

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2022-404-001531  
[2022] NZHC 2280**

UNDER The Judicial Review Procedure Act 2016

BETWEEN KŌKAKO LODGE TRUST  
Applicant

AND AUCKLAND REGIONAL PUBLIC  
HEALTH SERVICE  
First Respondent

AND AUCKLAND COUNCIL  
Second Respondent

Hearing: 6 September 2022

Appearances: Ryan Marsich for the Applicant  
Chris Browne and Alex Young for the First Respondent  
Lizzy Wiessing and Mike Lichtwark for the Second Respondent

Judgment: 7 September 2022

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**[REASONS] JUDGMENT OF MOORE J**

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This judgment was delivered me on 7 September 2022 at 5:30 pm  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

## Background

[1] Kōkako Lodge Trust (“the Lodge”) operates a facility near the Hunua Ranges, southeast of Auckland City. There are a number of children within the Achievement in Multi-cultural High Schools initiative (“AIMHI”) scheduled to attend the Lodge in the near future. The purpose of AIMHI is to support the development of children from backgrounds of socioeconomic disadvantage.

[2] On 24 August 2022, the Auckland Regional Public Health Service (“the ARPHS”) granted the Auckland Council (“the Council”) permission to conduct an aerial drop of sodium fluoroacetate (“1080”)<sup>1</sup> in an area proximate to the Lodge (“the Permission”).<sup>2</sup> The Council advised that its intention is to conduct the 1080 drop (“the Drop”) as soon as the weather permits it to do so.<sup>3</sup>

[3] A condition of the Permission requires the Lodge to cease operating when the Drop occurs and resume only when the tracks in the area have been cleared of any uneaten baits and/or the carcasses of predators killed by the poisonous baits (“the Condition”). The purpose of this condition is explained in an affidavit of Dr Denise Barnfather, the Medical Officer of Health at the ARPHS who granted the Permission. She deposed that:

- (a) there is a risk that children will leave the Lodge premises and enter the Drop area; and
- (b) a further risk that the public will mistakenly believe the regional park is open due to activity at the Lodge and enter the Drop area.

[4] I am advised that the application of 1080 will take approximately five days, with clearing of the tracks in the Drop area occurring shortly after. During this period, if the drop proceeds as planned, the Condition necessarily means that students involved in the AIMHI programme will be unable to attend the Lodge.

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<sup>1</sup> 1080 is a vertebrate toxic agent routinely used for pest control in New Zealand.

<sup>2</sup> This permission is required under s 95A of the Hazardous Substances and New Organisms Act 1996.

<sup>3</sup> I am advised that the pre-feeding stage of the Drop occurred on 1 September 2022.

[5] The Lodge applied for judicial review of the Council’s decision to proceed with the Drop on the conditions imposed by the Permission. The Lodge’s principal argument seems to be that the decision was unreasonable or irrational, although it also argues that the process by which the Permission was granted was unfair.

[6] Given that the Drop is imminent, the Lodge applied for an interim order restraining the Council from proceeding with the Drop and triggering the Condition.

[7] I heard the matter yesterday morning, at 10:00 am on 6 September 2022. That afternoon I issued a results decision declining the Lodge’s application. I indicated that I would give my reasons in writing before the close of business on Friday, although I forewarned the parties that they would necessarily be brief given the urgency.

[8] My reasons follow.

### **Interim orders under the Judicial Review Procedure Act 2016**

[9] At any time before the final determination of an application, the Court may make an interim order prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power if it is necessary to do so to preserve the position of the applicant.<sup>4</sup>

[10] While such an order may have the effect of an interim injunction, “there is no requirement to address such an application exactly as if it were for an interim injunction”.<sup>5</sup> Instead there is the following two-stage approach:<sup>6</sup>

- (a) to first consider if the applicant can establish a position to preserve; and
- (b) to then determine whether to exercise the Court’s wide discretion to make an order in the circumstances of the case, including the apparent

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<sup>4</sup> Judicial Review Procedure Act 2016, s 15(1) and (2)(a).

<sup>5</sup> *Singh v Minister of Immigration* [2009] NZCA 50 at [26] citing *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA).

<sup>6</sup> *MKD v Minister of Health* [2022] NZHC 67 at [47] citing *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101 at [3].

strengths or weaknesses of the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.

[11] It is to each of those questions I now turn.

**Is an interim order necessary to preserve the Lodge's position?**

[12] The first issue is whether the Lodge is able to establish that an interim order is necessary to preserve its position.

[13] This is a threshold question which has previously been interpreted liberally by this Court.<sup>7</sup> Preservation is not to be interpreted so narrowly that it means only preserving the status quo.<sup>8</sup>

[14] Ms Wiessing, for the Council, submitted that the Lodge has no position to preserve. She emphasised it is not clear what relief the Lodge is seeking in the event it succeeds in its substantive claim.

[15] Mr Marsich, for the Lodge, nevertheless advised that the Lodge's position was that it would pursue its substantive claim even if interim relief was not granted. As I understood him this is because the issue involves a matter of principle for his client in the event of future 1080 drops where similar prohibitions may be imposed. In response, Ms Wiessing observed that the Drop would have run its course and that pursuing the substantive claim may be both imprudent and fruitless.

[16] Therein lies the answer to this issue. The Lodge is seeking to avoid closure while the Drop and its aftermath occurs. That is the position it seeks to preserve. If interim relief is not granted, the Lodge will inevitably be required to cease operating during the period. It will be unable to accommodate the AIMHI students. There may also be financial implications to the Lodge, although these are not clearly articulated on the evidence.

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<sup>7</sup> *Christiansen v Director-General of Health* [2020] NZHC 887 at [58] citing *Greer v Chief Executive of Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [24]. See also *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 at [52]–[54].

<sup>8</sup> At [58].

[17] I do not accept Ms Wiessing's submissions that the Lodge has no position to preserve simply because its existing reservations can be rebooked and should, in any event, have been tentative given the long lead period of notice the Council gave the Lodge. That those existing bookings will have to be rescheduled amounts to a change of position. Whether that consequence is one which warrants interim relief is a question at the second stage of the test, but I am satisfied that this first question must be answered in favour of the Lodge.

[18] The threshold is met.

**Should the discretion to make an interim order be exercised in the circumstances of the case?**

[19] I therefore turn to consider whether the Court should exercise its discretion to make an interim order in the circumstances of the case.

[20] The issues on which the argument focussed were:

- (a) whether the apparent strength of the Lodge's case supported a grant of interim relief; and
- (b) whether the repercussions of a grant of interim relief supported the making of such an order.

[21] I now turn to consider each of those questions.

*Do the apparent strengths and weaknesses of the applicant's claim support a grant of interim relief?*

[22] Mr Marsich advances two grounds of review in support of the Lodge's claim. These are that the decision involved procedural impropriety and was unreasonable or irrational.

(i) *Procedural impropriety*

[23] Mr Marsich first submitted that the ARPHS adopted a standard that was too low when assessing the risk of harm associated with the Lodge remaining open. He

referred to an affidavit of David Jaques, the manager of the Lodge, dated 3 September 2022. Mr Jaques deposes that Dr Barnfather said in a meeting that she made decisions based upon the “possibility of a risk”, rather than the “probability of a risk”.

[24] Mr Marsich criticises Dr Barnfather for not focusing on the “probability” of a particular risk eventuating. He submitted that this is contrary to the Ministry of Health’s Guidelines for Issuing Permissions for the Use of Vertebrate Toxic Agents (“the Guidelines”).<sup>9</sup> He submitted that the Guidelines discuss risk by reference to the “probability” of specified adverse events occurring.

[25] There is nothing in this point. Mr Marsich places considerable weight on the turn of phrase which Dr Barnfather is claimed to have used once during this particular meeting. To accept this requires that she was correctly heard and understood. It also requires the conversation to have been correctly recalled. Mr Jaques’ evidence on this point is simply insufficient. It certainly cannot support the finding that Dr Barnfather’s entire risk assessment process prior to granting the Permission was flawed because it she applied the incorrect standard. That is particularly so because it is plain that she applied and followed the Guidelines when making her decision to impose conditions – a point to which I shall return.

[26] In any event, it is not clear that what it is claimed Dr Barnfather said demonstrates a misunderstanding on her part of the risk assessment process. A risk in this context is an adverse event that might occur. Inherent in this analysis is the probability that the risk might eventuate into a consequence. It plainly follows that in considering the possible risks, Dr Barnfather must have turned her mind to the probability that they actually occur. In any event, it is a well settled principle of interpretation that “probable” equates to “could well happen”.<sup>10</sup>

[27] Mr Marsich then submitted that ARPHS failed to consult with the Lodge when granting the Permission. He argues that the Guidelines emphasise that there should be “open and ongoing” communication with applicants.

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<sup>9</sup> Ministry of Health *Guidelines for Issuing Permissions for the Use of Vertebrate Toxic Agents* (July 2022).

<sup>10</sup> See for example *R v Gush* [1980] 2 NZLR 92 (CA).

[28] This point is misconceived. The passage of the Guidelines to which Mr Marsich refers states that:

“[a]n application for permission to use a [vertebrate toxic agent] or other hazardous substance may require discussion with the applicant in order to clarify aspects of the application and the conditions that may be imposed.”

[29] It is important to understand that it was the Council which applied to ARPHS for the Permission, not the Lodge. As the applicant, it is the Council with whom ARPHS should consult. The Lodge is simply an interested party. There do not appear to be any requirements to consult with interested parties in either the Guidelines or under s 95A of the Hazardous Substances and New Organisms Act 1996.

[30] It follows that both procedural criticisms appear weak.

(ii) *Unreasonableness or irrationality*

[31] Mr Marsich then submitted the decision was unreasonable or irrational. He submitted that the ARPHS could have imposed other alternative conditions which would permit the Lodge to continue operating. In particular, he referred to safety management measures suggested by the Lodge. He further submitted that the decision was unreasonable because other facilities in the area were not subject to conditions requiring them to cease operating.

[32] On this point Mr Browne, for the ARPHS, stepped through the relevant aspects of the Guidelines. The Guidelines note that public health risk management centres on appropriate and considered use of the “Model Permit Conditions”. These model conditions include one prohibiting the application of vertebrate toxic agents within a specified distance of public areas. Although if vertebrate toxic agents are to be aurally applied to public areas, further restrictions may be necessary to mitigate the risk of exposure. These include clearing the area of bait and animal carcasses. These additional conditions are likely to be necessary as “aerial operations may create greater risks of exposure to the public than ground-based operations, because baits can be laid on the ground with greater precision”.

[33] The conditions imposed by Dr Barnfather are entirely consistent with the Guidelines. Although Mr Marsich suggested that other alternative conditions could have been imposed, that does not render the condition requiring the Lodge to cease operating unreasonable. Dr Barnfather's decision would necessarily have been based upon a multitude of factors. Her qualifications qualify her as an expert in community health. Her evidence is that she originally sought to limit the Drop zone so as to prevent 1080 bait being dropped on the tracks – the effect of that being that the Lodge could continue operating. Her final and considered expert view was that it would be preferable to optimise the effectiveness of the drop by including the tracks and adjacent spaces. This took precedence in terms of the various weightings she was required to consider. While reasonable minds might differ on that conclusion, it cannot be said that no reasonable, qualified decision maker could have come to the same conclusion in all the circumstances.

[34] Dr Barnfather further explains why other facilities in relatively close proximity to the Lodge are not required to close. The Lodge is located inside the Hunua Ranges Regional Park. The other facilities are not. She inspected the site and formed the view that the Lodge lacked adequate physical barriers to the Drop site. She also relied on the Council's advice that there were physical barriers preventing access from other nearby facilities. The distinction between the Lodge and those facilities was reasoned.

[35] This is not the first time that the Council has conducted a Drop near the Lodge. Rachel Kelleher, the General Manager of the Environmental Services Division of the Council, affirmed an affidavit dated 5 September 2022 in which she recounts previous Drops she and Dr Barnfather were involved in. These Drops took place in 2015 and 2018.

[36] Ms Kelleher deposes that in 2015 the Council conducted a Drop on the condition that the Lodge restrict its operation to their site, with managed access through a particular gate. After the Drop she and Dr Barnfather attended the site to inspect the track clearance progress. They saw users from the Lodge outside the license area in a nearby carpark and by the Hunua Falls. The agreed controls on entry were not adhered to. She says she was disappointed with the lack of compliance.

[37] Ms Kelleher says that in 2018 the Drop was subject to a condition that the Lodge cease operating. The Lodge was closed for four weeks. The Council stationed a security guard near the gate to the Hunua Falls on days where the aerial application and track clearances took place.

[38] Although the Lodge now has a new manager, Dr Barnfather's caution is plainly understandable. Despite strict measures, previous experience informs the conclusion that there is a real risk that people may enter the Drop area despite an awareness of it.

[39] For these reasons, it is difficult to see how the decision can be characterised as:<sup>11</sup>

... so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[40] Nor is it one where the decision lacks an adequate evidential foundation, where the evidence is inconsistent or contradictory, or where the only reasonable conclusion contradicts the decision.<sup>12</sup> Dr Barnfather's decision was supported by the evidence.

[41] It follows that the Lodge's claim that the decision was unreasonable is unsustainable.

*Do the public and private repercussions of granting interim relief support such an order?*

[42] I thus turn to the repercussions of granting interim relief.

(i) *Repercussions to the Lodge*

[43] Mr Marsich submitted that the disadvantaged students due to attend the Lodge would be particularly affected by its closure. He emphasised the difficulties and stresses these students face on a day-to-day basis. He submitted that this was yet another matter that would adversely affect their mental health.

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<sup>11</sup> *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA) at 545 citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

<sup>12</sup> *Partners of Waikanae Health Centre v Health and Disability Commissioner* [2021] NZHC 1488 at [55] citing *Chamberlain v Attorney-General* [2017] NZHC 1821 at [66].

[44] This is supported by the evidence of Warren Megget, a trustee of the Lodge. He deposed that the AIMHI programme supports students from decile 1 schools. The vast majority are Māori and Pasifika. He says that young people are suffering great anxiety at present, precipitated by the effects of COVID-19. His view is that the Lodge being unable to facilitate these children will adversely affect their mental and physical health.

[45] I accept that there will likely be adverse impacts to students who are unable to attend the Lodge. Attendance would plainly be a positive experience for them. I immediately recognise that it is both regrettable and unfortunate that they may be adversely affected in the way the applicant's deponents suggest.

[46] However, while the impact to students is a relevant factor, it is mitigated by the limited period over which the Lodge is likely to be closed. It is apparent that the Council has attempted to minimise the extent of the closure not just in terms of the length of the closure but also offering alternative sites away from the drop zone.<sup>13</sup>

*(ii) Repercussions to the Council and third parties*

[47] The impact to students must also be weighed against the consequences to the Council and affected third parties.

[48] Ms Wiessing submitted that the public interest greatly outweighs that of the students. She submitted that the operational and financial consequences to the Council are severe.

[49] This is borne out on Ms Kelleher's evidence. Planning for the operation took more than a year. Consultation with and notification to the community has already taken place, and a significant delay occasioned by the total or partial postponement of the drop means this would have to be repeated. Pre-feed, non-toxic baits were applied on 1 September. The effectiveness of the Drop reduces as time passes between the application of pre-feed bait and of the 1080. Furthermore, exposure to the elements, particularly rain, makes the baits less palatable and attractive to the targeted predators.

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<sup>13</sup> The Lodge has not taken up any of the Council's offers apparently on the basis that the alternatives offered involve excessive travel and accompanying expense.

A Drop between now and late-October is required to account for the imminent bird breeding season, the need for specific weather conditions and the condition to avoid school and public holidays. The combination of these factors means that delay would risk the whole operation failing.

[50] Delay will also come at a considerable cost to the Council and hence ratepayers. 1080 is expensive to store as it is a hazardous substance. It also degrades over time and therefore could not be used if the Drop was delayed until next year. Extensive advertising has been undertaken. Approximately 40 per cent of the \$900,000 allocated to the operation has already been spent. The Council has limited ability to mitigate these damages for the reasons explained.

[51] Third parties will also be affected by further delay. These include other public authorities and local private landowners whose operations in the area have been paused to accommodate the Drop.

[52] I accept that there are very significant adverse repercussions to the Council and third parties if interim relief is granted. The public interest in avoiding these consequences outweighs, by some considerable margin, the Lodge's interest in remaining open for students to attend.

### *Conclusion*

[53] Notwithstanding the difficulties faced by students if the Lodge is closed, the apparent weakness of the Lodge's claim and the significant operational and financial consequences to the Council operate against an exercise of the discretion to grant interim relief.

### **Result**

[54] For those reasons, I declined the Lodge's application for an interim order.

### **Costs**

[55] Given their respective identities, I would hope that the parties can agree on costs and file a joint memorandum to that effect. In the event they cannot, I direct

sequential memoranda to be filed with the Council, as the successful party, filing and serving its submissions within 20 clear working days of this judgment and the Lodge 10 clear working days thereafter. No memorandum is to exceed three pages in length (not including any tables or appendices). I shall then deal with costs on the papers.

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**Moore J**

*Counsel/Solicitors:*

Mr Marsich, Auckland

Wilson Harle, Auckland

Ms Wiessing, Auckland

Auckland Council, Auckland