BEFORE THE ENVIRONMENT COURT

Decision [2017] NZEnvC022

ENV-2016-AKL-000188, 195; 203 and 239

IN THE MATTER	of appeals under s156 of the Local Government (Auckland Transitional Provisions) Act 2010 against decisions of the Auckland Council on recommendations of the Auckland Unitary Plan Independent Hearings Panel on the proposed Auckland Unitary Plan
BETWEEN	J LENIHAN THE PUHOI COMMUNITY FORUM INCORPORATED B FRIZZELL W T COLGAN, B STEPHENS, S GAVIN and M WECK Proposed Appellants
AND	AUCKLAND COUNCIL Proposed Respondent

Environment Judge C J Thompson
In Chambers: – under s279 of the Resource Management Act 1991

DECISION – PRELIMINARY JURISDICTION ISSUES

Decision issued: 28 FEB 2017

Introduction

[1] The issue to be resolved in this preliminary application by the Auckland Council is whether the persons and organisations named as *Proposed Appellants* in the intitulement to this decision do, as a matter of law, have a right of appeal to the Environment Court against the decisions of the Auckland Council, in its processing of recommendations of the Auckland Unitary Plan Independent Hearings Panel on the Proposed Auckland Unitary Plan (PAUP).

[2] Procedurally, a timetable was established for the lodging and exchange of written submissions by the parties, with the Council's submissions in reply being received on 22 February 2017. All of the parties noted as *Proposed Appellants* (with the exception of Mr Frizzell, who has not actively participated) have lodged submissions in support of the their positions, and I shall return to those shortly.

[3] The Council, supported by the Waitakere Ranges Protection Society Inc (in respect of the Lenihan appeal), Dickson Yachting Ltd and Housing New Zealand Corporation (in respect of the Puhoi Community Forum appeal), submits that those persons do not have such a right of appeal. It needs to be clearly understood that the PAUP process was set up as an alternative to the conventional plan preparation and hearings process, and contains a quite distinct and restricted set of hearing and appeal procedures.

The rights of appeal

[4] The answer to the preliminary issue lies in the correct interpretation of s156 of the Local Government (Auckland Transitional Provisions) Act 2010 which provides as follows:

> 156 Right of appeal to Environment Court
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> (1) A person who made a submission on the proposed plan may appeal to the Environment Court in respect of a provision or matter relating to the proposed plan—
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> (a) that the person addressed in the submission; and
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> (b) in relation to which the Council rejected a recommendation of the Hearings Panel and decided an alternative solution, which resulted in—
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> (i) a provision being included in the proposed plan; or
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> (ii) a matter being excluded from the proposed plan.
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> (2) However, if the Council's alternative solution included elements of the Hearings Panel's recommendation, the right of appeal is limited to the effect of the differences between the alternative solution and the recommendation.

(3) A person may appeal to the Environment Court in respect of a provision or matter relating to the proposed plan if—

(a) the Council's acceptance of a recommendation of the Hearings Panel resulted in—

(i) the provision being included in the proposed plan; or

(ii) the matter being excluded from the proposed plan; and

(b) the Hearings Panel had identified the recommendation as being beyond the scope of the submissions made on the proposed plan; and

(c) the person is, was, or will be unduly prejudiced by the inclusion of the provision or exclusion of the matter.

(4) The Environment Court must treat an appeal under this section as if it were a hearing under clause 15 of Schedule 1 of the RMA and, except as otherwise provided in this section, clauses 14(5) and 15 of Schedule 1 of the RMA and Parts 11 and 11A of the RMA apply to the appeal (including, to avoid doubt, sections 299 to 308).

(5) Notice of the appeal must be in the prescribed form and lodged with the Environment Court, and served on the Auckland Council, no later than 20 working days after the Council notifies the matters under section 148(4)(a).

(6) If the subject matter of the notice of appeal relates to the coastal marine area, the person must also serve a copy of the notice on the Minister of Conservation no later than 5 working days after the notice is lodged with the Environment Court.

[5] To summarise, under s156(1), a person who made a submission (ie to the Hearings Panel) has a right of appeal to this Court if that person can show that he, she, or it (1) made a submission about a particular provision or matter; and (2) that the Council rejected a recommendation of the Hearings Panel about that provision or matter; and (3) that rejection resulted in a provision being included in, or a matter being excluded from, the Proposed Plan.

[6] There are, it is to be noted, three cumulative criteria to be met for a valid appeal to this Court to be lodged. That is not to say that alleged errors not meeting those criteria will be without possible remedy – the Act specifically mentions the possibility of an appeal to the High Court on issues of law, and the possibility of an application for judicial review, which might deal with, for instance, issues of procedure. I am concerned only with the question of valid appeals, on issues of merit, to this Court.

[7] I should add, for clarity, that in the appeals in question the alternative possibility in s156(2) does not arise, so I need not discuss that further.

[8] In terms of s156(3), even if a person did not make a submission about the proposed plan, there is still a right of appeal if:

(a) The Council accepted a recommendation of the Hearings Panel and that acceptance resulted in a provision being included in the proposed plan or a matter being excluded from the proposed plan, and

(b) The Hearings Panel had identified the recommendation made by it as being beyond the scope of submissions made on the proposed plan; and

(c) The person wishing to lodge the appeal is, was, or will be unduly prejudiced by the inclusion of the provision or exclusion of that matter.

This too is a possible route of appeal that, to be viable, requires the making out of three cumulative factors. It is the Council's position that the Hearings Panel did not identify any issues, about which the named Appellants have attempted to bring an appeal, as being beyond the scope of the submissions made to it on the proposed plan. If that is so, there can be no right of appeal to this Court under that subsection.

[9] I should add that I have considered the relevant portions of the recent decision in *Albany North Landowners v Auckland Council* [2017] NZHC 138 and taken account of it, particularly its discussions of the concept of *scope*.

The positions of the appellants in question

Mr John Lenihan

[10] Mr Lenihan made a submission about the Titirangi Laingholm area which is located in the Waitakere Ranges Heritage Area. In particular, Mr Lenihan sought alternative *yard* provisions for that area and it is those provisions which are the subject of his appeal. The Hearing Panel's recommendations in its Report for Topic 075, in brief, recommended removal of the notified Titirangi Laingholm precinct from the Plan, with the effect that the underlying Large Lot zone controls became the primary planning controls for that area.

[11] In its Decisions Report of 19 August 2016, the Council accepted all of the Panel's recommendations about Topic 075 (with one exception which is not relevant to the present issue). It follows therefore, the Council submits, that Mr Lenihan's appeal cannot be brought within the terms of s156(1).

[12] Mr Lenihan's submissions do not argue for a right of appeal under s156(1). Rather, at paras 9 and 10 of his submissions, he says this:

> 9. As can be seen from the attachments, there is a clear error in the rules. The appellant is of the view that the only grounds available to it to appeal the decision without spending large sums of money and involving lawyers and planners was to appeal the AC decision under s156(3) as the outcome does prejudice the Appellant and seek for AC to remedy the defect under s292 of the RMA.
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> 10. It is noted that even if the method of appeal is wrong under s156(3), the Appellant maintains its challenge to these provisions by referring to section 85 of the RMA which is unaffected by the LG(ATP)A. Although no challenge has yet been brought under section 85, as can be seen, should the Court accept the Appellant's argument that these provisions subject to this appeal are preventing the reasonable use of the Appellant's land, the Appellant may proceed to bring a challenge under s85.

[13] A little later in his submissions, at para 13, Mr Lenihan goes on to acknowledge, in effect, that there may well be problems with his reliance on s156(3) and suggests that if this Court thinks that ... *it has not got the requisite power to determine the appeal, it should then be transferred to the High Court.*

[14] As will be apparent from what I have already said, I do indeed think that the Court lacks the ... *requisite power to determine the appeal.* In the absence of any identification by the Hearings Panel of the recommendation in issue as ... *being beyond the scope of the submissions made* ... there is no right of appeal to this Court under s156(3).

[15] The possibility of this Court transferring the proceeding to the High Court was addressed in the Council's submissions in reply, with reference being made to s144 (actually, I think, s44) of the District Courts Act 1947. This Court has the same powers as a District Court sitting in its civil jurisdiction, so I accept that I probably could ... *order that the proceedings be transferred to the High Court* ... in terms of s44. In the circumstances I agree with the Council's submission that I should not do so. Mr Lenihan was clearly and correctly advised by the Council, in a letter of 22 November 2016, that this Court did not have jurisdiction to hear his appeal, and that the Council would seek to have his purported appeal struck out if he continued with it. He was on clear notice that his appeal to this Court was fundamentally flawed, but elected to continue with it. Given the nature of this process, I do not consider it appropriate to transfer his appeal to the High Court in the face of opposition from the

Council to doing so. Mr Lenihan, as I will not at the conclusion of this decision, still could attempt to take judicial review proceedings in the High Court if he so wishes.

Puhoi Community Forum Inc

[16] The Puhoi Community Forum Inc made a submission seeking that the proposed Puhoi Precinct should not be established and that Puhoi should continue to be within the Rural and Coastal Settlement Zone. That became part of Topics 080 and 081.

[17] The Panel's recommendations were provided to the Council in two reports. The Council's decision which is the subject of the Forum's appeal relates to the rezoning of land at 97 Saleyards Road, Puhoi as *Coastal and Rural Settlement Zone* and the decision to change the minimum lot size in that zone from 4,000m^2 to 2,500m^2. This appeal was lodged with the Court on the basis that there was a right to appeal under s156(3) because:

> The Council accepted a recommendation of the Hearings Panel that the Hearings Panel should have identified as being beyond the scope of the submissions made on the proposed plan. (emphasis added).

[18] In a submission lodged for the Community Forum, on this preliminary issue, the argument is made that the Hearings Panel itself said, in the relevant part of its Report to the Council: ... *Where the matter could reasonably have been foreseen as a direct or otherwise logical consequence of a submission point the Panel has found that to be within scope.* The Community Forum argues that what it has concerns about could not, and was not, within the range of matters that were a ... *direct or otherwise logical consequence*, and should thus have been noted as being beyond scope. Its position is that the Hearings Panel simply has erred in that respect.

[19] The Council's submission on that appeal is that the Panel did not so identity the topic, and that s156(3) is very specifically confined to subjects which the Hearings Panel did so identify. The consequential submission from the Council is that this Court does not have the jurisdiction to declare that the Hearings Panel erred in failing to so identify any given subject.

[20] I have to agree with the Council's position that the outcome is dictated by the very clear words of s156(3). The right of appeal is defined by the three factors set out in that subsection, with the crucial one here being whether ...*the Hearings Panel*

had identified the recommendation as being beyond the scope of the submissions made on the proposed plan. It is beyond argument that it did not do so. Whether it erred in that is a question to be resolved either as a question of law, or perhaps mixed fact and law in judicial review proceedings. But is it clear beyond argument that the point is not one falling within the expressly and closely confined possibilities of appeal to this Court.

Colgan/Stephens/Gavin/Weck

[21] These people made individual and joint submissions on the PAUP. Collectively, they sought that a number of properties on Patumahoe Road and Clive Howe Road, Patumahoe should be rezoned *Residential* rather than *Rural Production.* The relevant issues were allocated to, and heard as part of, Topic 017 - *Rural Urban Boundary South.*

[22] The appeals lodged identified the grounds as being those in s156(1) and s156(3).

[23] The Council's position is that its decisions accepted all of the Panel's recommendations on those issues with the exception of: *Removal of the Rural Urban Boundary at Crater Hill and Pukaki Peninsula Puhinui:* - and that is not the subject of the proposed appeals by these submitters.

[24] Further, the Council's submission is that the Hearings Panel did not identify the issue of the rural urban boundary at Patumahoe as being beyond the scope of the submissions.

[25] I have carefully read the submissions lodged by Mr Colgan in support of these proposed appeals. He is concerned about the cancellation of the proposed mediation, and that the Hearings Panel did not accept his ... *many rebuttals* of the planning evidence given to the Hearings Panel. The Council's response on the mediation issue is that it was by then apparent that the matters being raised by the proposed appellants were not within jurisdiction, and that any agreement reached at mediation could not be carried through as a valid outcome. That the Hearings Panel did not accept Mr Colgan's points of view is not of itself a ground that overcomes the restrictions deliberately placed on rights of appeal in this piece of legislation.

[26] There is nothing in the proposed appellants' submissions to contradict the Council's position that the relevant recommendations made by the Panel were accepted by it; and that that no relevant issues were identified by the Panel as being beyond the scope of submissions made on the PAUP.

[27] It must therefore be the case that the proposed grounds of appeal raised by these parties are not within the confined parameters of s156(1) and s156(3).

Mr B Frizzell

[28] In terms of Mr Frizzell's appeal, the situation is rather different. It is the Council's position that Mr Frizzell did not make a submission on the PAUP; rather he made a submission on the draft Auckland Unity Plan and that is not the Plan for which rights of appeal are defined by s156. Further, the Council submits that even if he had submitted on the relevant Plan, the Hearings Panel did not identify any matter he would wish to raise as being beyond the scope of his submissions made on the PAUP.

[29] Mr Frizzell did not lodge any submissions on this preliminary issue in support of his proposed appeal. I do not, for the record, interpret any lack of submissions from him as an acceptance of the Council's argument on the subject, but I consider it plain that Mr Frizzell does not have a valid basis for an appeal to this Court.

Conclusions

[30] For the reasons I have outlined, I accept the Council's submissions that these proposed appeals are not within the confined boundaries of possible appeals to this Court under the PAUP legislation. They should not proceed any further.

[31] That is not to say that the proposed appellants are entirely without remedy if they consider that there have been material errors of law, or matters coming within the possible scope of judicial review. That will be a matter on which advice might be taken – I express no opinion either way.

Costs

[32] I imagine it unlikely that there will be any issue of costs, but as a formality I will reserve costs. If there is to be any application it should be lodged and served within

15 working days of the issuing of this decision, and any responses lodged and served within a further 10 working days.

Dated at Wellington the 27th day of February 2017

C J Thompson
Environment Judge