

BEFORE THE ENVIRONMENT COURT

ENV-2010-AKL-000279

IN THE MATTER of the Local Government
Act 1974

AND

IN THE MATTER of a referral of objections
on the proposed stopping
of portions of Higham Road
pursuant to section 342
and Schedule 10 of the Act

BY

AUCKLAND COUNCIL

**JOINT MEMORANDUM OF COUNSEL FOR AUCKLAND COUNCIL
AND LN HIGHAM AND SONS LIMITED AND J AND N HIGHAM
DATED 28 OCTOBER 2011**

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MAY IT PLEASE THE COURT

1. The purpose of this memorandum is to advise that Auckland Council (Council) hereby withdraws the road stopping application. LN Higham and Sons Limited and J and N Higham (Highams) support this withdrawal.

Interim decision

2. On 5 August 2011, the Court issued its interim decision. Paragraph 75 stated that "there may be a more constructive solution than simply rejecting the stopping as currently proposed". The Court directed that the parties attend a facilitated meeting, before summarising at paragraph 77 the matters that would need to be addressed in any revised proposal. Paragraph A of the Court's orders recorded that a modified proposal may be acceptable on certain conditions that encapsulate matters summarised in paragraph 77.
3. Throughout these proceedings, the Council and the Highams have demonstrated a willingness to modify the road stopping proposal, to try and find a solution that SHAG and the other objectors (and ultimately the Court) would find acceptable. The Court's interim decision is clear that substantial further modifications to the revised proposal presented to the Court would be required, in order for the Court to uphold the road stopping proposal.
4. The Council and the Highams, whose positions have been aligned during these proceedings, have in the course of preparing for the facilitated meeting considered the interim decision, and the implications for each of them of revising the proposal further to incorporate the Court's suggested modifications.
5. The Highams and the Council originally signalled their willingness to attend the facilitated meeting, resulting in a meeting being scheduled for 9 November 2011. However, after giving careful consideration to the Court's interim decision, they have now concluded that modifying the proposal to the satisfaction of the Court and the objectors, given the Court's findings in the interim decision, will be too onerous. On that basis, both parties now consider that no useful purpose would be served by the parties attending the facilitated meeting.

Withdrawal

6. Withdrawal of the proposal is made without leave, in reliance on *Mullen v Parkbrook Holdings Limited* [1999] 2 NZLR 312. In that case, the Court of Appeal held that an appellant has the right to withdraw or abandon an appeal without leave, subject to that withdrawal or abandonment not being an abuse of the Court's process. There is no abuse of process here. The withdrawal realistically and respectfully acknowledges the Court's findings on the merits of the road stopping in its interim decision.

7. In *Mullen*, the Court of Appeal analysed a number of authorities from overseas jurisdictions establishing the general principle that those initiating proceedings have a right to withdraw or abandon them, subject to any legislation or policy considerations which may circumscribe that right. No such considerations exist here.

8. Despite extensive case law in relation to the road stoppings under Schedule 10 of the Local Government Act 1974 counsel are unaware of any authorities suggesting the Council is unable to withdraw a proposal that is before the Court. *Re an application by New Plymouth District Council* [2011] NZ EnvC 88 states at paragraph 8 that once a road stopping proposal been referred to the Environment Court, the jurisdiction to approve the road stopping lies with the Court not the Council. The Court went on to state at paragraph 9:

The relevant provisions of LGA do not include a power for the Court to refer the matter back to a council for determination, even if an objection has been withdrawn, as in this instance. The Court is seized of the matter and must decide it having regard to the provisions of s342 and Schedule 10 LGA.

9. However, those dicta do not limit the Council's ability to withdraw a proposal. If the proposal is withdrawn, the Court is no longer seized of the matter.

10. Implicit support for the Council's ability to withdraw is also found in *Re an application by Buller District Council* [C/29/98], where the Court held that even if the Court confirmed a council's earlier decision to stop a road, the council is not obliged to take the final step and actually stop the road. It has a discretion whether to proceed. It follows that a council must also have a discretion

whether to proceed earlier in the Schedule 10 process, which it may exercise by withdrawing the proceedings.

Section 344 Local Government Act 1974

11. Objections to the road stopping proposal have centred upon the issue of public access to the beach at the end of the unformed road. The Council and the Highams acknowledge the objectors' concerns in relation to fences which presently traverse parts of the unformed road. The Highams advise that they intend to apply under section 344 of the Local Government Act 1974 for those fences to be replaced by gates.

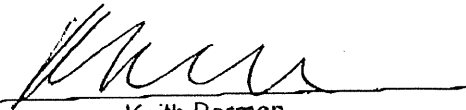
Teleconference

12. Should the Court consider it necessary, counsel for the Council and the Highams will be available for a judicial teleconference at short notice if required.

DATED this 28th day of October 2011



Padraig McNamara/Asher Fagan
Counsel for the Auckland Council



Keith Berman
Counsel for LN Higham and Sons Limited
and J and N Higham and s 274 parties
supporting the Highams' position