

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 208

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 (PAUP)

AND

IN THE MATTER of an Application by the Auckland Council for Waivers / Directions under section 281 of the RMA in relation to the service requirements of section 151(5) of the LGATPA
(ENV-2016-AKL-000260)

Decision: On the papers

Court: Principal Environment Judge L J Newhook

Date of Decision: 27 October 2016

Date of Issue: 27 October 2016

**DECISION OF THE ENVIRONMENT COURT CONCERNING EX PARTE
APPLICATION BY AUCKLAND COUNCIL UNDER S 281 RMA FOR WAIVERS AND
DIRECTIONS**

A: Waivers and Directions granted as detailed herein.



REASONS

Introduction

[1] Auckland Council has received the decisions of two requiring authorities Auckland International Airport Limited (AIAL) and Minister of Defence (MOD) on requirements for designations in the PAUP concerning Auckland International Limited and Whenuapai Airfield, respectively.

[2] Auckland Council is in the process of serving all submitters on those designations as required by section 151(5)(a) of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA).

[3] The council has submitted that, subject to whatever may be the proper interpretation of subsection (b) of that provision, there is the potential for Council to have to meet very substantial costs of further service of notice on some thousands of other persons in the vicinity of each airfield, for little legal purpose, unless the obligation is waived and replaced by certain directions.

The Four Designations Are As Follows:

- (a) AIAL designation 1100, relating to the principal designated airport area, but in addition large defined noise contour areas.
- (b) AIAL designation 1102, relating to obstacle limitation surfaces commencing at runway end protection areas, and restrictions for non-aeronautical ground lights.
- (c) MOD designation 4310, relating to the Whenuapai air base, together with provisions relating to the noise control area.
- (d) MOD designation 4311, relating to Whenuapai Airfield Approach and Departure Path Protection.



The application for waivers and directions

[4] The Council has sought the following waivers and directions:

- (a) In the case of AIAL designation 1100, a waiver of the requirement to serve notice of AIAL's decision on the designation, 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 on the designation);
- (b) In the case of AIAL designation 1102, a waiver of the requirement to serve notice of AIAL's decision on the designation, 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 on the designation);
- (c) In the case of MOD designation 4310, a waiver of the requirement to serve notice of MOD's decision on the designation, 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 on the designation);
- (d) In the case of MOD designation 4311, a waiver of the requirement to serve notice of MOD's decision on the designation, 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 on the designation);
- (e) For all four designations, it is directed 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.



[5] The Council lodged an affidavit by its General Manager Plans and Places, Mr J M Duguid, who has been closely involved with the development of the PAUP since late 2010.

[6] The two requiring authorities have signified their approval of the application for waivers and directions, by memoranda filed by their counsel very shortly after the application was lodged in court and served on them.

The Law

[7] Section 151(5) of the LGATPA provides as follows concerning service of notices of requiring authorities' decisions on designations:

- (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.

[8] The Council has taken a conservative interpretation of subsection (b) as to whether "*land to which the designation[s] apply*" includes land under the mapped noise contours and spatial limitations. That is, out of caution, it has assumed that to be the law. AIAL has signified the opinion of its legal advisors that such land is not so subject, but as I have noted, the Council has taken a conservative approach and considers that in some way the notice of the decision on the recommendation of the Council should be drawn to the attention of owners and occupiers of such land.

[9] That such a view is conservative may be noted from the provisions of sections 157 and 158 LGATPA, where 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 might be said to apply, who did not make a submission, do not have a right of appeal.

[10] The Council has applied to the Environment Court under s 281(1) RMA which provides to the relevant extent as follows:



(1)(a) waive a requirement of this Act or another Act or a regulation about –

(i) the time within it 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

(ii) what shall be served, whether or not the direction complies with this Act or any other Act or a regulation; or

...

[11] 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.

[12] In August this Court held that it had jurisdiction to make anticipatory waivers and directions under s 281 RMA in relation to future potential appeals against council's decisions on the PAUP under section 156(1) and (3) LGATPA.¹

[13] I note particularly that s 281(1) is not limited to waivers and directions in relation to the requirements of the RMA, because it refers to "*other Act[s]*", and I am satisfied that this must logically include the LGATPA.

[14] I am persuaded that s 37 RMA would not enable the Council to extend time periods or waive compliance in the current circumstances, because its provisions are limited to the RMA and regulations made under it.²

[15] I am satisfied that the Court has power to grant waivers and directions in the present circumstances, subject to careful consideration of the detail of those.



¹ Refer *Re Auckland Council* [2016] NZEnvC153.

² For a discussion of a comparison of s 37 and s 281 RMA, reference may be made to *Hartford Group Limited v Auckland City Council* (1998) 4 ELRNZ 342, *Pegasus Bay Beach Users Association Inc v Hurunui District Council* [2003] NZRMA 138; and *Canterbury Regional Council v Meridian Energy Limited* [2004] NZRMA 266.

Consideration

[16] Mr Duguid in his affidavit, advised that it had been calculated that strict compliance with s 151(5)(b) could involve the council having to send letters to over 310,000 land owners and occupiers, which would engage very considerable ratepayer expense, in excess of \$170,000. Counsel submitted that such cost would be disproportionate to any purpose that might be gained, even should the correct interpretation of s 151(5)(b) be to the effect that they needed to be served, because sections 157 and 158 LGATPA do not provide them any right of appeal. I consider that is a correct interpretation of the law, and further that no undue prejudice would arise if the Council's present application was granted, because of the absence of such appeal rights, the fact that submitters are all being served, and having regard to the detail of the directions for public notification which the Council urges should be undertaken which appear below in the orders that I now make.

The Waivers and Directions

[17] The Court makes the following waivers and directions:

- (a) In the case of AIAL designation 1100, a waiver of the requirement to serve notice of AIAL's decision on the designation, 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 on the designation);
- (b) In the case of AIAL designation 1102, a waiver of the requirement to serve notice of AIAL's decision on the designation, 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 on the designation);
- (c) In the case of MOD designation 4310, a waiver of the requirement to serve notice of MOD's decision on the designation, 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 on the designation);

- (d) In the case of MOD designation 4311, a waiver of the requirement to serve notice of MOD's decision on the designation, 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 on the designation);
- (e) Concerning all four designations, it is directed 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.

POST SCRIPT

The Court foreshadows that it will utilise its website for any appeals against designations in the PAUP in the same manner as with the general appeals already being managed. To that end, I direct that this decision be posted on the Court's website.

DATED at AUCKLAND this *27th* day of October 2016



L J Newhook
Principal Environment Judge

