

**IN THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

ENV-2016-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 under section 156(1) of the LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearings Panel ("**Hearings Panel**") on the proposed Auckland Unitary Plan ("**Proposed Plan**")

AND

IN THE MATTER of Proposed Plan Hearing Topic 010 RPS Heritage and Special Character

BETWEEN **HOUSING NEW ZEALAND CORPORATION**

Appellant

A N D **AUCKLAND COUNCIL**

Respondent

NOTICE OF APPEAL (RE TOPIC 010 RPS HERITAGE AND SPECIAL CHARACTER)

DATED: 16th September 2016

**ELLIS GOULD
SOLICITORS
AUCKLAND**

REF: Dr Claire Kirman / Alex Devine

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TO: The Registrar
Environment Court
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1. **Housing New Zealand Corporation** (“**the Appellant**”) appeals against part of a decision of **Auckland Council** (“**the Council**”) on the proposed Auckland Unitary Plan (“**Proposed Plan**”).
2. The Appellant has the right to appeal the Council’s decision to the Environment Court under section 156(1) of the LGATPA because the Council rejected recommendations of the Hearings Panel in relation to provisions or matters relating to the Proposed Plan:
 - (a) that the Appellant addressed in its submission relating to the special character provisions in the Proposed Plan (submission number 839; FS3338); and
 - (b) that resulted in alternative solutions being included in the Proposed Plan.
3. The Appellant provides further details of the reasons for its Appeal below.
4. The Appellant is not a trade competitor for the purposes of section 308D of the RMA. In any event, the Appellant is directly affected by effects of the subject of the Appeal that:
 - (a) adversely affect the environment; and
 - (b) do not relate to trade competition or the effects of trade competition.
5. Notice of the decision that is being appealed, being the decision on Proposed Plan Hearing Topic 010 RPS Heritage and Special Character (“**the Decision**”), was received by the Appellant on or about 19 August 2016.
6. The Decision was made by the Council.
7. The provisions and parts of the Decision that are being appealed are the rejection by the Council of the Hearings Panel’s recommendations pursuant to Hearing Topic 010 RPS Heritage and Special Character, summarised by Council as historic heritage matters.
8. The reasons for this Appeal are:
 - (a) Housing New Zealand Corporation lodged original submissions dated 28 February 2014 and further submissions dated 22 July 2014 (collectively, “**the Submissions**”) which sought, amongst other things,

amendments to the provisions addressing the historic heritage, special character and pre-1944 provisions.

- (b) In the course of the hearing the Council recast the Topic 010, 029, 030 and 079 provisions from the maintenance and enhancement of special character and amenity values under section 7, to historic heritage matters requiring protection as a matter of a national importance under section 6.
- (c) The Hearings Panel's recommendations rejected the Council's recast provisions and upheld the Submissions. Specifically the Hearings Panel's recommendation stated:

"The Panel supports the Special Character Areas Overlay – Residential and Business with a set of provisions seeking to ensure that the character and amenity values of these areas are maintained and enhanced.

The Panel is not convinced by the arguments put forward by the Council and some submitters in topic 010 RPS heritage and special character (or historic character as the Council is seeking to call it) is 'historic heritage' requiring protection as a matter of national importance.

The Special Character Overlay has been retained as special character, and has not changed to historic character as proposed by the Council. The reasons for this are set out in more detail below. This means the special character provisions remain as streetscape character and amenity issues (in terms of section 7 of the Resource Management Act 1991) rather than historic heritage (in terms of section (6 (f) of the Resource Management Act 1991 – with its focus on protection).

The Panel considers that if the Council wishes to change the basis for controls on the use and development of a number of residential and business areas from special character to historic character than it should proceed by a plan change. This would require a robust section 32 analysis of the relative benefits and costs of such a change and enable public participation through the schedule 1 Resource Management Act 1991 process." (Refer: Report to Auckland Council, Hearing Topics 010, 029, 030 and 079, at page 5)

- (d) The Decision accepted all the recommendations of the Hearings Panel report for Hearing Topic 010 as they related to the content of

the Proposed Plan, and also the associated recommendations as they appeared in the maps, with the exception of the inclusion of a new objective (B5.3.1(1)) which reads: "*Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development*" and consequential amendments to the policies (B5.3.2) and explanation and principal reasons for adoption (B5.4) as set out below:

B5.3.2. Policies

- (1) *Identify special character areas to maintain and enhance ~~the amenity values of places that reflect patterns of settlement, development, building style and/or streetscape quality over time.~~*
- (2) *Identify and evaluate special character areas considering the following factors:*
 - (a) *physical and visual qualities: groups of buildings, or the area, collectively reflect important or representative aspects of architecture or design (historical building types or styles), and/or landscape or streetscape and urban patterns, or are distinctive for their aesthetic quality; and*
 - (b) *legacy historical: the area collectively reflects an important aspect, or is representative, of a significant period and pattern of community development within the region or locality.*
- (3) *Include...*
- (4) *Maintain and enhance the amenity values of Manage identified special character areas by all of the following:*
 - (a) *requiring new...*

B5.4 Explanation and principal reasons for adoption

Historic heritage...

Special character areas include older established areas and places which may be whole settlements or parts of suburbs or a particular rural, institutional, maritime, commercial or industrial area. They are areas and places of special architectural or other built character value, exemplifying a collective and cohesive importance, relevance and interest to a locality or to the region. ~~The identified character amenity values (particularly the character or appearance) and the quality of the~~

environment (particularly of the streetscape) of these special character areas should be maintained and enhanced by controls on demolition, design and appearance of new buildings and additions and alterations to existing buildings. It will also be important that the authorities responsible for the operation and maintenance of streets have proper regard for the appearance and quality of streets in special character areas, including in particular the presence of trees and other vegetation.

These are two key components...

- (e) In making these amendments to the provisions recommended by the Hearings Panel the Council argued that it was appropriate for the Proposed Plan to include a new objective at the Regional Policy Statement (“RPS”) level of the Proposed Plan, as without it, the Proposed Plan provisions (as recommended by the Hearings Panel) which relate to the Special Character Overlay in the Proposed Plan would not have an appropriate objective at the RPS level and, as a consequence, there would then be a disconnect between the RPS provisions and the District Plan (“DP”) provisions.
- (f) In contrast, the Appellant considers that:
 - (i) In making what the Council described in its evidence as a “*significant policy shift*” (Rowe, in response to questioning from Commissioner Hill) the Council was, in effect, changing the provisions from a section 7 RMA justification to a section 6 RMA justification.
 - (ii) The RMA makes a clear distinction between historic heritage matters under section 6 and matters of character and amenity under section 7.
 - (iii) The Appellant also says the new objective and supporting consequential amendments raise an issue as to whether or not the Council has jurisdiction to adopt the proposed changes. In that regard:
 - (a) At the hearing the Council stated that the proposed amendments were being made in response to

submissions by the Urban Design Forum New Zealand (5277-103), the New Zealand Institute of Architects (5280-101) and Stuart and Orchid Bracey (5695-44 and 46), which sought that there was a clear distinction between places of recognised historic heritage value and areas of special character.

- (b) None of the submissions lodged on the Proposed Plan supported splitting the provisions into two sections addressing historic character in the RPS and special character in lower order provisions.
- (c) The notified Special Character Overlay provisions reflect, and are consistent with, the understanding emphasised in the Plan Modification 163 Environment Court hearing that heritage and special character are quite different matters (Refer: *Latimour v Auckland Council* [2013] NZEnvC 79).
- (d) Whilst the Hearings Panel can include a provision within the Proposed Plan that is outside of scope of submissions, the Council cannot:

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(1) The Auckland Council must—

(a) decide whether to accept or reject each recommendation of the Hearings Panel; and

(b) for each rejected recommendation, decide an alternative solution, which—

(i) may or may not include elements of both the proposed plan as notified and the Hearings Panel's recommendation in respect of that part of the proposed plan; but

(ii) must be within the scope of the submissions.

...

(Emphasis added) (Refer: section 148 LGATPA)

- (e) It is therefore not within the jurisdiction of the Council to include this new objective and to make the

consequential policy and explanation changes to the Proposed Plan.

- (iv) Thirdly, the Appellant says that having accepted the Hearings Panel's recommendations on the DP provisions, there are no lower level provisions in the Proposed Plan that require this objective (and consequential changes to the RPS) in order for those DP provisions to be supported at the RPS as claimed by the Council. Even if there were the need for an objective at the RPS level, there is no need for that objective to refer to historic heritage as opposed to special character.
- (v) Finally, the Appellant is concerned that the introduction of the new objective referencing historic heritage at the RPS level could be inappropriately used by the Council to support later changes to the DP provisions, in circumstances where the Hearings Panel concluded that if historic heritage was to be introduced as the focus of these provisions it should be by way of Plan Change to provide people with the appropriate Schedule 1 opportunity for comment on the proposed refocusing of the provisions.
- (g) Unless and until the Proposed Plan provisions are amended to delete objective (B5.3.1(1)), the provisions will not:
 - (i) promote the sustainable management of resources;
 - (ii) otherwise be consistent with Part 2 of the RMA;
 - (iii) be appropriate in terms of section 32 of the RMA; or
 - (iv) be consistent with the balance of the provisions of the Proposed Plan.

9. The Appellant seeks the following relief:

- (a) That the Decision subject to this Appeal be disallowed in relation to the introduction of objective (B5.3.1(1)).
- (b) That a new objective be included at RPS level to set the direction for the management of special character areas in the DP as follows:

B5.3.1. Objectives

(1) Identify, maintain and enhance the amenity values of special character areas.

- (c) Such other orders, relief or other consequential amendments as are considered appropriate or necessary by the Court to address the concerns set out in this Appeal.
 - (d) Costs of and incidental to the Appeal.
10. The Appellant **attaches** the following documents to this Notice of Appeal:
- (a) Copies of the Appellant's original submission relating to the relevant Proposed Plan provisions (**Annexure A**).
 - (b) A copy of the Hearing Panel recommendations version of the relevant Proposed Plan provisions (**Annexure B**).
 - (c) A copy of the relevant parts of the Decision (**Annexure C**).
 - (d) A record that Auckland Council has been served with a copy of this Notice in accordance with the decision of the Environment Court granting waivers (Refer: [2016] NZ EnvC 153) in respect of the requirement to serve a copy of any Notice of Appeal on a submission on the provision or matter to which the appeal relates (**Annexure D**).

DATED at Auckland this 16th day of September 2016

Housing New Zealand Corporation by its
solicitors and duly authorised agents Ellis Gould



Dr CE Kirman / AK Devine

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