IN THE ENVIRONMENT COURT
AT AUCKLAND

I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision [2021] NZEnvC 012

IN THE MATTER OF	an appeal pursuant to s 120 of the Resource Management Act 1991
BETWEEN	RICHARD JAMES DAVIS
	(ENV-2018-WLG-130)
	Appellant
AND	GISBORNE DISTRICT COUNCIL
	Respondent
AND	GISBORNE PISTOL CLUB INCORPORATED
	Consent Holder
AND	DAVID DUNBAR
	BRUNO HAAG
	ROB KARAITIANA
	Section 274 parties

Court:	Environment Judge MJL Dickey sitting alone under s 279 of the Act
Hearing:	27-28 October 2019
Last case event:	Costs submissions dated 23, 29 and 30 June 2020.
Submissions:	M Williams for R J Davis, B Haag and R Karaitiana D Randal and F Wedde for the Gisborne District Council G Webb for the Gisborne Pistol Club Inc
Date of Decision:	22 February 2021
Date of Issue:	22 February 2021

DECISION OF THE ENVIRONMENT COURT ON COSTS

A: The application for costs is granted.

B: $16,000 is awarded against the Council and $5,000 is awarded against the Club. Both awards are made in favour of the Residents.

REASONS

Introduction

[1] The Court allowed an appeal by R J Davis against a decision of the Gisborne District Council (**the Council**) on a review of the conditions of the Gisborne Pistol Club Inc's (**the Club**) 2001 consent to allow the operation of the Pistol Club at 150 Gaddums Hill Road, Kaiti (**the site**).[1] The appellant, Mr Davis, and s 274 parties Messrs B Haag and R Karaitiana (in this decision, collectively **the Residents**) have now applied for costs against the Council and the Club under s 285 of the Act.

Background

[2] The Club commenced activities at the site between 1987 and 1990. It applied for and was granted a retrospective consent in 2001.[2] At that time, the land surrounding the site was zoned Rural Residential, meaning that residential development and subdivision were contemplated under the plan. However, it was not until 2010 that private residences were established in the vicinity of the site.[3] The Council started to receive complaints from residents regarding noise from the site, and the Council invited and received a letter in 2012 from the Kauri Park Residents Association requesting the Council review the consent.[4]

[3] The Council notified the Club of its intention to review the consent in February 2014.[5] The Club began looking for alternative sites, and the Council put the

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[1] *Davis v Gisborne District Council* [2020] NZEnvC 74 (interim decision) and *Davis v Gisborne District Council* [2020] NZEnvC 116 (final decision).
[2] Interim decision at [15].
[3] Interim decision at [16].
[4] Interim decision at [17].
[5] Interim decision at [18].

review on hold while that occurred.[6] Consent was granted in 2016 for an alternative site, however the decision granting consent was challenged by way of judicial review.[7] The Club surrendered the consent for the alternative site in December 2017.[8] The Council then re-notified the review because of the time that had elapsed since the original notification, and proceeded with the review.[9]

[4] The independent commissioner's review decision substituted a revised set of conditions that, among others, limited the days and hours of operation, and made specific provision for training times for the NZ Police. The Club was also required to provide a report to the Council detailing the best practicable option for sound insulation and for reducing the noise created from the metal targets. No noise limits were imposed.[10]

[5] In deciding this appeal, the Court found:

(a) There were significant differences between the activities the 2001 Consent authorised and those being undertaken at the site;[11]

(b) The expansion of activities at the Club over time compared to what was authorised by the 2001 Consent was a relevant matter, and the Club had not complied with Condition 1 of the 2001 consent to undertake its activities "in general accordance with the details submitted with the application";[12]

(c) It was abundantly clear that all three parties were aware of the potential for adverse noise effects to occur from the Club's activities but that did not alter the fact that noise levels must be reasonable, which was the primary focus of the Court's decision;[13]

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[6] Interim decision at [18] – [19].
[7] Interim decision at [18].
[8] Interim decision at [18].
[9] Interim decision at [19].
[10] Interim decision at [2].
[11] Interim decision at [193].
[12] Interim decision at [240] and [242].
[13] Interim decision at [216].

(d) The receiving environment was sensitive to adverse noise effects and the evidence was clear that the effects were very significant – to the point that Residents' health was being adversely affected and some have had to leave their homes on occasion to get relief;[14]

(e) Noise experts and Residents agreed that the noise was unreasonable, and in the Residents' views was intolerable at times;[15]

(f) The Court did not consider continued use of the site with no reduction in current noise levels could be considered reasonable under any circumstances without reducing the hours of use to the point where the Club could not function; but use of the site could not come with such adverse effects on other people's amenity or health;[16]

(g) The Court found that, as a minimum, a very significant immediate interim reduction from current noise levels to 65 dB L_{AFmax} must occur for health and amenity reasons. Within two years, the level must reduce further to the 55 dB L_{AFmax} recommended by Dr Chiles and Mr Styles.[17]

[6] The Court amended the conditions to limit days and times of shooting activities and to apply a temporary noise limit of 65 dB L_{AFmax} for most shooting activities for 2 years and thereafter a limit of 55 dB L_{AFmax} will apply.[18]

Principles

[7] Under s 285 of the Act the Court has a discretion as to whether to make an award of costs.[19] There is no scale of costs and costs are not awarded as a penalty but in the exercise of judicial discretion where compensation is just.[20] The Residents refer to the recent Environment Court decision in *Okura Holdings Limited v Auckland Council,*

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[14] Interim decision at [202].
[15] Interim decision at [202].
[16] Interim decision at [231].
[17] Interim decision at [235].
[18] The conditions outlined in the interim decision were confirmed in the final decision.
[19] Section 285 RMA, *Tairua Marine Ltd v Waikato Regional Council* [2006] NZRMA 485 (HC).
[20] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385; (1996) 2 ELRNZ 138 (PT).

for a helpful summary of the relevant principles and factors to be considered.[21] No party disagreed with the basic legal principles to be applied to this application.[22]

[8] The fundamental basis for the Residents' claim is that:[23]

(a) Both the Council and the Club advanced arguments (being central to their case) that were without substance[24] and emphatically rejected by the Court; and further

(b) For its part, the Council failed to perform its duties properly, acted unreasonably throughout the process of review, and is "blameworthy" in that regard.[25]

[9] The Council did not accept the assertions made by the Residents and submitted that the appropriate outcome is that costs should lie where they fall.[26] The Club also opposes any award of costs.[27]

[10] In this case the issues are:

(a) Whether an award of costs should be made against the Council;

(b) Whether an award of costs should be made against the Club;

(c) What the quantum should be, and how any award should be apportioned between the Council and Club.

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[21] *Okura Holdings Ltd v Auckland Council* [2020] NZEnvC 53.
[22] Council's costs reply at [5].
[23] Residents' costs memorandum at [5].
[24] Relying on one of the "*Bielby*" factors (*Development Finance Corporation of NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC)).
[25] Referring to *Albert Road Investments Ltd v Auckland Council* [2018] NZEnvC 241 at [53], *View West Ltd v Auckland Council* [2019] NZEnvC 095 at [13].
[26] Council's costs reply at [4].
[27] Club's costs reply at [1].

Discussion

Should costs be awarded against the Council?

The Council advanced arguments (being central to their case) that were without substance and emphatically rejected by the Court

[11] The Residents submitted that the essential case of both the Club and the Council was that no noise limit should be included in the resource consent, and that this argument entirely lacked substance.[28] The Residents also submitted that the Court emphatically rejected that argument.[29]

[12] The Residents' submissions on this point noted that the Club and Council were both steadfast that the noise limit recommended by the noise experts as appropriate (55 dB L_{AFmax}) should not be included, primarily because it would undermine the Club's viability.[30] The Residents submitted that the Court rejected the argument for a range of reasons, including that it ignored the overriding requirements of s 16 of the Act.[31] The Residents submitted that the Court found that Dr Chiles was aware that noise from the Club would be loud and intrusive at neighbouring houses, and in his opinion would be unreasonable if a new shooting range was established.[32] The Residents also noted that the Council and Club both relied on Dr Chiles' opinion that the noise limit otherwise agreed as appropriate should not be imposed because residents moving into this area should have had some expectation of this disturbance.[33] The Residents submitted that, in being predicated on expert opinion, which was itself based on what an earlier Environment Court decision had determined was a flawed premise (as in *Harvey*) the case lacked substance.[34]

[13] The Residents also submitted that a further proposition inherent to both the Club and Council's case, being that adverse effects of shooting activities were

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[28] Residents' costs memorandum at [15].
[29] Residents' costs memorandum at [15].
[30] Residents' costs memorandum at [17].
[31] Residents' costs memorandum at [18].
[32] Residents' costs memorandum at [21], referring to the interim decision at [144].
[33] Residents' costs memorandum at [19], referring to the interim decision at [213] – [214].
[34] Residents' costs memorandum at [22], *Nelson City Council v Harvey* [2011] NZEnvC 48, referring to the Court's discussion of *Harvey* in the interim decision at [214].

adequately controlled by restraints on hours and days of operation lacked substance for another significant reason.[35] The Court found that the restrictions accommodated a level of activity going well beyond the jurisdiction conferred by the 2001 retrospective consent application.[36]

[14] Counsel for the Council acknowledged that a number of the arguments the Council advanced were not accepted by the Court, however, that is not enough of itself to attract an award of costs, particularly against a local authority acting in its regulatory role.[37]

[15] The Council submitted that it took a reasonable approach to the issue, in particular:[38]

(a) Previous court decisions that the Council relied on held that the scope of a review should not include cancelling the activity which is authorised by the resource consent;[39]

(b) A related issue is viability, which is a relevant matter for the review under s 131(1)(a) of the Act (and which is a matter that the Court acknowledged was difficult);[40]

(c) It relied on Dr Chiles' expert evidence, and his evidence was that "coming to the noise" can be a relevant factor (noting that the *Harvey* decision referred to by the Residents records that this can be a factor but should not be determinative).[41]

[16] The Council noted that this has been a difficult case, and the Court agreed that it was complex – legally, technically, environmentally, socially and practically.[42] The Council does not consider it has misinterpreted clearly settled law or pursued

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[35] Residents' costs memorandum at [24].
[36] Residents' costs memorandum at [25].
[37] Council's costs reply at [7].
[38] Council's costs reply at [8].
[39] Relying on *Minister of Conservation v Tasman District Council* HC Nelson CIV-2003-485-1072, 9 December 2003 at [45].
[40] Interim decision at [256].
[41] *Nelson City Council v Harvey* [2011] NZEnvC 48 at [104].
[42] Council's costs reply at [9], referring to the interim decision at [3].

unmeritorious arguments.[43]

[17] In considering whether the Council's arguments were without substance, I note that arguments without substance are those that are beyond the jurisdiction of the Court or are issues that are advanced without supportive argument or are irrelevant to the case before the Court.[44]

[18] In this case the arguments advanced by the Council were not without substance. Instead the Council pursued arguments that did not sufficiently acknowledge the effects of noise from the Club on the Residents or the requirements of the Act. For this reason, I find that the Council's argument that no noise limits be imposed was unreasonable and unsuccessful, but not without substance.

[19] Although this finding means that the Council's case may not have met the threshold for a higher award of costs, it does not exempt it from an award of costs being made against it. In the context of this case I find that the Council's pursuit of the "no noise limit" argument was unreasonable given the adverse noise effects on the neighbouring Residents. It was an argument that failed to recognise the reality of the situation and its pursuit by the Council without compromise warrants an award of costs.

The Council's actions have been "blameworthy"

[20] The Residents accepted that the Court would not ordinarily order costs against a local authority, but they nevertheless argued that in this case the Council demonstrably failed to perform its duties properly and has acted unreasonably.[45] In that regard, the Residents submitted the Council is "blameworthy".[46]

[21] The Residents submitted that the Council:

(a) Set a defective noise limit on Club activity from the outset;

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[43] Council's costs reply at [10].
[44] *Fonterra Co-operative Group Ltd v Manawatu-Wanganui Regional Council* [2013] NZEnvC 289 at [23]–[30].
[45] Residents' costs memorandum at [31].
[46] Residents' costs memorandum at [31].

(b) Effectively unleashed the reverse sensitivity problem through a failure to fulfil its s 31 RMA responsibility when approving residential subdivision in the surrounding area;

(c) Enabled the situation to continue unabated by acting (as landowner) to renew the Club's lease;

(d) Failed to move in a timely way to address the issue.[47]

[22] The Council replied that the threshold for making an award of costs against it is high.[48] The Council submitted that there needs to be a clear and obvious neglect of its duty.[49] It submitted that costs are only awarded against a council in rare cases.[50]

[23] Counsel submitted that in determining blameworthiness, it is the Council's conduct in the proceeding that is particularly relevant, not the Council's prior conduct. The Council submitted that the Court should therefore not focus on the Council's earlier actions (for example, the setting of the original noise limit, the granting of consent for surrounding subdivisions and renewing the lease). The Court's focus should instead be on the Council's conduct of the review and related appeal. [51]

[24] The Council submitted that the way it approached the noise issues surrounding Club activities was reasonable and in accordance with its duties.[52]

[25] It explained that it initiated a review, delegated the s 42A report to an independent consultant planner and delegated its decision-making power to an independent commissioner.[53] In response to criticisms of the delay in progressing the review of conditions, the Council noted that it allowed time for the Club and residents to discuss the matter directly, and it placed the review on hold at the end of 2014, with

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[47] Residents' costs memorandum at [33].
[48] Council's costs reply at [13].
[49] Council's costs reply at [13], referring to *Ballantyne v Papakura District Council* EnvC Auckland A 054/2008, 15 May 2008 at [14].
[50] Council's costs reply at [13], referring to *Newbury Holdings Ltd v Auckland Council* [2013] NZHC 1172 at [83].
[51] Council's costs reply at [14], relying on *Auckland Regional Council v Waiheke Island Airpark Resort Ltd* (2010) 16 ELRNZ 182 (HC) at [54], *Newbury Holdings Ltd v Auckland Council* [2013] NZHC 1172 at [76] – [77].
[52] Council's costs reply at [16].
[53] Council's costs reply at [16] – [17].

the knowledge of residents, to allow the Club to explore alternative sites.[54] The Council provided a range of assistance to the Club in this process, but ultimately the Club decided to surrender the consent for the alternative site, which the Council considers regrettable.[55] When the Club decided to surrender that consent, the Council considered it was necessary to renotify the review, given the time that had passed.[56]

[26] With respect to the conduct of the proceeding, the Council submitted: it was always willing to mediate; called an appropriate number of witnesses (two); made its noise witness available for conferencing, where some issues were resolved; and the hearing itself was conducted efficiently.[57]

[27] The Council submitted that the decisions cited by the Residents are not directly analogous to this proceeding.[58] It submitted that the high threshold of blameworthiness has not been made out.[59]

[28] In considering whether the Council was blameworthy and breached its duty, I accept that the Council was in a position where it was defending a Commissioner's decision and that it raised credible issues about the jurisdictional scope of the Court's review powers and viability.

[29] I also accept the Council's submissions that it is it's conduct in this proceeding that is relevant to determining an award of costs. However, I consider that the actions of the Council in contributing to the creation of the reverse sensitivity issues (by granting consent for the subdivision) and its awareness of the potential for adverse noise effects are relevant to the issue of costs because these factors give context to the Council's stance in this case.

[30] Ultimately a number of missteps were made by the Council at several different stages of this proceeding. I accept the Residents' submissions and find that these missteps mean that an award of costs is justified against the Council.

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[54] Council's costs reply at [18(a) and (b)].
[55] Council's costs reply at [18(b)].
[56] Council's costs reply at [18(c)].
[57] Council's costs reply at [19].
[58] Council's costs reply at [20] – [21], referring to *View West Ltd v Auckland Council* [2019] NZEnvC 95 and *Albert Road Investments Ltd v Auckland Council* [2018] NZEnvC 241.
[59] Council's costs reply at [27].

Should costs be awarded against the Club?

[31] As noted above, the Residents submitted that the essential case of both the Club and the Council was that no noise limit should be included in the resource consent, and that this argument entirely lacked substance.[60] The Residents submitted that the Club (and Council) were steadfast that the noise limit recommended by the experts should not be imposed because it undermined the Club's viability.[61] The Residents also submitted that the Club's argument that adverse effects of shooting activities were adequately controlled by restraints on hours and days of operation also lacked substance because the Court found that the restrictions accommodated a level of activity going well beyond the jurisdiction conferred by the 2001 retrospective consent.[62] The Residents submitted that compounding the situation faced by the Court in this regard was a substantial degree of uncertainty (and inconsistency) within the Club's evidence as to its operations.[63]

[32] The Club submitted that it should not be treated for costs purposes as an "undeserving *de novo* applicant".[64] The Club said that it successfully sought a standard appropriate to the current environment which did not exist in 2001.[65] While the Court found that the change in circumstances warranted a fresh approach that does not mean the Club should face costs.[66] The Club submitted that it is established that since the consent was issued, the Council has not ever found the Club in breach of its consent obligations.[67] It noted that the factor which militates against the Club is the extent to which it departed from the terms and conditions of the original consent.[68]

[33] The Club submitted that it would be "perverse" to think that the Club operating under its consent limits should have had one eye to the future and, as a small sporting body, recognise there might be a residential lifestyle invasion into its

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[60] Residents' costs memorandum at [15].
[61] Residents' costs memorandum at [17].
[62] Residents' costs memorandum at [24] – [25].
[63] Residents' costs memorandum at [27].
[64] Club's costs reply at [9].
[65] Club's costs reply at [9].
[66] Club's costs reply at [9].
[67] Club's costs reply at [10].
[68] Club's costs reply at [11].

neighbourhood (even though it may not have been notified) and planned accordingly.[69] It submitted that the argument that the Residents "came to the nuisance" was well founded in law and was genuinely advanced by the Club.[70] The Court preferred the *Nelson City Council v Harvey* approach (which in itself is not determinative) and, of course, the s 16 duty.[71]

[34] The Club submitted that any costs order will further penalise the Club.[72]

[35] In considering whether costs should be awarded against the Club I acknowledge that the Club was largely caught between the encroachment of housing and the desire to continue its activities, and I acknowledge the situation was not of its making.

[36] However, the Club's misstep was to grow the Club's activities beyond that originally authorised, and its unwillingness to compromise given the effect of the noise generated by the Club on the neighbouring Residents.

[37] For these reasons I consider an award of costs against the Club is appropriate.

The Club's financial position

[38] The Residents noted that they are mindful of the Club's financial position, and acknowledged the Club's position as "victim" of the Council's neglect of duty as well.[73] The Residents said that their preference would be that from this point the Club dedicates such resources as it has to noise mitigation, and asked that the Court bear this factor in mind on the issue of apportionment of costs as well.[74]

[39] The Club outlined its financial position in its costs reply.[75] It said it wished to move, but if it is required to pay further costs it will significantly restrict its ability to develop another location, or, in the interim, to carry out any possible noise reduction

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[69] Club's costs reply at [14].
[70] Club's costs reply at [15].
[71] Club's costs reply at [15].
[72] Club's costs reply at [16].
[73] Residents' costs memorandum at [35].
[74] Residents' costs memorandum at [36].
[75] Club's costs reply at [17].

measures.[76]

[40] In *Hokio Trusts v Manawatu-Wanganui Regional Council*,[77] it was Court's view that incapacity to meet an award of costs was a factor to be considered when initiating an appeal, not at the end of the proceedings.

[41] In this case the Club did not initiate the appeal. Its consent was reviewed and the Council's decision appealed by Mr Davis. For this reason, and the fact that the Residents are mindful of the Club's financial position and the steps it will need to take to mitigate the noise from its activities, I agree that the Club's financial position should be considered in determining the quantum of the costs award.

Quantum

Above comfort level?

[42] The Residents incurred total costs of $64,000 and seek an award of $42,500, being about two thirds of the costs incurred.[78] In the Environment Court costs awards tend to fall into three broad categories.[79] In this case, the Residents seek costs in the second category, above "comfort zone" or higher than normal costs.

[43] The Club argued that the Residents' success does not elevate the costs consequences out of the comfort zone.[80]

[44] The Council submitted that the Court (if it determined costs should be awarded) should not award costs above the normal "comfort level" of 25 – 33 per cent.[81] It submitted that it would be very unusual to award costs at such a high level against a council acting in its regulatory role.[82] While there are some decisions where higher costs have been awarded, these were relatively rare, and involve exceptional circumstances.[83]

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[76] Club's costs reply at [18].
[77] *Hokio Trusts v Manawatu-Wanganui Regional Council* [2017] NZEnvC 159.
[78] Residents' costs memorandum at [3].
[79] *Van Dyke v Tasman District Council* [2011] NZEnvC 405.
[80] Club's costs reply at [12].
[81] Council's costs reply at [22].
[82] Council's costs reply at [23].
[83] Council's costs reply at [23] - [24], referring to *Ngati Pikiao Environmental Society Inc v Bay of*

[45] Having considered the factors and circumstances of this case, including the financial position of the Club, I find that costs are warranted within the "comfort zone" of costs awarded of one third of the costs incurred.

Disposition amongst parties?

[46] The Residents submitted that the Council should pay two thirds of the costs they claim.[84]

[47] I accept this submission and apportion the award of costs so that the Council is responsible for approximately two thirds of the award and the Club the remaining one third.

Decision

[48] I make an award of costs of $21,000.

[49] $16,000 is awarded against the Council. $5,000 is awarded against the Club.

[50] Both awards are made in favour of the Residents.

MJL Dickey
Environment Judge

Plenty Regional Council [2013] NZEnvC 116.
[84] Residents' costs memorandum at [34].