

**IN THE ENVIRONMENT COURT
AUCKLAND**

ENV

IN THE MATTER

of the Resource Management Act 1991 ("**Act**")

AND

IN THE MATTER

of Clause 14(1) of the First Schedule of the Act.

BETWEEN

**CHRISTIAN WHATA (ON BEHALF OF THE
WAIHANGA KAINGA TRUST)**

Appellant

AND

AUCKLAND CITY COUNCIL

Respondent

NOTICE OF APPEAL TO ENVIRONMENT COURT

27 JULY 2009

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1. INTRODUCTION

- 1.1 Christian Whata in his capacity as a Trustee of the Waihanga Kainga Trust ("**Trust**") appeals against parts of the decision of the Auckland City Council ("**Council**") on the Proposed Hauraki Gulf Islands District Plan ("**Proposed Plan**").
- 1.2 The Trust made a submission on the Proposed Plan on 8 December 2006.
- 1.3 A notice of the decision by the Council ("**Decision**") was received on 2 May 2009. The Decision approved the Proposed Plan with modifications.
- 1.4 The parts of the Decision being appealed are as follows:
- (a) 10a.10.5 - Activity table.
 - (b) Part 10c.3.2 and Part 11.5.1 - Notification requirements.
 - (c) Part 10a.10.3.2(2) - Development location on sites.
 - (d) Part 10c: Development Controls for land units and settlement areas (Rule 10c.5.7) - Improvement to landscape and ecology.
 - (e) Rule 10c.4.5 and Table 10c.4: Development controls - open space 1-4, rural 1-3, and conservation - Building coverage.
 - (f) Rule 10c.5.4 and Table 10c.4: Development controls - open space 1-4, rural 1-3, and conservation - Noise levels.

2. GENERAL REASONS FOR APPEAL

- 2.1 The Decision, in its present form:
- (a) will not promote sustainable management of resources;
 - (b) is contrary to Part 2 and other provisions of the Resource Management Act 1991;
 - (c) will not meet the reasonably foreseeable needs of future generations;
 - (d) will not enable social, economic and cultural well being;
 - (e) is otherwise contrary to the purposes and provisions of the Act and other relevant planning documents;
 - (f) is inappropriate and inconsistent with the purpose and principles of the Act; and
 - (g) is not necessary to avoid, remedy or mitigate the adverse effects of the proposed activity.

- 2.2 Without limiting the generality of this section 2, the Trust also opposes the Decision for the reasons set out in sections 3-8 below.

Relief sought

- 2.3 The Trust seeks that the Decision in its current form be:
- (a) declined; or
 - (b) amended as set out below, or if the Court is not minded to grant that relief that the Court amend the Decision in some alternative way that meets the Trust's concerns as set out in this appeal; and
 - (c) such further or consequential relief (including consequential amendments to any of the provisions) as may be necessary to fully give effect to the relief sought in this appeal.
 - (d) Costs.

3. 10a.10.5 - ACTIVITY TABLE

- 3.1 The Trust's key concern was, and still is, the Council's approach to the activity status of residential activities within the Island Residential 2 Zone. In particular, the Trust sought that:
- (a) residential activities be classified as a controlled activity, subject to compliance with the development controls;
 - (b) residential activities that meet the development standards be reclassified as controlled activities; and
 - (c) where residential development does not meet the development controls, then it be classified as a restricted discretionary activity, with discretion restricted to those areas of non-compliance.
- 3.2 The Decision states that the Council, through its experience in administering the Operative Plan, has established that the potential effects are such that they cannot be adequately controlled by conditions of consent, and that therefore, restricted discretionary status is more effective than a controlled activity status.
- 3.3 The Trust considers that the restricted discretionary activity status is unreasonable and unnecessarily onerous insofar as it relates to residential activity within residential zones. Under the Proposed Plan, any residential activities that comply with the development standards (which are very stringent) must be processed as a restricted discretionary activity and therefore can be potentially declined. Further, any residential activity that does not comply with the standards becomes fully discretionary, even though the infringement may be very minor and relate to only one standard.
- 3.4 There are a number of reasons why controlled activity status for residential activities within the Island Residential 2 Zone is most appropriate, including:

- (a) The controlled activity status would be consistent with the objectives and policies for the Island Residential 2 Zone. By not enabling residential development, the Council is changing the fundamental nature of the zone from a residential zone in a bush setting, to a bush zone which may have potential residential development. That was not the zone's intention and is inconsistent with the objective and policy framework.
 - (b) Property owners should be entitled to the certainty that a dwelling can be constructed on their property for them and their families to live in. That certainty is consistent with the focus of the zone as "an important residential area". To not provide for any certainty that a residentially zoned property may be used for residential purposes may render a number of interests in land as incapable of reasonable use.¹
 - (c) By using the restricted discretionary activity status, the Council is in fact encouraging developers to "take the risk" of applying for any development, rather than encouraging sympathetic developments in the Island Residential 2 Zone through the use of controlled activity status. The Council is therefore potentially undermining its own vision for the zone.
 - (d) While the restricted discretionary activity status may be appropriate for activities that do not comply with development standards, especially those relating to scale of the development, it is inappropriate to provide the Council with the ability to impose conditions not relating to the concerns of the affected standard in the relevant assessment criteria.
 - (e) The Council's refusal to use controlled activity status is arbitrary. There is no resource management reason for taking such an approach. Appropriate controls can be placed on residential development through a combination of the development standards and the ability to impose conditions so as to ensure good environmental outcomes. Controlled activity status, when used appropriately, can be an effective resource management tool.
- 3.5 Accordingly, it is most appropriate for residential activities to be classified as a controlled activity within the Island Residential 2 Zone, where they meet all relevant development controls, and as a restricted discretionary activity where all relevant development controls are not met.

Relief sought

- 3.6 Without limiting the relief sought in paragraph 2.3 above, the Trust seeks that the residential activities that meet the development standards be reclassified as controlled activities in the Island Residential 2 Zone.

¹ Section 85 of the Resource Management Act 1991.

4. PART 10c.3.2 AND PART 11.5.1 - NOTIFICATION REQUIREMENTS

- 4.1 The Trust sought that Part 10c.3.2 and Part 11.5.1 be amended such that commercial, recreational or other non-residential activity located immediately adjacent to residential activity, may not be automatically processed without notification.
- 4.2 The Decision provides that the nature of the proposed activity, whether it be commercial or residential, may have little or no influence on the effects arising from an infringement to these controls and hence should have no bearing on whether an application is notified or not.
- 4.3 The Trust supports the notification requirements set out in Part 10c.3.2 and Part 11.5.1. The residential activities which are provided for as controlled or restricted discretionary activities can be appropriately considered on a non-notified basis and should not be required to go through the full public notification process.
- 4.4 However, this is not appropriate for commercial or recreational activities or non-residential activities that may involve intensive use of a site in a residential context. The Council should retain discretion to consider such activities on a notified basis in accordance with the public participatory policy of the Act.

Relief sought

- 4.5 Without limiting the relief sought in paragraph 2.3 above, the Trust seeks that Part 10c.3.2 and Part 11.5.1 be amended such that commercial or recreational or other non residential activity located immediately adjacent to residential activity, may not be automatically processed without notification.

5. PART 10a.10.3.2(2) - DEVELOPMENT LOCATION ON SITES

- 5.1 The Trust sought that 10a.10.3.2(2) be amended to read:
- "By ensuring that any development is located on portions of the site that are of lower ecological values, where practicable and if not practicable, by ensuring that any development avoids, mitigates or remedies effects on ecological values".
- 5.2 The Decision provides that the amendments would create uncertainty about when it is practicable or not practicable to develop on portions of sites of lower ecological value. Further, if there are significant reasons why a development could not be established within parts of a site that have a lower ecological value, then this could be considered on a case by case basis as part of the resource consent process rather than by amending the policy.
- 5.3 The Trust is of the view that the above amendment would continue to seek the preservation of the zone's ecological values, while providing sufficient flexibility for sites to be developed in an appropriate and sympathetic manner in terms of their context and surrounding bush environment.

- 5.4 By placing the onus on the developer to establish that it would not be practicable to develop on sites of lower ecological value, this perceived uncertainty could be overcome. Contrary to what is stated in the Decision, the amendment of this policy in the manner sought by the Trust would in fact make it clear that consideration of whether development could occur on parts of a site with lower ecological value is to occur on a case by case basis, which is what the Decision indicates the Council is seeking.

Relief sought

- 5.5 Without limiting the relief sought in paragraph 2.3 above, the Trust seeks that 10a.10.3.2(2) be amended to read (or words to a similar effect):

"By ensuring that any development is located on portions of the site that are of lower ecological values, where practicable and if not practicable, by ensuring that any development avoids, mitigates or remedies effects on ecological values".

6. PART 10c: DEVELOPMENT CONTROLS FOR LAND UNITS AND SETTLEMENT AREAS (RULE 10c.5.7) - IMPROVEMENT TO LANDSCAPE AND ECOLOGY

- 6.1 The Trust sought the insertion of new assessment criteria to provide recognition for any improvements to landscape and ecology associated with any proposed redevelopment.
- 6.2 The Decision provides that section 104 of the Act requires consent authorities, when considering an application for a resource consent, to assess the positive effects of a proposal. Such positive effects may include landscape enhancement or ecological benefits. As such, the Decision does not consider that this requirement also needs to be included in the Plan.
- 6.3 While section 104 is broad, there is no reason why particular matters cannot be directed in the Plan to be considered by the consent authority. Plans commonly refer to specific effects which a consent authority is to have regard to and there is no resource management reason why a plan cannot refer to a specific matter or effect (either positive or negative) to be considered by a consent authority.

Relief sought

- 6.4 Without limiting the relief sought in paragraph 2.3 above, the Trust seeks that the Decision be amended to include a new assessment criterion in Rule 10c.5.7 to provide recognition for any improvements to landscape and ecology associated with any proposed redevelopment.

7. RULE 10c.4.5 AND TABLE 10c.4: DEVELOPMENT CONTROLS - OPEN SPACE 1-4, RURAL 1-3, AND CONSERVATION - BUILDING COVERAGE

7.1 The Trust sought that the building coverage in the Open Space 2 Zone (previously called the Recreation 2 Zone in the Notified version) be amended from 300m² per site to 10% of the site area.

7.2 The Decision provided that Open Space 2 Zone is to be applied to sports parks and community facilities such as halls and clubrooms across the Gulf Islands and is characterised by a range of active recreation and community activities and a variety of buildings such as halls, changing rooms, clubrooms and sports equipment. Therefore, it is considered that 300m² per site is appropriate as it allows for the establishment of a range of recreation activities and associated buildings.

7.3 The Operative Plan currently provides that the building coverage for the Community Zone (equivalent to the Open Space 2 Zone) is 10% of the site area. This allows for development to occur while still maintaining the character and visual amenity of the area. In this regard there are small sites that are currently zoned Open Space 2. The proposed level of enabling could overwhelm those sites and could be entirely discordant with the character of the surrounding area. Accordingly, the proposed amendment of the building coverage rule in the Open Space 2 Zone may create adverse effects on the character and visual amenity of the area.

7.4 By using a percentage of the site area, a level of building coverage which is proportionate to the site can be achieved, whereas using a blanket figure irrespective of site area ignores the visual character and amenity of a site. In applying to recreational grounds which are generally very large, 10% of the site area would be larger than 300m² in many instances. In this regard the Decision is in fact reducing the flexibility to build in those zones.

Relief sought

7.5 Without limiting the relief sought in paragraph 2.3 above, the Trust seeks that the Decision be amended, so that the 10% building coverage rule in relation to the Open Space 2 Zone in the Operative Plan is retained.

8. RULE 10C.5.4 AND TABLE 10C.4: DEVELOPMENT CONTROLS - RECREATION 1-3, RURAL 1-3, AND CONSERVATION - NOISE LEVELS

8.1 The Trust sought that:

- (a) the existing Noise standards in relation to the Recreation 2 Zone (now Open Space 2 Zone) in the Operative Plan be retained by the Council; or
- (b) alternatively, and only if the decision sought in paragraph (a) was declined, that the noise standards for the Recreation 2 zone be retained, unless the Recreation 2

property is adjacent to a residential zone, in which case the residential noise standards should apply.

8.2 The Decision provides the amendment at Rule 10c.5.4:

Note: these noise levels apply on adjacent sites where residential activities occur. Where one site abuts another site with a lower noise standard, the lower noise standard will apply at the boundary.

Relief sought

8.3 The Trust supports the amended version of the Note to Rule 10c.5.4. However, in the event that the Court makes any amendment to Rule 10c.5.4, the Trust seeks that the Noise standards in relation to the Open Space 2 Zone be amended as follows:

Land units	Recreation-1 (local parks and esplanade reserves) <u>Open space 1 (ecology and landscape)</u>	Recreation-2 <u>Open space 2 (recreation and community facilities)</u>	Recreation 3- <u>Open space 3</u> (Rangihoua Park)	<u>Open space 4 (marae)</u>	Rural 1 (rural landscape amenity)	Rural 2 (western landscape)	Rural 3 (Rakino amenity)	Conservation
Conservation and amenity:								
Noise (L _{eq} levels): Monday to Saturday 7am to 10pm and Sunday 9am to 6pm	45dBA	55 <u>50</u> dBA	55dBA	55dBA	50dBA	50dBA	50dBA	45dBA
All other times including public holidays (night time)	40dBA	45 <u>40</u> dBA	45dBA	45dBA	40dBA	40dBA	40dBA	40dBA

9. MEDIATION

9.1 The Trust is willing to engage in mediation to seek to address its concerns.

10. ATTACHMENTS

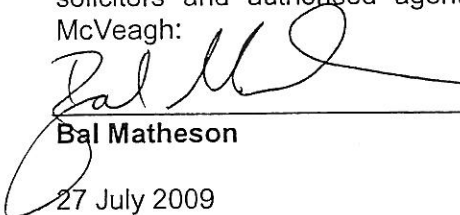
10.1 The following documents are **attached** to this notice of appeal:

- (a) a copy of the Trust's original and further submissions (**Attachment A**);
- (b) a copy of the relevant parts of the Decision (**Attachment B**); and

- (c) a list of names and addresses of persons to be served with a copy of this appeal (**Attachment C**).

CHRISTIAN WHATA (ON BEHALF OF THE WAIHANGA KAINGA TRUST) by his solicitors and authorised agents Russell McVeagh:

Signature:


Bal Matheson

Date:

27 July 2009

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TO: The Registrar of the Environment Court at Auckland
AND TO: The Auckland City Council
AND TO: Relevant Submitters

Advice to recipients of copy of notice*How to become party to proceedings*

You may be a party to the appeal if you lodge a notice of your wish to be a party to the proceedings in form 33 with the Environment Court within 30 working days after this notice was lodged with the Environment Court.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

Advice

If you have any questions about this notice, contact the Environment Court Unit of the Department for Courts in Auckland, Wellington or Christchurch.

Attachment A:

Attachment B:

Attachment C: