

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

between: Transpower New Zealand Limited, a duly incorporated company having its registered office at Wellington and carrying on business as a provider of electricity transmission services

Appellant

and: Auckland Council, a unitary authority established under the Local Government (Auckland Council) Act 2009

Respondent

Notice of Appeal

Dated: 16 September 2016

REFERENCE: James Gardner-Hopkins (james@jghbarrister.com)
Luke Hinchey (Luke.Hinchey@chapmantripp.com)

Chapman Tripp
T: +64 9 357 9000
F: +64 9 357 9099

23 Albert Street
PO Box 2206, Auckland 1140
New Zealand

www.chapmantripp.com
Auckland, Wellington,
Christchurch

**CHAPMAN
TRIPP** 

NOTICE OF APPEAL

TAKE NOTICE THAT Transpower New Zealand Limited (*Transpower*) will appeal to the High Court against the decision of Auckland Council (*Council*) to accept a recommendation of the Independent Hearings Panel (*IHP*) on a submission made by Transpower, **UPON THE GROUND** that the decision is erroneous in law.

Scope of appeal

- 1 The Appellant appeals against the decision of the Council to accept, unchanged, a number of recommendations of the IHP that failed individually, collectively, and consequentially (and most likely inadvertently) to appropriately manage certain buildings, structures and activities within the National Grid Yard, including:
 - (a) Provisions that fail to adequately manage certain buildings, structures and certain subdivision within the National Grid Yard as follows:
 - (i) Rule A11 in Table D26.4.1, which prevents any management of buildings, structures and alterations for “non-sensitive” activities (other than certain agricultural and horticultural buildings and structures) by providing for them as permitted activities within the National Grid Yard.
 - (ii) Rules A22 to 26 in Table D26.4.1 and the subdivision provisions Chapters E38 Urban and E39 Rural, which, in a similar way to Rule A11, fail to adequately manage subdivisions involving building platforms within the National Grid Yard (unless the platform is for a “sensitive activity”).
 - (iii) Policies D26.3(1)(i) and (j), which fail to provide policy direction as to the appropriateness of buildings, structures and activities within the National Grid Yard depending on whether the relevant area is already compromised by underbuild, or whether the corridor (the National Grid Yard) can be protected so that the line and network do not become compromised by future development.
 - (b) Rule A5 in Table D26.4.1, which currently provides a barrier to certain land use activities (which was not sought by Transpower) by imposing a default activity status of non-complying for “any activity not otherwise provided for”.
- 2 As the Council accepted the recommendations of the IHP, references to the findings and reasoning of the IHP referred to in this notice of appeal are also to be read as references to the Council, as necessary.

Errors of Law and Grounds of Appeal

- 3 The IHP in making its recommendation and the Council in making its decision to accept the IHP's recommendation, made the following errors of law / the grounds of appeal are as follows:

Ground 1: Mistake and/or unintentional failure to reflect findings made

- (a) The IHP was mistaken and did not intend to, and/or unintentionally failed to reflect the findings it had made on the evidence before it, in respect of:
- (i) providing in Rule A11 for buildings, structures and alterations for non-sensitive activities within the National Grid Yard to be permitted activities in urban areas which have not yet been compromised by underbuild and in future urban zones and rural zones (*Buildings Error*); and
 - (ii) failing to adequately manage subdivisions involving building platforms within the National Grid Yard particularly in areas which have not yet been compromised by underbuild, other than those involving a building platform for a "sensitive activity" (including through rules A22 to 26, D26.7 and chapters E38 and E39) (*Subdivision Error*); and
 - (iii) failing to provide appropriate policy direction in Policies D26.3(1)(i) and (j) as to the appropriateness of buildings, structures and activities within the National Grid Yard depending on whether the relevant area is already compromised by underbuild, or whether the corridor (the National Grid Yard) can be protected so that the line and network do not become compromised by future development, and failing to implement those policies through appropriate rules (*Policy Error*); and
 - (iv) providing in Rule A5 in Table D26.4.1 for "any activity not otherwise provided for" to be a non-complying activity (*Default Activity Status Error*).

(Together the *National Grid Errors*).

- (b) The National Grid Errors were mistakes, and/or errors that unintentionally failed to reflect the findings the IHP had made on the evidence before it, given that:
- Buildings and Subdivision Errors*
- (i) Transpower had intended, in the provisions it sought, to permit existing and new buildings for non-sensitive activities (ie to allow development) within the National Grid Yard where the relevant land already contained

urban development (underbuild) in the National Grid Yard which meant that the lines are already compromised (such land to be identified on planning maps).

- (ii) However, Transpower had also sought, supported by its evidence, greater restriction for sensitive activities, buildings for sensitive activities, and buildings and structures for non-sensitive activities within the National Grid Yard (with some limited exceptions). The restrictions were sought to apply both in rural areas (including future urban areas) and also in urban areas where the land does not yet contain development in the National Grid Yard which would compromise the lines. In these areas the opportunity is available to ensure that land use and development does not compromise the operation, maintenance, upgrading and development of the National Grid.

- (iii) Transpower's position in this regard was explicitly recognised in the IHP report on Hearing Topic 042, Infrastructure, at [3.1.2].

- (iv) The IHP further recorded, at [3.2], its acceptance of the Transpower position, stating:

... the Panel also supports a more stringent rule regime to ... manage new activities to minimise issues of reverse sensitivity especially in areas that will be urbanised in the future.

- (v) The IHP's intent in recommending the provisions of the National Grid Corridor Overlay was stated as being, at [3.2]:

To avoid increasing risks to public health and safety and to enable the operation, maintenance and upgrading of existing national grid assets.

- (vi) The IHP made findings of fact, at [3.2], as follows:

Mr Noble and Ms Fincham provided a number of examples that clearly demonstrated the problems Transpower New Zealand Limited faces in obtaining access and adequate working space to undertake repairs and maintenance where development has occurred under and around the national grid. In some cases the under-build has severely restricted and compromised Transpower's ability to undertake maintenance or project work.

- (vii) The IHP went on to state:

The need to ensure that these issues do not arise in the future, together with issues associated with the health and safety of people and property and with reverse sensitivity, are key reasons for the Panel's recommendations on the extent of the National Grid Corridor Overlay.

- (viii) The IHP further reinforced its support for the Transpower position in its recommended drafting of the Overlay description in section D26.1, where it recognised the requirements of the National Policy Statement on Electricity Transmission 2008 (*NPSET*) and described the purpose of the National Grid Corridor Overlay as follows (emphasis added):

Under the National Policy Statement on Electricity Transmission 2008, the Council is required to recognise and provide for the national significance of the National Grid, including through identifying and providing a buffer corridor and associated rules to avoid sensitive activities in the corridor **and manage the actual and potential adverse effects of other activities on the National Grid.**

The purpose of the National Grid Corridor Overlay is to manage sensitive activities **and potentially incompatible development (including land disturbance)** within close proximity to the National Grid in order to:

- prevent risks to people and property;
- protect the National Grid;
- preserve line access for inspection and maintenance;
- preserve a corridor for the operation, maintenance, upgrade and development of National Grid infrastructure; and
- manage potential reverse sensitivity effects.

Subdivision is managed so that future development achieves the objective and policies of the National Grid Corridor Overlay, including that the National Grid is not compromised and its long-term upgrading and development is facilitated in accordance with the National Policy Statement on Electricity Transmission 2008.

... **development in close proximity to the National Grid** can pose risks to the National Grid itself including the potential for loss of security of supply through outages or physical damage, and through constraints on access for inspection and maintenance and undertaking line upgrades.

- (ix) Further, the objective of the National Grid Corridor Overlay at D26.2 requires that:
 - (1) The efficient development, operation, maintenance and upgrading of the National Grid is not compromised by subdivision, use and development.
- (x) The policies of the National Grid Corridor Overlay at D26.3 specify that this objective is to be achieved by requiring subdivision, use and development within the National Grid Corridor Overlay to be undertaken so that it (among other things):
 - (b) does not compromise security of supply and/or the integrity of National Grid assets;
 - (c) does not compromise ongoing access to conductors and support structures for maintenance and upgrading works;
 - (e) does not foreclose operation and maintenance options or the carrying out of planned upgrade works;
 - (f) manages all activities to avoid exposure to health and safety risk from the National Grid;
 - (i) provides for activities not sensitive to transmission lines in the National Grid Yard within the residential, business, open space and special purpose zones;
 - (j) avoids buildings within the National Grid Yard in rural zones and the Future Urban Zone, except for buildings for low intensity rural activities; and
 - (k) limits, as far as practicable, potential reverse sensitivity effects.
- (xi) Given its findings in respect of the matters identified in paragraph 3(b)(iii) to (x), the IHP must have intended to provide a greater level of management than it did in respect of buildings, structures and alterations for non-sensitive activities and subdivision for non-sensitive activities within the National Grid Yard.
- (xii) The IHP mistakenly focused on and/or mistakenly thought that it was addressing the findings it had made by reference to zoning, rather than the extent to which areas of the National Grid Yard are already compromised by underbuild and where the corridor (the National Grid Yard) can be protected so that the line and network do not become compromised by future development.

- (xiii) Accordingly, the IHP mistakenly made, and/or unintentionally failed to reflect its findings in making, the Buildings and Subdivision Errors.

Policy Error

- (xiv) Given its findings in respect of the matters identified in paragraph 3(b)(iii) to (x), the IHP would have intended to provide greater control in respect of buildings and structures within the National Grid Yard in areas that do not contain existing development under the lines, as compared to areas where the lines are already compromised by existing underbuild.
- (xv) The IHP would have intended to reflect that position in Policies D26.3(1)(i) and (j), which would assist in the consideration of any resource consent or plan change made in the future.
- (xvi) Policies D26.3(1)(i) and (j) as currently worded mistakenly or inadvertently focus on zoning, rather than whether the relevant land contains existing development under the National Grid lines (and therefore the lines are already compromised) or does not contain underbuild (and therefore the opportunity is available to ensure development occurs in a way that does not compromise the National Grid).
- (xvii) The IHP further failed to implement those policies (as they should have been framed) through appropriate rules.
- (xviii) Accordingly, the IHP mistakenly made, and/or unintentionally failed to reflect its findings in making the Policy Error.

Default Activity Status Error

- (xix) In providing in Rule A5 in Table D26.4.1 for "any activity not otherwise provided for", all activities not listed in D26.4.1 will require non-complying resource consent.
- (xx) A range of those activities do not need that level of control, such as outdoor residential use, industrial yards and storage areas, open space, farming, and recreational activities (excluding buildings/development for such activities). Such types of activities should be managed under the provisions of the relevant underlying zoning, rather than being non-complying under Rule A5.

- (xxi) Providing for such activities to be non-complying was not sought by Transpower or any other party and no evidence was before the IHP supporting their non-complying status.
 - (xxii) Accordingly, the IHP mistakenly made, and/or unintentionally failed to reflect its findings in making the Default Activity Status Error.
- (c) The Council, in accepting the IHP's recommendations in respect of each and all of the National Grid Errors, adopted the IHP's mistake(s) and/or failed to reflect the findings the IHP had made on the evidence before it.
- 4 Grounds 2 to 6 apply in the alternative, in the event that the IHP was not mistaken and did intend to make the National Grid Errors.

Ground 2 – Failure to achieve the objective and policies of the National Grid Corridor Overlay

- (a) The IHP and/or the Council erred in law in making the Buildings, Subdivision, and Policy Errors as those decisions do not achieve the objective and the policies of the National Grid Corridor Overlay, given that enabling non-sensitive buildings and structures as permitted activities, and failing to adequately manage subdivision within the National Grid Yard in urban areas which do not contain existing underbuild will, in those locations:

- (i) compromise the efficient development, operation, maintenance and upgrading of the National Grid (Objective 1);

and further will:

- (ii) compromise security of supply and/or the integrity of National Grid assets (Policy 1(b));
- (iii) compromise ongoing access to conductors and support structures for maintenance and upgrading works (Policy 1(c));
- (iv) foreclose operation and maintenance options or the carrying out of planned upgrade works (Policy 1(e));
- (v) not manage activities appropriately to avoid exposure to health and safety risk from the National Grid (Policy 1(f));
- (vi) not avoid buildings within the National Grid Yard in rural zones and the Future Urban Zone, except for

buildings for low intensity rural activities (Policy 1(h));
and

- (vii) not limit, as far as practicable, potential reverse sensitivity effects (Policy 1(k)).

Ground 3: Failure to give reasons

- (b) The IHP in recommending and/or the Council in accepting the IHP's recommendation in respect of the Buildings, Subdivision, and Policy Errors acted unlawfully by failing to give reasons:
 - (i) The IHP had a duty to give reasons for its findings to outline the intellectual route taken in reaching those findings¹.
 - (ii) The IHP failed to give any reasons for departing from what Transpower sought and what the IHP had accepted, as referred to in paragraph 3(b) above.
 - (iii) The Council adopted the relevant IHP's recommendations without providing any reasoning or analysis of its own.

Ground 4: Edwards v Bairstow

- (c) The IHP and/or the Council erred in law as the "true and only reasonable conclusion from the evidence"² is:
 - (i) In respect of the Buildings, Subdivision and Policy Errors, that, within the relevant areas, buildings and structures for non-sensitive activities should not be permitted (with some limited exceptions) and subdivision involving non-sensitive activities requires greater control than that provided in the IHP recommendations/Council decisions, given:
 - (aa) The pleadings in paragraphs 3(b)(i) to (xviii) above.
 - (bb) The evidence that demonstrated the past and current problems, often serious, faced by Transpower in obtaining access and adequate working space to undertake repairs and maintenance where development (including non-sensitive development) has occurred under and around the National Grid.

¹ *Murphy v Rodney District Council* [2004] 3 NZLR 421 at para 25 and *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 564 at 565-567.

² Adopting the test as described in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, [2015] NZRMA 375 at [22]-[23].

- (cc) The evident need to ensure that these issues do not arise, or are avoided, remedied or mitigated in the future, which would not be achieved through permitted activity status.
 - (dd) The additional health and safety risks to people and property if development (including non-sensitive development) is generally provided for as a permitted activity.
 - (ee) The evidence of reverse sensitivity effects, which cannot be avoided, remedied or mitigated through permitted activity status.
- (ii) In respect of the Default Activity Status Error, the pleadings in paragraphs 3(b)(xix) to (xxiii).

Ground 5: Failure to give effect to the National Policy Statement on Electricity Transmission ("NPSET")

- (d) The IHP and/or the Council erred in law in making the Buildings, Subdivision, and Policy Errors, as those recommendations/decisions fail to "give effect to" or "implement" the NPSET in the relevant areas, given that:
 - (i) Section 67(3)(a) of the RMA requires the Regional Policy Statement to "give effect to" the NPSET.
 - (ii) Section 75(3)(a) of the RMA further requires the District Plan to "give effect to" the NPSET.
 - (iii) "Give effect to" means "implement": *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38.
 - (iv) Policy 10 of the NPSET requires the IHP/Council, "to the extent reasonably possible manage activities to avoid reverse sensitivity effects on the electricity transmission network and to ensure that operation, maintenance, upgrading, and development of the electricity transmission network is not compromised".
 - (v) Policy 2 of the NPSET requires the IHP/Council to "recognise and provide for the effective operation, maintenance, upgrading ... of the electricity transmission network".
 - (vi) Policy 5 of the NPSET also requires the IHP/Council to "enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets".

- (vii) Enabling non-sensitive buildings and structures as permitted activities, failing to adequately manage subdivision within the National Grid Yard in urban areas which do not contain existing underbuild, and failing to provide adequate policy direction to protect that part of the corridor (the National Grid Yard) that is not already compromised by underbuild, so that the lines and network do not become compromised by future development does not give effect to or implement any of these policies.

Ground 6: Failure to give effect to the Regional Policy Statement ("RPS")

- (e) The IHP and/or the Council erred in law in making the Buildings, Subdivision, and Policy Errors, as those recommendations/decisions fail to "give effect to" or "implement" the RPS as required by section 75(3)(c) of the RMA, in particular the objectives and policies of Section B3 Ngā pūnaha hanganga, kawekawe me ngā pūngao - Infrastructure, transport and energy, including:
 - (i) 3.1 Commercial and Industrial Growth – Objective 3(c): Industrial growth occurs in appropriate locations that avoid conflicts between incompatible activities.
 - (ii) 3.1 Commercial and Industrial Growth – Policy 7(a)(vi): New commercial activities are, where appropriate, to be enabled on identified growth corridors in business and mixed use zones, having regard to avoiding conflicts between incompatible activities.
 - (iii) 3.2 Significant infrastructure and energy – Objective 1: Resilient infrastructure and a high quality service.
 - (iv) 3.2 Significant infrastructure and energy – Objective 3: Development, operation, maintenance, and upgrading of significant infrastructure is provided for and enabled, while managing any adverse effects it may have on ... the health, safety and amenity of communities.
 - (v) 3.2 Significant infrastructure and energy – Objective 5: Infrastructure planning and development is integrated and co-ordinated at an early stage with land use and development to support residential and business growth.
 - (vi) 3.2 Significant infrastructure and energy – Objective 6: Auckland's significant infrastructure is protected from reverse sensitivity effects and incompatible subdivision, use and development.

- (vi) 3.2 Significant infrastructure and energy – Objective 7: The locational or function-based requirements of significant infrastructure are recognised.
- (viii) 3.2 Significant infrastructure and energy – Policy 1: Provide for the efficient development, use, operation, maintenance and upgrading of secure and reliable infrastructure.
- (ix) 3.2 Significant infrastructure and energy – Policy 4: Recognise and provide for the operational and technical requirements of significant infrastructure.
- (x) 3.2 Significant infrastructure and energy – Policy 7: Avoid reverse sensitivity effects by requiring subdivision, use and development to not occur in a location or form that constrains the use, operation, maintenance and upgrading of existing and planned significant infrastructure:

Questions of law

5 The questions of law to be decided are:

- (a) Did the IHP/Council make a mistake or unintentionally fail to reflect the findings the IHP had made in:
 - (i) providing, in Rule A11 in Table D26.4.1 for buildings, structures, and alterations for non-sensitive activities within the National Grid Yard (other than certain agricultural and horticultural buildings and structures) to be permitted activities in rural and future urban areas and urban areas which do not contain existing underbuild and where the lines are not compromised; and
 - (ii) failing, including through rules A22 to 26, D26.7 and chapters E38 and E39, to adequately manage subdivisions involving building platforms within the National Grid Yard other than those involving a building platform for a “sensitive activity”; and
 - (iii) failing, in Policies D26.3(1)(i) and (j), to provide appropriate policy direction as to the appropriateness of buildings, structures and activities within the National Grid Yard depending on whether the relevant area contains existing underbuild or not, and failing to implement those policies through appropriate rules; and

- (iv) providing, in Rule A5 in Table D26.4.1, for “any activity not otherwise provided for” in the National Grid Yard to be a non-complying activity.
- (b) If the IHP/Council intended to make each of the recommendations/decisions they did in respect of the National Grid Errors, did the IHP/Council err in law in respect of each in doing so:
- (i) by failing to achieve the objective and policies of the National Grid Corridor Overlay; and/or
 - (ii) by failing to give reasons; and/or
 - (iii) when the true and only reasonable conclusion on the evidence is that:
 - (aa) buildings and structures for non-sensitive activities should not generally be permitted within the National Grid Yard where the lines are not already compromised by existing underbuild; and/or
 - (bb) subdivisions, other than those involving a building platform for a “sensitive activity” (which are adequately managed), require greater management than provided particularly in areas which have not yet been compromised by underbuild; and/or
 - (cc) Policies D26.3(1)(i) and (j) should provide direction that buildings, structures and certain activities within the National Grid Yard should not be allowed in areas where the lines are not already compromised but may be acceptable in areas where there is existing underbuild, and that those policies and should be implemented through appropriate rules; and/or
 - (dd) there is no need, and it is unnecessary and inappropriate, for “any activity not otherwise provided for” in the National Grid Yard to be a non-complying activity.
 - (iv) by failing to give effect to or implement the NPSET; and/or
 - (v) by failing to give effect to or implement the RPS.

Relief sought


6 The Appellant seeks that:

- (a) The appeal be allowed.
- (b) Amendments to address the mistakes/and or other errors identified by Transpower be ordered by the High Court.
- (c) If the relief in (b) is not provided, that the matter be referred back to the IHP for reconsideration in light of the findings of this Honourable Court.
- (d) Costs.

Related proceedings

- 6 The Appellant is lodging related proceedings in the Environment Court, under section 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010. Specifically, an appeal relating to the National Grid Corridor Overlay in the Proposed Auckland Unitary Plan.

DATED 16 September 2016



James Gardner-Hopkins / Luke Hinchey
Counsel for the Appellant

Address for service of person:

Transpower New Zealand Limited
c/- Luke Hinchey
Chapman Tripp
Level 38
23 Albert St
Auckland
Email address: Luke.Hinchey@chapmantripp.com
Telephone: 09 357 2709

To: The Registrar of the High Court at Auckland

And to: The Respondent

This Notice of Appeal is filed by **LUKE PATRICK HINCHEY**, solicitor for the Appellant, of Chapman Tripp.

Address for service: Transpower New Zealand Limited
c/- Luke Hinchey
Chapman Tripp
Level 38
23 Albert St
Auckland

Telephone: + 64 9 357 2709

Email: Luke.Hinchey@chapmantripp.com

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

in the matter of: an appeal under section 158 of the LGATPA

between: **Transpower New Zealand Limited**, a duly incorporated company having its registered office at Wellington and carrying on business as a provider of electricity transmission services
Appellant

and: **Auckland Council**, being a Unitary Council established under the Local Government (Auckland Council) Act 2009, of Auckland
Respondent

Notice of application by appellant for directions as to service

Dated: 16 September 2016

REFERENCE: James Gardner-Hopkins (james@jghbarrister.com)
Luke Hinchey (Luke.Hinchey@chapmantripp.com)

APPLICATION FOR DIRECTIONS

To the Registrar of the High Court at Auckland

And

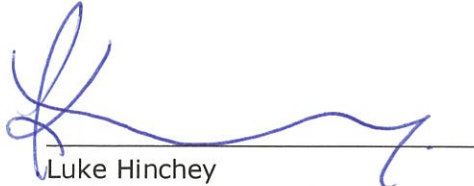
To Auckland Council, Respondent

This document notifies you that –

- 1 The appellant, Transpower New Zealand Limited, will on the day of 2016, at 10am, apply to the Court for an order directing who is to be served (and the mode and timeframe of service) with the notice of appeal filed under section 158 of the Local Government (Auckland Transitional Provisions) Act 2010 (*LGATPA*), other than the respondent.
- 2 The grounds on which the order is sought are as follows:
 - 2.1 the appeal concerns decisions by the respondent as to the provisions relating to activities within the National Grid Yard in the Proposed Auckland Unitary Plan (*PAUP*). Those provisions were considered as part of Topic 042 - Infrastructure;
 - 2.2 submission points from approximately 400 submitters and further submitters were allocated to Topic 042;
 - 2.3 the respondent published a notice in the New Zealand Herald on 19 August 2016, which (among other things) briefly outlined the appeal rights under the *LGATPA*. We understand the respondent has also contacted all submitters and further submitters on the *PAUP* to provide that information;
 - 2.4 the respondent's website contains the Independent Hearings Panel's recommendations and Council's decisions on the *PAUP*, and a summary of appeal rights. The respondent is also publishing all notices of appeal served on it on its website; and
 - 2.5 accordingly, all submitters and further submitters will be on notice that Council's decisions have been released and that appeals may be filed. They will also have access to any appeals that have been lodged.

3 This application is made in reliance on Rules 20.6(1)(c) and 20.7 of the High Court Rules.

Date: 16 September 2016



Luke Hinchey
Solicitor for the appellant