

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-

UNDER

the Local Government (Auckland
Transitional Provisions) Act 2010 and the
Resource Management Act 1991

IN THE MATTER

of an appeal under section 158 of the
Local Government (Auckland Transitional
Provisions) Act 2010

BETWEEN

Independent Maori Statutory Board

Appellant

AND

Auckland Council

Respondent

**NOTICE OF APPEAL
9 SEPTEMBER 2016**



ATKINS | HOLM | MAJUREY

T L Hovell
PO Box 1585
Shortland Street
AUCKLAND 1140

TAKE NOTICE that the abovenamed Appellant, the Independent Maori Statutory Board, will appeal to the High Court against the decision of the Auckland Council on the Proposed Auckland Unitary Plan delivered on 19 August 2016 **UPON THE GROUNDS** that the decision is erroneous in law.

APPEAL

1. Those parts of the decision ("**Decision**") appealed against relate to Sites and Places of Value to Mana Whenua ("**Sites of Value**") and references to cultural landscapes which were part of Hearing Topic 009 (Mana Whenua) and Hearing Topic 036/037 (Maori land and treaty and Mana Whenua sites).
2. The Auckland Council accepted the Independent Hearings Panel ("**IHP**") Recommendations. Paragraph 10.1 of the Decision records:

"10.1 The Council has accepted all the recommendations of the Panel contained in the Panel reports for Hearing Topic 009 (Mana Whenua) and Hearing Topic 036/037 (Maori land and treaty and Mana Whenua sites), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps."

3. As the Auckland Council has accepted the recommendations of the IHP, references to the findings and reasoning of the IHP in the extracts below are to be read as references to the Auckland Council.
4. The parts of the Decision appealed are more specifically contained in:

Sites of Value

- a. Auckland Unitary Plan IHP Report to Auckland Council Hearing topic 009 Mana Whenua (July 2016) ("**Decision Report (009)**"). Relevant extracts record:

"1.2 Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

In summary the changes recommended include:

...

iii. deleting the provisions relating to the sites and places of value to Mana Whenua and its overlay (noting that the Council formally withdrew those sites of value identified on privately-owned land). This matter is also addressed in the Panel's Report to Auckland Council – Hearing topics 036, 037 Maori Land and Mana Whenua sites July 2016.

6.2 Panel recommendation and reasons

...

The Panel has recommended the deletion of those sites of value identified on publicly-owned land. This means that all of the sites of values are to be removed from the Unitary Plan. The reasons for removing those sites of value identified on publicly-owned land are the same as those set out above. **That is, those sites have not been appropriately identified and evaluated to determine if they are indeed a site of value.**

The Panel's approach to protecting places and areas has been set out in the Panel's Report to Auckland Council – Overview of recommendations July 2016 and in the Report to Auckland Council - Hearing topic 010 Historic heritage July 2016. In that report it is stated:

In the Panel's view, the method of protecting historic heritage by scheduling those places identified as having considerable and outstanding historic heritage value is well-established. The Panel supports this approach because it provides certainty to landowners and is likely to achieve the outcomes sought by the Plan. The Panel considers that significant historic heritage places should be identified, evaluated and included in the schedule following the process set out in the regional policy statement because this promotes effective protection.

For these reasons, the Panel does not support the inclusion of plan provisions relating to unscheduled historic heritage. If the Council wishes to protect historic heritage, it should follow the identification and scheduling process provided for in the regional policy statement, using the plan change procedure.

Overall, the Panel does not support the inclusion of objectives and policies addressing 'unscheduled historic heritage' in the regional policy statement (nor does it support the many references to 'unscheduled significant historic heritage' that occur throughout the Plan, and this is addressed in more detail in the Panel's report on hearing topic 031 Historic heritage as referenced above). Accordingly, provisions relating to unidentified historic heritage places have been removed from the regional policy statement (pages 5-6).

The above paragraphs apply equally to the Sites and Places of Value to Mana Whenua Overlay. While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to be by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.

Overall, the Council's section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

This matter is also addressed in the panel's report on Topic 037- Mana Whenua Sites as referenced above. However given the deletion of policy approach to the sites of value in the regional policy statement, the district plan provisions also need to be deleted. Accordingly there no objectives, policies, rules or schedule for any of the sites of value."

- b. Auckland Unitary Plan IHP Report to Auckland Council Hearing topic 036/037 Maori Land and Treaty, and Mana Whenua sites (July 2016) ("**Decision Report (036/037)**"). Relevant extracts record:

"1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

...

ix. Confirming deletion of the Sites and Places of Value to Mana Whenua Overlay consequential to the recommendations in Topic 009 Regional Policy Statement – Mana Whenua.

5.2.2. Sites and places of value to Mana Whenua

The Panel heard wide-ranging evidence on this issue and concluded that the entire schedule should be deleted because it was not properly founded. The reasons for the Panel's recommendation to delete the entire schedule are set out in the Panel's Overview of recommendations (report as referenced above) and in the Panel's Report to Auckland Council – Hearing topic 009 Regional Policy Statement - Mana Whenua. Section 8.3.8 of the Overview of recommendations states:

The Sites and Places of Value to Mana Whenua Overlay (Topic 037) is linked to the Sites and Places of Significance to Mana Whenua Overlay, both based on policies set out in the regional policy statement. The approximately 3600 sites and places of value to Mana Whenua were identified using the New Zealand Archaeological Association database of archaeological sites, rather than by a comprehensive identification of Mana Whenua values or the degree of significance of those values.

The Council's basis for this approach was stated to be 'precautionary'. There were a large number of submissions opposing this overlay on the basis that insufficient investigation had been undertaken. In evidence at the hearings the Council advised that a programme of work had been established to review the scheduled items and assess them in terms of their values to Mana Whenua.

The Panel supports the approach of having two distinct layers of protection for particular sites with which Mana Whenua have ancestral relationships.

This is similar to other natural and physical resources for which the Unitary Plan provides two layers of protection.

However, the Panel does not consider there to be a sufficient evidential basis for the schedule at this stage and therefore recommends the deletion of this overlay. The re-application of the overlay can be considered once the values of Mana Whenua and the sites that are important to them in relation to these values have been identified following appropriate consultation and research. This may include a review of the New Zealand Archaeological Association database (and other identified sites).

The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled."

Cultural landscapes

c. Decision Report (009). Relevant extracts record:

"The notified regional policy statement contained policies relating to cultural landscapes. The Council proposed to amend some of these policies through the hearings process. No cultural landscapes were mapped in the notified Plan or proposed to be mapped by the Council during the hearing process.

The Panel questioned a number of submitters and their witnesses as to how Māori cultural landscapes might in future be recognised or protected in the Plan rules. Some submitters are clearly concerned that a Māori cultural landscape may give rise to a further layer of physical protection over broad areas of the city, to be implemented by restrictive activity status and policy direction to 'avoid' certain effects.

The Council confirmed in its closing statement that the reference to Māori cultural landscapes was a deliberate decision. The Council considered use of the term 'Māori cultural landscapes' to be appropriate because this concept was gaining increasing recognition and use in New Zealand's planning documents. Mr Murdoch, Council's expert heritage consultant, discussed in evidence some specific examples, including the *Te Aranga Cultural Landscapes Strategy* which was developed by the Ministry for the Environment in conjunction with Te Puni Kokiri and which recognises the concept of a Māori cultural

landscape. He also confirmed that through his involvement in the negotiation of Treaty settlement claims, he had seen increasing acknowledgement of Māori cultural landscapes by Government departments.

However, the Council at 5.2 and 5.3 of its closing statement stated:

At this stage, it is too early to speculate how such landscape protection might be implemented, which is why the Council has signalled the ongoing nature of this work in Chapter B5. In particular, B5.4, Policy 5 provides that Māori cultural landscapes will be recognised, enhanced and protected by *developing an agreed methodology to identify, record, assess and map the values associated with these landscapes, and determine the most appropriate mechanisms to recognise the values associated with them (emphasis added)*. The methods in B5.4 also identify *"ongoing work to identify and map the Mana Whenua values associated with cultural landscapes"*.

Given the work to be done, it would be premature for the Council to signal how Māori cultural landscapes might be recognised or protected in the PAUP rules.

There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (i.e. objectives, policies and rules). The Panel agrees with the Council that it is premature to signal how Māori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan rules.

The regional policy statement sets out the issues of significance to Māori and to iwi authorities in the region, and this includes:

protecting Mana Whenua culture, landscapes and historic heritage.

Also the policies in B6.5 Protection of Mana Whenua cultural heritage, include that a Māori cultural assessment identify Mana Whenua values associated with the landscape in structure planning and plan change processes. Other than those provisions above, provisions relating to cultural landscapes have been deleted."

d. Decision Report (036/037). Relevant extracts include:

"Consequential to the Panel's recommendations in Topic 009, all provisions relating to ... consideration of cultural landscapes are deleted as being unnecessary given ... the latter simply reflects that landscape values (and choices about which of those are important) are all inherently

cultural in origin (see the Panel's Report to Auckland Council – Overview of recommendations July 2016, page 72)."

ERRORS OF LAW

5. The errors of law alleged by the Appellant are as follows:
- a. The Decision reached conclusions which, on the evidence, it could not reasonably have reached, or otherwise misconstrued the evidence and submissions, for example:

Sites of value

- i. "The Panel has recommended the deletion of those sites of value identified on publicly-owned land. This means that all of the sites of values are to be removed from the Unitary Plan. The reasons for removing those sites of value identified on publicly-owned land are the same as those set out above. **That is, those sites have not been appropriately identified and evaluated to determine if they are indeed a site of value.**" [Emphasis added]
- ii. "... While those sites of value were identified in the notified Plan, **no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were...**" [Emphasis added]
- iii. "The approximately 3600 sites and places of value to Mana Whenua were identified using the New Zealand Archaeological Association database of archaeological sites, **rather than by a comprehensive identification of Mana Whenua values or the degree of significance of those values.**" [Emphasis added]
- iv. "The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, **but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled.**" [Emphasis added]
- v. "The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled."

Maori cultural landscapes

- vi. "... The Panel agrees with the Council that it is premature to signal how Māori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan **rules.**" [Emphasis added]
- b. In making its findings, the Council had regard to irrelevant factors, for example:

Maori cultural landscapes

- i. "The Panel questioned a number of submitters and their witnesses as to how Māori cultural landscapes **might in future be recognised or protected in the Plan rules.** Some submitters are clearly concerned that a Māori cultural landscape **may give rise to a further layer of physical protection over broad areas** of the city, to be implemented by restrictive activity status and policy direction to **'avoid'** certain effects.

...
There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (i.e. objectives, policies and rules) ..." [Emphasis added]
- c. In reaching its decisions on sites of value, the Council failed to have regard to relevant considerations, namely the deletion of rules requiring cultural impact assessments;
- d. In reaching its decisions, the Council failed to follow the appropriate statutory directions, particularly in deleting policies of the RPS that addressed issues of significance to Mana Whenua;
- e. The Council failed to recognise and provide for the relationship of Mana Whenua and their culture and traditions with their ancestral land, sites, wahi tapu and other taonga within the Auckland region, and particularly in respect of sites of value and cultural landscapes within the Auckland region;
- f. The Council failed to have particular regard to the kaitiakitanga of Mana Whenua in respect of sites of value and cultural landscapes within the Auckland region;
- g. The Council failed to take into account the principles of the Treaty of Waitangi and, in particular, the principle of

active protection of taonga, particularly of sites of value and cultural landscapes in the Auckland region.

QUESTIONS OF LAW

6. The questions of law to be resolved are:
 - a. Did the Council err in law by reaching conclusions which, on the evidence, it could not reasonably have reached, or otherwise had no rational basis?
 - b. Did the Council, in making its findings, err in law by having regard to irrelevant matters?
 - c. Did the Council, in making its findings, err in law by failing to have regard to relevant considerations?
 - d. Did the Council err in law in failing to follow the appropriate statutory directions, particularly in relation to the policies of the RPS?
 - e. Did the Council err in law in failing to recognise and provide for the relationship of Mana Whenua and their culture and traditions with their ancestral land, sites, wahi tapu and other taonga within the Auckland region, and particularly in respect of sites of value and cultural landscapes within the Auckland region?
 - f. Did the Council err in law in failing to have particular regard to the kaitiakitanga of Mana Whenua in respect of sites of value and cultural landscapes within the Auckland region?
 - g. Did the Council err in law in failing to take into account the principles of the Treaty of Waitangi and, in particular, the principle of active protection of taonga, particularly of sites of value and cultural landscapes in the Auckland region?

GROUNDINGS OF APPEAL

Evidential basis for sites of value

7. In recognising that there can be evidential concerns associated with the identification of wahi tapu or sites of cultural value, particularly where there is no physical evidence of such sites, the notified PAUP and associated section 32 report adopted a conservative approach of scheduling sites of value where the sites corresponded with

cultural sites that had some physical evidence associated with them, such as archaeological sites of Maori origin, or were otherwise well known to be of value to Mana Whenua.

8. The evidence on behalf of the Council, the Appellant and mana whenua groups further set out the clear basis for the identification and evaluation of sites of value to mana whenua contained in the overlay.
9. This evidence was acknowledged in the Decision Report, which records:

“...In evidence at the hearings the Council advised that a programme of work had been established to review the scheduled items and assess them in terms of their values to Mana Whenua.”

10. Notwithstanding this, the Decision Report (036/037) records:

“However, the Panel does not consider there to be a sufficient evidential basis for the schedule at this stage and therefore recommends the deletion of this overlay.”

11. The sites of value identified in the overlay met evidential standards. The Decision erred in law in finding that there was insufficient evidential basis for the sites of value.

Process for sites of value

12. The Decision erred in law in stating that a proper process had not been undertaken for the sites of value. The Decision records:

“... While those sites of value were identified in the notified Plan, no criteria had been applied to be able to evaluate them or verify that the sites actually existed and what their values were. If the Council wishes to pursue a schedule of sites of value with a supporting policy framework, this would need to be by a plan change using the Schedule 1 process under the Resource Management Act 1991, with the required section 32 analysis.

Overall, the Council's section 32 evaluation for the Sites and Places of Value to Mana Whenua Overlay does not provide an adequate basis for the introduction of that overlay.

This matter is also addressed in the panel's report on Topic 037- Mana Whenua Sites as referenced above. However given the deletion of policy approach to the sites of value in the regional policy statement, the district plan provisions also need to be deleted. Accordingly there no objectives, policies, rules or schedule for any of the sites of value.”

...

... The re-application of the overlay can be considered once the values of Mana Whenua and the sites that are important to them in relation to these values have been identified following appropriate consultation and research. This may include a review of the New Zealand Archaeological Association database (and other identified sites)"

13. The Decision takes issue with the process in which the sites of value were notified, and therefore deletes the sites of value on this basis.
14. The sites of value to Mana Whenua were properly notified and within scope. Substantial evidence was produced in support of the sites of value.
15. The Decision erred in law by:
 - a. Deleting the sites of value to Mana Whenua on the basis of what it considered should be a proper process for such matters;
 - b. Ignoring the evidence that was produced throughout the hearing;
 - c. Abdicating its role of making a decision based on the evidence before it.

Conclusions not available on the evidence or based on factual errors for sites of value

16. The Decision Report records:

(009)

"Notwithstanding the above, the Auckland Development Committee, at its 12 November 2015 meeting passed Resolution number AUC/2015/205, which is:

That the Auckland Development Committee:

a) agree to remove Sites and Places of value overlay on private land until such a time that all Sites and Places have been accurately identified and mapped.

(036/037)

"The Panel notes that, in its reply on this topic, the Council withdrew many of the sites that had been scheduled as being of value to Mana Whenua where these were located on privately owned land. The Panel considered whether such a half-way position was an appropriate method, but concluded that the basis of the effects is the same whoever owns the land, so it would be more appropriate to ensure that all sites of value are properly identified, assessed and scheduled."

17. This matter was addressed by the Auckland Council staff report for the Auckland Development Committee (10 August 2016), which provided:

"The Panel incorrectly stated that the Council had formally withdrawn the sites on private land due to insufficient evidence, and that the remaining sites are those on publicly-owned land.

...

b. The Panel's recommendation to withdraw all sites and places of value was based on an inaccurate understanding of the Council's Auckland Development Committee resolution of 12 November 2015 and subsequent withdrawal of 593 sites.

c. There is sufficient evidential basis for the inclusion of 2213 sites and places of value in the overlay, as established in evidence, legal submissions, closing statement and post-hearing report provided by the Council to the Panel in both hearing topics 009 and 037.

...

e. The Panel incorrectly indicates that "while those sites of value were identified in the notified PAUP, no criteria and been applied to be able to evaluate them or verify that the sites actually existed and what their values were." This word was undertaken as part of the evidence base for Topic 037."

18. The Decision Report erred in law as it was based on an incorrect factual basis or reached conclusions not available on the evidence.

Failed to have regard to relevant considerations

19. In making its findings to delete the provisions relating to cultural impact assessments, the Decision Report (036/037) noted the overlap with the sites of value, recording:

"The cultural impact assessment issue is also linked with the proposed 3600 sites and places of value to Mana Whenua as discussed above. Given the Panel's recommendation to delete the Sites and Places of Value to Mana Whenua Overlay, the need to obtain a cultural impact assessment is much reduced. However in the Panel's view this is not reason to retain such a specific method in the regional policy statement. It is the Panel's view is that the term cultural impact assessment is too definitive at the regional policy statement level of the Unitary Plan."

20. It equally follows that the deletion of the provisions relating to cultural impact assessments 'reduced the impact' of the sites of value. However, in reaching its decision to delete the sites of value provisions, the Decision Report does not take this matter into account.

Regional Policy Statement higher order policies

21. Decision Report Topic 009 relates specifically to the RPS component of the PAUP. The RPS has its particular statutory purpose and directives within the hierarchy of statutory instruments under the RMA.
22. The RPS seeks to:
 - a. Achieve the purpose of the RMA by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the region;
 - b. Identify the issues of significance to iwi authorities in the region, and the policies for those issues;
 - c. The methods to implement those policies.
23. The reason for deleting the objectives and policies of the RPS relating to sites of value is based on the perceived lack of identification and evaluation of the sites of value within the proposed rules, being matters within the lower order regional and/or district plan components of the PAUP.
24. The deletion of the policy framework for sites of value to Mana Whenua, particularly on the basis of perceived issues with the identification and evaluation of sites of value contained within the overlay:
 - a. Is not a proper basis for deleting the higher order objectives and policies;
 - b. Fails to apply the statutory directives and provide for the Part 2 requirements of the RMA relating to the provision and recognition of cultural sites and values;
 - c. Fails to follow the statutory direction for the RPS to state the policies for the issues of significance to Mana Whenua in the region;
 - d. Is inconsistent with other findings within the Decision Report (036/037), for example:

“The Panel supports the approach of having two distinct layers of protection for particular sites with which Mana Whenua have ancestral relationships. This is similar to other natural and physical resources for which the Unitary Plan provides two layers of protection.

... The re-application of the **overlay** can be considered once the values of Mana Whenua and the sites that are important to them in relation to these values have been identified following appropriate consultation and research..." [Emphasis added]

25. Similarly, the deletion of the references to cultural landscapes from the RPS on the basis that rules and maps have not been identified:

- a. Fails to provide for the important Part 2 requirements of the RMA relating to the provision and recognition of cultural sites and values;
- b. Is inconsistent with other findings of the Decision, for example:

"The regional policy statement sets out the issues of significance to Māori and to iwi authorities in the region, and this includes:

protecting Mana Whenua culture, landscapes and historic heritage."

- c. Fails to follow the statutory direction for the RPS to state the policies for the issues of significance to Mana Whenua in the region;
- d. Was based on irrelevant factors, particularly in speculating as to future plan changes and rules, for example:

"The Panel questioned a number of submitters and their witnesses as to how Māori cultural landscapes **might in future be recognised or protected in the Plan rules**. Some submitters are clearly concerned that a Māori cultural landscape **may give rise to a further layer of physical protection over broad areas** of the city, to be implemented by restrictive activity status and policy direction to **'avoid'** certain effects.

...

There are no cultural landscapes mapped nor is there a clear view of what they are, where they may apply and what type of management response would be appropriate or required if there were mapped cultural landscapes (i.e. objectives, policies and rules). The Panel agrees with the Council that it is premature to signal how Māori cultural landscapes might be recognised or protected in the Proposed Auckland Unitary Plan **rules**." [Emphasis added]

- e. Misconstrued the evidence and submissions. In supporting the retention of policies addressing Maori cultural landscape, the Council submission noted that it

would be premature to speculate as to the rules as a basis to remove the policies. However, the Decision Report (009) relies on this as a basis for deleting the policies.

Incorrect statutory test and failed to provide for relationship of Maori with their ancestral lands, waters and sites

26. In deciding to delete the references to cultural landscapes, the Decision Report (036/037) records

“Consequential to the Panel's recommendations in Topic 009, **all provisions relating to ... consideration of cultural landscapes are deleted as being unnecessary given ... the latter simply reflects that landscape values (and choices about which of those are important) are all inherently cultural in origin** (see the Panel's Report to Auckland Council – Overview of recommendations July 2016, page 72).” [Emphasis added]

27. The Decision Report introduces a requirement of necessary for Maori cultural landscapes which has no proper basis in the statutory directives under the RMA.
28. The reason for the finding similarly ignores the statutory directives to provide for the relationship of Maori with their ancestral lands, waters, sites and wahi tapu and is an improper basis for deleting provisions relating to Maori cultural landscapes.

RELIEF SOUGHT

29. The Appellant seeks that:
- a. The appeal be allowed;
 - b. The provisions (objectives, policies, methods and rules) of the PAUP in relation to sites and places of value to Mana Whenua and the provisions of the PAUP relating to Maori cultural landscapes be reinstated by the High Court;
 - c. If the relief in (b) is not provided, that the matter be remitted back to the Auckland Council for reconsideration;
 - d. Costs.

DATE: 9 September 2016



Tama Hovell

Legal Counsel for Independent Maori
Statutory Board

To: The Registrar, High Court, AUCKLAND

And to: The Respondents and interested parties to the
decision to which this appeal relates

This notice of appeal is filed by Tama Hovell, solicitor for the Appellant, of the firm
Atkins Holm Majurey Ltd

Address for Service: C/- Tama Hovell
Atkins Holm Majurey Ltd
Level 19, 48 Emily Place
PO Box 1585, Shortland Street
Auckland 1140

Telephone: (09) 304 0294

Facsimile: (09) 309 1821

Email: tama.hovell@ahmlaw.nz