BEFORE THE Independent Hearings Panel at Ngaruawahia

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of hearing submissions and further submissions on the proposed Waikato District Plan

AND

IN THE MATTER of Hearing 18: Rural

LEGAL SUBMISSIONS
ON BEHALF OF WAIKATO DISTRICT COUNCIL

Dated 30 September 2020

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INTRODUCTION

1. At the conclusion of the Waikato District Council's ("Council") opening on the Rural topic hearing, the Panel requested that I prepare legal submissions addressing the applicability of the Environment Court's decision in *Cabra Rural Developments Limited v Auckland Council* [2018] NZEnvC 90 ("Cabra 2018") on the Panel's determination of submissions on the proposed Waikato District Plan ("Proposed Plan").

2. The issue arises from the legal submissions of counsel for Middlemiss Farm Holdings Limited and Buckland Land Owners Group (together referred to as "MFH") who states that the Cabra 2018 decision should be adopted by the Panel, when considering the relief sought by MFH.

IS THE CABRA 2018 DECISION BINDING ON THE PANEL?

3. Counsel for MFH claims that judicial decisions concerning transferrable development rights "must carry weight in these proceedings over the opinions of the writer of the recommendation reports, because they are findings from higher order judicial bodies".[1] He goes on to invite the Panel to use the Cabra decision as a precedent.[2]

4. I do not accept that proposition is correct in law. It is well established that the Environment Court is not bound by its own decisions and is free to consider each case on its own facts and merits.[3] Environment Court decisions are not binding on the Panel, at best, they are a guide only as rarely are the factual situations identical.

5. The Environment Court has specifically commented on the issue of whether a provision in one district plan would create a precedent in respect of another district plan. In *New Zealand Heavy Haulage Association Inc v South Taranaki District Council*[4] the Court stated:

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[1] Middlemiss and Buckland legal submissions, dated 28 September 2020, paragraph 1.4.
[2] Middlemiss and Buckland legal submissions, dated 28 September 2020, paragraph 9.4.
[3] *Raceway Motors Limited v Canterbury Regional Planning Authority* [1976] NZLR 605.
[4] [2018] NZEnvC 80.

> [41] The Court has rarely found *precedent* arguments greatly convincing. Within the overall statutory structure of plan-making, each situation is generally to be judged on its own merits (as the Association effectively acknowledged in the attitude it took to the Ruapehu situation). We will deal with the South Taranaki situation on its own merits and judge it against the statutory requirements. What might happen elsewhere in the future will depend on the issues relevant to that place and time.

6. Accordingly, the Panel's determination on the relief sought by MFH must be assessed on its own merits, applying the statutory tests as they relate to the hierarchy of planning documents applicable to the Waikato district.

7. For completeness, I acknowledge that under section 74(2)(c) of the Resource Management Act 1991 ("RMA"), the Council when preparing or changing a district plan, must have regard to the extent to which the district plan *needs* to be consistent with the plans or proposed plans of adjacent territorial authorities. However, that obligation falls short of the claim made on behalf of MFH that the Cabra 2018 decision is binding on your decisions on submissions requesting a transferable development rights ("TDR") regime in the Proposed Plan.

FACTUAL SITUATION ARISING IN CABRA 2018

8. The Environment Court considered appeals which sought to reinstate the Independent Hearing Panel ("IHP") recommendations relating to the subdivision rules that should apply to the protection of significant ecological areas ("SEA's") concerning indigenous vegetation and wetlands in the Auckland Rural areas. The Auckland Council had substituted the IHP recommendations for its own decisions due to its concern that the IHP recommendations would lead to an uncontemplated level of subdivision with the Rural area, especially in areas other than the Countryside Living zone. The Auckland Council's provisions were more constraining than those of the IHP.[5]

[5] *Cabra Rural Developments Limited & Ors v Auckland Council* [2018] 90 at [5].

9. The outcome of the hearing turned on the most appropriate standards and criteria for incentivized protection of SEAs and revegetation for restricted discretionary activity Rural Subdivision.[6] The parties were agreed that the Transferable Rural Site Subdivision ("TRSS") rights should only enable subdivision within the Countryside Living zone, and to that extent the parties were consistent with both the Auckland Council decision and the IHP recommendation.[7]

10. At the core of the case were the objectives and policies for indigenous biodiversity (Chapter B7 Natural Resources of the RPS) and the overlay provisions, including objectives and policies for Significant Ecological Areas Overlay (terrestrial and marine) (D9) and relevant rules. This included those arising in the coastal environment and therefore affected by the New Zealand Coastal Policy Statement ("NZCPS").[8]

11. The Environment Court considered the relevant planning provisions, particularly the NZCPS, the RPS, and the RMA as these related to the Auckland Unitary Plan ("AUP"). The Court disagreed with the Council's contention that only those areas mapped as SEAs in the AUP constituted a significant ecological area.[9] It was evident that there were many other areas identified that would constitute SEAs. Following previous case law, the Court stated it was a question of fact whether an area was a SEA.[10]

12. Turning to consider the appropriate provisions put forward by the parties, the Environment Court found that there should be a clear preference in the AUP for transferable rights to the Countryside Living zone.[11]

13. Both the Council and the IHP provisions sought to encourage transferable rights of subdivision out of the rural area.[12] Having considered all the

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[6] At [2].
[7] At [3].
[8] At [15](a).
[9] At [140].
[10] At [166].
[11] At [266].
[12] At [313]

various factors, the Court concluded that the Council had failed to understand that the incentivisation of protection addressed a matter of significant importance in terms of the RMA and the NZCPS.[13] Accordingly, the Court concluded that the purpose of the RMA and the policy statements and the superior documents would be best met by reinstating the objectives, policies, and methods of the IHP decision that were altered by the Council decision.[14]

14. In summary, the Environment Court allowed the appeals in Cabra 18. The Auckland Council's appeal to the High Court was successful in part, and the High court remitted the matter back to the Environment Court.[15] That decision was released on 16 September 2020.[16] Attachment C to the decision is a summary of the Court's conclusions on the provisions. A copy is attached as **Appendix 1** to these submissions.

15. Essentially, the Court concluded the minimum size for lots meeting the SEA criteria for transferable development should be set at 2ha (same as IHP) but agreed with council that the right to the second lot should not arise until a minimum area of 10ha is being preserved.

APPLICABILITY OF CABRA 2018 TO WAIKATO PROPOSED PLAN

16. Counsel for MFH appropriately acknowledges that the Waikato district is different to the Auckland Council geographically, ecologically and in terms of higher Regional Policy Statement provisions. He also accepts that provisions from another jurisdiction should be carefully considered, and modified as appropriate, before any adoptions.[17] However, despite those acknowledgements, he urges the Panel to apply the Cabra 2020 attachment C provisions, with slight modification to the thresholds.

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[13] At [345].
[14] At [346].
[15] *Auckland Council v Cabra Developments Ltd* [2019] NZHC 1892 at [266].
[16] Cabra Rural developments Ltd v Auckland Council [2020] NZEnvC 153.
[17] Middlemiss and Buckland legal submissions, dated 28 September 2020, paragraph 7.7.

17. In my submission there are significant differences between the AUP and the Proposed Plan policy framework which means that the Panel should take care in "transporting" the Cabra decisions to your decisions on the Proposed Plan. The differences are set out below:

(a) The Environment Court expressly acknowledged at paragraph [3] of the Cabra 2018 decision that "The parties are agreed that TRSS rights should *only* enable subdivision within the Countryside Living zone."

The relief sought by MFH does not seek to transfer lots into a designated zone. The proposed new rules seek to transfer TDR lots within 2 kilometres of roads, nearest boundaries of school sites or residential zones of sites as identified in the Schedule attached to Mr Hartley's planning evidence. This location for the landing of receiver lots is in the Rural zone. Based on the submitter's updated relief attached to their legal submissions, lots as small as 4000m^2 could land in the Rural zone. This is below the minimum size for lots in the Waikato Country Living zone (5000m^2) and minimum size in the Waikato Rural zone (8000m^2).

This location appears to be more flexible than the Cabra 18 decision where lots are confined to the Countryside Living zone in the AUP.

(b) Unlike the Proposed Plan, the Environment Court accepted[18] that the AUP provided a policy basis for transferrable rural site subdivision. Policy E 15.3(4) of the AUP (District Plan) provides:

> (4) Protect, restore, and enhance biodiversity when undertaking new use and development through any of the following:
>
> (a) using transferrable rural site subdivision to protect areas in Schedule 3 Significant Ecological Areas – Terrestrial Schedule;

[18] *Cabra Rural Developments Limited & Ors v Auckland Council* [2018] 90 at [191] and [192].

(b) requiring legal protection, ecological restoration and active management techniques in areas set aside for the purposes of mitigation or offsetting adverse effects on indigenous biodiversity; or

(c) linking biodiversity outcomes to the other aspects of the development such as the provision of infrastructure and open space.

(c) Objective E 39.2(12), rural subdivision, in the AUP (District Plan) provides:

> "Rural lifestyle subdivision is primarily limited to the Rural-Countryside Living Zone, and to sites created by protecting or creating significant areas of indigenous vegetation or wetlands."

(d) The Environment Court expressly held[19] the method that transfers the lot advantage out of the general rural area is clearly supported by the general objective and policies for the rural area and biodiversity. The Court said this is because a subdivision occurs outside the productive area, within the Countryside Living zone.

The Proposed Plan contains no objective or policy framework enabling transferable rights.

(e) Both the Auckland Council and IHP Provisions sought to encourage transferrable rights of subdivision out of the rural area.

That is not the case with the submitter's relief which applies to the Rural zone.

18. Counsel for MFH submits that their relief meets the section 32AA requirements because it is seeking similar provisions to those approved in the Cabra cases. However, in terms of the new proposed TDR rules requested by MFH, the test is whether those rules are the most appropriate to achieve the Proposed Plan objectives, not the AUP's

[19] *Cabra Rural Developments Limited & Ors v Auckland Council* [2018] 90 at [286].

objectives which expressly provide for transferable rights into the Countryside Living zone.

19. It is further contended that the MFH relief gives better effect to the Waikato Regional Policy Statement ("Waikato RPS") in terms of protecting and enhancing indigenous biodiversity and ecological values. It is claimed that the SNA provisions in the Proposed Plan do not go far enough to give effect to the Waikato RPS.[20] The SNA hearing topic has not been heard and the s42A report for that topic is not yet available. It is submitted when assessing the MFH relief against the Waikato RPS, the recommendations on the upcoming SNA topic will be relevant to incentivised subdivision.

20. In conclusion:

(a) The Cabra decisions are not binding on the Panel and do not set a precedent;

(b) The Cabra decisions cannot simply be "transported" to the Waikato context. The policy framework in the AUP expressly enabled transferable subdivision to the Countryside Living zone. No such framework exists in the Proposed Plan and the relief sought by MFH applies to the Rural zone, not an area outside the Rural area like in Cabra; and

[20] Middlemiss and Buckland legal submissions, dated 28 September 2020, paragraph 8.15.

(c) The relief sought by MFH must be assessed on its own merits, in the context of the Waikato district, and applying the planning documents applicable to the Waikato district, including the objective and policy framework of the Proposed Plan and the Waikato RPS.

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