In the High Court of New Zealand
Auckland Registry
I Te Kōti Matua O Aotearoa
Tāmaki Makaurau Rohe
CIV-2025-404-

Under	the Resource Management Act 1991 (RMA)
In the matter	of an appeal against a decision of the Environment Court under section 299 of the RMA
Between	**Auckland Council** a unitary authority established under the Local Government (Auckland Council) Act 2009 **Appellant**
And	**Gardon Trust** of 92 Constable Road, Waiuku 2683, New Zealand, family trust **Matoaka Holdings Limited** a company with its registered office at Level 14, 88 Shortland Street, Auckland Central, Auckland 1010, New Zealand **Pokorua Holdings Limited** a company with its registered office at Level 14, 88 Shortland Street, Auckland Central, Auckland 1010, New Zealand **First Respondents**

(continued over)

Notice of appeal

Date: 20 March 2025

Next Event Date:
Case Officer:
Judicial Officer:

DLA PIPER

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And **Baseline (2018) Limited**
a company with its registered office at Level 1, Australis Nathan Building, 37 Galway Street, Auckland Central, Auckland 1010, New Zealand

Second Respondent

And **Chapman Onion Exports Limited**
a company with its registered office at Union Road, RD3, Pukekohe, New Zealand

Sharon Maria Chapman
of 233a Union Road, Mauku, Pukekohe 2678, New Zealand, occupation unknown

Third Respondents

To: The Registrar of the High Court at Auckland

And to: The Registrar of the Environment Court at Auckland

And to: The First Respondents, Gardon Trust, Matoaka Holdings Limited, and Pokorua Holdings Limited

And to The Second Respondent, Baseline (2018) Limited

And to: The Third Respondents, Chapman Onion Exports Limited, and Sarah Chapman

And to: The section 274 interested parties to the appeals to the Environment Court

Take notice that Auckland Council (**Council**) is appealing to the High Court against the decision of the Environment Court in *Gardon Trust & Ors v Auckland Council* [2025] NZEnvC 058 (**Decision**) dated and issued on 27 February 2025 upon the grounds that the decision is wrong in law and upon the further grounds set out below.

Decision appealed against and scope of appeal

1 The Decision allowed appeals by Gardon Trust and others against a decision made by the Council[1] to decline a private plan change request (**PC73**) made by the First Respondents to rezone approximately 32.5 hectares of land at 43, 45A, 92 and 130 Constable Road, Waiuku (**PC73 site**) from Auckland Unitary Plan Operative in part (**AUP**) Rural – Mixed Rural Zone (**MRZ**) to Residential – Mixed Housing Urban Zone, and to introduce a new precinct within the AUP.

2 The Council appeals the Decision in its entirety.

[1] The decision was made by independent hearings commissioners appointed by the Council and acting under delegated authority on 24 February 2023.

Errors of law

First error of law – misinterpretation and misapplication of provisions of the Auckland Unitary Plan Operative in part

3 The Environment Court erred in its interpretation of and misapplied AUP Regional Policy Statement (**RPS**) Objective B2.6.1(1)(b) and Policy B2.6.2(1)(d).

Second error of law – misinterpretation and misapplication of provisions of the National Policy Statement on Urban Development 2020

4 The Environment Court erred in its interpretation of and misapplied the National Policy Statement on Urban Development 2020 (**NPS-UD**) in finding that the PC73 site forms part of an existing urban environment, and in failing to recognise that Waiuku forms part of the Auckland Tier 1 urban environment for the purposes of the NPS-UD.

Third error of law – misinterpretation and misapplication of provisions of the National Policy Statement for Highly Productive Land 2022

5 The Environment Court erred in its interpretation of and misapplied clause 3.6 of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**).

Fourth error of law – failure to take into account and properly apply mandatory considerations under the Resource Management Act 1991

6 The Environment Court erred in its interpretation of s 75(3) of the Resource Management Act 1991 (**RMA**) when it adopted a "balancing" approach to its consideration of PC73 and failed to give effect to various provisions of the NPS-UD and NPS-HPL (as required by s 75(3)(a) of the RMA) and the AUP RPS (as required by s 75(3)(c) of the RMA).

Fifth error of law – failure to have regard to relevant considerations / failure to properly apply mandatory considerations

7 The Environment Court erred when it failed to have regard to the following relevant considerations:

7.1 The expert planning evidence before the Environment Court from Ms Chloe Trenouth to the extent that it addressed planning processes for Waiuku.

7.2 The Tāmaki – Whenua Taurikura Auckland Future Development Strategy 2023-2053 (**FDS**), as required by clause 3.17(a) of the NPS-UD and s 74(2)(b)(i) of the RMA, and that the FDS identifies Waiuku as a rural settlement and forms part of the rural area strategy.

Sixth error of law – taking into account irrelevant considerations

8 The Environment Court erred by taking into account the following irrelevant considerations:

8.1 That the Environment Court considered that the Housing and Business Development Capacity Assessment for the Auckland Region 2023 (**HBA**) prepared under the NPS-UD, did not meet the explicit requirements of the NPS-UD.

Questions of law

9 The questions of law to be determined in this appeal are:

9.1 Did the Environment Court err in its interpretation of and misapply AUP RPS Objective B2.6.1(1)(b) and Policy B2.6.2(1)(d)?

9.2 Did the Environment Court err in its interpretation of and misapply the NPS-UD in finding that the PC73 site

forms part of an existing urban environment, and in failing to recognise that Waiuku forms part of the Auckland Tier 1 urban environment for the purposes of the NPS-UD?

9.3 Did the Environment Court err in its interpretation of and misapply clause 3.6 of the NPS-HPL?

9.4 Did the Environment Court err in its interpretation of s 75(3) of the RMA when it adopted a "balancing" approach to its consideration of PC73 and fail to give effect to various provisions of the NPS-UD and NPS-HPL (as required by s 75(3)(a) of the RMA) and the AUP RPS (as required by s 75(3)(c) of the RMA)?

9.5 Did the Environment Court err when it failed to have regard to the following relevant considerations:

9.5.1 The expert planning evidence before the Environment Court from Ms Chloe Trenouth to the extent that it addressed planning processes for Waiuku?

9.5.2 The FDS, as required by clause 3.17(a) of the NPS-UD and s 74(2)(b)(i) of the RMA, and that the FDS identifies Waiuku as a rural settlement and forms part of the rural area strategy?

9.6 Did the Environment Court err by taking into account the following irrelevant considerations:

9.6.1 That the Environment Court considered that the HBA prepared under the NPS-UD, did not meet the explicit requirements of the NPS-UD?

Grounds of appeal

10 The Decision was made on the basis of the errors of law described above. The errors were material to the Decision and the Environment Court's findings. The appeal should be allowed on the grounds that the Decision was made on a wrong legal basis.

11 The grounds of appeal relevant to each of the questions of law to be determined are set out below.

First error of law – misinterpretation and misapplication of provisions of the AUP

12 AUP RPS Objective B.2.6.1(b) and Policy B2.6.2(1)(d) require growth and development which "avoids elite soils and avoids where practicable prime soils which are significant for their ability to sustain food production." Objective B.2.6.1(b) and Policy B2.6.2(1)(d) are directive, with a clear focus on avoidance.

13 The Environment Court considered that the wording of Objective B.2.6.1(b) and Policy B2.6.2(1)(d) require the consideration of the words "avoids where practicable", "prime soils" and "significant for their ability to sustain food production".[2]

14 The Environment Court found that there was no dispute that the land involves prime soils.[3]

15 In terms of the words "avoids where practicable", the Environment Court found that the question turns on whether it is practicable to avoid the use of either the PC73 site or other land with prime soil for the expansion of Waiuku.[4]

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[2] Decision at [114].
[3] Decision at [115].
[4] Decision at [115].

16 In terms of the words "significant for their ability to sustain food production", the Environment Court relevantly found that the range of crops that could be cultivated on the PC73 site is likely to be similar to those within nearby sites, it is difficult to see anything about the PC73 site that makes it significant in comparison to nearby land or throughout the region as a whole, and the relatively small area of prime soils on the PC73 site does not make it significant.[5]

17 These reasons are contrary to the guidance that the High Court in *Gock v Auckland Council* gave about the phrase "elite soils and prime soils which are significant for their ability to sustain food production" in AUP RPS Policy B2.2.2(2)(j).[6] In particular, the High Court in *Gock* did not support a quantitative approach to assessing significance as it did not see how a comparator could be identified and it considered that a distinguishing feature needed to be an extrinsic factor that can affect the use of the soils.[7]

18 In addition, the Environment Court:

18.1 Erroneously concluded that the question under AUP PRS Policy B2.6.2(1)(d) "turns on whether it is practicable to avoid the use of either [the PC73 site] or other land with prime soil for expansion of Waiuku";[8]

18.2 The Environment Court misinterpreted what constituted "prime soils" in stating its own definition,[9] rather than adopting the AUP definition of "land containing prime soils";[10] and

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[5] Decision at [122]-[124].
[6] *Gock v Auckland Council* [2022] NZHC 3126, (2022) ELRNZ 438.
[7] *Gock v Auckland Council* [2022] NZHC 3126, (2022) ELRNZ 438 at [84].
[8] Decision at [118].
[9] Decision at [123].
[10] In Chapter J1 Definitions of the AUP.

18.3 Erroneously conflated AUP RPS Policy B2.6.2(1)(d) with "the additional lens of the NPS-UD".[11]

Second error of law – misinterpretation and misapplication of provisions of the NPS-UD

19 The Environment Court held that the PC73 site "forms part of an existing urban environment and that urban environment is Waiuku".[12]

20 The NPS-UD contains the following definition of "urban environment":

> **urban environment** means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:
>
> (a) is, or is intended to be, predominantly urban in character; and
>
> (b) is, or is intended to be, part of a housing and labour market of at least 10,000 people

21 The requirements in paragraph (a) and (b) of the definition are conjunctive given the use of the word "and" between the paragraphs.

22 The Environment Court made inconsistent factual findings that Waiuku is a town with a population of "nearly 10,000",[13] that the population of Waiuku "is currently above or near … 10,000",[14] that Waiuku has a population "exceeding" 10,000,[15] and that Waiuku "would sustain a population of 10,000 people currently".[16] In making these factual findings the Environment Court did not consider both the "housing and labour market" as required by paragraph (b) of the definition.

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[11] Decision at [127].
[12] Decision at [145], also see [156].
[13] Decision at [16].
[14] Decision at [141].
[15] Decision at [145].
[16] Decision at [233].

23 Regardless of these inconsistent factual findings, the PC73 site is zoned rural (given its MRZ zoning under the AUP), and so does not form part of an urban environment. The Environment Court was therefore in error in concluding that the PC73 site forms part of an existing urban environment, despite its finding that the PC73 site and Waiuku generally "is intended to be part of a housing and labour market with at least 10,000 people",[17] and Waiuku was in fact an urban environment in itself.[18]

24 The Court also erred by failing to recognise that Waiuku forms part of the Auckland Tier 1 urban environment for the purposes of the NPS-UD.

Third error of law – misinterpretation and misapplication of provisions of the NPS-HPL

25 Policy 5 of the NPS-HPL provides that "The urban rezoning of highly productive land is avoided, except as provided in this national policy statement." Policy 5 of the NPS-HPL is directive, and the only pathway for urban rezoning to occur is through clause 3.6(1)(a) to (c) of the NPS-HPL, which states:

> **3.6 Restricting urban rezoning of highly productive land**
>
> (1) Tier 1 and 2 territorial authorities may allow urban rezoning of highly productive land only if:
>
> (a) the urban rezoning is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the National Policy Statement on Urban Development 2020; and
>
> (b) there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment; and

[17] Decision at [141].
[18] Decision at [147], also see [154]-[165].

(c) the environmental, social, cultural and economic benefits of rezoning outweigh the long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

26 The requirements of clause 3.6(1)(a) to (c) of the NPS-HPL are conjunctive given the use of the word "and" between the paragraphs.

27 Clause 3.6(1)(a) of the NPS-HPL refers to the rezoning being "required". Clause 3.6(1)(a) also refers to "sufficient development capacity" to meet the requirements of the NPS-UD, and whether the rezoning is "required" in that context.

28 In terms of determining what is meant by "sufficient development capacity", clause 3.2 of the NPS-UD states:

3.2 Sufficient development capacity for housing

(1) Every tier 1, 2, and 3 local authority must provide at least sufficient development capacity in its region or district to meet expected demand for housing:

(a) in existing and new urban areas; and

(b) for both standalone dwellings and attached dwellings; and

(c) in the short term, medium term, and long term.

(2) In order to be sufficient to meet expected demand for housing, the development capacity must be:

(a) plan-enabled (see clause 3.4(1)); and

(b) infrastructure-ready (see clause 3.4(3)); and

(c) feasible and reasonably expected to be realised (see clause 3.26); and

(d) for tier 1 and 2 local authorities only, meet the expected demand plus the appropriate competitiveness margin (see clause 3.22).

29 The NPS-HPL does not provide a geographic area for the area of assessment about sufficient development capacity in clause 3.6(1)(a). Clause 3.2 of the NPS-UD refers to at least sufficient development capacity in a "region or district". Clause 3.10 of the NPS-UD references assessing demand in "urban environments" in a region or district and that development capacity is sufficient in the region or district to meet that demand.

30 Clause 3.6(1)(b) of the NPS-HPL refers to there being "no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market". Clause 3.6(3) of the NPS-HPL states:

> (3) In subclause (1)(b), development capacity is **within the same locality and market** if it:
>
> (a) is in or close to a location where a demand for additional development capacity has been identified through a Housing and Business Assessment (or some equivalent document) in accordance with the National Policy Statement on Urban Development 2020; and
>
> (b) is for a market for the types of dwelling or business land that is in demand (as determined by a Housing and Business Assessment in accordance with the National Policy Statement on Urban Development 2020).

31 The Housing and Business Development Capacity Assessment for the Auckland Region 2023 (**HBA**) prepared under the requirements of the NPS-UD examined sufficiency throughout Auckland and also at a Local Board level, including for the Franklin Local Board Area (where Waiuku is located).

32 The HBA is intended to be relied upon, given it is specifically referred to in clause 3.6(3) of the NPS-HPL.

33 The Environment Court stated that neither the NPS-UD nor NPS-HPL define how the terms "locality" and "market" are intended to be interpreted but stated they "provide elements of a framework

for interpretation and a context for interpretation".[19] In light of that framework and context,[20] the Environment Court held:[21]

> **What are the essential attributes of the concept of 'locality and market'?**
>
> [171] We conclude that key attributes include:
>
> (a) A clearly defined area/geographical most relevant to the assessment of capacity and demand;
>
> (b) Identification of related dwelling typologies with respect to market preferences and affordability, across the range of densities – from urban zoning to rural zoning – associated with the clearly-defined area; and
>
> (c) With respect to areas of urban zoning, consideration of well-functioning urban form (Live-Work-Play connections) associated with the clearly defined area.
>
> [172] We have taken the view that the concepts of 'locality' and 'market' need to be considered as distinct but complementary concepts, rather than a single concept, where:
>
> (a) 'locality' refers to a range of attributes such as social and community identity; infrastructure provision; community amenities provision (theatre, library, recreation ground, public reserves, …); social services provision (health, education, …); while
>
> (b) 'market' is related to buyer preferences and affordability of housing in that locality, as well as to developer preferences and profitability.

34 In reaching these conclusions, the Environment Court:

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[19] Decision at [153].
[20] Decision at [154]-[170].
[21] Decision at [171]-[172].

34.1 Erroneously relied on the NPS-UD, which does not use the phrase "the same locality and market" or the phrase "locality and market";

34.2 Erroneously imported consideration of "the same locality and market" into clause 3.6(1)(a) of the NPS-HPL, which does not contain this phrase;

34.3 Failed to recognise that clause 3.6(3) of the NPS-HPL defines when development capacity is within the same locality and market for the purposes of clause 3.6(1)(b); and

34.4 Applied the wrong legal test.

35 The Environment Court also applied an inappropriate gloss to clause 3.6(1) of the NPS-HPL in suggesting that "Small areas of land, say less than 40 to 50 hectares, may be justified if they become defensible boundaries."[22]

36 In addition, the Environment Court misapplied clause 3.6(1) of the NPS-HPL by not carrying out the evaluation required by clause 3.6(1)(c) and not having regard to the evidence concerning the application of clause 3.6(1)(c).

Fourth error of law – failure to take into account and properly apply mandatory considerations under the RMA

37 The Environment Court referred at various points in the Decision to taking a "balancing" approach to the statutory criteria.[23]

38 In reaching these conclusions, the Environment Court failed to recognise that the preferred zoning and other PC73 provisions are required to give effect to the NPS-UD and NPS-HPL (as

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[22] Decision at [232].
[23] Decision at [148], [150] and [236]. Similarly, see Decision at [133].

required by s 75(3)(a) of the RMA) and the AUP RPS (as required by s 75(3)(c) of the RMA).

39 The Supreme Court in *Environmental Defence Society v New Zealand King Salmon (**King Salmon**)* has held that "give effect to" means to implement. It is a strong directive creating a firm obligation on the part of those subject to it.[24]

40 The Supreme Court in *King Salmon* recognised that the way in which relevant policies are expressed has a central bearing on decision making on a plan change. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive than a requirement to give effect to a policy which is worded at a higher level of abstraction.[25]

41 The Supreme Court in *King Salmon* also recognised that when dealing with a plan change, objectives and policies expressed in more directive terms will carry greater weight than those expressed in less directive terms.[26]

42 The "balancing" approach taken by the Environment Court led it to err in its application of ss 75(3)(a) and 75(3)(c) of the RMA, and led the Environment Court to balance less directive provisions of the NPS-UD against more directive provisions of the NPS-HPL and the AUP RPS.[27]

43 The correct approach was for the Environment Court to recognise that more directive objectives and policies in the NPS-HPL relating to highly productive land (notably Objective 1 and Policy 5 and whether the strict criteria in clause 3.6 were met) and in the

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[24] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].
[25] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, [2014] 1 NZLR 593 at [80].
[26] *Environmental Defence Society v New Zealand King Salmon* [2014] NZSC 38, [2014] 1 NZLR 593 at [129].
[27] For example, see Decision at [150] and [236].

AUP RPS relating to prime soils (including Objective B2.6.1(1) and Policy B2.6.2(1)) should be given more weight.

Fifth error of law – failure to have regard to relevant considerations / failure to properly apply mandatory considerations

44 The Environment Court repeatedly expressed the view that Waiuku has been overlooked / left out of consideration for development and forgotten through the planning process.[28]

45 In reaching these findings the Environment Court failed to recognise the expert planning evidence before the Environment Court from Ms Chloe Trenouth to the extent that it addressed planning processes for Waiuku.

46 In reaching these findings the Environment Court also failed to have regard to the FDS, as required by clause 3.17(a) of the NPS-UD and s 74(2)(b)(i) of the RMA, and that the FDS identifies Waiuku as a rural settlement and forms part of the rural area strategy.

Sixth error of law – taking into account irrelevant considerations

47 The Environment Court identified that it perceived a problem with the HBA as it was "carried out mainly at a regional level and therefore does not meet the requirements of the NPS-UD".[29]

48 As discussed in the context of the third error of law, the HBA is intended to be relied upon, given it is specifically referred to in clause 3.6(3) of the NPS-HPL. The Environment Court did not have jurisdiction to determine whether the HBA met the requirements of the NPS-UD, and to the extent that the

[28] Decision at [39]-[40] and [233].
[29] Decision at [206]-[207].

Environment Court engaged in this exercise it took into account an irrelevant consideration.

49 In any event, the HBA was prepared in accordance with the requirements of the NPS-UD.

Relief sought

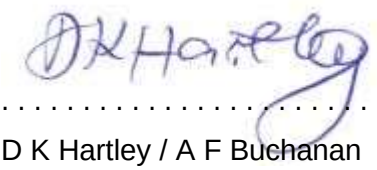
50 The Council seeks:

50.1 That its appeal be allowed and the Decision set aside;

50.2 That the matter be referred back to an alternative division of the Environment Court for reconsideration in light of the findings of the High Court; and

50.3 Costs.

Date: 20 March 2025



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D K Hartley / A F Buchanan
Solicitor for Auckland Council

This document is filed by Diana Hartley of DLA Piper New Zealand, solicitor for the appellant.

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