IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-2331

UNDER	the Local Government (Auckland Transitional Provisions) Act 2010 ("**the Act**")
IN THE MATTER	of an appeal pursuant to s158 of the Act
BETWEEN	**MAN O' WAR FARM LIMITED** having its registered office at Tasman Building, Level 7, 16-22 Anzac Avenue **Appellant**
AND	**AUCKLAND COUNCIL** a unitary authority established under the Local Government (Auckland Council) Act 2009 **Respondent**

FIRST AMENDED NOTICE OF APPEAL AGAINST UNITARY PLAN DECISIONS OF AUCKLAND COUNCIL

Date: November ~~16 September~~ 2016

Solicitor for Appellant:

Brian Joyce
Clendons North Shore
PO Box 305349
Auckland 0757

Phone: (09) 377 8419
Fax: (09) 476 3679

Counsel for Appellant:

Matthew Casey QC
PO Box 317
Auckland 1140

Phone: (09) 337 0400
Fax: (09) 337 0800

Martin Williams
PO Box 754
Napier

Phone: (06) 835 0665
Fax: (06) 835 6269

To: The Registrar, High Court, Auckland

And

To: Auckland Council

This document notifies you that –

1. Man O' War Station Limited **(appellant)** hereby appeals to the High Court at Auckland against decisions made by Auckland Council (**respondent**) dated and received by the appellant on 19 August 2016 **UPON THE GROUNDS** that the decisions are wrong in law.

DECISIONS APPEALED

2. The appellant appeals against those parts of the decisions made by the respondent pursuant to s148 of the Act, regarding the following provisions (including maps and overlays) of the proposed Auckland Unitary Plan (**Unitary Plan**) prepared under the Act:

   (a) The mapping of substantial areas (some 75%, or 1925 ha) of the appellant's rural property on Waiheke Island as an outstanding natural landscape (**ONL**), along with an area of the property located at Man O' War Bay as having outstanding natural character (**ONC**), and the provisions of the Unitary Plan including Parts D11 and E12 triggered by that mapping (Part A of this notice of appeal).

   (b) Policies in Part E15 of the Unitary Plan requiring the avoidance of adverse effects on certain natural resources located in the coastal environment (Part B of this notice of appeal).

   (c) The definition of "*Land which may be subject to coastal hazards*" in Part J1 of the Unitary Plan, and associated provisions including rules within Part E36 of the Unitary Plan triggered through application of that definition (Part C of this notice of appeal).

   (d) Rule (A39) within Part F2 of the Unitary Plan precluding access by livestock to the coastal marine area from 30 September 2018 (Part D of this notice of appeal).

STANDING

3. The appellant made submissions on the Unitary Plan in relation to each of the above provisions or matters.

4. The respondent accepted recommendations of the Auckland Unitary Plan Independent Hearings Panel which considered submissions to the Unitary Plan pursuant to s128 of the Act (**Hearings Panel**) which resulted in the provisions identified above being included in the Unitary Plan.

5. The appellant therefore has standing to appeal to the High Court under s 158 of the Act on questions of law.

PART A – ONL AND ONC MAPPING

Errors of law

6. In upholding the ONL and ONC mapping over the appellant's property to the extent recommended by the Hearings Panel, Auckland Council erred in law in the following respects:

   (a) By applying the wrong legal test (or threshold) as to what comprises an ONL or an ONC.

   (b) By misinterpreting the term "outstanding" as set within s6(b) of the Resource Management Act (**RMA**), including with reference to Policies 13 and 15 of the New Zealand Coastal Policy Statement 2010 (**NZCPS 2010**), in light of the Supreme Court's decision in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (*King Salmon*).

   (c) By adopting ONL mapping prepared by way of assessment in a regional context, rather than through comparison with other natural landscapes at national scale.

   (d) By including extensive areas of pasture, vineyards and other exotic plantings within the ONL areas mapped under the Unitary Plan over the appellant's property, which areas cannot reasonably be found to be part of a natural landscape that is outstanding within the proper meaning of that term.

   (e) By adopting the Hearing Panel's reasoning through its decisions whereby the assessment tables and schedules of the Unitary Plan were to have been amended to identify that farming activities exist within ONL areas, and that their presence does

not cause adverse effects, but failing to implement or adopt any such changes to that effect.

(f) By instead including rules within Parts D11 and E12 of the Unitary Plan that will severely restrict activities basic to rural production, presumably on the basis that such activities do have adverse effects.

Questions of law

7. This Part (A) of the appeal raises the following questions of law:

(a) What is the correct test or threshold to be applied in deciding whether an area or landscape is outstanding for the purpose of s6(b) of RMA and Policy 13 of NZCPS 2010?

(b) Is the threshold of what comprises an ONL applied at regional or national scale?

(c) Can areas of pasture, vineyards or exotic plantings that form part of a working farm properly be included within an ONL?

(d) Where it is assumed in a decision that farming activities are not adverse, can rules rationally or reasonably be included in a planning instrument prepared under RMA on the basis that they do have adverse effects?

Grounds of Appeal

8. The grounds of this Part (A) of the appeal are as follows:

(a) The ONL mapping included within the Unitary Plan was directly adopted from Change 8 to the (legacy) Auckland Regional Policy Statement. The appellant opposed this mapping in its submission to the Unitary Plan.

(b) In preparing the Change 8 ONL mapping, it was assumed that extensive pastoral landscapes which include a picturesque mix of bush on hills or lowlands qualify as ONL, in a regional context. Some 75% (or 1925 ha) of the appellant's Waiheke Island property, and some 16% of the Auckland Region, was mapped as ONL under both Change 8 and the Unitary Plan on that basis.

(c) In order to properly qualify as an ONL under RMA a natural landscape must instead be "remarkable", "exceptional", and "conspicuous because of excellence", to fall within the meaning

of "outstanding" as applied in s6(b) of RMA and Policy 15 of NZCPS 2010.

(d) In order to properly qualify as an ONL under RMA a natural landscape must be assessed as outstanding applying the threshold or test as set out in (c) above, through comparison with other natural landscapes at a national scale.

(e) In order to qualify as an area of outstanding natural character for the purpose of Policy 13 of NZCPS 2010, a resource area must be 'wholly natural' and of such quality that all adverse effects on it must be avoided.

(f) Substantial areas of the appellant's rural property mapped as ONL comprise pasture, vineyards or other exotic plantings that do not meet the required threshold to qualify as outstanding, and cannot reasonably be found to do so, but are instead "picturesque" parts of the relevant landscape of amenity but not outstanding landscape value. The area mapped as ONC does not meet the requisite test, as set in (e) above.

(g) The Hearings Panel reasoned that activities basic to farming could take place within areas mapped as ONL, and recorded that changes had been made to the assessment tables and schedules identifying that the presence of (presumed) rural activities does not cause adverse effects, but no such amendments are in fact included within the Unitary Plan under the Council's decisions.

(h) Instead very severe restrictions on buildings and land disturbance (to a maximum of 50 m^2 in each case) are included within sections D11 and E12 of the Unitary Plan, presumably on the basis that such activities do have adverse effects.

(i) In addition, areas of pasture and vineyard are referenced in Schedule 7 of the Unitary Plan (for ONL 78 as applied to the appellant's property) describing the characteristics and qualities that contribute to ONL value, but should not be.

The appellant seeks

(a) A direction that Auckland Council prepare revised ONL and ONC mapping for the appellant's property which meets the proper legal threshold of outstanding, and following assessment at the proper scale, as determined by the Court, and/or

(b) The inclusion of express provisions stating that in applying any other provisions of the Unitary Plan relating to ONLs, ONCs and HNCs the dynamic and seasonal nature of typical rural activity including the character, intensity and scale of associated effects are an accepted part of natural character, and not considered adverse or inappropriate, and/or

(c) The deletion of Parts D11 and E12 relating to rural activities within ONLs and in particular the restrictions on the scale of permitted buildings structures and land disturbance within ONCs, HNCs and ONLs, within the following provisions of the Unitary Plan~~and~~:

(i) As to section D11 – Activities A3 and A9 to A12 (Activity Table D11.4.1), Rule D11.6.2 and the relevant matters of discretion and assessment criteria in D11.8.1 and D11.8.2 (as triggered by application of these rules);

(ii) As to section E12 – Rules A25 and A28 to A33 (Activity E12.4.2, first two columns only) and the relevant matters of discretion and assessment criteria in Rules E12.8.1 and E12.8.2 (as triggered by application of these rules), and/or,

~~(c)~~(d) ~~or.~~Amendment to Schedule 7 of the Unitary Plan (for ONL 78) to remove any reference to pastoral land cover or vineyards, and

~~(d)~~(e) Such further, other or consequential relief required to give effect to the decisions sought in this Part A of the appeal.

~~(e)~~(f) Costs.

PART B – E15 VEGETATION MANAGEMENT AND BIODIVERSITY

Errors of law

9. In upholding Policies E15.3(9) and (10) of the Unitary Plan as recommended by the Hearings Panel, Auckland Council erred in law in the following respects:

(a) By including these policies in the Unitary Plan in the form proposed during the submissions process (after notification) on the basis that they are required to "give effect to" Policy 11 of NZCPS 2010; and

(b) By failing to undertake any further evaluation as directed under s32AA of RMA for changes to the Unitary Plan not addressed in the original s32 evaluation preceding notification of the Unitary Plan, including any assessment of the economic and social costs

Formatted: Space Before: 12 pt, After: 12 pt, Add space between paragraphs of the same style, Line spacing: Multiple 1.25 li, Outline numbered + Level: 2 + Numbering Style: a, b, c, … + Start at: 1 + Alignment: Left + Aligned at: 0 cm + Tab after: 1 cm + Indent at: 1 cm

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

Formatted: Font: (Default) Arial

that would flow from implementation of the new policies, on the incorrect basis that such costs and benefits would have been considered as part of development of the NZCPS 2010; and

(c) For failing to take into account relevant considerations including the specific costs resulting from implementation of these policies in the circumstances applying under the Unitary Plan (i.e. for Auckland region, and including over the appellant's Waiheke Island property).

Questions of law

10. This Part (B) of the appeal raises the following questions of law:

(a) Is the requirement in s32AA of RMA to prepare a further evaluation of proposed changes to the Unitary Plan (where not previously evaluated under s32) displaced by the direction of s67(3) of RMA whereby a regional plan must give effect to a New Zealand Coastal Policy Statement?

(b) Is any evaluation undertaken in the context of preparing NZCPS 2010 sufficient to displace any requirement to undertake an evaluation (or further evaluation) under s32 or 32AA of RMA for the purpose of preparing the Unitary Plan under the Act?

(c) Do policies E15(9) and (10) give effect to Policy 11 of NZCPS 2010?

Grounds of appeal

11. The grounds of this Part (B) of the appeal are as follows:

(a) Policies E15.3(9) and (10) were not included in the Unitary Plan when notified but instead proposed during the submissions process on the basis that they give effect to Policy 11 of NZCPS 2010.

(b) Auckland Council witnesses gave evidence to the Hearings Panel that in order to avoid adverse effects on the relevant resources as referred to and required by the policies, those resources may need to be fenced to protect them from grazing by livestock.

(c) For the appellant's property, this may mean that some 480 ha of bush features need to be fenced in that manner.

(d) There are potentially significant costs associated with having to fence such extensive bush areas on the property, with evidence given to the Hearings Panel that these requirements could ultimately lead to the undermining of overall farm viability, and cause the operation to become entirely uneconomic.

(e) No assessment of the costs of the proposed policies, including of that nature (i.e. as to fencing, or to the overall impact on farm viability and therefore as to the potential reduction in employment and economic growth) was undertaken by Auckland Council or the Hearings Panel, on the basis that such costs and benefits "would have been considered as part of the development of the NZCPS 2010". The requirements of s32(2) of RMA have not therefore been met in relation to these provisions.

(f) Policies E15.3(9) and (10) do not directly reflect (give effect to or implement) the wording of Policy 11 NZCPS 2010, but instead include additional wording and requirements not found in Policy 11 (and omit wording that is contained within Policy 11).

(g) The requirements of s32, s32AA, and s67(3) of RMA are additive and the direction in s67(3) of RMA to give effect to a New Zealand Coastal Policy Statement does not displace the obligation to undertake the evaluations required under s32 and s32AA.

The appellant seeks

(i) A direction that Auckland Council delete policies E15.3(9) and (10) of the Unitary Plan; and/or

(ii) Before including those provisions undertake an evaluation meeting the requirements of s32(2) of RMA.

(iii) Costs.

PART C – LAND WHICH MAY BE SUBJECT TO COASTAL HAZARDS

Errors of law

12. In upholding the definition of "*land which may be subject to coastal hazards*" in Part J1 of the Unitary Plan, and provisions including rules

within Part E36 of the Unitary Plan triggered through application of that definition, Auckland Council erred in law in the following respects:

(a) By including a definition of "*Land which may be subject to coastal hazards"* that was not sought in any submissions to the Unitary Plan, without the requirements of s144(8~~6~~) of the Act being met.

(b) By including within the definition "*any land which may be subject to erosion over at least a 100 year timeframe*" but without identifying such land including within the Unitary Plan maps.

(c) Thereby triggering application of rules and other provisions of the Unitary Plan that are *ultra vires* for lack of certainty, because a reader of the Unitary Plan cannot determine whether or not a building can be established with or without resource consent approval on the face of the provisions.

Questions of law

13. This Part (C) of the appeal raises the following questions of law:

(a) Did Auckland Council have jurisdiction to include a definition of *Land which may be subject to coastal hazards* that was not sought in any submissions to the Unitary Plan as notified, and in the absence of the Hearings Panel identifying that its recommended definition was beyond the scope of submissions, under s144(8~~6~~) of the Act?

(b) Can a definition be included within the Unitary Plan that has the effect of triggering other provisions including rules and whereby resource consents may be required, within undefined areas of land?

(c) With reference to the definition of "*Land which may be subject to coastal hazards"*, are the provisions of Part E36 of the Unitary Plan including those rules that require a resource consent for new buildings or structures "*on land which may be subject to coastal erosion",* ultra vires?

Grounds of appeal

14. The grounds of this Part (C) of the appeal are as follows:

(a) When notified, the Unitary Plan set rules for activities (including buildings and structures) on land which may be subject to *natural hazards* (Part 4.11 of the Unitary Plan as notified).

(b) The appellant opposed these provisions with reference to the phrase "*land which may be subject to natural hazards*" as applied under Policy 1 of section C5.12 of the Unitary Plan as notified, and as then defined under the Unitary Plan.

(c) The Hearings Panel recommended and Auckland Council adopted revised definitions of such areas including a new definition of *"Land which may be subject to coastal hazards*" as including any land which may be subject to erosion *over at least a 100 year timeframe*. No submissions to the Unitary Plan requested such a revised definition.

(d) A reader of the Unitary Plan will not be able to determine, including with reference to the Unitary Plan maps, whether land in coastal areas falls within that definition, and as such the definition and the provisions of the Unitary Plan triggered by the definition are void for uncertainty and *ultra vires.*

The appellant seeks

(a) Deletion of the revised definition of "*Land which may be subject to coastal hazards"* or at least that part of it which refers to any land which *may be subject to erosion over at least a 100 year timeframe*, and/or

Formatted: Font: Bold

~~(a)~~(b) A declaration that the Hearings Panel wrongly failed to identify, under s 144(8) of the Act, that its revised definition of "*Land which may be subject to coastal hazards"* was beyond the scope of submissions made to the Unitary Plan, such that the Environment Court has jurisdiction to consider Auckland Council's decision to accept that revised definition (and associated provisions of the Unitary Plan triggered by application of that definition) pursuant to an appeal under s156(3) of the Act.

~~(b)~~(c) Costs.

PART D – LIVESTOCK ACCESS TO COASTAL MARINE AREA

Errors of law

15. In upholding Rule A39 within Part F2 of the Unitary Plan which precludes access by livestock to the coastal marine area from 30 September 2018 (for areas mapped as high natural character (HNC), ONL or ONC, Auckland Council erred in the following respects:

(a) By failing to undertake an evaluation of the kind required by s32(2) of RMA of the potential costs of the requirement, including

for properties such as Man O'War Farm, some 24.5 kilometres of which bounds the coastal marine area.

(b) By failing to take into account in direct and indirect costs resulting from the rule including loss of significant areas of land otherwise available for production (reducing overall farm viability).

(c) By wrongly assuming that areas with HNC, ONL or ONC value must be fenced from livestock to give effect to Policy 21 of NZCPS 2010.

Questions of law

16. This Part (D) of the appeal raises the following questions of law:

(a) Does Policy 21 NZCPS 2010 require the fencing of livestock from the coastal marine area where the quality of water in the coastal environment has not deteriorated such that it is having a significant adverse effect on (*inter alia*) ecosystems or natural habitats?

(b) Can a rule be upheld within the Unitary Plan, where the direct and indirect costs of that rule have not been assessed in accordance with the requirements of s32(2) of RMA?

Grounds of appeal

17. The grounds of this Part (D) of the appeal are as follows:

(a) The appellant opposed what is now Rule A(39) of Part F2 of the Unitary Plan in its submissions and presented evidence to the Hearings Panel that there would be significant costs (in addition to the direct costs of fencing stock from the CMA itself around the perimeter of Man O' War Farm) caused by the rule, including loss of access to significant areas of productive land.

(b) Auckland Council's s32 evaluation assumed that "little land would be taken out of production" as a result of fencing requirements, whereas the only reasonable conclusion contradicts that assumption in light of the evidence presented to the Hearings Panel by Man O' War Farm.

(c) For the purpose of such s32(2) evaluation as was undertaken, Auckland Council assumed that Rule A(39) was required to give effect to Policy 21 NZCPS 2010, whereas that Policy only directs the exclusion of stock from the coastal marine area in areas where water quality has deteriorated such that it is having a

significant adverse effect on (inter alia) ecosystems and natural habitats.

(d) By contrast the occasional grazing of stock within the coastal marine area contiguous with Man O' War Farm has not caused any deterioration in water quality, and coastal areas of the property are mapped as having high or outstanding natural character (and landscape value) under the Unitary Plan despite such grazing.

The appellant seeks

(a) Deletion of rule A39 of part F2 of the Unitary Plan in so far as it relates to livestock access to the coastal marine area, apart from areas that have been degraded by human activities.

(b) Costs.

Dated this day of November ~~September~~ 2016.

_____
Brian Joyce
Solicitor for appellant

This notice of appeal is filed by **Brian James Joyce**, solicitor for the appellants, of the firm of Clendons North Shore.

The address for service of the appellant is at the offices of Clendons North Shore, Suite 4, Building F, Apollo Technical Park, 3 Orbit Drive, Mairangi Bay.

Documents for service on the appellants may be:

(a) Left at the address for service.
(b) Posted to the solicitor at P O Box 305 349, Auckland 0757.
(c) Transmitted to the solicitor by fax to (09) 476 3679.
(d) Emailed to the solicitor at brian.joyce@clendons-ns.co.nz.