IN THE HIGH COURT OF NEW ZEALAND **CIV-2016-**
AUCKLAND REGISTRY

UNDER	the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") and the Resource Management Act 1991 ("RMA")
AND	
IN THE MATTER	of an appeal under section 158 of the LGATPA and section 299 of the RMA
BETWEEN	**The University of Auckland** a body corporate established under the University of Auckland Act 1961 and the Education Act 1989, of 22 Princes Street Auckland Appellant
AND	**Auckland Council** a local authority constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009 having its principal office at 135 Albert Street, Auckland Respondent

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NOTICE OF APPEAL BY THE UNIVERSITY OF AUCKLAND

Dated 16 September 2016

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TAKE NOTICE THAT the University of Auckland ("University") will appeal to the High Court against a decision of the Auckland Council ("Council") notified on 19 August 2016, **UPON THE GROUNDS** that the decision is erroneous in law.

Decision Appealed

1. The University appeals against a decision made by Council on a provision or matter relating to the Proposed Auckland Unitary Plan ("PAUP"). The provision or matter was the subject of a submission made by Professor Peter Shepherd of the University on the PAUP;

2. Council accepted a recommendation of the Independent Hearings Panel ("Hearings Panel") which resulted in no provision being made for the use of viable (self-replicating) GMO medical vaccines as a permitted activity in the Proposed Plan; and

3. The matter appealed is the omission of any provision enabling the use of viable GMO medical vaccines as a permitted activity in the decision approving **Section E37** *Genetically modified organisms* of the publicly notified Unitary Plan ("Decision Version").

   (All references to the findings and reasoning of the Hearings Panel in this appeal are to be read as references to the Council decision).

Errors of law

4. The Council adopted without alteration the recommendations of the Independent Hearings Panel concerning the provisions in Section E 37, including provision for genetically modified organism activities, genetically modified organism field trials, the use of viable genetically modified veterinary vaccines, and genetically modified organism releases, either food-related or non-food-related as (variously) permitted, discretionary or prohibited activities as specified in **Table E 37.4.1**

5. The Activity Table in (A1) provides for "*Genetically modified organism activities* ***not specifically provided for or prohibited****, including research within contained laboratories and* ***medical or veterinary applications involving use of non-viable genetically modified products***" as a permitted activity, with no separate provision for the use of *viable* genetically modified medical vaccines, whereas the use of *any viable genetically modified veterinary vaccine of a specific dose supervised by a veterinarian* is provided for as a permitted activity.

6. In failing to make separate provision for the use of viable genetically modified medical vaccines the Council failed to recognise that the use of such vaccines for medical treatment will result in the subsequent release of genetically modified organisms (non-food-related) to land and/or within the Coastal Marine Area, which the Activity Table in (A6) states is a prohibited activity.

Questions of law

7. The questions of law to be decided are:

   (a) Did the Council err in law in making provision in Activity Table E37.4.1(A1) for medical applications involving the use of only *non-viable* genetically modified products as a permitted activity?

   (b) Did the Council err in law in omitting from Activity Table E 37.4.1 (A3) provision for the use of *viable* genetically modified *medical* vaccines when recognising the need for provision as a permitted activity for the use of *viable* genetically modified *veterinary* vaccines (separately from the provision in (A1) for veterinary applications involving the use of non-viable genetically modified products), given that the general permitted activity provision E 37.4.1 (A1) only permits genetically modified organism activities that are *not prohibited*, and that administering a viable genetically modified medical vaccine for treatment purposes will result in a genetically modified organism release to land and/or within the Coastal Marine Area?

(c) Did the Council err in law by including in the 37.1 **Background** explanatory material relating to the use of genetically modified veterinary vaccines including reference to activity status, the assessed level of risk and the terms and conditions to apply to the use of GMO veterinary vaccines, but failed to make any reference to the use of genetically modified medical vaccines?

(d) Did the Council err in law in failing to make any reference to the appropriate use of genetically modified medical and veterinary vaccines to enable people and communities to provide for their social, economic and cultural well-being and health and safety in 37.2 **Objective** and E 37.3 **Policies**?

(e) Did the Council err in law in failing to include in the **Definitions** section of the Unitary Plan a definition of "*medical vaccine*", "*genetically modified medical vaccine*", and "*viable genetically modified medical vaccine*"", whilst including in the Definitions section definitions of "*veterinary vaccine,*" "*genetically modified veterinary vaccine*" and "*viable genetically modified veterinary vaccine*"?

Grounds of Appeal

General grounds of appeal

8. The errors of law relate to the lack of explicit provision in the general text and the Activity table in Section E 37 for the use of viable as well as non-viable GMO medical vaccines as a permitted activity, while making explicit provision for the use of viable as well as non-viable veterinary vaccines as permitted activities and including explanatory material concerning the use of veterinary vaccines in the **Background** section.

9. The lack of specific provisions referring to the use of viable GMO medical vaccines along with the use of viable GMO veterinary vaccines results in the use of a viable genetically modified medical vaccine having to rely on the general activity provision for *"Genetically*

modified organism activities not specifically provided for or prohibited", and the error of law in the Decision text is that this general provision cannot apply to the use of GMO medical vaccines because the treatment of patients with a genetically modified medical vaccine will result in a non-food -related genetically modified organism release to land and/or the Coastal Marine Area, which is a prohibited activity.

10. The lack of provision in Section E 37 for the use of viable as well as non-viable genetically modified medical vaccines includes the omission of any reference in the Objective and the Policies to the use of genetically modified medical vaccines (or indeed, to the use of GMO veterinary vaccines) to enable people and communities to provide for their social, economic and cultural well-being and health and safety.

Specific grounds of appeal

11. Professor Peter Shepherd of the University made a submission on the PAUP concerning the notified proposed text relating to genetically modified organisms.

12. The submission objected in particular to the proposal that the release of both food and non-food related GMO be totally prohibited in Auckland. The submission stated there appeared to be a point of view of the Council based on the perception there is a serious risk posed by the release of these organisms and that the proposed plan provisions seemed "*focused mainly on food crops and does not consider other GMO contexts*." The submission went on to state that "*the blanket prohibition puts all GMOs in one basket and does not take into account the fact that there are many different types of GMOs that are aimed at addressing a wide range of issues outside the area of food crops*." The summary in the submission included the contention of Professor Sheppard that the draft plan did not properly take into account all forms of GMO and as such would have unintended

consequences for new applications of this technology that are outside the original opposition to GMO technologies.

13. The Hearings Panel received evidence from an Auckland Council expert witness Professor Heinemann which included an Appendix 2 that referred to medical vaccines and contained a draft activity table which included the use of medical vaccines as a permitted activity, but no reference was made to this in the Hearings Panel report.

14. Before the Auckland Council had completed making its decisions on the Hearings Panel report, the University drew to the attention of the Council the shortcomings in Section E37 in respect of the use of viable GMO medical vaccines, and the lack of definitions for medical vaccines, and viable GMO medical vaccines despite the Hearings Panel report recommendation that definitions be added to the Definitions section in respect to veterinary vaccines. The Auckland Council response was that the use of viable GMO medical vaccines was permitted by activity provision A1 in the Activity Table.

15. The University Medical School and the Auckland Hospital is currently engaged in a clinical trial involving the administering of an EPA-approved viable GMO medical vaccine (Pexa-Vec) to liver cancer patients, and the failure to make specific provision for the use of viable GMO medical vaccines (as has been done in respect of viable GMO veterinary vaccines) results in the continuation of this program after the E37 rules in the Unitary Plan becoming operative being prohibited, since the patients to whom the vaccine is administered will release GMO organisms into the environment.

Relief

16. The Appellant seeks the following relief:

(a) That its appeal be allowed;

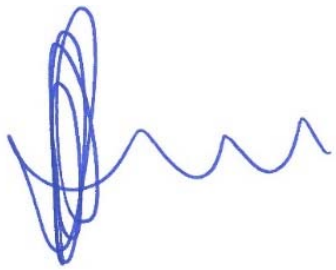
(b) That this Court makes an order directing the Auckland Council to amend the Auckland Unitary Plan provisions as set out in **Appendix 1** (amendments to Section E37) and **Appendix 2** (amendments to Definitions) to this Notice of Appeal;

(c) In the alternative, that this Court makes an order directing the Hearings Panel to re-visit its decision on Section E37;

(d) Consequential relief; and

(e) Costs.

Dated at Auckland this 16th day of September 2016



Richard Brabant

Counsel for the University of Auckland

This Notice of Appeal is filed by Rebecca Ewert, solicitor for the Appellant. The address for service of the Appellant is 22 Princes Street, Auckland 1010.

Documents for service on the Appellant may be:

(a) Left at the address for service; or

(b) Posted to the solicitor at Private Bag 92019, Auckland 1142.

In either case copies to counsel sent by email to richard@brabant.co.nz

TO: The Registrar
High Court
Auckland

AND TO: Auckland Council

Appendix 1

Amendments to Section E37

Tracked changes proposed by the University of Auckland to the Auckland Unitary Plan Independent Hearing Panel's recommendations on Topic 024 Genetically Modified Organisms

Editorial Note:

The University of Auckland's proposed changes are shown in ~~strikethrough~~ and underline.

E37. Genetically modified organisms

E37.1. Background

The outdoor use of genetically modified organisms (GMOs) has the potential to cause adverse effects on the environment, economy and social and cultural wellbeing. The objectives and policies seek to protect the community and receiving environment from risks associated with any genetically modified organism activity. The application of a precautionary approach to the outdoor use, storage, cultivation, harvesting, processing or transportation of genetically modified organisms in Auckland means that:

- the release of a genetically modified organism is prohibited (this is to avoid the risk that significant adverse environmental effects will arise, including adverse effects on the economy, community and/or Mana Whenua resources and cultural heritage values); and
- outdoor field trialling of a genetically modified organism (with prior approval of the Environmental Protection Authority (EPA)) is a discretionary activity.

Pastoral farming, dairying, horticulture and forestry are important land uses in Auckland and are significant contributors to the local and regional economy. Aquaculture is also a growing primary industry in New Zealand. Therefore there are a range of outdoor genetically modified organisms that genetically modified organism developers could consider using in Auckland, including genetically modified food crops, trees, animals, aquaculture products and pharmaceutical crops. The potential for adverse effects, including accidental contamination, resulting from the outdoor use of genetically modified organisms poses a risk to the community and environment. By specifying classes of genetically modified organisms and applying standards to the outdoor use of genetically modified organisms, the risks associated with their use, storage, cultivation, harvesting, processing or transportation can be reduced.

Within Auckland, this will involve managing and limiting the outdoor use of genetically modified organisms. Further, rules and controls will be used to mitigate any adverse effects associated with contamination by genetically modified organisms beyond the subject site, thereby reducing the risks to the community, environment and economy. Accidental or unintentional migration of genetically modified organisms that result in genetically modified organism contamination and subsequent clean up and remediation can be expensive. The Council therefore requires a genetically modified organism

consent holder to meet all potential costs associated with the activity and will secure long term financial accountability through appropriate standards and bonding requirements.

The Environmental Protection Authority is not obliged to set monitoring requirements as a part of its approval process, and can only require monitoring where it is relevant to assessing environmental risk. Under section 35 of the Resource Management Act 1991, the Council has a duty to monitor, which can be expensive. Requiring a genetically modified organism consent holder to meet the costs of monitoring, via consent conditions, ensures the costs are met by the consent holder, rather than the community. The resource consent status indicates the levels of risk considered acceptable by the community for that particular genetically modified organism activity and class.

The use of genetically modified medical and veterinary vaccines is a permitted activity where they are ~~not~~ viable and their administration is a specific delivery dose supervised by a medical practitioner or veterinarian. Any other use of genetically modified vaccines is a discretionary activity. Non-viable genetically modified veterinary vaccines tend not to persist in the environment, appear to be low risk and are difficult to monitor, making control by the Plan less appropriate. Viable genetically modified ~~veterinary~~ vaccines can have higher risks if their administration is not supervised or controlled by a medical practitioner or veterinarian. An example is a genetically modified veterinary vaccine distributed by way of edible food or edible plants, which cannot be supervised by a veterinarian, and may present higher risks to the environment and to the health and safety of people. In this circumstance the Council will have the discretion to require controls or to decline an application. The Council will also be able to respond quickly if there are compelling reasons for its use to benefit human or animal health and welfare. It is generally expected that if a discretionary activity consent is granted, it would apply as a consent for the use of the viable genetically modified veterinary vaccine on any land in the region, noting that specific conditions such as exclusions of specified areas may apply.

A relevant Environmental Protection Authority approval is required as a precondition for all applications for resource consent. The duration of any consent granted will be aligned with the Environmental Protection Authority approval terms. **E37.2. Objective [rcp/dp]**

(1) The environment, including people and communities and their social, economic and cultural well-being and health and safety, is protected from potential adverse effects associated with the outdoor use, storage, cultivation, harvesting, processing or transportation of genetically modified organisms, while enabling the use of Environmental Protection Authority approved vaccines for medical and veterinary purposes (including research and trials).

E37.3. Policies [rcp/dp]

(1) Adopt a precautionary approach by prohibiting the general release of a genetically modified organism, and by making outdoor field trialling of a genetically modified organism and the use of viable genetically modified medical or veterinary vaccines not supervised by a medical practitioner or veterinarian a discretionary activity.

(2) Provide for the controlled use of Environmental Protection Authority approved vaccines for medical and veterinary purposes as a permitted activity.

(3) Require that the holder of a resource consent granted for the outdoor field trialling of a genetically modified organism is financially accountable (to the extent possible) for any adverse effects associated with the activity, including clean-up costs and remediation, including through the use of bonds.

(4) Require outdoor field trialling of genetically modified organisms to avoid, as far as can reasonably be achieved, risks to the environment or to the mauri of flora and fauna or to the relationship of Mana Whenua with flora and fauna from the use, storage, cultivation, harvesting, processing or transportation of a genetically modified organism.

(5) Require all monitoring costs to be met by the consent holder.

(6) Require that the outdoor use of genetically modified organisms does not result in migration of genetically modified organisms beyond the area designated by:

(a) ensuring adequate site design, construction and management techniques;

(b) preventing the escape of genetically modified organisms from transporting vehicles or vessels; and

(c) ensuring all heritable material is removed upon the conclusion of the activity.

(7) Adopt an adaptive approach to the management of the outdoor use, storage, cultivation, harvesting, processing or transportation of a genetically modified organism through periodic reviews of these plan provisions, particularly if new information on the benefits and/or adverse effects of a genetically modified organism activity becomes available.

(8) Require, where appropriate, more stringent measures than those required under the provisions of the Hazardous Substances and New Organisms Act 1996 to manage potential risks.

E37.4. Activity table

Table E37.4.1 Activity table specifies the activity status of the use of genetically modified organisms on land pursuant to section 9(3) of the Resource Management Act 1991 and the activity status of works, occupation and activity in the coastal marine area pursuant to sections 12(1), 12(2) and 12(3) of the Resource Management Act 1991.

Table E37.4.1 Activity table

Activity		**Activity status**
(A1)	Genetically modified organism activities not specifically provided for or prohibited, including research within contained laboratories and medical or veterinary applications involving use of non-viable genetically modified products	P

(A2)	Genetically modified organism field trials on land and within the coastal marine area and any structure intended to house, or otherwise contain, plants and animals which are associated with the conducting of genetically modified organism field trials	D
(A3)	The use of any viable genetically modified medical or veterinary vaccine of a specific dose supervised by a medical practitioner or veterinarian	P
(A4)	The use of any viable genetically modified medical or veterinary vaccine not otherwise provided for	D
(A5)	Genetically modified organism releases – food-related on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with outdoor genetically modified organisms releases, except as specifically provided for	Pr
(A6)	Genetically modified organism releases – non food-related on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with outdoor genetically modified organism releases, except as specifically provided for	Pr

E37.5. Notification

(1) Any application for resource consent for the following activities must be publicly notified:

(a) genetically modified organism field trials on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with the conducting of genetically modified organism field trials; or

(b) the use of any viable genetically modified medical or veterinary vaccine not otherwise provided for.

(2) Any application for resource consent for an activity listed in Table E37.4.1 Activity table and which is not listed in E37.5(1) above will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991.

(3) When deciding who is an affected person in relation to any activity for the purposes of section 95E of the Resource Management Act 1991 the Council will give specific consideration to those persons listed in Rule C1.13(4).

E37.6. Standards

All activities listed as a discretionary activity in Table E37.4.1 Activity table must comply with the following discretionary activity standards. These standards are in addition to any controls/conditions imposed by the Environmental Protection Authority.

E37.6.1. Approvals

(1) All genetically modified organism discretionary activities must:

(a) have the relevant approval from the Environmental Protection Authority; and

(b) be undertaken in accordance with Environmental Protection Authority approval conditions for the activity.

E37.6.2. Bond requirements

(1) The Council requires the holder of a resource consent for an activity involving the use of a genetically modified organism to provide a bond in respect of the performance of any one or more conditions of the consent, including conditions relating to monitoring required of the genetically modified organism activity (prior to, during and after the activity), and that this bond be available to pay or reimburse any costs incurred by, or on behalf of, the Council to avoid, remedy or mitigate any adverse environmental effects and any other adverse effects to, or on, third parties (including economic effects), that become apparent during the exercise or after the expiry of the consent.

(2) The exact time and manner of implementing and discharging the bond will be decided by, and be executed to the satisfaction of, the Council.

(3) All of the following matters will be considered when determining the amount and type of the bond:

(a) what adverse effects could occur and the potential significance, scale and nature of those effects, notwithstanding any measures taken to avoid those effects;

(b) the degree to which the consent holder for the activity has sought to avoid those adverse effects, and the certainty associated with whether the measures taken will avoid those effects:

(c) the level of risk associated with any unexpected adverse effects from the activity;

(d) the likely scale of costs associated with remediating any adverse effects that may occur;

(e) the timescale over which effects are likely to occur or arise; and

(f) the extent of monitoring that may be required in order to establish whether an adverse effect has occurred or whether any adverse effect has been appropriately remedied.

E37.6.3. Monitoring

(1) A discretionary activity for a genetically modified organism may require monitoring during, and beyond, the duration of consent. Monitoring is to be carried out by either the Council, or the consent holder, with appropriate reporting procedures to the relevant regulatory authority.

(2) A monitoring strategy for a discretionary activity for a genetically modified organism can include all of the following matters:

(a) inspection schedules for the site, storage areas and equipment (daily, weekly, monthly, events based);

(b) testing of procedures (e.g. accidental release response);

(c) training programmes for new staff, and updates for existing staff;

(d) audits of sites and site management systems; and

(e) sample testing of plants, soils and water in neighbouring properties or localities for the presence of migrated genetically modified organisms.

E37.6.4. Reporting

(1) Reporting requirements by the consent holder must be stipulated in the consent conditions.

E37.7. Assessment – controlled activities

There are no controlled activities in this section.

E37.8. Assessment – restricted discretionary activities

There are no restricted discretionary activities in this section.

E37.9. Special information requirements

(1) An application for:

(a) the use of any viable genetically modified <u>medical or</u> veterinary vaccine not otherwise provided for; or

(b) for genetically modified organism field trials on land and within the coastal marine area and any structure intended to house or otherwise contain plants and animals which are associated with the conducting of genetically modified organism field trials

must be accompanied by all of the following:

(i) evidence of approval from the Environmental Protection Authority for the specific genetically modified organism for which consent is sought;

(ii) details of the proposed containment measures for the commencement, duration and completion of the proposed activity;

(iii) details of the species, its characteristics and lifecycle, to which the genetically modified organism activities will relate;

(iv) research on adverse effects to the environment and economy associated with the activity should genetically modified organisms escape from the activity area, and measures that will be taken to avoid, remedy or mitigate such effects;

(v) evidence of research undertaken that characterises and tests the genetically modified organisms, and the certainty associated with the accuracy of that information;

(vi) a management plan outlining on-going research and how monitoring will be undertaken during, and potentially beyond, the duration of consent;

(vii) details of areas in which the activity is to be confined; and

(viii) a description of contingency and risk management plans and measures.

Appendix 2

Amendments to Definition Section

Tracked changes proposed by the University of Auckland to the Auckland Unitary Plan Independent Hearing Panel's recommendations on Topic 065 Definitions relating to genetically modified organisms

Editorial Note:

The University of Auckland's proposed changes are shown in underline.

G

Garden centre

Shop for the sale of plants, trees or shrubs.

Includes the sale of:

- landscaping supplies;
- bark and compost; and
- statuary and ornamental garden features provided that their sale is accessory to the sale of plants, trees or shrubs. This definition is nested within the Commerce nesting table.

Gas distribution regulator station

Those parts of works or gas installations, being a building, structure or enclosure incorporating fittings, valves and other ancillary equipment that are used principally for the purposes of the control of the distribution of gas.

Genetically modified organism

Unless expressly provided otherwise by regulations, any organism in which any of the genes or other genetic material:

- have been modified by in vitro techniques; or
- are inherited or otherwise derived, through any number of replications, from any genes or other genetic material which has been modified by in vitro techniques.

This does not apply to genetically modified products that are not viable and are no longer genetically modified organisms, or products that are dominantly non-genetically modified but contain non-viable genetically modified ingredients, such as processed foods.

Genetically modified medical vaccine

A medical vaccine that is a genetically modified organism as defined in this Plan.

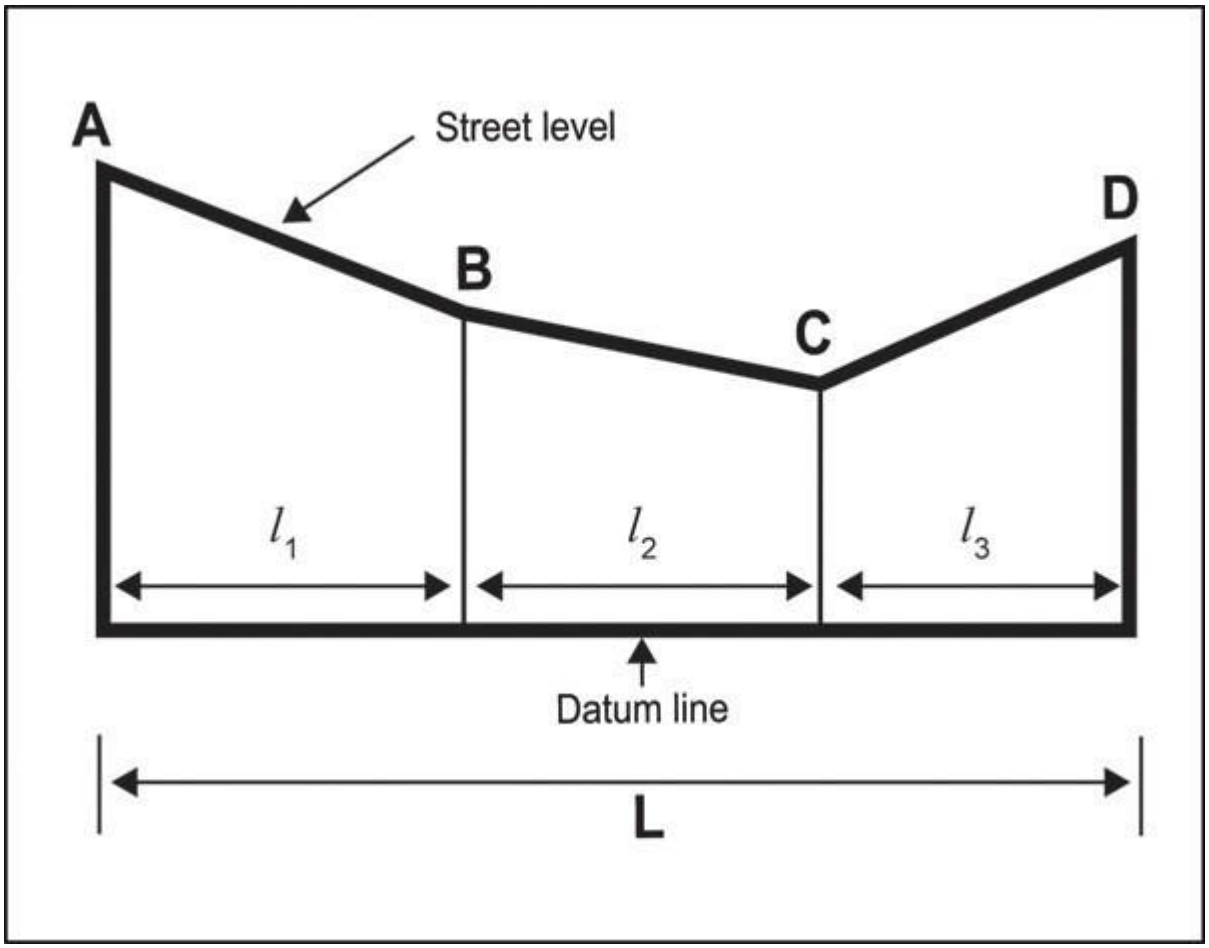
Genetically modified veterinary vaccine

A veterinary vaccine that is a genetically modified organism as defined in this Plan.

M

Mean street level

The average level of all points on the surface of the street measured at the centre line of the street parallel to the street boundary of the site. Figure J1.4.4 Mean street level below and the following formula illustrate how mean street level should be calculated. **Figure J1.4.4 Mean street level**



(A, B, C and D represent the street levels at given points where the street gradient changes. L represents the length of the boundary).

$$MSL = \frac{\left(\frac{A+B}{2} \times l_1\right) + \left(\frac{B+C}{2} \times l_2\right) + \left(\frac{C+D}{2} \times l_3\right)}{L}$$

$$l_1 + l_2 + l_3 = L$$

The following qualifications apply to sites with more than one frontage and corner sites:

(a) For a site with two frontages, the mean street level at each frontage applies for half the distance between those frontages.

(b) For a corner site that has one frontage, the mean street level is the average of all points measured at the centre lines of the streets parallel to all street boundaries of the site.

(c) A site with three or more frontages will be subject to (a) and (b) above between the highest and lowest frontages.

Medical vaccine

A biological compound that:

- Is used to produce or artificially increase immunity to a particular disease;
- Is controlled by the Medicines Act 1981; and
- Has been approved as safe to use by the Ministry of Health.

Metal thermal spraying

Spraying a fine metallic material onto a surface, in a molten or semi-molten state, to form a coating. Includes:

- molten metal flame spraying;
- electric arc spraying;
- powder flame spraying; and
- plasma arc spraying.

V

Vehicle crossing

Facility for vehicle access between a road carriageway and a site boundary.

Vertebrate toxic agent

Substance used to eradicate, modify or control vertebrate animals.

Vessel

Boat or craft used in navigation in or on the water, with or without propulsion. Includes:

- barges, lighters, or similar vessels;

hovercraft or similar craft;

- submarines or other submersibles; and

- houseboats.

Veterinary clinic

Facility used for animal healthcare. Includes:

- animal hospital treatment.

This definition is nested within the Commerce nesting table.

Veterinary vaccine

A biological compound that:

- is used to produce or artificially increase immunity to a particular disease;
- is controlled by the Agricultural Compounds and Veterinary Medicines Act 1997; and
- has been tested and approved as safe to use by a process similar to that conducted for approval and use of medical vaccines.

Viable genetically medical vaccine

A genetically modified medical vaccine that could survive or replicate in the environment or be transmitted from the inoculated recipient.

Viable genetically modified veterinary vaccine

A genetically modified veterinary vaccine that could survive or replicate in the environment or be transmitted from the inoculated recipient.

Vibe

A quality of a plan that is incapable of being defined.

Visitor accommodation

Facility used for accommodating tourists and short-stay visitors away from their normal place of residence. Includes:

- backpacker lodges;
- motels and hotels;

- services or amenities such as restaurants, bars, gyms and ancillary retail provided on-site for the exclusive use of people staying in the accommodation and their guests;
- serviced rental accommodation for visitors offered at a daily tariff or with a pricing structure consistent with short stay accommodation; and
- timeshare accommodation. Excludes:
- boarding houses and hostels;
- letting of dwellings, including for holiday purposes; and
- accommodation on a marae.

This definition is nested within the Residential nesting table.

Volatile organic compound

A hydrocarbon based compound with a vapour pressure greater than 2mm of mercury (0.27 kilopascals) at a temperature of 25°C or having a corresponding volatility under the particular conditions of use, but does not include methane.