BEFORE THE ENVIRONMENT COURT

Decision No: [2012] NZEnvC 4
ENV-2009-WLG-000182

IN THE MATTER	of an appeal under section 120 of the Resource Management Act 1991
BETWEEN	BUNNINGS LIMITED Appellant
AND	HASTINGS DISTRICT COUNCIL Respondent

Court: Environment Judge B P Dwyer sitting alone under s279 of the Act

Heard: In Chambers at Wellington

COSTS DECISION

Decision Issued: 18 JAN 2012

A: Costs awarded.

Introduction

[1] On 6 October 2011, the Court issued a decision[1] declining an appeal by Bunnings Limited (Bunnings) against a decision of Hastings District Council (the Council) refusing an application for land use consent to construct and operate a Bunnings Warehouse at Pakowhai Road, Hastings.

[2] Costs were reserved. The Council and CDL Land NZ Limited (CDL) (a s274 party) sought costs awards against Bunnings. The costs applications were put on hold to enable discussions to take place between Bunnings, the Council and CDL with a view to those parties resolving costs between them. They have been unable to do so and have referred the matter back to the Court for resolution.

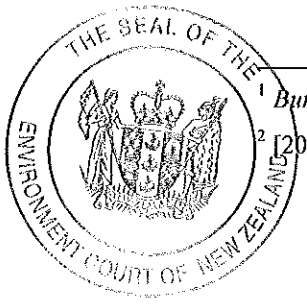
[3] The Council seeks a costs award against Bunnings of $130,000, being approximately 65% of total costs incurred by the Council. CDL seeks a *significant* award of costs. Bunnings opposes the costs applications.

Background

[4] Bunnings' proposal was for the establishment of a large warehouse style retail operation, selling a wide range of home, building, hardware and garden products on a 4ha block situated in the Plains Zone of the Hastings District Plan (the District Plan) on the rural outskirts of Hastings City.

[5] The proposal constituted a non-complying activity under the District Plan and was publicly notified. Twenty five submissions were received, 18 of which opposed the proposal.

[6] The application was declined by the Council. We considered the Council decision pursuant to s290A RMA in the course of our decision and noted that ... *our findings are largely in accordance with those made by the Council.*[2]



[1] *Bunnings Ltd v Hastings District Council* [2011] NZEnvC 330.

[2] [2011] NZEnvC 330, at [170].

[7] We reached the conclusion that Bunnings' proposal passed through neither of the two gateways of s104D RMA. We were not satisfied that the adverse effects of the proposal on the environment would be minor. That finding was largely based on what the Court considered to be inadequacies in Bunnings' assessment of the effects of its proposal on CDL's adjoining land. We also found that the proposal was contrary to the objectives and policies of the District Plan. The appeal was declined on that basis.

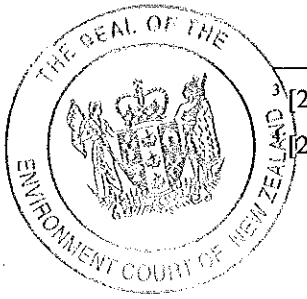
[8] We went on to consider the proposal *on its merits* in accordance with s104 RMA. We found that even if the application had passed one of the gateway tests contained in s104D, we would have still declined consent.

[9] We made the following finding:[3]

> *In our view, Bunnings' proposal does not achieve the purpose of sustainable management. Although it has some positive enabling aspects, it appears to be directly opposed to the aims of s5(2)(a) and (b) RMA. The District Plan emphasises those aims through its objectives and policies insofar as sustainable management of the Heretaunga Plains is concerned. We consider that is the determinative factor in the outcome of these proceedings.*

[10] In reaching the above conclusion, we emphasised the importance of the objectives and policies of the District Plan which set out to protect the *rural resource* of the Hastings district. We held that Bunnings' approach to this issue which concentrated on the soil structure of the site, rather than the wider rural resource, was *fundamentally flawed.*[4]

The Council Application



[3] [2011] NZEnvC 330, at [168].
[4] [2011] NZEnvC 330, at [136].

[11] The Council incurred costs totalling $198,955.34.[5] It suggested that an appropriate award to it would be $130,000. The Council identified its costs in the following table:

(a) Mr J Ash – preparation of evidence and attendance at Court	4,233.73
(b) Pedologist, Mr S Hainsworth – site investigation, preparation of evidence and attendance at Court, travel and accommodation	4,263.00
(c) Soil scientist, Dr B Clothier – site investigation, preparation of evidence and attendance at Court, travel and accommodation	8,244.56
(d) Economist, Dr J Small – preparation of evidence and attendance at Court, travel and accommodation	5,956.52
(e) Property adviser and valuer, Mr Penrose – site investigation, preparation of evidence and attendance at Court	17,215.50
(f) Resource management witness, Mr Matheson – preparation of evidence and attendance at Court, travel and accommodation	33,078.13
(g) Legal fees – senior counsel (time only, no travel or other 'out of town' disbursements)	52,433.32
(h) Legal fees – solicitors and junior counsel	65,896.98
(i) Hastings District Council planner, Mr P McKay – preparation of evidence and attendance at Court	7,633.60
(j) **Total**	**$198,955.34**

[12] The Council's submission referred to the provisions of s285 RMA and the Court's broad discretion to award costs. It referred to the usual range of authorities

[5] In its reply submissions, the Council reduced these costs by $2,593.07 to remove legal costs pertaining to mediation.

cited in costs applications. It contended that the Council had a particular interest and a public duty to see that the strong policy direction of the District Plan was upheld.

[13] The Council identified three factors which it submitted were of particular significance in exercise of the Court's discretion to award costs:

- The fact that the Court largely concurred with the findings of the Council's Hearings Commissioners;
- That the appeal was one of a succession of attempts to establish non-complying activities in the Plains Zone where the objectives and policies of the District Plan have come under attack;
- The Court upheld the primacy of the objectives and policies of the District Plan and found that the proposal was contrary to the purpose of achieving sustainable management.

[14] The Council raised the issue of cost claims for staff members in respect of the evidence of its planner, Mr P McKay. It contended that Mr McKay was diverted from other duties to provide the Court with evidence on policy issues which related directly to the hearing and that on that basis it was appropriate that the cost of his time be reimbursed to the Council[6].

[15] In response to a submission from Bunnings that it was unnecessary and unjustified for the Council to have instructed Queen's Counsel (M Casey QC), the Council contended that these proceedings were the latest in a line of cases challenging the objectives and policies of the Council's District Plan and the Council had no option but to take the appeal seriously. It said that the Council regarded the appeal as *seminal* and that if consent was granted it would have found it very difficult to resist granting consent to similar applications.

[6] *Waitakere City Council v Gordon* A 28/98, *Baker Boys Ltd v Christchurch City Council* C 209/99, *Te Awanga Lifestyle Ltd v Hastings District Council* [2010] NZEnvC 15.

The CDL Application

[16] CDL incurred the following costs relating to the appeal:

• Legal fees	$34,102.69
• Planning witness fees	$16,544.00
	$50,646.69[7]

[17] CDL adopted the submissions of the Council. Additionally, it noted the findings of the Court as to the inadequacies in Bunnings' analysis of potential impacts of its developments on the adjoining CDL land. It said that these inadequacies were … *unexplainable given that these matters were raised by CDL in its submissions, raised by CDL in the hearing before the Council and raised by CDL in the evidence which was pre-circulated.*[8] (I note that the Council decision[9] specifically identified the need for adequate mitigation of the effects of the proposal on the CDL land).

[18] CDL submitted that it was required to spend considerable sums to protect its position as a developer in the Residential and Deferred Residential Zones of the District Plan and contended that Bunnings failed to discuss issues relating to the CDL land and to enter into any meaningful dialogue with it.

[19] CDL sought a significant award of costs without specifying a particular amount.

Bunnings' Response

[20] Bunnings' opposition to the costs applications revolved around the quantum of costs which ought be awarded. It contended that in each case an appropriate award would be 20% of total costs incurred after certain deductions which it identified.

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[7] The CDL costs application also referred to costs incurred at the time of the Council hearing ($14,687.01). Those are not costs of these proceedings and are not recoverable pursuant to s285.

[8] CDL submissions, para 8.

[9] Para 13.9.

[21] Insofar as the Council application was concerned, Bunnings raised four issues in opposition to the costs claim.

[22] Firstly, it submitted that the Council costs included legal fees for attending without prejudice discussions and mediation and that the costs involved in these processes should be set aside. The Council conceded that in reply and made an appropriate adjustment to its costs claim.

[23] Secondly, Bunnings opposed inclusion in the costs claim of the sum of $7,633.60 for time spent by Mr McKay. Bunnings referred to a range of authorities on the issue of award of costs for Council officers. Bunnings acknowledged that whilst there are instances where the Court has determined that it is appropriate to award costs for Council officers' time, this was not an appropriate case for doing so and referred to the *Te Awanga Lifestyle* decision declining such costs.

[24] I do not propose to take that matter any further in this instance. The Council officer costs in dispute amount to slightly under 4 percent of the total costs incurred, so they are a comparatively small factor in the overall costs considerations. To the extent necessary, I hold that the Court may award costs for officer time if it is reasonable in any particular case, but it is not usual to do so and there is a clear reticence on the Court's part about awarding such costs.

[25] Thirdly, Bunnings contended that the costs incurred by the Council were excessive and unnecessary. There were two aspects to this contention:

- That legal fees for senior counsel ($52,433.32) were unnecessary and unjustified. Bunnings challenged the decision to instruct Queen's Counsel, which it said doubled the legal fees incurred by the Council and contended that ... *This multiplication of legal advisors should not be allowed to have the effect of inflating any costs awards against Bunnings.*[10]

[10] Bunnings submissions, para 19(b).

- That witness fees of $33,078.13 charged by Council's outside planning witness (Mr A R Matheson) were excessive, given that he should have been familiar with the proposal due to his involvement at Council hearing level;

I will discuss these matters in my considerations.

[26] Fourthly, Bunnings submitted that the Council's claim for approximately 65% of total costs is well beyond the general *comfort zone* of the Environment Court (25-33%), that a contribution of 65% sought by the Council is much higher than usual and that the *Bielby* factors[11] are not present in this instance.

[27] Bunnings contended that its arguments were not without substance or merit and said that its appeal raised new issues of substance in respect of non-complying proposals to develop Plains or Rural zoned land in Hastings, namely:

- The proposal involved a commercial activity rather than residential subdivision, as had earlier cases;
- There was evidence of a shortage of suitable alternative sites for a Bunnings Warehouse.

[28] Bunnings submitted that the Court accepted its position as to lack of adverse effects on the soil resource and that this was supported by expert opinion from competent and well respected experts. It claimed that its arguments were focused and concise.

[29] Insofar as the CDL costs application was concerned, Bunnings challenged inclusion of legal and witness costs for attendance at mediation and Council hearing costs. I concur with Bunnings' submissions in that regard and will not address that matter further.

[30] Bunnings disputed CDL's claim for a significant award of costs to the extent that it was based on flaws in Bunnings' landscape assessment. It said that it was

[11] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

entitled to rely on the advice of its landscape witness. Bunnings disputed that it failed to enter into meaningful dialogue with CDL and pointed to the fact that it attended mediation in an effort to resolve the appeal. I will address these matters in my overall considerations.

Considerations

[31] Section 285(1) RMA provides:

> *(1) The Environment Court may order any party to proceedings before it to pay to any other party the costs and expenses (including witness expenses) incurred by the other party that the Court considers reasonable.*

[32] Environment Court costs are *quintessentially a discretionary area.*[12] The Court's discretion to award costs must be exercised on a principled basis and relevant principles have been identified in various cases, a number of which were referred to by Counsel in their submissions.

[33] Unlike most other jurisdictions, costs do not automatically follow the outcome of proceedings in the Environment Court. Such proceedings often involve the prediction of future outcomes or the application of disciplines where there is room for reasonable difference of views between impartial and objective witnesses. Public participation in the resource management process is encouraged and parties before the Court often represent wider community interests rather than their own personal interests. A number of such parties appeared in this appeal.

[34] For these (and probably other) reasons, the Court has a discretion as to whether or not costs ought be imposed in every case, pursuant to s285. The exercise of that discretion frequently turns on the merits of a party's position and how that party conducted its case. In this instance it is conceded by Bunnings that costs ought be awarded to the successful parties who have sought them and I agree with that

[12] *Heli Harvest Ltd v Marlborough District Council* HC Wellington CIV 2004 485 1669, 24 February 2005.

concession. The matter in dispute between the parties is the quantum of costs that ought be awarded.

[35] The test as to the appropriate level of costs contained in s285 is, *what is reasonable*? As a matter of general observation, costs awards in the Environment Court tend to fall into three broad categories:

- Standard costs, which generally fall within a *comfort zone* of 25-33% of costs actually incurred;
- Higher than normal costs, where particular aggravating or adverse factors might be present such as those identified in *Bielby;*
- Indemnity costs, which are within the Court's jurisdiction to award but which are awarded only rarely, in exceptional circumstances.

[36] Bunnings argued for standard costs on the basis of 20% of actual costs, consistent with that awarded by the Court in the *Te Awanga Lifestyle* case. The Council sought higher than normal costs, claiming approximately 65% of actual costs incurred.

[37] I concur with the Council's position that this is a case where higher than normal costs ought be awarded. There are four reasons for that:

- Firstly, I note that the Council decision was upheld in all respects. I would go so far as to say that it was not seriously challenged[13]. In particular, the Court concurred with the Council's finding wherein it rejected Bunnings' contention that because only a small area of land would be lost from productive use, the proposal constituted an insignificant departure from the policies of the District Plan.

[13] In *Warren v Gisborne District Council* [2011] NZEnvC 172, the Judge noted in awarding costs that the appellant had pursed the same issues on appeal, with the same result. In *Flacks v Auckland City Council* A 171/2002, the Court noted that parties who are unsuccessful at first instance, and fail again on appeal, may be more vulnerable to an award of costs.

- Secondly, I consider that the case advanced by Bunnings suffered from two fundamental flaws identified in the decision. Bunnings considerably understated the versatile nature and capacity of the soils of the site as established by their past use and performance and wrongly discounted the capacity of the site to be viably managed. Further, it took far too narrow an approach to the objectives and policies of the District Plan relating to protection of the rural resource which are directed at wider considerations than just the soil structure of a site, considered in isolation. In those respects, Bunnings' case might be described as *without substance* or *unmeritorious*[14].

- Thirdly, I concur with the Council's submission that the appeal involved issues of considerable public interest in terms of application of the District Plan. It is difficult to regard the appeal as anything other than a direct challenge to very clear objectives and policies of the District Plan relating to protection of the rural land resource. We held that Bunnings' proposal was directly contrary to those objectives and policies, notwithstanding Bunnings' attempt to distinguish its proposal because of its inability to find an appropriately zoned site elsewhere which could meet its idiosyncratic requirements. I accept the Council's submission that if Bunnings' consent was granted, the Council would have found it very difficult to resist granting consent to similar applications in the future. Bunnings was clearly *pushing the boundaries*[15].

- Finally, there was the failure to adequately assess the effect that Bunnings' proposal might have on CDL's land, something which was specifically identified in the Council decision. Again, I consider that is akin to the situation in *Warren*[16].

Collectively, these findings lead me to the conclusion which I have reached.

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[14] *DFC NZ Ltd v Bielby* [1991] 1 NZLR 587 (HC).

[15] *Heron v Auckland City Council* W 11/2007.

[16] *Warren v Gisborne District Council* [2011] NZEnvC 172.

[38] I have considered Bunnings' submissions regarding allegedly excessive and unnecessary costs on the part of the Council.

[39] Bunnings complained about the costs incurred in having Queen's Counsel representing the Council, in addition to the Council's own legal advisors. I do not consider that the Council can be criticised for instructing Counsel as it did, having regard to the obvious significance of this case for the Council. Nor can the Council be criticised for also relying on the services of its usual legal advisor, who is himself a highly experienced practitioner and who attended to case management matters leading up to the hearing. Undoubtedly, it was reasonable for the Council to have acted in the manner it did in terms of its legal representation.

[40] The question for the Court however, is what level of the costs incurred by the Council is it reasonable that Bunnings ought pay? While it is not for Bunnings to dictate whom the Council ought to have instructed as Counsel, neither is it reasonable for Bunnings to be penalised for the Council having chosen *gold plated* representation.

[41] Insofar as the evidence of Mr Matheson is concerned, the claim of excessive charges is based on the proposition that as Mr Matheson was involved at the time of the Council hearing, his costs before the Court ought not to have been as high as they were. I note that Mr Matheson's costs were $33,078.13, which is a very substantial amount. I also note that he provided a detailed brief to the Court addressing pertinent issues and that we accepted his evidence in a number of relevant respects.[17]

[42] I am not in a position to assess whether Mr Matheson's fees were excessive or not. They have been accepted and paid by the Council. Again, the issue is what level of costs is it reasonable that Bunnings ought to pay?

[43] I accept that Bunnings participated in mediation with CDL but, having done so, it failed to adequately identify the possible effects which its proposal might have

[17] [2011] NZEnvC 330, e.g. at [148], [156] and [157].

on CDL's land and the mitigation of those effects. The need for mitigation of effects on the CDL land had been signalled in the Council decision but was not accurately or adequately addressed by Bunnings in its evidence to the Court.

[44] I intend to balance all of those factors by making a costs award above the common 25-33% level, but at a lesser rate than the 65% sought by the Council.

Outcome

[45] Having regard to all of the above factors I determine as follows:

- Bunnings will pay to the Council the sum of $98,000 being approximately 50% of the costs incurred by the Council.
- Bunnings shall pay to CDL the sum of $25,000 being approximately 50% of the costs incurred by CDL.

[46] In each case the costs award may be enforced (if necessary) in the District Court at Hastings.

DATED at Wellington this 17th day of January 2012

B P Dwyer
Environment Judge