

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

**CIV-2016-**

**UNDER**

the Local Government (Auckland Transitional Provisions) Act 2010 (“LGATPA”) and the Resource Management Act 1991 (“RMA”)

**AND**

**IN THE MATTER**

of an appeal under section 158 of the LGATPA and section 299 of the RMA

**BETWEEN**

**Ancona Properties Limited** an incorporated company with its registered office at Suite 204, 8 Turua Street, St Heliers

Appellant

**AND**

**Auckland Council** a local authority constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009 having its principal office at 135 Albert Street, Auckland

Respondent

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**NOTICE OF APPEAL BY ANCONA PROPERTIES LIMITED**

Dated 16 September 2016

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**Solicitors for the Appellant**

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**TAKE NOTICE THAT** Ancona Properties Limited (“Ancona”) will appeal to the High Court against the decision of the Auckland Council (“Council”) notified on 19 August 2016, **UPON THE GROUNDS** that part of the decision is erroneous in law.

### **DecisionAppealed**

1. Ancona appeals against a decision made by Council on a provision or matter relating to the Proposed Auckland Unitary Plan (“PAUP”). The provision or matter:
  - (a) Was the subject of a submission and further submission concerning the St Heliers Precinct provisions made by Ancona on the PAUP;
  - (b) Council accepted a recommendation of the Independent Hearing Panel (“Hearings Panel”) which resulted in revised St Heliers Precinct provisions being included in the Proposed Plan;
  - (c) The recommendations of the Hearings Panel with regard to the St Heliers Precinct provisions included Rule 1329.7.1 **Frontage alignment, setback and maximum height**, which rule includes Figure 13 9.7.1 *Frontage setback control*, being a diagram depicting the dimensions in the rule (“Precinct Decision”). (*As Council has accepted the recommendations of the Hearings Panel, all references to the findings and reasoning of the Hearings Panel in this appeal are to be read as references to the Council decision*); and
  - (d) The provision or matter appealed is the error in the publicly notified Unitary Plan text, and specifically in the diagram Figure 1329.7.to accompanying the rule controlling frontage alignment, setback and maximum height in the St Heliers Precinct provisions (“Text Decision”).

### Error of law

2. The Council adopted without alteration the recommendation of the Hearings Panel for the St Heliers Precinct, but the Text Decision includes an explanatory Figure (Figure 1329.7.1) that shows a maximum 8.5m height within **4.0m** of the site frontage when the relevant rule 1329.7.1 (1) specifies that buildings must not exceed 8.5m in height within **2.5m** of the site frontage. The *wording* of the rule is in accordance with the Hearings Panel recommendation. The accompanying *Figure* contains a dimension error by reference to the rule. It is an error of law for the decision to contain an explanatory Figure depicting an incorrect dimension by reference to the relevant rule, where the rule wording implements the Council Decision, but the explanatory Figure does not.
3. Without a correction to Figure 1329.7.3 *Frontage setback control* changing the setback dimension of 4m to 2.5m, the publicly notified decision text for the St Heliers Precinct does not give effect to the Precinct Decision.

### Question of law

4. The question of law to be decided is:
  - (a) Did the Council err in law by publishing an incorrect Figure depicting the maximum height and setback controls specified in Rule 132 9.7.1 (1) of the St Heliers Precinct provisions, whereby the explanatory figure does not contain the same setback dimension as the rule controlling frontage setback, and nor does the setback dimension (4m) in the Figure accord with the recommendation of the Hearings Panel as to the appropriate setback dimension, that recommendation having been adopted by the Council as its decision?

## **Grounds of Appeal**

### *General grounds of appeal*

5. The error of law is to publish text provisions (in this case the rule and accompanying Figure controlling frontage alignment, setback and maximum height in the St Heliers Precinct) that is incorrect by reference to the Precinct Decision and which contains an internal inconsistency of dimension, whereby the setback dimension (2.5m) in the rule is not correctly depicted in the accompanying figure which contains a setback dimension of 4.0m.
6. The error of law has resulted in the publicly notified decision text for the St Heliers Precinct failing to give effect to the Precinct Decision

### *Specific grounds of appeal*

7. Ancona lodged a submission and a further submission in respect of the St Heliers Precinct provisions in the notified PAUP.
8. Ancona sought (*inter alia*) to support the rules or controls relating to maximum height, frontage height and the setback control for this particular precinct as notified, those controls being the same as had been determined by an earlier Environment Court decision on Plan Change 145 to the Operative Auckland District Plan (Isthmus Section).
9. Ancona presented evidence and legal submissions before the Hearings Panel in support of its submissions. In rebuttal evidence the urban design witness for the Auckland Council Mr Reilly proposed a change to the relevant setback control increasing the setback dimension from 2.5m to 4.0m. This proposed change was opposed through legal submissions, expert evidence of Ancona's planning expert Mr Smith, and evidence from Ancona's managing director Mr Markham.
10. The Hearing Panel Recommendation Report for the St Heliers Precinct (Topic 081) Section 329.3 **Key issues** recorded that Ancona owned or occupied and leased out a substantial part of the St Heliers Village commercial centre and that its position and that of its expert

witness Mr Smith was aligned with the expert witnesses for the Auckland Council, aside from the proposition in the rebuttal evidence of Mr Matthew Reilly that the setback provision in the precinct development control should be increased from 2.5m to 4.0m.

11. The Hearing Panel Recommendation Report concluded:

“For all the reasons put forward in the legal submissions and the evidence on behalf of Ancona Properties Ltd, Mr Smith’s version of the precinct provisions is recommended, apart from a number of further minor changes to this precinct to address best practice matters that the Panel seeks to provide across the Plan and to improve their functionality and for clarity.”

12. The recommended setback provision in the precinct development control accordingly dimensioned the setback at 2.5m in accordance with the expert evidence of Ancona’s witness Mr Smith. The accompanying explanatory diagram Figure 1329.7.1 contained a dimension error of 4.0m, the dimension proposed in rebuttal evidence of Mr Riley that the Hearings Panel did not recommend in its Report.
13. The Recommendation Version of Figure 1329.7.1 was wrong in respect of the 4.0 m setback dimension.
14. The Council decision adopting the St Heliers Precinct provisions including Figure 1329.7.1 with the incorrect 4.0m setback dimension resulted in an erroneous dimension being included in the publicly notified Decision Text.

### **Relief**

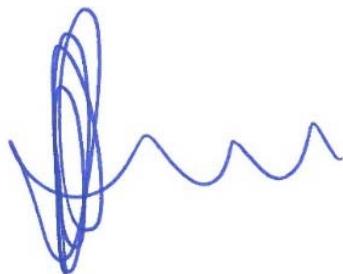
15. The Appellant seeks the following relief:

- (a) That its appeal be allowed;
- (b) That this Court makes an order directing the Auckland Council to amend the Auckland Unitary Plan Text in respect of the St Heliers Precinct Rule 1329.7.1, correcting Figure 1329 .7 .1 so

that the setback dimension shown of 4.0m is amended to 2.5m.

- (c) In the alternative, that this Court makes an order directing the Hearings Panel to re-visit its decision on the St Heliers Precinct and correct the dimension error.
- (d) Consequential relief; and
- (e) Costs.

Dated at Auckland this 16<sup>th</sup> day of September 2016



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**Richard Brabant**

Counsel for Ancona Properties Limited

This Notice of Appeal is filed by Tony Nicholson, solicitor for the Appellant, of Burton Partners. The address for service on the Appellant is Level 3, 16 Viaduct Harbour Avenue, Auckland 1010

Documents for service on the Appellant may be:

- (a) Left at the address for service; or
- (b) Posted to the solicitor at PO Box 8889 Symonds Street, Auckland 1150.

In either case copies to counsel sent by email to [richard@brabant.co.nz](mailto:richard@brabant.co.nz)

**TO:**           The Registrar  
                 High Court  
                 Auckland

**AND TO:**     Auckland Council