**IN THE ENVIRONMENT COURT**
**AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA**
**KI TĀMAKI MAKAURAU**

**Decision [2024] NZEnvC 355**

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| IN THE MATTER OF | an appeal under s 120 of the Resource Management Act 1991 |
| BETWEEN | ALMA AND PETER COOPER, AMY AND GREG CRAMOND, NIKKI HARRIS, SUSAN HODKINSON, NATASHA AND JOHN LEE, JONATHAN AND PATRICIA MCKINNEY<br><br>(ENV-2022-AKL-142)<br><br>Appellants |
| AND | KAIPARA DISTRICT COUNCIL<br><br>Respondent |
| AND | VERMONT STREET PARTNERS LIMITED<br><br>Applicant |
| AND | MANGAWHAI DEVELOPMENTS LIMITED<br><br>Section 274 party |

Court: Environment Judge S M Tepania

Hearing: On the papers
Last case event: 23 August 2024

Counsel: B Carruthers KC for the Appellants and section 274 party
W Bangma for the Respondent
S Berry and C Timbs for the Applicant

Date of Decision: 23 December 2024

Date of Issue: 23 December 2024

Cooper v Kaipara District Council

## DECISION OF THE ENVIRONMENT COURT AS TO COSTS

A: Under s 285 of the Resource Management Act, I make the following awards of costs:

(a) I award Kaipara District Council $54,590 (being 66% of its actual costs incurred) against the Appellants.

(b) I award the Applicant $78,267.66 (being 66% of its actual expert witness costs incurred of $118,587.37[1]) against the Appellants and MDL jointly and severally.

(c) I also award the Applicant $161,761.36 (being 66% of half of its actual legal costs incurred of $490,185.94[2]) against the Appellants and MDL jointly and severally.

B: The awards are enforceable in the District Court in accordance with s 286 of the RMA.

## REASONS

### Introduction

[1] This costs decision follows the Court's decision on an appeal against a decision of the Kaipara District Council (**Council**) granting consent to Vermont Street Partners Ltd (**Applicant**) to subdivide and create 67 rural residential allotments and a balance lot at 183 Devich Road, Mangawhai, being legally described as Lot 1 DP 525736 and Lot 2 DP 330158 contained in Record of Title 842223.

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1 As per Appendix 2 - Summary Table of All Expert Costs Incurred and Supporting Invoices attached to the Applicant's costs application dated 2 August 2024.

2 As per Appendix 1 Summary – Costs Application Table attached to the Applicant's costs application dated 2 August 2024.

[2] By interim decision dated 14 June 2024,[3] the Court advised that consent is granted, subject largely to the revised conditions as proposed by the Applicant. Detailed reasons for the decision were to follow.

[3] By decision dated 21 June 2024,[4] the Court concluded:

(a) the proposal generally accords with the relevant objectives and policies of the higher order planning documents, the RPS, regional plans and Kaipara District Plan (**KDP**);

(b) the proposal will result in positive benefits, including in terms of ecological and landscape enhancement;

(c) there is no provision in the KDP to support a requirement that the Applicant provide additional community facilities and the *Augier* condition offered by the Applicant to provide such facilities (to the value of $250,000 including GST), is not necessary for the grant of consent;

(d) the grant of consent is appropriate, based on the Court's assessment of the effects of the proposal under s 104(1)(a) and (ab) of the RMA and the proposal's consistency with the relevant statutory planning documents under s 104(1)(b);

(e) the grant of consent will promote the sustainable management purpose of the RMA.

[4] The Court issued a decision approving conditions on 21 November 2024.[5]

### *The stay decision*

[5] Mangawhai Developments Ltd (**MDL**), a s 274 party, applied for a stay of the appeal pending the High Court's substantive determination of the proceeding in CIV-2022-404-1890, *Mangawhai Developments Ltd v Lake View Estate Residents' Society Inc*. The

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3 *Cooper v Kaipara District Council* [2024] NZEnvC 139.

4 *Cooper v Kaipara District Council* [2024] NZEnvC 143 (**Decision**).

5 *Cooper v Kaipara District Council* [2024] NZEnvC 295.

High Court proceeding sought declarations, including that MDL remained the "Controlling Member" under the Lake View Estate Residents' Society's constitution. MDL submitted that it, as the Controlling Member, had a significant influence on whether the Applicant's development may proceed (as the Controlling Member may undo previous agreements and decisions that the Lake View Estate Residents' Society (**Society**) has made that have allowed the development to progress to date and block further steps being taken by the Society to enable any approved development to proceed). The Court declined the stay application, finding that a stay would result in delay which may reasonably be expected to result in prejudice to the Applicant. Potential prejudice to MDL or the Appellants did not provide a particularly strong basis for granting a stay. Delay to the proceedings would not be in the interests of justice.[6]

[6] The High Court issued a decision on 28 June 2023, finding that MDL lost its Controlling Member status of the Society under its constitution when MDL sold the land that is now the subject of this appeal.[7] On 26 July 2024, the Court of Appeal issued its judgment dismissing MDL's appeal against the High Court decision.[8]

## Applications

### *The Applicant*

[7] The Applicant has applied for costs and says that defence of its successful resource consent application via a *de novo* hearing in the Environment Court has come at significant financial cost.[9] Costs are sought from:[10]

(a) MDL, in reliance on the stay decision, in the sum of $45,858.17 (which represents 100 per cent, or indemnity, costs);

(b) the Appellants and MDL (jointly and severally), in reliance on the substantive

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6 *Cooper v Kaipara District Council* [2023] NZEnvC 121.
7 *Mangawhai Developments Ltd v Lake View Estate Residents Soc Inc* [2023] NZHC 1628.
8 *Mangawhai Developments Ltd v Lake View Estate Residents Soc Inc* [2024] NZCA 342.
9 Applicant application for costs dated 2 August 2024 at [1.4].
10 Ibid, at [1.6], [2.1], [6.3] and [7.13]. These amounts include GST.

decision, in the sum of $613,773.31[11] (again, indemnity costs).

[8] The Applicant submits it is just in the present circumstances to make an award of costs against MDL, on the basis:[12]

(a) MDL, as a s 274 party, sought to stay appeal proceedings that had been afoot for nearly a year, when the appeal proceedings were significantly advanced;

(b) the stay was opposed by the Council and the Applicant, with the Appellants taking no formal position;

(c) MDL joined the proceedings, and then lodged the High Court declarations (the proceedings relevant to the stay application) but did not file a stay application until some seven months later, and despite the Court having advised that a formal application would be required, and indicating it was unclear how control of the owners committee would prevent the grant of consent;

(d) the prejudice MDL asserted would be visited on various third parties if the stay was not granted was not supported by MDL's evidence, and MDL failed to acknowledge that a stay would prejudice the Applicant.

[9] The Applicant characterises the attempt to stay the appeal as an unmeritorious delaying tactic.[13] It submits that MDL's arguments were advanced without substance, its position was misconceived, inconsistent with the relevant legal principles and unsupported by evidence.[14] But for the stay application, no costs would have been incurred, as the stay application bore no relevance to the substantive proceeding.[15]

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11 We record that our review of the appendices attached to the application setting out the separate legal fees and expert costs incurred amounted to $608,773.31.
12 Ibid, at [6.1].
13 Applicant application for costs dated 2 August 2024 at [6.2].
14 Ibid, at [6.4].
15 Ibid, at [6.5].

[10] With respect to the substantive proceedings, the Applicant says it is the successful "captured party"[16] that has been forced to incur significant cost to defend its resource consent.[17] The Applicant submits that:[18]

(a) the Appellants and MDL advanced positions and/or their witnesses gave evidence that was inconsistent with established legal principles;

(b) their sole expert witness gave evidence that fell short of the objective independent analysis that an independent expert witness is expected to provide, noting an apparent reluctance to properly utilise or accept uncontested expert witness evidence, in forming her expert planning position;

(c) the Appellants and MDL advanced arguments that were contrary to the Applicant's expert evidence and did not call expert evidence in support of the position it advanced.

[11] The Applicant criticised the Appellants and MDL for not offering amended conditions: at best they could be described as providing comments on the conditions. The Applicant says they had multiple opportunities to do so.[19]

[12] The Applicant also submitted that the Appellants and MDL required Mr Sundstrum to appear and give evidence that was not material to the decision and the Court's findings.[20]

[13] The Appellants maintained a position that consent be declined, at the hearing and closing. It is submitted that that position had no legal or evidential basis whatsoever.[21] The Applicant also submits that the changes to the original consent conditions via the appeal process were minor, and the only substantive changes achieved were insertion of cul-de-sacs at road ends and additional access ways,

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16 Ibid, at [7.2], relying on *The Trustees of the Spruce Grove Trust v Queenstown Lakes District Council* [2024] NZEnvC 140.

17 Applicant application for costs dated 2 August 2024 at [7.2].

18 Ibid, at [7.4].

19 Applicant application for costs dated 2 August 2024 at [7.5].

20 Ibid, at [7.5].

21 Ibid, at [7.5].

including to the esplanade strip.[22] The Applicant says the substantive changes were already established by way of settlement discussions well in advance of the hearing and prior to evidence exchange.[23]

[14] The decision outcome is not materially different to the settlement offer initially put forward by the Applicant on 13 December 2022.[24]

[15] The Applicant also says the Appellants and MDL:[25]

(a) took a significant amount of time to provide details of the relief they sought;

(b) did not work constructively to narrow the outstanding issues on appeal;

(c) only narrowed their position and abandoned a key issue (reduction in the number of lots) shortly before the hearing;

(d) continued to maintain that consent should be declined;

(e) sought to prevent or delay proceedings.

[16] The Applicant submitted that the Appellants and MDL advanced arguments without substance including that:[26]

(a) the Appellants/ MDL were put on notice as early as 26 July 2022 that there were evidential issues with the position they sought to advance;

(b) they called no expert evidence, apart from a single planning witness, instead relying on lay witnesses giving subjective amenity positions;

(c) they sought to advocate positions that were not supported by their own expert evidence.

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22 Ibid, at [7.6].
23 Ibid, at [7.7].
24 Ibid, at [7.7].
25 Applicant application for costs dated 2 August 2024, at [7.19]- [7.22].
26 Ibid, at [7.22].

[17] The Applicant considers that the Appellants and MDL failed to explore reasonably available options for settlement, submitting:[27]

(a) the Applicant made several concessions to address the Appellants' and MDL's concerns, including offering a $250,000 payment to the Society for communal facilities;

(b) the Applicant's proposals were put forward on 13 December 2022, and were reiterated in subsequent correspondence;

(c) no material changes were made by the decision, when compared to the settlement process;

(d) the Appellants and MDL's position that the Applicant should gift Lot 14 and pay a financial contribution of around $3,000,000, shows the likely reasons why settlement was never reached.

[18] The Applicant contends that the Appellants and MDL took unmeritorious points and failed. The Applicant submits that the Court has previously held that where the plan provisions and factual findings create an entirely predictable or substantial headwind for an appellant, the arguments may be considered to be unmeritorious and have been advanced without substance.[28] In reliance on that, the Applicant submits that its case was entirely predictable from the outset, and the Appellants and MDL took points unsupported by relevant cogent evidence.[29] The Appellants and MDL's failure to appropriately confine their appeal issues at a very early stage in these proceedings meant that the Applicant was put to the cost of engaging and calling various expert witnesses to prove facts and adduce expert evidence that should have been admitted well in advance of the hearing and prior to evidence exchange.[30]

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27 Ibid, at [7.25]- [7.32].

28 Applicant application for costs dated 2 August 2024 at [7.34], *Regina Properties Ltd v New Plymouth District Council* [2023] NZEnvC 185 at [28].

29 Applicant application for costs dated 2 August 2024 at [7.35].

30 Ibid, at [7.39].

[19] The Applicant also submits that there were abuses of process:[31]

(a) the Appellants advised on 8 February 2023 that a landscape expert witness would be called, which was misleading; and

(b) the Appellants and MDL's witnesses sought to use the evidential process to cast unsubstantiated personal aspersions denigrating Mr Sundstrum and his conduct.

[20] The Applicant submits that the Appellants and MDL have sought to use every available avenue to prolong these proceedings, as evidenced by their requests for procedural delays throughout the case management process.[32] The Applicant maintains that the Appellants and MDL prosecuted the appeal in a deliberate and strategic manner, designed to put the Applicant to the maximum inconvenience and cost in the hope that its development would fail.[33] The proceedings were taken to advance various individuals' private ideas, interests and desires about what the further development of Lake View Estate should look like.[34]

[21] As to quantum, the Applicant says the costs sought exclude mediation costs, costs relating to the strike out application prepared against MDL (which was not filed) and legal attendances unrelated to the appeal.[35] The Applicant also lists costs excluded from the claim for expert witness costs.[36] The Applicant submits that given the nature of the appeal, the Appellants' and MDL's conduct and the case the Applicant was required to run at hearing, the costs incurred were eminently reasonable.[37] It also submits that it is reasonable to award costs incurred in making the costs application.[38]

***The Council***

[22] The Council seeks an award of costs against the Appellants of $54,590 (GST

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31 Ibid, at [7.41].
32 Applicant application for costs dated 2 August 2024, at [7.7].
33 Ibid, at [7.8].
34 Ibid, at [7.23].
35 Ibid, at [7.44].
36 Ibid, at [7.46].
37 Ibid, at [7.47]- [7.48].
38 Ibid, at [7.49].

inclusive) being 66 per cent of the Council's actual costs incurred.[39] Council has excluded costs relating to mediation and costs opposing the stay application by MDL.[40]

[23] In the Council's submission, such an award would be reasonable because:[41]

(a) the appeal was unsuccessful and the Court confirmed the consent on terms very similar to the Council's decision;

(b) the Appellants advanced arguments that were without substance/were unmeritorious and failed;

(c) the Appellants failed to explore reasonably available options for settlement;

(d) the way in which the Appellants conducted their case unnecessarily lengthened the hearing;

(e) the Council's costs were reasonably and properly incurred and the Council conducted a focused case with legal counsel and an independent expert planning witness.

[24] The Council noted that the Appellants advised on 9 June 2023 that they were no longer pursuing a reduction in the number of lots and would no longer be calling a landscape architect. However, this indication was only given after the Applicant and the Council had already filed their evidence-in-chief.[42]

[25] After expert conferencing on 13 July 2023, a planning joint witness statement was provided to the Court. In that statement:[43]

(a) all planners agreed there was no ability to impose conditions requiring the Applicant to fund or upgrade existing community facilities or provide new facilities;

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39 Council application for costs dated 2 August 2024 at [1.2].
40 Ibid, at [1.2].
41 Ibid, at [1.3].
42 Council application for costs dated 2 August 2024 at [2.6].
43 Ibid, at [2.8].

(b) all planners agreed the esplanade strip should be planted, except for a 10 m wide strip to accommodate access;

(c) the Applicant's and Council's planners noted that effects on the internal roading network were addressed by the conditions requiring pre- and post-condition reports.[44]

[26] The Council submits that throughout the hearing, the Appellants continued to maintain that unless additional land or communal facilities were provided, issues in relation to the esplanade strip were addressed, a bond was required to ensure damage to the Society's roads was repaired, and a new dual carriageway security gate was provided, then consent should be declined.[45] This required the Applicant, and to a lesser extent, the Council, to present comprehensive evidence in support of all aspects so that the Court could make a decision on a de novo basis.[46]

[27] The Council acknowledges that the Applicant made changes that the Appellants considered to be improvements. However, the Council considers those changes would best be described as "refinements" to the proposal and they were fairly minor in nature.[47]

[28] The Council maintains that to reduce costs, and not unnecessarily lengthen the hearing, the Council adopted the expert evidence called on behalf of the Applicant.[48]

[29] In the Council's submission, the Appellants advanced a case that the Court found was without substance.[49] The Appellants called a number of residents of Lake View Estate and planning evidence, but did not otherwise call specialist expert evidence.[50] There was no lawful basis for some of the changes sought.[51]

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44 Council notes that the Appellants' planner noted the conditions did not require the reports to be provided to the residents and considered that a bond should be required.

45 Council application for costs dated 2 August 2024 at [2.11].

46 Ibid, at [5.13] and [5.15].

47 Council memorandum in reply dated 23 August 2024 at [3.3].

48 Council application for costs dated 2 August 2024 at [3.1].

49 Ibid, at [5.3] and [5.5].

50 Ibid, at [5.4].

51 Ibid, at [5.6].

[30] The Council further submits that the planning JWS showed a high degree of alignment between the planning witnesses on many issues. This, and the fact that the Appellants were not calling any other expert witnesses, meant it would have been appropriate to explore settlement at that point.[52]

[31] The Council also pointed out that the Appellants' planner had clearly accepted in the planning JWS that there was no ability to require additional communal facilities to be required under the operative District Plan. The Appellants' decision to dedicate hearing time to this also lengthened the hearing unnecessarily.[53]

***Appellants' response***

[32] The Appellants and MDL submit:[54]

(a) it is not just to compensate the Applicant, and its costs sought are not reasonable;

(b) the Applicant's costs application is designed to penalise the Appellants and MDL for objecting to the proposal;

(c) there is no justification to award costs in relation to the preparation of the costs application;

(d) none of the factors in the Practice Note clause 10.7(j) are present;

(e) it would be fair and just for the Applicant's costs to lie where they fall;

(f) an award of no more than $20,000 to the Council would be fair and just in the circumstances (an award of 25 per cent).

[33] The Appellants and MDL also submit that any award of costs must be excluding GST.[55]

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52 Ibid, at [5.10].
53 Council application for costs dated 2 August 2024 at [5.18].
54 Appellants'/ MDL response dated 16 August 2024 at [2].
55 Ibid, at [2].

[34] They contend that the Applicant has maintained a position throughout that the existing property owners in Lake View Estate have no right to object, and the application should be processed non-notified. The Appellants and MDL characterise the Applicant's actions as amounting to "silencing" them.[56]

[35] The Appellants and MDL also dispute the Applicant's suggestion that they have failed to appropriately engage in the process. The Appellants and MDL submit there is no substance to this narrative.[57]

[36] With respect to the allegations concerning the attendance of Mr Sundstrum (the Applicant's director), the Appellants and MDL say he did not appear at the Council hearing, nor did he attend the Court-assisted mediation.[58] TATL and MDL submit that Mr Sundstrum has at no time engaged or consulted or met with the Appellants, resorting instead solely to lengthy and overly aggressive legal correspondence.[59]

[37] They submit that the Appellants and MDL came prepared to mediation and set out very clearly the changes being sought to the proposal. They also note there is no obligation on a party to provide "substantive" details on what is required to resolve a matter in advance of mediation.[60] The Appellants and MDL submit that mediation resulted in better connections between and through the development, and to the esplanade reserve, and better protection of wetland features.[61] The Appellants and MDL submitted that the changes were a direct result of the substantive requests put forward by the Appellants and MDL at mediation. They were not "concessions" as the Applicant suggests.[62]

[38] The Appellants and MDL dispute the Applicant's version of events surrounding efforts to settle. In particular, they submit that the Applicant has fundamentally misunderstood the position of the Appellant and MDL where it suggests their

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56 Ibid, at [9].
57 Appellants'/ MDL response dated 16 August 2024 at [10].
58 Ibid, at [11].
59 Ibid, at [11].
60 Ibid, at [13].
61 Ibid, at [14].
62 Ibid, at [15].

position was that the Applicant should be gifting Lot 14 and be providing a financial contribution of circa $3 million dollars.[63] As well, TATL and MDL submit that there were no repeated attempts to settle costs. They say that demands were sent, and unreasonable timeframes were given, but no attempts to settle were made.[64]

[39] The Appellants and MDL submit that the Applicant was aware from 22 February 2023 that the Appellants and MDL were not seeking to reduce the number of rural-residential lots. However, on the understanding that the Applicant had elected to cease settlement discussions, the MDL stay application was promptly prepared and filed on 17 March 2023. The Appellants and MDL submit that the sole purpose of the stay proceedings was to minimise the costs incurred by all parties.[65] When the outcome of that was known in June 2023, the parties agreed a timetable and the matter was heard within 3 months.[66]

[40] The Appellants and MDL submit that the hearing was run efficiently, with concise legal submissions and focused cross-examination. They submit that there is no way that the hearing can be portrayed as prolonged or unnecessarily lengthy.[67]

[41] While the Appellants and MDL accept that they were unsuccessful in relation to some amendments sought, they submit that there can be no doubt that the proposal was further improved through the evidence exchange and hearing process. They refer to improved legal and formed access, planting and changes to conditions, including relating to the esplanade strip.[68] Being unsuccessful does not equate to arguments "without substance" or taking "unmeritorious points".[69]

[42] In addition, the Appellants and MDL submit there was an evidential basis to every argument advanced, and that the case for the Appellants and MDL was consistent with established legal principles.[70] The Appellants and MDL submit they

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63 Ibid, at [15(k)] (page 9).
64 Ibid, at [15(q)] (page 11).
65 Appellants/ MDL response dated 16 August 2024 at [8]-[9] (page 6).
66 Ibid, at [10] (page 6).
67 Ibid, at [12] (page 6).
68 Ibid, at [13] (pages 6-7).
69 Ibid, at [14] (page 7).
70 Ibid, at [15] (page 7).

were clear and concise as to how their concerns could be addressed – there was no need to prepare condition wording or incur the expense of preparing an alternate scheme plan when the concept was not agreed.[71] There was also no need to engage or call expert evidence. The Appellants and MDL submit that the matters taken to hearing did not require expert evidence other than the considered and conscientious evidence of their planning witness.[72]

[43] The Appellants and MDL also submit there has been no abuse of process. Counsel says she did not mislead the court (as suggested by the Applicant) at the judicial conference on 9 February 2023, when it was suggested an expert landscape witness might be called. Counsel submits that it is common practice that counsel would indicate a potential upper limit of witnesses, with the Court noting that witnesses may reduce over time.[73]

### ***Reply submissions***

[44] The Council lodged brief submissions in reply to the Appellants and MDL's memorandum. The Council continues to submit that changes made by the Applicant would best be described as "refinements" to the proposal – they were fairly minor in nature.[74] It submits that the proposal granted was fundamentally the same as was granted by the Council.[75] It maintains its submission that the award it seeks is reasonable, and in line with principles identified in the Practice Note and case law.[76]

[45] The Applicant submits that the theme running through the Appellants and MDL's memorandum was that it was for the Applicant to "make the running" in relation to addressing the issues raised by the appeal and it should have proposed measures that would resolve it. Eventually, the Applicant submits, it was forced to proceed to hearing.[77]

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71 Ibid, at [15] (page 8).
72 Ibid, at [15] (page 9).
73 Appellants/ MDL response dated 16 August 2024 at [15] (page 10).
74 Council reply dated 23 August 2024 at [3.3].
75 Ibid, at [3.4].
76 Ibid, at [5.1].
77 Applicant reply dated 23 August 2024 at [1.8].

[46] The Applicant submits that various "facts" in the costs response appear largely as bare assertions, absent any substantive justification.[78] For example, it disputes that the Applicant wanted the application not to be notified – it was eventually notified at the Applicant's request.[79] The Applicant again submitted that it has continually engaged with the Appellants and MDL to attempt to clarify and resolve matters. It submits that this began immediately following the filing of the appeal and continued through the hearing.[80] It disputes that the Applicant was aware from 22 February 2023 that the Appellants and MDL were not seeking to reduce the number of lots – that position was conditional.[81] The Applicant also reiterated its submission that it was not until 9 June 2023 that the Appellants and MDL confirmed they were not calling evidence from a landscape expert (because a reduction in number of lots was not being pursued).[82]

[47] The Applicant also submits that MDL's motivations are a relevant consideration, and it has concerns about the bona fides of MDL as a s 274 party, noting that it did not have any involvement at the Council hearing and submitting that its involvement in the substantive proceeding appeared to be about wresting control of Lake View Estate and any development from the Applicant.[83]

**Costs in the Environment Court**

[48] Under s 285 of the RMA, the Environment Court may order any party to pay any other party the reasonable costs and expenses incurred by the other party. Section 285 confers a broad discretion. There is no scale of costs under the RMA. The Environment Court Practice Note 2023 sets out guidelines in relation to costs, however, the Practice Note does not create an inflexible rule or practice.[84]

[49] There is no general practice in the Environment Court that costs follow the

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78 Ibid, at [2.6].
79 Ibid, at [2.7(a)].
80 Applicant reply dated 23 August 2024 at [2.7(d)].
81 Ibid, at [2.7(i)]-[2.7(k)].
82 Ibid, at [2.7(s)].
83 Ibid, at [2.10]. Applicant application for costs dated 2 August 2024 at [6.2].
84 *Canterbury Regional Council v Waimakariri District Council* [2004] NZRMA 289 (HC) at [21].

event.[85] The Environment Court, unlike the High Court, does not have a general practice that a successful party is entitled to costs unless there are special circumstances in which it would be fairer to depart from that rule.[86] The purpose of a costs award is not to penalise an unsuccessful party but to compensate a successful party where that is just.[87]

[50] When considering an application for costs, the Court will make two assessments: first whether it is just in the circumstances to make an award of costs; and second, having determined that an award is appropriate, deciding the quantum of costs to be awarded.[88]

[51] In determining the quantum of costs awards the Environment Court has declined to set a scale of costs. Nonetheless, experience has shown that many of the Court's awards have tended to fall within four bands, as follows:[89]

(a) no costs, which is normally the position in relation to plan appeals under Schedule 1 to the Act or in cases where some aspect of the public interest counts against any award being made;

(b) standard costs, which generally fall between 25 — 33 per cent of the costs actually and reasonably incurred by a successful party (sometimes referred to as the 'comfort zone');

(c) higher than standard costs, where certain aggravating factors are present as discussed below; and

(d) indemnity costs, which are awarded rarely and in exceptional circumstances.

[52] Section 10.7(j) of the Court's Practice Note 2023 lists six potential aggravating factors that are given weight in the assessment of whether to award costs and what

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85 *Culpan v Vose* PT Auckland, A064/93, 17 June 1993.
86 Ibid.
87 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* [1996] NZRMA 385 (PT).
88 *Re Queenstown Airport Corporation Ltd* [2019] NZEnvC 37.
89 *Evans v Marlborough District Council* [2024] NZEnvC 160.

the quantum should be if they are present in a case:[90]

i. whether the arguments advanced by a party were without substance;

ii. whether a party has not met procedural requirements or directions;

iii. whether a party has conducted its case in a way that unnecessarily lengthened the case management process or the hearing;

iv. whether a party has failed to explore reasonably available options for settlement;

v. whether a party has taken a technical or unmeritorious point and failed;

vi. whether any party has been required to prove facts which, in the Court's opinion having heard the evidence, should have been admitted by other parties.

[53] The Applicant also described these as "aggravating" factors, relying on recent caselaw.[91]

[54] The amounts claimed include GST. The Appellants and MDL submit that any amounts awarded should be excluding GST, but do not include any case law in support of that proposition.[92] The Council refers to *Adcock v Marlborough District Council* and submits that the purpose of an award of costs is to make a reasonable contribution towards expenses that were actually and reasonably incurred.[93] That can include GST. However, if a party is GST registered, and able to recover GST paid on invoices to another party, then the GST will not actually be incurred and should be excluded. In this case, the Council says any award made to it should include GST, as it considers it will be liable to pay GST on any award of costs it receives.[94]

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90 These factors are derived from *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).

91 Applicant reply dated 23 August 2024 at [2.3]- [2.5]; *McDonnell v Auckland Council* [2024] NZEnvC 151 at [10]; *Evans v Marlborough District Council* [2024] NZEnvC 160 at [17]; *Barbican Securities Ltd v Auckland Council* [2024] NZEnvC 164 at [11] – [12]; *Chen v New Zealand Transport Agency – Waka Kotahi* [2023] NZEnvC 23 at [8].

92 Appellants'/ MDL response dated 16 August 2024 at [2(h)].

93 Council reply dated 23 August 2024 at [2.3] and *Adcock v Marlborough District Council* [2010] NZEnvC 35.

94 Council reply dated 23 August 2024 at [2.5].

***Indemnity costs***

[55] The Applicant seeks indemnity costs. It acknowledges that indemnity costs are awarded rarely and only in exceptional circumstances.[95] It is submitted such an award is justified here. The Applicant refers to *Currie v Palmerston North City Council*[96] and *The Trustees of the Spruce Grove Trust v Queenstown Lakes District Council*,[97] where "significant costs awards" were made against unsuccessful appellants because:[98]

(a) their questioning of witnesses did not advance their case;[99]

(b) the evidence called by them did not advance their case;[100]

(c) they failed to establish a factual basis for their contentions;[101]

(d) their relief was unrealistic;[102]

(e) they sought to advance their commercial interests rather than properly respect the design intentions of the relevant planning instrument;[103]

(f) they sought to advance arguments that were entirely without merit and sought relief that was not supported by properly informed expert evaluation;[104]

(g) they failed to explore reasonably available opportunities for settlement, including where they were on notice as to fundamental flaws in their case;[105]

(h) where the party seeking costs had to participate to protect its interest in the face of the appellants' endeavour.[106]

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95 Applicant application for costs dated 2 August 2024 at [7.14].
96 *Currie v Palmerston North City Council* [2023] NZEnvC 216 (*Currie*).
97 *The Trustees of the Spruce Grove Trust v Queenstown Lakes District Council* [2024] NZEnvC 140 (*Spruce Grove Trust*).
98 Applicant application for costs dated 2 August 2024 at [5.5]- [5.6].
99 *Currie* at [34].
100 Ibid, at [36].
101 Ibid, at [40].
102 *Spruce Grove Trust* at [36].
103 Ibid, at [39].
104 Ibid, at [40].
105 Ibid, at [42].
106 Ibid, at [52(a)].

[56] Counsel also referred to *Evans v ADL Properties Ltd*, in which the Court said that indemnity costs "are seldom awarded and usually only when there has been flagrant disregard for processes or particularly reprehensible behaviour or other such exceptional circumstances".[107] That case involved an application for an enforcement order made by Mr Evans against ADL Properties Ltd (ADL), seeking compliance with a condition of a resource consent ADL held. The Court refused the application for enforcement orders and said that there was no adverse effects justification for the order sought. The legal costs awarded to ADL were reduced by 25 per cent.[108] The Court otherwise ordered indemnity costs. The Court said that Mr Evans "chose to act when the maximum damage could be done to [ADL] if the orders were made" and said that "[t]he conduct shown in this proceeding is at best adversarial and at worst malicious and has resulted in unnecessary costs".[109]

[57] *Jackson v Phillips*[110] was another case concerning an enforcement order application which the Court had declined. The Court considered that the applicant's case had little or no merit. When the view of the Phillips' engineer was considered, the weakness in the case would have been obvious and the desirability of reaching a workable solution would have been highly apparent.[111] In the costs decision, the Court said:[112]

> … given the state of the evidence as reviewed in the substantive decision, and the refusal of the Applicant to accept what was a generous settlement offer made by Mr and Mrs Phillips before the hearing, this is a situation where they should not be out of pocket at all.

[58] The Court awarded indemnity costs in that case.

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107 *Evans v ADL Properties Ltd* [2017] NZEnvC 155 at [26].
108 Ibid, at [37].
109 *Evans v ADL Properties Ltd* [2017] NZEnvC 155 at [30].
110 *Jackson v Phillips* EnvC Wellington W 063/2008, 19 September 2008.
111 Ibid, at [6].
112 Ibid, at [7].

## Evaluation

### *Is an award of costs justified?*

[59] The Appellants and MDL were largely unsuccessful. I accept the Council's submission that any changes made to the proposal to meet their concerns were of a fairly minor nature. That, in and of itself, is not sufficient to found a costs award in the Environment Court. The Appellants were entitled to appeal the Council's decision on the subdivision consent. MDL was a party, and likewise entitled to exercise those rights. However, any party to Court proceedings must assist the Court by conducting itself in such a way as to aid in the timely and cost-effective resolution of proceedings.[113]

[60] The Appellants and MDL did not formally abandon a reduction of lots until 9 June 2023, which was after evidence had already been prepared and lodged. They did not supply a refined statement of issues confirming the changes they sought until 9 June 2023. They continued to submit that the consent should be declined throughout the hearing, and in closing submissions.[114] In conducting the case in this way, the Applicant and the Council were required to present a more comprehensive case in support of all aspects of the proposal than would have been required if the Appellants and MDL had narrowed their focus.

[61] While the Appellants and MDL called lay witnesses to give evidence as to effects on amenity, they brought only one expert witness, a planning witness. The Court preferred the Applicant's expert evidence that the effects on landscape, visual amenity and rural character would be minor and acceptable. The Court accepted Mr Hartstone's opinion that the Appellants' and MDL's expectations did not align with what was justified when the application was assessed against the relevant planning provisions.[115]

[62] I accept the Council's submission that the JWS signed by all three planning

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113 RMA, s 269.
114 Appellants'/ MDL closing submissions dated 10 October 2023 at [6].
115 Decision at [168].

experts indicated a relatively high degree of alignment between the planning witnesses on many issues.

[63] I also accept the Council's submission that the case advanced by the Appellants and MDL fell short of establishing that consent should be declined. Some key aspects of the Appellants' case were (at best) peripheral to the matters the Court had to decide. For example, the issue of damage that might be caused to private roads is a private civil matter in respect of which the Society has remedies under the Property Law Act 2007.[116] Any concerns regarding the adequacy of the gate are a private civil matter solely for the residents to address.[117]

[64] For these reasons, I consider an award of costs to the Applicant and the Council in respect of the substantive proceedings is appropriate.

[65] The Applicant also sought a separate award of costs against MDL in relation to the costs associated with the stay application. While the stay application was not successful, I do not consider that costs are warranted in relation to it, and I decline to make an award in that regard.

***Should indemnity costs be awarded?***

[66] While I consider that an award of costs is warranted in relation to the substantive proceeding, I do not consider that indemnity costs are justified in this case. I find that the enforcement order cases the Applicant refers to in support of its arguments are not comparable. I also do not think that the Applicant can characterise itself as a "captive party". The Appellants were entitled to exercise their right to appeal the Council's decision and the situation is not comparable to a defendant in an enforcement proceeding.

[67] The other cases the Applicant relied on are not cases in which total indemnity costs are awarded, although significant costs were awarded in some. I accept the submissions that indemnity costs are awarded only rarely and in exceptional cases.

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[116] Ibid, at [189].
[117] Ibid, at [199].

[68] In this case I do not consider that there are exceptional circumstances in the way the Appellant and MDL conducted their cases such that indemnity costs are warranted. I decline to make an award of indemnity costs on that basis.

### *Quantum*

[69] Having determined that costs are warranted, but not on an indemnity basis, the main issue for determination is the quantum of costs to be awarded and whether the amount of costs sought is reasonable.

[70] While it is not the function of the Court under s 285 to determine whether the costs incurred by a party are reasonable (that is a matter between the party and its advisors), the Court can determine what a reasonable sum on a party and party basis is, based on the circumstances of the case. That includes the Court being able to consider the costs incurred by a party, to ascertain whether any aspects should be discounted or adjusted.

[71] In my assessment $600,000 for the substantive case, involving a two-day hearing and the evidence of six witnesses seems high. I observe that almost $500,000 of the costs the Applicant incurred are legal costs.[118] I do acknowledge that the Applicant has also stated that it has excluded some costs.[119]

[72] In comparison the Council's total legal costs are $54,000 (for the substantive hearing and without mediation costs).[120] While the Council only had to brief one witness, a ten-fold difference in costs between the two parties seems high.

[73] I note that the exercise of the Court's discretion under s 285 does not require an empirical or mathematical formula; what is required is the award, if at all, of a figure which is fair and reasonable in all the circumstances.

[74] Given the circumstances of this case, I consider that costs are warranted at a

118 Applicant application for costs dated 2 August 2024 at [7.43].
119 Ibid, at [7.44].
120 Council application for costs dated 2 August 2024 at [3.2].

higher level than "comfort" level costs, however I am of the view that the amount awarded in relation to the Applicant's costs needs to be adjusted, to recognise that the costs sought are high and out of proportion when compared to the costs sought by the Council.

[75] I consider that in the circumstances the evidence of the Applicant's and Council's expert witnesses was substantively helpful and therefore an award of 66% of costs incurred in that respect is granted. I award the Applicant 66% of half of its actual legal costs incurred. The Council is awarded 66% of its total costs incurred.

### *GST*

[76] In *Global Metal Solutions Limited v Hamilton City Council*[121] the High Court determined that the Environment Court is entitled to consider actual costs by reference to a GST inclusive figure and stated as follows:

> [90] Generally, where scale costs are awarded, those costs are GST neutral. This is because scale costs are an objective representation of a reasonable contribution to costs recoverable and are set without reference to the actual costs incurred by the parties. However, awards of increased costs are sometimes determined by reference to actual costs incurred, including the GST component of those costs.
>
> [91] Had the award of costs represented indemnity costs, then the position may be different to avoid the potential for over-recovery assuming that costs recovered by HCC are not themselves subject to GST (about which no evidence was presented). Indemnity costs were not awarded, and I consider that the Court was entitled in its discretion to assess a proportion of the gross costs paid by HCC as a means of describing the quantum awarded.

[77] I am satisfied that GST can be taken into account in this case as the Court is not awarding indemnity costs and there is no risk of "over-recovery" occurring.

### Outcome

[78] Under s 285 of the Resource Management Act, I make the following awards of costs:

(a) I award Kaipara District Council $54,590 (being 66% of its actual costs

[121] [2024] NZHC 790.

incurred) against the Appellants.

(b) I award the Applicant $78,267.66 (being 66% of its actual expert witness costs incurred of $118,587.37[122]) against the Appellants and MDL jointly and severally.

(c) I also award the Applicant $161,761.36 (being 66% of half of its actual legal costs incurred of $490,185.94[123]) against the Appellants and MDL jointly and severally.

[79] The awards are enforceable in the District Court in accordance with s 286 of the RMA.

**S M Tepania**
**Environment Judge | Kaiwhakawā i te Kōti Taiao**

122 As per Appendix 2 - Summary Table of All Expert Costs Incurred and Supporting Invoices attached to the Applicant's costs application dated 2 August 2024.

123 As per Appendix 1 Summary – Costs Application Table attached to the Applicant's costs application dated 2 August 2024.