IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2016 404 0002327

UNDER	The Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991
AND IN THE MATTER	of an application for judicial review under Part 1 of the Judicature Amendment Act 1972
BETWEEN	**CHARACTER COALITION INCORPORATED** an incorporated society, c/ Level 1, Northern Steamship, 122 Quay Street, Britomart, Auckland 1010
	First Applicant
AND	**AUCKLAND 2040 INCORPORATED** an incorporated society of 7 Park Avenue, Takapuna, Auckland 0622
	Second Applicant
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 STATEMENT OF CLAIM

10 October 2016

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The Applicants by their Solicitor say:

PARTIES

1 The first applicant is an incorporated society under the Incorporated Societies Act 1908 (registration number 2650772) (**Character Coalition**).

2 The Character Coalition's public interest objects (at clause 3 of its rules) are:

> "3.1 The purposes of the Society are to:
>
> a. Recognise, protect and enhance the character and heritage of Auckland;
> b. Provide information to members and the community about character and heritage issues in Auckland;
> c. Engage and associate with interested community groups on how best to recognise, protect and enhance character and heritage;
> d. Do anything necessary or helpful to the above purposes.
>
> 3.2 Pecuniary gain is not a purpose of the Society."

3 The Character Coalition (as successor to a then unincorporated body) lodged a primary and further submission on the proposed plan.

4 The second applicant is an incorporated society under the Incorporated Societies Act 1908 (registration number 2586382) (**Auckland 2040**).

5 Auckland 2040's public interest objects (at clause 2.4 of its rules) are:

> "(a) represent and advocate for residents of Auckland in relation to significant planning issues including, but not limited to, the Auckland Unitary Plan, so as to provide a strong community voice;
> (b) actively participate in meaningful consultation between communities in the Auckland region and the Auckland Council, Council Controlled Organisations, Local Area Boards and central government in relation to the above purposes; and
> (c) do anything necessary or helpful to the above purposes."

6 Auckland 2040 lodged a primary and further submission on the proposed plan.

7 The respondent (**Council**) is a local authority constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009 and a consent authority under the Resource Management Act 1991 (**RMA**).

PROPOSED AUCKLAND UNITARY PLAN

8 On 22 July 2016, the Auckland Unitary Plan Independent Hearings Panel (**Hearings Panel**) released recommendations on the Proposed Auckland Unitary Plan (**proposed plan**). Recommendations were released under s144 of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**).

9 On 19 August 2016, Council publicly notified the decisions version of the proposed plan. 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 has accepted the recommendations of the Hearings Panel, references to the findings and reasoning of the Hearings Panel in this claim are to be read as references to the Council decision.

10 The provision or matter was the decision to:

(A) 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**);

(B) 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**).

11 The scale of 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."

12 The SHZ and MHS rezoning resulted in (by Council's calculation) approximately 28,910 (29,000 rounded) residential homes being rezoned without scope and without opportunity for input by submitter, landowner and affected person input. The location, including street, suburb and area for the 29,000 homes, is information held by Council.

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

DECISION SUBJECT TO REVIEW

14 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 the 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 homes). The Hearings Panel did not provide reasons or particulars to establish scope to rezone the 29,000 homes.

15 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. But for the purposes of this claim, the Applicants 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).

(F) (A)-(E) are relied on as if pleaded in full.

GOVERNING BODY MEETING FEBRUARY 2016

16 Council convened a Governing Body meeting on 24 February 2016. It addressed the agenda report cited at [11] above (which identified the 29,000 residential homes to be rezoned out of scope). The report (and attachments) are relied on as if pleaded in full.

17 The Governing Body passed the following resolution (Resolution Number GB/2016/18):

> "..That the Governing Body:
>
> a) remove from the proposed Auckland Unitary Plan maps the 'out of scope' zoning changes made on 10 November 2015, which were not directly supported by any submission, and that this now be confirmed as Auckland Council's position.
>
> b) remove from the proposed Auckland Unitary Plan maps the 'out of scope' zoning changes made on 24 November 2015, which were not directly supported by any submission, and that this now be confirmed as Auckland Council's position.
>
> That the Governing Body:
>
> c) note that the proposed 'out of scope' zoning changes (other than minor changes correcting errors and anomalies) seek to modify the Proposed Auckland Unitary Plan in a substantial way.
>
> d) note that the timing of the proposed 'out of scope' zoning changes impacts the rights of those potentially affected, where neither submitter or further submitter, and for whom the opportunity to participate in the process is restricted to Environment Court appeal.
>
> e) in the interests of upholding the principle of natural justice and procedural fairness, withdraw that part of its evidence relating to 'out of scope' zoning changes (other than minor changes correcting errors and anomalies)."

The resolution is relied on as if pleaded in full.

First ground for review – Scope

18 The applicants repeat paragraphs 1-17 above.

19 The Hearings Panel recommended rezoning of the 29,000 homes 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 through wrong legal test.

Particulars:

a. 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 including the "Clearwater" tests.

b. Relevant case law was referred to and adopted by the Hearings Panel at [4.2] of its "Overview of Recommendations." In rezoning SHZ and MHS zones, the Hearings Panel acted outside s144(5) LGATPA and the High Court authority it cited. It is not possible to state with certainty which areas were rezoned within scope, and which were rezoned

outside scope, given absence of particulars provided by the Hearings Panel. However, this appeal is limited to the 29,000 homes identified at [11] above.

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions are invalid for the 29,000 homes (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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 Costs.

Second ground for review – Consequential changes

20 The applicant repeats paragraphs 1-17 above.

21 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 homes. It therefore acted unlawfully through wrong legal test.

Particulars

a. 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."[2]

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

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions are invalid for the 29,000 homes (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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 Costs.

Third ground for review – Methodological error

22 The applicant repeats paragraphs 1-17 above.

23 There were methodological errors in the Hearing Panel's approach to scope for the SHZ and MHS rezoning of the 29,000 homes. The methodological errors were adopted by Council. The errors 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."[3]) 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"[4]). The scope of a submission

[3] Ibid at [4.4.4], p34
[4] Ibid at [4.4.4], p33

cannot be understood by reference to another submission, and it is 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 evaluating how the range of submissions should be considered"[5]). 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 irrelevant consideration or wrong legal test to do so.

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions for the 29,000 homes are invalid (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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 Costs.

Fourth ground for review – Methodological error

24 The applicant repeats paragraphs 1-17 above.

25 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 error in approach when rezoning the 29,000 homes.

[5] Ibid at [4.4.4], p33

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions for the 29,000 homes are invalid (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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 Costs.

Fifth ground for review – Wrong legal test

26 The applicant repeats paragraphs 1-17 above.

27 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 error in approach when rezoning the 29,000 homes.

Particulars

(A) 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 homes was required to meet the legal tests for scope.

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions for the 29,000 homes are invalid (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

[6] Ibid at [4.2], p25

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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 Costs.

Sixth ground for review – Natural Justice / Procedural fairness

28 The applicant repeats paragraphs 1-17 above.

29 The SHZ and MHS rezoning decisions for the 29,000 homes were made an out of scope basis. This meant that directly affected persons were unable to lodge submissions, whether in support or opposition, to putative changes to zoning.

30 The effect of rezoning is significant:

(A) It resulted in out of scope changes being made to the mapping of 29,000 residential homes in the proposed plan;

(B) 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 rezoning SHZ and MHU properties on an area, suburb, neighbourhood or street basis (for the 29,000 residential homes identified).

Wherefore the applicant seeks:

A A declaration that the SHZ and MHS rezoning decisions for the 29,000 homes are invalid (to the extent that these were made out of scope, or otherwise unlawful) and an order setting them aside;

B Where the finding is that the SHZ or MHS rezoning for the 29,000 homes 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, with directions as to service on 3rd parties deprived opportunity to appear or make submissions;

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 Costs.

This document is filed by Jason Pou, Solicitor for the Applicants, of the firm Tu Pono Legal. Documents for service on the Applicant may be served by courier, post or email at the following address, with copy by email to Counsel:

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