BEFORE THE ENVIRONMENT COURT

ENV 2017-AKL-

IN THE MATTER of the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to section 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010

BETWEEN **FEDERATED FARMERS OF NEW ZEALAND**

Appellant

AND **AUCKLAND COUNCIL**

Respondent

NOTICE OF APPEAL TO ENVIRONMENT COURT AGAINST DECISION ON PROPOSED AUCKLAND COMBINED PLAN
Section 156, Local Government (Auckland Transitional Provisions) Act 2010

Federated Farmers of New Zealand

To: The Registrar
Environment Court
CX 10086
AUCKLAND

1. I, Federated Farmers of New Zealand, appeal against a decision of Auckland Council (the **Council**) on the Auckland combined plan (the **proposed plan**).

2. I have the right to appeal the Council's decision—
   (a) under section 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010 because the Council rejected a recommendation of the Hearings Panel in relation to a provision or matter I addressed in my submission on the proposed plan. The Council decided on an alternative solution, which resulted in a provision being included in the proposed plan or a matter being excluded from the proposed plan.

3. I provide further details of the reasons for my appeal below.

4. I am not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.

5. (*omitted*)

6. I received notice of the decision on 4 July 2017.

7. The decision was made by Auckland Council.

8. The decision that I am appealing is as follows:

   - The decision by the High Court, which was "… tantamount to the Council rejecting the [Auckland Unitary Plan Independent Hearings Panel's] decision",[1] to amend the proposed plan as agreed between the University of Auckland and the Council, as recorded in the judgment [2017] NZHC 1150 – *The University of Auckland v Auckland Council*.

9. The reasons for the appeal are as follows:

   (a) There is no jurisdiction in any legislation which provides the Court with the power to consider the appeal "… as if it is a decision of the Council pursuant to s 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010".[2]

   (b) If there is jurisdiction that provides the Court with the power to consider the appeal, there is no jurisdiction by which Issues, Objectives, Policies, Rules and associated discussion relating to the management of Genetically Modified Organisms (GMOs) as such can be included in the proposed plan.

   GMOs are managed under the Hazardous Substances and New Organisms Act 1996. Under that legislation, central government has established a specialist agency, the Environmental Protection Authority (EPA), (formerly the Environmental Risk Management Authority, ERMA), which has responsibility for GMOs as such, and which is required to assess the risks inherent in the release of any GMOs. Once this is done and a GMO approved for release, then it is not scientifically or legally possible for the Council (or anybody) to demonstrate that there would be any real risk of adverse effects arising from the release of that organism. Without there being any risk of adverse effects arising from the release of a GMO as such, there is no basis on which Council can become involved in matters to do with the regulation of a GMO on the basis that it is a GMO.

   To put it another way, there is nothing in the Resource Management Act (RMA) that provides jurisdiction to differentiate between two organisms for regulatory purposes, on the grounds that one is genetically modified, and the other is not.

   (c) In terms of s 32 of the RMA, there is no justification for the Council including Issues, Objectives, Policies, Rules and associated discussion relating to the management of GMOs as such in the proposed plan.

   The provisions in the proposed plan are not supported by the science.

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[1] The decision, at [18].
[2] The decision, at [24].

It follows from this that any "section 32 evaluation" can demonstrate nothing other than that there is no justification for the Council including Issues, Objectives, Policies, Rules and associated discussion relating to the management of GMOs in the proposed plan.

(d) As regards s 32AA of the RMA, no further evaluation has been carried out in respect of the changes that have been made to the proposed plan by way of the decision.

(e) The High Court has expressed a "tentative view" that "... *discharges* [of GMOs] via human waste were not the type of release specifically intended to be caught by [Auckland Unitary Plan Rule E37.4.1] A6 ..." (emphasis added).[3] Four matters arise:

(i) The EPA specifically provides authorisation for the release of GMOs "via human waste" in its decision on Application APP202601;

(ii) The release of a GMO is not a "discharge" in the sense in which that word is used in the RMA;

(iii) Activity Table E37.4 specifically provides that the use of GMOs is regulated under the district plan provisions of the Auckland Unitary Plan. The decision has opened up the possibility that the release of GMOs should be considered to be a regional plan matter rather than, or as well as, a district plan matter;

(iv) For the purpose of identifying the issue at an early opportunity, and in addition to the matters raised in (a) and (b) above, the matters described in (iii) above can be considered to be jurisdictional in nature.

(f) The decision does not take into account the effect of s 360D(1) of the RMA, which empowers the Minister for the Environment to make regulations to prohibit or remove specified rules or types of rules that would duplicate, overlap with, or deal with the same subject matter that is included in other legislation. RMA s 360D(2) makes it plain that s 360D(1) applies to GMOs used in medical applications. As discussed in (b) above, GMOs are managed under the Hazardous Substances and New Organisms Act 1996.

(g) The decision does not "cover the field". While the changes ordered in the decision appear to provide for the release of GMOs in medical applications as a permitted activity, the subsequent release of GMOs by those who have been treated with GMOs in the course of a medical application continues to be a prohibited activity, which is in contrast to the provision made for such releases by the EPA in its decision on Application APP202601.

10. I seek the following relief:

(a) That the Court determine that it does not have the jurisdiction to consider the appeal;

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[3] The decision, at [15].

(b) Should the Court determine that it does have the jurisdiction to consider the appeal:

(i) That the Court determine that the Auckland Council does not have the jurisdiction to regulate GMOs;

(ii) Should the Court determine that the Auckland Council does have the jurisdiction to regulate GMOs:

1 That the Court determine that the Council cannot regulate the use of GMOs in the proposed plan, including regulation of the use of GMOs in medical applications and any release of GMOs consequential upon the use of GMOs in medical applications.

2 That the Court direct the Auckland Council to prepare changes to the proposed plan to address the matters raised in the appeal, as provided for in s 293(1)(a) of the RMA.

(c) Costs.

11. I attach the following documents to this notice:

(a) a copy of the relevant decision:
(b) any other documents necessary for an adequate understanding of the appeal:
(c) a list of names and addresses of persons to be served with a copy of this notice:
(d) a copy of my submission.

Date: 14 August 2017

Signature:

P R Gardner
person authorised to sign on behalf of appellant

Contact details

Address for service of appellant:

Richard Gardner
Federated Farmers of New Zealand
Private Bag 92-066
Auckland

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Contact person: Richard Gardner, In-house Lawyer and Senior Policy Advisor

Advice to recipients of copy of notice of appeal

How to become party to proceedings

1. You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal and you lodge a notice of your wish to be a party to the proceedings (in form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003) with the Environment Court within 15 working days after the period for lodging a notice of appeal ends. You must also serve a copy of that notice on the Council and the appellant within the same 15-working-day period, and serve copies on all other parties within 5 working days after that period ends.

2. Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

3. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (*see* form 38 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003).

How to obtain copies of documents relating to appeal

4. The copy of this notice served on you does not have attached a copy of the appellant's submission or the decision appealed. These documents may be obtained, on request, from the appellant.

   The copy of this notice served on you does not have attached a copy of any other documents necessary for the adequate understanding of the appeal (of which there was one, the decision by the Chief Executive of the EPA on Application APP202601, dated 27 October 2015), or a list of names and addresses of persons to be served with a copy of this notice. These documents may be obtained, on request, from the appellant.

Advice

5. If you have any questions about this notice, contact the Environment Court in Auckland.