

COMPLAINT NUMBER	21/406 Appeal 21/013
ADVERTISER	Auckland City Council
ADVERTISEMENT	Western Sprints Native Bush Restoration Project, Print
DATE OF MEETING	23 November 2021
OUTCOME	Not Upheld No Further Action Required

Summary of the Complaints Board Decision

The Complaints Board did not uphold a complaint about misleading statements made in a print advertisement from Auckland City Council regarding the Native Bush Restoration Project. The Complaints Board ruled that, within an advocacy environment, the Advertiser had provided sufficient substantiation to support the explanation given for the felling of pines trees in the Western Springs Lakeside Park.

Advertisement

The Auckland Council advertorial in the NZ Herald provides an update on the progress of the Western Springs Native Bush Restoration Project. The advertorial is formatted in a question-answer style, explaining why all pine trees have been removed, how much disturbance there has been to the forest's understory, and how many trees and shrubs will now be planted. At the end of the article, there is a call to action to be involved in the planting programme, with a contact email address for the Council. The council logo is visible in the bottom right corner.

Summary of the Complaint and Appeal

The Complainant was concerned the advertisement is making an unsubstantiated claim in order to justify the removal trees as part of the Western Springs native bush restoration project. The Complainant appealed the No Grounds to Proceed ruling saying the number of trees that were dead or dying is disputed and provided an alternative report. The Complainant questioned whether there was evidence to support the confirmation that the felling process confirmed the bad health of the trees.

Issues Raised:

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser's Response

The Advertiser said the Council and independent arboricultural experts had been assessing the pines for over a decade. The Advertiser provided David Stejskal's Statement of Evidence-2018 which stated that 94% of the trees were in less than good condition. The Advertiser also provided the Tree Consultancy Company's technical report produced in 2020 which reviewed various reports including the Chris Benton 2019 report supplied by the Complainant. The technical report concluded the general condition of the trees was sub-optimal. The Advertiser supplied photos showing decay in felled trees.

Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2(e) Advocacy advertising: Advocacy advertising must clearly state the identity and position of the advertiser. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

Relevant precedent decisions

In considering this complaint the Complaints Board referred to two precedent decisions, Decision 19/359 and 19/379, both of which were Not Upheld.

The full versions of these decisions can be found on the ASA website:

<https://www.asa.co.nz/decisions/>

Decision 19/359 concerned a print and website advertisement from City Vision about the benefits to the Community from converting an 18-hole golf course to a 9-hole course with additional community facilities. The Complainant was concerned the advertisement contained misleading information.

The Complaints Board did not uphold the complaint, ruling that the Advertiser had provided sufficient substantiation to support the claims made about its proposal for the future of Chamberlain Park, in the context of advocacy advertising.

Decision 19/379 concerned a print advertisement from Save Chamberlain Park movement about City Vision's plans, claiming the plan was to destroy an Auckland park by using rate payer's money to remove 1000 mature trees. The Complainant, City Vision, said the advertisement contained misleading statements.

The Complaints Board did not uphold the complaint, saying the advocacy advertisement was a mixture of opinion and factual claims and the Advertiser had provided sufficient substantiation for the factual claims made.

Preliminary Matter

The Chair of the Complaints Board ruled the initial complaint from the Complainant had No Grounds for Proceed. The Complainant appealed the decision. The Chairperson of the Appeal Board referred the matter to the Complaints Board for the Board to consider the Advertiser's response to the following two statements made in the advertisement:

“Those that were remaining were of varying health with the majority considered to be dead or dying or compromised by internal decay”

“This was confirmed during the felling process, with many trees that appeared to have healthy foliage found to be rotten inside.”

Complaints Board Discussion

The Chair noted that the Complaints Board’s role was to consider whether there had been a breach of the Advertising Standards Code. In deciding whether the Code has been breached the Complaints Board has regard to all relevant matters including:

- Generally prevailing community standards
- Previous decisions
- The consumer takeout of the advertisement, and
- The context, medium, audience and the product or service being advertised, which in this case is:
 - Context: Community concerned about the removal of pine trees as part of the Western Springs Native Bush Restoration Project
 - Medium: Newspaper
 - Audience: Newspaper readers
 - Product: Information from Auckland City Council on the restoration project

Consumer Takeout

The Complaints Board agreed the likely consumer takeout of the advertisement was an Auckland City Council update on progress on the Western Springs Native Restoration Project, explaining the reason for the removal of approximately 200 pine trees.

Does the advertisement fit the definition of advocacy advertising?

The Complaints Board said the advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They say:

1. That section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in section 14 is not absolute as there could be an infringement of other people’s rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the rights granted by section 14 to ensure there is fair play between all parties on controversial issues. Therefore, in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.

5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

Role of the ASA when considering an advocacy advertisement.

The Complaints Board noted its role is to consider the likely consumer takeout of an advertisement and complaints about advocacy advertising are considered differently to complaints about advertising for products and services.

The Complaints Board observed that in a free and democratic society, issues should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations.

Under Rule 2(e) Advocacy advertising of the Advertising Standards Code:

- The identity of the advertiser must be clear.
- Opinion must be clearly distinguishable from factual information, and
- Factual information must be able to be substantiated.

If the identity and position of the Advertiser is clear, a more liberal interpretation of the Advertising Standards Code is allowed.

Is the identity and position of the Advertiser clear?

The Complaints Board said the identity and position of the Advertiser was sufficiently clear for the advertisement to meet the identity requirements of Rule 2(e). The Board noted the inclusion of a contact email address for the Auckland City Council, westernsprings@aucklandcouncil.govt.nz, as well as the Auckland City Council logo. The Board confirmed the position of the Advertiser, providing an explanation for the removal of pine trees as part of the native bush restoration project, was clear.

Is the advertisement likely to mislead or deceive consumers?

The Complaints Board considered the two factual claims made in the advocacy advertisement in turn:

Statement 1:

“Those that were remaining were of varying health with the majority considered to be dead or dying or compromised by internal decay”

The Complaints Board said the Advertiser had provided sufficient substantiation for this claim. The Board noted Mr David Stejskal’s *Statement of Evidence 2018*, page 3, paragraph 5.4 states “Inspection of the remaining 203 standing trees in 2018 has revealed 126 individual trees or around 62% are either dead, have heavily reduced canopies, have sustained damage by fire, or are visually displaying poor health. The remainder (77 trees) are better but still only fair or fair to poor health. Only a dozen (6%) of the trees in the stand have been classed as in good condition.”

The Board noted the Advertiser had also provided *The Tree Consultancy Company Technical Report* by Andrew Benson – 2020 ([Tree Consultancy Company’s final technical report \(the TCC report\)](#)), which states on page 26 - “The general condition of the trees is sub-optimal, and because of their underlying physiology and known limitations to growth, are now chronically predisposed to further decline.”

The Complaints Board noted the Technical report had reviewed various assessment reports of the health of the trees, including the example cited by the Complainant from Chris

Benton dated 2019. However, the Tree Consultancy Company report concluded that the general condition of the trees was sub-optimal.

The Complaints Board ruled the substantiation provided by the Advertiser was sufficient to prevent the advertisement being likely to mislead consumers or breach Principle 2 and Rule 2(b) of the Advertising Standards Code.

Statement 2:

“This was confirmed during the felling process, with many trees that appeared to have healthy foliage found to be rotten inside.”

The Complaints Board said the Advertiser had provided sufficient substantiation for the statement made in the advertisement.

The Board noted Mr David Stejskal's *Statement of Evidence 2018*, page 3, paragraph 5.6 states “Trunks of live trees considered to be in fair (or even good) health have randomly snapped and inspection of these has revealed the trunks have been weakened by insect tunnelling and decay. Trees in poor health and have also snapped. There is no practicable way of determining which trees are weakened by decay or insect tunnelling.”

The Advertiser had also provided photographic examples of exposed cross sections of pines cut during the felling process which revealed pockets of decay in a number of trees.

The Complaints Board ruled the substantiation provided by the Advertiser was sufficient to prevent the advertisement being likely to mislead consumers or breach Principle 2 or Rule 2(b) of the Advertising Standards Code.

The Complaints Board noted that where a claim in an advertisement was challenged by a Complainant, the onus fell on the Advertiser to provide the substantiation for that claim. The Board also reiterated its stance that it was not an arbiter of scientific or technical fact nor was it within its jurisdiction to verify the efficacy of a method of treatment or expert reports. Instead, its focus was to consider the likely consumer take out of an advertisement rather than the absolute scientific or technical legitimacy of a claim. The Complaints Board said the statements made in the advertisement, within an advocacy environment, had been adequately substantiated.

The Complaints Board ruled the advertisement was not in breach of Principle 2 or Rules 2(b) or 2(e) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaint was **Not Upheld**.

No further action required

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website, www.asa.co.nz. Appeals must be made in writing with notification of the intent to appeal lodged within 14 calendar days of receipt of the written decision. The substantive appeal application must be lodged with the ASA within 21 calendar days of receipt of the written decision.

APPENDICES

1. Complaint
 2. Appeal Submission
 3. Appeal Accept Ruling
 4. Response from Advertiser
 5. Response from Media
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Appendix 1

ORIGINAL COMPLAINT

There has been a long running community debate of whether all of the trees in Western Springs Forest should be felled for health & safety reasons immediately or whether they be removed progressively. In spite of a number of arborists reports that only a small percentage of trees needed immediate removal, the Council felled all of them at the same time. The paragraph at the top of the second column, of the advertisement states "with the majority (of trees) considered to be dead, dying or compromised by internal decay" vindicates the Council's decision to remove all of the trees. I have asked Council to provide me a copy of the evidence to support this statement and they have not provided it.

Appendix 2

APPEAL SUBMISSION FROM COMPLAINANT

The grounds on which I appeal are as follows.

1. The assessment that "62% of the trees were dead or in poor health" is disputed. I attach the report of Arborist Chris Benton dated August 2019 which disputes this assessment. See page 6.
2. Now that the trees have been felled it is possible to assess their actual state by analysing the stumps. At the time of the advertisement very few people had been allowed on site. However, several who had been, commented to me that a very high proportion of the trees that they had been able to look at were in good health.
3. Thus, it was possible for the Council to assess in fact the state of the trees.
4. On 11 June, I lodged a LGOIMA request asking the Council to provide the evidence to support their claim. This has not been provided within the required 20 working days. I am in the process of referring the delay to the Ombudsman.

Appendix 3**APPEAL ACCEPT RULING**

COMPLAINT NUMBER	21/406
APPEAL NUMBER	21/013
APPLICANT	Complainant
ADVERTISER	Auckland City Council
ADVERTISEMENT	Auckland City Council, Print
DATE	7 October 2021
OUTCOME	Accepted

SUMMARY

The Chair of the Complaints Board ruled on 9 August 2021, the complaint regarding an Auckland City Council newspaper advertisement about the Native Bush Restoration Project had no grounds to proceed.

The Complainant appealed the Decision. The appeal application was considered by the Chairperson of the Appeal Board.

The Chairperson ruled that the appeal application be accepted, parties be provided the opportunity to comment, and the matter be referred to the Complaints Board.

CHAIRPERSON'S RULING

The Chairperson viewed the application for appeal. She noted that there were five grounds upon which an appeal was able to proceed. These were listed at Clause 6(c) of the Second Schedule of the Advertising Standards Complaints Board Complaints Procedures and were as follows:

- (a) The proper procedures have not been followed.
- (b) There is new evidence of sufficient substance to affect the decision.
- (c) Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision.
- (d) The decision is against the weight of evidence.
- (e) It is in the interests of natural justice that the matter be reheard.

The Complainant appealed the Decision from the Chair of the Complaints Board which ruled the complaint had No Grounds to Proceed. (A full copy of the appeal is in Appendix 2 and a full copy of the Chair's ruling is in Appendix 3).

After reviewing all the relevant correspondence, the Chairperson held that on balance the Appeal application had met the threshold to establish grounds for appeal under Ground (e), it is in the interests of natural justice that the matter be reheard.

Accordingly, the Chairperson ruled the Appeal application be accepted, parties be provided the opportunity to comment, and the matter be referred to the Complaints Board.

Chairperson's Ruling: Appeal application Accepted

Appendix 4

RESPONSE FROM ADVERTISER, AUCKLAND CITY COUNCIL

We acknowledge the complaint and subsequent appeal made in relation to the advertisement that was placed in the NZ Herald regarding the Western Springs Native Bush Restoration Project.

The information relied upon for the statements at issue is summarised in this response letter and in the following attachments:

- Statement of Evidence of David Stejskal
- Tree Consultancy Company final report
- Images taken throughout the felling process

Auckland Council staff and independent arboricultural experts have been assessing the pines at Western Springs for over a decade and during varying stages of the Western Springs Native Bush Restoration Project.

Some of the findings were reflected in Mr Stejskal's Statement of Evidence, attached, which was presented at the publicly notified resource consent hearing in December 2018.

The key findings are listed below (paragraph 5, page 3 of Mr Stejskal's Statement of Evidence).

5.1 Over the past twenty years the extent of the stand of late-mature radiata pines at Western Springs has progressively reduced from approximately 509 standing trees to 203 trees.

5.4 Inspection of the remaining 203 standing trees in 2018 has revealed 126 individual trees or around 62 per cent are either dead, have heavily reduced canopies, have sustained damage by fire, or are visually displaying poor health. The remainder (77 trees) are in better condition but still only in fair or fair to good health. Only a dozen (6 per cent) of trees in the stand have been classed as in good condition.

Based on the above, we highlight that at the time of Mr Stejskal's evidence in 2018, 94 per cent of trees were in a less than good condition and were showing signs of decline.

We have also attached a copy of the [Tree Consultancy Company's final technical report \(the TCC report\)](#) which was produced in October 2020. When briefed, TCC were provided with various previous reports and assessments of the trees (including Chris Benton's 2019 report referred to by the complainant) which they reviewed prior to producing their report. TCC also assessed each of the remaining trees in-person over a number of days.

Within the report, TCC states that 31 trees were standing dead (16%), and a further 57 trees (29%) had live crown volumes less than 50 per cent, making them the most vulnerable to future decline and the effects of periods of environmental stress, e.g. drought. The report goes on to state that “overall, the forest canopy is visually very sparse and the volume of foliage on the trees is diminishing” (page 15).

The TCC report also notes (see page 26):

In biological terms, the general condition of the trees is sub-optimal, and because of their underlying physiology and known limitations to growth, are now chronically predisposed to further decline, with the most vulnerable trees being those which have less than 50 per cent of their live crowns remaining (29% of the population). The trees are also predisposed to future failure events (trunk snapping) because of biomechanical features (e.g. high H:D) which cannot be rectified at this stage in the life of the trees. Future tree failures are expected to continue.

The trees were not formally surveyed after being felled, as to do so would have been a time consuming and costly exercise, requiring each of the trees to be cut every half a meter or so.

However, the exposed cross sections from where the pines were cut during the felling process revealed pockets of decay of varying length, in various places in a number of the tree trunks.

While the exact quantity was not calculated, the above confirmed that pockets of decay were present in many of the trees, irrespective of canopy health and without obvious external indicators. We have attached a collection of images which demonstrate these varying levels of internal decay.

For the reasons stated above, we consider that there was sufficient evidence to support the two statements at issue in the advertisement.

Please let us know if you require any further information.





Appendix 5

RESPONSE FROM MEDIA, NZME

Any advertisement which is placed within the New Zealand Herald is subject to NZME's advertising terms and conditions, which requires (inter alia) advertisers to warrant that information contained within the advertisement complies with law and codes. This includes the requirement that advertisements not be misleading.

The points on appeal appear to be fact specific, and NZME cannot expand substantively on these.