

**BEFORE THE ENVIRONMENT COURT  
AUCKLAND REGISTRY**

**ENV –**

**IN THE MATTER** of an appeal under clause 14(1) of  
Schedule 1 of the Resource  
Management Act 1991

**AND**

**IN THE MATTER** of a Proposed District Plan

**BETWEEN** **MIDDLEMISS FARM HOLDINGS  
LIMITED**

Appellant

**AND**

**WAIKATO DISTRICT COUNCIL**

Respondent

**To: The Registrar  
Environment Court – Auckland**

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**NOTICE OF APPEAL TO THE ENVIRONMENT COURT AGAINST  
A DECISION ON A PROPOSED DISTRICT PLAN  
BY THE WAIKATO DISTRICT COUNCIL**

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*1 March 2022*

**Counsel Instructed**

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## DECISION APPEALED

1. Middlemiss Farm Holdings Limited (the **Appellant**), appeals a decision of the Respondent, the Waikato District Council, on the following matter (the **Decision**):

The Proposed Waikato District Plan, notified and determined under Schedule 1 of the Act (**Proposed Plan**).

2. The Appellant made a submission on the Proposed Plan (Submitter number 794).
3. The Appellant is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**Act**).
4. The Appellant received notice of the Decision on 17 January 2022.
5. The Decision was made by commissioners and adopted by the Respondent.

## PROVISIONS BEING APPEALED

6. The parts of the Decision that are appealed include.
  - Part 1 – Introduction and general provisions – Interpretation
  - Part 2 – SD - Strategic Direction
  - Part 2 – ECO – Ecosystems and indigenous biodiversity
  - Part 2 – NATC – Natural Character
  - Part 2 – SUB - Subdivision
  - Part 3 – GRUZ – General rural zone
  - Part 3 – RLZ – Rural lifestyle zone
  - Part 4 – Schedules - APP2 – Criteria for determining significance of biodiversity
  - Part 4 – APP3 - Biodiversity offsetting
7. The Appellant made detailed submissions (30 pages with tracked change attachments) on the Notified Proposed Plan seeking ecological protection, maintenance and enhancement through subdivision and development incentives. This included support for Conservation Lot provisions for the protection of Significant Natural Areas (**SNAs**) and seeking that similar mechanisms be extended to provide for in situ ecological enhancement.

8. The purpose of the relief sought was to not only protect existing SNAs and significant natural features, but also to establish new and expanded areas of indigenous biodiversity, considering the significant loss and degradation in the Waikato. This would be achieved by harnessing the subdivision development process to provide resources for the permanent protection, maintenance and enhancement, of existing and new areas of native plantings, riparian margins and wetlands.
9. The submission sought detailed relief in Section 6 and proposed 8 pages of tracked changes in an attached Appendix to the submission. Part of the relief sought was to import the enhancement subdivision provisions for rural areas from the Proposed Auckland Unitary Plan (**AUP**). These were based on provisions from legacy plans including the Franklin District Plan.
10. The submission relief was further refined in the hearing process and legal submissions and planning evidence provided detailed tracked changes to the rural and other relevant provisions of the Proposed Plan.
11. Those parts of the Decision that are inconsistent with the Appellants submission, further submissions, legal submissions and hearing evidence, are the subject of this appeal.

## **REASONS FOR APPEAL AND RELIEF SOUGHT**

### **Overview**

12. The reasons for the relief sought were outlined in detail in the original submission, and legal submissions and technical evidence presented in the hearings that the Appellant participated in. The Appellant cited supporting case law for the relief sought, including the series of *Cabra* cases on the Proposed AUP rural provisions. In these cases the Auckland Council opposed the enhancement provisions but the final determination of the Court was that they met the purpose of the Act and they are now operative.
13. The AUP provisions are essentially based on legacy plan provisions from the Rodney, Manukau and Franklin territorial authorities, which are still contained in the Operative Franklin District Plan. The Appellants in that regard are not seeking

entirely new provisions but merely the extension of Franklin legacy provisions across the whole of the Waikato District.

14. The now Operative AUP provides guidance as an integrated suite of objectives, policies, and rules, that promote the protection, maintenance and enhancement of indigenous biodiversity and water quality through:
  - a) The protection and extension of SNAs and wetlands;
  - b) *In situ* subdivision for projects that demonstrate significant ecological benefit;
  - c) TDRs for lots to move from donor ecological areas to recipient zones or overlays in more accessible country living zones.
  - d) TDRs to encourage the amalgamation of titles on high class soils and transfer them to locations that are not significant for primary production.
  
15. While it is understood that the Waikato is not the same territorial authority as Auckland, the Appellant considers that the environment is sufficiently similar for the findings of the Court in *Cabra* to be given significant weight. With respect to the Hearings Panel, it did not explain why the determinations of the *Cabra* cases were seemingly of little relevance and distinguishable to the Waikato District
  
16. The main reasons for the Hearing Panel to reject the SNA conservation lot provisions, and enhancement subdivision incentives, including TDRs, was captured in the following paragraphs from the Decision Report 22: Rural:

*5.54 We heard evidence from several submitters regarding the benefits of having subdivision rules that facilitate the protection (and restoration) of areas with high ecological value in return for the ability to create compensatory small lots. There were two mechanisms advanced by submitters for achieving such an outcome. The first was a 'conservation lot' whereby an additional lot would be enabled on the same property, in return for protecting or restoring a specified area of bush or wetland. The second method was a regime for TDRs, whereby protection of areas of land with high ecological value on one property generated the right to create smaller compensatory lots on separate sites elsewhere in the district.*

*5.55 We have decided not to pursue either option. We have addressed Significant Natural Areas (SNAs) in a separate decision, whereby there is a clear obligation on landowners to appropriately manage areas of high ecological value. The recent NPS-FM likewise sets out a series of obligations on landowners to maintain the health of waterways and wetlands and provides clear direction that the further loss of wetland extent and values should be avoided. It appears to us that, in many*

*respects, the conservation lot concept would serve to simply reward landowners for doing what they are required to be doing anyway in terms of fencing off waterways, maintaining wetlands, and managing SNAs*

17. The Hearings Panel appears to have seized upon the gazetting of the National Policy Statement – Fresh Water Management – 2020 (**NPS-FM**), and its perceived regulatory impact, to conclude that no incentive provisions were required, or appropriate, in the Proposed Plan.
18. The first concern is that the Decisions are inconsistent. In a zoning decision for Pokeno, the Panel stated:

*128. We heard evidence from Ms Shanks and Mr Moore that the proposal could maintain and enhance streams and water quality through the stormwater management measures and riparian planting of waterways, thereby contributing to the restoration and protection of the health and wellbeing of the Waikato River (which this catchment ultimately drains to). However, we are concerned that under the standard PDP Residential Zone provisions there are no rules that actually require the development and implementation of an Ecological Management Plan, including riparian planting, as Ms Shanks had recommended for this land. As a result, we have included an Environmental Protection Area overlay over the areas on the CSL Block where Ms Shanks' evidence supported riparian planting (see dark green areas on Figure 14 below), which will have the effect of requiring planting upon subdivision. We have also added a provision in relation to the Munro Block that requires the consideration of planting stream margins at the subdivision consent stage. Decision Report 281: Zoning - Pōkeno*

19. The reasoning demonstrates that protection beyond the NPS-FM is required and also that the subdivision and development process is a useful tool to achieve the desired outcome of permanent and robust environmental protection and enhancement. These planning principles are not reflected in the previously quoted passage and Rural provisions in the Decision.
20. The Appellant considers that the findings of the Panel regarding the provisions for rural areas are flawed as set out in more detail below.

### **Scope and jurisdictional issues**

21. Regarding scope, there appears to have been no grounds in the submissions received for the deletion on the Conservation Lot provisions in the Notified Proposed Plan.
22. Jurisdictionally, with respect, the deletion of the Conservation Lot provisions was outside the powers and authority of the Hearings Panel.

### **Sustainable management not promoted**

23. Regarding the Act, the Decision on the Proposed Plan does not:

- a) meet the purpose and principles in Part 2;
- b) enable people to provide for their social and economic wellbeing and for their health and safety;
- c) meet the requirements of s 6(c) & s 7(d) & (f));
- d) mean that the Respondent achieves its functions as a territorial authority under s 31 of the Act;
- e) satisfy s 32 and s 32AA requirements, and the need to assess the benefits and costs of opportunities for environmental protection and enhancement, providing countryside living, and economic growth and employment. The Decision does not meet the tests in (s 32(2)(a));
- f) satisfy the matters that must be considered for a Proposed Plan (s 74);
- g) “give effect” to the higher order statutory planning instruments as is required (s 75(3)) and as explained further below;
- h) avoid, remedy and mitigate, significant adverse environmental effects; and
- i) demonstrate sound resource management practice.

24. Conservation lot incentives provide an opportunity for the permanent protection of degraded and threatened ecological remnants, which meets the requirements of the Act (including s 6((a), (c) & s 7(b), (c), (d) & (f)).

25. There are significant biodiversity and water quality benefits to be gained from ecological enhancement particularly along waterways and wetland areas. Water quality is a key issue identified by the WRPS and The Vision and Strategy, which requires an improvement of water quality in the Waikato catchment, not simply maintenance.

### **NPS – FM not given effect to**

26. As above, the reasoning in the Decision appeared to rely largely upon the regulatory requirements for fencing streams and protecting wetlands in the NPS-

FM to determine that the Conservation Lot, and other incentive provisions, were no longer required because they were an inappropriate “reward”. However:

- a) The Rural hearing was within a month of the NPS-FM and evidence had already been filed and the new NPS-FM provisions were not raised in the manner that the Panel has now determined.
- b) Therefore, the Hearings Panel received no submissions and technical evidence, e.g. in the s 42A Report or from an ecologist, to support its conclusions.
- c) There is little analysis of the actual provisions in the NPS-FM in the Decision, and it overlooked key parts of the NPS-FM, and the Act (s 6 & 7), and WRPS, that require the protection, maintenance and enhancement of indigenous biodiversity.
- d) The Hearings Panel failed to understand that just fencing a riparian margin, or not developing a wetland, does not achieve the statutory requirements. Without the capital, resources and land law instruments, associated with subdivision and development (consent notices, monitoring and enforcement measures etc), riparian areas and wetlands could become weed infested and of little ecological benefit.
- e) The Hearings Panel also failed to recognise and give effect to Policies 5, 6 and 13 of the NPS-FM which actively seek an improvement in and restoration of freshwater values and ecosystems. These policies will not be achieved in any meaningful way unless specific planning provisions are put in place to incentivise these outcomes.
- f) If the Hearings Panel intended to rely on the NPS-FW, to the extent that is reflected in the Decision (e.g. to remove the Respondent’s promoted Conservation Lots etc), natural justice and a fair hearing process would have been to reconvene the Hearings. This would have enabled the presentation of legal submissions and evidence from the Council and the parties, regarding the interpretation of the NPS-FW and how it should be implemented through the district plan.

27. Furthermore, the Decision does not give effect to the NPS-FM for the following reasons:

- a) The gravitas of the loss of biodiversity and water quality degradation in the Waikato was not fully acknowledged by the Panel. The Decision does not prioritise the health and well-being of water bodies and freshwater ecosystems (Objective 2.1).
- b) The Panel policy strategy for the management of the natural and physical resources in rural areas was mainly to protect those areas for primary production. The Decision does not give sufficient weight to the protection and enhancement of ecosystem services, essential for primary production, to achieve a sustainable representation of biodiversity across the District.
- c) Expert evidence supports the Appellants' relief in order to improve the well-being of the degraded water bodies and freshwater ecosystems of the Waikato.

***Policy 5: Freshwater is managed through a National Objectives Framework to ensure that the health and well-being of degraded water bodies and freshwater ecosystems is improved, and the health and well-being of all other water bodies and freshwater ecosystems is maintained and (if communities choose) improved***

- d) The Panel did not receive evidence that merely the prohibition on the modification of "natural wetlands" will ensure that "*....their values are protected, and their restoration is promoted.*" (Policy 6).
- e) While the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 now prohibit earthworks within or the drainage or modification of a "natural wetland" (clause 53), it does not compel a requirement to fence from livestock or manage invasive exotic weeds.
- f) The Decision does not achieve integrated management by recognising interactions between freshwater, land, water bodies, ecosystems, and receiving environments as required "must" (3.5(1)). Land uses have the most significant impact on water quality and the Decision will not facilitate the landuse changes necessary to restore water quality. Those changes include the retirement and enhancement of thousands of hectares of degraded and marginal land in the District.
- g) The scale of the ecological protection, restoration, enhancement and improvement, in the Waikato is so large, that resourcing from the development process is essential to give effect to the NPS-FM in a meaningful



manner. Farming is often marginal economically and will not provide the revenue streams to achieve ecosystem restoration, and the Panel received no evidence that its “stick” regulatory approach alone will achieve the purpose of the Act. Regulatory costs and burdens, and the lack of incentives, will only push more properties into pine tree carbon farming, with its associated issues.

- h) Directive 3.5(4) requires that *“every territorial authority must include objectives, policies, and methods in its district plan to promote positive effects, and avoid, remedy, or mitigate adverse effects (including cumulative effects), of urban development on the health and well-being of water bodies, freshwater ecosystems, and receiving environments.”*
- i) The relief that the Appellant is seeking is a suite of planning instruments to achieve positive effects and a “carrot” to substantially improve fresh water quality.

28. At a more fundamental level the Decision has failed to give effect to the NPS-FM and its Regulations because it has not properly developed objectives, policies, rules and methods to implement the NPS-FM. There is a hierarchy of planning instruments (*King Salmon*) and the Decision largely defers to the NPS-FW provisions directly to achieve outcomes rather than achieve the implementation task required by the Act under s 75. For example, the Appellant is not aware of any evidence being presented at the Hearing that increasing the minimum lot size for subdivision from 20 to 40 ha, removing incentives to permanently protect SNAs, and not providing incentives to re-create lost ecosystems and ecological corridors, would improve fresh water quality.

29. The Decision, in trying to rely directly on the NPS-FM and the Regulations, has misunderstood the purpose of a district plan and overlooked the role of district planning provisions, including incentive planning methods (approved in *Cabra*), to give effect to those higher order provisions. It is noted that every local authority must give effect to the NPS-FW as soon as reasonably practicable (4.1(1)).

#### **WRPS not given effect to**

30. The Decision does not give effect to the relevant objectives and policies of the Waikato Regional Policy Statement (**WRPS**) and in particular;

- a) The objectives and policies for the protection of indigenous biodiversity and the provision of “ecosystem services”. For example:

**Environmental Enhancement:** Policy 11.1 - Maintain or enhance: indigenous biodiversity

*Promote positive indigenous biodiversity outcomes to maintain the full range of ecosystem types and maintain or enhance their spatial extent as necessary to achieve healthy ecological functioning of ecosystems, with a particular focus on:*

- aa). working towards achieving no net loss of indigenous biodiversity at a regional scale;*
- a). the continued functioning of ecological processes;*
- ab). the re-creation and restoration of habitats and connectivity between habitats;*
- b). supporting (buffering and/or linking) ecosystems, habitats and areas identified as significant indigenous vegetation and significant habitats of indigenous fauna;*
- c). providing ecosystem services;*
- d). the health and wellbeing of the Waikato River and its catchment;*
- e). contribution to natural character and amenity values;*
- f). tūngata whenua relationships with indigenous biodiversity including their holistic view of ecosystems and the environment;*
- g). managing the density, range and viability of indigenous flora and fauna; and*
- h). the consideration and application of biodiversity offsets.*

*Policy 11.1 of the RPS guides Waikato Regional Council and territorial authorities to maintain indigenous biodiversity wherever it occurs. An important component of the policy direction is to work towards no net loss for all indigenous biodiversity at a regional scale. The policy is also important where ecosystems have been depleted and fragmented, such as coastal and lowland ecosystems, and where maintaining indigenous biodiversity in the long term requires enhancement and restoration. The Policy will be implemented through a combination of both regulatory and non-regulatory mechanisms. This provides the flexibility to manage the varying local contexts and take into account the positive effects that some activities may have on indigenous biodiversity. Examples of this include positive effects from riparian planting. (Emphasis added)*

- b) There is no detailed analysis in the Reasons about how the Decision gives effect to this policy as is required. This policy needs more intervention than the NPS-FM relied on in the Decision. Merely protecting habitats that exist, even if the Decision provisions were successful (which is disputed) does not re-create and restore habitats and the connections between them.
- c) Regarding the transfer of titles to amalgamate fragmented high class soils, this is a specified method in the WRPS, that has been overlooked by the Hearings Panel.
- d) Other relevant objectives include 3.4, 3.8, 3.16, 3.19 and policies 8.2, 8.3 and 11.1.

- e) The relief sought will enhance water quality and protect and maintain mana whenua values and the taonga of the Waikato River.

### **Country living and *Cabra***

31. The Appellants' relief will satisfy the undeniable demand for country living in a manner that provides significant and permanent ecological benefits, through land title instruments. This is a "win-win" for people and the environment.
32. The demand for country living may otherwise be met by the occupation of productive lots by "lifestyle" owners thus making them unavailable for primary production.
33. Rural amenity values would be maintained and enhanced with appropriate siting, design and colours of housing, and the provision of mitigation and enhancement planting, through appropriate development controls.
34. The Decision does not ensure consistency and integration (horizontal and vertical) with the relevant objectives and policies of other parts of the Proposed Plan and the higher order statutory requirements.
35. Further reasons why the relief should be granted are outlined in the detailed original submission and the legal submission and expert evidence presented in the Hearings.
36. The Appellant also respectfully refers to the reasons outlined by the Court in the *Cabra* decisions, to approve relief similar to that sought for the Waikato District. Two excerpts from *Cabra and ors v Auckland Council* [2018] EnvC 90 are provided below:

*[329] We have concluded that the use of the approach under the restricted discretionary activity will assist Council in focusing on the critical issues we have identified relating to overlays, elite soils, rural production, rural character and amenity and provision of infrastructure. Overall, we have concluded that the IHP provisions, with a modification to staging, are more efficient in achieving the outcomes of the Plans in that:*

- (a) they are focused on achieving the outcomes in respect of overlays and rural character and amenity we have discussed;*
- (b) there is the potential for increases in indigenous biodiversity through the region;*
- (c) enhancement of connection between existing biodiversity sites, pathways and ecotones is supported; and*

*(d) long-term protection of significant indigenous biodiversity can be achieved.*

37. Regarding the efficacy of the relief sought, the Court stated at page 93:

*“We have concluded that the incentivisation within Rodney, and to a lesser extent in the Manukau area, has at least reduced the level of reduction in significant indigenous vegetation, and has improved the existing stands of indigenous vegetation and resulted in wetland gain.”*

## **RELIEF SOUGHT**

38. The Appellant seeks the following relief:

- a) That the Decision be overturned, in part, in accordance with the grounds outlined in this appeal and the relief sought.
- b) Those parts to be amended include:
  - Part 1 – Introduction and general provisions – Interpretation
  - Part 2 – SD - Strategic Direction
  - Part 2 – ECO – Ecosystems and indigenous biodiversity
  - Part 2 – NATC – Natural Character
  - Part 2 – SUB - Subdivision
  - Part 3 – GRUZ – General rural zone
  - Part 3 – RLZ – Rural lifestyle zone
  - Part 4 – Schedules - APP2 – Criteria for determining significance of biodiversity
  - Part 4 – APP3 - Biodiversity offsetting
- c) That the Proposed Plan be amended, insofar as it does not provide the Appellant with the;
  - objectives and policies;
  - rules including subdivision rules and zoning;
  - activity status; and
  - standards;

sought in its submission and this Appeal.

- d) Provisions similar to those that are now operative in the AUP for incentive subdivision, including the lot size triggers, and TDRs, including the identification of receiver areas for titles e.g. the Buckland Land Owners Group.
- e) In the alternative, the detailed track changed provisions that Middlemiss provided to the Respondent in its submission, as further modified in the Hearing process through legal submissions, and expert technical and planning evidence.
- f) The site specific relief sought for 95 Jericho Road.
- g) Other such relief, and consequential amendments, considered appropriate to meet the purpose of the Act and the higher level statutory planning requirements.
- h) Costs of and incidental to this appeal.

## **MEDIATION**

39. The Appellant consents to engaging in mediation, or any other dispute resolution activity that may be appropriate, to try and settle its appeal.

## **DOCUMENTS ATTACHED**

40. The following documents are attached to this notice:
- a) The Appellants original submission and further submission on the Proposed Plan (**Appendix A**);
  - b) The most relevant parts of the Decision to the appeal (**Appendix B**); and
  - c) A list of names and addresses of persons to be served with a copy of this notice (**Appendix C**).

**DATED** this 1st day of March 2022



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**Peter Fuller**  
**Counsel for Middlemiss Farm Holdings Limited**

**Counsel's address for service:**

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Barrister  
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## **Advice to recipients of copy of notice of appeal**

### How to become a party to proceedings

You may be a party to the appeal if;

- (a) within 15 working days after the period for lodging a notice of appeal ends you lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant; and
- (b) within 20 working days after the period for lodging a notice of appeal ends, you serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

### How to obtain copies of documents relating to the appeal

The copy of this notice served on you does not attach a copy of the appellant's submission or the decision appealed. These documents may be obtained, on request, from the appellant.

### Advice

If you have any questions about this notice, contact the Environment Court in Auckland, Wellington, or Christchurch.

**APPENDIX A – APPELLANTS’ ORIGINAL AND FURTHER SUBMISSIONS**



**APPENDIX B – PARTS OF THE PROPOSED PLAN**

**APPENDIX C – LIST OF PARTIES TO BE SERVED****Respondent – Waikato District Council**

District Plan Hearings Administrator  
Waikato District Council  
Private Bag 544  
Ngaruawahia 3742  
Email: Districtplan@waidc.govt.nz

**Waikato Regional Council**

Waikato Regional Council  
Attn: Andrew Tester  
Senior Policy Advisor  
Private Bag 3038  
Waikato Mail Centre  
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Cc: waikatoregion.govt.nz

**Submitters**

See **attached** Excel spreadsheet as at 1 March 2022