

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

**CIV-2016-404-2349
[2017] NZHC 1351**

BETWEEN THE STRAITS PROTECTION SOCIETY
INCORPORATED
Applicant

AND AUCKLAND COUNCIL
First Respondent

AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL
Second Respondent

Hearing: 16 June 2017

Counsel: r b Enright for Applicant
H J Ash for First Respondent
P Andrew for Second Respondent

Judgment: 20 June 2017

JUDGMENT OF WHATAJ

*This judgment was delivered by me on 20 June 2017 at 4.00 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Simpson Grierson, Auckland
Crown Law

[1] The Proposed Auckland Unitary Plan (PAUP) was notified on 30 September 2013, and included as part of the regional policy statement (RPS) a rural urban boundary (RUB). The function of that boundary was to demarcate, as the name suggests, the point at which urban intensification should stop. In the notified PAUP, the RUB extended to the Hauraki Gulf Islands and, in particular, Waiheke Island.

[2] The Independent Hearings Panel (IHP) resolved to remove the RUB from the RPS section of the PAUP and relocate it in the district level provisions. As the Hauraki Gulf Islands and, in particular, Waiheke Island, were not included within the district level provisions of the PAUP, that had the effect of removing the RUB from Waiheke Island altogether. That outcome was not sought by any submitter.

[3] Straits Protection Society Incorporated has applied to judicially review the IHP's decision to relocate the RUB to the district level provisions, but only insofar as it removed the RUB from the policy level provisions and thereby removed the RUB from Waiheke Island. It says, and the Auckland Council agrees, that the outcome could not have been reasonably foreseen or anticipated by any submitter and was therefore out of scope.

[4] The IHP abides the decision of this Court.

Assessment

[5] The IHP did not make its decision lightly. In making its recommendation in relation to the RUB for Waiheke Island, the IHP made the following comment:¹

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.

¹ Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts: Hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas)* (22 July 2016) at 15.

[6] In confirming the position, the Chairperson of the IHP later said in a clarification minute dated 19 August 2016:

The suggestion that the Panel’s recommendation is intended to leave the Rural Urban Boundary in place as a method in the Regional Policy Statement is incorrect ... The removal of the Rural Urban Boundary as a method from the Regional Policy Statement and the addition of it as a rule in the District Plan, coupled with the Panel’s jurisdiction being limited to exclude consideration of district planning matters in the Hauraki Gulf Islands, has resulted in the recommended maps showing no Rural Urban Boundary on Waiheke. This is a matter that may be addressed in the next review of the district plan for the Hauraki Gulf Islands ... In the meantime, the Panel recommendations, if accepted mean that there is no rural Urban Boundary on Waiheke.

[7] My initial reaction to the appeal was that the IHP had a reasoned and logical basis for not purporting to affect Waiheke, directly or indirectly, with district level control, given that the Local Government (Auckland Transitional Provisions) Act 2010 states that a district plan for Auckland means the plan for a district “excluding the geographic area to which the Hauraki Gulf Islands section of the district plan of the former Auckland City Council applies (which, as a proposed plan, was notified on 18 September 2006 and amended by decisions notified on 4 May 2009)”.²

[8] But I am satisfied that there being no submissions seeking the removal of the RUB from the Hauraki Gulf Islands and, in particular, Waiheke Island, the IHP acted out of scope.³ In short, the recommendation could not have been reasonably foreseen as a direct or otherwise logical consequence of a submissions point.⁴ The merits of such a decision were, of course, for the IHP, but in making an out of scope recommendation without correctly identifying it as such, a right of appeal to the Environment Court pursuant to s 156(3)(b) was denied.

[9] Given the full agreement between the parties about this, I am prepared to make the following declaration as sought:

A declaration that the recommendation provided by the Auckland Unitary Plan Independent Hearing Panel to the Auckland Council in relation to the Rural Urban Boundary as it affected the Hauraki Gulf Islands was beyond

² Local Government (Auckland Transitional Provisions) Act 2010, s 116(2).

³ Applying the threshold test adopted in *Albany North Landowners v Auckland Council* [2017] NZHC 138.

⁴ At [108], [112] and [115].

the scope of submissions made on the Proposed Auckland Unitary Plan and should have been identified as such in terms of section 144(8(a) of the Local Government (Auckland Transitional Provisions) Act 2010.

[10] This declaration will put the matter on the procedural track it would have been on had the IHP correctly identified its recommendation as out of scope, triggering a right of appeal to the Environment Court pursuant to s 156(3)(b).

[11] I also direct that:

- (a) A copy of my decision is served on all submitters on this part of the PAUP and the submitters are to be advised of their rights of appeal to the Environment Court.
- (b) Notification of this decision together with advice as to rights of appeal by way of publication in a newspaper with Auckland-wide distribution.

[12] There is no order as to costs.