

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 of the LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearing Panel ("**Hearing Panel**") on the proposed Auckland Unitary Plan ("**Proposed Plan**")

**AND**

**IN THE MATTER** of Proposed Plan Hearing Topic 075 – Waitakere Ranges

**BETWEEN** **THE WAITAKERE RANGES PROTECTION SOCIETY INCORPORATED**

**Appellant**

**AND** **AUCKLAND COUNCIL**

**Respondent**

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NOTICE OF APPEAL

RE PROPOSED PLAN TOPIC 075 – WAITAKERE RANGES

DATED: 15 September 2016

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**TAKE NOTICE** that at \_\_\_\_\_ on \_\_\_\_\_ 2016 or as soon as Counsel may be heard Counsel for the Appellant will move the High Court at Auckland on appeal from the decision of the Auckland Council ("**Council**") dated 19 August 2016 regarding Hearing Topic 075 - Waitakere Ranges ("**the Decision**") of the Proposed Auckland Unitary Plan ("**the Proposed Plan**") as follows:

### **Background**

1. The Appellant has the right to appeal the Decision to the High Court under section 158(1) of the LGATPA because this Appeal relates to provisions or matters relating to the Proposed Plan:
  - (a) That the Appellant addressed in submissions; and
  - (b) In relation to which the Council accepted recommendations of the Auckland Unitary Plan Independent Hearings Panel ("**Hearing Panel**") which resulted in provisions being included in the Proposed Plan or a matter being excluded from the Proposed Plan.
2. The Appellant is not a trade competitor for the purposes of section 308D of the RMA.
3. The Appellant lodged original submissions dated 27 February 2014 (submitter 2959) and further submissions dated 21 July 2014 (further submitter 3147) (collectively, "**the Submissions**") on the Proposed Plan.
4. This Appeal relates to a matter that was addressed in the Submissions, being the activity status for subdivision in the Waitakere Ranges at a density greater than that specifically provided for ("**Default Status**"):
  - (a) The Proposed Plan as notified contained precincts and sub-precincts that identified the intended or enabled subdivision pattern for land in the Waitakere Ranges. In respect of some of those precincts and sub-precincts the Default Status for subdivision was Prohibited Activity.
  - (b) The Appellant through its original submissions:
    - (i) Supported the Proposed Plan provisions that allocated a Default Status for subdivision of Prohibited Activity;
    - (ii) Sought to introduce a Default Status of Prohibited or Non-complying Activity for subdivision in the Oratia Sub-precinct in

place of the Discretionary Activity status in the Proposed Plan as notified.

- (c) The Appellant through its further submissions opposed submissions filed by third parties that sought to remove the Prohibited Activity Default Status for subdivision.
  - (d) In evidence and legal submissions presented to the Hearing Panel at the hearing on Hearing Topic 075 – Waitakere Ranges, the Appellant and the Council supported the retention of Prohibited Activity Default Status for subdivision.
5. In its recommendations report dated 22 July 2014 on Hearing Topic 075 – Waitakere Ranges (“**the Report**”), the Hearing Panel replaced the Prohibited Activity Default Status for subdivision with Non-complying Activity status (“**the Status Change**”).
  6. The Decision accepted the recommendations in the Report regarding the Status Change.
  7. The Decision adopted the reasons of the Hearing Panel as expressed in its recommendation reports with respect to recommendations that were accepted by the Council.

#### **Errors of Law**

8. The Appellant alleges that the Council and the Hearing Panel erred as follows in the Decision in relation to the Status Change:
  - (a) By having regard to the Waitakere Ranges Heritage Area Act 2008 (“**WRHAA**”) only insofar as it will affect the assessment of future resource consent applications pursuant to section 13 of the WRHAA and failing to take into account relevant and mandatory considerations being the duties and obligations in sections 10 and 11 of the WRHAA in respect of the preparation and reviewing of regional policy statements, regional plans and district plans.
  - (b) By failing to undertake an assessment of the costs and benefits of the Status Change in terms of section 145(1)(d) of the LGATPA and sections 32AA and section 32 of the RMA and instead addressing only the costs of imposing Prohibited Activity status.

- (c) By applying the incorrect legal test for the implementation of Prohibited Activity status, in asserting that, "*prohibited activity status implies that the Plan has got all the answers right which seems unlikely in the Waitakere Ranges, given its history and existing pattern of subdivision, use and development*" (para 9.2 of the Report).
- (d) By failing to take into account relevant considerations, being:
- (i) Case law regarding the basis upon which Prohibited Activity status should be considered including in particular:
- Paragraphs [1115] to [1144] of *Robinson and others v Waitakere City Council* (Eighth Decision) (EtCt decision A3/2009) ("**the Robinson Decision**"):
  - *Coromandel Watchdog of Hauraki Incorporated v Ministry of Economic Development* (Court of Appeal decision [2008] NZRMA 77).
- (ii) The benefits of imposing Prohibited Activity Default Status for subdivision in the Waitakere Ranges, including the benefits articulated and addressed in the *Robinson Decision*.

#### Questions of Law to be Resolved:

9. The questions of law to be resolved are:
- (a) Did the Hearing Panel fail to comply with duties and obligations on it pursuant to sections 10 and 11 of the WRHAA?
- (b) Was the Hearing Panel required to undertake and include in the Report an assessment of benefits and costs with reference to the Status Change and, if so, did the Hearing Panel undertake and include in the Report an assessment of benefits and costs with reference to the Status Change?
- (c) Did the Hearing Panel apply an incorrect legal test for the implementation of Prohibited Activity status, being the threshold test described in paragraph 8(c) above?
- (d) Did the Hearing Panel err in law by failing to take into account relevant considerations being those specified in paragraph 8(d) above?

- (e) Did the Council in the Decision incorporate and repeat the errors of law identified in paragraphs 9(a), (b), (c) and (d) above by accepting the Hearing Panel's recommendation regarding the Status Change without rectifying the Hearing Panel's errors?

**Grounds of Appeal:**

*Sections 10 and 11 of the WRHAA*

10. Sections 10 and 11 of the WRHAA specify that:
- (a) When preparing or reviewing a regional policy statement, regional plan or district plan that affects the Waitakere Ranges Heritage Area, the Council must give effect to the purpose of the WRHAA and the objectives (sections 10(1) and 11(1)); and
  - (b) When evaluating a proposed policy statement, proposed regional plan or proposed district plan that affects the Waitakere Ranges Heritage Area, the Council must examine whether the proposal is the most appropriate way to achieve the objectives, having regard to the purpose of the WRHAA (sections 10(3) and 11(3)).
11. The duties and obligations in sections 10 and 11 of the WRHAA applied to the Hearing Panel with respect to its Report and to the Council with respect to its Decision.
12. The reasons for the Panel's recommendations with respect to the Status Change do not address the purpose of the WRHAA, the objectives set out in the WRHAA, or sections 10 or 11 of the WRHAA.
13. The Hearing Panel's recommendations with respect to the Status Change and the Decision:
- (a) Do not give effect to the purpose of the WRHAA or the objectives set out in the WRHAA;
  - (b) Do not examine whether the Status Change is the most appropriate way of achieving the objectives, having regard to the purpose of the WRHAA; and
  - (c) Instead, have regard to the WRHAA only in terms of the extent to which it might influence the assessment of subsequent applications for

resource consent to subdivide land within the Waitakere Ranges Heritage Area (see the statement in para 9.2 of the Report that, “Proposals to subdivide land over and above the allocated entitlement face robust assessment under sections 104 and 104D of the Resource Management Act 1991 and sections 7 and 8 of the Waitakere Ranges Heritage Area Act 2008.”).

*Failure to undertake assessments of costs and benefits*

14. Pursuant to section 145(1)(d) of the LGATPA, the Hearing Panel was required to include in its recommendations a further evaluation of the Status Change in accordance with section 32AA of the RMA, which must be undertaken in accordance with section 32(1) to (4) of the RMA.
15. The Hearing Panel failed to include a further evaluation of the Status Change in the Report and in particular failed to:
  - (a) Examine whether the Status Change was the most appropriate way to achieve the relevant objectives of the Proposed Plan by assessing the relative efficiency and effectiveness in achieving the objectives of a Prohibited Activity Default Status in comparison with the Non-complying Activity Default Status adopted by the Hearing Panel (section 32(1)(b));
  - (b) Identify and assess the benefits and costs of the effects that are anticipated from the implementation of the provisions (section 32(2)(a)); and
  - (c) Quantify the benefits and costs referred to in (b) above (section 32(2)(b)).
16. While the Report identifies matters that the Hearing Panel considers to be costs of retaining a Prohibited Activity Default Status for subdivision, the Hearing Panel did not endeavour to:
  - (a) Identify or evaluate the benefits of Prohibited Activity status; or
  - (b) Compare the relative costs and benefits of the alternative options.
17. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel’s recommendations, including the Status Change. The Decision contains no evaluation in

accordance with sections 32AA and 32(1) to (4) of the RMA with respect to the Status Change. Accordingly, the Decision has incorporated and repeated the failure of the Hearing Panel to provide in the Report a further evaluation in accordance with sections 32AA and 32(1) to (4) of the RMA with respect to the Status Change.

*Applying the wrong legal test for implementation of Prohibited Activity status*

18. The Hearing Panel's evaluation asserted that, "*Prohibited activity status implies that the Plan has got all the answers right which seems unlikely in the Waitakere Ranges, given its history and existing pattern of subdivision, use and development*" (para 9.2 of the Report).
19. In doing so, the Hearing Panel has misdirected itself as to the correct legal test for the implementation of Prohibited Activity status in planning instruments made under the RMA:
  - (a) The Hearing Panel effectively imposed a threshold test on the imposition of Prohibited Activity status, being that it could only be adopted if there is no prospect of a resource consent being appropriately granted if Non-complying Activity status is allocated instead of Prohibited Activity status.
  - (b) Prohibited Activity status is a tool available to the Council pursuant to the RMA. There is no statutory or other threshold exclusively relating to the allocation of Prohibited Activity status to an activity.
  - (c) Prohibited Activity status is not necessarily permanent and:
    - (i) Is subject to periodic review through the plan review process; and
    - (ii) May be altered through a private plan change request or public plan change process.
  - (d) Prohibited Activity status should be upheld if it is warranted in terms of the evaluation under section 32 of RMA, regardless of whether resource consent might appropriately be granted to a proposal if Non-complying Activity status was adopted instead.
  - (e) The Hearing Panel's evaluation is contrary to the Court of Appeal decision in *Coromandel Watchdog of Hauraki Incorporated v Ministry*

*of Economic Development* (Court of Appeal decision [2008] NZRMA 77).

20. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel's recommendations, including the Status Change. The Decision contains no separate discussion of the test applying to the implementation of Prohibited Activity status in planning instruments made under the RMA. Accordingly, the Decision has incorporated and repeated the Hearing Panel's misdirection as to the correct legal test for the implementation of Prohibited Activity status in planning instruments made under the RMA.
21. Had the Report and Decision applied the correct legal test for the implementation of Prohibited Activity status in planning instruments made under the RMA they would not have upheld the Status Change.

*Failure to take account of relevant considerations regarding Status Change*

22. The Report fails to take any account of case law regarding the basis upon which Prohibited Activity status should be assessed including in particular:
  - (a) Paragraphs [1115] to [1144] of *Robinson and others v Waitakere City Council* (Eighth Decision) (EtCt decision A3/2009), which:
    - (i) Concerned the implementation in the Operative Plan of the Swanson Structure Plan and is directly relevant to Proposed Plan Hearing Topic 075;
    - (ii) Addressed the costs and benefits relating to a Default Status for subdivision of Prohibited Activity, with particular reference to the circumstances and characteristics relating to the Waitakere Ranges;
    - (iii) Canvassed the caselaw relating to the application of Prohibited Activity status; and
    - (iv) Concluded that the Default Status for subdivision in the part of the Waitakere Ranges subject to the Swanson Structure Plan should be a Prohibited Activity under the Operative Plan.



(b) *Coromandel Watchdog of Hauraki Incorporated v Ministry of Economic Development* (Court of Appeal decision [2008] NZRMA 77) which:

- (i) Relates to the appropriate status of mining in the Thames Coromandel District;
- (ii) Gives guidance with respect to the application of Prohibited Activity status in District plans; and
- (iii) In doing so, concludes that the High Court erred "*in holding that a prohibited activity status can only be used when a planning authority is satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration*".

23. The Hearing Panel failed to take any account of the benefits of imposing Prohibited Activity Default Status for subdivision in the Waitakere Ranges, including the benefits articulated, addressed and evaluated in the *Robinson* Decision. Those benefits:

- (a) Have not been rendered irrelevant by the passage of time, intervening events or the passing of the WRHAA; and
- (b) Remain relevant in terms of the determination by the Hearing Panel and Council of the Default Status for subdivision pursuant to the Proposed Plan.

24. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel's recommendations, including the Status Change. The Decision contains no separate consideration of the matters identified in paragraphs 22 and 23 above. Accordingly, the Decision has incorporated and repeated the Hearing Panel's failure to take into account those relevant considerations.

25. Had the Report and Decision had regard to the relevant considerations listed in paragraphs 22 and 23 above they would not have upheld the Status Change.

### **Relief Sought**

26. The Appellant seeks:

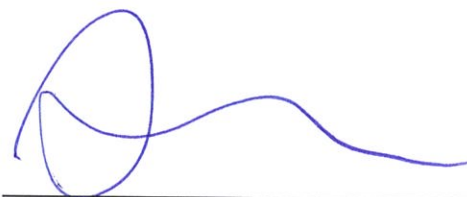
- (a) That the appeal be allowed.
- (b) That the Decision be disallowed to the extent that it approves the Status Change.
- (c) That the Decision be remitted back to the Council for reconsideration.
- (d) That the Court direct the Council to provide the Appellant and other interested parties with an opportunity to make further submissions and provide further evidence in relation to the Default Status for subdivision in the Waitakere Ranges.
- (e) Costs.

### Attachments

27. The Appellant **attaches** the following documents to this Notice of Appeal:
- (a) Copies of the parts of the Appellant's original and further submissions that relate to the Default Status for subdivision in the Waitakere Ranges (**Annexure A**).
  - (b) A copy of the Report (**Annexure B**)
  - (c) A copy of the relevant parts of the Decision (**Annexure C**).
  - (d) A list of persons who are parties to the proceedings concerning or who appeared before the Hearing Panel with regard to the Default Status for subdivision in the Waitakere Ranges and on whom the Appellants will serve a copy of this Appeal (**Annexure D**).

This notice is filed in reliance on section 158 of the Local Government (Auckland Transitional Provisions) Act 2010, sections 299 and 300 of the Resource Management Act 1991 and Part 20 of the High Court Rules.

DATED 15 September 2016



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**D A Allan**

Solicitor for the Appellant

TO: The Auckland Council

AND TO: The Registrar  
The High Court  
Auckland

AND TO: The persons listed in Annexure D

This Notice of Appeal is filed by **Douglas Andrew Allan**, solicitor for the appellant whose address for service is at the offices of Ellis Gould, Solicitors, Level 17, Vero Centre, 48 Shortland Street, PO Box 1509, Auckland 1140, DX CP22003, Auckland, Telephone: (09) 307-2172, Facsimile: (09) 358-5215.

Documents for service on the appellant may be left at the above address for service or may be:

- (a) Posted to the solicitor at PO Box 1509, Auckland; or
- (b) Left for the solicitor at a Document Exchange for direction to DX CP22003, Auckland.