CHC-249).

⁴ Memorandum of counsel dated 19 May 2020.

⁵ Consent memorandum dated 2 October 2019 at [10(b)].

⁶ 2GP Group 1 Report dated 3 June 2020 at [15].

⁷ Affidavit of S C Hickey affirmed 15 October 2019.



[7] More particularly, the City Council confirms these orders can be made because:⁸

- (a) while the amendment agreed is minor in terms of its impact on the plan's provision it is significant for the Appellant in terms of efficiency gains and cost reductions as it will significantly reduce the number of consents being triggered for relatively minor earthworks associated with utility cabinets;
- (b) any interrelationship with any other appeal is remote and inconsequential; and
- (c) there is no risk that the resolution of this appeal would create prejudice or be inconsistent with any decisions made on appeals on the indirectly related strategic direction policy.

[8] In making these orders, I wish to reiterate that it is not good practice to apply for consent orders where there are possible overlaps or inter-relationships with other appeals, but the appellants to those appeals agree. The reasons for the court's view are set out in a Minute dated 29 May 2020.

Other matters

[9] Federated Farmers of New Zealand Inc, and Kāti Huirapa Rūnaka Ki Puketeraki and Te Rūnanga o Ōtākou are s 274 parties to this appeal and have signed the consent memorandum.

[10] Dr A Johnson, City Development Manager, has also assured the court that the proposed amendments are drafted in line with the *2GP drafting protocol set out in the 2GP Style Guide April 2019 – incorporating changes made through 2GP decisions*.⁹

[11] I record the parties' attestation that they are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction and conform to relevant requirements and objectives of the RMA, including Part 2 and on that basis request that the amendments shown in underline in Appendix A are made.

[12] They agree that costs should lie where they fall and accordingly no order of costs is sought.¹⁰



⁸ 2GP Group 1 Report dated 3 June 2020 at [15].

⁹ https://www.dunedin.govt.nz/data/assets/pdf_file/0007/715867/2G_P-Style-Guide.pdf; supplementary affidavit of A L Johnson affirmed 25 October 2019 at [8].

¹⁰ Consent memorandum dated 2 October 2019 at [11].

Outcome

[13] All parties to the proceeding have executed the memorandum requesting the orders. Based on the information before me, I am satisfied pursuant to s 32AA of the Resource Management Act 1991, that the amendments proposed are the most appropriate way to achieve the relevant objectives.¹¹ As the orders will promote the purpose of the Act I will make the orders sought.


J E Borthwick
Environment Judge

The seal of the Environment Court of New Zealand is circular. It features the text "THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND" around the perimeter. In the center is the coat of arms of New Zealand, which includes a crown, a shield with a cross, and two figures holding a shield.

¹¹ Affidavit of S C Hickey affirmed 15 October 2019 notes strategic objective 2.3.1.7 at [29] and objective 8A.2.1 at [30].

Appendix A

Rule 8A.5.1.1 General

The following earthworks are always considered earthworks - small scale:

- a. post holes for the erection of fences;
- b. post holes for permitted or approved buildings or signs;
- c. driving of piles for building foundations;
- d. earthworks in the Port Zone;
- e. earthworks in the rural or rural residential zones, outside flood hazard overlay zones, associated with burying material infected by unwanted organisms as declared by the Ministry for Primary Industries' Chief Technical Officer or an emergency declared by the Minister for Primary Industries under the Biosecurity Act 1993;
- f. earthworks subject to an approved building consent, except in the rural or rural residential zones or where they are located more than 1.8m from the building;
- g. earthworks for the erection of new fences or the construction of walking tracks or vehicle tracks, where the fence or track is associated with a permitted land use or city-wide activity, provided that the earthworks:
 - i. do not result in a change in finished ground level that exceeds 1m; and
 - ii. do not exceed 2m in width if located in an ASBV or ONF, ONCC, HNCC or NCC overlay zone, or 3m in width outside these areas.
- h. earthworks ancillary to the operation, repair and maintenance of the roading network; and
- i. earthworks ancillary to forestry; and
- j. earthworks ancillary to the operation, repair, minor upgrading and maintenance of existing network utilities.

