IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2022] NZEnvC 186

IN THE MATTER OF	two appeals under cl 14 of Schedule 1 to the Resource Management Act 1991
BETWEEN	BLUE WALLACE SURVEYORS LIMITED (ENV-2022-AKL-045) PERJULI DEVELOPMENTS LIMITED (ENV-2022-AKL-053) Appellants
AND	WAIKATO DISTRICT COUNCIL Respondent

Court: Chief Environment Court Judge D A Kirkpatrick

Hearing: On the papers
Last case event: 18 August 2022

Submissions: T Gibbons for Blue Wallace Surveyors Limited and Perjuli Developments Limited
K Ridling for the Waikato District Council
S Graydon for Heritage New Zealand Pouhere Taonga
A Mako for Te Whakakitenga o Waikato
K Huirama for Ngā Uri o Tamainupō Trust
M Campbell for Federated Farmers of New Zealand

Date of Decision: 4 October 2022

Date of Issue: 4 October 2022

DECISION OF THE ENVIRONMENT COURT

A: The application by Blue Wallace Surveyors Ltd to amend its appeal is granted.

B: The application by Perjuli Developments Ltd to amend its appeal is declined.

C: The application the Council to strike out the appeal by Perjuli Developments Ltd is granted.

D: Directions are made in para. [54] as to costs.

REASONS

Introduction

[1] These two appeals are against the Waikato District Council's decisions on submissions on the Proposed Waikato District Plan (**the Plan**). In particular, they concern the identification of land as being of significance to Maaori and the effects of such identification. This decision addresses applications by the appellants to amend their notice of appeal to include references to reasonable use and s 85 of the Resource Management Act 1991 (**RMA**). The Council opposes these amendments and applies to strike out one of the notices of appeal.

[2] The appeal by Blue Wallace Surveyors Limited (**BWSL**) is introduced as follows:

> BWSL made a submission on the Proposed Plan (Submitter number 662), and a Further Submission (FS1287).

[3] BWSL states that the parts of the Council's decision that it is appealing against are:

> a. The decision of WDC to assign Maori Sites Of Significance (MSOS) and Maori Areas Of Significance (MAOS) over contested private

land which has not been subject to a balanced evaluation in regard to the level of significance.

b. The decision to place restrictive policy overlays over private properties which will have a significance economic disadvantage to the landowner.

c. The decisions impact on a pre-determined MSOS annotation needs to be taken in to account in regard to a feature's level of significance and the consequential

d. In particular but without limitation:

i. Part 4, Schedule 3, ID 294 (relating to 5851 Great South Road, Ngaaruawaahia).

ii. The identification of 5851 Great South Road, Ngaaruawaahia, property ID 1004594 as a MSOS (Site or Area of Significance to Maaori) on the planning map (per Figure 5, page 17, Decision Report 7).

iii. Part 2, Objective SASM-O2; Part 2, Policy SASM-P1; Part 2, Rules SASM-R1, SASM-R4, and SASM-R5.

[4] The relief originally sought by BWSL included removing the identification of 5851 Great South Road, Ngaaruawaahia, in the Schedule and on the planning map.

[5] The appeal by Perjuli Developments Limited (**Perjuli**) is introduced as follows:

> Perjuli is recognised as a submitter in opposition to the decision to map the borrow pits at 5851 Great South Road, Ngaaruawaahia, as a Maaori Site of Significance (MSOS), per paragraph 7.7 of Decisions Report 7. Perjuli is the landowner of the site. The initial submission on the PWDP was made by Blue Wallace Surveyors Limited (BWSL), submitter 662 and further submission FS1287, but as the Decisions Report at paragraph 7.7 states Perjuli's opposition directly, Perjuli as owner of the site asserts standing as an appellant.

[6] Perjuli states that the parts of the Council's decision that BWSL is appealing against are:

a. Part 4, Schedule 3, ID 294 (relating to 5851 Great South Road, Ngaaruawaahia).

b. The identification of 5851 Great South Road, Ngaaruawaahia, property ID 1004594 as a SASM (Site or Area of Significance to

Maaori) on the planning map (per Figure 5, page 17, Decision Report 7).

c. Part 2, Objective SASM-O2, Part 2, Policy SASM-P2, Part 2, Rule SASM-R1. Part 2, Rule SASM-R4, Rule SASM-R5.

d. Those provisions relating to SASMs generally.

[7] The relief originally sought by Perjuli included removing the identification of 5851 Great South Road, Ngaaruawaahia, in the Schedule and on the planning map.

[8] Since the original appeals were filed both Perjuli and BWSL have applied to amend the relief sought in their notices of appeal in the same terms by adding, as subparagraphs 12(e)-(f) in BWSL's amended appeal and as subparagraphs 8(c)-(d) in Perjuli's amended appeal, the following new subparagraphs:

> That it be recognised that retaining the identification of the site at 5851 Great South Road, Ngaaruawaahia, as a SASM will make the site incapable of reasonable use and place an unfair and unreasonable burden on the landowner.
>
> That if the identification of the site as a SASM is retained the Court direct the acquisition of the site by WDC pursuant to section 85 of the RMA.

The parties' positions

[9] The Council opposes the applications of both Perjuli and BWSL. Its opposition to the application by BWSL is based on what it perceives as a lack of scope on behalf of BWSL to raise the issues in the amended appeal. It opposes the amended appeal by Perjuli on the grounds that Perjuli does not have the standing to file an appeal in the first instance. As a result it seeks that the appeal by Perjuli be struck out under s 279(4) of the RMA.

[10] Other parties to these proceedings have also filed submissions in relation to the applications with Heritage New Zealand Pouhere Taonga supporting the Council's position, Te Whakakitenga o Waikato and Ngā Uri o Tamainupō ki Whaingaroa Trust opposing the applications to amend the

appeals and Federated Farmers of New Zealand abiding the decision of the Court.

5851 Great South Road, Ngaaruawaahia

[11] The property at 5851 Great South Road, Ngaaruawaahia was not included as a Maaori Site of Significance in Schedule 30.3 of the notified Plan. Ngāti Tamainupō in submission 962 sought the following:

> Add protection on some of the significant borrow pits on the properties at 5851 Great South Road and 2831 River Road Ngaaruawaahia, and any other section the submitter deems to be of high cultural significance (e.g. proximity to Pukeiāhua and size).

[12] The submission was received late on 19 October 2018 but was publicly notified for further submissions on 29 April 2019. On 26 June 2019 the Council's hearing commissioners confirmed that late submissions received on or before 31 October 2018 (including the Ngāti Tamainupō submission) were accepted.

[13] At the Council hearing Ms K Huirama spoke on behalf of Ngāti Tamainupō about the high cultural value of the borrow pits on the properties at 5851 Great South Road and 2831 River Road, Ngaaruawaahia, and sought their protection via scheduling in the Plan.

[14] As discussed in detail below, the Council's hearing commissioners were also addressed by a representative of both BWSL and Perjuli.

[15] The submission of Ngāti Tamainupō was accepted and the property at 5851 Great South Road, Ngaaruawaahia was added to Part 4: Schedules and Appendices of the rearranged Decisions Version of the Plan as a SASM in Schedule 3 - Sites and areas of significance to Maaori. It is identified as "ID: 294, NZAA site number: SS/84, Type: Borrow Pits, Site name and location/area: 5851 Great South Road Ngaruawahia", with its significance and feature of interest described as:

> The horticultural soils, borrow pits and associated pa are of scale that makes them an outstanding and significant cultural and archaeological landscape in Aotearoa/New Zealand. It is an archaeological and cultural landscape created by the utilisation of the soils deposited by the Waikato River and is associated with Pukeiāhua Pa. These are the most extensive complexes of Maori gardens identified in any region of New Zealand.

The issues to be determined

[16] There are two principal issues to be determined:

(a) Whether the amendments sought by BWSL are within the scope of its submissions on the Plan.

(b) Whether Perjuli has standing to bring an appeal or whether its appeal should be struck out.

Are the amendments to BWSL's appeal within scope?

[17] BWSL made a further submission on the Plan in support of submission 978 by B Nabbs & M Forsyth. That submission concerned the Maaori Site of Significance Patuwai Paa (ID 273; NZAA S14/117) on a property at 212D Newell Road, Tamahere. BWSL supported the submission to the extent that it agreed that further archaeological assessment needed to take place before the property was identified as a site of cultural significance.

[18] The Council's decision report at paragraph 3.15 confirms that Mr Tim Lester presented evidence or submissions on behalf of BWSL in support of the Nabbs & Forsyth submission regarding this Maaori Site of Significance. The decision report records:

> Mr Lester stated that all relevant environmental, cultural and landowner considerations need to inform a balanced evaluation prior to a MSOS [Maaori Sites of Significance] annotation being placed on private properties. In particular, Mr Lester requested that we recognise that constraints imposed by a MSOS annotation require further evaluation so as to ensure the level of significance is accurately articulated and a landowner's development rights are not unreasonably restricted. He stated that annotating a MSOS on private land has the potential to carry with it a significant economic and financial burden to landowners. Mr

> Lester considered that the planning map notations in the PDP need to be subject to a robust archaeological and cultural assessment rather than relying on desktop assumptions.

[19] The decision report then determines, at paragraphs 7.7 – 7.9, that the borrow pits should be included in the schedule and on the planning map to achieve the objectives of the Plan.

[20] The Council's position is that the amendments sought to BWSL's appeal are not within the scope of the Nabbs & Forsyth submission as that submission does not mention 5851 Great South Road, Ngaaruawaahia or the reasonable use of that property under s 85 of the RMA or address the Plan provisions relating to Maaori Sites, Areas of Significance generally. It follows, in the Council's submission, in terms of cl 8(2) of Schedule 1 to the RMA that BWSL's further submission on the Nabbs & Forsyth submission cannot address those matters.

[21] The Council's submits that the relief available under s 85(2) of the RMA is expressly limited to persons with an interest in the land affected. As BWSL is a firm of surveyors, engineers and planners, the Council submits that BWSL has no interest in the land at 5851 Great South Road. It submits that an interest in resource management planning and land development throughout the district does not constitute an interest in 5851 Great South Road, Ngaaruawaahia under s 85 of the RMA.

[22] BWSL's position is that its amendments are within the scope of its further submission and that it was invited to address 5851 Great South Road, Ngaaruawaahia in oral submissions by the hearing commissioners. Regarding the Council's criticism that it did not make submissions on 5851 Great South Road, Ngaaruawaahia, BWSL submits that it was difficult to do so as the property was not listed in the notified Plan.

[23] BWSL submits that the term "interest in land" in section 85(2) of the RMA is not defined and can be interpreted broadly. It submits that it can have

an interest in the land that is less than a formal estate in land and still have the right to make a submission under s 85(2) of the RMA. BWSL also submits that whether it is eligible to seek relief under s 85 of the RMA is a substantive issue that does not need to be determined at this preliminary point. Its position is that no party will be unduly prejudiced by allowing the notice of appeal to be amended to incorporate relief under section 85 of the RMA.

[24] There is no challenge by the Council to BWSL's standing to bring an appeal in relation to 5851 Great South Road. The focus of the challenge is whether the amendments sought to be made by BWSL to its appeal in relation to s 85 of the RMA are within the scope of its further submission. I therefore agree with BWSL's submission that the issue as to whether it is eligible for relief under s 85 of the RMA does not need to be the subject of this decision.

[25] Schedule 1 to the RMA governs the submission and appeal process in relation to a proposed plan. The text of the relevant clauses in the Schedule confines the scope of submissions and consequently of any appeals from decisions on those submissions.[1] In particular:

a. Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed.

b. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought.

c. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but further submissions cannot introduce additional matters.

---

1 *Federated Farmers of New Zealand Inc v Mackenzie District* Council [2013] NZEnvC 257 at [24]-[51].

d. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of council must be made by a person who made a submission on that provision or matter.

[26] In *Re Vivid Holdings Limited*[2] the Court determined that in order to establish jurisdiction for the Court to consider an appeal from a decision on a submission, the submission must first raise a relevant resource management issue and then any decision requested of the Court on appeal must be fairly and reasonably within the general scope of:

a. an original submission; or

b. the proposed plan as notified; or

c. somewhere in between.

[27] The test is whether or not the amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the plan change. This will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[3]

[28] In *Westfield (NZ) Limited v Hamilton City Council* Fisher J stated:[4]

> [72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields,*[5] *Williams and Purvis* [6], and *Vivid.*[7]
>
> [73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the

---

2 *Re Vivid Holdings Limited* [1999] NZRMA 468.
3 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145.
4 *Westfield (NZ) Limited v Hamilton City Council* (2004) NZRMA 556 (HC) at [72] to [74].
5 *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1.
6 *Williams v Dunedin City Council* EnvC C022/2002.
7 *Re Vivid Holdings Ltd* (1991) NZRMA 467.

> express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> [74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implied in ss 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would *not* have been within the reasonable contemplation of those who saw the scope of the original.

[29] One aspect of BWSL's further submission was focussed on the potential for a significant economic and financial burden to be imposed on a landowner when a Maaori Site of Significance is identified on private land. I am mindful that I should not interpret or assess the extent of the scope of a submission so narrowly as to limit appeal rights and on that basis find that including relief under s 85 of the RMA is not too far removed from the concerns raised in BWSL's submission.

[30] Having considered the submissions of the parties I find that BWSL's further submission on the submission by Nabbs & Forsyth provides the necessary scope for BWSL to amend its appeal to include relief in its appeal under s 85 of the RMA.

[31] Finally, as BWSL's appeal already seeks relief in relation to 5851 Great South Road, Ngaaruawaahia, I find that amending the appeal to seek relief in relation to this property under s 85 of the RMA is also within scope.

[32] For these reasons BWSL's application to amend the appeal is granted.

Does Perjuli have standing to bring an appeal?

[33] Perjuli did not make a submission or further submission in relation to 5851 Great South Road, Ngaaruawaahia, as part of the submission process prior to the hearings of submissions. It was invited to address the Council's

hearing commissioners in relation to that site in the course of the hearing.

[34] Whether Perjuli made a submission on the Plan or not hinges on the status attributed to the statement it made to the hearing commissioners as the landowner of 5851 Great South Road, Ngaaruawaahia. The following excerpt from the decision report illustrates how the hearing commissioners requested more information from 5 property owners, including Perjuli, who would be affected by the addition of further Maaori Sites of Significance:

> **6 Submission seeking additional MAOS and MSOS**
>
> 6.1 A number of submitters sought to include new MAOS or MAOS into the PDP that were not included in the notified PDP. In the absence of further submissions from affected landowners, we were concerned that they may not have been aware of submissions in relation to their land, particularly in cases where Ms Sheryl Paekau recommended the submissions be accepted.
>
> 6.2 At the conclusion of Hearing 20, we issued directions (dated 4 August 2020) requesting Council staff to provide further details of privately owned land where submissions sought new MSOS and MAOS be included in the PDP.
>
> 6.3 Council provided the requested information on 19 August 2020, which confirmed that there were 5 private properties where submissions sought new MSOS or MAOS and which were not included in the notified PDP, namely:
>
> a) Riria Kereopa Memorial Drive, Raglan;
>
> b) Kernott Road, Horotiu (opposite No 24 Kernott Road);
>
> c) Riverbank Road, Mercer;
>
> d) Corner of Gordonton Road and Piako Road; and
>
> e) 5851 Great South Road and 2831 River Road, Ngaruawahia.
>
> 6.4 In her legal submissions on behalf of Council, dated 19 August 2020, Ms Parham advised us that:
>
> a) Council did not inform the 5 landowners listed above and that there was no requirement under the RMA for Council to notify individual landowners whose properties may be potentially affected by a submission;
>
> b) The Schedule 1 process imposes an obligation on Council to publish a "summary of decisions requested by submitters".

This process enables landowners who may be affected by a submission to become involved in the process as a further submitter;

c) The 5 landowners listed above did not lodge either a primary submission, or a further submission on these matters;

d) Despite these landowners not having standing as a submitter on this hearing topic, section 76(3) of the RMA expressly provides for Council to have regard to the actual and potential effects on the environment, including (in particular) any adverse effects. Such effects include consideration of restrictions imposed if a site or area of land was to be listed in Schedules 30.3 or 30.4); and

e) To ensure that principles of natural justice are followed and that all relevant information is before us, Ms Parham submitted that we were entitled to hear from the affected landowners so that they could express their views on a submission concerning their opportunity is confined to submitters and further submitters.

6.5 Having carefully considered this matter and Ms Parham's legal submissions, we issued directions on 28 August 2020 requiring Council to inform the landowners to which a submission had sought an MSOS or MAOS over their land and invited them to provide any views they may have in writing. We also directed that in all cases where the validity and/or location of any suggested MSOS or MAOS had been questioned, Council staff should ground-truth the site/area in question, provided the landowner granted access. We have reflected the feedback received from landowners in our consideration of each site, as set out below.

…

Borrow Pits, Ngaaruawaahia:

7.7 The borrow pits at 5851 Great South Road, Ngaaruawaahia was one of the more contentious sites on which we heard evidence. On the one hand, Ngaati Tamainupo sought that the borrow pits on the site be mapped as a MSOS, while the landowner, Perjuli Development Limited, opposed this.

7.8 We received extensive evidence and submissions detailing the background to issues concerning this land, including Plan Change 17, the resource consent for the earthworks, the Heritage NZ authority, and subsequent challenge by Ngaati Tamaunipo, and the more recent occupation of the land.

7.9 On the evidence presented, we are satisfied as to the cultural and historical importance of the remaining 7 borrow pits on the land at 5851 Great South Road, Ngaaruawaahia and have included them as an MSOS in Schedule 30.3 and on the planning maps. Having

> considered the alternatives and costs and benefits in accordance with section 32AA of the RMA, we consider this to be the most appropriate way to achieve the objectives in Chapters 2 and 7 of the PDP.

[35] The Council's position is that:

(a) Perjuli did not make a valid submission or further submission to the Council on the Plan;

(b) Perjuli cannot bring its appeal in reliance on the further submissions of BWSL; and

(c) The further information sought by the hearing commissioners in accordance with s 76 of the RMA does not confer submitter status on Perjuli.

[36] The Council submits that while the hearing panel had the power to receive late submissions under s 37 of the RMA, no request was made by Perjuli to do so and the fact that Perjuli was not listed in the list of submitters at 2.2 of the decision demonstrates that it was not heard by the hearing panel as a submitter.

[37] Perjuli's position is that the Plan includes a Maaori Site or Area of Significance overlay on its land at 5851 Great South Road, Ngaaruawaahia that was not in the notified version of the Plan and that it was unaware of the status being applied to its land until it was invited to make a written statement at the direction of the hearing panel. Perjuli's submission is that it treated the letter from the Council dated 19 October 2020 as an invitation to make a submission, and that it did so. Its submission is that the Council never advised it that its statement would not be treated as a submission nor was it advised of the process to make a late submission.

[38] From Perjuli's perspective the Council invited it to make a submission, and now seeks to deny it an appeal right against the decisions it made. It

submits that being able to proceed with this appeal as the landowner of 5851 Great South Road, Ngaaruawaahia is a fundamental issue of natural justice and fair process. Its position is that it should be able to participate in a process that concerns its own land. Perjuli submits that it will be prejudiced if its application to amend its appeal is declined and that no other party will be prejudiced if the application is allowed.

[39] In addition, Perjuli submits that the recent Environment Court decision[8] concerning the cultural significance of the site and the strong views held by Ngāti Tamainupō about the significance of the site demonstrate why it is important that relief under s 85 of the RMA is available.

[40] The right to appeal against a decision of a local authority on a proposed plan is provided by Clause 14 of Schedule 1 of the RMA. Clause 14 provides:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of-
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or
>
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan;
>
> (2) However, a person may appeal under subclause (1) only if-
>
> (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

[41] It is well established that Clause 14 provides two conditions for an appeal against a Council's decision. These conditions are:

---

8 *Perjuli Developments Limited v Waikato District Council* [2022] NZEnvC 051.

(a) that an appeal can only be made if one of specific circumstances outlined in Clause 14(1) Schedule 1 to the RMA is met; and

(b) that a person appealing under subclause (1) must have referred to the appealed provision or matter in a submission on the Plan.

[42] The question to be determined is whether Perjuli's statement to the hearing commissioners can be considered a submission. Perjuli believes that by appearing before the hearing commissioners and addressing the effects of including its property at 5851 Great South Road, Ngaaruawaahia, it had made a submission. It is clear, however, that Perjuli was not invited to make a submission in terms of Schedule 1 to the RMA and that the hearing commissioners heard from Perjuli on the basis that they were seeking further evidence about the effects of the proposed provisions of the Plan relating to Sites and Areas of Significance to Maaori under s 76(3) of the RMA. The content of the decision report does not indicate any intention to waive or otherwise extend the time for making submissions under s 37 of the RMA. Consequently, Perjuli's participation in the hearing was as a witness and not as a submitter.

[43] This is an unfortunate situation. Perjuli could have asked for waiver of the time limit within which to file a submission. However, it did not do so and is now in a position where it cannot alter the fact that it was not a submitter on the Plan. Retroactively declaring that Perjuli's statement to the hearing commissioners was a submission in terms of Part 1 of Schedule 1 to the RMA would create the possibility that any kind of statement in the hearing process could be advanced as a submission, with all of the consequences, including appeal rights, that must follow from such a declaration. That would make the scope of submissions in the plan making process completely uncertain. For this reason Perjuli does not have standing under Clause 14 of the First Schedule to the RMA to bring an appeal to the Environment Court, as only a person who made a submission on a plan may bring an appeal.

[44] Perjuli submits that this result could lead to every landowner making a submission on every proposed plan or plan change that could affect their property so as to guard against changes resulting from submissions by others, to set up a possible counter-submission under s 85(2)(a) of the RMA and to preserve a potential right of appeal to advance that counter-submission. That is a possible consequence of the process set out in Part 1 of Schedule 1 to the RMA. In light of the various provisions in the RMA which offer alternative ways to make a submission on a proposed plan or plan change or otherwise to address a provision in a plan which may render an interest in land incapable of reasonable use, it is not, in my view, an unavoidable consequence.

[45] Generally, the first alternative way of dealing with this situation is to make a further submissions in opposition to primary submissions within the ordinary process for making a plan or a plan change. Another way is to make use of the unlimited scope under s 37 of the RMA for a local authority to extend a time period or to waive a failure to comply with a requirement for the time in which to make a submission. Even after a council has made its decisions on submissions, or later still after the plan making process has been completed, the risk of being unable to respond to such a change is reduced by the procedure set out in s 85(2)(b) of the RMA which enables any person having an interest in land who considers that their interest would be rendered incapable of reasonable use by a provision of a plan or proposed plan to apply under cl 21 of Part 2 of Schedule 1 to the RMA to change the Plan, with an appeal right under cl 27.

[46] In the present case, Perjuli could also rely on the appeal by BWSL, to which it is a party under s 274 of the RMA. Perjuli says it should not have to be reliant on BWSL in order to have standing to oppose a proposed plan provision in relation to its own land, but as indicated above, that does not appear to be Perjuli's only option.

[47] I conclude that Perjuli did not make a submission or further submission

on the Plan and therefore does not have standing to bring an appeal against the decisions of the Council on submissions on the Plan.

Should Perjuli's appeal be struck out?

[48] In considering whether the appeal by Perjuli should be struck out, I refer to *Federated Farmers of New Zealand Inc v Queenstown Lakes District Council*[9] where the Court held:

> The discretion to strike out a proceeding under s279(4) is generally used sparingly. However, where there is an issue that concerns a want of jurisdiction to bring an appeal, the discretionary element falls away. As the court said in *Federated Farmers (Wairarapa Division) v Wellington Regional Council,*[10] " ... if those [jurisdictional] boundaries are exceeded ... then there is no discretion to be exercised "sparingly". The case must simply be struck out as legally frivolous or vexatious."

[49] In this case Perjuli does not have standing to bring an appeal and cannot obtain that standing now that the Council has made its decisions on submissions. The discretionary aspect of s279(4) of the RMA accordingly falls away and the appeal must be struck out for want of jurisdiction.

[50] The appeal by Perjuli is struck out for those reasons.

Outcome

[51] The application by BWSL to amend its appeal is granted.

[52] The application by Perjuli to amend its appeal is declined.

[53] The application to strike out the appeal by Perjuli is granted.

[54] The normal practice of the Court in relation to costs in respect of appeals

---

9 *Federated Farmers of New Zealand Inc v Queenstown Lakes District Council* [2018] NZEnvC 14 at [5].

10 *Federated Farmers (Wairarapa Division) v Wellington Regional Council* EnvC C192/99 at [17]. See also *Atkinson v Wellington Regional Councill* EnvC W13/99 at [16].

from decisions under cl 14 of Schedule 1 to the RMA is that they lie where they fall, in recognition of the participatory nature of the plan making process. Should any party in this case nonetheless seek costs, its application must be filed and served within ten working days of the date of this decision, and any party against whom costs are sought has a further ten days in which to respond to that application.

D A Kirkpatrick
Chief Environment Court Judge