

BEFORE THE ENVIRONMENT COURT

ENV-2009-AKL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of a reference pursuant to Clause 14(1) of the
First Schedule to the Act

BETWEEN

**THUMB POINT STATION LIMITED, MAN
O'WAR FARM LIMITED, HURUHE STATION
LIMITED, MAN O'WAR STATION LIMITED and
SOUTH COAST STATION LIMITED**

Appellants

AND

AUCKLAND CITY COUNCIL

Respondent

**NOTICE OF APPEAL AGAINST DECISIONS ON PROPOSED HAURAKI
GULF ISLANDS DISTRICT PLAN**

TO: The Registrar
Environment Court
AUCKLAND

1. The Appellants appeal against decisions of the Auckland City Council ("**the Council**") regarding the Proposed Hauraki Gulf Islands District Plan ("**Proposed Plan**").
2. The Appellants made submissions and further submissions on Proposed Plan.
3. The Appellants received notice of the decisions on 4 May 2009.
4. The decisions were made by the Council.
5. The Appellants appeal those aspects of the decisions relating to:
 - (a) Activities within Landforms 1 and 2.

- (b) The status of activities not otherwise provided for in the Proposed Plan.
 - (c) Density limits for dwellings.
 - (d) Provision for wineries.
 - (e) Farming within Landform 6.
 - (f) Financial contributions.
 - (g) Helicopter activities.
 - (h) Subdivision standards for Landforms 4 and 5.
 - (i) Scheduling of ecological, archaeological and geological sites.
 - (j) Under-grounding of electricity and telecommunications.
 - (k) Vegetation removal on steep slopes.
 - (l) Farming and grazing activities within archaeological sites.
 - (m) Planning maps.
6. The reasons for the appeal are:
- (a) As stated in the Appellants' original and further submissions in relation to the provisions of the Proposed Plan subject of the decisions identified in paragraph 5 above.
 - (b) That the relevant decisions fail to promote sustainable management of natural and physical resources, and are contrary to the provisions of Part II of RMA.
 - (c) That the relevant decisions do not fulfil the Council's functions under section 31 of RMA and meet its duties under section 32 of the Act, nor the requirements of sections 74 – 76 of the Act.
 - (d) To the extent required, and particularly in light of significant mapping errors as to the extent of scheduled sites of ecological significance, and with respect to Landform

boundaries, that the Court ought to exercise its powers under sections 292 and 293 of the Act to remedy those defects and order that changes be made.

- (e) As stated below in relation to each aspect of the decisions under appeal.

7. The Appellants seek the following relief:

- (a) To the extent not granted by the decisions at issue, the relief sought in the Appellants' original and further submissions in relation to each aspect of Proposed Plan, subject of the decisions identified in paragraph 5 above.
- (b) Without limiting the generality of that, the relief sought in relation to each aspect of the decisions as specified below.
- (c) Such further or other including consequential relief as the Court considers necessary or appropriate to give effect to the relief sought in this appeal, including through the exercise of the Court's powers under sections 292 and 293 of RMA.
- (d) Costs.

Part A – ACTIVITIES WITHIN LANDFORMS 1 AND 2

- 8. The Proposed Plan as notified limited permitted activities within Landforms 1 and 2 (Dune Systems Area) to eco-sourced planting, with all activities including the construction and relocation of buildings having non-complying activity status.
- 9. While dwellings and other activities are provided for within the Sand Flats Area of Landform 2, that sub-zone is not applied to any land on Waiheke Island.
- 10. In their submissions, the Appellants sought provision for residential dwellings as a restricted discretionary activity in Landforms 1 and 2, along with assessment criteria to ensure any development is appropriate.

11. The Appellants also sought extension of provision for Rural Property Management Plans to and including Landforms 1 and 2 to recognise that large parcels of land including as owned by the Appellants have multiple Landforms applied to them, and which require an integrated and cohesive management approach across the properties in question.
12. The decisions reject the submissions made by the Appellants as to provision for residential dwellings within Landforms 1 and 2, but extend provision for Rural Property Management Plans into those Landforms (as a discretionary activity).

Reason for Appeal

13. The Proposed Plan as amended by the Council's decisions is inappropriately restrictive as to the range of activities that may take place within Landforms 1 and 2, and to an extent that would undermine the sustainable management purpose relative to the natural and physical resources associated with those Landforms.
14. There is no justification under RMA for confining activities to eco-sourced planting, except as approved by way of a Rural Property Management Plan, with all other activities non-complying.
15. Even to the extent that the resources in question trigger application of section 6 of RMA, appropriate forms of development should be encouraged rather than restricted through unnecessary, inefficient and inappropriate application of non-complying activity status.
16. It would be more appropriate, efficient and effective to provide for residential dwellings as a restricted discretionary activity subject to appropriate criteria aimed at ensuring protection and enhancement of the resources in question, including to better achieve the objectives and policies of the Proposed Plan as amended through the Council's decisions.
17. The Landforms are themselves inappropriately applied to significant areas of land owned by the Appellants, and which do not

have the qualities or display the attributes assumed in the Landform descriptions within the Proposed Plan.

18. Overall, provision for residential dwellings as a restricted discretionary activity within Landforms 1 and 2 (except to the extent already permitted, in Landform 2) would be the most appropriate way to achieve the purpose of the Act, and the amended objectives and policies of the Proposed Plan.

Relief Sought

19. Provide for residential activities as a restricted discretionary activity in Landforms 1 and 2 (except to the extent permitted in Landform 2), subject to appropriate assessment criteria to ensure protection and enhancement of the natural and physical resources to which those Landforms apply.

PART B – STATUS OF ACTIVITIES NOT OTHERWISE PROVIDED FOR

20. Rule 4.2 of the Proposed Plan states that resource consent for a non-complying activity must be obtained for any activity which is not specifically provided for as a permitted, controlled, restricted discretionary or discretionary activity in the relevant parts of the Proposed Plan.
21. The Appellants sought in their submissions that any activity not otherwise provided for be afforded discretionary activity status, rather than non-complying, in order to achieve the enabling purpose of the RMA, and apply the effects based approach of the Proposed Plan.
22. This aspect of the Appellants' submissions was rejected.

Reasons for Appeal

23. It is neither necessary nor appropriate, and is not the most efficient or effective way to achieve the purpose of the Act and the objectives and policies of the Proposed Plan, to default any activity not otherwise provided for, to non-complying status.

24. The matters addressed in the gateway tests of section 104D of RMA would in any event be applied to the consideration of an application for a discretionary activity (objectives and policies of the Proposed Plan, and the adverse effects of the activity in question).
25. Conferring non-complying activity status on all such activities therefore simply duplicates application of the same statutory tests to the activity in question.

Relief Sought

26. Amend Rule 4.2 to require that any activity not otherwise specified in the Plan obtain resource consent as a discretionary activity

PART C - DENSITY LIMITS FOR DWELLINGS

27. Under the Proposed Plan as notified those Landforms that provide for dwellings, limit that activity to "one per site".
28. In their submissions, the Appellants sought to establish density limits commensurate with the purpose of the Landforms, and at a level matching provision for subdivision in each relevant Landform (as to minimum lot sizes).
29. This submission was rejected by the Council out of concern that providing for more than one dwelling per site would increase pressure for subdivision.

Reasons for appeal

30. The Appellants combined landholding of 1785 hectares comprises 12 titles, and as such only 12 dwellings are permitted under the Proposed Plan, over the property as a whole. The resultant maximum density of approximately one dwelling per 150 hectares average land area is well below anything that could be sensibly justified under the RMA.
31. Providing for a density limit on an area rather than "per site" basis in the manner sought by the Appellants would better (as well as more efficiently and effectively) achieve the purpose of the Act and

the objectives and policies of the Plan; better reflect the degree of effects associated with such development, and would not give rise to any greater level of subdivision than could be achieved through the subdivision rules of the Proposed Plan.

Relief Sought

32. Establish density limits for residential dwellings which reflect the minimum site areas for the relevant Landforms as provided for in section 12 of the Proposed Plan, with development of residential dwellings to that density to be a permitted or controlled activity, and anything beyond it a discretionary activity.

PART D – PROVISION FOR WINERIES

33. Under the Proposed Plan as notified, wineries were provided for in Landforms 3 and 5 as a discretionary activity.
34. The Appellants' submissions sought that wineries be provided for in other non-residential Landforms as a restricted discretionary activity.
35. In its decisions, the Council amended the status of wineries so as to provide for them as a permitted activity in Landforms 3 and 5, and also extended the definition of "Winery" by reference to the range of activities encompassed within the term.
36. However the Council rejected the Appellants' submissions requesting that wineries be provided for in other Landforms, including on the basis that such an activity may have impacts on amenity and natural resource values.

Reasons for Appeal

37. The Appellants have significantly diversified the range of productive uses undertaken within their properties. There are now some 170 hectares of vineyards planted, with locations and varieties specifically tailored to soil type, topography and micro climatic conditions.

38. Vineyards have been established including within Landforms 6 and 7, and enjoy existing use rights to the extent that horticulture is not provided for within Landform 7 (while being provided for as a permitted activity within Landform 6).
39. The general sections of the Proposed Plan have been amended to specifically reference the existence of vineyards, olive groves and farmlands as contributing to the high visual amenity of the Waiheke landscape, and through referencing the need to assist economic growth and local employment, including investment in wine and tourism industries, as a key resource management issue to be addressed through the Plan (section 3.3 setting out the overall strategy for eastern Waiheke Island).
40. In that context, it is inappropriate and does not constitute the most efficient or effective means to achieve the purpose of the Act and the objectives and policies of the Proposed Plan, to preclude wineries establishing within Landforms 6 and 7, and whereby such activity can be appropriately integrated with the horticultural land use in question, in a manner that contributes to environmental quality and amenity values, as well as promoting social and economic wellbeing.
41. Any clearance of vegetation or other activity necessary to establish a winery would be subject to the restrictions in Rule 10(c).5.1.1, and/or as apply within any scheduled ecological sites so preserving the ecological, landscape and amenity values of the Landforms, to the extent not already modified through established pastoral farming and horticultural / vineyard activities.

Relief Sought

42. Provide for wineries within all non residential Landforms as a restricted discretionary activity.

PART E – FARMING WITHIN LANDFORM 6

43. The Proposed Plan as notified did not provide for pastoral farming within Landform 6 (regenerating slopes).

44. In their submissions, the Appellants sought provision for farming as a permitted activity within Landform 6 so as to sensibly accommodate the extensive and long established activities undertaken within the Appellants' properties.
45. The Council's decisions rejected this submission, retaining pastoral farming as a non-complying activity by virtue of Rule 4.2 of the Plan.
46. The primary reason given in the Council's decisions related to the ability of the Appellants to rely on existing use rights for such pastoral farming activities as occur within the Landform.
47. In addition, the decisions state that pastoral farming would not be consistent with the objectives and policies applying within the Landform, as it is not a low intensity use.

Reasons for Appeal

48. It is neither appropriate, nor efficient or effective, to force long established activities to rely on existing use rights as may be enjoyed at any particular time under section 10 of RMA, in order to continue activities that the Proposed Plan states are basic to the overall strategy for the eastern portion of Waiheke Island, and to providing for social and economic well being.
49. Case law confirms that the scope of any authorisation conferred by section 10 varies over time, undermining the necessary certainty landowners must have in order to continue to invest in such activities.
50. Pastoral farming would more likely avoid effects on natural character, ecological sites and visual amenity than any alternative and more intensive land use, subdivision or development, and as might replace pastoral farming if not sensibly provided for under the provisions of the Proposed Plan.

Relief Sought

51. Provide for pastoral farming as a permitted activity within Landform 6.

PART F – FINANCIAL CONTRIBUTIONS

52. The Proposed Plan as notified contains significantly modified requirements as to financial contributions, relative to those applied under the Operative District Plan.
53. The Appellants' submissions sought that the financial provisions from the Operative District Plan be retained, in light of significant potential duplication between the new provisions and the development contribution requirements applied by the Council under the Local Government Act 2002.
54. The Appellants also supported a number of other submissions regarding the new financial contribution requirements.
55. The Council rejected these submissions.

Reasons for Appeal

56. The financial contribution provisions are unnecessary and inappropriate, and are not the most efficient or effective means to achieve the purpose of the Act and the objectives and policies of the District Plan.
57. There is sufficient scope within the development contributions requirements of the Local Government Act 2002 for the Council to offset any impacts of development and ensure it recovers the costs of service provision.
58. Furthermore, the provisions are unclear and imprecise as to the manner in which the level and form of any contribution may be set, and as to how the stated maximums may be waived or reduced short of an application for resource consent (Rule 6.9).

Relief Sought

59. Delete the financial contributions section of the Proposed Plan.

PART G- HELICOPTER ACTIVITIES

60. Under the Proposed Plan as notified, helicopter activities were only permitted on Great Barrier Island.
61. The Appellants sought provision for the takeoff and landing of private helicopters on private land as a permitted activity within Landforms 1 to 7.
62. The Appellants also supported submissions by other parties seeking greater provision for helicopter activities within the Proposed Plan.
63. The Council in its decisions amended the Proposed Plan to provide for helipads and airstrips within Landforms 3 and 5 where used for farming or horticulture, but by way of an exception to permitted activity Rule 13.8.2. This rule now permits helipads and airstrips within Landforms 3, 5, 6 and 7 provided there is no more than one helipad or airstrip per site, and with a restriction on the number of inward and outward movements that may occur in a seven day period (three).

Reasons for Appeal

64. Helicopter activities are an essential component of productive land use activities, sought to be sustained as part of the broader strategy for eastern Waiheke, and throughout the entire 1785 hectare estate owned by the Appellants.
65. They are the most efficient and effective means of undertaking a range of essential activities related to horticulture and pastoral farming including weed and pest management, reviewing fencing, tree planting, stock location and general maintenance.
66. In short, it is all but impossible to sustainably operate a large scale productive unit on an Island without regular helicopter activities.

67. It is equally impossible to confine helicopter operations to specific helipads (defined within the Plan to mean land used for takeoff or landing). Instead, takeoff and landing must take place where and as necessary throughout the properties as a whole, in order to collect and distribute materials and products and to apply fertiliser and sprays.
68. Furthermore, given the location of the Appellants' properties as surrounded by the Coastal Marine Area on three sides and remote from any significant areas of sensitive use (including residential activity), helicopter operations can take place without adverse effect, at well beyond the frequency envisaged by Rule 13.8.2.
69. Finally, in excepting Landforms 3 and 5 from Rule 13.8.2, helicopter operations may in effect default to a non-complying status (clause 4.2 of the Proposed Plan).
70. For these many reasons, more general provision for helicopter activities on Waiheke Island is required.
71. In addition, greater provision for helicopter activities is required to meet the objectives and policies of the Proposed Plan, including in relation to transportation (section 13) and the overall strategy for eastern Waiheke as set out in section 3 of the Proposed Plan.

Relief Sought

72. Provide for the takeoff and landing of private helicopters on private land as a permitted activity within Landforms 1 to 7, and without limitation as to the number of landing areas or frequency of movements.

PART H- SUBDIVISION STANDARDS FOR LANDFORMS 4 AND 5

73. Under the Proposed Plan as notified, the minimum site area for Landforms 4 and 5 was set at 25 hectares.

74. In their submissions, the Appellants sought that the minimum site area of 15 hectares as applied under the Operative District Plan be reinstated within Landforms 4 and 5.
75. The Council rejected these submissions in its decisions and maintained the minimum 25 hectare site requirement, in large measure to protect the open rural character of the Landforms.

Reasons for Appeal

76. A minimum site requirement of 25 hectares is not the most appropriate, efficient or effective means to achieve the purpose of the Act or the objectives of the Proposed Plan, including in relation to Landforms 4 and 5.
77. The 25 ha minimum site requirement is ineffective and inappropriate to sustain any viable productive use; with pastoral farming activities requiring a lot size significantly greater than 25 hectares, and the average horticultural unit being closer to 15 hectares.
78. A 15 hectare site requirement would better enable productive land use activities to be sustained on the Appellants' properties, and at the same time avoid inappropriately intensive subdivision and land use development; thereby protecting the natural character, ecological and hydrological values sought to be sustained through application of the Landforms.

Relief Sought

79. Reinstate the minimum site areas for subdivision for Landforms 4 and 5 at 15 hectares.

PART I -SCHEDULING OF ARCHAEOLOGICAL, ECOLOGICAL AND GEOLOGICAL SITES

80. The Appellants' properties have a number of scheduled ecological and archaeological sites applied to them under the Proposed Plan.

81. The Appellants' submissions sought that unless the value, number and dimensions of the identified sites could be supported by relevant and satisfactory assessment, they should be deleted.
82. The Appellants supported submissions by other parties requiring that before application of such scheduling, there be extensive analysis and surveying along with investigative work to justify and confirm the proper extent of the scheduled areas.
83. The Appellants commissioned detailed investigative archaeological and ecological assessments along with highly accurate and specific computer modelling of their properties to verify (or otherwise) the true extent of significant ecological or archaeological sites as applied under the maps of the Proposed Plan (Series 2).
84. This analysis revealed a number of substantial discrepancies, with areas scheduled as having significant ecological value that were clearly incorrectly identified as such, including for being in productive use (for example as areas of pasture, or vineyard). Conversely, areas that would warrant protection under the rules of the Proposed Plan, were not scheduled as sites of ecological significance. This information was presented in evidence at the hearing of the Appellants' submissions.
85. In its decisions, the Council maintained all of the scheduled ecological sites, including those incorrectly applied, but also added a number of additional sites of ecological significance to the series 2 planning maps as relate to the Appellants' properties.

Reasons for Appeal

86. It is unnecessary, inappropriate, inefficient and ineffective to schedule as sites of ecological significance, or as having archaeological value, areas of land in productive use; that have no demonstrable ecological or archaeological value, and/or that are clearly incorrectly identified (for example a wetland feature that is located on a ridgeline).

87. In addition to the significant adverse consequences for continued sustainable productive use of the land in question, incorrect scheduling undermines the credibility of that planning initiative.
88. The series 2 maps of the Proposed Plan should be amended by reference to the accurate representation of areas that demonstrably have ecological or archaeological significance as produced by the Appellants, and as presented in evidence at the hearing of the Appellants' submissions.

Relief Sought

89. Amend the series 2 maps of the Proposed Plan to correctly and accurately identify any sites of ecological or archaeological significance and to delete any inappropriate schedulings as revealed through the Appellants' computer model simulation of the its properties.

PART J - UNDER-GROUNDING OF ELECTRICITY AND TELECOMMUNICATIONS SERVICES

90. Under the Proposed Plan as notified, Policy 12.3.8.1 would require that electricity and telecommunication services be placed underground at the time of subdivision.
91. The Appellants in their submissions sought to amend any existing sections of the Proposed Plan referring to the under-grounding of electricity and telecommunication services in Landforms that are not urban.
92. The Council in its decisions accepted this reasoning but made no amendments to the Proposed Plan.

Reasons for Appeal

93. There should be no mandatory requirement for under-grounding of telecommunications and electricity services in rural Landforms. This is neither necessary nor appropriate to achieve the purpose of the Act and the objectives and policies of the Plan.

Relief Sought

94. Amend policy 12.3.8 and any other sections of the Proposed Plan that would require under-grounding of electricity and telecommunication services in non-urban Landforms to give effect to the relief sought in the Appellants' submissions.

PART K – VEGETATION REMOVAL ON STEEP SLOPES

95. Under Rule 8.5.1 of the Proposed Plan as notified, the removal of any vegetation on land steeper than 18 degrees required resource consent as a restricted discretionary activity.
96. The Appellants in their submissions sought to provide for vegetation removal as part of any approved Rural Property Management Plan for vineyard or pastoral productive purposes.
97. This relief was rejected by the Council in its decisions.

Reasons for Appeal

98. Vegetation removal, including on steep slopes (greater than 18°) should be permitted where approved as part of a Rural Property Management Plan, as there is no need or purpose served by duplicating the assessment of any effects arising from the activity, and as may be needed to facilitate vineyard establishment and operation.

Relief Sought

99. Provide for vegetation removal on slopes greater than 18 degrees as part of a Rural Property Management Plan as a permitted activity, where undertaken for vineyard or pastoral productive purposes.

PART L- FARMING AND GRAZING WITHIN ARCHAEOLOGICAL SITES

100. Under the Proposed Plan as notified, the grazing of land by heavy animals was a prohibited activity in relation to certain Category A archaeological sites, and otherwise required resource consent.

101. In their submissions, the Appellants sought that the Proposed Plan be amended to provide for existing farming and grazing operations including areas of the Appellants' land to which Tables 7.1 and 7.2 (relating to archaeological sites) applied, and deletion of any reference to prohibited activity status.
102. In its decisions, the Council deleted Tables 7.1 and 7.2 and in their place provided for grazing by light animals as a permitted activity (for all archaeological sites), but for the grazing of heavy animals as a restricted discretionary or discretionary activity (for Category B and Category A archaeological site respectively).
103. The prohibited activity status of grazing by heavy animals in certain archaeological sites was deleted.

Reasons for Appeal

104. It is neither necessary nor appropriate to require resource consents for long established pastoral farming activities, regardless of whether that involves grazing by light or heavy animals within archaeological sites.
105. For the reasons set out in relation to pastoral farming within Landform 6 (Part E of this appeal), established grazing activities should be provided for under the Plan as a permitted activity rather than being forced to rely on existing use rights.

Relief Sought

106. Provide for grazing by light and heavy animals within archaeological sites as a permitted activity.

PART M – PLANNING MAPS

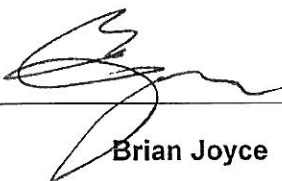
107. The detailed investigative and computer modelling work referenced in Part I of this appeal revealed clear anomalies in terms of the application of Landforms to significant areas of land within the Appellants' properties, and whereby long established pastoral or horticultural uses are incorrectly and inappropriately zoned in a

manner that restricts the sensible continuation of such activities, except in reliance on existing use rights.

108. The incorrect and inappropriate zonings are not the most efficient, effective or appropriate way to achieve the purpose of the Act or the objectives and policies of the Proposed Plan, including the overall strategy for Waiheke Island (eastern Waiheke).
109. The Appellants consider that amendments to the Landform boundaries are required in order to give effect to relief sought regarding the inaccurate scheduling of sites of ecological significance referenced in Part I of this appeal, and where the Landform boundaries reflect the incorrect or inappropriate application of such scheduling to land within the Appellants' properties.
110. The Appellants seek that the Court otherwise apply its powers under sections 292 or 293 of RMA in order to remedy the defects involved, and/or provide for a form of zoning under the Proposed Plan that would promote sustainable management of natural and physical resources, and better achieve the objectives and policies of the Proposed Plan as a whole.
111. **The Appellants attach the following documents to this notice:**
- (a) A copy of their submissions.
 - (b) A copy of the relevant aspects of the Council's decisions.
 - (c) A list of names and addresses of persons to be served with a copy of this notice (being all submitters to the Proposed Plan).

Signature:

The Appellants, by their authorised agent:



Brian Joyce

Date: 23 July 2009

Address for service: Mr Brian Joyce
Clendons North Shore
Barristers & Solicitors
P O Box 305349
North Shore City 0757

Telephone: (09) 3778419

Facsimile: (09) 4763679

Email: brian.joyce@clendons-ns.co.nz

Advice to Recipients of Copy of Notice of Appeal

How to Become Party to Proceedings

You may be a party to the appeal if you made a submission on the matter of this appeal and 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).

How to Obtain Copies of Documents Relating to Appeal

The copy of this notice served on you does not attach a copy of the appellant's submission and (or) the decision (or part of the decision) appealed. These documents may be obtained, on request, from the appellant.

Advice

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

Contact Details of Environment Court for Lodging Documents

Documents may be lodged with the Environment Court by lodging them with the Registrar.

The Auckland address of the Environment Court is:

8th Floor, District Court Building
3 Kingston Street
Auckland.

Its postal address is:

PO Box 7147
Wellesley Street
Auckland 1141

and its telephone and fax numbers are:

Telephone: (09) 916 9091
Fax: (09) 916 9090

