

16 August 2017

APPEAL BY MAN O WAR FARM LTD AGAINST THE COASTAL HAZARDS PROVISIONS INCLUDED IN THE AUCKLAND UNITARY PLAN

Introduction

1. The purpose of this letter is to advise all affected submitters (primary submitters and further submitters) of a recent decision issued by the High Court in relation to an appeal brought by Man O War Farm Ltd (**Man O War**) against the definition of 'land which may be subject to coastal hazards' (**the Definition**) and related provisions in the Auckland Unitary Plan (**AUP**); and to advise all affected submitters of a right of appeal under section 156(1) of the Local Government Auckland (Transitional Provisions) Act 2010 (**LGATPA**) against certain amendments to the coastal hazards provisions, which were agreed by all parties to the Man O War appeal.
2. This letter provides information about the Man O War appeal, the High Court's decision, the right of appeal arising under section 156(1) of the LGATPA, and the procedure for those who wish to lodge an Environment Court appeal.

The Man O War appeal

3. Man O War brought an appeal under section 158 of the LGATPA alleging that the Auckland Council (**Council**) erred in law when it decided to accept the recommended Definition and related provisions that, in the appellant's opinion, were uncertain and therefore unlawful.
4. The Council, as well as another party involved in the appeal, accepted that there was uncertainty within the Definition through the inclusion of the words 'any land which may be subject to erosion over at least a 100 year time frame'. This phrase made it difficult for a Plan reader to identify whether they need a resource consent for development or subdivision near the coast.
5. The parties filed documentation which allowed the appeal to be determined without a hearing. The documentation included a set of amendments to the coastal hazards provisions that were agreed by all parties to the appeal (**Agreed Amendments**). The Agreed Amendments included amending the Definition and

consequentially amending associated parts of the AUP that are triggered by the Definition, as follows:

- a) Amending the Definition “land which may be subject to coastal hazards” to:
 - i. Change the heading of the Definition to “coastal erosion hazard area”;
 - ii. Delete “land which may be subject to coastal erosion over at least a 100 year timeframe” from the Definition;
 - iii. Include an option to prepare a report to determine the extent of the erosion area rather than relying on the parameters in the Definition;
 - iv. Remove the coastal inundation element of the Definition so as to rely on the existing definitions for “Coastal storm inundation area one per cent AEP plus 1m sea level rise (CSI1)” and “Coastal storm inundation area one per cent AEP sea level rise (CSI1)”;
- b) Amending the definition of “Coastal storm inundation area one per cent AEP sea level rise (CSI1)” to clarify that the option of a site specific report is available to determine extent for the 1% AEP;
- c) Amending the definitions of “Coastal storm inundation area one per cent AEP plus 1m sea level rise (CSI1)” and “Coastal storm inundation area one per cent AEP sea level rise (CSI1)” by refining their titles and terms so that they are more consistent with the maps they refer to;
- d) Making consequential changes to references to these definitions in Chapters E36 Natural Hazards and Flooding, E38 Subdivision – Urban, E39 Subdivision – Rural, I315 Gabador Precinct and I402 Auckland Airport Precinct; and
- e) Making changes to matters of discretion and assessment criteria at E36.8.1 and E36.8.2 relating to effects on public access, landscape and other environmental values, caused by any works proposed in

association with the building or structure, including any associated earthworks and land form modifications. These changes clarify that these effects are relevant *where they are caused by the works* and these earthworks and mitigation measures are relevant where they are to address the hazard (and not generally).

The decision of the High Court

6. On 16 June 2017 the High Court issued a decision¹ which determined that the coastal hazards definition was uncertain. A copy of the High Court's decision is **attached** to this letter.
7. The High Court held that under normal circumstances the appeal would be referred back to either the Auckland Unitary Plan Independent Hearings Panel (**Panel**) or the Council for reconsideration and a new decision. However, as the Court agreed that the Agreed Amendments would bring clarity to the provisions,² the Court held that the better approach would be for the Agreed Amendments to be substituted for the Council's decision and for the Council to serve notice on all directly affected submitters advising them of the decision and the available right of appeal under section 156(1) of the LGATPA (see paragraph 16 of the High Court's decision).
8. The Agreed Amendments are attached to the High Court's decision as Appendix 1, with ~~strike through~~ identifying deleted text and underline identifying new text.
9. Please note that the Agreed Amendments were drafted by the parties involved in the Man O War appeal to resolve the uncertainty in the Definition and related provisions. Any subsequent appeal to the Environment Court will not be allowed to raise issues that go beyond the Agreed Amendments.

Right of appeal under section 156(1), LGATPA

10. Section 156(1) of the LGATPA provides:
 - (1) A person who made a submission on the proposed plan may appeal to the Environment Court in respect of a provision or matter relating to the proposed plan—
 - (a) that the person addressed in the submission; and
 - (b) in relation to which the Council rejected a recommendation of the Hearings Panel and decided an alternative solution, which resulted in—
 - (i) a provision being included in the proposed plan; or
 - (ii) a matter being excluded from the proposed plan.

¹ [2017] NZHC 1349.

² At paragraphs 14 and 15.

- (2) However, if the Council's alternative solution included elements of the Hearings Panel's recommendation, the right of appeal is limited to the effect of the differences between the alternative solution and the recommendation.
11. Normally, a right of appeal under section 156(1) would arise if the Council rejects a recommendation made by the Panel and decides an alternative solution for that recommendation. Any appeal would be limited to the "effect of the differences" between the Panel's recommendation and the Council's alternative solution.
12. In this situation, the High Court has effectively substituted the Agreed Amendments for the Council's "alternative solution". The right of appeal therefore relates to the "effect of the differences" between the Agreed Amendments and the relevant coastal hazards provisions that were recommended by the Panel.

How to lodge an appeal with the Environment Court

13. Useful information relating to Unitary Plan appeals - including a summary of appeal rights under the LGATPA, all waivers and directions issued by the Environment Court, all decisions issued by the High Court and Environment Court, and the prescribed Notice of Appeal forms (for appeals under section 156(1)) - can be found on both the Environment Court and Council webpages:

<https://www.environmentcourt.govt.nz/auckland-unitary-plan-appeals/>

<http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/plansstrategies/unitaryplan/Pages/paupappeals.aspx>

14. Anyone considering filing an appeal with the Environment Court is encouraged to first seek independent legal advice.

Waivers and directions

15. After receiving the High Court's decision and liaising with the Environment Court and the parties to the Man O War appeal, the Council applied to the Environment Court for various waivers and directions to streamline the Notice of Appeal and section 274 processes. The application was motivated by the large number of persons who need to be served with the High Court's decision and advised of the available right of appeal.
16. On 10 August 2017 the Environment Court granted certain waivers and directions for appeals relating to the coastal hazards provisions arising from the High

Court's decision. A copy of the Environment Court's decision is **attached** to this letter.

17. The waivers and directions are set out in full at paragraph [8] of the attached Environment Court decision and summarised as follows:

Notices of Appeal

- a) A waiver of the normal requirement to serve all submitters with a copy of any Notice of Appeal filed with the Court;
- b) A waiver of the requirement to give written notice of service information to the Registrar;
- c) A direction that one hard copy of any Notice of Appeal must be filed with the Court;
- d) A direction that the Council be served electronically by email to unitaryplan@aucklandcouncil.govt.nz; and
- e) A direction that any Notice of Appeal be filed within 30 working days of the date the directions were issued, being 21 September 2017.

Section 274 parties

- f) A waiver of the normal requirement to lodge signed section 274 notices with the Court and a direction allowing filing by email to unitaryplan.ecappeals@justice.govt.nz.
- g) A waiver of the normal requirement to serve section 274 notices on all other parties.
- h) A direction that all section 274 notices be served on the relevant appellant and on the council to unitaryplan@aucklandcouncil.govt.nz;
- i) A waiver of the usual requirement to file an extra copy of any section 274 notice with the Court.

All other documents

- j) A direction that all other documents that are not required to be filed in hard copy can be filed electronically.

Appeal timeframe

18. As set out above at paragraph 17(e), all appeals need to be filed within 30 working days of the date of the Court's waivers and directions. Therefore, the last date for filing appeals is **21 September 2017**.

19. If there are any queries in relation to the above, please email unitaryplan@aucklandcouncil.govt.nz.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Mike Wakefield'.

Mike Wakefield
Senior Solicitor