IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002276
[2018] NZHC 154

BETWEEN	VIADUCT HARBOUR HOLDINGS LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent
	BODY CORPORATES 199318 (THE POINT), 313742 (VIADUCT POINT), 197236 AND 192317 (LATITUDE 37), 378969, 383524, 338459, 336640, 321390, 321391, 321389, 321939 AND 323876 (THE PARC), 326496 (NORTH), 343562 (STRATIS) 358939 (HALSEY), 384911 (SOFITEL) AND THE LIGHTER QUAY RESIDENTS SOCIETY INCORPORATED
	SECTION 301 PARTIES

Hearing:	31 July 2017
Appearances:	D M Salmon & R Schultz for the Appellant W S Loutit & S J Mitchell for the Respondent B J Tree for Section 301 Parties
Judgment:	15 February 2018

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 15 February 2018 at 4pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Lee Salmon Long, Auckland
Simpson Grierson, Auckland
Minter Ellison Rudd Watts, Auckland

Introduction

[1] This is an appeal on questions of law under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010 ("the Act"), ss 299(2) and 300–307 of the Resource Management Act 1991 (as applicable) and Part 20 of the High Court Rules 2016.

[2] The appeal is brought by Viaduct Harbour Holdings Ltd ("Viaduct"). Viaduct is the freehold owner of the land located within an area described in the Proposed Auckland Unitary Plan as Sub-Precinct C. It carries on business as a property holding and development company based in the Viaduct.

[3] Viaduct appeals the decisions of the Auckland Unitary Plan Independent Hearings Panel ("the Panel") to recommend, and of the Auckland Council to accept recommendations, as to:

(a) changes to the Proposed Auckland Unitary Plan necessary to create an area of residential enclave in the Viaduct Harbour Precinct identified as "Sub-Precinct C", to the exclusion of office and other activities;

(b) extending the perimeter boundary of the proposed Sub-Precinct C to include Lighter Quay; and

(c) the absence of any recommended provisions to allow for a two metre "roof bonus" in the new Sub-Precinct C, as had been part of the Auckland Operative District Plan ("the Operative Plan") applicable to the Viaduct Harbour Precinct.

[4] Viaduct made submissions to the Panel regarding the Viaduct Harbour Precinct and also participated in a pre-hearing mediation with the Council regarding the issues relating to the Precinct.

[5] A number of other parties who also made submissions to the Panel in relation to the Viaduct Harbour Precinct gave notice of intention to appear on this appeal.[1] This group comprises 17 body corporates and one incorporated society (collectively referred to as "the Body Corporates"). Included in the group are 13 body corporates representing the leasehold owners of property located in the centre of the Viaduct Harbour Precinct on which there are four high-quality residential apartment complexes built between 1999 and 2003. Also included in the group are four further body corporates who represent the North, Stratis and Halsey residential apartments and the Sofitel Hotel, and the Lighter Quay Residents Society Incorporated being a society representing the owners of residential apartments in the Lighter Quay premises. Ms Tree appeared as counsel for all 14 parties comprising the Body Corporates.

Background to Unitary Plan

[6] The purpose of the Act when enacted in 2010 was explained in s 3 as being to further resolve matters relating to the reorganisation of local government in Auckland, a process that had been commenced in accordance with legislation enacted in 2009.[2] The Act contained provisions for a process for the development of the first combined planning document for the Auckland Council under the Resource Management Act 1991.[3]

[7] A draft version of the Proposed Auckland Unitary Plan was first prepared by the Council and released for informal public consultation and submissions between March and May 2013.

[8] Part 4 of the Act was inserted on 4 September 2013.[4] Its purpose was to provide a streamlined means to accomplish the preparation of a combined Auckland plan. Part 4 set out the process for the preparation of a combined plan that would meet the requirements of a regional policy statement, a regional plan (including a regional coastal plan), and a district plan for Auckland.[5]

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1 Resource Management Act 1991, s 301; Local Government (Auckland Transitional Provisions) Act 2010, s 158(5).
2 Local Government (Tamaki Makaurau Reorganisation) Act 2009; Local Government (Auckland Council) Act 2009.
3 Local Government (Auckland Transitional Provisions) Act 2010, s 3(2)(d).
4 Local Government (Auckland Transitional Provisions) Amendment Act 2013, s 6.
5 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1).

[9] The Council was required by ss 121 to 126 to prepare a plan, notify that plan and call for submissions. This plan is referred to as the Proposed Auckland Unitary Plan (the PAUP). The PAUP was publicly notified for submissions on 30 September 2013, with the time for the filing of submissions closing on 28 February 2014. The Council received 9,400 primary submissions from which 93,600 primary submission points were identified by the Council, and summarised in the Summary of Decisions Requested Report. There was then an opportunity for further submissions. The Council received 3,800 further submissions containing 1,400,000 submission points. In relation to zoning, the Council received over 20,000 rezoning requests in relation to more than 80,000 properties.

The Panel

[10] The Minister for the Environment and the Minister for Conservation established an Independent Hearings Panel comprising a chairperson and three to 10 other members as required by the Act.[6] The role of the Panel was to convene public hearing sessions to hear the submissions and thereafter prepare a report or reports, and make recommendations to the Council on the PAUP.[7] At the hearings the public could make submissions and call evidence,[8] and the Council was required to attend the hearings to assist the Panel by speaking to submissions, calling evidence, clarifying matters or providing any other information as requested.[9]

[11] During 2014, the Council had categorised and allocated each submission point to a particular "Topic", and issues relating to the Viaduct area were allocated to Topic 050 "City Centre (Viaduct Harbour Precinct)." The Panel's hearing of submissions on Topic 050 took place during April and May 2015.

[12] The Panel was required to provide its report (or reports) containing its recommendations to the Council no later than the date being 50 working days before

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6 Section 161 originally provided for a chairperson and up to seven members, but this was amended in 2015 with the intention of assisting the Hearings Panel to meet its statutory deadline. See Local Government (Auckland Transitional Provisions) Amendment Act 2015, s 7(1).

7 Local Government (Auckland Transitional Provisions) Act 2010, ss 127(1), 128 and s 164.

8 Local Government (Auckland Transitional Provisions) Act 2010, s 129(1).

9 Local Government (Auckland Transitional Provisions) Act 2010, s 137.

the expiry of three years from the date on which the Council had notified the PAUP, unless that time was extended by the Minister for the Environment.[10]

[13] The Panel's recommendations on the PAUP were divided into three parts: an "Overview Report", dated 22 July 2016,[11] together with separate reports on hearing topics or groups of topics; the Panel's recommended version of the PAUP provisions; and the Panel's recommended version of the PAUP's maps presented in the electronic "GIS Viewer" format.

[14] The Panel's recommendations as regards the Viaduct Harbour Precinct were contained in its Report to Auckland Council on Hearing Topics 050-054, City Centre and business zones ("the Viaduct Harbour Precinct report")[12] and its recommended version of the PAUP regarding the Viaduct Harbour Precinct ("the I211 Recommendations").[13]

[15] Upon receipt of the Panel's reports and recommendations, the Council was required to consider the recommendations and make decisions to either accept or reject each recommendation, notify its decisions on the recommendations within 20 working days,[14] and release the Panel's report or reports containing the recommendations to the public by making them available on the Council's internet site and for inspection during working hours free of charge.[15]

[16] Once the Council publicly notified its decisions on the Panel's recommendations, each part of the PAUP (other than parts relating to the coastal marine area, designations, and heritage orders) was to be treated as amended in accordance with the decisions of the Council, and deemed to have been approved by the Council in accordance with the provisions of the Resource Management Act.[16]

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10 Local Government (Auckland Transitional Provisions) Act 2010, ss 146 and 147.

11 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council: Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) [Overview Report].

12 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council: Hearing Topics 050-054, City Centre and business zones* (July 2016) [Viaduct Harbour Precinct Report].

13 Auckland Unitary Plan Independent Hearings Panel *Recommendation I211: Viaduct Harbour Precinct* (22 July 2016) [I211 Recommendations].

14 Local Government (Auckland Transitional Provisions) Act 2010, s 148.

15 Local Government (Auckland Transitional Provisions) Act 2010, s 150.

16 Local Government (Auckland Transitional Provisions) Act 2010, ss 152(1) and (2).

Background to the topics involved in this appeal

[17] There are three specific matters relating to the Panel's recommendations as regards the Viaduct Harbour Precinct and the Council's decision to accept and adopt them that are in issue on this appeal: the creation of Sub-precinct C; the inclusion of Lighter Quay within that sub-precinct; and the non-inclusion of a "roof-bonus" within Sub-precinct C.

Sub-precinct C

[18] The Viaduct Harbour Precinct ("the Precinct") incorporates Viaduct Harbour and the land adjacent to the harbour (including Hobson Wharf), as well as the adjacent coastal marine area. The Precinct comprises Sub-precincts A, B, and C, as shown on the Auckland Unitary Plan map attached as appendix A to this judgment.

[19] The land and the residential buildings administered by the Body Corporates are located within Sub-precinct C, which is a residential area within the Precinct. The creation of Sub-precinct C as a residential area was recommended by the Panel and accepted and adopted by the Council and included in the Auckland Unitary Plan (AUP).

Lighter Quay

[20] The Lighter Quay building is also located within Sub-precinct C and comprises both residential premises and the Sofitel Hotel.

The roof bonus

[21] Under the Operative Plan which predated the PAUP and prior to the Council notifying the PAUP, all sites in the Viaduct Harbour Precinct had the benefit of a two metre roof bonus which applied in addition to the specified maximum permitted building height. The "roof bonus" allowed the construction of roofs and roof top projections to a height of two metres above the building height limit. This provision was not continued and included in the PAUP. In its written submission to the Council

on the PAUP,[17] Viaduct sought the reinstatement of the roof bonus for all sites within the Viaduct Harbour Precinct, to recognise and reflect the fact that existing buildings in the Precinct had been constructed in accordance with that control.

[22] In accordance with s 134 of the Act, the Panel referred the issues raised by the submitters on the Viaduct Harbour Precinct to mediation. The Council, Viaduct and the Body Corporates participated in the mediation which was held on 26 February 2015. The outcome of the mediation was set out and recorded in a Mediation Joint Statement pursuant to s 134(4) of the Act. Although the mediation process failed to produce agreement on the Body Corporates' proposal for the creation of Sub-precinct C within the Viaduct Harbour Precinct, agreement was reached between the Council and the parties to the mediation regarding the roof bonus. The Mediation Joint Statement recorded the agreement as follows:[18]

> The height limit in sub-precinct A may be exceeded by no more than 2m for roofs, including any roof top projections, subject to the building complying with clause 3.2 below (site intensity).

Submissions before the Panel

[23] As I have already noted, the Panel heard submissions on Hearing Topic 050 from the Council and submitters relating to the City Centre and including the Viaduct Harbour Precinct in May 2015.[19] In support of their submission that a Sub-precinct C should be created within the Viaduct Harbour Precinct, the Body Corporates presented evidence from expert witnesses: Mr David Haines, a Chartered Town Planner, and Mr Gordon Moller who was the architect for the development of the Point and Viaduct Point apartments. Further evidence was presented on behalf of the Body Corporates by Mr Woodhams[20] and Mr Duffy.[21] Submissions were presented on behalf of Viaduct by its General Manager Mr Paul Gunn, and by several expert consultants including: Mr Clinton Bird; Mr Andrew Anderson, architect; Mr Craig McGarr, planning and

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17 Dated 28 February 2014.

18 At the time of the mediation, Sub-precinct C was yet to be created. The area referred to in the Mediation Joint Statement as "Sub-precinct A", includes the area subsequently identified as Sub-precinct C.

19 7-8 and 11-13 May 2015.

20 Chair of the Lighter Quay Residents Society, representing all of the 420 owners of the Lighter Quay apartments and Sofitel.

21 Chair of The Point body corporate committee, and authorised to represent the body corporates for: The Point, Viaduct Point, Latitude 37 and the Parc.

resource management consultant; Mr Zoltan Moricz, property market consultant; and Mr Michael Foster, planning consultant. Submissions were also presented on behalf of the Council by expert witnesses: Ms Bridget Gilbert; Mr Nicholas Roberts; and Ms Kathryn Coombes.

[24] It is clear from a review of the evidence that was presented to the Panel by the witnesses and experts on behalf of the parties that there was a considerable volume of evidence before the Panel both in favour and in opposition to the creation of a residential enclave (Sub-precinct C) within Sub-precinct A of the Viaduct Harbour Precinct. The argument in favour of the creation of a residential Sub-precinct C was principally advanced on behalf of the Body Corporates and Lighter Quay by Mr Haines, who said:

> [41] Twenty years ago the Council's planning endeavours focussed on the "use" and "development" of the Viaduct Harbour Precinct. "Protection" was not a significant component (apart from heritage features) in the planning life cycle of the Precinct at that time. Today, those same use controls need to remain in order to protect the re-vitalised and now well-established Viaduct Harbour Precinct. Similarly, development controls (relating to building height, urban design and other matters) also remain important as other sites in the Precinct become available for re-development.
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> [42] It is widely recognised across most land use planning systems that proposed developments need to be assessed in terms of both the land use activities being enabled, as well as the built form that is being proposed. Both are discrete mechanisms and one, or both, may trigger the need for a resource consent application to be made to the relevant consent authority. This is why District Plans routinely include Activity tables relating to land uses and a separate set of controls relating to built form.
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> [43] In the case of the Viaduct Harbour Precinct, the Council has recognised the importance of physically separating office activities from residential activities, as above. The result is that purpose-built residential apartment complexes have been established. The [Viaduct Harbour Residences[22]] (and other apartment developments) stand out as high quality residential complexes. Their planning integrity is not impugned by potentially incongruous office activities being permitted within the same sub-precinct, much less the same building. In fact, the opposite applies and office activities are specifically excluded from the residential neighbourhoods which form the heart of the Precinct.
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> [44] It is important to dispel the notion that office activities can somehow co-exist in a manner that is of no planning significance.
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> ...

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22 The Point; Viaduct Point; The Parc; and Latitude 37.

[48] When considering mixed use environments, it is also important to distinguish between mixed use precincts and mixed use sites. For precincts, mixed uses need to be integrated horizontally and, for sites, mixed uses need to be integrated vertically.

...

[50] In the case of mixed use sites, vertical integration of land uses is potentially fraught for residential activities and can be:

(a) Only satisfactorily addressed when mixed use buildings are purpose-built and have separate street addresses, entry foyers and lift banks; and

(b) Less satisfactorily addressed for non-purpose-built buildings which are held in single ownership, with the owner being able to segregate potentially incongruous activities on a floor by floor basis.

[51] The general incompatibility of offices and related commercial activities within the same building as residential activities is confirmed by the actions of those corporate and high-net-worth individual landowners (landlords) of commercial office towers across Auckland. I am not aware of any circumstances where lease contracts for commercial office towers permit residential activities to establish within them.

....

[59] In the case of the [Viaduct Harbour Residences] Bodies Corporate, their [Unit Titles Act 2010] status means that they cannot stop individual unit owners from changing their use from residential to offices or a range of other potential commercial uses. Each apartment building within the Viaduct Harbour Precinct has been designed and constructed with the intention that it be used as a residential apartment block. The [Viaduct Harbour Residences] Bodies Corporate must therefore look to the Council, through its planning rules, to protect their apartment buildings and their residential neighbourhoods from incongruous land uses establishing as of right within them.

...

[65] The only other change relates to the extension of sub-precinct C to include the sites of the Lighter Quay development including, North, Stratis, Halsey Street and the Sofitel, as the same planning concerns I have about the potential degradation of residential neighbourhoods also apply to them.

[25] The contrary argument in opposition to the creation of a residential enclave and Sub-precinct C was advanced by the witnesses for both the Council and Viaduct. For the Council Mr Roberts and Ms Coombes in a joint statement of evidence said:[23]

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23 The wording of this submission, while somewhat ambiguous, was nevertheless clearly intended to support the proposition that the creation of Sub-precinct C was unnecessary for the purpose of maintaining the residential character and amenity of the area.

> [11.8] We do not agree with the proposed objective [of maintaining the residential character and amenity in sub-precinct C as an attractive place for permanent residents]. While there is a concentration of residential activities in sub-precinct C, in our opinion, this does in itself contribute to the distinctive character of the Viaduct Harbour, such that it needs to be maintained. The character of the precinct in our opinion, is derived from the mix of uses across the precinct, the distinctive low-medium rise built form and its public open spaces and waterfront setting. In the unlikely event that the residential buildings are converted to other uses in the future, this would not in our opinion erode the established character of the Viaduct Harbour.

[26] Similarly, the evidence presented on behalf of Viaduct by its expert witness Mr Zoltan Moricz in opposition to the proposed residential enclave argued that the occupier market attractiveness of the Viaduct Precinct for campus style and boutique offices would be critical in providing long term office supply in the future. He said:

> [106] The development experience of the Viaduct Harbour precinct indicates that the market can deliver successful property development outcomes based on actual patterns of occupier demand as opposed to strict planning guidelines.
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> ...
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> [113] My evidence shows that the Viaduct Harbour precinct plays a crucial role in the Auckland CBD office market. Arguably, the Viaduct Harbour precinct plays a crucial role in the New Zealand economy. It provides the most favoured locational option and agglomeration in New Zealand for large corporates, many of whom are international companies, wanting to accommodate in campus style office space.
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> [114] Given the reality of globalisation and international mobility, it is important that appropriate capacity is provided to cater for the office location and typology requirements of these types of companies in the Auckland CBD. There is a need for long term capacity to cater for premium low rise large floor plate campus style offices in waterfront locations to maintain Auckland's and New Zealand's international economic competitiveness. As my comparisons with major Australian cities shows, both Melbourne and Sydney have extensive fringe CBD waterfront precincts under development to cater for office uses. These provide alternatives to Auckland for firms seeking this type of office premise and location and Auckland has to provide long term occupational options of this kind to remain an internationally competitive business location. Given my analysis of Wynyard office capacity being exhausted by the mid-2030s, the Viaduct is critical in providing long term supply capacity in the period to 2040.
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> ...
>
> [116] In my view there are clear future economic benefits to not restricting office use in Viaduct Harbour. These benefits go well beyond their direct impact on the assets of Tram Lease Ltd, Viaduct Harbour Holdings Ltd & Viaduct Harbour Management Ltd at the Viaduct. Because of the CBD's

> significance in contributing to the future economic performance of Auckland, Viaduct Harbour's very high level of market attractiveness for office use, and the emerging scarcity of comparably market attractive office locations by the mid-2030s, the benefits of land use efficiency and optimisation for office use in the Viaduct Harbour have a broader significant positive impact on the regional and national economy.

[27] In the introduction to its Viaduct Harbour Precinct report, the Panel said:

> This report covers all of the submissions in the Submissions Points Pathways report (SPP) for this topic. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) [of s 144(8) of the Act] and, while individual submissions and points may not be expressly referred to, all points have nevertheless been taken into account when making the Panel's recommendations.

[28] Under the heading 'Reference documents', the Panel also listed the documents and submissions it had relied on in making its recommendations, as well as the submissions and evidence presented to the Panel on the topic, which list included the Mediation Joint Statement in relation to Viaduct Harbour.

[29] The Panel set out a summary of its recommended changes to the PAUP in relation to the Business – City Centre Zone, which included:

> x. Add a new sub-precinct C to the Viaduct Harbour Precinct, with offices now a discretionary activity and convenience retail (dairies, hairdressers etc) as restricted discretionary activities.

[30] In its I211 Recommendations, the Panel then specified the establishment of Sub-precinct C as a residential enclave. The Council subsequently adopted the recommendations of the Panel in its Decisions Report[24] and the Decision Version of the PAUP, dated 19 August 2016. It reproduced the explanation and recommendations in the same terms, plans and maps as were contained in the Panel's recommendations.

Joint list of issues

[31] Prior to the hearing of this appeal, the parties filed a joint list of issues. Items (c) and (f) on this list were not pursued by the appellant. The issues remaining to be resolved are:

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[24] Auckland Council *Decisions of the Auckland Council on recommendations by the Auckland Unitary Plan Independent Hearings Panel on submissions and further submissions to the Proposed Auckland Unitary Plan: Decisions Report* (19 August 2016) [Decisions Report] at [36].

First challenged decision: creation of Sub-precinct C

(a) Was the decision to recommend/accept the creation of a new Sub-precinct C in the Viaduct Harbour Precinct unreasonable in light of the evidence presented to the Panel on the matter?

(b) Was the Panel and/or the [Auckland Council] obliged to give detailed reasons for the decision to create Sub-precinct C and if so, did the Panel and/or the [Auckland Council] satisfy that obligation?

Second challenged decision: removal of the roof bonus in Sub-precinct C

(c) Not pursued.

(d) Was the decision not to include a two metre roof bonus in Sub-precinct C unreasonable in light of the evidence presented to the Panel on the matter?

(e) Was the Panel and/or the [Auckland Council] obliged to give detailed reasons for the decision not to include the two metre roof bonus and if so, did the Panel and/or the [Auckland Council] satisfy that obligation?

Third challenged decision: inclusion of Lighter Quay in Sub-precinct C

(f) Not pursued.

(g) Was the decision to recommend/accept that Lighter Quay ought to form part of Sub-precinct C unreasonable in light of the evidence presented to the Panel on the matter?

Appellant's submissions

[32] Mr Salmon for Viaduct submits that the Panel and the Council made errors of law in reaching the decisions to create Sub-precinct C; to include Lighter Quay within Sub-precinct C; and by not providing for a two metre roof bonus to apply within

Sub-precinct C. He submits that the Panel and Council failed to give sufficient reasons for the decisions and that the decisions were perverse or unreasonable having regard to the evidence and context in which they were made. In doing so he relies on the principles set out in *Edwards (Inspector of Taxes) v Bairstow*[25] and *Bryson v Three Foot Six Ltd.*[26]

[33] Mr Salmon submits that when considering whether a decision is unreasonable and thereby an error of law, the Court should not only assess the adequacy of the evidence upon which the decision was made, but also assess the chain of logical reasoning in the application of the law to the facts.[27]

[34] In relation to the Panel's recommendation to create Sub-precinct C, Mr Salmon submitted that the Operative Plan that preceded the PAUP did not formally zone parts of the Viaduct into separate commercial and residential uses, and an examination of the planning history of the Precinct showed that the intention was to permit a wide range of non-residential activities within the Precinct including the area proposed for inclusion within Sub-precinct C. Mr Salmon submitted that none of the evidence presented by the Council or by Viaduct regarding the planning history and the objectives of the Operative District Scheme permitting and promoting a mixed use of activities within the Precinct were weighed or addressed in any way by the Panel or the Council in their written reasons. He submits that the absence of any evaluation of the evidence or any statement of reasons is of particular significance when the result of the creation of Sub-precinct C is that the Viaduct Precinct, containing a few hundred residential units, becomes the only part of the Auckland CBD where office use is not permitted, and is founded upon acceptance of a contention that residential and office use cannot co-exist, notwithstanding the evidence before the Panel that these different uses could co-exist.

[35] Mr Salmon submits that the creation of a residential Sub-precinct C has created a "desert of commercial and other activity where there is no broader plan to do so in the unitary plan". He submits that this is not a case where the decision to create Sub-

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25 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL).
26 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
27 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 discussed in MB Rodriguez Ferrere "Redefining reasonableness" [2017] NZLJ 67.

Precinct C is so obviously correct that it speaks for itself, and nor is it a decision on which the Body Corporates' submitters' evidence was so strong that it obviously ought to have succeeded and where there is no room to infer any logical disconnection. He submits that the Panel's decision to create Sub-precinct C is therefore "odd" and "irregular" which serves to heighten the importance of the need to give proper and adequate reasons for the decision. He also refers to the Council's lack of support for the creation of Sub-precinct C, and says that the inconsistency between the Council's position and the Panel's decision is itself of significance to the question of whether an error of law was made by the Panel in its decision to create Sub-precinct C and contrary to the evidence presented by both Viaduct and the Council.

[36] As regards the inclusion of Lighter Quay in Sub-precinct C, Mr Salmon acknowledges that the inclusion of Lighter Quay was contended for and supported by evidence given to the Panel by the Chairman of the Lighter Quay Residents Society. However, that evidence did not address the amenity of providing for the Sofitel Hotel to be included within the proposed Sub-precinct C. Accordingly Mr Salmon submits that the Panel's failure to give reasons, coupled with its decision being contrary to the evidence presented by both the Council and Viaduct, are such as to demonstrate that the decision amounts to an error of law. Furthermore, he says that the Panel did not direct its mind to independently assessing the rationality of including Lighter Quay within Sub-precinct C and by doing so made an error of law.

[37] Finally, as regards the roof bonus, Mr Salmon notes that Viaduct had presented written submissions to the Panel seeking the reinstatement of a two metre roof bonus addition to the maximum permitted height restriction for all sites in the Viaduct Harbour Precinct, which had been previously provided for in the Operative Plan central area section but not carried over into the notified PAUP. Mr Salmon says that despite the agreement recorded in the Mediation Joint Statement for Topic 050, the Panel omitted to either address that issue in its reasons or include the roof bonus in its recommendations. Mr Salmon submits that it seems likely that the Panel simply failed to turn its mind to the issue of the roof bonus and its application within Sub-precinct C.

[38] Mr Salmon submits that the appeal should be allowed and the Panel's recommended amendments to the PAUP creating Sub-precinct C be set aside. As regards the roof bonus, Mr Salmon says that as the correct decision is clearly apparent from the terms of the Mediation Joint Statement, the Court should grant relief by making an order directing the Council to make provision in the AUP for a roof bonus to apply to the Sub-precinct C area of the Viaduct Harbour in the terms set out in the Mediation Joint Statement.

[39] As regards the alleged errors of law which he claims have arisen from the Panel's failure to provide any or sufficient reasons for its decision and recommendation, and by reason of making a decision without any sufficient evidential foundation, Mr Salmon seeks an order remitting the issue of whether Sub-precinct C should be established back to the Auckland Council for its determination. Mr Salmon submits that although the Panel continues to exist in legal terms, the Council is seized of the relevant evidence, is therefore in a position to decide the matter and is the ultimate decision maker as to the contents of the AUP.

Auckland Council's submissions

[40] The Council opposes all of Viaduct's grounds of appeal.

[41] In respect of the duty to give reasons and as to the sufficiency of reasons, the Council's position is that while the Panel was obliged to give reasons, it was not obliged to give "detailed" reasons. It submits that the Council was not obliged to give further reasons for its decision to accept the Panel's recommendations.

[42] As regards the alleged errors of law, Mr Loutit for the Council submits that Viaduct has not met the requisite "very high hurdle".[28] He says that the appellant is inappropriately seeking to revisit the factual merits of this case in the context of a question of law appeal. Mr Loutit submits that the Panel had more than sufficient evidence before it to reach and justify its conclusion that Sub-precinct C should be created. In particular, Mr Loutit notes that the Body Corporates expressly sought the

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28 *Independent Māori Statutory Board v Auckland Council* [2017] NZHC 356, (2017) 19 ELRNZ 721 at [64].

creation of Sub-precinct C in their submissions, and he refers to the evidence that the Panel received in support of the creation of Sub-precinct C.

[43] Mr Loutit notes that Viaduct in its submissions has examined the evidence presented to the Panel in great detail, and he submits that it is not the role and function of this Court to examine the evidence in detail to make a finding as to what the most appropriate planning provisions would be. Rather, he submits, the High Court's role is to determine whether there has been an error of law.

[44] In respect of the inclusion of Lighter Quay in Sub-precinct C, Mr Loutit submits that sufficient evidence was presented to make the recommendation a permissible option.

[45] On the issue of the roof bonus, the Council's position is that the Panel's recommendation was not unreasonable as it received evidence supporting the recommendation. Mr Loutit refers the Court to the planning evidence that Mr Haines, for the Body Corporates, submitted to the Panel. Mr Haines attached to his evidence a marked-up version of the PAUP. In his mark-up Mr Haines sought the following amendment to the drafting of the roof bonus proposed by the Council's planning witnesses:

> 3. <u>On land shown in sub-precinct A with a height limit of 24 metres or greater</u> the height limit ~~in sub-precinct A~~ may be exceeded by no more than 2m for roofs, including any roof top projections, subject to the building complying with clause 3.2 below (site intensity)

[46] Mr Loutit notes that Mr Haines' mark-up also included the full suite of amendments sought by the Body Corporates in relation to the creation of Sub-precinct C. He argues that this means that the Sub-precinct A referred to in the roof bonus drafting sought by Mr Haines on behalf of the Body Corporates did not include the land areas covered by Sub-precinct C.

[47] In short, Mr Loutit submits that while the Council and Viaduct sought that the roof bonus apply to all of the land shown as Sub-precinct A in the PAUP, the Body Corporates sought that the roof bonus apply only to the land which remained Sub-precinct A – and would not apply to the land which became Sub-precinct C (or those

buildings with a height of less than 24 metres). Accordingly, Mr Loutit submits that the Panel's recommendations were supported by evidence and were, therefore, not unreasonable.

Body Corporates' submissions

[48] For the Body Corporates Ms Tree adopts the legal submissions made for the Council in relation to issues 1(a), (b) and (g). The Body Corporates will abide the Court's decision in respect of the roof bonus in Sub-precinct C and the issues in (c), (d) and (e).

[49] By way of background and introduction to her submissions, Ms Tree says that the Viaduct Harbour Precinct was established under the provisions of the Auckland City Central Area District Plan which provided for offices as a permitted activity in specific areas away from the water's edge and main pedestrian routes as identified on the City of Auckland Operative District Plan.[29] Pursuant to the Central Area District Plan, office activities in the balance of the Precinct, including the area occupied by the Body Corporates' buildings, were non-complying. Ms Tree says that the PAUP retained the Viaduct Harbour Precinct but did not identify an area for office activities on the Precinct Plan, and did not list office activities in the Viaduct Harbour Precinct Activity table. Consequently the Central Area Activity Table applied which provided that office use, and a wide range of other commercial activities, were permitted throughout the Precinct. This was a significant change and the Body Corporates were concerned that the PAUP, by providing for unconstrained non-residential activities, would displace the residential use of their premises and change the character of the area, progressively making it less desirable for long-term and permanent residents. For those reasons the Body Corporates made submissions to the Panel seeking, amongst other things, the creation of a new Sub-precinct C to recognise, protect and provide for the residential character and amenity values in the area of the established residential apartments together with a new area (area A) within Sub-precinct C which would provide appropriate controls on commercial activities that may be permitted to be established and conducted within Sub-precinct C.

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29 *City of Auckland Operative District Plan Central Area Section* (operative 2004, updated 6 September 2011) at [14.7].

[50] Ms Tree says that the Body Corporates have no interest in the roof bonus issue and she makes no submissions regarding that issue.

[51] In relation to the Panel's statutory obligation to give reasons for accepting or rejecting submissions, Ms Tree says that while the Panel is required to give reasons it is not required to give detailed reasons. She notes that the Viaduct Precinct is one of 15 precincts located within the city centre area, and says that if the Panel were required to provide reasons for every decision made in relation to the Topic 050 report, it would have been an impossible task. Ms Tree says that a key part of the Body Corporates' submission as regards reasons is that the Panel's reasons for recommending the creation of Sub-precinct C can be seen in and are apparent from the wording of the new Sub-precinct description, objectives and policies. Ms Tree further noted the Panel's statement in its report that in all cases, changes it made to the PAUP were to be read as being recommendations.

[52] Ms Tree submits that the Panel has given adequate reasons for accepting or rejecting submissions. In her submission, the Panel's reasons are clearly expressed and apparent from the contents of the wording of the objectives and policies as set out in its report and recommendations for the Sub-precinct. Ms Tree says that the process by which the Panel made amendments and additions to the PAUP to provide for the creation of Sub-precinct C was an active process which confirms that the recommendations were not the result of some error, but rather were the consequence of a deliberate decision to accept the submissions and evidence presented by the Body Corporates in support of the creation of Sub-precinct C. Moreover, says Ms Tree, the Panel made it clear in its report that the amendments it had made and recommended were to be read as being its reasons. Ms Tree further noted that the Body Corporates had submitted to the Panel that office use within the proposed Sub-precinct should be categorised as being non-complying activities, whereas the Panel recommended that they be categorised as restricted activities. This decision shows that the Panel had assessed the issue and concluded that such a provision would provide sufficient protection for the residential uses within the Sub-precinct.

[53] As to whether the Panel's decisions and recommendations were reasonable and founded on sufficient evidence, Ms Tree says that the Court should resist any attempt

by the appellant to utilise an appeal on grounds of error of law to have the Court undertake a review of the factual merits of the submissions considered by the Panel.

The obligation on the Panel to give reasons

The law

[54] Section 144(8) of the Act requires the Panel to include within its recommendation reports its recommendations on the topic or topics covered by the report; its decisions on the provisions and matters raised in submissions made in respect of the topic covered; and the reasons for accepting or rejecting submissions. In expressing its reasons, the Panel may address submissions by grouping them according to the provisions of the PAUP to which they relate or to the matters to which they relate.

[55] In my recent decision in *Belgiorno-Nettis v Auckland Council* I addressed the issue of the Panel's obligation to give reasons for the recommendations made to the Council.[30] As the same issue arises here, it is convenient to set out my introductory comments to the obligation to give reasons in that case:

> [99] In New Zealand there is no inflexible rule of general application that a Judge must give reasons, although it is good judicial practice to do so.[31] However, in this case it is not disputed that the Panel was required to give reasons for its recommendations and that the Council was required to give reasons when rejecting recommendations. This requirement is prescribed by the Act. The issue here is whether the reasons given by the Panel were adequate, and in addressing that issue, it is appropriate to consider the purposes served by the giving of reasons generally.
>
> [100] There are a number of reasons why a decision maker, such as a judge or, in this case the Panel, is required to provide reasons for their decisions. The Court of Appeal in *Lewis v Wilson & Horton Ltd* outlined three broad reasons.[32]
>
> (a) First, the provision of reasons for decisions is an important part of openness in the administration of justice, and serves a wider purpose than that of the interests involved in the particular case. Openness and transparency of legal proceedings, including the provision of reasons for decisions is critical to the maintenance of public confidence in the justice system.

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30 *Belgiorno-Nettis v Auckland Council* [2017] NZHC 2387.
31 *R v Awatere* [1982] 1 NZLR 644 (CA).
32 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [74]–[82].

(b) Second, giving reasons enables the lawfulness of what has been done to be assessed by a court exercising supervisory jurisdiction.

(c) Third, a requirement to give reasons imposes discipline upon the decision maker, and operates to guard against the making of erroneous or arbitrary decisions.

[101] In *Singh v Department of Labour*, referred to in *Lewis v Wilson & Horton Ltd*,[33] the Court of [Appeal] commented on the rationale for requiring the giving of reasons, which they said included providing assurance to affected parties that their evidence and arguments have been assessed in accordance with the law, and enabling them to decide whether or not to challenge a decision.[34]

[102] The Court of Appeal's observations in *Lewis v Wilson & Horton Ltd* were endorsed by the Privy Council in *Taito v R*,[35] and have been applied in the resource management context by the High Court.[36]

[103] What then is required to discharge an obligation to give reasons? In *Lewis v Wilson & Horton Ltd* Elias CJ observed that "the reasons may be abbreviated. In some cases they will be evident without express reference."[37] Thus it is evident that there are no uniform requirements that apply in all situations. The extent and depth of the reasoning required in order to give effect to the purposes described above may vary having regard to the function and role of the decision maker, the significance of the decision made upon the person or parties affected by the decision, the rights of appeal available, and the context and time available to make a decision.

[104] Asher J in *Television New Zealand Ltd v West* stated:[38]

> ... the depth of the reasoning process can be expected to vary in accordance with the role of the tribunal and the nature of the hearing. A District Court might give very short reasons for a bail decision during a busy court day. Appellate Court decisions are generally detailed and closely reasoned.

...

(footnote numbers adjusted)

[56] When considering the extent of the Panel's duty to give reasons, among the relevant considerations is the function and role of the decision maker. For context, it is worth setting out s 144 of the Act in full:

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33 At [76].
34 *Singh v Department of Labour* [1999] NZAR 258 at 262-263.
35 [*R* v *Taito* [2003] UKPC 15, [2003] 3 NZLR 577 at 585].
36 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).
37 At [81].
38 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [82].

144 Hearings Panel must make recommendations to Council on proposed plan

(1) The Hearings Panel must make recommendations on the proposed plan, including any recommended changes to the proposed plan.

(2) The Hearings Panel may make recommendations in respect of a particular topic after it has finished hearing submissions on that topic.

(3) The Hearings Panel must make any remaining recommendations after it has finished hearing all of the submissions that will be heard on the proposed plan.

Scope of recommendations

(4) The Hearings Panel must make recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA (which relates to designations and heritage orders), as applied by section 123.

(5) However, the Hearings Panel—

(a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan; and

(b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.

(6) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.

Recommendations must be provided in reports

(7) The Hearings Panel must provide its recommendations to the Council in 1 or more reports.

(8) Each report must include—

(a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and

(b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and

(c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—

(i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

(9) Each report may also include—

(a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and

(b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.

(10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[57] In *Belgiorno-Nettis* I reached the conclusion that the Panel was not required to respond to individual submissions and give reasons for its zoning and height recommendations on a site-specific basis. In doing so I was influenced by the statutory context of s 144(8) and the scale of the task with which the Panel was faced:

> [110] Section 144(8)(c) of the Act is to be interpreted and its meaning ascertained both from its text and in light of its purpose.[39] In my view, the clear purpose of Part 4 of the Act was to facilitate the preparation of the first Auckland combined plan, combining the requirements of a regional policy statement, regional plan, and a district plan by means of a streamlined set of procedures and processes that would enable the Auckland Unitary Plan to be produced within the comparatively short time of three years. The Panel was to hear all submissions and thereafter make recommendations to the Council regarding the contents of the proposed plan, leaving the Council to accept or reject the Panel's recommendations within the very limited timeframe of 20 working days. Given the scale of the Panel's task the Panel, while required to include reasons, was specifically empowered to address submissions by grouping them according to the provisions of the Plan to which they related, or according to the matters they related to.
>
> [111] In this statutory context, I consider that it would be sufficient for the Panel to group submissions by reference to the issues, relief or "topics" to which the submissions were directed. There was in my view, no criteria for the grouping of submissions that would require the Panel to group submissions on the basis of their connection to a specific site, or by reference to site-specific issues.
>
> [112] I note that the language used in s 144(8)(c)(ii) refers to grouping the submissions according to the "matters to which they relate." The word "matters" encompasses the use of a broad range of possible criteria for the grouping of submissions. Submissions, or groups of submissions, that are focused upon particular "sites" are no doubt capable of being treated as "matters", and could be grouped together pursuant to s 144(8)(c)(ii). However, were the Panel to adopt that approach it would inevitably lead to it considering a multiplicity of groupings of site-specific submissions which would be contrary to the objective of expeditious and efficient consideration and disposition of the many submissions it was required to address. In my view, the use of the broader concept of "matters" both enables and suggests the legislative intention for the use of higher-level grouping criteria to be

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39 Interpretation Act 1999, s 5(1).

employed. Such an approach enabled the Panel to group submissions directed at common issues irrespective of the particular sites that they related to, and thereby proceed in an efficient and expeditious manner.

[113] I disagree with the appellant's submission that as zoning and height control issues are site-specific, the reasons for accepting or rejecting submissions must engage with submissions on that basis by grouping submissions that relate to a specific site or sites. In my view, such an approach would frustrate the clear legislative purpose of ss 144(8)(c) and (10).

[114] It is also clear not only from the volume of submissions presented to the Panel, but also from the large proportion of the submissions that sought site-specific relief, that the Panel would be quite overwhelmed were it required to respond to submissions and give reasons for its recommendations on a site-specific basis. While the Panel was careful to note that it had heard and considered all of the submissions presented to it, it proceeded to make broad and high level recommendations regarding zoning and height controls. Apart from referring to individual properties or submissions for the purpose of giving an example of its rationale, the Panel generally did not address submissions by reference to specific sites, even where they had been the subject of a number of separate submissions – unless they were considered to warrant some specific relief not hitherto included in the Plan.

[115] It is also significant in relation to the legislative purpose of s 144, that the 2015 Amendment Act enabled the Panel to make recommendations in respect of topics, and to provide its recommendations to the Council in one or more reports. By enabling the Panel to address submissions and make its recommendations to the Council by reference to topics, the legislation recognised that arranging the issues into topics was an effective and efficient means of the Panel dealing with the large volume of material.

[116] That conclusion is reinforced when one considers the detailed nature of the submissions made by the appellant. The Panel was dealing with thousands of submissions, including many of a similar nature, directed at site-specific relief. The numeric volume of the submissions was such as would have made it simply impossible for the Panel to respond to even groupings of site-specific submissions and complete its task within the tight timeframe prescribed by the Act. That situation informs a purposive interpretation of Part 4 and the requirements of s 144(8). The fact that the Panel was empowered to gather submissions together by reference to provisions of the proposed plan or other matters that that they related to, and thereby manage and process the volume of material included in the submissions, is in my view a significant factor indicating the legislative intent.

(footnote numbers adjusted)

[58] While the *Belgiorno-Nettis* case related to the sufficiency of reasons given by the Panel in connection with submissions made regarding specific sites, the above observations are also of general application to the present appeal, particularly as regards the purposive approach to interpretation of the mandatory requirement

contained in s 144(8)(c) for the Panel's reports to include reasons for accepting or rejecting submissions presented to it.

[59] In *Albany North Landowners v Auckland Council*, Whata J similarly reached the conclusion that the Panel was not required to list and respond to every individual submission:[40]

> Approaching the issue purposively and in light of the scheme of Part 4, it is, as Mr Somerville QC submitted, unrealistic to expect the IHP to specify and then state the reasons for accepting and rejecting each submission point. As Ms Kirman helpfully noted there were approximately 93,600 submission points in respect of the PAUP. It would have been a Herculean task to list and respond to each submission with reasons, especially given the limited statutory timeframe to produce the reports (3 years). Furthermore, the listing of individual submissions and the reasons given would inevitably have involved duplication, adding little by way of transparency or utility to interested parties, provided the issues raised by the submissions are addressed by topic in the reasons given by the IHP. Accordingly I can see no proper basis for reading into s 144(8) a mandatory obligation for greater specificity than that adopted by the IHP, namely to identify groups of submissions on a topic by topic basis …
>
> The Act plainly envisages resolution of issues by topic not by individual submission or area.

[60] In *Hollander v Auckland Council*, a more recent appeal against a zoning decision made by Auckland Council (accepting the Panel's recommendation), Heath J also acknowledged the "extraordinary breadth of the Panel's task".[41] Although he accepted that the Panel was obliged, within the constraints of the Act, to comply with the principles of natural justice and to give reasons, he held that the Panel was not obliged to give individualised reasons.

[61] Having considered the statutory context and the Panel's function and role, it is also relevant to take into account the right of appeal being exercised in the present case. As noted in *Lewis*, one of the rationales for the giving of reasons is to enable an appellate court to assess the lawfulness of what has been done. Mr Salmon submits that the reasons for the Panel's decision are not readily ascertainable, and it is improper to simply infer that the Panel adopted the evidence and submissions of the Body

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40 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [143] and [144].
41 *Hollander v Auckland Council* [2017] NZHC 2487 at [59].

Corporates. If that approach is adopted, he says that Viaduct is effectively deprived of its appeal right.

[62] I note however that the right of appeal being exercised in the present case is a limited one. Section 158 of the Act confers a right of appeal to the High Court upon a person who made a submission on the proposed plan in respect of a matter addressed in the submission to the Panel, and where the Council accepted a recommendation of the Panel resulting in a provision being included in, or excluded from the proposed plan. An appeal is limited to a question of law.[42] Viaduct in the present case alleges errors of law by reason of the Panel's decisions being founded upon clearly untenable conclusions, which were unsupported by the evidence before it.

[63] On an appeal limited to a question of law, the appellate Court will not allow itself to be drawn into revisiting the factual merits of the case under the guise of a question of law.[43] The question must be whether the decision under appeal was a "permissible option".[44]

[64] The limited nature of the appeal right in the present case, and the very high hurdle that Viaduct faces as a result, informs the requirements of the obligation to give reasons. The reasons provided must be adequate and sufficient to enable the appellate court to see and determine whether there is some factual basis upon which the conclusion can be supported and/or whether the Panel has misdirected itself as to the law. Bearing in mind also the statutory context and the functions of the Panel, particularly the timeframes and enormous number of submissions with which it is confronted, I consider that having regard to the contents of the Panel's recommendations, no more is required.

The adequacy of the reasons for the recommendation to create Sub-precinct C

[65] In relation to Sub-precinct C, Mr Salmon says that the only expression of reasons given by the Panel was that contained in its Viaduct Harbour Precinct Report in which it said:

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42 Section 158(4).
43 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [54].
44 *Transpower*, above n 43, at [54].

x. Add a new sub-precinct C to the Viaduct Harbour Precinct, with offices now a discretionary activity and convenience retail (dairies, hairdressers etc) as restricted discretionary activities.

[66] However, as Mr Loutit notes, the Panel's Overview Report confirms that the Panel provided its reasons in three forms: its recommendation reports, recommended provisions, and by means of amended PAUP maps presented by GIS Viewer. In its Overview Report the Panel explained:[45]

> The reasons for the Panel's recommendations whether to keep or change provisions are set out in the recommendations and, like the Plan itself, should be read as an integrated whole. The Overview section is intended to guide readers to finding the recommendations on the matters likely to be of interest, but it is important that the Overview be read in conjunction with the detailed narratives in the relevant topic reports.
>
> ...
>
> In all cases, the changes [made by the Panel to the PAUP] are to be read as recommendations. The Panel wishes to stress that it has given a great deal of thought to ensuring that its recommendations are integrated and consistent. Any decision to amend or reject a recommendation should include consideration of the consequential changes that may need to be made to other parts of the Unitary Plan to maintain overall integration and consistency.
>
> ...
>
> ...In the frequent cases where a version of the text has been agreed among the parties (the Council and submitters participating in mediation and the hearing session), the Panel has respected such agreements wherever they appear to the Panel to be consistent with the Resource Management Act 1991, any relevant policy statements and the rest of the Unitary Plan.

[67] As I have already noted, the Panel summarised its recommendations regarding the Viaduct Harbour Precinct in its Viaduct Harbour Precinct Report. It explained in the introduction to this report that the report covered all of the submissions in the Submissions Points Pathways report for that topic, and that it had grouped all of the submissions pursuant to s 144(8)(c) of the Act. The Panel further stated that while individual submissions and points may not have been expressly referred to in its report, "all points have nevertheless been taken into account when making the Panel's recommendations." It also referred to the submissions and evidence presented to it on the topic, and listed the documents and submissions it had relied on in making its recommendations, which materials included the Mediation Joint Statement in relation

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45 At 5, 14 and 17.

to Viaduct Harbour.[46] In the summary of its recommended changes to the PAUP, it referred to recommending the addition of a new Sub-precinct C to the Viaduct Harbour Precinct, with offices to be a discretionary activity and convenience retail to be restricted discretionary activities.[47]

[68] The Panel's more detailed recommendations of changes to the PAUP in relation to Viaduct Harbour are found in its I211 Recommendations, where it said:[48]

> The precinct is characterised by its enclosed water space, interesting water edge, proximity to the city core, and areas of low-rise character buildings.
>
> ...
>
> The purpose of the Viaduct Harbour precinct is to provide for a scale of development and a range of uses which reflect and complement the Viaduct Harbour as a special place of character within the city centre.
>
> ....
>
> To build upon and reinforce the Viaduct Harbour's attributes, provision is made for a wide range of activities. In particular, the establishment of a mix of recreation, leisure, retail, entertainment and community/cultural activities is encouraged along the water's edge, open spaces, and certain roads where pedestrian activity is likely to be highest.
>
> ...
>
> The residential area, identified as Sub-precinct C, recognises the established high quality residential environment and the benefits that a permanent residential population provides to the character, vitality, safety and amenity of the precinct.

[69] The Panel's I211 Recommendations included within seven objectives of the PAUP as regards the Viaduct Harbour Precinct:[49]

> (7) Maintain the residential character and amenity in Sub-precinct C as an attractive place for permanent residents.

[70] The Panel's I211 Recommendations also recommended a number of policies that would apply to the Viaduct Harbour Precinct in addition to those that were applicable to the City Centre Zone, including:[50]

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46 At 19–21.
47 At 5.
48 At 1.
49 At 2.
50 At 3.

(11) Maintain the residential character and amenity values in Sub-precinct C by avoiding activities that adversely affect the residential character and its related amenity values.

(12) Provide for permanent residents in Sub-Precinct C to:

(a) maintain and enhance the character and vitality of the precinct; and

(b) promote the safety and amenity for pedestrians through passive surveillance.

[71] In its I211 Recommendations the Panel also recommended the following criteria for the Council when assessing a restricted discretionary activity resource consent application concerning the Viaduct Harbour precinct:[51]

(17) activities on the ground floor within Area A of sub-precinct C:

(a) the extent to which activities are compatible with and do not detract from the residential character and amenity values of sub-precinct C; and

(b) whether activities generate noise levels that would adversely affect residential amenity. The Council may impose conditions on the activity's hours of operation and/or permitted levels of low frequency noise.

[72] I consider that when taken and read together, all these statements by the Panel do provide a sufficiently clear and detailed expression of its reasons for recommending the creation of Sub-precinct C. In particular, the Panel's statement in its I211 Recommendations that: "The residential area, identified as Sub-precinct C, recognises the established high quality residential environment and the benefits that a permanent residential population provides to the character, vitality, safety and amenity of the precinct" is in my view a succinct but nevertheless adequate expression of the Panel's reasons for recommending the creation of the Sub-precinct. While these reasons are expressed concisely, in my view such brevity is entirely consistent with the Panel's obligation to provide reasons notwithstanding the enormous number of submissions and issues it had to deal with and determine in the limited time provided for doing so.

[73] Furthermore, I consider that the Panel's reasons as evident from its explanation of Sub-precinct C also demonstrate that it had considered the competing submissions

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51 At 17.

of the interested parties, and that it had concluded that the establishment of Sub-precinct C was necessary in order to maintain and preserve the residential character and amenities of the Sub-precinct as an area for permanent residents.

[74] I further find that these statements of the Panel set out its reasons in sufficient detail as to render its recommendation decision, and the basis upon which it was reached, susceptible to analysis and criticism enabling the parties and the appellate court to assess whether the Panel took into account all relevant matters or considered any irrelevant matters. In particular, I note that the Panel set out a list of the material and evidence it had considered and relied upon in reaching its recommendation decisions. I also consider that the Panel's statements sufficiently inform the parties and any reader as to the Panel's reasoning and decision process and the material relied on by the Panel and referred to in reaching the recommendation decision. Taken together, I consider that the Panel has provided a sufficiently detailed statement of its reasons to enable an affected party to determine whether to exercise the right to appeal on a question of law, and adequate for the appellate Court to consider whether the Panel has reached a conclusion that is unsupportable on the evidence or has misdirected itself as to the law.

[75] Viaduct submits that because Sub-precinct C contains only several hundred residential units and is to be the sole exclusively residential enclave located within the Auckland CBD, there is a particular need for the Panel to have included within its reasons an evaluation of the competing submissions and evidence, and an explanation for its decision. However, that proposition overlooks the Panel's explanation of its purpose being to maintain the established and existing residential character and use of the purpose-built residential apartment buildings within Sub-precinct C. In the expert evidence presented to the Panel on behalf of the Body Corporates, it was contended that in the absence of such protection, the residential uses within the apartment premises of the Body Corporates would be likely to be progressively encroached upon by the introduction of commercial offices, to the detriment of the residential amenities, and result in the displacement of permanent residents from the precinct. The Panel's conclusion and decision on this issue does not, in my view, require any more specific or detailed reasons to be given than were in fact provided by means of the statements

it made in its Overview Report, Viaduct Harbour Precinct report and I211 Recommendations.

[76] The Panel's decision involved an evaluation of the case for the creation of the Sub-precinct and the contrary arguments advanced by the Council and Viaduct, which led to the Panel preferring and adopting the contentions of the Body Corporates. Such a decision did not involve an elaborate rationale but was in essence simply a preference of one case and solution over another. That is self-evident and no more detailed reasons for that preference are necessary in my view.

[77] Accordingly I find that the Panel's reasons for its recommendation to create Sub-precinct C were adequate and sufficient, and consequently the appellant fails on this ground of its appeal.

Absence of reasons relating to the roof bonus

[78] As is apparent from the joint list of issues, the appellant also challenges the Panel's failure to give any reasons for not including the two metre roof bonus as applicable to Sub-precinct C. I consider that it is clear that the Panel was required to give reasons for a decision to adopt a different course from the agreed position presented to it by the parties at the hearing and in the Mediation Joint Statement. The Panel itself had explained in its Overview Report that it had approached the instances of agreed positions by respecting such agreements wherever they were consistent with the Resource Management Act, any relevant policy statements and the rest of the Unitary Plan.[52]

[79] While any such reasons could have been expressed succinctly, had the Panel made a considered decision to omit provision for any roof bonus in Sub-precinct C, as a minimum it would need to say why it had reached that conclusion. However, for the reasons I shall further address below, I consider that the absence of any express reasons or explanation as regards the roof bonus has led me to conclude that the Panel must have overlooked this issue.

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52 At 17.

The obligation on the Council to give reasons

[80] Mr Salmon notes that apart from the Council's statement in its Decisions Report that it had accepted all the recommendations of the Panel as contained in the Panel's Viaduct Harbour Precinct Report as they related to the PAUP and were contained in the plans and maps attached to the Panel's recommendations, no further rationale or reasons were given by the Council for its decision to adopt and accept those recommendations.

[81] In terms of the procedure stipulated by the Act, where it accepted the Panel's recommendations, the Council was not required to give reasons for its decisions to do so. The Council was only required to provide and notify its reasons where it decided to reject a recommendation of the Panel.[53]

[82] The appellant submits that the Council nevertheless had a common-law duty to provide its reasons, relying on *Lewis v Wilson & Horton Ltd.* The question of whether the Council had a common-law duty to give reasons notwithstanding the provisions of the statute is informed by the context in which the decisions to either accept or reject the Panel's recommendations were to be made. This context includes the enormous volume of material and number of recommendations that the Council was required to consider, as well as the extremely tight time frame of 20 working days within which it was required to make determinations regarding the acceptance or rejection of the Panel's recommendations.

[83] Where the Panel was itself required to give reasons, those persons or parties who made submissions would thereby be informed of the reasons for any recommendation decision which was accepted by the Council. In those circumstances a common-law requirement upon the Council to also provide reasons for accepting the recommendation would be likely to add little more than a reference to the Panel's reasons. It is also of significance that the Act only requires the Council to provide reasons where it decides to reject a Panel recommendation, thereby ensuring that persons affected by such a decision would be informed of the reasons for such a

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53 Local Government (Auckland Transitional Provisions) Act 2010, s 148(4)a)(ii).

rejection decision and the adoption of some alternative and different provision in the PAUP.

[84] In *Independent Māori Statutory Board v Auckland Council*, Wylie J held that the Council's decision to accept recommendations by the Panel was not required to be accompanied by reasons.[54] Counsel in that case accepted that, by implication, where the Council accepted a recommendation made to it by the Panel, it could be taken as having accepted the Panel's reasoning.

[85] Having regard to this factual and statutory context and to the principles set out in *Lewis v Wilson & Horton,* I do not consider that a common-law duty can be implied requiring the Council to give reasons for its decision to accept the Panel's recommendation to create Sub-precinct C. Accordingly, I find that the appellant fails on this ground of its appeal.

Alleged factual error and questions of law

[86] Viaduct's appeal is founded in part upon the proposition that the decisions of the Panel to create Sub-precinct C; to include Lighter Quay within Sub-precinct C; and not to provide for a two-metre roof bonus to apply within Sub-precinct C in each case involved errors of law by reason of being founded upon clearly untenable conclusions, which were unsupported by the evidence before the Panel.

Appeals on a question of law

[87] The Supreme Court in *Bryson v Three Foot Six Ltd* set out when an error of fact can amount to an error of law:

> [25] An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable.

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[54] *Independent Māori Statutory Board v Auckland Council*, above n 28, at [65]; see also *Transpower New Zealand Ltd v Auckland Council*, above n 43, at [56].

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable - so clearly untenable - as to amount to an error of law; proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test …
>
> [27] It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind. Lord Donaldson MR has pointed out in *Piggott Brothers & Co Ltd v Jackson* the danger that an appellate court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:
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> > "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by any evidence or a clear self-misdirection in law by the industrial tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option … ."
>
> (footnotes omitted)

[88] The test therefore creates a high threshold. The appellate court will not weigh up competing evidence or attempt to judge the sufficiency of the evidence.[55] The question is whether the true and only reasonable conclusion contradicts the Panel's recommendation.

The creation of Sub-precinct C

[89] Addressing the evidence before the Panel in relation to the issue of a proposed Sub-precinct C, Mr Salmon says that although there was evidence presented in support of the creation of Sub-precinct C, that evidence was opposed by evidence presented on behalf of Viaduct and also opposed by witnesses for the Council. He notes that there were only five submitters, including the parties to this appeal, involved in making

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55 *Hutchinson Bros Ltd v Auckland City Council* (1988) 13 NZTPA 39 (HC).

submissions to the Panel and that the other two submitters addressed issues that are not relevant to the appeal. He submits that the planners for both the Council and Viaduct and expert consultant witnesses called by Viaduct did not view the creation of Sub-precinct C as an appropriate objective for the Viaduct Harbour Precinct and they supported the notified version of the PAUP in which there was no provision for a Sub-precinct C.

[90] However, I note that the evidence before the Panel presented by and on behalf of the Body Corporates included expert opinion evidence supporting and justifying the need for the establishment of a residential sub-precinct within the Viaduct Harbour Precinct, in order to protect and preserve the residential uses of the purpose-built residential complexes that have been established in the area. The evidence of Mr Haines, which I have referred to and set out at [24] above, sets out the basis and rationale for the establishment of a sub-precinct as being necessary to protect the established residential use of the Body Corporates' residential apartment complexes. Mr Haines also addressed the issue of incompatibility of mixed commercial and residential uses and the effect of commercial activities upon residential amenities in a single site. He also addressed and supported the extension of Sub-precinct C to include the Lighter Quay development. In addition to Mr Haines, there was also evidence from the other witnesses who gave evidence on behalf of the Body Corporates in support of the creation of Sub-precinct C.

[91] On the basis of the evidence presented to the Panel by the Body Corporates, it was clearly an option open to the Panel to prefer this contention over the opposition presented on behalf of both Viaduct and the Council, and to recommend to the Council the creation of Sub-precinct C as a necessary and appropriate means of protecting the residential use of the Body Corporates' premises.

[92] While the submissions and evidence presented to the Panel on behalf of Viaduct set out the planning and economic case for not restricting office use within the Viaduct Precinct, in my view it is quite clear that acceptance of the appellant's submissions was not the only reasonable conclusion that the Panel could have reached. The appellant has not shown that the Panel's conclusions as to the need for the creation of Sub-precinct C were untenable or unsupportable.

The extension of Sub-precinct C to include Lighter Quay

[93] The inclusion of Lighter Quay within Sub-precinct C was sought and supported by evidence presented to the Panel by Mr Woodhams, Chairman of the Lighter Quay Residents Society.

[94] As outlined by Mr Loutit in his submissions, the evidence relating to the inclusion of Lighter Quay within Sub-precinct C included:

(a) Mr Duffy's primary evidence, in which he explained that the Lighter Quay Body Corporates supported the relief sought by the Body Corporate submitters and sought that Sub-precinct C be extended over Lighter Quay for this reason;

(b) Mr Woodham's primary evidence, which described the Lighter Quay residential complex and explained why the Lighter Quay Body Corporates supported the creation of Sub-precinct C and the inclusion of Lighter Quay within it;

(c) Mr Haines' primary evidence, in which he explained that the planning concerns he had about the potential degradation of the residential neighbourhoods in the Viaduct Harbour Precinct applied equally to Lighter Quay as the other residential complexes;

(d) Mr Haines' rebuttal evidence, in which he noted that there was a "clear and direct policy framework" in the Operative Plan to provide for residential activity in the areas occupied by Lighter Quay (as well as the other complexes) and stated his "opinion [that] it is necessary and appropriate for this to be continued in the PAUP";

(e) Mr Haines' hearing day evidence outline, which considered that it was "appropriate to support the expansion of the Body Corporates' relief to include the Lighter Quay apartments, especially if there are good planning reasons for doing so and it will result in better plan making"; and

(f) Mr Moller's evidence, which asserted that the provisions of the notified Unitary Plan that allowed for office uses would erode "the established character and amenity of the overall area which relies on the existing defined residential apartments within the Market Place, Customs Street, Pakenham Street, and Halsey Street blocks". Lighter Quay is located on Halsey Street.

[95] Mr Loutit further submits that in addition to evidence presented to the Panel on behalf of the Body Corporates, the evidence of Mr Anderson to the Panel on behalf of Viaduct is also of particular significance because he said that:

> ... the high quality apartment developments in the Precinct such as Latitude 37, Lighter Quay, The Parc, The Point and Viaduct Point will all readily lend themselves either to home occupation or change of use to consulting rooms or office suites.

[96] Mr Loutit submits that if the Panel was minded to introduce restrictions on office activities within the Viaduct Harbour Precinct in order to protect its existing residential uses as sought by the Body Corporates, Mr Anderson's evidence provides a clear basis for Lighter Quay to also be included within the area where office activities are to be restricted.

[97] In my view, Mr Woodhams' evidence in particular provided a clear and sufficient evidential basis for the Panel's decision and recommendation to extend the perimeter of Sub-precinct C to include Lighter Quay. Mr Woodhams explained in his evidence that as Chairman of the Society, he represented all 420 owners of the Lighter Quay apartments included within four Body Corporates, and including Sofitel which has 191 units and which operates a 5-star hotel with a café and restaurant on its ground floor on the inner basin frontage. Mr Woodhams further explained that 229 residential apartments in Lighter Quay fell within the ambit of three of the four Body Corporates he represented, with the Sofitel Body Corporate comprising 191 units. Mr Woodhams said that the Sofitel benefited from its co-location within the residential enclave, enjoying the quieter residential environment, while also being within walking distance to the Auckland CBD and Viaduct Harbour entertainment and dining amenities.

[98] Although there are obvious differences between the provision of hotel accommodation by Sofitel and the purely residential use of the other three Body Corporate premises, there is nevertheless substantial congruency between them, with the respective uses being considered by the Body Corporates and Sofitel themselves as being complementary. As I have noted, this contention was supported in the evidence of Mr David Haines.

[99] Having regard to the evidence and submissions presented to the Panel, the Panel's recommendation that Lighter Quay be included within Sub-precinct C was clearly an available option, and cannot be viewed as untenable or unreasonable.

[100] I therefore conclude that the appellant has failed to overcome the very high hurdle and establish that the Panel made an error or errors of law by reason of its acceptance of the evidence and submissions of the Body Corporates seeking the creation of Sub-precinct C and including the extension and inclusion of Lighter Quay within Sub-precinct C.

The roof bonus

[101] At the mediation which preceded the hearing of submissions, the parties reached agreement regarding the provision of a roof bonus to apply to Sub-precinct A of the Viaduct Harbour Precinct, being a more extensive area within which Sub-precinct C was subsequently established. Such an allowance was consistent with the provisions under which the existing buildings within Sub-precinct C had been constructed.

[102] As I have earlier noted, the Mediation Joint Statement recorded the agreement of all parties including the Council, the appellant, and the Body Corporates regarding the inclusion in the PAUP of a provision allowing the height limit in Sub-precinct A to be exceeded by no more than two metres for roofs, including any roof top projections. As well as the Mediation Joint Statement, the witnesses who gave evidence before the Panel confirmed that agreement had been reached by all parties at the mediation regarding the roof bonus. By way of example, Mr Nicholas Roberts and Ms Kathryn Coombes who gave evidence on behalf of the Council said:

> We support reinstating the 2m roof bonus because it will provide for some flexibility in building height to enable variety in roof form. This will encourage some diversity in heights and roof form across the precinct and will provide visual interest. This amendment was agreed at mediation.

[103] I reject Mr Loutit's submission that Mr Haines' marked up amendments to the PAUP means that the Sub-precinct A referred to in the roof bonus drafting sought by Mr Haines on behalf of the Body Corporates did not include the land areas covered by Sub-precinct C. As I have said, I consider that it is clear that all parties to the mediation had reached agreement as to the provision of the two metre roof bonus, and that the reference to Sub-precinct A in the Mediation Joint Statement simply reflected the fact that Sub-precinct C was yet to be created at the time of the mediation, and did not mean that the Body Corporates sought that the roof bonus apply only to the land which remained Sub-precinct A.

[104] Having regard to the Mediation Joint Statement, the evidence and the consensus position of the parties thereby presented to the Panel, while the Panel was not bound to adopt and apply the agreed terms,[56] in the absence of any contrary and compelling considerations or evidence the Panel could reasonably be expected to do so. The Panel made no reference to any reasons for not adopting and applying the agreed provision.[57] In the absence of any explanation or reasons for not adopting and applying what had been agreed by all parties, it would appear that the Panel must have overlooked the agreed position. The likelihood that the Panel may have overlooked the agreed position is perhaps explained by the manner in which it was presented within the Mediation Joint Statement presented to the Panel. The agreement was not directly referred to in the section of the Statement which set out the "Mediation Outcomes"; rather, it was contained in an attachment to the Statement. Having regard to the truly vast volume of evidence and material that the Panel was required to consider and process, such an oversight (if that is what occurred) can be seen as quite understandable.

[105] However, having regard to the existence of an agreed position reached by all parties directly affected by the existence of a roof bonus to apply within Sub-precinct

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56 See *Hollander v Auckland Council*, above n 41, at [67].

57 Compare *Hollander*, above n 41, where Heath J found that the Panel did give adequate reasons in departing from the aligned position of the Council and submitters.

A (which included the area of the yet-to-be-created Sub-precinct C), and in the absence of any reasons being provided by the Panel for doing so, I consider that the Panel's decision and recommendation to the Council which omitted to make provision for the roof bonus must be considered unreasonable, without foundation, and untenable.

[106] Accordingly, the appellant has succeeded in overcoming the very high hurdle required to establish an error of law was made by the Panel in failing to accept and act upon the agreed position of the parties as recorded in the Mediation Joint Statement.

[107] Having determined that the appellant has made out that ground of its appeal, it is unnecessary for me to further consider the issue of whether the Council was required to give detailed reasons for the decision to accept the Panel's recommendation and not include the two metre roof bonus in the AUP.

Conclusion

[108] The appellant has failed to establish that the Panel, in making its recommendation decisions regarding the creation of Sub-precinct C and regarding the inclusion of Lighter Quay within Sub-precinct C, made any error of law.

[109] The appellant has succeeded in showing that the Panel made an error of law in failing to accept and act upon the agreed position of the parties as recorded in the Mediation Joint Statement regarding the creation of the two metre roof bonus applicable to Sub-precinct C.

[110] As a consequence of the error of law made by the Panel in its recommendation to the Council, the omission of the roof bonus was unlawful and that recommendation is quashed, as is the Council's decision to accept the Panel's recommendation as regards the omission of a roof bonus applicable to Sub-precinct C.

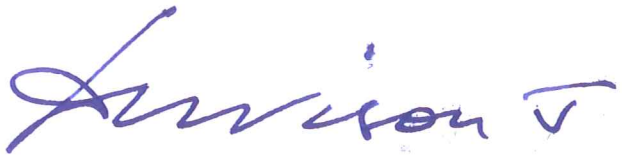
[111] Absent the error of law, the correct decision is clear and on the basis of the evidence could only reasonably have been a recommendation by the Panel to include provision in the PAUP for the creation of a two metre roof bonus to apply to buildings within Sub-precinct C. Accordingly, I grant relief to the appellant and make an order directing the Council to amend the AUP by making provision for and creating a two

metre roof bonus applicable to Sub-precinct C, and otherwise in accordance with the wording contained in the Mediation Joint Statement dated 26 February 2015, which provided:

> 3. The height limit in sub-precinct A may be exceeded by no more than 2 m for roofs, including any roof top projections, subject to the building complying with clause 3.2 below (site intensity).

[112] The appellant has succeeded in its appeal as regards one of the Panel's recommendations and the Council's adoption of it, and has failed in its appeal against the other two challenged recommendations. I consider that before fixing costs the Court should obtain memoranda as to costs from the parties. Accordingly I direct that the appellant is to file and serve a memorandum as to costs within 10 working days following delivery of this judgment, and the respondent and Section 301 Parties shall file and serve their memoranda as to costs within 10 further working days following service upon them of the appellant's memorandum. No memorandum is to exceed three pages in length aside from any appendices or attachments.

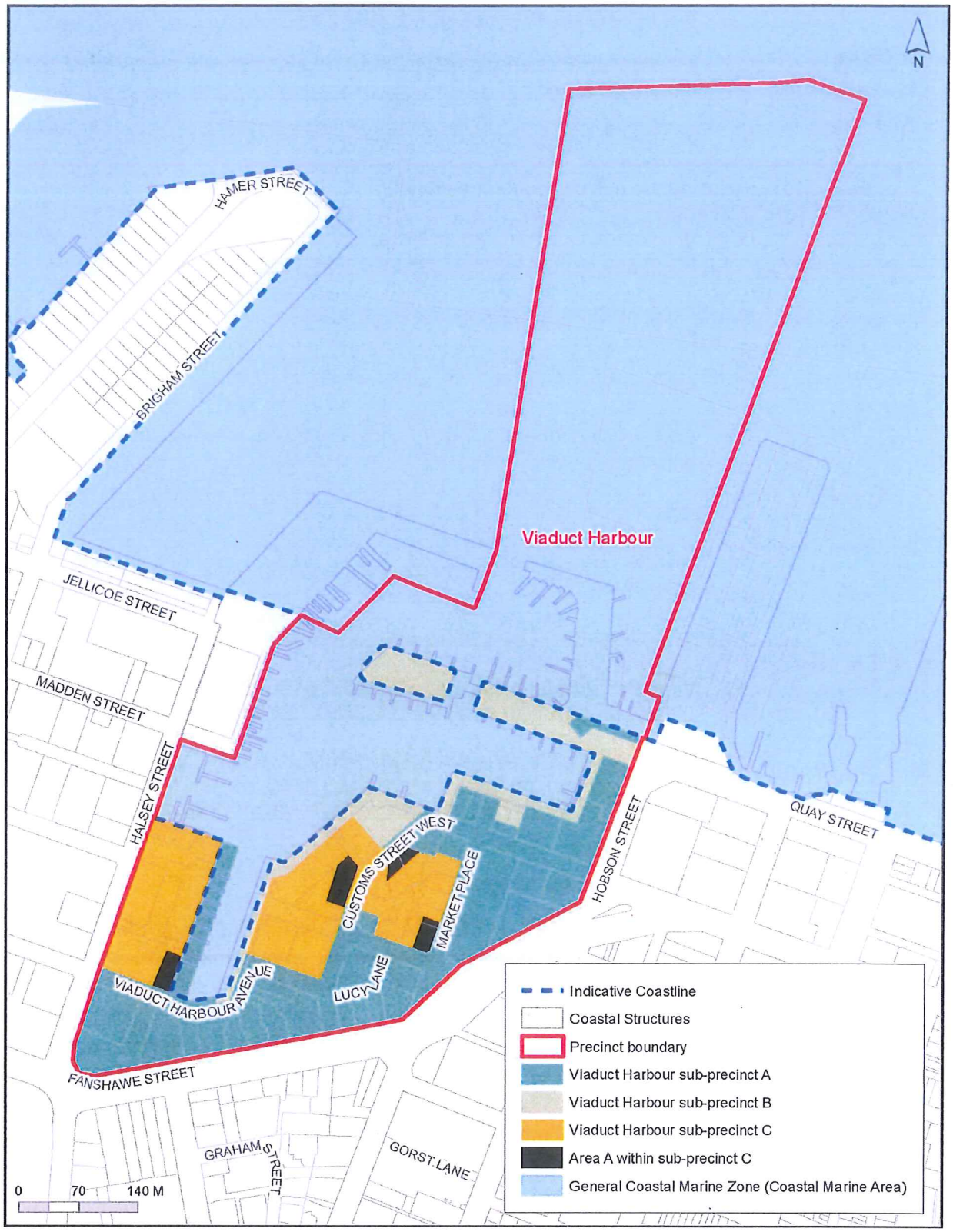
[113] Upon receipt of the memoranda as to costs, I shall determine the question of costs upon the papers.



Paul Davison J

1211.10. Precinct plans

1211.10.1 Viaduct Harbour: Precinct plan 1 —Precinct and sub-precincts



[CIV-2016-404-002276: Viaduct Harbour Holdings Limited]

[ENV-2016-AKL-000185: Viaduct Harbour Holdings Ltd] [CIV-2016-404-002276: Viaduct Harbour Holdings Limited]