

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2016-404-2313
[2017] NZHC 2311**

BETWEEN

ARENA LIVING LIMITED
Appellant

AND

AUCKLAND COUNCIL
Respondent

THE AUCKLAND PRESBYTERIAN
HOSPITAL TRUSTEES

KNOX HOME TRUST BOARD

HOUSING NEW ZEALAND
CORPORATION

Hearing: On the papers

Counsel: G L Cleary and L Player-Bishop for Appellant
M J L Dickey and M C Allan for Respondent
D Minhinnick and L Eaton for The Auckland Presbyterian
Hospital Trustees Inc
B Carruthers and L Eaton for Knox Home Trust Board
C Kirman and A Devine for Housing New Zealand Corporation

Judgment: 25 September 2017

JUDGMENT OF WHATA J

*This judgment was delivered by me on 25 September 2017 at 3.00 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

[1] The parties have agreed an amendment to the Auckland Unitary Plan that will resolve the appellant's appeal. The appeal relates to the appellant's site at 21 Graham Collins Drive, Windsor Park (known as the Knightsbridge site). The central issue raised by the appeal is whether or not the Independent Hearings Panel (the Panel) erred by not making special provision for a retirement village on the Knightsbridge site.

[2] The broader background is for the notified Proposed Auckland Unitary Plan (PAUP) included a Special Purpose Retirement Village Zone (SPRVZ). It appears it was not a popular zone. Many submitters and the Auckland Council (the Council) supported its deletion or replacement with an alternative.

[3] The Council adopted a position that amendments should be made to the residential and business zone provisions in order to properly recognise retirement villages within various zones. This position was supported by expert planning evidence. That planning evidence supported increased height limits to 11 metres but within the Mixed Housing Suburban (MHS) zone, that is, a residential mixed housing zone.

[4] The Panel did not support enabling additional building height for existing retirement villages in the MHS zone. This left certain sites previously within the SPRVZ, but now zoned MHS, with a maximum height of eight metres (plus the additional one metre roof). No specific reasons for its recommendation to not provide for additional height for retirement villages in the MHS zone were given, but the Panel's report on residential zoning recognised retirement villages as an example of what it called an integrated residential development.¹

[5] In relation to the Knightsbridge site, the appellant lodged a submission on the PAUP supporting the Council's general approach but seeking specific changes in relation to the SPRVZ provisions, including the definition of "retirement villages" and the activity table. A variety of heights across the Knightsbridge site (ranging between 23 metres and 11 metres or three to seven stories) were also sought. Only

¹ Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topics 059-063 Residential zones* (22 July 2016) at 22-23.

one further submission was received in response to the appellant's submissions, a supporting submission on a point relating to an Auckland Transport designation. No further submissions on the Knightsbridge site were received.

[6] At the hearing, the appellant provided planning evidence in support of its submissions. There it sought a Terrace Housing and Apartment Building (THAB) zoning. The Council's evidence in rebuttal only briefly engaged with this evidence, with Mr Brown for the Council specifically rebutting an argument that there was a defensible boundary provided in the Knightsbridge site because of its large size.

The appeal

[7] The appellants lodged an appeal on a number of grounds, which were reducible to the following questions:

- (a) Was the failure to provide the Additional Height Control for existing retirement village sites within the MHS zone a decision which was open to the Panel on evidence?
- (b) Has there been a failure to provide reasons for not applying the Additional Height Control to existing retirement village sites within the MHS zone?
- (c) Did the Panel undertake an assessment of the failure to provide the Additional Height Control, as required by section 32 of the RMA?
- (d) Has there been a failure to provide reasons for not permitting Further Height Allowances on retirement village sites belonging to Arena?
- (e) Did the Panel undertake an assessment of the failure to recommend Further Height Allowances for the retirement village sites belonging to Arena, as required by section 32 of the RMA?
- (f) In deciding the rezone Knightsbridge retirement village site as Mixed Housing Suburban, did the Panel fail to take into account a relevant matter?
- (g) Did the Panel fail to give reasons for rezoning the Knightsbridge site as MHS?

Position of the Council

[8] The Council accepts the Panel recommendations in relation to the Knightsbridge site failed to take into account relevant matters, namely:

- (a) the Panel's own zoning principles support greater intensity on the site;
- (b) there are no expected adverse effects on neighbouring properties; and
- (c) the evidence before the Panel supported a height of 11 metres, or greater, for the site.

[9] The Council also accepts that a rezoning of the Knightsbridge site from MHS to Mixed Housing Urban (MHU), the relief sought by the parties by consent, is justified for the following reasons:

- (a) it is consistent with controls provided in the SPRVZ;
- (b) evidence presented by Council witnesses and the appellants' witnesses supported a height at the Knightsbridge site of at least 11 metres;
- (c) no evidence was presented to the Panel which challenged or opposed development up to 11 metres on the Knightsbridge site;
- (d) no other submissions or further submissions were received regarding the zoning of the Knightsbridge site; and
- (e) there is no material difference between MHS zone with 11 metres, additional height zone control (supported by Council witnesses in the hearings) and the MHU zone (now proposed by the Council).

[10] The parties also agree the error of law materially affected the Unitary Plan as it relates to the zoning of the Knightsbridge site. The parties, in short, agree the site is most appropriately zoned MHU.

Interested persons

[11] The parties note that apart from the s 301 parties, who agree to the proposed amendment, any other third parties with standing to become parties to this appeal have had the opportunity to signal their interest in the appeal by filing a notice of intention of appeal, pursuant to s 301 of the Resource Management Act 1991 (RMA). The period for other parties to join the appeal under s 301 of the RMA expired on or about 30 September 2016.

Assessment

[12] The framework for assessment was set out in *Ancona Properties Ltd*,² which I adopt. In coming to my view, I am guided by the fact all parties have agreed on the existence of an error.

[13] While the parties are agreed as to the error, I do not agree that the claim based on failure to have regard to the Panel's own zoning principles is sustainable. The Panel was plainly aware of its preferred policy matrix. Rather, it is reasonably clear the Panel focused on whether or not special provision should be made for 'retirement villages' given their special characteristics. The following passage from the Panel's recommendations reports is illustrative:³

The Panel has not provided for a particular class of activity called 'retirement village' but has instead provided for 'integrated residential developments', which would include a retirement village.

...

It is the Panel's view, and that of the Council, that the focus of the Plan needs to remain on the resource management reasons relating to villages, primarily due to their typical site/building size and scale and the management of effects associated with accessory activities that tend to establish with the village – matters not determined by a particular ownership model.

...

It is the Panel's position that using the residential provisions that apply to residential developments which are a restricted discretionary activity in the Residential - Mixed Housing Suburban, Residential - Mixed Housing Urban and Residential - Terrace Housing and Apartment Buildings Zones (i.e.

² *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594. See [2]-[5] in particular.

³ At 22-23.

those involving five or more dwellings) is appropriate as the criteria are applicable to assessing a retirement village or other forms of integrated residential development.

These provisions, as amended, are focused on the size and scale of buildings and site development, and how that development responds to its surrounds and the planned character of the zone. The Panel considers that in terms of built form and the likely larger site sizes, a retirement village complex and a larger-scale residential development are likely to have similar effects and should therefore be subject to similar assessment matters. Furthermore, this approach fits with the structure of the residential provisions, which do not include separate lists of criteria applying to different activities.

The activity status for integrated residential developments is restricted discretionary in the Residential - Single House Zone, the Residential - Mixed Housing Suburban Zone, the Residential - Mixed Housing Urban Zone and the Residential - Terrace Housing and Apartment Buildings Zone. The provisions are largely the same as those applying to larger scale residential developments, with a focus on the effects on the neighbourhood character, residential amenity and the surrounding residential area from all of the following:

- i. building intensity, scale, location, form and appearance;
- ii. traffic;
- iii. design of parking and access; and
- iv. noise, lighting and hours of operation.

[14] It is also tolerably clear from the foregoing passage, the Panel did not regard retirement villages as a particular class of activity not otherwise covered by a generic classification, namely integrated residential developments, and the rules that attach to it.

[15] However, as I noted in relation to the appeal by Samson Corporation Ltd and Sterling Nominees Ltd in *Bunnings Ltd v The Auckland Unitary Plan Independent Hearings Panel*, it is evident to me the Panel erred by failing to have specific regard to the appellants' site characteristics and the uniformity of evidence in support of liberal height controls in relation to that site.⁴ There being no submitter seeking contrary relief, the generic approach adopted by the Panel, while understandable given the scale of the exercise it was tasked with, produced an error. A site-specific

⁴ *Bunnings Ltd v The Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2141 at [64]-[65].

approach was an available resource management option and, if not appropriate for good planning reasons, the Panel should have specified why.⁵

[16] Accordingly, given the combination of site-specific issues arising, the uniformity of the evidence in support of a more liberal height regime, and the consistency of the outcome with the broader objectives and policies of the plan for enabling such development, I am content to find that the IHP erred in failing to have specific regard to the appellants' special site characteristics.

[17] I initially had misgivings about the form of relief as beyond scope, with the result that persons affected would not have the opportunity to be heard. I directed the parties to confer, and I am satisfied by their response. I can do no better than repeat the reasons they have provided as to why the relief sought, MHU zoning, is appropriate:

- (a) During the submission and hearing process, the appellant supported a SPRVZ, which provided for varying heights ranging from 23 metres to 11 metres. The proposed MHU zone falls within the scope of that particular submission.
- (b) The MHU zone is preferable to the available alternatives, namely an MHS zone with a height variation, or a special precinct akin to the relief sought and granted in the Auckland Presbyterian Hospital Trustees Inc appeal.⁶ The Council notes if a MHS zone with an overlay was adopted it would be the only such site in the Unitary Plan. The precinct option was applied in the Auckland Presbyterian Hospital Trustees Inc appeal due to the bespoke features of that site which are not applicable here.

[18] In relation to potential prejudice to third parties, I am satisfied for the reasons expressed by the Council that no particular party is prejudiced by the relief, namely:

⁵ See *Marche Ltd v Auckland Council* [2016] NZHC 145, [2016] NZAR 542 at [23]-[26]. As Elias CJ noted in *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17, [2005] 2 NZLR 597 at [56], there is a growing recognition of the obligation on public authorities to give reasons.

⁶ *Auckland Presbyterian Hospital Trustees Inc v Auckland Council* [2017] NZHC 2158.

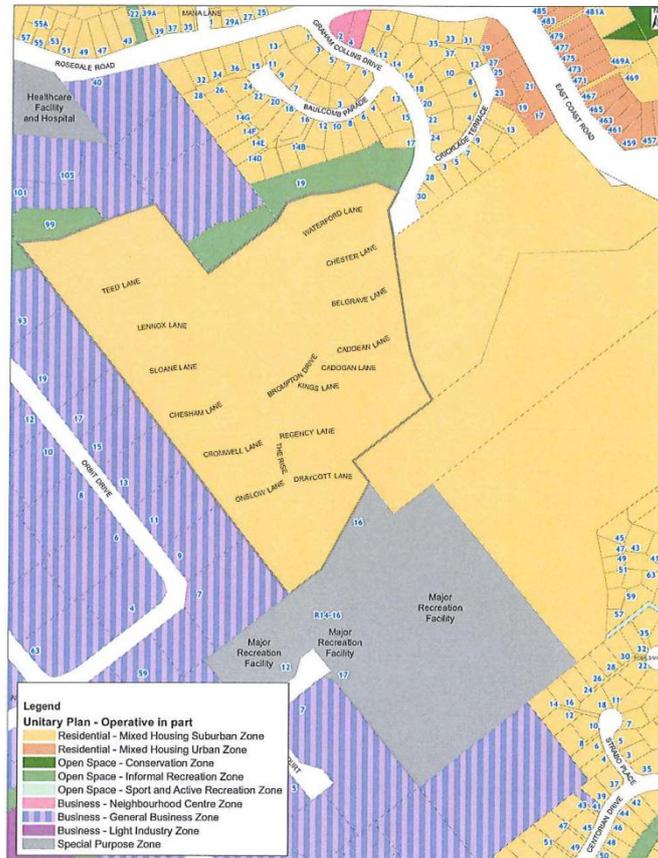
- (a) The Knightsbridge site does not border any residential properties. As such, there is little concern of the adverse effects on the surrounding environment from the level of development enabled by an MHU zoning.
- (b) There is no real distinction between the MHU zone and the alternative, being the MHS zone with an additional height overlay.
- (c) Far greater capacity on the site was contemplated during the Unitary Plan process, ranging between 11 metres and 23 metres.
- (d) No other submissions were received in relation to the Knightsbridge site, and no further submissions addressing Arena's submission on the Knightsbridge site were made.
- (e) Of the three submitters who did join as interested parties, none have a specific interest in the Knightsbridge site. Rather, all sought additional height and development capacity on existing retirement village sites across Auckland (an appeal point Arena has since withdrawn).
- (f) For these reasons, fair notice has been given to readers and potential submitters as to the level of potential development and height on the Knightsbridge site.

Orders

The relief sought, set out in Appendix A, is granted.

APPENDIX A
Amendments to GIS Viewer of Unitary Plan

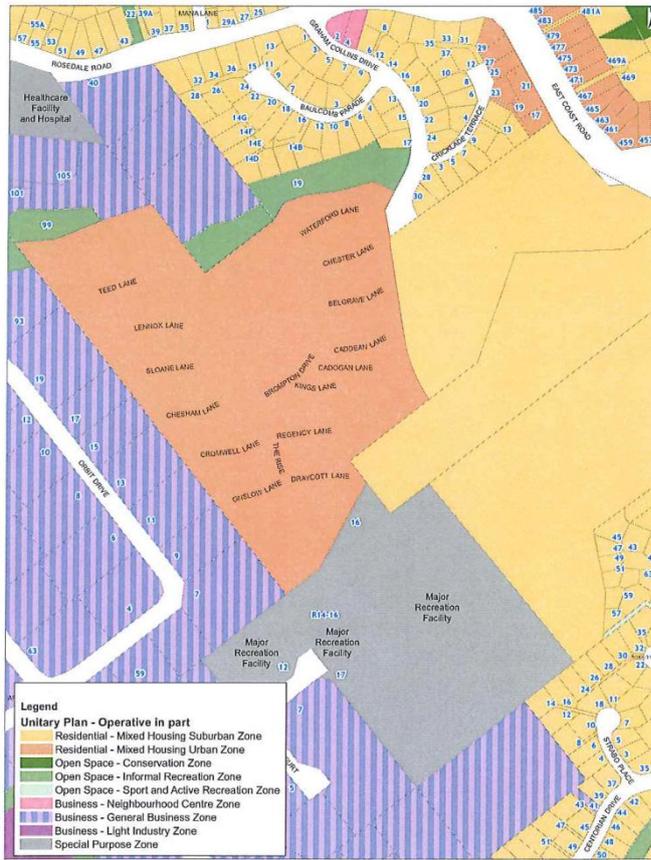
Map A: Current Zoning of Knightsbridge Site:



Unitary Plan - Operative in part
21 Graham Collins Drive, Windsor Park

 Auckland Council

Map B: Proposed Zoning of Knightsbridge Site



Unitary Plan - agreed amendment
21 Graham Collins Drive, Windsor Park