

**BEFORE THE ENVIRONMENT COURT / I MUA I TE KOOTI TAIAO O
AOTEAROA**

AT AUCKLAND

UNDER the Resource Management Act 1991

A N D

IN THE MATTER of an appeal under clause 29(6) of Schedule 1 of the Act

BETWEEN **GP (TURNSTONE CAPITAL) LIMITED**

(ENV - 2019 - AKL -)

Appellant

AUCKLAND COUNCIL

Respondent

NOTICE OF APPEAL

12 MAY 2020

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**TO: THE REGISTRAR
ENVIRONMENT COURT
AUCKLAND**

- 1. GP (TURNSTONE CAPITAL) LIMITED (Turnstone Capital)**
appeals against part of a decision of Auckland Council on Private Plan Change 25: Warkworth North (**PPC25**).
- 2. Turnstone Capital:**
 - a. Lodged the request for PPC25 on 29 March 2018;
 - b. Made a submission on PPC25 on 5 July 2019; and
 - c. Made a further submission on PPC25 on 12 September 2019.
- 3. Turnstone Capital is not a trade competitor for the purposes of section 308D of the Act.**
- 4. Turnstone Capital received notice of the Decision on 26 March 2020.**
- 5. The Decision was made by Independent Commissioners appointed by Auckland Council and delegated the appropriate authority to do so.**
- 6. The parts of the Decision that Turnstone Capital is appealing are:**
 - a. The retention of the Future Urban Zone on the corner of Hudson Road and Falls Road;
 - b. Deficiencies in the provisions aimed at the timely delivery of the Western Link Road to collector road standard;
 - c. The rejection of bespoke stream work provisions in Sub-precinct A;
 - d. The extent of the yard setback for properties adjoining the Future Urban zoned land in the development known as Viv

Davie-Martin Drive;

- e. The finding that the Stormwater Management Plan will engage the s127 process envisaged under the Region-wide Network Discharge Consent (**NDC**); and
 - f. Correction of minor errors in the planning provisions.
7. The general reasons for the appeal are that the parts of the Decision referred to in (a) – (e) above:
- a. Do not give effect to the National Policy Statements (**NPS**) currently in force, including the NPS:FM and NPS:UD;
 - b. Do not give effect to the Regional Policy Statement (**RPS**);
 - c. Are inconsistent with the regional provisions of the Auckland Unitary Plan: Operative in Part (**AUP**);
 - d. Have policies and methods that are not the most appropriate method for achieving the objectives of the AUP, including but not limited to the new Precinct's objectives;
 - e. Have not adequately considered the actual or potential effects of activities in the creation of the zoning and rule framework.
8. The specific reasons for the appeal are as follows:

Zoning

- a. Sub-precinct A covers the land area owned or controlled by Stubbs Farm Estate Limited at the time of the private plan change request in 2018.
- b. The southern corner of Sub-precinct A is bounded by Hudson Road, Falls Road, the stream and the existing Light Industry zone along Hudson Road. It is in three titles, two of which were the subject of an earlier Environment Court decision, *Albert Road Investments Ltd v Auckland Council* [2018]

NZEnvC 102, to subdivide to raise finance for the plan change process.

- c. A range of zonings were sought for this land:
 - i. The March 2018 request for a private plan change sought this area be zoned predominantly Residential: Single House with a strip adjacent the stream zoned Residential: Mixed Housing Suburban.
 - ii. At the request of the Council, the private plan change as notified proposed this area be zoned Residential: Mixed Housing Suburban.
 - iii. Contrary to that earlier request, the July 2019 submission from Auckland Council sought this area be zoned Business: Light Industry.
 - iv. The July 2019 submission from Turnstone Capital sought this area be zoned Business: Mixed Use.
- d. The Decision elected to retain this, now isolated, pocket of Future Urban zone pending further consideration.
- e. In relation to a potential industrial zoning, the Decision correctly records that there was no evidence from Auckland Council underpinning the projected need and quantum for additional Business: Light Industry zone.¹
- f. In relation to a potential business zoning, the Decision notes that “more bespoke provisions will likely be necessary. The present zone options and provisions are simply too coarse for the uncertainty that exists.”²

¹ Paragraph 83, page 23.

² Paragraph 86, page 23.

- g. In relation to a potential residential zoning, the Decision simply notes it should remain as Future Urban Zone “in the meantime pending further consideration both because there is sufficient live-zoned residential land available under PPC25 and pending subsequent experience of the need for further BLIZ land.”³ There was no suggestion, by any party, that PPC25 provided “sufficient live-zoned residential land” for the growth of Warkworth, a satellite town⁴ with population growth expected to be 20 – 25,000.⁵
- h. It is clear the Independent Commissioners were swayed by the Council’s concerns that it can be problematic to rezone live zoned land to Business: Light Industry at a later date⁶ and preferred to leave the zoning “decision for a later date when the need or rationale for the range of appropriate activities is more evident.”⁷ It was wrong to do so when:
- i. there was no evidence underpinning or supporting the Council’s request for more Business: Light Industry land in Warkworth;
 - ii. there was ample evidence from Turnstone Capital and Middle Hill Limited that there is in excess of 50 years’ supply of live zoned Business: Light Industry land in Warkworth.
- i. The Independent Commissioners were correct not to zone the land Business: Light Industry, as sought by Council, but erred when they failed to introduce a live zone on the land thereby creating a pocket of Future Urban Zone surrounded by live zoned land, unnecessarily hindering urban development and unduly increasing the costs of obtaining

³ Paragraph 110, page 27.

⁴ Auckland Plan

⁵ Paragraph 63, page 18.

⁶ Paragraph 83, page 23.

⁷ Paragraph 85, page 23.

consent to develop the land.

- j. There are strong grounds for zoning the land either Residential: Mixed Housing Suburban or Business: Mixed Use. Either zone would appropriately address the topography of the land, fit well with the pattern of surrounding zonings, and provide a range of appropriate uses to ensure a superior urban outcome for the locality.

Western Link Road

- k. The Western Link Road (**WLR**), connecting Falls Road in the south to State Highway 1 in the north, is a key structural element of PPC25. Its timely delivery as a collector road (with the potential to be upgraded by Auckland Transport to an arterial road in the future) is fundamental to the development of the PPC25 area.
- l. PPC25, as sought by Turnstone Capital, had provisions to ensure:
 - i. Stream-lined consenting of the WLR project;
 - ii. Timely delivery of the WLR project;
 - iii. Staged occupation of built form development.
- m. The Decision accepted the staging and timing⁸ but made a number of changes to the PPC25 provisions intended to “provide greater certainty as to their intent, as stated by Turnstone Capital.”⁹ However, the amendments made by the Decision inadvertently changed the extent of construction required at each stage thereby undermining the intent of the provisions.

⁸ Paragraphs 158 and 159, page 36.

⁹ Paragraph 160, page 37.

- n. In relation to the stream-lined consenting of the WLR project, the Decision records the Independent Commissioners were satisfied that sufficient mitigation and offsets could be achieved within Sub-precinct A to enable the consenting of the WLR stream crossings and that it was “appropriate to include provisions relating to the stream works necessary to form the WLR through Sub-precinct A. This will provide more certainty for Turnstone Capital and Auckland Transport in the planning, funding, staging and design of that road.”¹⁰ The intent was for the construction of the WLR to be “exempt from the E3.4.1 rules.”¹¹ However, the amendments made by the Decision limited the exemption to one rule in E3.4.1 and not the key rule or even all rules as was intended.

Bespoke Stream Work Provisions

- o. The Decision “generally adopts the standard provisions of the AUP except where a modification is required to achieve the overall purpose of PPC25.”¹² This approach, which is consistent with the manner in which precinct provisions are generally developed under and in the AUP,¹³ is supported.
- p. The Independent Commissioners were alive to the issues Turnstone Capital had faced during the project, as at the date of the hearing and the “fact that the pathway to this point has not been as smooth as it could (and perhaps should) have been.”¹⁴
- q. In relation to the inclusion of the WLR stream works rule, the Decision records that “inclusion of that activity is consistent with AUP(OP) policy direction that provides for the balanced consideration of stream works necessary for the provision of

¹⁰ Paragraph 198, pages 44-45.

¹¹ Paragraph 199, page 45.

¹² Paragraph 27, pages 8-9.

¹³ Paragraph 27, pages 8-9.

¹⁴ Paragraph 30, page 10.

infrastructure, growth and development.”¹⁵ However, for all other stream works in Sub-precinct A the Decision found that Chapter E3, including the rules in E3.4.1 should apply¹⁶ on the basis that the Independent Commissioners had “not received sufficient information to conclude that such reclamation is appropriate or can be adequately mitigated / offset”¹⁷ with the existing consenting process under E3 “the appropriate mechanism to determine such outcomes.”¹⁸ In doing so, the Independent Commissioners erred.

- r. Turnstone Capital proposed to culvert three streams, reclaim three sections of intermittent streams (with a combined length of 350m) and enhance other sections of permanent and intermittent streams within Sub-precinct A¹⁹ to enable efficient urban development of Sub-precinct A. The plan change as notified, supported by Turnstone Capital’s submission, was for these works to be assessed as a restricted discretionary activity requiring mitigation or offset measures to ensure no net loss of biodiversity (assessed by reference to the documents referred to in AUP Policy E3.3(4)). The evidence of Turnstone Capital demonstrated that there will be adequate opportunity within the precinct to provide any offsets necessary to achieve no net loss of biodiversity.
- s. The Council’s witness accepted a restricted discretionary activity status for the proposed works but sought the strengthening of the assessment criteria. This was proposed in the version of PPC25 put forward by Turnstone Capital in closing.

¹⁵ Paragraph 198, page 44.

¹⁶ Paragraph 199, page 45.

¹⁷ Paragraph 200, page 45.

¹⁸ Paragraph 200, page 45.

¹⁹ Paragraph 181, page 41.

- t. The reasoning accepted in the Decision in relation to the activity status of stream works required for the WLR applies equally to the stream works required to enable efficient development of the urban land resource. Providing for the application to be assessed as a restricted discretionary activity ensures that there is no net loss of biodiversity.
- u. The experience of Turnstone Capital with Council to date demonstrates beyond doubt that a non-complying activity status will unduly hinder or prevent the urban development of this land. Bespoke provisions are required, and have been supported by sufficient evidence to justify restricted discretionary activity status.
- v. As demonstrated by the Turnstone Capital evidence, stream loss has been avoided where possible and otherwise minimized with appropriate mitigation and off-setting. The inclusion of a restricted discretionary activity status is consistent with AUP(OP) policy direction that provides for the balanced consideration of stream works necessary for the provision of growth and urban development. Provided there is no net loss in biological diversity, the stream works required to enable urban development of the land can proceed.

Setback adjoining Viv Davie-Martin Drive

- w. The Decision imposes a 9m yard setback “along the western boundary of the RMHS zone to provide a buffer to the RSHZ zone of Viv Davie-Martin Drive”, with associated policy support and consequential changes.
- x. The low density housing accessed via Viv Davie-Martin Drive is zoned Future Urban, not Residential: Single House zone.
- y. Presumably on the assumption that the density of development within the area would remain unchanged into the future, and in response to a misinterpretation of Auckland

Council's evidence, Mr Munro (urban design expert for submitter and PPC25 landowner, Middle Hill Ltd) in response to questions from the Independent Commissioners suggested a 9m yard setback along the boundary would be an efficient method to buffer or separate the two residential developments.²⁰

- z. The Decision errs as:
- i. Viv Davie-Martin Drive is Future Urban zone, not Residential: Single House Zone. Its future zoning is as yet unknown but will inevitably enable intensification.
 - ii. The side and rear yard setbacks in the Residential: Mixed Housing Suburban zone are 1m, capable of infringement as a restricted discretionary activity. The extent of the yard setback does not change depending on adjacent zoning. There are no known examples of excessive yards being required adjacent other Future Urban zoned land, or between two residential zones.
 - iii. There is no rationale for extending the rear yard to 9m in this location, or to making it fully discretionary to infringe the yard. Doing so creates a sub-optimal urban outcome with an inefficient use of the urban land resource.

Stormwater Management

- aa. PPC25 sought to add the AUP Stormwater Management Area Flow (**SMAF**) controls to the area. A Stormwater Management Plan (**SMP**) was prepared for the PPC25 area and submitted with the private plan change request in 2018.
- bb. Days before the Council hearing commenced, Auckland Council was granted a Region-wide NDC.

²⁰ Paragraphs 105 - 106, page 27.

- cc. Any development of the land will require consent under AUP E8 and E9.²¹ Consent may also be required under E10, or the SMP could be included in the NDC. The two options to include the SMP in the NDC are for it:
- i. To be approved through the PPC25 process and simply included;
 - ii. To be progressed by Auckland Council as a s127 application to change the NDC.
- dd. The Decision accepted that, in the absence of an agreed SMP, the appropriate route was to use s127 of the Act to incorporate the SMP into the NDC.²² In doing so, the Decision failed to acknowledge:
- i. it is only Auckland Council as consent holder who is able to lodge and progress the s127 application;
 - ii. given the Council's obstructive approach to date, there is no certainty that Auckland Council will ever engage with the SMP let alone work with Turnstone Capital (and any other landowners) to finalise the documentation and lodge a s127 application;
 - iii. even if it does, Turnstone Capital will have no standing in that process, nor any control over the final form of the SMP; and
 - iv. that Auckland Council may form the view that the s127 application should be publicly notified (and have in fact already indicated that outcome is probable), despite the extensive consultation and public process that PPC25 (including its approach to stormwater management and its draft SMP) has already been

²¹ Paragraph 216, page 48.

²² Paragraph 217, page 48.

subjected to.

- ee. The more appropriate method is for the SMP to be finalised through the PPC25 process, enabling it to then be simply adopted into the NDC.

Minor errors to be corrected

- ff. There are a number of minor errors in the decision version of PPC25 that should be corrected to improve its readability and workability. At the request of Auckland Council, these errors have been included in the appeal rather than corrected using clause 16 of Schedule 1.

9. Turnstone Capital seeks the following relief:

- a. To live zone the land bounded by Hudson Road, Falls Road, the stream and the existing Business: Light Industry zone as either:
 - i. Residential: Mixed Housing Suburban as proposed in the notified Plan Change; or
 - ii. Business: Mixed Use as sought in Turnstone Capital's submission on the Plan Change.
- b. To approve the SMP to enable it to be adopted into the NDC without requiring a subsequent s127 application process;
- c. To amend the Precinct provisions in the manner shown in **Attachment 1** in order to:
 - i. Remove the ambiguity around the staging and timing of delivery of the WLR inadvertently created by the Decision, by amending the penultimate paragraph of the Precinct Description, deleting new policy 7 (which adds nothing to existing policy 8), and improving the wording and structure of I552.6.1 and I55.2.6.5.

- ii. Better reflect the intent of the Decision to exempt the stream works required for the WLR from E3.4.1, by making minor amendments to Rule (A7) in Table I552.4.1 listing the three rules of interest from E3.4.1 in I552.6 (rather than just E3.4.1(A33)), and amending the purpose of I552.6.2 to capture all stream works for the construction of WLR with minor amendments to (1) and (2).
- iii. Re-introduce the bespoke stream work provisions across Sub-precinct A, involving amendments to the third paragraph of the Precinct Description, reintroducing what was Precinct Plan 2 as Precinct Plan 3, adding a new policy (4) with a consequential amendment to existing policy 4 (renumbered 4A), new rules (A6), (A8) and (A9) in Table I552.4.1, and an exemption from the rules in E3.4.1 listed in I522.6, amending the heading of I552.6.2, and adding a new purpose, a new standard, a new matter of discretion in I552.8.1 and a new assessment criterion in I552.8.2(2A).
- iv. Require development to achieve the SMAF requirements of the AUP by implementing the approved SMP, involving a new standard for wastewater (I55.2.6.6A), and reference to the standard in the rules (A1) and (A4) in Table I552.4.1 and the notification rule I552.5.4.
- v. Reduce the yard setback for development adjacent Viv Davie-Martin Drive from 9m to 4m and apply the AUP activity status for yard infringements, by deleting Rule (A6) in Table I55.2.4.1 and amending I552.6.7.
- vi. Correct minor errors: in paragraph 3 of the Precinct Description, the placement of the “and” in the list in Objective 1, the numbering of policies, deletion of the

superfluous note above Table I552.4.1, deletion of the unnecessary rule providing for controlled activities (of which there are none) to be processed non-notified and consequential renumbering of the remainder of the notification rules in I552.5, adding reference to Precinct Plan 1 to the purpose of I552.6.1, and correcting the error in the note to I552.6.1.

- d. To reintroduce Precinct Plan 2, now numbered as Precinct Plan 3, as per **Attachment 2**.
- e. Such other or further relief to address the reasoning above; and
- f. Costs.

GP (TURNSTONE CAPITAL) LIMITED, by its counsel:



Signature:

B S Carruthers

Date:

12 May 2020

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TO:

Registrar, Environment Court, Auckland

AND TO:

Respondent

AND TO:

Submitters at the electronic address for service to be provided by the Respondent

Attachments:

1. Amendments sought to Precinct provisions
2. Precinct Plan 3
3. A copy of the request for Private Plan Change 25
4. A copy of the Turnstone Capital submission
5. A copy of the Council decision
6. A list of names and addresses of persons to be served with a copy of this notice.