

**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 designations 1100 and 1102 (Auckland International Airport Limited) and 4310 and 4311 (Minister of Defence) in the proposed Auckland Unitary Plan

**AND**

**IN THE MATTER** of an Application for Waivers / Directions under section 281 of the RMA in relation to the service requirements of section 151(5) of the LGATPA

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**MEMORANDUM OF COUNSEL FOR THE AUCKLAND COUNCIL ACCOMPANYING  
NOTICE OF MOTION BY AUCKLAND COUNCIL UNDER SECTION 281 OF THE RMA  
APPLYING FOR WAIVERS / DIRECTIONS**

**Dated 19 October 2016**

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**MAY IT PLEASE THE COURT:**

**Introduction**

1. This memorandum addresses the various waivers and directions sought by the Auckland Council (**Council**) pursuant to section 281 of the RMA in its Notice of Motion dated 18 October 2016, and the jurisdiction and grounds for those waivers / directions.
2. The Council is seeking waivers and directions in respect of the requirements of section 151(5)(b) of the LGATPA as they relate to the service of notice on certain owners and occupiers of land to which four airport designations (**the Designations**) in the proposed Auckland Unitary Plan (**Proposed Plan**) apply.
3. The Designations are described in the affidavit of John Duguid, and identified in the Notice of Motion as follows (paragraph 1):
  - (a) Auckland International Airport Limited (**AIAL**) designation 1100. This designation relates to the main designated airport area, but its provisions also address a large number of properties within defined noise contour areas (the Aircraft Noise Notification Area (**ANNA**), the High Aircraft Noise Area (**HANA**), and Moderate Aircraft Noise Area (**MANA**) areas).
  - (b) AIAL designation 1102. This designation relates to specification for obstacle limitation surfaces (**OLS**), restrictions relating to runway end protection areas, and restrictions for non-aeronautical ground lights.
  - (c) Minister of Defence (**MOD**) designation 4310. This designation relates to the air base at Whenuapai, but includes provisions relating to a noise control area.
  - (d) MOD designation 4311. This designation is for Whenuapai Airfield Approach and Departure Path Protection.

**Primary Waivers / Directions Sought**

4. The specific waivers and directions sought by the Council are as follows:

- (a) In the case of AIAL designation 1100, a waiver of the requirement to serve notice on the owners and occupiers of properties within the "designated area" and within the HANA, MANA and ANNA areas as identified in the designation figures (but still effect service on all submitters);
- (b) In the case of AIAL designation 1102, a waiver of the requirement to serve notice on owners and occupiers of properties within this designation, encompassing the Obstacle Limitation Surface areas, runway protection areas and sites subject to requirements for non-aeronautical ground lights identified in the designation figures (but still effect service on all submitters);
- (c) In the case of MOD designation 4310, a waiver of the requirement to serve notice on the owners and occupiers of properties within the designation and the noise control area identified in the designation figures (but still effect service on all submitters);
- (d) In the case of MOD designation 4311, a waiver of the requirement to serve notice on the owners and occupiers of properties within this designation, encompassing the airfield approach and departure path protection areas identified in the designation figures (but still effect service on all submitters);
- (e) For all four designations, directions that alternative service be effected by means of notices published in:
  - (i) The New Zealand Herald;
  - (ii) At least one community newspaper circulating in the area surrounding each airport; and
  - (iii) The Council website.

**Alternative Waiver / Direction**

- 5. Paragraphs 6 and 7 of the Notice of Motion seek an alternative waiver and direction, in the event that the Court refuses the primary waivers / directions sought by the Council.
- 6. The purpose of the alternative waiver / direction is to ensure that the Council is not in a position of non-compliance with the LGATPA, in the event that it is unsuccessful in its application.

### Relevant LGATPA provisions

7. The Council's service obligations under the LGATPA in relation to requiring authorities' decisions are set out in section 151(5) of that Act. The obligation is two-fold. The Council must ensure that, within 15 working days after it receives the decisions, notice of the decisions and a statement of the time within which an appeal against the decisions may be lodged is served on:
- (a) First, *"persons who made a submission on the requirement"*: section 151(5)(a), LGATPA; and
  - (b) Secondly, *"owners and occupiers of land to which the designation... applies"*: section 151(5)(b), LGATPA.
8. Under sections 157 and 158 of the LGATPA, only submitters have a right of appeal to the Environment Court or High Court in relation to requiring authorities' designation decisions. Owners and occupiers of land to which a designation applies who did not make a submission do not have a right of appeal.
9. Copies of sections 151, 157 and 158 of the LGATPA are **attached** to this memorandum for convenience.

### Jurisdiction – Section 281, RMA

10. Section 281 of the RMA will be well known to the Court, however a copy of that provision is also **attached** for convenience. Relevant extracts from section 281 are set out below.
11. Under section 281(1), a person may apply to the Environment Court to:
- (a) Waive a requirement of this Act or another Act or a regulation about—
    - (i) The time within which anything shall be served; or
    - ...
    - (iii) The method of service; or
    - ...
    - (v) The persons on whom anything shall be served; or
    - ...
  - (b) Give a direction about—
    - (i) The time within which or the method by which anything is to be served; or

- (i) The time within which or the method by which anything is to be served; or
- (ii) What shall be served, whether or not the direction complies with this Act or any other Act or a regulation; or

...

12. Section 281(2) provides that the *"Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced"*.

13. In relation to the Court's jurisdiction to consider and determine the Council's application, we note the following matters, by reference to case law where appropriate:

(a) The Court held that it had jurisdiction to make anticipatory waivers and directions under section 281 of the RMA in relation to potential appeals under sections 156(1) and (3) of the LGATPA in **Re Auckland Council** [2016] NZEnvC 153.

(b) Section 281(1) is not limited to waivers or directions in relation to requirements of the RMA. For instance, section 281(1)(a) and (b)(ii) refer respectively to requirements of "another Act" and "any other Act", which the Council considers should logically include an Act such as the LGATPA.

(c) The Environment Court considered the scope of its powers under section 281 in **Hartford Group Ltd v Auckland City Council**<sup>1</sup>. Judge Sheppard considered the Court's powers in the context of a council's powers under the former section 37 of the RMA, holding that<sup>2</sup>:

In my opinion s 281 can only stand alongside s 37 without inconsistency if s 281 is interpreted more narrowly, as not empowering the grant of waivers in respect of the time for serving submissions on resource consent applications which could (if made in time, or with the applicant's agreement) have been extended under s 37. I hold that s 281 should be interpreted as being implicitly limited in that way.

(d) Therefore, **Hartford** directly addressed the question of the power of the Court to grant a waiver where section 37 of the RMA applies<sup>3</sup>.

<sup>1</sup> (1998) 4 ELRNZ 342.

<sup>2</sup> At para 52.

<sup>3</sup> As the Court noted in **Pegasus Bay Beach Users Association Inc v Hurunui District Council** [2003] NZRMA 138, para 14.

- (e) Section 37(1), in its current form, provides:

A consent authority or local authority may, in any particular case,—

- (a) extend a time period specified in this Act or in regulations, whether or not the time period has expired; or
  - (b) waive a failure to comply with a requirement under this Act, regulations, or a plan for the time or method of service of documents.
- (f) Section 37 is more limited in scope than section 281. Section 281 expressly provides the Court with the ability to waive a requirement of *"another Act"*. Section 37 on the other hand relates to requirements under *"this Act [i.e. the RMA], regulations, or a plan for the time or method of service of documents"*. Section 37 is limited to waivers of time or method of service, whereas section 281 goes further in providing for waivers in relation to *"the persons on whom anything shall be served"*.
- (g) The Environment Court in **Canterbury Regional Council v Meridian Energy Ltd**<sup>4</sup>, in discussing the relationship between sections 37 and 281, made the following observation as to the limits of section 37:

...

In contrast section 37 appears to give Councils only retrospective powers, that is to act after some kind of default has occurred. Further, it would be an odd procedure for a quasi judicial authority to knowingly breach the statutory procedures and then apply to itself for waiver.

- (h) There is therefore doubt as to whether Council could, in reliance on section 37, waive compliance with section 151(5)(b). Flowing from that, the implicit limitation on section 281 described by Judge Sheppard does not 'bite' or operate so as to prevent the Court from considering the present application.
- (i) Counsel also note that the Court in **Re Christchurch City Council**<sup>5</sup> granted a waiver under section 281 of the requirements in clause 11(1) of Schedule 1 on a council for service of a copy of the council's decision. The Court therefore implicitly accepted that it fell within its jurisdiction to make waivers and directions in relation to procedural

<sup>4</sup> [2004] NZRMA 266, para 18.  
<sup>5</sup> Decision C049/99.

requirements of Schedule 1, prior to clause 14 appeals being lodged. (The Court also referred in that case to the Court's originating jurisdiction under section 281, as confirmed most recently by the Court in **Re Auckland Council**).

### **Grounds for Application**

14. Before addressing briefly the grounds for the Council's application, Mr Duguid acknowledges that it may be open to debate whether certain areas, for instance within the AIAL noise contours, are "*land to which the designation... applies*" in terms of section 151(1)(b). However, the Council has proceeded on a conservative basis for the purposes of service under section 151(5) and on an assumption that these areas may arguably fall within the scope of section 151(5)(b).
15. The grounds for seeking the waivers and directions are set out in detail in the Notice of Motion and the supporting Affidavit of John Duguid, and are not repeated in full here. However, a broad summary of the basis for the Council's application follows.
16. It has been calculated that strict compliance with section 151(5)(b) would involve sending letters to 310,382 land owners and occupiers. As pleaded in the Notice of Motion, this cost (to the ratepayer) is substantial and, it is submitted, disproportionate to any benefits resulting from service on owners / occupiers, particularly in light of:
  - (a) The Council's proposal to publish notices concerning the two requiring authorities' decisions in the New Zealand Herald, local papers, and the Council's website; and
  - (b) Importantly, the fact that owners / occupiers who were not submitters on the designations have no appeal rights under sections 157 and 158 of the LGATPA.
17. It is important to note that service is still being effected in accordance with section 151(5)(a) for all owners / occupiers with potential appeal rights (i.e. those owners / occupiers who made submissions).
18. The environmental benefit referred to at paragraph 5(l) of the Notice of Motion of minimising the quantities of paper that would otherwise be generated by strict compliance with section 151(5)(b) is also significant.
19. While the Environment Court has previously held that "*as a matter of law the only undue prejudice to be considered is that which would occur to existing parties if the waiver was to*


*be granted*<sup>6</sup>, the Council has nonetheless turned its mind to whether any undue prejudice would arise, if its application is granted. The Council does not consider that any undue prejudice will arise, if its application is granted, for the reasons recorded at paragraph 5(k) of the Notice of Motion, reproduced below:

- (i) The proposals for public notice of the relevant designation decisions;
- (ii) Owners and occupiers of land do not have appeal rights under sections 157 and 158 of the LGATPA unless they made submissions on the Designations; and
- (iii) Service is still being effected in accordance with section 151(5)(a) for all owners / occupiers with potential appeal rights (i.e. those owners / occupiers who made submissions).

#### ***Ex Parte* Nature of Application**

20. Counsel are conscious of the *ex parte* nature of this application, however it is submitted that the sheer number of owners / occupiers at issue strongly indicates that consideration of the application on the basis of, for instance, a *Pickwick* process, is likely to be unworkable. In addition, it is submitted that the fact that the land owners and occupiers at issue have no rights of appeal under the LGATPA must be relevant to any consideration of the appropriateness of determining the application on an *ex parte* basis.

**Dated 19 October 2016**



**Matthew Allan / Rachel Ward**

**Counsel for the Applicant**

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<sup>6</sup> **Ahn v Christchurch City Council**, Decision C152/06, para 12.



## **Resource Management Act 1991**

### **281 Waivers and directions**

- (1) A person may apply to the Environment Court to—

  - (a) waive a requirement of this Act or another Act or a regulation about—
    - (i) the time within which anything shall be served; or
    - (ii) the time within which an appeal or submission to the Environment Court must be lodged; or
    - (iia) the time within which a person must give notice under section 274 that the person wishes to be a party to the proceedings; or
    - (iii) the method of service; or
    - (iv) the documents that shall be served; or
    - (v) the persons on whom anything shall be served; or
    - (vi) the information, or the accuracy of information, that shall be supplied; or
  - (b) give a direction about—
    - (i) the time within which or the method by which anything is to be served; or
    - (ii) what shall be served, whether or not the direction complies with this Act or any other Act or a regulation; or
    - (iii) the terms, including terms as to adjournment, costs, or other things, on which any information shall be supplied.
- (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
- (3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the court (to which subsection (1)(a)(ii) applies) unless it is satisfied that—

  - (a) the appellant or applicant and the respondent consent to that waiver; or
  - (b) any of those parties who have not so consented will not be unduly prejudiced.
- (4) Without limiting subsections (2) and (3), the Environment Court may waive a requirement as to time under this section whether or not an application is made under this section before the requirement has been breached.
- (5) A Registrar may exercise a power in this section if conferred by the Principal Environment Judge either generally or in relation to a specific matter and, in either case, on such terms and conditions as the Principal Environment Judge thinks fit.

**Local Government (Auckland Transitional Provisions) Act 2010**

**151 Designations and heritage orders of requiring authorities other than Auckland Council**

- (1) A decision of the Auckland Council that is notified to a requiring authority under section 148(4)(b) must be treated as if it were a recommendation notified under clause 9(1) of Schedule 1 of the RMA.
- (2) The requiring authority must notify the Auckland Council as to whether it accepts or rejects the recommendation in whole or in part within 30 working days after the day on which it receives the recommendation.
- (3) The requiring authority may modify the requirement only if the modification is recommended by the Auckland Council or is not inconsistent with the requirement as notified.
- (4) If the requiring authority rejects the recommendation in whole or in part, or modifies the requirement, it must give reasons for its decision.
- (5) The Auckland Council must ensure that, within 15 working days after it receives the decision, a notice of decision and a statement of the time within which an appeal against the decision may be lodged is served on—
  - (a) persons who made a submission on the requirement; and
  - (b) owners and occupiers of land to which the designation or heritage order applies.
- (6) If the Auckland Council gives a notice of a decision, it must—
  - (a) make a copy of the decision available for inspection on its Internet site and at its offices; and
  - (b) include with the notice a statement of the places where a copy of the decision is available; and
  - (c) send or provide, on request, a copy of the decision within 3 working days after the request is received.

**157 Right of appeal to Environment Court (designations and heritage orders)**

- (1) A person has a right of appeal to the Environment Court against any aspect of a decision referred to in section 152(4)(a) of a requiring authority or the Auckland Council if—
  - (a) the person is an owner or occupier of land to which the designation or heritage order applies; and
  - (b) the person made a submission on the requirement that referred to that aspect of the decision.
- (2) A person has a right of appeal to the Environment Court against any aspect of a decision referred to in section 152(4)(a) of a requiring authority other than the Auckland Council if—
  - (a) the person is not an owner or occupier of land to which the designation or heritage order applies; and

- (b) the person made a submission on the requirement that referred to that aspect of the decision; and
  - (c) in that aspect of the decision, the requiring authority rejected the Auckland Council's recommendation on the matter.
- (3) The Auckland Council has a right of appeal to the Environment Court against any aspect of a decision referred to in section 152(4)(a) of a requiring authority other than the Auckland Council.
- (4) A person has a right of appeal to the Environment Court against any aspect of a decision referred to in section 152(4)(a) of the Auckland Council if—
- (a) the person is not an owner or occupier of land to which the designation or heritage order applies; and
  - (b) the person made a submission on the requirement that referred to that aspect of the decision; and
  - (c) in that aspect of the decision, the Council rejected the Hearings Panel's recommendation on the matter.
- (5) An appeal must be treated as if it were an appeal under section 174 of the RMA, and that section and Parts 11 and 11A of the RMA apply to the appeal (including, to avoid doubt, sections 299 to 308).
- (6) Despite subsection (5), notice of an appeal may be lodged and served under section 174(2)(c) of the RMA no later than 30 working days after the date on which the Auckland Council gives notice of the decision about the requirement under—
- (a) section 151(5), for a designation or heritage order of a requiring authority other than the Council; or
  - (b) section 148(4)(a), for a designation or heritage order of the Council.

#### **158 Right of appeal to High Court on question of law**

- (1) A person who made a submission on the proposed plan may appeal to the High Court in respect of a provision or matter relating to the proposed plan—
- (a) that the person addressed in the submission; and
  - (b) in relation to which the Council accepted a recommendation of the Hearings Panel, which resulted in—
    - (i) a provision being included in the proposed plan; or
    - (ii) a matter being excluded from the proposed plan.
- (2) A person may appeal to the High Court against any aspect of a decision referred to in section 152(4)(a) of a requiring authority other than the Auckland Council if—
- (a) the person is not an owner or occupier of land to which the designation or heritage order applies; and
  - (b) the person made a submission on the requirement that referred to that aspect of the decision; and

- (c) in that aspect of the decision, the requiring authority accepted the Auckland Council's recommendation on the matter.
- (3) A person may appeal to the High Court against any aspect of a decision referred to in section 152(4)(a) of the Auckland Council if—
  - (a) the person is not an owner or occupier of land to which the designation or heritage order applies; and
  - (b) the person made a submission on the requirement that referred to that aspect of the decision; and
  - (c) in that aspect of the decision, the Council accepted the Hearings Panel's recommendation on the matter.
- (4) However, an appeal under this section may only be on a question of law.
- (5) Except as otherwise provided in this section, sections 299(2) and 300 to 307 of the RMA apply, with all necessary modifications, to an appeal under this section.
- (6) Notice of the appeal must be filed with the High Court, and served on the Auckland Council, no later than 20 working days after the Council notifies the matters under—
  - (a) section 148(4)(a), in the case of an appeal under subsection (1) or (3); or
  - (b) section 151(5), in the case of an appeal under subsection (2).
- (7) If the subject matter of the notice of appeal relates to the coastal marine area, the person must also serve a copy of the notice on the Minister of Conservation no later than 5 working days after the notice is filed with the High Court.