IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-0002326

UNDER	s158 of the Local Government (Auckland Transitional Provisions) Act 2010
AND IN THE MATTER	of an appeal under s299 of the Resource Management Act 1991
BETWEEN	**CHARACTER COALITION INCORPORATED** an incorporated society, c/ Level 1, Northern Steamship, 122 Quay Street, Britomart, Auckland 1010
	First Appellant
AND	**AUCKLAND 2040 INCORPORATED** an incorporated society of 7 Park Avenue, Takapuna, Auckland 0622
	Second Appellant
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

SECOND AMENDED NOTICE OF APPEAL

10 October 2016

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TAKE NOTICE that the Appellants hereby appeal to the High Court against a decision of the Respondent (**Council**) publicly notified on 19 August 2016 **UPON THE GROUNDS** that the decision is wrong in law.

DECISION APPEALED

1 This appeal is against a decision made by Council on a provision or matter relating to the Proposed Auckland Unitary Plan (**proposed plan**). The provision or matter:

(A) Was the subject of separate primary and further submissions made by the First and Second Appellants on the proposed plan;

(B) Council accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel (**Hearings Panel**) which resulted in the provision or matter being included in the proposed plan. As Council accepted the recommendations of the Hearings Panel, references to the findings and reasoning of the Hearings Panel in this appeal are to be read as references to the Council decision.

(C) The provision or matter was the decision to:

(i) rezone Single House Zone residential properties to other residential zones (Mixed Housing Suburban, Mixed Housing Urban, Terrace House and Apartment Buildings) when Council had no scope to do so (**SHZ rezoning**);

(ii) rezone Mixed Housing Suburban residential properties to other residential zones (Mixed Housing Urban, Terrace Housing and Apartment Buildings) when Council had no scope to do so (**MHS rezoning**).

(D) The scale of the out of scope rezoning was identified by Council in a report to its Governing Body dated 24 February 2016. The report was prepared by the Chief Executive and General Manager – Plans and Places. The report states:

> "There are over 413,000 properties zoned residential in Auckland. The proposed changes to the maps involve approximately 14 per cent (57,820 properties) of all residential properties in Auckland, with approximately seven per cent clearly within the scope of submissions and seven per cent potentially outside the scope of submissions. The remaining 86 per cent, or approximately 351,180 properties, have no proposed changes to the notified PAUP zoning maps."

(E) The SHZ and MHS rezoning resulted in (by Council's calculation) approximately 28,910 (29,000 rounded) residential properties ("the 29,000 properties") being rezoned outside the scope of a submission requesting rezoning of those properties and without opportunity for submitter, landowner and affected person input ("outside scope"). The

location, including street, suburb and area for the 29,000 properties, is information held by Council.

(F) This appeal is a challenge to the mapping of the 29,000 properties (where the lines are drawn) because the Hearings Panel acted outside scope and therefore jurisdiction. The appeal does not challenge the Objectives, Policies or Methods for the SHZ and MHS (except to the extent that mapping is a "method" of implementing policies). Relevant parts of the Hearings Panel recommendation that resulted in the SHZ and MHS rezoning (and are therefore subject to challenge) are stated below.

RELEVANT PART OF DECISION APPEALED

2 Council adopted without alteration the Auckland-wide SHZ and MHS rezoning recommended by the Hearings Panel on the putative basis that it was within scope. Accordingly, reasons given by the Hearings Panel to justify SHZ and MHS rezoning as within scope are also reasons of Council as decision-maker. This appeal relates to the 7% of residential properties that Council identified in its evidence as being out of scope (the 29,000 properties). The Hearings Panel did not provide reasons or particulars to establish scope to rezone the 29,000 properties. The third and fourth errors of law raise this lack of particulars.

3 General reasons for residential rezoning are provided in the Hearing Panel's Report to Council as follows:

(A) Overview of Recommendations, particularly [4]-[4.6] as to Scope and [6.2] as to Residential demand and supply;

(B) Annexure 1 Enabling Growth;

(C) Appendix 3, Summary of recommendations out of scope;

(D) Mapping for the SHZ and MHS zone arising from Topics 059-063 and Topics 080 and 081;

(E) 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).

ERRORS OF LAW

4 The Hearings Panel recommended rezoning of the 29,000 properties as being within scope on an area by area basis. The Hearings Panel was wrong and there was no scope to do so. Council adopted that recommendation. It therefore acted unlawfully (**first error**).

5 The Hearings Panel wrongly stated that spatial changes to the SHZ and MHS zones were "consequential changes" arising from relief sought in submissions (without identifying the submissions it relied upon for those consequential changes).[1] Spatial changes (SHZ and MHS rezoning) on an area by area basis went beyond consequential powers. Council adopted this error in relation to the 29,000 properties. It therefore acted unlawfully (**second error**).

6 There were methodological errors in the Hearing Panel's approach to scope for the SHZ and MHS rezoning of the 29,000 properties. The methodological errors were adopted by Council (**third error**). The errors of law were:

(A) Zoning was putatively undertaken on an area by area basis ("Ultimately, the Panel has reviewed zoning and precinct issues by area, with reference to the submissions in relation to each area. On that basis, the recommendations are considered to be within the scope of submissions seeking rezoning or consequential to such submissions."[2]) The Hearings Panel failed to identify submissions that created scope on an area by area basis; and (for each area) failed to identify whether rezoning was in reliance on any one or more submissions or on consequential powers.

(B) The Hearings Panel interpreted the scope of generic submissions by reference to the scope of non-generic submissions ("More specifically, there are submissions seeking greater intensification around existing centres and transport nodes as well as submissions seeking that existing special character areas be maintained and enhanced. The greater detail of these submissions assists in understanding how the broader or more generalised submissions ought to be understood"[3]). The scope of a submission cannot be understood by reference to another submission, and it is an irrelevant consideration or wrong legal test to do so.

(C) The Hearings Panel interpreted the scope of submissions by reference to the proposed regional policy statement being evaluated and the subject of recommendations in the Report: ("The strategic framework of the regional policy statement also assists in

[1] IHP Panel Report Overview of Recommendations at [4.4]-[4.4.4], pp29-34
[2] Ibid at [4.4.4], p34
[3] Ibid at [4.4.4], p33

evaluating how the range of submissions should be considered"[4]). It is circular for the Hearings Panel to draft the recommended regional policy statement, then infer scope in light of the regional policy statement as drafted by it. The proper scope of a submission cannot be understood by reference to a recommended regional policy statement and it is an irrelevant consideration or wrong legal test to do so.

7 The Hearing Panel's failure to identify:

(A) submissions relied upon to confer scope for SHZ and MHS rezoning on an area by area basis; and

(B) reliance on consequential powers to confer scope for SHZ and MHS rezoning on an area by area basis -

was failure to give reasons in breach of its legal duty to do so. The Council adopted this approach, for the 29,000 properties, in its decision (**fourth error**).

8 The Hearings Panel made errors of law in interpretation of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**) and its relationship to the Resource Management Act 1991. This affected the approach to scope for the SHZ and MHS rezoning. The Council adopted this approach for the 29,000 properties in its decision (**fifth error**).

QUESTIONS OF LAW TO BE RESOLVED

9 Whether Council wrongly decided that there was scope for the SHZ and MHS rezoning on an area by area basis, for the 29,000 properties. Whether Council was wrong and there was no scope to do so in relation to some or all of those areas. Whether Council therefore acted unlawfully (**first question**).

10 Whether Council wrongly decided that spatial changes to the SHZ and MHS zones were "consequential changes" arising from relief sought in submissions. Whether spatial changes (SHZ and MHS rezoning) on an area by area basis went beyond consequential powers for the 29,000 properties (**second question**).

11 Whether Council's approach to scope involved errors of methodology for the 29,000 properties (**third question**).

[4] Ibid at [4.4.4], p33

12 Whether Council's failure to identify:

(A) submissions relied upon to confer scope for SHZ and MHS rezoning on an area by area basis; and

(B) reliance on consequential powers to confer scope for SHZ and MHS rezoning on an area by area basis -

was failure to give reasons in breach of legal duty to do so for the 29,000 properties (**fourth question**).

13 Whether Council erred in its interpretation of the LGATPA and its relationship to the Resource Management Act 1991. Whether this error affected its approach to scope on an area by area basis for the SHZ and MHS rezoning for the 29,000 properties (**fifth question**).

GROUNDS OF APPEAL

14 General grounds for the 5 errors of law are:

(A) Each error is a material error of law;

(B) The errors of law have resulted in region-wide changes being made to the mapping of the SHZ and MHS zones in the proposed plan;

(C) A decision that SHZ and MHS rezoning is within scope means that there is no merits-based appeal available to the Environment Court. If wrongly decided, potential Appellants are impaired or prevented from bringing an appeal on the merits of re-zoning SHZ and MHU properties on an area, suburb, neighbourhood or street basis;

(D) Relevant case law and statutory provisions support the alleged errors of law, including statutory purpose in both the LGATPA and Resource Management Act;

(E) In February 2016, Council agreed that SHZ and MHS rezoning proposed in Council's evidence was outside scope. The decisions version of the proposed plan goes further than Council's evidence, in terms of rezoning of SHZ and MHS properties, so the Council decision is inconsistent with its earlier public decision that the proposed zoning changes could not be proceeded with.

15 Specific grounds for the five errors of law are:

16 As to the first error, scope of changes to the proposed plan as notified is defined by reference to the plan provisions as notified, the relief sought in submissions made on the proposed plan, and the test as to scope identified in High Court authority, in particular the "*Clearwater*" tests.

Relevant case law was referred to and purportedly adopted by the Hearings Panel at [4.2] of its "Overview of Recommendations." In rezoning the 29,000 properties in the SHZ and MHS zones, the Hearings Panel made recommendations as to rezoning of the 29,000 properties that did not meet the requirements of s144(5) and (8) LGATPA and did not follow the High Court authority it cited. It is not possible to state with certainty which residential properties and residential areas were rezoned within scope, and which were rezoned outside scope, due to lack of particulars from the Hearings Panel. However, this appeal is limited to the 29,000 properties identified at [1](D) above.

17 As to the second error, the Hearings Panel wrongly stated that spatial changes to the SHZ and MHS zones were "consequential changes" arising from relief sought in submissions:

> "Where there are good reasons to recommend in favour of a particular rezoning sought in a submission and also good reasons for that rezoning to include neighbouring properties as a consequence, the Panel's recommendations include those neighbouring properties even when there are no submissions from the owners or occupiers of them."[5]

18 This reasoning does not identify scale (what is "neighbouring"). The Appellants accept that directly adjacent properties could be rezoned on a consequential basis (House D if Houses A, B, C, are rezoned). But it was error of law to rezone as "consequential":

(a) Streets A and B on the basis that Houses B and C in Street A are to be upzoned; or
(b) Street B on the basis that a submission requested that Street A was to be upzoned; or
(c) Suburb B on the basis that a submission requested that Suburb A was to be upzoned; or
(d) Area B on the basis that a submission requested that Area A was to be upzoned; or
(e) By reference to uncertain or generic submissions.

19 As to the third error, errors in methodology are particularised at [6] above. Methodological errors resulted in the Hearings Panel misdirecting itself as to the correct approach to scope.

20 As to the third and fourth errors, there is a duty to identify submissions or consequential powers relied upon to confer scope for the SHZ and MHS rezoning on an area by area basis. 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

[5] Ibid at [4.4.4], 34

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.

21 As to the fifth error, the Hearings Panel asserted that s144(5) LGATPA meant that the Hearings Panel was "not constrained in making recommendations only to the boundaries of what was proposed in the Unitary Plan as notified and what was sought in submissions."[6] While the Panel was able to make recommendations out of scope, these needed to be identified as such. The Panel did not state that the SHZ and MHS rezoning was outside the scope of submissions or made in reliance on s144(5) LGATPA. Accordingly the rezoning (for the 29,000 properties) was required to meet the legal tests for scope that the Hearings Panel accepted were applicable.

RELIEF

22 The Appellants seeks the following relief:

(A) That the appeal be allowed and the decisions on SHZ and MHS rezoning for the 29,000 properties are quashed (to the extent that these are out of scope, or otherwise unlawful);

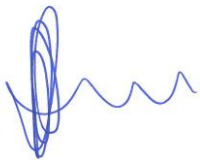
(B) Where the finding is that the SHZ or MHS rezoning for the 29,000 properties is outside the scope of any submission, that the matter be referred to the Environment Court for a hearing on the merits under s156 LGATPA;

(C) Where the finding is that the decisions are quashed as a result of failure to provide reasons (and not because of scope) then the matter is remitted to the Council for the Hearings Panel to reconsider its recommendations;

(D) Consequential relief;

(E) Costs.

Dated this 10th day of October 2016



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Richard Brabant / Rob Enright

Counsel for Appellants

[6] Ibid at [4.2], p25

This Amended Notice of Appeal is filed by Jason Pou, Solicitor for the Appellants, of the firm Tu Pono Legal. 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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