

4 July 2017

Dear Submitter / Further Submitter

## **APPEAL BY THE UNIVERSITY OF AUCKLAND AGAINST THE GENETICALLY MODIFIED ORGANISM 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 the University of Auckland (**University**) against the Chapter E37 - Genetically Modified Organism (**GMO**) provisions included 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 GMO provisions, which were agreed by all parties to the University appeal.
2. This letter provides information about the University 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 University appeal**

3. The University brought an appeal under section 158 of the LGATPA alleging that the Auckland Council (**Council**) erred in law when it decided to accept recommended GMO provisions that, in the University's opinion, made medical applications involving viable GMOs a Prohibited Activity.
4. The Council, as well as other parties involved in the appeal, did not accept that an error of law was made, instead arguing that the use of medical applications involving viable GMOs was a Permitted Activity.
5. Following a judicial conference before the High Court, the parties filed documentation which allowed the appeal to be determined without a hearing. The documentation included a set of amendments to the GMO provisions that were agreed by all parties to the appeal (**Agreed Amendments**). The Agreed

Amendments clarified that medical applications involving viable GMOs were a Permitted Activity.

### **The decision of the High Court**

6. On 30 May 2017 the High Court issued a decision<sup>1</sup> which determined that the GMO provisions were uncertain in relation to the activity status of medical applications involving viable GMOs. 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 activity status issue,<sup>2</sup> 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 paragraphs 20, 23 and 24 of the High Court's decision).
8. The Agreed Amendments are attached to the High Court's decision as Appendix A, 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 University appeal to resolve the question of the activity status for medical applications involving viable GMOs only. Any subsequent appeal to the Environment Court will not be allowed to raise issues that go beyond the Agreed Amendments.
10. The Council also notes that there is an unresolved High Court appeal in relation to the GMO provisions by Federated Farmers of New Zealand Incorporated (CIV-2016-404-2299). The Federated Farmers appeal challenges the ability of the Council to include provisions in the AUP which regulate GMOs and is on hold pending the outcome of a related Court of Appeal matter (also brought by Federated Farmers but in relation to a separate planning document).

### **Right of appeal under section 156(1), LGATPA**

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<sup>1</sup> [2017] NZHC 1150.

<sup>2</sup> At paragraph 16 of the decision the Court notes that this assumes that "the intention was to provide for the use of viable GMO medical vaccines as a permitted activity".

11. 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.
  - (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.
12. 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.
13. 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 GMO provisions that were recommended by the Panel.

#### **How to lodge an appeal with the Environment Court**

14. 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>

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

#### ***Waivers and directions***

16. After receiving the High Court’s decision and liaising with the Environment Court and the parties to the University 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.

17. On 3 July 2017 the Environment Court granted certain waivers and directions for appeals relating to the GMO provisions arising from the High Court's decision. A copy of the Environment Court's decision is **attached** to this letter.
18. The waivers and directions are set out in full at paragraph [5] 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](mailto: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 14 August 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](mailto: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](mailto: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***

19. As set out above at paragraph 15(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 **14 August 2017**.
  
20. If there are any queries in relation to the above, please email [unitaryplan@aucklandcouncil.govt.nz](mailto:unitaryplan@aucklandcouncil.govt.nz).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Mike Wakefield', written in a cursive style.

**Mike Wakefield**  
Senior Solicitor