



Form 7

Notice of appeal to Environment Court against decision on proposed plan

Clause 14(1) of First Schedule, Resource Management Act 1991

To: the Registrar
Environment Court
Auckland,

1. **Name of applicant:**

We, **Sean Deery of Waiheke Project management Ltd**, appeal against a part of a decision of Auckland City Council in respect of the District Plan Hauraki Gulf Islands Section - Proposed 2006

We made the following submissions on that plan.

(Submission numbers, 2796/1, 2796/2, 2797/1, 2797/2, 2797/3, 2798/1, 2799/1, 2800/1, 2801/1, 2802/1, 2803/1, 2804/1, 2805/1, 2806/1, 2807/1, 2808/1, 2809/1, 2810/1, 2811/1, 2812/1, 2813/1, 2814/1, 2814/2, 2814/3, 2814/4, 2814/5, 2814/6, 2815/1, 2816/1, 2817/1, 2817/2, 2817/3, 2817/4, 2817/5, 2817/6, 2818/1, 2819/1, 2820/1, 2821/1, 2822/1, 2823/1, 2824/1)

2. **Date of receipt of decision:**

I received notice of the decisions on the 4th May 2009

3. **Name of Authority:**

The decision was made by the Auckland City Council.

4. **The parts of a decisions that I am appealing are:**

3.6 Other submissions opposing the whole Plan

3.6.2 Panel's determination on submissions and Plan amendments

3.6.3.10 Controlled and restricted discretionary activities

In its supporting reasons (for 2796/2) submission 2796 expresses concern that the controlled activity status is not used in the Plan. This submitter (Sean Deery) presented evidence at the hearing about this issue. The officer's hearing report provides the following commentary to explain why controlled activities were not included in the Plan as notified: "During the formulation of the Plan, the council reached the view that the controlled activity status was not appropriate for any of the activities identified in the Plan. In the past, the council has used the controlled activity status in the Isthmus Plan, the Central Area Plan and in the operative Hauraki Gulf Islands Plan. Considerable experience in administering these Plans, together with the development of case law, has led council to the view that, in the main, the use of the controlled activity status does not provide the council with sufficient discretion to address the potential



adverse effects associated with particular proposals. The council cannot decline an application for a controlled activity. While the council may impose reasonable conditions that relate to the matters over which it has reserved control, it cannot impose conditions which require such significant modification as to fundamentally alter the proposal. To do so would effectively negate the consent granted and prevent the activity from taking place. Not all proposals which warrant assessment through the resource consent process can be adequately mitigated by the use of conditions. Some proposals need to be declined or substantially modified. The controlled activity status should be reserved for situations where the council is confident that every proposal should be consented to and that adverse effects can be adequately addressed via conditions without substantial modification to the original proposal. While the controlled activity approach does provide greater certainty to applicants, this needs to be balanced against the need to ensure good environmental outcomes." The panel has carefully considered the differences between controlled and the restricted discretionary categories. The panel understands that potential applicants are likely to prefer the greater certainty associated with controlled activity category where the council is not able to decline or substantially modify a proposal. The panel has considered the importance of the certainty aspect for applicants and the costs associated with lack of certainty. However the panel has balanced this against the benefits associated with ensuring that the council has the ability to modify or decline proposals where this is required to achieve the objectives and policies of the Plan. Therefore the panel is persuaded that the controlled activity status should remain absent from the Plan and that this approach is the most appropriate for achieving the objectives of the Plan. Generally, most restricted discretionary applications are non-notified. The panel notes that the council's ability to modify or decline proposals is limited to the matters over which it has restricted its discretion, as specified in the Plan. In the case of the construction of buildings (including alteration and additions) as a restricted discretionary activity, the council has restricted its discretion to scale, form, colour, location, and open space considerations (in recreation 1 to 3 only).

The reasons for the appeal are as follows:

- ◆ The council has failed to provide specific examples to justify removal of the controlled activity status.
- ◆ Land owners require surety in the process when seeking to undertake development of their property. The proposed removal of the controlled activity status unfairly removes that surety of outcome and over regulates development for landowners.

I seek the following relief:

1. Retain the controlled activity status in the proposed plan.

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The part of a decision that I am appealing is:

Part 6 - Financial contributions

4.2 Submissions about part 6 in general

4.2.2.3 Retain provisions from the operative Plan

The panel is satisfied that the provisions in the Proposed Plan are more legally robust than those in the Operative Plan, as they have been drafted in the context of the current RMA provisions and case law. During the development of the Proposed Plan, the council considered 'rolling over' the



provisions in the Operative Plan without any substantial change. Legal advice was received that this approach posed a serious risk to the council due to the evolution of law relating to financial contributions. In particular, due to its global approach to financial contributions, the Operative Plan was considered to lack a sufficient link between the method of calculating a contribution and the actual demand created by a subdivision or development. Legal challenge can occur by means of appeals to the Plan, or through appeals to conditions requiring financial contributions on individual resource consent applications. The panel does not support a return to the provisions in the operative Plan and therefore recommends that submissions be rejected.

The reasons for the appeal are as follows:

- ◆ The council proposes to unfairly require both a financial contribution and also the ability to require land as part of an application to subdivide land.
- ◆ Land owners will be unfairly disadvantaged with the council's ability to require land as part of a subdivision application.

I seek the following relief:

- ◆ Retain the rules for financial contribution already in the operative plan.
- ◆ Any issue of land acquisition should only be by offer from a land owner seeking a subdivision of land, not a rule in a plan.

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The part of a decision that I am appealing is:

Part 10c - Development controls for land units and settlement areas

4.2 Submissions about part 10c as a whole

The submitters have not provided details of what minor changes should be made to the operative provisions, or in fact, what provisions in part 10c are particularly inappropriate. The submitters did not attend the hearing and as such no further clarification has been forthcoming. As such, the panel considers that the submissions should be rejected.

4.9 Submissions about clause 10c.4.7 - Ridgeline control

The panel considers that the control is an important mechanism for controlling the location of buildings on or near ridgelines, which, if left uncontrolled, could result in significant adverse visual effects. As such, a development control is more appropriate than an assessment criterion in this case. The panel also notes that not all buildings require resource consent and hence if the matter of ridgeline dominance was only applied through assessment criteria then such buildings would not be subject to these.

Therefore, the panel recommends that the submissions be rejected.

4.9.2.3 Submissions infringement to the control be a controlled activity

The above submissions request that an infringement to the ridgeline control be a controlled activity, as opposed to a discretionary activity. As has been the approach taken throughout the Plan, a controlled activity status does not provide an appropriate level of control, particularly in this case involving potential significant adverse effects. Therefore, the panel does not consider that a controlled activity status is appropriate in this case.

Therefore, the panel recommends that the submissions be rejected.



4.9.2.4 Submissions - infringement to the control be a restricted discretionary activity

The effects of locating buildings on or near a ridgeline could be significant. As noted previously in this report, restricted discretionary activities are generally those where the effects can be easily identified and/or where any effects are limited to the subject site. The panel considers that an infringement to this control should remain a discretionary activity due to the wide ranging potential effects of an activity within a significant ridgeline area, including adverse amenity and visual effects. In addition, it is unlikely that the effects of locating a building on or near a ridgeline would be limited to the subject site only. Therefore, the panel recommends that the submissions be rejected.

4.9.2.5 Submissions - Operative Plan control be retained

These submissions ask that the Operative Plan ridgeline control be retained. Having reviewed the Operative Plan ridgeline control the panel notes that, though the wording is somewhat different to the proposed control, the effect is the same. The Operative control is no more or less restrictive than the rule in the Plan. The proposed rule is clearer and therefore the panel sees no benefit in retaining the Operative control. Therefore, the panel recommends that the submissions be rejected.

The reasons for the appeal are as follows:

- ◆ The council proposal to implement the proposed rule on the following properties will unfairly restrict the landowners ability to develop their land. The proposed rule is more restrictive as it seeks to restrict development to a level below ridgelines and proposed criteria for development that do not allow for any reasonable development above the ridgeline.
- ◆ Properties affected by this rule are 72 Cory Rd Palm Beach, 48 and 50 Korora Rd, Oneroa
- ◆ A submission was made by the appellant, at another hearing, as the notice for this hearing was insufficient (2 weeks) for the appellant to return to Auckland to present the submission.

I seek the following relief:

- ◆ Retain the existing rules for development on a ridgeline already in the operative plan.
- ◆ Or amend the proposed plan to allow development at 4 metres in height as a controlled activity with vegetation mitigation.

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The part of a decision that I am appealing is:

Part 12 – Subdivision

4.2 Submissions about rejecting all of part 12.

4.2.3 Panel's recommendation

The submissions being considered in this section of the report are too general to be the basis of any recommended changes to the Plan. However the panel consider that the directions provided at the focus groups as they relate to subdivision have been considered and where appropriate,



included as part of the objectives, policies and rules for part 12 (subdivision). The panel also note that, there are a large number of other submissions and other subparts to the above submissions that raise more specific concerns about the implications of the Plan. These will be considered in other decision reports. On this basis, the panel consider that submissions should be rejected.

12.6.3 Company leases and unit titles

Any building or All-buildings subject to a company lease or unit title application must:

1. Have existing use rights; or
2. Comply with the provisions of the Plan; or
3. Have a valid resource consent.

Table 12.1: Minimum site areas for land units

The reasons for the appeal are as follows:

- ◆ The proposed rules will have a detrimental and restrictive effect on landowners that have established buildings or consent for buildings and who would wish to undertake unit title subdivisions of those buildings or proposed buildings.
- ◆ The minimum site areas for all rural land units in Table 12.1 are too conservative and should allow a range of options for smaller lot sizes to maximize better environmental outcomes.

I seek the following relief:

- ◆ Allow unit title provisions, for subdivision to stand on their own merits as is allowed for in the operative plan.
- ◆ Allow a reduction in the minimum lot size in all rural land subject to proven improved environmental outcomes.

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The part of a decision that I am appealing is:

Part 13 - Transport and miscellaneous submissions about roading and transport, bridle paths and roading notations

4.3.2.3 Submissions about clause 13.2.3 - airstrips & helipads

In relation to the claim made by Mr. Deery at the hearing that the Onetangi airfield is designated in the operative Plan the panel notes that the airfield was not designated in the operative Plan but that it was provided for (in a sense) under part 6F, assessment criteria for listed discretionary activities. The submitter also stated that the Onetangi airfield had continued to be used by a range of aircraft and helicopters on a regular basis. The panel asked for written proof that clearly illustrated this was the case and asked the officers to review the site file. While some correspondence was provided by the submitter it wasn't of sufficient detail to confirm that the airfield had continued to be used to the extent described by the submitter at the hearing. A review of the site file by officers confirmed that the Onetangi airfield had operated as a commercial



airfield. However, evidence presented at a hearing for an entertainment facility for the site indicated that use of the site for an airfield had ceased 6-8 months prior to the hearing. The hearing was in February 2002. Discussions with council service centre staff were that the Onetangi airstrip had not been used for many years. However, no formal monitoring of the site had been undertaken to confirm this. At the most, it would appear to the panel that the area of land that had previously being used as a commercial airstrip was used on a very limited basis for helicopters. Given the lack of detail confirming the ongoing use of the Onetangi airfield and evidence suggesting it was no longer used as an airfield the panel recommends that these submissions are rejected. Notwithstanding this, the panel notes that the inclusion of provisions in an operative Plan (albeit under part 6F, assessment criteria) does not mean that they are included in a proposed Plan. The panel also notes that the submitter may seek to confirm existing use rights with Auckland City Environments.

The reasons for the appeal are as follows:

- ◆ The council fails to recognize the legitimate use and activity afforded to the site at 78 Onetangi Rd in the operative plan ,

The proposed plan neglects to include the existing consented and approved commercial airstrips within Land Unit 20 Permitted on Lot 2, DP 95735 part Allotment 38, Parish of Waiheke (Onetangi).

Subject to the provisions of the operative district plan for fixed wing and Helicopter landing
Reference PART 6F - PARTICULAR ASSESSMENT CRITERIA FOR LISTED DISCRETIONARY ACTIVITIES
6F.1.1.2 Commercial Airstrips specifically Rules:A & B

that specifically allows the site to operate as a commercial airfield. The site was designated by the council in the 1982 Operative scheme as an aerodrome and airstrip and later confirmed in numerous council correspondence.

- ◆ The council by deleting reference to this section of the plan injuriously removes the rights of the landowner.
- ◆ The landowner has continually allowed commercial aircraft to operate from the site.

I seek the following relief:

- ◆ That the provisions for the airfield from the operative plan, specifically ;
6F.1.2.Commercial Airstrips Rules A & B ;

be retained, to allow the site continuous, on going use of aircraft on a commercial basis.

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The part of a decision that I am appealing is:

Notice of requirement by Auckland City Council for Owhanake Wastewater Treatment Plant (map reference 1-14)



5.2 Submissions opposing the designation of the Owhanake Treatment Plant site

5.6.2 Panel's analysis and recommendations

The current consents for the site were the result of a publicly notified process and the proposed conditions of the designation match those provided for in the approved land use consent for the site. Any expansion of the site's activities would be required to go through a further ARC consent process. The RMA does not allow for compensation to be paid for district plan provisions. As such, it is the panel's view that the issue of potential effects would be adequately dealt with through the consent process to ensure that compensation would not be necessary.

The reasons for the appeal are as follows:

- ◆ The council being the landowner of the site under designation failed to consult with the landowner at 52 Delamore Drive, Waiheke Island, as required by the RMA and the councils own policy regarding affected parties and neighbours.
- ◆ The proposed designation and proposed further works will cause immediate and severe effects for the landowner.
- ◆ These effects include a substantial economic harm to the value of his land and the effects of noise, smell and visual pollution to his proposed dwelling.

I seek the following relief:

- ◆ The council meet and consult with the owner of 52 Delamore Drive; Waiheke Island to discuss the potential effects of the designation and possible remedies to lessen or negates these effects.
- ◆ If these remedies cannot be achieved then the council should compensate the landowner reasonably and fairly.

The following documents are attached to this notice;

1. Copies of appellants relevant submissions
2. A copy of the relevant decisions
3. Appended documents for an adequate understanding of the appeal.
4. A request for a waiver to serve a copy of this notice on every person who made a submission to which the appeal relates

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Signature of appellant

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Date Sunday, July 26, 2009

Address for service of appellant: Sean Deery, Waiheke Project Management Ltd,
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Copies of appellants relevant submissions



A copy of the relevant decisions



Appended documents for an adequate understanding of the appeal

- ◆ Submission 2798/1; Isola estate 78 Onetangi Rd