

BEFORE THE WHANGĀREI DISTRICT COUNCIL AND NORTHLAND REGIONAL COUNCIL

Under The Resource Management Act 1991

And

In the matter of a resource consent application by Northport Limited under section 88 of the Resource Management Act 1991 for a port expansion project at Marsden Point

Application No. Whangārei District Council: LU2200107
Northland Regional Council:
APP.040976.01.01

MEMORANDUM
on behalf of the Director-General of Conservation
Submitter No. 158

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MAY IT PLEASE THE PANEL

Requirements of expert witnesses

1. The Panel has questioned how someone employed by a government agency, whose functions include advocating for conservation of natural and historic resources generally¹ can be seen to be independent.
2. This memorandum provides additional context on the role of experts who are employed by the Department for Conservation (the Department) in matters brought to hearing by the Director-General of Conservation (DGC).
3. It is provided so the evidence of her experts in this matter can be appropriately considered in your decision.
4. Experts are employed by the Department to perform a wide range of functions it has under the Conservation Act, such as technical assistance with managing land and resources held under the Act s 6(1) or advising the Minister on matters relating to conservation generally s 6.(g).
5. As Ms Kirk confirmed, she has not appeared in this matter in an advocacy role. That is the role of the DGC's legal counsel. And as Ms Kirk confirmed to the Panel, she was not involved in the preparation of the DGC's submission on the application for the proposed expansion.
6. The Court of Appeal and High Court have held in a number of cases that, as a matter of law, whether or not an expert witness independent of the party by whom s/he is called is a matter going to weight, not admissibility, and the issue of weight is considered on a case by case basis.² In this case, it is difficult to understand why the Panel would afford less weight to Ms Kirk's evidence because she is employed by the Department.
7. Employees of the Department regularly appear before Hearing Panels and the Environment Court as experts throughout New Zealand, assisting Courts with matters within the area of their particular expertise. It is an established practice.

¹ Conservation Act 1987, s6(b).

² *Smith v Attorney-General* [2010] NSCA 258, where the Court of Appeal said that there "...is a long line of authority to [the] effect..." that "...an expert witness' evidence is not rendered inadmissible because the witness is also a witness as to a fact, or is associated with one of the parties," at [40].

8. The Department sometimes has experts with the deepest expertise in relatively narrow fields. For example, in this case the Applicant's avifauna assessment relies on Dr Beauchamp's published data of bird numbers in the Whangarei Harbour.³
9. The expert witnesses for the Department have expressly agreed⁴ to comply with the Code of Conduct contained in the Environment Court's Practice Note 2023, which makes clear the witness has an overriding duty to impartially assist the Court (or as here, the Hearing Panel) on matters within their expertise (at 9.2.(a)).⁵
10. The situation where an expert may have another (possibly competing) duty to a party to the proceeding or other person engaging the expert, is explicitly resolved in the Code by making clear that the expert witness "*has an overriding duty to impartially assist the court on matters within the expert's area of expertise. This duty to the Court **overrides** any duty to a party to the proceeding or other person engaging the expert.*" (Bold added).
11. The duty to act impartially to assist the Court (or Hearing Panel) is the necessary 'neutral professional common ground' that all experts have agreed to occupy at this hearing. Otherwise, the Applicant's or Council experts could also face criticism as being contracted by either the promoter of the proposal (the Applicant) or by the agency that administers the rules (the Council).
12. As the Court of Appeal commented in *Belcher v Chief Executive of the Department of Corrections*:⁶

[97] It is not unknown for expert evidence to be given by witnesses who have an association with one of the parties. It is, for instance, commonplace for police officers or forensic specialists (for example, accountants or computer experts) to give expert evidence for the Crown in criminal cases. We therefore do not accept that Dr Wilson's association with the department disqualified him from giving evidence (or providing a report) on the [extended supervision order] application.

13. It is not a separate requirement in the Evidence Act 2006 that an expert witness be 'independent' of the party they appear for. Nor is it a requirement of the Environment Court's Practice note. Rather, experts are required through a commitment to the Code of Conduct, to assist the Panel impartially on matters within their expertise, not to act as an advocate, and to declare any fact or

³ See Coastal Avifauna Assessment, Appendix 13 to Application and AEE, pages 13 to 39.

⁴ For example, Ms Kirk EIC paras 8-10.

⁵ Ms Kirk's opinions both support and challenge the evidence before you.

⁶ [2007] 1 NZLR 507.

relationship which may impact on this impartiality. The expert witnesses for the Director-General have done this. As Ms Kirk confirmed to the Panel, her role has been to assist the Panel.

14. Ms Kirk has endeavoured to provide a detailed analysis of the planning framework, an area within her expertise, in order to provide substantial help⁷ to the Panel. She has declared her employment status and agreed to comply with the Code. Her opinions both support and challenge the evidence before you.⁸
15. By way of contrast, an example of advocacy by a planning witness can be seen in *Tram Lease Ltd v Auckland Transport* described by the Court below:⁹

[96] The flavour of his significant confidence in his track record in infrastructural projects unfortunately manifested itself in the tone he employed throughout his evidence, particularly his rebuttal evidence.

[97] With that flavour came a related concern for us, that much of the evidence amounted to advocacy, contrary to the expectations of the Court in its December 2014 Practice Note guiding the work of expert witnesses.

[98] These approaches led him to offer such statements as:

... AT fails to recognise or acknowledge such effects. The reality is that an experienced infrastructure provider would realise that such effects are sufficiently significant to warrant a pragmatic approach that involves "buy the property, do the work, and then on-sell it." Mr Foster, evidence-in-chief, paragraph [3.2]

[99] Further observations, immediately following the last, included that, in his opinion, the temporary and long-term measures proposed by AT were "unworkable, unrealistic and impractical", followed by an observation that the "whole thrust of the AT case is founded on the assumption that land will allegedly be made available by KiwiRail to mitigate the adverse effects of the project [no such arrangement having been made]."

[100] Much of the rest of the evidence-in-chief followed the pattern of starting with a strong negative advocated position, supported by little more reasoning than that we should accept his word because of his considerable experience with major infrastructure projects over the last 20 years.

⁷ Evidence Act 2006 s25 (1) provides: "An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding."

⁸ For example, Kirk Summary Statement, at para 34 supports Dr Mitchell and at para 26 she adopts Ms Niblock's analysis, but at para 20 she disagrees with Dr Mitchell.

⁹ [2015] NZEnvC 137.

16. In that case, the evidence of the planning witness Mr Foster was largely not needed but the Court noted it would have struggled to assign much of his evidence any weight.
17. That expert's approach is in stark contrast to the approach of Ms Kirk.

Familiarity with the site

18. In regard to the Panel's criticism of Ms Kirk's lack of a site visit, as you are aware she had a family situation which prevented her involvement in this matter over the last weeks and a cyclone prevented the planned site visit on Sunday. Notwithstanding this, Ms Kirk has made herself familiar with the site through the Applicant's application and assessment of environmental effects including maps, photos and descriptions which have enabled her to consider the site against the planning provisions and relevant overlays and zoning, as well as discussions with Dr Beauchamp who has detailed knowledge of the site and the surrounding environment.
19. As Ms Kirk was not providing expert opinion on the site itself and her role was more in the nature of a 'desktop' assessment of the relevant planning and statutory provisions, it is not clear what additional facts Ms Kirk would have gathered had she undertaken an in-person site visit, nor how her opinions could be considered to be reliant on having physically visited the site. In regard to technical evidence about the site, she has relied on the opinions of the appropriate experts, such as Dr Bull and Dr Beauchamp in regard to avifauna.
20. While a site visit could be considered best practice, on the facts in this case; given the steps taken by Ms Kirk to familiarise herself with the site's characteristics, the quality of electronic information that she has availed herself of, and the fact that an in-person site visit by expert witnesses is not required by the Environment Court's Code of Conduct or otherwise,¹⁰ the absence of an in-person visit to the site would not appear to detract at all from the weight to be afforded to Ms Kirk's evidence.

¹⁰ See *Wilkins Farming Co. Ltd v Southland Regional Council* [2020] NZEnvC 200 where the absence of a site visit by two of the council's experts was unsuccessfully raised in respect of a costs application against the council, and no mention of this is made in either of the relevant decisions as affecting the Court's treatment of those witnesses' evidence - see *Wilkins Farming Co. Ltd v Southland Regional Council* [2020] NZEnvC 155 and *Wilkins Farming Co. Ltd v Southland Regional Council* [2020] NZEnvC 175).

Conclusion

21. It is considered neither Ms Kirk's employment by the Department nor the fact that she could not undertake an in-person site visit, detracts from the weight of Ms Kirk's evidence.
22. If the Panel takes a different view on these matters, detailed reasoning in the Panel's decision would be appreciated.

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2 November 2023