

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-

UNDER the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**) and the Resource Management Act 1991 (**RMA**)

IN THE MATTER of an appeal under section 158(1) of the LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearings Panel (**Hearings Panel**) on the proposed Auckland Unitary Plan (**Proposed Plan**)

AND

IN THE MATTER of Proposed Plan Hearing Topics 011 Regional Policy Statement Rural, 056 Rural and 038 Contaminated Land

BETWEEN **Horticulture New Zealand Incorporated**
Appellant

AND **Auckland Council**
Respondent

**NOTICE OF APPEAL
16 SEPTEMBER 2016**

ATKINS | HOLM | MAJUREY

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TAKE NOTICE that under section 158(1) of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**) the Appellant appeals to the High Court from the decision of the Auckland Council in respect of the Proposed Auckland Unitary Plan (the **Proposed Plan**) dated 19 August 2016 (the **Decision**) received by the Appellant on 19 August 2016 **UPON THE GROUNDS** that the decision is erroneous in law as set out below.

INTRODUCTION

1. The Appellant is an incorporated society with the principal object of providing benefit to the horticulture industry. A key activity of the Appellant is involvement in Resource Management Act 1991 (**RMA**) plans and policy.
2. The Appellants made numerous submissions and further submissions on the Proposed Auckland Unitary Plan (**Proposed Plan**).
3. This appeal relates to three distinct submissions made on three Proposed Plan topics, namely:
 - (a) Topic 011 – Regional Policy Statement – Rural (**Topic 011**);
 - (b) Topic 056 – Rural Objectives and Policies (**Topic 056**); and
 - (c) Topic 038 – Contaminated Land (**Topic 038**).

Topic 11

4. In relation to Topic 011 the Appellant made a submission on the draft plan asking for the policy to be included and this request was supported by the inclusion of the policy in the notified version. The Appellant submitted on the notified version of the Proposed Plan supporting the following policy:

B8.2 Policy 6

Support the allocation of water to areas of elite and prime land and to the areas of non-soil dependent horticulture.

5. The only other submission on this policy was from Federated Farmers of New Zealand (**Federated Farmers**) who sought to extend the policy to include all rural production land.
6. Throughout the hearings process the Council changed its position and supported the change requested by Federated Farmers.

7. No submitters nor the Council sought the deletion of the policy.
8. The Independent Hearings Panel (**IHP**) recommended changes to the relevant section of the Proposed Plan which included deleting policy 6. The IHP did not give reasons for deleting this policy.
9. The Council accepted the recommendations of the Panel.

Topic 56

10. In relation to Topic 056 the Appellant submitted in opposition to a rule that would require a 20 metre side and rear yard in the rural zones. The Appellant proposed an alternative rule which included different side and rear yards depending on what rural zone was under consideration. The Appellant also sought a specific exemption for crop support structures, artificial crop protection structures, hedges and shelter belts.
11. Throughout the hearings process the Council supported the intent of the Appellant's submission but proposed a different approach to address it.
12. The IHP recommended changes to the relevant section of the Proposed Plan which included changing the side and rear yards in the various rural zones. The IHP did not provide an exemption for crop support structures, artificial crop protection structures, hedges and shelter belts. The IHP did not give reasons for not including this exemption.
13. The Council accepted the recommendations of the IHP.

Topic 38

14. In relation to Topic 038 the Appellant submitted on various matters but this appeal point relates to the submissions in relation to discharges of agrichemicals and vertebrate toxic agents (VTAs) – Chapter 5.10 / H4.9 (of the notified Proposed Plan).
15. In its closing submissions the Council provided a revised set of the provisions. The IHP stated it largely agreed with the Council's provisions as follows:

As set out in Council's supplementary closing remarks (4 September 2015), following the close of the hearing the Council continued discussions with the Minister of Conservation, Horticulture New Zealand and Skyworks

Helicopters to resolve outstanding issues relating to the agrichemicals and vertebrate toxic agent provisions. As a result of these discussions, the Council has reached agreement with the Minister and Horticulture New Zealand on all of the provisions and many of those of concern to Skyworks Helicopter. The Panel considers that not all the concerns raised by Mr Carkeek from Skyworks Helicopters can be addressed through the Plan provisions.

The Panel is generally supportive of the final form of the provisions agreed with the Council and the various submitters in Topic 038. However, as discussed in Section 2, the Panel is recommending some additional amendments to clarify the relationship of the contaminated land provisions and the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health and to address the Panel's plan-wide approach to accidental discovery requirements.¹
(emphasis added)

16. However the IHP recommended version of the Proposed Plan differs in a number of key respects from the Council closing submission version. These differences go beyond the changes that the IHP noted it had made. In particular, for the Appellant, a number of key and important references to agrichemical training requirements have been removed.
17. The Council accepted the recommendations of the IHP.

ERRORS OF LAW

18. The errors of law alleged by the Appellant are:

Topic 011

- (a) The Council erred in accepting the recommendation of the IHP to delete policy 6 without any submission that supported such a removal.
- (b) The Council erred in accepting the recommendation of the IHP to delete policy 6 without providing any reasons for the removal.

¹ IHP Report to AC Topic 038 Contaminated land 2016-07-22)

Topic 056

- (c) The Council erred in accepting a recommendation that did not provide an exemption for crop support structures, artificial crop protection structures, hedges and shelter belts from having to comply with side and rear yard requirements without providing reasons.

Topic 038

- (d) The Council erred in accepting a recommendation that provided for changes to the Proposed Plan which were inconsistent with the reasons provided for those changes.
- (e) The Council erred in accepting a recommendation that provided for changes to the Proposed Plan without providing reasons for the changes.

QUESTIONS OF LAW

19. The questions of law to be resolved are:

Topic 011

- (a) Did the Council err when it accepted the recommendation of the IHP to delete policy 6 without any submission that supported such a removal?
- (b) Did the Council err when it accepted the recommendation of the IHP to delete policy 6 without providing any reasons for the deletion?

Topic 056

- (c) Did the Council err when it accepted a recommendation that did not provide an exemption for crop support structures, artificial crop protection structures, hedges and shelter belts from having to comply with the side and rear yard requirements without providing reasons for not including the exemptions?

Topic 038

- (d) Did the Council err when it accepted a recommendation that provided for changes to the Proposed Plan which were inconsistent with the reasons provided for those changes?

- (e) Did the Council err when it accepted a recommendation that provided for changes to the Proposed Plan without providing reasons for the changes?

GROUNDINGS OF APPEAL

20. The grounds of appeal for all topics in relation to the failure to provide reasons are that:

(a) Section 144(7) and (8) of the LGATP provide:

(7) The Hearings Panel must provide its recommendations to the Council in 1 or more reports.

(8) Each report must include—

(a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and

(b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and

(c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

(b) The IHP was required to provide reasons for its recommendations. The error on the part of the IHP not to provide reasons has been transferred through into the Council's decisions.

(c) The failure to provide reasons does not comply with the statutory direction.

(d) The errors have a significant impact on the horticulture sector that the Appellant represents.

21. The grounds of appeal in relation to the other questions of law are:

Topic 011

- (a) The Council had no jurisdiction to accept a recommendation of the IHP to remove policy 6 as there was no submission seeking its removal.
- (b) Section 144 of the LGATPA provides the legal framework for the IHP recommendations.
- (c) Section 144(5) of the LGATP provides as follows:
 - (5) However, the Hearings Panel—
 - (a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan;
- (d) In relation to out of scope changes while it is open for the IHP to make recommendations that are outside the scope of the submissions the IHP must identify those recommendations that are out of scope in its report. The relevant recommendations on Topic 011 did not identify any that were out of scope.
- (e) The error has a significant impact on the horticulture sector that the Appellant represents

Topic 038

- (f) The Council had no jurisdiction to approve provisions in the Proposed Plan which were inconsistent with the reasons given for those provisions.
- (g) The error has a significant impact on the horticulture sector that the Appellant represents

RELIEF SOUGHT

22. The relief sought is:
- (a) That the appeal be allowed;
 - (b) That in relation to all the topics the matters are remitted back to the Council for re-consideration; and
 - (c) Costs.

DATE: 16 September 2016



Helen Atkins

Legal Counsel for Horticulture New
Zealand Incorporated

To: The Registrar, High Court, AUCKLAND

And to: The Registrar, High Court, AUCKLAND

And to: The Respondents and interested parties to the
decision to which this appeal relates

This notice of appeal is filed by Helen Atkins, solicitor for the Appellant, of the firm
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