

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

**CIV 2016**

**UNDER**

The Local Government (Auckland Transitional Provisions) Act 2010  
and the Resource Management Act 1991

**AND IN THE MATTER**

of an application for judicial review under Part 1 of the Judicature  
Amendment Act 1972

**BETWEEN**

**THE STRAITS PROTECTION SOCIETY INCORPORATED** an  
incorporated society with its registered office at 1 Church Bay Road,  
Waiheke Island

**Applicant**

**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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**STATEMENT OF CLAIM**

**16 September 2016**

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**Solicitor Acting**

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**The Applicant by its Solicitor says:**

**PARTIES**

- 1 The Applicant is an incorporated society under the Incorporated Societies Act 1908 (registration 1336381) (**Society**).
  
- 2 The Society's public interest objects (at clause [2] of its rules) include:
  - a) To represent and promote the interests of members as they relate to the environment - particularly to the protection, maintenance and enhancement of the environment as embodied in the principles of ecological sustainable development; and generally to the implementation of the Resource Management Act 1991; the Human Rights Act 1993; the Local Government Act 2002; the Acts arising from the reorganization of Local Government in New Zealand; the Proposed Auckland Unitary Plan; the Auckland Unitary Plan; and related Council controlled organizations, the rule of Law and the Constitution of New Zealand.
  
  - f) To take action to promote sustainable development and to ensure the equitable, non-discriminatory, efficient, effective and economical provision of welfare, public services and utilities by local, regional and national service providers, both public and private, for the wellbeing of people and communities, and the environment.
  
- 3 The respondent is a local authority constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009 and a consent authority under the Resource Management Act 1991 (**Council**).

**PROPOSED AUCKLAND UNITARY PLAN**

- 4 On 22 July 2016, the Auckland Unitary Plan Independent Hearings Panel (**Hearings Panel**) released recommendations on the Proposed Auckland Unitary Plan (**proposed plan**). Recommendations were released under s144 of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**).
  
- 5 In its report *Changes to the Rural Urban Boundary, rezoning and precincts*, the Hearings Panel stated:

A small number of submitters requested changes to the Rural Urban Boundary on Waiheke Island. As noted above the Panel recommends the Rural Urban Boundary be located in the district plan and the district plan in the recommended Plan does not cover Waiheke Island or the other Hauraki Gulf Islands. Within this context the Panel considers any changes to the Rural Urban Boundary on Waiheke Island are best left to a district plan review for the Hauraki Gulf Islands, at which time such possible changes can be considered in the wider context of other district plan issues. The Panel therefore has not recommended changes to the Rural Urban Boundary on Waiheke Island. (p15)

6 The Hearings Panel recommendations on the RUB in relation to the Hauraki Gulf Islands (and associated reports) are relied upon as if pleaded in full.

7 On 19 August 2016 the Chairperson of the Hearings Panel issued a minute, *Clarification of recommendation on the Rural Urban Boundary for Waiheke (minute)*. The minute relevantly stated:

“During the course of debate at the meeting of the governing body of the Auckland Council on the Panel’s recommendations, the meaning of the final sentence was questioned. It was suggested that this sentence may mean that the Rural Urban Boundary, as notified on 30 September 2013 as part of the proposed Auckland Unitary Plan, remains part of the Regional Policy Statement in relation to the Hauraki Gulf Islands, even though it is recommended to be removed from the Regional Policy Statement in respect of the rest of the Auckland Region and relocated as a rule in the District Plan provisions.”

8 The minute concluded that deletion of the RUB from the regional layer (regional policy statement) and its’ non-replacement in the district layer (district plan) was deliberate. The Hauraki Gulf Islands do not have a RUB under the decisions version of the proposed plan. In contrast, the rest of the Auckland region continues to have a RUB, as a rule in the district plan. The minute is relied upon as if pleaded in full.

9 The minute was issued after the Governing Body passed its resolution on 10 August 2016 to approve the recommendations of the Hearings Panel in relation to the RUB for the Hauraki Gulf Islands. Accordingly, the minute was not considered by Council in making its decision to delete the RUB for the Gulf Islands (without replacement within the planning framework).

#### **DECISION SUBJECT TO REVIEW**

10 On 19 August 2016, Council publicly notified the decisions version of the proposed plan. Council adopted without change the Hearings Panel recommendation on the RUB for the Hauraki Gulf Islands. There is no RUB for the Gulf Islands in the decisions version of the proposed plan.

11 As Council has accepted the recommendations of the Hearings Panel, references to the findings and reasoning of the Hearings Panel in this claim are to be read as references to the

Council decision. Council's decision is relied on as if pleaded in full. Recommendations made by the Hearings Panel are to be read as an integrated whole, meaning that many parts of those recommendations (and Council's decision adopting same) may have some relevance to the appeal. But for the purposes of this appeal, the Appellants principally rely upon errors of law in the Hearings Panel's "Overview of Recommendations" (in particular "Scope", which outlines case law, methodology and approach to scope).

### **First ground for review – Scope**

12 The applicant repeats paragraphs 1-11 above.

13 The Hearings Panel recommended deletion of the RUB for the Gulf Islands as being within scope. The Hearings Panel was wrong and there was no scope to do so. Council adopted that recommendation. It therefore acted unlawfully through wrong legal test.

#### **Particulars:**

(A) Scope of changes to the proposed plan is defined by reference to the plan provisions as notified, relief sought in submissions made on the proposed plan, and the test as to scope identified in High Court authority including the "Clearwater" tests.

(B) Relevant case law was referred to and adopted by the Hearings Panel at [4.2] of its "Overview of Recommendations." In deleting the RUB for the Gulf Islands, the Hearings Panel acted outside s144(5) LGATPA and the High Court authority it cited.

#### **Wherefore the applicant seeks:**

A A declaration that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan was invalid and an order setting that decision aside;

B Where the finding is that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan is outside the scope of any submission, that the matter be referred to the Environment Court for a hearing on the merits under s156 LGATPA;

C Costs.

### **SECOND GROUND FOR REVIEW – FAILURE TO CONSIDER RELEVANT MATTERS / WRONG LEGAL TEST**

14 The applicant repeats paragraphs 1-11 above.

- 15 The Hearings Panel failed to consider whether the RUB should be retained in the proposed regional policy statement (or the regional planning framework) for the Hauraki Gulf Islands; alternatively it applied wrong legal test, in light of:
- (A) S115(1)(c) LGATPA required differential treatment of the Hauraki Gulf Islands in any event;
  - (B) Statutory power under s115(1)(c)<sup>1</sup> (“not required”) coupled with s144(5) LGATPA to recommend out of scope changes to the Hauraki Gulf District Plan framework, to ensure consistency between the Hauraki Gulf Islands and the rest of the Auckland region;
  - (C) provisions of the Hauraki Gulf Marine Park Act and sustainable management / Part 2 RMA values that were mandatory considerations in relation to whether the RUB should be retained as part of the Gulf Islands planning framework;
  - (D) Mandatory s32/s32AA RMA analysis in relation to cost-benefit and options for deletion or retention of the RUB for the Hauraki Gulf Islands

**Wherefore the applicant seeks:**

- A A declaration that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan was invalid and an order setting that decision aside;
- B Where the finding is that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan is outside the scope of any submission, that the matter be referred to the Environment Court for a hearing on the merits under s156 LGA TPA;
- C Costs.

**THIRD GROUND – FAILURE TO GIVE REASONS**

- 15 The applicant repeats paragraphs 1-11 above.
- 16 The Hearing Panel’s failure to identify:
- (A) submissions relied upon to confer scope for deletion of the RUB for the Hauraki Gulf Islands;
  - (B) s32 / s32AA options analysis in relation to deletion of the RUB for the Hauraki Gulf Islands;

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<sup>1</sup> “..the plan is not required to include district plan provisions in relation to the Hauraki Gulf Islands (the district plan provisions of the former Auckland City Council in relation to those islands will become operative as part of an existing separate process)”

(C) treatment of the Hauraki Gulf Islands as meriting special treatment in light of the mandatory considerations stated in the Hauraki Gulf Marine Park Act - was failure to give reasons in breach of its legal duty to do so. The Council adopted this approach in its decision.

**Particulars**

(A) There is a duty to identify submissions or consequential powers relied upon to confer scope for deletion of the RUB for the Hauraki Gulf Islands. This arises under s144(8)(c) LGATPA and/or administrative law principles that impose an obligation to identify the basis for decision-making. Submitters cannot establish how scope was established when reasons are not given. Where a decision is made outside scope, then a submitter has a right to take a merits appeal to the Environment Court.

**Wherefore the applicant seeks:**

- A A declaration that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan was invalid and an order setting that decision aside;
- B Where the finding is that deletion of the RUB for the Hauraki Gulf Islands in the decisions version of the proposed plan is outside the scope of any submission, that the matter be referred to the Environment Court for a hearing on the merits under s156 LGATPA;
- C Costs.

**This Statement of Claim** is filed by **Andrew Simpson**, Solicitor for the Appellants, of the firm Simpson Dowsett Meggitt. Documents for service on the Appellant may be served by courier, post or email at the following address, with copy by email to Counsel:

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