IN THE WAITANGI TRIBUNAL Wai 2572

CONCERNING the Treaty of Waitangi Act 1975

AND a claim by Ihakara Porutu Puketapu, Catherine Mārie Amohia Love and others on behalf of themselves, Te Atiawa Nui Tonu and Taranaki Whānui ki Te Upoko o Te Ika a Maui

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DECISION
ON APPLICATION FOR AN URGENT HEARING

1 February 2017

Introduction

1. On 20 September 2016, Ihakara Porutu Puketapu and Catherine Mārie Amohia Love (the applicants) filed a statement of claim and an application for urgent hearing concerning the sale and development of land located at Omarukaikuru/Shelly Bay (Wai 2572, #1.1.1). This claim is brought on behalf of Te Atiawa Nui Tonu and Taranaki Whānui ki Te Upoko o Te Ika (Taranaki Whānui) and those with historical and contemporary interests in Omarukaikuru/Shelly Bay and Te Whanganui a Tara.

2. The applicants allege that they have been or are likely to be prejudicially affected by the following Crown actions, which they allege will extinguish their rights as mana whenua and landowners in relation to the land:

    a) The enactment of the Housing Accords and Special Housing Areas Act 2013 (HASHAA) and the designation of Shelly Bay as a Special Housing Area;

    b) The implementation of the Wellington City Housing Accord 2014;

    c) The Regulatory Impact Statements and recommendations of the Ministry of Business, Innovation and Employment; and

    d) Crown actions in undermining the Resource Management Act 1991 (RMA).

Background

The land at Omarukaikuru/Shelly Bay

3. The land at Shelly Bay is owned by the Port Nicholson Block Settlement Trust (PNBST), which was established in August 2008, to receive and manage the assets transferred to Taranaki Whānui in settlement of its historical claims. The Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Deed of Settlement provided for the deferred purchase of the land at Shelly Bay, which PNBST purchased in February 2009.

4. In 2015 the PNBST Trustees put forward a proposal for sale of the Shelly Bay land to The Wellington Company. This transaction would have constituted a major transaction according to the Trust Deed, which required that 75 per cent of beneficiaries vote in favour of the proposal for it to go forward. This threshold was not reached in a vote in early 2016, so the sale did not proceed (Wai 2572, #A1).

5. The Wellington Company currently holds a ten year lease of all the PNBST property at Shelly Bay and the Trust is in ongoing negotiations with The Wellington Company to enter into a joint venture for the development of Shelly Bay. Neville McClutchie Baker, the then chairman of the PNBST Trust Board, stated in his affidavit of 13 October 2016 (Wai 2572, #A1) that any land sold as part of the joint venture would not be a major transaction and therefore would not require approval through a beneficiary vote.

The HASHAA legislation

6. The Housing Accords and Special Housing Areas Act was enacted in 2013 with the purpose of enhancing housing affordability by facilitating an increase in land and housing supply in certain areas identified as having housing supply and affordability issues. The Wellington district is included as such an identified district in Schedule 1 of HASHAA.

7. This Act empowers the Minister of Housing (the Minister) to enter into housing accords with territorial authorities which provide for the Minister and the territorial authority to work together to address housing supply and affordability issues in the district of the territorial authority (HASHAA 2013, s 4). The territorial authority party to a housing accord may recommend to the Minister that areas within its district be designated as Special Housing Areas (HASHAA 2013, s 17).

8. When a territorial authority makes such a recommendation, it provides the Ministry of Business, Innovation and Employment (MBIE) with the relevant information for the Minister to assess whether the statutory requirements for the establishment of a Special Housing Area are met (Wai 2572, #A2). MBIE officials rely on this information to assess whether a proposed Special Housing Area meets the statutory requirements set out in s 16 of HASHAA and to prepare a regulatory impact statement. The officials then provide the Minister with a brief of the relevant information (Wai 2572, #A2). If the Minister is satisfied that the statutory criteria are met, the Minister may recommend the making of an Order in Council by the Governor-General to establish the new Special Housing Area (HASHAA 2013, s 16).

The creation of Special Housing Areas at Shelly Bay

9. On 24 June 2014, the Minister of Housing entered into a housing accord with the Wellington City Council (WCC), the relevant local authority for the district including Shelly Bay. WCC then recommended that two areas of Shelly Bay be designated as Special Housing Areas. WCC agreed to recommend the first area on 8 April 2015 and the second on 28 April 2015.

10. MBIE officials assessed both areas as meeting the statutory requirements, prepared regulatory impact statements, and briefed the Minister with the relevant information. The Minister then recommended to the Governor-General that the areas at be Shelly Bay designated as Special Housing Areas. This resulted in the Housing Accords and Special Housing Areas (Wellington—New June 2015 Areas) Order 2015 and Housing Accords and the Special Housing Areas (Wellington—New December 2015 Areas) Order 2015, which established two Special Housing Areas at Shelly Bay.

11. The two Special Housing Areas at Shelly Bay have now expired. Pursuant to s 18 of HASHAA, the first special housing area expired on 16 September 2016 and the second expired on 11 December 2016. However, this will not affect the existing resource consent application lodged by The Wellington Company with WCC on 15 September 2016, because this was lodged before the expiry of the Special Housing Areas. Schedule 3, s 1 of HASHAA provides that the provisions of the Act still apply to resource consent applications made during the duration of a Special Housing Area, despite its later disestablishment. WCC will therefore still consider The Wellington Company's application in relation to Shelly Bay according to the relevant provisions of HASHAA.

Parties' Submissions

Applicants' Submissions

12. The applicants allege that the combined effect of the HASHAA legislation, the implementation of the Wellington City Housing Accord, the advice of MBIE and Crown actions in undermining the RMA is likely to cause them and those they represent significant and irreversible prejudice. This prejudice includes the alienation of the Māori landowners from their largest asset in the Wellington region, the prevention of the iwi

from being able to fully utilise the settlement property as intended for the progress of Taranaki Whānui and the effective extinguishment of the applicants' rights as landowners and iwi mana whenua in relation to the land at Shelly Bay.

13. The applicants strongly object to PNBST's proposal to enter into a joint venture with The Wellington Company to develop the land at Shelly Bay. They object on the basis that they are mana whenua in relation to the land at Shelly Bay, which they allege has historical significance, is likely to contain wāhi tapu, and is the Māori owners' largest asset in the Wellington region. The applicants are also concerned about the involvement of international investors in the development proposal. The applicants allege that such investors may not consider themselves to have Treaty obligations and that the proposed development contains no protection for the rights of Māori or New Zealanders.

14. The Crown actions which the applicants oppose relate both to a number of specific Crown actions as well as to the relevant legislative environment. The specific Crown actions which the applicants allege are:

    a) The sale of WCC-owned land at Shelly Bay to Ian Cassels or his company, The Wellington Company, for development without notifying or properly consulting with Māori who had interests in the land, or offering the land to mana whenua;

    b) The Crown's reliance on PNBST as the representative organisation for Taranaki Whānui when the Crown had been informed that PNBST does not have an iwi mandate and is operating in breach of its Trust Deed; and

    c) The Crown's encouragement and support for PNBST's actions in selling land at Shelly Bay which the applicants allege amounts to PNBST intentionally acting against tribal law.

15. The applicants challenge the following aspects of the legislative environment:

    a) The passing of the HASHAA legislation;

    b) The signing and implementation of the Wellington City Housing Accord;

    c) The designation of Shelly Bay as a Special Housing Area and associated official advice from MBIE officials which enabled this; and

    d) The resulting streamlined resource consenting process, which the applicants argue undermines the RMA, effectively extinguishes their rights as landowners and mana whenua, and removes requirements for meaningful consultation with mana whenua and Māori owners.

16. The applicants submit that the overall effect of the Crown's actions is the alienation of Māori owners from land and takutai moana, in breach of the Crown's Treaty obligation to protect Māori interests in land, and the prevention of meaningful participation for mana whenua in decisions in relation to land. The applicants further submit that the Crown is undermining undertakings given by Taranaki Whānui as part of its Treaty settlement to exercise kaitiakitanga over sites in the Wellington region with historical significance to previous hapu and iwi occupants.

17. The applicants submit that there is no alternative remedy that, in the circumstances, it would be reasonable for them to exercise, and that they are ready to proceed to an urgent hearing.

Crown's Submissions

18. The Crown opposes the applicants' application for an urgent hearing and submits that it should be declined because the applicants have failed to show a current or pending Crown action or policy that is causing, or is likely to cause, significant and irreversible prejudice.

19. The Crown alleges that the applicants are challenging actions and decisions that are not those of the Crown, or made on behalf of the Crown, or ones in which the Crown is involved. The Crown submits that the Crown has had no involvement in PNBST's Shelly Bay development plans and the development would not involve any Crown land. The Crown argues that the actions and decisions under challenge are primarily those of PNBST, and the claim is essentially an internal dispute between the PNBST and some of its beneficiaries. The Tribunal lacks jurisdiction to inquire into such matters.

20. To the extent that the applicants seek to challenge HASHAA and the establishment of two special housing areas under HASHAA, the Crown accepts this is a matter in respect of which the Tribunal has jurisdiction to inquire.

21. However, the Crown argues that the applicants have failed to make out the grounds for an urgent hearing because there is no current or pending Crown action or policy that is causing them, or is likely to cause them, significant and irreversible prejudice, and which would warrant diversion of the Tribunal's resources from its other priorities in order to be heard under urgency. The Crown argues that an urgent inquiry could not ameliorate the applicants' position, because:

    a) Even if the HASHAA Act and the special housing areas did not exist, there would be no legal barrier to the PNBST seeking to develop the land through the standard processes of the RMA; and

    b) The consenting process for the proposed development is now underway and will proceed independently of the existence or nonexistence of the SHAs that are being challenged.

22. The Crown further submits that local authorities, including WCC, do not act on behalf of the Crown because they are separate bodies corporate and vested with statutory powers. The Crown argues that the Crown's Treaty obligations in relation to local authorities extend only to ensuring that the statutory framework is consistent with Treaty principles, and not to the decisions that local authorities make.

23. The Crown also submits that there is no evidence that the land at Shelly Bay is of special cultural significance or contains wāhi tapu, and that despite the number of named applicants in this claim there is no evidence of wider support for their position amongst PNBST's beneficiaries.

Applicants' Reply

24. I directed the applicants to reply to the Crown's submissions and evidence by 3 November 2016. To date, the Tribunal has not received any submissions or evidence in reply from the applicants.

Urgency Criteria

25. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
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> - The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - The claimants can demonstrate that they are ready to proceed urgently to a hearing.
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> Other factors that the Tribunal may consider include whether:
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> - The claim or claims challenge an important current or pending Crown action or policy;
> - An injunction has been issued by the courts on the basis that the applicants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
> - Any other grounds justifying urgency have been made out.
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> Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

26. In deciding whether to grant urgency, an important factor for the Tribunal to consider is whether the applicants have demonstrated that there are pending or current Crown actions or policies which are likely to cause significant or irreversible prejudice to the applicants and those they represent, in breach of the principles of the Treaty of Waitangi.

27. The applicants have failed here to demonstrate a connection between the alleged prejudice and any pending or current action by or on behalf of the Crown. Counsel for the Crown have correctly assessed the actions and decisions under challenge as primarily those of PNBST.

28. This claim appears to be the result of an internal dispute within PNBST with a portion of its beneficiaries. The evidence provided by the Crown demonstrates that the Crown is not involved in the plans to develop or sell land at Shelly Bay, nor is there any Crown land involved. The focus of the Tribunal must, as a matter of law, be upon the relationship between the Crown and the applicants. The Tribunal has no jurisdiction to inquire into the internal disputes of a post-settlement governance entity.

29. The Tribunal does have jurisdiction to inquire into the aspects of the legislative environment that the applicants challenge, including the HASHAA legislation and the establishment of Special Housing Areas. However, the applicants have not demonstrated a sufficient connection between the prejudice they allege and a Crown

action under this legislation. Even without the existence of HASHAA and the Special Housing Areas, there would be no legal barrier to PNBST developing the land through the standard RMA process. This means that an urgent Tribunal inquiry into the legislative environment would not ameliorate the applicants' position.

30. Because the essence of the claim is an objection to PNBST's decision to develop the land, there are alternative remedies that it would be more appropriate for the applicants to pursue. As beneficiaries of PNBST, they have the opportunity participate through the Trust in the joint venture development, and they can also challenge PNBST decisions through internal dispute mechanisms under the Trust Deed. The applicants' allegation that PNBST is acting in breach of its Trust Deed could be addressed through the courts.

31. Further, the applicants have not supplied the Tribunal with any evidence of wider support for their application from the groups they claim to represent.

32. The applicants' failure to reply to Crown submissions and evidence as directed also calls into question whether they are in a position to proceed urgently to a hearing.

Decision

33. For the reasons stated above, the application for urgency is dismissed.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 2572, the Omarukaikuru (Shelly Bay) Claim.

DATED at Wellington this 1st day of February 2017

Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL