

**BEFORE THE ENVIRONMENT COURT
AT AUCKLAND**

ENV2016-AKL-

IN THE MATTER

of the Local Government
(Auckland Transitional
Provisions) Act 2010
("LGATPA") and the
Resource Management Act
1991 ("RMA")

AND

IN THE MATTER

of an appeal by the
SMITHIES FAMILY TRUST
under section 156(1) of the
LGATPA against a decision
of the **AUCKLAND
COUNCIL** on the proposed
Auckland Unitary Plan
("PAUP")

AND

IN THE MATTER

of PAUP Hearing Topics 011
RPS Rural; 056 and 057
Rural Objectives and Policies
and Rural Activities and
Controls; and 064
Subdivision

BETWEEN

SMITHIES FAMILY TRUST

Appellant

AND

AUCKLAND COUNCIL

Respondent

NOTICE OF APPEAL

TO: The Registrar of the Environment Court
PO Box 7147
Wellesley Street
Auckland 1010



1. **THE SMITHIES FAMILY TRUST** ("the Trust" or "Appellant") appeals against part of the decision of the Auckland Council ("the Council") on the proposed Auckland Unitary Plan ("PAUP").

2. The Trust has the right to appeal the Council's decision:
 - (a) Under section 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") on the basis that the Council rejected a recommendation of the Independent Hearings Panel ("IHP") in relation to a provision or matter addressed in the Trust's submission on the PAUP (Submission 2707). The Council decided on an alternative solution, which resulted in a provision being included in the PAUP or a matter being excluded from the PAUP; and
 - (b) Under section 156(3) of the LGATPA, to the extent that any of the parts of the decisions identified in paragraph 7.2 below relate to recommendations of the IHP which the IHP should properly have identified as being beyond the scope of the submissions made on the PAUP, the Council accepted those recommendations, and the Council's decision resulted in provisions being both included in and excluded from the PAUP which unduly prejudice the Trust.
3. The Trust provides further details of the reasons for its appeal below.
4. The Trust is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 ("RMA").
5. The decision being appealed against was made by the Council. The Trust received notice of the Council's decision on 19 August 2016.

6. **BACKGROUND AND ISSUES CONCERNING COUNCIL PRACTICE RELEVANT TO THE APPEAL**

The Trust

- 6.1 The Trust owns a property at 1466 Weranui Road, RD1 Silverdale. That property is zoned Rural Production in both the PAUP as notified and in the Decisions Version of the PAUP released on 19 August 2016.
- 6.2 Trustees of the Trust also have interests in other properties elsewhere in the Auckland Region. This includes some 159.78ha of land off Wayby Station Road / Cox Road in the Wayby Valley, Wellsford. That land is also zoned Rural Production in both the PAUP as notified and in the Decisions Version of the PAUP.

Issues relating to Council approach / practice

- 6.3 The trustees of the Trust have recent experience in making applications for transferable rural site subdivision under the provisions of the operative Auckland District Plan: Rodney Section ("ODP") for their Wayby land pursuant to the ODP which provides for and encourages such applications (as does the PAUP). The trustees have encountered significant obstacles in the assessment and processing by the Council of transferable rural site subdivision applications to such an extent that the Council's practice would appear to be contrary to the relevant provisions of the ODP and the PAUP and, ultimately, the purpose of the RMA.
- 6.4 The two key difficulties are a lack of clarity in the ODP provisions regarding:
 - (a) The level of information that applicants are required to provide in support of transferable rural site subdivision applications, particularly when seeking subdivision for the creation of new "donor" lots for

transfer on the basis of protection, rehabilitation or enhancement of significant biological diversity. This has resulted in the Council rejecting such applications as being incomplete under section 88(3) of the RMA, despite those applications adequately meeting the requirements of that provision.

- (b) The ability to seek subdivision to create the new donor lots in advance of applying to subdivide the receiver sites the new lots are to be transferred to.

6.5 The issue in paragraph 6.4(b) above has arisen because the ODP did not provide sufficient land within the Countryside Living Town zone (being the allocated "receiver" zone) for all the transferable rural site subdivision that could be created in accordance with that Plan. As a result, it has not been possible to identify and include a complete assessment of subdividing the relevant receiver sites when making more recent donor site subdivision applications. (The equivalent zoning under the PAUP is the Countryside Living Zone.)

6.6 The Trustees consider that it is appropriate for the Court to be aware of these difficulties in considering this appeal given the opportunity to ensure that the equivalent PAUP provisions for rural subdivision are clear, workable and do not give rise to similar issues.

The Trust's submission on the PAUP

6.7 The Trust was one of five Silverdale landowners that collectively filed a comprehensive submission on the PAUP (albeit with separate submission forms) given their similar interests regarding the land use and subdivision provisions applying in the Rural zones. It was treated as a single submission (Submission 2707). The other landowners comprise:

- (a) Capstone Farm Limited;
- (b) Peter Becher;
- (c) Sheryl Hellyer; and
- (d) Gregory O'Neil.

6.8 In summary, Submission 2707:

- (a) Raised issues regarding the adequacy of the assessment undertaken under section 32 of the RMA to support the PAUP's Rural zone provisions (including objectives, policies and rules) as notified.
- (b) Sought a range of amendments to those provisions (including the Regional Policy Statement provisions relating to Rural zones) to:¹
 - (i) Provide for sustainable land use and development and to allow for people and communities to provide for their social and economic wellbeing;
 - (ii) Better enable future land use and development opportunities by using the discretionary activity process for a wider range

¹ As outlined for example at pages 2 and 68 of submission 2707.

of subdivision and land use activities than in the PAUP as notified;

- (iii) Establish an appropriate planning framework that recognises and provides for the diversity of the Auckland Region, existing patterns of subdivision, the location of properties in relation to rural settlements and urban areas, and the actual land use capability of the varying land types found within the region; and
- (iv) Ensure that the PAUP provides an appropriate planning framework that will assist in sustainably delivering the 30% rural growth capacity uptake within the rural area that the Auckland Plan promotes.

- (c) Sought specific amendments to the objectives, policies and methods (including rules) regarding rural subdivision (including transferable rural site subdivision).

6.9 The Trust presented planning evidence in support of that submission at the following hearings before the IHP:

- (a) 011 Regional Policy Statement Rural;
- (b) 056 and 057 Rural Objectives and Policies and Rural Activities and Controls; and
- (c) 064 Subdivision.

7. **PARTS OF THE COUNCIL'S DECISION APPEALED, REASONS AND RELIEF SOUGHT**

7.1 The parts of the Council's decision to which the Trust's appeal relates are those which:

- (a) Introduce objectives at both the Regional Policy Statement and District Plan level regarding the avoidance / prevention of sporadic, random and scattered subdivision of rural land for rural lifestyle living.
- (b) Remove or reduce the provision for in-situ and transferable rural site subdivision based on:
 - (i) The protection or enhancement of indigenous wetland.
 - (ii) The protection or enhancement of indigenous vegetation, including that which is not identified in the SEA Overlay but which meets the relevant SEA factors.
 - (iii) Restorative revegetation planting.
- (c) Increase the minimum area of indigenous vegetation to be protected to qualify for in-situ or transferable rural site subdivision on this basis.
- (d) Reduce (and inappropriately restrict) the maximum number of new lots (yield) that can be achieved for both in-situ and transferable rural site subdivision.

- (e) Fail to provide a clear and workable process through which in-situ and transferable rural site subdivision can practically be undertaken.

7.2 Without limiting the generality of the foregoing, the parts of the Council's decision being appealed against comprise all aspects of the PAUP Decisions Version that do not reflect the IHP's recommendations² in respect of the following provisions:³

- (a) B9.4.1 – Objectives.
- (b) B9.4.2 – Policies.
- (c) B9.5 – Principal reasons for adopting.
- (d) E15.3 – Policies.
- (e) E39.2 – Objectives.
- (f) E39.3 – Policies.
- (g) E39.4 – Activity Table (relating to Table E39.4.2 only).
- (h) E39.6.3 – Standards – controlled activities.
- (i) E39.6.4 – Standards – restricted discretionary activities.
- (j) E39.8.1 – Matters of discretion.
- (k) E39.8.2 – Assessment criteria.
- (l) H19.7.1 – Zone description.
- (m) Appendix 15 – Subdivision information and process:
 - (i) 15.3.1 Process (specifically including Table 15.3.1.1).
 - (ii) 15.3.2 Explanation of Terms.
 - (iii) 15.5 Legal protection mechanism to protect indigenous vegetation, wetland or revegetated planting.
 - (iv) 15.6 Restorative planting.

Reasons for the Trust's appeal

7.3 The reasons for the Trust's appeal are that the parts of the Council's decision which are the subject of this appeal:

- (a) With respect to District Plan policies and methods, do not represent the most appropriate means of achieving:
 - (i) The objectives of the proposed Regional Policy Statement; or

² For the avoidance of doubt, the matters appealed exclude any changes made in the relevant parts of the Council's decision to correct obvious typographical errors in the IHP's recommendations.

³ These provisions are reflected in Attachment A to the Council's Decision Report dated 19 August 2016 under the heading "Topic 064 – E39 Subdivision Rural" (at pages 294 to 316).

- (ii) The purpose of the RMA.
- (b) Are contrary to and do not promote the sustainable management of natural and physical resources in accordance with section 5 and other relevant matters in sections 6 and 7 of the RMA. In particular, the relevant parts of the Council's decision will not:
 - (i) Enable the community to provide for its social and economic wellbeing in accordance with section 5(2) of the RMA;
 - (ii) Adequately enable the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna in accordance with section 6(c) of the RMA; or
 - (iii) Provide for the efficient use and development of natural and physical resources in accordance with section 7(b) of the RMA.
- (c) Will not assist the Council to carry out its functions under sections 30 and 31 of the RMA.
- (d) Do not appropriately have regard to the actual and potential effects of subdivision and associated activities on the environment.
- (e) Are not supported by an appropriate and robust analysis under section 32 of the RMA.
- (f) Do not give effect to or have adequate regard to relevant planning documents, including the Auckland Plan.

7.4 Without limiting the generality of the foregoing, the particular grounds for the Trust's appeal are that the parts of the decision being appealed:

- (a) Will result in a lack of opportunity and flexibility for appropriate subdivision and use within the rural zones, and the Rural Production zone in particular.
- (b) Inappropriately try to protect rural land from forms of subdivision which will in fact have important environmental and ecological benefits, including the protection, rehabilitation or enhancement of significant biological diversity.
- (c) Are not based on any sound resource management rationale as to why appropriately formulated rules (as have been in place under the operative Auckland District Plan: Rodney and Franklin sections, for example) cannot provide for environmental protection based "bonus lot" subdivision in a rural zone.
- (d) Will unduly constrain opportunities to meet demand for rural lifestyle living in appropriate locations, as directed to be appropriate in accordance with the Auckland Plan.
- (e) Fail to deliver a sustainable rural planning framework and sound forward planning.
- (f) Are not required in order to ensure the productive potential of elite land is not undermined.

- (g) Do not reflect the sound planning principle (and the IHP's sound recommendation⁴) that provision for subdivision for rural lifestyle purposes should be enabled subject to appropriate constraints on location, scale and density.
- (h) Will not give sufficient, appropriate and workable guidance to all parties (including applicants and Council officers) as to the process that should be followed for in-situ and transferable rural site subdivision. The provisions will therefore continue (and potentially exacerbate) the issues that have been encountered in this regard when applying under the operative (legacy) planning documents, as outlined above.

Relief sought

7.5 The Trust seeks the following relief:

- (a) That the parts of the Council's decisions outlined in paragraph 7.2 above be deleted and replaced by the provisions as recommended by the IHP, or other similar (or more enabling) provisions to like effect which appropriately address the Trust's issues as raised above.
- (b) As a consequential amendment arising from the relief in paragraph 7.5(a) above, that Table 15.3.1.1 be amended (as outlined in **Appendix E**, or to similar effect) to explicitly clarify that:
 - (i) Transferable rural site subdivision applications can be staged (i.e. that it is not necessary that subdivision applications for the donor and receiver site be lodged together, or potential receiver sites to have been identified at the time of seeking to subdivide donor sites); and
 - (ii) Multiple donor sites can be transferred to receiver sites within the one receiver site subdivision application (i.e. it is not necessary to lodge separate subdivision applications for each individual donor site that is to be transferred to a receiver site).
- (c) Such further or other consequential relief as the Court deems appropriate to address the Trust's issues as raised above.
- (d) Costs.

Attachments

7.6 The following documents are attached to this notice:

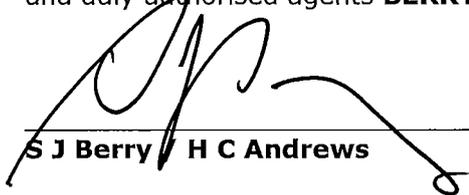
- (a) A copy of the relevant parts of Attachment A to the Council's decision, which outlines (in track changes) the changes to the IHP's recommendations in respect of the parts of the Council's decision being appealed that were made by the Council (**Appendix A**).
- (b) A copy of the relevant parts of the Council's decision (**Appendix B**).
- (c) A copy of the relevant parts of the Council's decision report (**Appendix C**).

⁴ In its *Updated Interim Guidance Text for RPS Topic 011*, dated 10 June 2015 (at point 5).

- (d) A copy of the IHP's recommendation report for Topic 064 Subdivision Rural (**Appendix D**).
- (e) The Trust's proposed amendments to Table 15.3.1.1 Transferable rural site subdivision process (**Appendix E**).
- (f) A list of names and addresses of person to be served with a copy of this notice (**Appendix F**).
- (g) A copy of the Trust's submission (**Appendix G**).

DATED at **AUCKLAND** this *16th* day of September 2016

SMITHIES FAMILY TRUST by its solicitors
and duly authorised agents **BERRY SIMONS:**



S J Berry / H C Andrews

ADDRESS FOR SERVICE OF APPELLANT

Berry Simons
PO Box 3144
Shortland Street
AUCKLAND 1140

Telephone: (09) 969 2300
Facsimile: (09) 969 2304
Email: simon@berrysimons.co.nz
Contact person: Simon Berry, Partner

Advice to recipients of copy of notice

How to become party to proceedings

You may become a party to the appeal if you are one of the persons described in section 274(1) of the RMA.

To become a party to the appeal, you must, within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in Form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003) with the Environment Court by email (to unitaryplan.ecappeals@justice.govt.nz) and serve copies of your notice by email on the Auckland Council (to unitaryplan@aucklandcouncil.govt.nz) and the appellant.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

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

How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach copies of the relevant parts of the Council's decision or the appellant's submission. 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.

APPENDIX A
RELEVANT PARTS OF ATTACHMENT A TO THE
COUNCIL'S DECISION ON THE PAUP (19 AUGUST 2016)