

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2022-485-263  
[2022] NZHC 1338**

IN THE MATTER of an application for judicial review under  
the Judicial Review Procedure Act 2016 and  
Part 30 of the High Court Rules 2016

BETWEEN N BHANA AND COMPANY LIMITED  
First Applicant

GAZLEY HOLDINGS LIMITED  
Second Applicant

RESENE PAINTS LIMITED  
Third Applicant

WELLINGTON AUTO GLASS LIMITED  
Fourth Applicant

D & T MOTORS LIMITED  
Fifth Applicant

JOHN DUDLEY MOTORS LIMITED  
Sixth Applicant

AND WELLINGTON CITY COUNCIL  
Respondent

Hearing: 2 June 2022

Counsel: G M Richards and O L Wilkinson for Applicants  
N M H Whittington for Respondent

Judgment 8 June 2022

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**JUDGMENT OF SIMON FRANCE J**

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## **Introduction**

[1] The Wellington City Council is constructing a cycleway, and improving bus lanes, on what is called the Newtown to City transitional cycleway.<sup>1</sup> A necessary part of the implementation is the removal of existing public carparking along the route. The applicants are businesses along the route who are affected, primarily by the removal of carparks, but also by other traffic adjustments. For example, along the Cambridge Terrace/Kent Terrace aspect of the route, turning areas that allow a car to go from one to the other will be closed.

[2] The applicants are challenging the Council's decision-making process in three primary aspects:

- (a) the power the Council is using is submitted not to be available for this sort of project;
- (b) if it is available, the Council's decision-making process is unclear and flawed, and does not meet the requirements of proper decision-making. It is submitted it is unclear who made the decision, what considerations were taken into account, and whether alternative routes were considered; and
- (c) it is submitted the consultation process failed to meet the standards required by the Local Government Act 2002. Within this challenge is an issue concerning what matters require consultation. The Council has seen it as a relatively narrow obligation given the cycleway is implementing policy that has itself been the subject of consultation.

[3] The cycleway is under construction. The first applicant is already impacted. The other applicants will shortly be so. The applicants seek interim orders preventing further implementation pending the substantive hearing on 12 September 2022.

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<sup>1</sup> Cycleway is used also to cover bus improvements being done at the same time.

[4] On Friday last week I issued a results judgment directing a halt to work pending the hearing. These are my reasons. In general, while all three proposed challenges inform the decision, I consider there is sufficient issue concerning whether the council is authorised to do what it is doing by the power it relies on such as to make a temporary halt appropriate. The impact on the applicants of further implementation will be immediate and significant. I would not have made interim orders solely because of the consultation issue.

### **Brief relevant facts**

[5] The cycleway<sup>2</sup> traces back to Let's Get Wellington Moving, a joint initiative of the council, the Greater Wellington Regional Council and Waka Kotahi NZ Transport Agency. It is a plan to move more people using fewer vehicles.

[6] In response to the present challenge the Council identified two key documents – the Wellington Parking Policy 2020,<sup>3</sup> and Paneke Pōneke (the bike network plan). It is of some relevance to these proceedings that the latter was put out for consultation in late November 2021, and adopted by the Council only on 10 March 2022.

[7] In May 2021 Council officers were asked to review the 2015 Cycleways Master Plan, and develop a programme “delivering low cost cycleways” in years one to three of the Council’s Long-Term Plan,<sup>4</sup> starting with the Southern Connection. The Newtown to City cycleway is part of the Southern Connection. This was done and incorporated into Paneke Pōneke which was approved by the Council on 23 September 2021 for public consultation. This was four months after the directive concerning the Southern Connection had been issued. The document was not released for consultation until late November and, as noted, adopted in March 2022.

[8] Concerning the power being used to install the cycleway, the Council witness, Ms Claire Pascoe, refers to a Waka Kotahi initiative of 2020 called “Innovating Streets”. It was:<sup>5</sup>

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<sup>2</sup> Cycleway is used also to cover bus improvements being done at the same time.

<sup>3</sup> Me Hiki Ki Pōneke | Wellington City Council *The Parking Policy 2020* (August 2020).

<sup>4</sup> Me Hiki Ki Pōneke | Wellington City Council *Tō mātou mahere ngahuru tau: Our 10-year Plan* (30 June 2020).

<sup>5</sup> Waka Kotahi NZ Transport Agency “Innovating Streets” (7 September 2021) [www.nzta.govt.nz](http://www.nzta.govt.nz).

designed to make it quicker and easier for councils to trial changes aimed at making streets safer, providing more travel choice ...

Wellington City Council received funding to trial a cycleway in Brooklyn using this initiative. The method uses powers, to be set out more fully, that allow for “Temporary Prohibition of Traffic”. Of the method, the witness observes:

... This focused on giving the community an opportunity to experience a new road layout, by delivering temporary changes using a traffic management plan and adaptable, low-cost materials, and then giving the public an opportunity to provide feedback.

4.4 This process allowed the Council to deliver bike network improvements within 7 months, as opposed to the traditional planning and engagement approach which takes 2-4 years for each section of bike network improvement.

[9] The new method, therefore, represents the discovery of a power that effects a dramatic change in implementation times. The alternative is a traffic resolution made under the Traffic and Parking Bylaw 2021. While on its face that process only requires a consultation period “of at least 14 days”, Mr Whittington confirmed the period is context specific. Ms Pascoe’s evidence just cited highlights this alternative process can take much longer.

[10] The work on the cycleway commenced in March 2022, presumably shortly after Paneke Pōneke was adopted. It has progressed since, moving from the start in Newtown towards the city. Work scheduled to begin on 29 May was halted pending this interim orders hearing.

[11] The plan for Adelaide Road and Cambridge Terrace can only be implemented by removing carparking. For Adelaide Road, other than some parks outside the after-hours health centre, all on-street parking goes. On Cambridge Terrace, 43 per cent of daytime parking and 35 per cent of night-time parking go. Cambridge and Kent Terraces are also altered in terms of traffic flow one to the other.

### **Effect of delay on the Council until substantive hearing**

[12] The impacts identified by the Council of a delay until the September hearing are:

- (a) funding for staff;
- (b) a risk contractors will not be available when the work can commence;
- (c) delay to what is planned as a continual and rolling programme of installation; and
- (d) the potential for a lack of contractor confidence in the Council.

[13] The staff funding issue is not particularly clear. It is estimated there may be a loss to the project of \$32,000 per month. This figure assumes that of the 10 staff on the wider project, 25 per cent of their time is on this project and will be lost during the period of the interim orders. It is not explained why a pause would mean work on this project planning would stop, nor why the staff could not work on the wider project.

[14] As for the issues with contractors, the Court must on an interim orders application accept the evidence. However, it is speculative, and expressed to be so. Delay in the project is regrettable, but it is very early stages given Paneke Pōneke was only adopted in mid-March.

### **Impact on the applicants**

[15] Each of the applicants describes their present business model and the role the relevant roads and parking spaces play within that model. The Council evidence raises the question whether it is a sustainable model, or even sound to the extent to which it relies on parks to which there is no inherent right. These points may be valid, or not, but the issue for an interim orders hearing is whether there is an interest to preserve that will be affected.<sup>6</sup>

[16] Concerning the impact of the cycleway, each applicant deposes to an expected significant impact on the day-to-day operation, and financial viability of their business. The evidence is consistent, and at this interim orders stage is not disputed by the Council other than perhaps for the first applicant. The reason for that difference

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<sup>6</sup> Judicial Review Procedure Act 2016, s 15(1).

is that the cycleway implementation has passed that business and changes such as a new loading bay area have already been made. Also, it is a grocer business, and the Council says research shows the development of cycleways can be a plus for such businesses. The other businesses are associated with vehicles – servicing and sales, and the impacts are not contested.

[17] As for an interest to preserve, all the applicants have been operating on the relevant roads for some time. The changes being made are changes that generally require formal authorisation and some consultation. The applicants do not contend for a right to, for example, the carparking but submit their legitimate existing business interests mean they are entitled to a removal process that is lawful and consistent with required consultation.

### **The intended challenges**

[18] The first issue is the power being used. The council identified it as being contained in cl 11(b), sch 10 to the Local Government Act 1974. The heading to the clause is “Temporary Prohibition of Traffic” and it provides:

- 11 The council may, subject to such conditions as it thinks fit (including the imposition of a reasonable bond), and after consultation with the Police and the New Zealand Transport Agency, close any road or part of a road to all traffic or any specified type of traffic (including pedestrian traffic)—
  - (a) while the road, or any drain, water race, pipe, or apparatus under, upon, or over the road is being constructed or repaired; or
  - (b) where, in order to resolve problems associated with traffic operations on a road network, experimental diversions of traffic are required; or
  - (c) during a period when public disorder exists or is anticipated; or
  - (d) when for any reason it is considered desirable that traffic should be temporarily diverted to other roads; or
  - (e) for a period or periods not exceeding in the aggregate 31 days in any year for any exhibition, fair, show, market, concert, film-making, race or other sporting event, or public function:

provided that no road may be closed for any purpose specified in paragraph (e) if that closure would, in the opinion of the council, be likely to impede traffic unreasonably.

[19] The passage earlier cited from the evidence of Ms Pascoe sets out how it is considered the power applies.<sup>7</sup> The materials used are not permanent, and improvements to the design may happen as a result of the feedback. It is said to be experimental because it is trying an initiative to overcome a problem with the whole road network, namely too many vehicles.

[20] The contrary view advanced by the applicants is:

- (a) The cycleway is not temporary or experimental. There is going to be a cycleway where this one is. It is part of the published policy and the fact that there may be design tweaks does not make it temporary within the intent of cl 11. As far as the road goes, it is a permanent change, albeit some alterations may occur.
- (b) Other facts telling against the concept of temporary are the fact that it will take six months of work to install and is said to be intended for review after six to 12 months but with no fixed review date. This emphasises the Council is in reality installing the cycleway, and this falls outside the power for temporary diversions.

[21] Other arguments both ways are identified but I consider there is plainly enough material for a tenable challenge. It is an expansive use of a temporary diversion power; it may well be a lawful use but the proposition is plainly arguable. It is of passing interest that the source document from Waka Kotahi, while identifying the possibilities, would not be described as confidently asserting the power.

[22] The related challenge is to the Council's decision-making process in relation to this power. This is somewhat in its early stages in that it is not entirely clear, at least as presently appears, what was taken into account by whoever the decision-maker was. Wrapped up within this will be consideration of what needed to be taken into account, with the early impression being that the Council has taken a restricted view of this, seeing prior policy decisions as settling definitively most of the issues. Whether that is so must await the substantive hearing, but again I consider at this stage there is a tenable challenge to the adequacy of the decision-making process. It is common

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<sup>7</sup> Above at [8].

ground that neither the documents concerning this cycleway, nor the preceding Brooklyn cycleway, expressly identify cl 11(b) as the power being used. Mr Whittington says it can be inferred from the use of words such as “pilot” (said to be a reference to experimentation in cl 11(b)) but accepts it is a process of inference.

[23] The third issue is consultation, and this again very much turns on what consultation is required. The Council, in broad terms, sees the task as consulting with businesses as the cycleway draws near to discuss how impacts of, for example, removing parks may be ameliorated. The question of removing parks is not itself, however, seemingly seen as a point requiring consultation. This view flows from the position that documents such as the Parking Policy allocate low priority to on-road parking of essential routes. The parameters are settled.

[24] The applicants submit more is required. At an interim orders stage it seemed to me the least compelling of the challenges but again a full airing may lead to different assessments. That is not also to say that the implementation of the relatively limited task the Council has set itself could not be improved, nor to say the consultation is sufficient given the clear impact the changes will have on a large number of businesses. Rather, at the interim orders stage I consider the case for a stay of the works based on consultation deficiencies was the weakest of the grounds.

### **Interim orders**

[25] The balance between the two parties rather clearly favours the applicants. The impacts on their businesses will be significant and immediate. The impact on the project of a three-month delay, although unfortunate, is otherwise reasonably negligible as best can be presently assessed. There are perhaps some downstream risks with availability of contractors, but delay in projects is not a new concept to deal with.

[26] These observations are not intended to minimise the importance to many of getting these projects going, but given Paneke Pōneke was only adopted in March, and given that by any standards matters are moving very quickly since then, a relatively short pause can be seen in context. It is also important that the applicants are identifying a genuine challenge to the lawfulness of a model that the Council plainly intends to use on a significant scale. Early confirmation of its validity or otherwise

would seem desirable. Less expenditure, and less work to be undone if unlawful, has some appeal.

[27] The Council submitted the applicants had delayed seeking relief, saying the proceeding could have been filed in March. Instead, the applicants organised a petition. These proceedings could at least have been filed contemporaneously. However, the timeframes being talked about are not long and, as observed, the Council is moving very quickly on a significant project. Counsel for the applicants detailed difficulty with obtaining documents from the Council. It is unclear whether those claims are disputed but I accept the advice on when the documents were received, and can see little basis for criticism of the speed of filing. I do not consider delay is a relevant factor in this case.

### **Conclusion**

[28] The applicants have identified an arguable case that the Council cannot do what it is doing under the power it relies on. That is obviously fundamental and provides a strong basis for interim orders. The legality of the process is a question that will have broader implications, and at this early stage a delay of three months, while undoubtedly disappointing, is not critical to the project.

[29] The application for interim orders was accordingly granted. The Council was required not to further implement the cycleway work other than to make safe any already completed works. This is to last until determination of the substantive proceeding, although the presiding Judge may of course modify the order at the hearing.

[30] The applicants are entitled to costs on a standard 2B basis.

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Simon France J

Solicitors:  
Hughes Robertson, Wellington for Applicants