IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA446/2023
[2024] NZCA 465

BETWEEN	WOODGATE LIMITED First Appellant
	TERRA CIVIL LIMITED Second Appellant
AND	PALMERSTON NORTH CITY COUNCIL Respondent

Hearing:	20 August 2024
Court:	Courtney, Goddard and Palmer JJ
Counsel:	G J Woollaston for Appellants N Jessen and O E Sinnema for Respondent
Judgment:	20 September 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis with an uplift of 20 per cent and usual disbursements.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In October 2022, the Palmerston North City Council (the Council) obtained an order of the Environment Court under s 86D of the Resource Management Act 1991

(RMA) that its proposed Plan Change G (PCG), which had been publicly notified on 8 August 2022, was to have immediate effect.[1] PCG adversely affected Woodgate Ltd and Terra Civil Ltd (TCL). They applied for judicial review of the Council's decision to apply under s 86D. Radich J declined their application.[2] Woodgate and TCL appeal.

Background

[2] Woodgate and TCL own adjoining blocks of land in the Palmerston North suburb of Aokautere. Leslie Fugle is the director and shareholder of Woodgate. Mr Fugle's stepson, Kane Davidson, is the director and shareholder of TCL.[3] In 2022, Woodgate was the purchaser of some of the land concerned under an unconditional sale and purchase agreement with CTS Investments LLC (CTS).[4] It had plans to develop a retirement complex on the land. TCL was to undertake the earthworks for the development.

[3] During 2022, Mr Fugle had discussions with the Council regarding the proposed retirement complex. On 29 March 2022, an application was lodged with Horizons Regional Council for resource consent to undertake earthworks for the proposed retirement village. On 12 July 2022, Woodgate lodged applications with the Council for land use and subdivision consents.

[4] The Council was required to consult with identified office holders and stakeholders when preparing a proposed plan change.[5] The Council had been discussing PCG with the community, including Mr Fugle, since 2018. As noted, the Council publicly notified PCG on 8 August 2022.

[5] The following day, the Council returned Woodgate's resource consent application on the ground that the information provided was incomplete.

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1 *Re Palmerston North City Council* [2022] NZEnvC 214.
2 *CTS Investments LLC v Palmerston North City Council* [2023] NZHC 1742.
3 It was explained during the High Court hearing that TCL is controlled by or on behalf of Mr Fugle's children and stepchildren: see *CTS Investments LLC v Palmerston North City Council*, above n 2, at [9], n 3.
4 CTS Investments LLC (CTS) was an applicant in the High Court but is not a party to this appeal.
5 Resource Management Act 1991, s 73(1A) and sch 1.

[6] A plan change normally has effect when a decision on the plan change has been made, after considering submissions on the proposed plan change, and that decision has been notified.[6] However s 86D of the RMA provides that a local authority may apply to the Environment Court for a rule in a proposed plan to have legal effect on an earlier date. On 25 August 2022, the Council made its application to the Environment Court under s 86D without notice.

[7] CTS, Woodgate, and TCL made a joint submission on PCG on 5 September 2022, the last day for making submissions.

[8] The Environment Court made an order under s 86D on 25 October 2022 providing for PCG to have immediate legal effect.[7] PCG imposed more onerous obligations on Woodgate in relation to its proposed development. It also rezoned a substantial proportion of TCL's land as reserve. Woodgate and TCL say that the s 86D application was targeted at them, to ensure that the proposed retirement complex would be subject to PCG.

[9] In making the s 86D order, the Court observed that:[8]

> [53] Although the area affected is large, the Council has engaged with the landowners. The activity status of some activities will be more stringent and there will be more standards and matters to address when making applications for resource consent. PCG will have a definite impact on landowners who wish to develop their land in a way that is contrary to the Structure Plan in PCG. However, I consider the risk to the environment in terms of the ongoing effects of unplanned subdivision and development are such that it is appropriate, and in fact necessary, that the PCG rules be given legal effect now rather than when decisions on submissions are made. It is difficult to "take back" poor planning outcomes that fail to provide for necessary housing and appropriate infrastructure and that damage the natural environment. Affected landowners (and members of the public) now have the opportunity to challenge the provisions through the Schedule 1 process.

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6 Section 86B and sch 1.
7 *Re Palmerston North City Council*, above n 1.
8 *Re Palmerston North City Council*, above n 1.

The judicial review application

[10] Woodgate and TCL brought their judicial review application in December 2022. They asserted that the Council was required to consult with them before notifying PCG but had failed to consult with the people who were authorised to represent them. They also asserted that the Council should have notified them of its intention to make the s 86D application. Relevantly for this appeal, TCL argued that Mr Fugle was not authorised to represent it and the Council was obliged to ensure that it consulted with someone who was authorised. Woodgate and TCL sought orders setting the Environment Court's decision aside and, effectively, setting aside the Council's decision to notify PCG.[9]

[11] The application was heard in June 2023 and the High Court's decision declining the application released on 5 July 2023. The Judge agreed that the Council was required to consult the major landowners in the area affected by PCG when it was preparing PCG,[10] but held that it had done so by consulting generally with affected parties and, in particular, with Mr Fugle, whom the Council (reasonably) perceived to be the representative of all the companies and that the Council had provided sufficient information in doing so.[11]

[12] The Judge also held that, even if the parties had established an error by the Council in relation to its consultation with the parties, it would not have been appropriate to set aside the Environment Court's decision.[12] The Court could only grant that relief if the decision of the Environment Court was in issue and if a flaw had been found in that Court's process. Nor could the Court set aside or stay notification of PCG, given that would undermine the Environment Court's decision and prejudice other parties who had made submissions in the hearing process.[13] In any event, there was no prejudice to the applicants, since they had, by that time, filed substantive submissions as part of the hearing process, which would be considered by the

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9 There were two further causes of action relating to the land use consent application made by TCL which are not relevant to the appeal.

10 *CTS Investments LLC v Palmerston North City Council*, above n 2, at [51]. The Judge also held that the Council was not required to notify the s 86D application but that aspect of the judgment is not pursued on appeal.

11 At [55]–[67].

12 At [71] and [72].

13 At [73].

Independent Hearing Panel.[14] They would have a right of appeal against the Panel's decision.[15]

Appeal

The issues on appeal are moot

[13] Woodgate no longer maintains that the Council failed to consult with it — the evidence was clear that Mr Fugle represented Woodgate for that purpose and there had been adequate consultation. TCL, however, continues to assert that Mr Fugle was not authorised to represent it for the purposes of consultation on PCG and that the Council was required to ascertain who was authorised to represent it and to deal with that person.

[14] The parties identified the following issues on appeal:

(a) In consultation on PCG, whether the Council was required to separately consult with TCL through its company director.

(b) In consultation on PCG, whether the Council was required to supply draft plan change provisions to Woodgate and TCL.

(c) If the Council did not meet its consultation obligations:

(i) whether the relief sought by Woodgate and TCL is available; and/or

(ii) whether the relief sought by Woodgate and TCL is appropriate.

[15] Determination of these issues would have no practical utility. By the time the judicial review application was heard, the process for the hearing on PCG had begun. The closing date for submissions was 5 September 2022 and a hearing was held

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14 At [74], citing Resource Management Act, sch 1 cl 10; *Trustpower Ltd v Electricity Authority* [2017] 2 NZLR 253 (HC) at [100]–[107]; and *Deliu v New Zealand Law Society* [2015] NZCA 12 at [25].

15 *CTS Investments LLC v Palmerston North City Council*, above n 2, at [74], citing Resource Management Act, sch 1 cl 14 and s 290.

between 4 and 8 December 2023. The Independent Hearing Panel released its decision on 6 May 2024. The submissions made on behalf of Woodgate, TCL, and CTS were addressed in the report. The Panel determined that PCG is to be accepted, subject to specified amendments. The appellants have filed an appeal in the Environment Court against the Panel's decision.

[16] Any failure by the Council to consult has been overtaken by the hearing before the Panel, at which Woodgate and TCL were able to make submissions on PCG, and by the Panel's decision. Mr Woollaston, for Woodgate and TCL, accepted this, as he was bound to do. Nevertheless, Mr Woollaston submitted that this Court should clarify the law relating to the Council's obligation to ascertain the identity of parties likely to be affected by a plan change and who is authorised to represent them. He submitted that this would be relevant and helpful to TCL in relation to future developments and suggested declaratory relief as an appropriate outcome.

[17] Given the Panel has accepted PCG, and the Council is now apprised of TCL's complaint that Mr Fugle was not authorised to represent it, there is no need for clarification of the Council's obligations in relation to TCL's future developments. In general, this Court does not provide advisory opinions that have no practical effect.[16] There is no relief this Court can grant in this appeal that will affect the current status of PCG. Further, the possibility of declaratory relief was not raised in the notice of appeal and there was no proposal as to the appropriate terms of a declaration. We also doubt that the High Court would have jurisdiction to grant relief setting aside the Environment Court decision in proceedings where the Environment Court was not named as a defendant, and there was no challenge to that Court's process or to its decision. We agree with the Judge that this relief was not available in these proceedings.[17] In all those circumstances, the appeal must be dismissed.

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16 See generally *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [14]–[18]; *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 (CA) at 199 per Richardson J; *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 (HL) at 114 per Viscount Simon LC; and *Borowski v Attorney General of Canada* [1989] 1 SCR 342 at [15]–[25].

17 *CTS Investments LLC v Palmerston North City Council*, above n 2, at [72].

The Council was entitled to proceed on the basis that Mr Fugle was authorised to represent TCL

[18] For completeness, we record our view that there is no merit in the argument that the Council was obliged to take specific steps to ascertain whether Mr Fugle was authorised to represent TCL for the purposes of consulting on PCG.

[19] There is now no disagreement that the Council was required to consult with TCL as a party likely to be affected by PCG. Clause 3(2) of sch 1 of the RMA permitted the Council to consult any party and cl 3(4) required the Council to undertake that consultation in accordance with s 82 of the Local Government Act 2002. Section 82(1) sets out the principles the Council must apply when required to undertake consultation with parties likely to be affected by its decision:[18]

> **82 Principles of consultation**
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> (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
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> (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
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> (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
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> (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
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> (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
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> (e) that the views presented to the local authority should be received by the local authority with an open mind and should

[18] See *Thorndon Quay Collective Inc v Wellington City Council* [2024] NZCA 316 at [27]–[33] for a general overview of decision making under the Local Government Act 2002.

> be given by the local authority, in making a decision, due consideration:
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> (f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

[20] These principles are concerned with ensuring that parties affected by local authority decision-making are provided with the information needed to understand and comment on the issues. They do not require a formal process, nor indeed any particular form of process. All that is required is a process that is effective for the parties. As the Judge pointed out, consultation is the way in which, for certain exercises of public power, the principles of natural justice are applied,[19] but the requirements of natural justice — the form the consultation should take — will vary materially depending on the circumstances of the case.[20] In *Wellington International Airport Ltd v Air New Zealand*, this Court approved the statement of McGechan J in the High Court that "[i]mplicit in the concept [of consultation] is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses."[21]

[21] The obligation to ensure that TCL was sufficiently informed did not require the Council to identify a properly authorised representative with whom to communicate. It was just required to ensure that TCL was provided with sufficient information to consider and comment on PCG. We agree with the Judge that the Council did that.

[22] In 2019, the Council invited parties likely to be affected by PCG to a "drop-in" session for discussion about the proposed change. TCL was on the mailing list for that

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19 *CTS Investments LLC v Palmerston North City Council*, above n 2, at [38], citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA); and *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 (CA).

20 *CTS Investments LLC v Palmerston North City Council*, above n 2, at [39], citing *R v Home Secretarty, ex parte Doody* [1994] 1 AC 531 (HL) at 106; and *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC).

21 *Wellington International Airport Limited v Air New Zealand*, above n 18, at 675, quoting *Air New Zealand Ltd v Wellington International Airport Ltd* HC Wellington CP403/91, 6 January 1992 at 8. See also *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC) at [47].

invitation, though there was no evidence that anyone from TCL attended or sought any other form of contact with the Council. In his affidavit, Mr Davidson made no mention of the invitation, nor of any attempt by TCL to contact the Council directly.

[23] There had, however, been direct consultation between the Council and Mr Fugle, whom the Council treated as representing both Woodgate and TCL. In July 2018, Mr Fugle met with Council representatives to discuss what was then referred to as the preliminary Aokautere Structure Plan. In the Council's meeting notes from that date Mr Fugle is simply referred to as a "company representative". In September 2019, Mr Fugle met with two council officers to discuss PCG. The Council's meeting notes record matters of concern to "developers" generally.

[24] For TCL to succeed in its complaint that the Council should not have treated Mr Fugle as representing its interests without explicit authority from TCL, it would need to show that Mr Fugle's engagement with the Council did not result in TCL being adequately consulted. The evidence is against TCL on this. The mere fact Mr Fugle may have held himself out as representing TCL does not, in itself, mean that there was adequate consultation with TCL. However, Mr Fugle was a well-known local developer, and the Council was aware of the familial relationship between him and TCL. According to the Council's principal planner, Mr Duindam, TCL's interests in relation to the development of its land "have always been represented by Mr Fugle". It was reasonable for the Council to proceed on the basis of this understanding.

[25] Further, the Aokautere Masterplan, dated 30 May 2022, contained a map showing Aokautere land ownership, with the three major landowners shown. The block that comprised both Woodgate and TCL land was identified as "Fugle interests".[22] The Masterplan recorded that in August and September 2019, informal consultation on the emerging masterplan had been held and a wide range of feedback recorded. There is no record of TCL raising any concern then, or since, that the map was inaccurate in describing TCL's land as the "Fugle interests".

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[22] For completeness, we note an adjoining block of landed is recorded as being owned by Woodgate. The appellants collectively identified themselves in their submission on PCG dated 5 September 2022 as the interests "labelled as 'Fugle Interests'".

[26] By 2021, planning for the retirement complex was underway. TCL was involved in the development, but Mr Fugle dealt with the Council in relation to all aspects of the proposal. He also dealt with the Council over TCL's resource consent application, made in July 2021 by TCL's consultant surveyor, Mr Pirie. Mr Hindrup, then a Council planner, said that Mr Fugle engaged with him in relation to the application and presented himself as if he were the applicant, or authorised by the applicant. Mr Hindrup had no contact with Mr Davidson.

[27] Mr Davidson, the director and shareholder of TCL, did not give any direct evidence about the effect of PCG on TCL. Instead, he adopted Mr Fugle's affidavit, which described the effect of PCG on both Woodgate and TCL and explained that the rezoning of TCL's land would affect its ability to progress its role in the retirement complex development.

[28] Neither Mr Fugle, nor Mr Davidson referred to the direct consultation that Mr Fugle had with the Council. In particular, Mr Davidson did not say that Mr Fugle was not authorised to represent TCL for this purpose. He did not say that TCL had not received adequate information about PCG prior to the Masterplan being released. Nor did he say that there were matters TCL wanted to convey to the Council that were not conveyed.

[29] On this evidence, the Council was entitled to treat Mr Fugle as authorised to represent TCL for the purposes of consulting on PCG and it could not be said that the consultation was not adequate.

Costs

[30] In the event of the appeal being dismissed, the Council seeks costs for a standard appeal, with an uplift of 20 per cent to reflect the fact that the arguments regarding the High Court's jurisdiction to set aside the Environment Court' decision were moot.

[31] Mr Woollaston accepted that the Council's position on costs was not unreasonable if the issue was moot.

[32] We have concluded that the appeal raises issues that are moot, that the argument regarding consultation would have failed in any event and that there is no basis on which relief could have been granted. We agree that an uplift of 20 per cent from costs on a standard appeal is appropriate.

Result

[33] The appeal is dismissed.

[34] The appellants must pay the respondent costs for a standard appeal on a band A basis with an uplift of 20 per cent and usual disbursements.

Solicitors:
Dewhirst Law, Palmerston North for Appellants
Cooper Rapley Lawyers, Palmerston North for Respondent