IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-002324
CIV-2016-404-002325
[2018] NZHC 916

UNDER	The Judicature Amendment Act 1972 and Local Government (Auckland Transitional Provisions) Act 2010
IN THE MATTER	Of an application for judicial review in respect of decisions made under the Local Government (Auckland Transitional Provisions) Act 2010
BETWEEN	NORTH EASTERN INVESTMENTS LIMITED First Plaintiff
	HERITAGE LAND LIMITED Second Plaintiff
AND	AUCKLAND COUNCIL First Defendant

/cont

Hearing: 7, 8 and 9 February 2018

Appearances: JW Maassen for the Plaintiffs
H Ash and W Bangma for the First Defendant
No appearance by or on behalf of the Second Defendant
C Kirman and A Devine for the Third Defendant

Judgment: 2 May 2018

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Wednesday, 2 May 2018 at 4:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL
Second Defendant

HOUSING NEW ZEALAND
CORPORATION
Third Defendant

Introduction

[1] This proceeding involves a block of land comprising two adjoining titles totalling 7.8 hectares at 56 Fairview Avenue and 129 Oteha Valley Road in Albany on Auckland's North Shore (the land). The land is owned by the second plaintiff, Heritage Land Limited (Heritage). The first plaintiff, North Eastern Investments Land (NEIL), plans to develop the land.

[2] The first defendant, Auckland Council (the Council), is responsible for district and regional planning under both the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010. Following the amalgamation of the former Auckland City Council and a number of other local councils in the Auckland region and pursuant to its obligations under the above legislation, the Council prepared a combined planning instrument known as the Proposed Auckland Unitary Plan (the proposed plan). The proposed plan was publicly notified on 30 September 2013 and was open for submission from then until July 2014.

[3] NEIL lodged a submission on 28 February 2014. NEIL sought rezoning of the land (together with two further titles totalling 0.2 hectares at 131 Oteha Valley Road and 135 Oteha Valley Road owned by the Council and Auckland Transport respectively) from the proposed Residential - Mixed Housing Urban and Residential - Mixed Housing Suburban to a zone which would allow the most intensive type of residential development, Residential - Terrace Housing and Apartment Buildings, over most of the land and a zone which would allow for commercial development, Business - Mixed Use over a strip of land fronting Oteha Valley Road. NEIL also sought a precinct designation to establish an appropriate policy and rule framework for the land that recognised its potential for intensive residential development to a higher intensity than that set as a benchmark for the Terrace Housing and Apartment Buildings zone and for a Mixed Use development fronting Oteha Valley Road.

[4] In particular, NEIL proposed three sub-precincts A, B and C. Sub-precinct A would comprise 17 apartment buildings of between three and six stories containing 419 apartments. Sub-precinct B would comprise approximately 3,100 square metres of commercial space in three separate blocks, each having two or three additional

levels containing 45 apartments. Sub-precinct C would comprise of two apartment buildings of seven or eight stories containing 60 apartments.

[5] The Council set up the second defendant, the Auckland Unitary Plan Independent Hearings Panel (the Panel), to hear submissions and make recommendations to the Council on those submissions. The panel held a hearing session on 20 April 2016 to consider NEIL's submissions, at which NEIL was represented by counsel. After the hearing, NEIL filed further information as requested by the Panel. The Panel released its recommendations in July 2016. It recommended a Terrace Housing and Apartment Buildings zone for all of the land, but did not recommend a precinct designation, stating it was not convinced that a precinct as proposed was necessary or appropriate. The Council subsequently adopted the Panel's recommendations.

[6] The failure to recommend and adopt a Mixed Use zone for part of the land and a precinct designation for all the land will, however, potentially limit the scope of development of the land and profit for the developer. An application for resource consent, the outcome of which would not be certain, would be required if NEIL wished to proceed with its development plans, which would probably have to be amended from their present form.[1]

[7] NEIL does not have a right to appeal the merits of the Panel's recommendations and the Council's adoption of its recommendations. It therefore challenges various procedural aspects of the process as unlawful and/or unfair in an application for judicial review.[2] The Panel abides the decision of the Court. The third defendant, Housing New Zealand Corporation (HNZ), was joined as a defendant by order of the Court on 31 July 2017 on the basis that it had sought the summons at issue before the Panel and the outcome of the proceeding would have an impact on it.

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1 NEIL already has a resource consent for its development plans, but does not wish to be bound by its terms.

2 The plaintiffs initially filed an appeal on a question of law as well, but the parties agree that the issues for determination are all now contained in the amended statement of claim filed in the judicial review proceedings.

Hearings Panel Recommendation

[8] The Panel recommendation is set out below in full:

> **Albany 5 Precinct**
>
> 1. Summary of recommendations
>
> The Panel does not support this precinct.
>
> The Panel notes that the precinct proposed by the landowner, North Eastern Investments Limited, was not supported by the Council.
>
> …
>
> 2. Precinct description
>
> The proposed Albany 5 precinct is located at 56 Fairview Ave and 129/131 and 135 Oteha Valley Road.
>
> The purpose of the precinct was to establish a policy and rule framework for the land that recognised its potential for intensive residential development to a higher intensity and height than that set as the benchmark for the Residential – Terrace Housing and Apartment Buildings Zone and for a mixed use development fronting Oteha Valley Road.
>
> The precinct sought the inclusion of three sub-precincts to provide for differing building heights as follows:
>
> (i) Sub-precinct A: 27m. This is the major, more elevated part of the site fronting Fairview Avenue;
>
> (ii) Sub-precinct B: 23m. This is the Mixed Use area along Oteha Valley Road; and
>
> (iii) Sub-precinct C: 34m or 60m through the Residential – Terrace Housing and Apartment Buildings Zone. This is the southernmost and lowest area of the site.
>
> The zoning of the land in the notified proposed Auckland Unitary Plan was predominantly Mixed Housing Urban Zone and in a small part, Mixed Housing Suburban Zone.
>
> 3. Key issues
>
> The key issue between the Council and North Eastern Investments Limited related to the zoning of the land and the height and intensity of future development.
>
> The Council's position was summarised in the joint planning evidence on precincts (Albany 1, 3, 4, 5 etc) dated 26 January 2016 in the table at paragraph 7.9, as set out below:
>
> > The underlying zone of the proposed new precinct under the notified PAUP is MHS and MHU. The MHS and MHU zones provide for a maximum

> building height of 8m, and 11m respectively, and yard controls ranging from 1.3m to 2.5m.
>
> The proposed new precinct would more than double the maximum building height limits from those proposed in the underlying zones. The zone controls for building height and yards are set at levels that are appropriate for the zone.
>
> A proposal to exceed the height limits can be pursued through a resource consent application. The resource consent process would involve assessment of any dominance, privacy and shading effects on the surrounding neighbourhood.
>
> The evidence of Terry Conner (Topic 081) explains why the change of zoning sought by the submitter from MHS and MHU to THAB is not supported. In summary, it is inappropriate to encourage more intensive residential development in this area without appropriate assessment of the effects.

Ms Conner's evidence also dated 26 January 2016 on Rezoning – North Shore – Albany and Greenhithe on page 32, as set out below:

> Do not support change to the THAB of either site, due to access concerns but support an alternative change for 39 Fairview Ave from SH/MHS to solely MHS to avoid split zoning. MHS is an appropriate zone for properties not close to centres and the RFN to recognise the planned suburban built character of the area. MHU is proposed to be retained on 56 Fairview. Access to much of this area is constrained by a 1 lane bridge and is not conducive to a safe pedestrian walk to public transport. Retention of the respective zones and the proposed change to MHS are the most appropriate ways to achieve the objectives of the MHS and MHU zones and gives effect to the RPS.
>
> The outcome of the Environment Court hearing of the proposed AT requirement for improvements at the Medallion Road, currently underway, may have a material impact on this issue.

The evidence on behalf of both parties set out the relevant history in relation to the earlier resource consent application and the Auckland Transport notice of requirement, both matters having been considered by the Environment Court.

The Panel agrees with the submitter that this site has considerable potential for residential development but was not convinced by the evidence that a precinct as proposed is necessary or appropriate. The Panel supports the evidence on behalf of the Council in opposing the precinct provisions.

The Panel has instead agreed with the submitter that a more intensive zoning is appropriate and has recommended that the entire eight hectare site be rezoned Residential – Terrace Housing and Apartment Buildings Zone. The proposed Business – Mixed Use Zone for a portion of the land is not supported in this location which is relatively close to but physically separated from the nearby metropolitan centre at Albany. If any future specific proposal seeks to exceed the height provisions of that zoning the Panel considers that such a proposal would need to be tested by way of a resource consent application.

The Panel is confident that the Auckland-wide provisions, together with the provisions of the Residential – Terrace Housing and Apartment Buildings

> Zone, will appropriately enable the future development of this site, give effect to the regional policy statement and achieve the purpose of the Resource Management Act 1991.
>
> 4. Panel recommendations and reasons
>
> The Panel having regard to the submissions, the evidence and ss 32 and 32AA of the Resource Management Act 1991, recommends that the Albany 5 Precinct not be adopted. The rezoning of the land within the proposed precinct to Residential – Terrace Housing and Apartment Buildings Zone is considered the most appropriate way to enable the development of the proposed precinct site and to give effect to the regional policy statement and achieve the purpose of the Resource Management Act 1991.

Grounds of review

[9] The grounds of review can broadly be divided into four categories.

[10] The first category concerns the evidence of a Council planner, Ms Terry Conner. NEIL alleges that a summons issued by the Panel at the request of HNZ to produce her statement of evidence to the Panel was invalid. Further, NEIL alleges that it was unfair in the circumstances for the Panel to rely on Ms Conner's statement of evidence especially when NEIL had waived its right to cross-examine her. Overall, NEIL alleges that the Panel failed to adopt a fair and appropriate procedure contrary to s 136(4) of the Local Government (Auckland Transitional Provisions) Act.

[11] The second category focuses on the Panel's recommendation on the precinct designation. NEIL alleges that the recommendation was legally flawed because there was no evidence for its conclusion that the proposed sub-precinct B should be zoned Terrace Housing and Apartment Buildings, rather than Mixed Use. Alternatively, NEIL alleges that the Panel's decision was irrational. In particular, NEIL alleges that the Panel failed to consider certain allegedly relevant information, namely attachment C to the evidence of a resource management planner, Mr Paul Thomas.

[12] The third category relates to the Council's decision to accept the recommendations of the Panel. After the Panel had made its recommendations, but before the Council adopted those recommendations, the Environment Court issued two decisions regarding the land in [2016] NZEnvC 073 and [2016] NZEnvC 139.

NEIL alleges that the Council was required to have consideration to those decisions, but failed to do so.

[13] Fourth, NEIL alleges that the Panel's recommendation in relation to the Macroinvertebrate Community Index (MCI) was legally flawed because there was no evidence to support the recommendation that the MCI layer should have statutory effect as part of the proposed plan, rather than being for information purposes only. Alternatively, NEIL alleges that it was unfair for the Panel to make the recommendation without giving submitters an opportunity to be heard. Finally, NEIL alleges that the recommendation to incorporate the MCI layer into the proposed plan was outside the scope of submissions, but the Panel failed to identify it as such.

Hearing Panel's procedure

[14] Sections 128 to 143 of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) provided the framework for hearings into submissions on the proposed plan and the procedure to be followed. Every person who had made a submission and stated that they wished to be heard was entitled to speak at a hearing session, either personally or through a representative, and call evidence subject to the Panel's right to limit excessive repetition. The Panel had to give 10 working days notice of hearing sessions and could invite or require persons to attend pre-hearing session meetings for the purposes of clarifying any matter or facilitating resolution of any issues.

[15] The Panel could also direct a conference of experts to be held, again, for clarifying any matter or facilitating resolution of an issue. In addition to directing a conference of experts, the Panel could refer persons to mediation or other alternative dispute resolution if it was appropriate to do so and likely to resolve issues between the parties. At each hearing session no fewer than two members of the Panel had to be present. At a hearing session the Panel could permit a party to question any other party or witness and could permit cross-examination. Otherwise the Panel was directed to establish a procedure for hearing sessions that was appropriate and fair in the circumstances and avoided unnecessary formality.

[16] The Council had to attend hearing sessions to assist the Panel. A number of provisions of the Commissions of Inquiry Act 1908 were to apply to each hearing session as if the Panel were a Commission and the hearing were an inquiry under the Act. This included the power to maintain order and the power to summons witnesses. Any summons for a witness to appear at a hearing session had to be in the prescribed form and signed by the chairperson.

[17] The Panel could direct a submitter or the Council to provide briefs of evidence in writing or electronically to the Panel before a hearing session. It had broad powers to make directions in relation to evidence and submissions before or at hearing sessions. The Panel was able to commission reports from consultants or any other person on any matter arising from a hearing session or any other matter that the Panel considered necessary for the purposes of making its recommendations.

[18] The Panel's procedural autonomy was confirmed by s 164(d) of the Act, which provided that its functions and powers included the power to regulate its own proceedings in the manner it thought fit.

[19] The Panel prepared and issued a document setting out the procedures it would follow, the Auckland Unitary Plan Hearing Procedures (the hearing procedures). The hearing procedures incorporated matters which were contained in the Act as well as matters which the Panel had itself determined within its discretion to establish its own procedures.

[20] In general the Act did not specify how documents and other information relevant to hearing sessions were to be provided or made available to the Panel and the other parties. This was left to the Panel's discretion as part of determining its own procedures. The hearing procedures covered these matters, including the service of documents and communications to and from the Panel. In this regard, there was significant reliance on the Panel's website as the mechanism for extensive communication between the Panel and submitters and the submitters between themselves. The Act recognises the use of electronic communications and the internet as appropriate for communication involving multiple parties. Under s 143 any written or electronic evidence received by the Panel and certain reports provided to the Panel

had to be made available for inspection on the Panel's website. The Panel's practice of using its website for what were, in effect, public notices, was consistent with the Act.

[21] Relevant extracts from the hearings procedure are as follows:

> 21. Communications from the Hearings Panel relating to procedural matters generally will be issued by the Hearings Panel support staff (on the Hearing Panel's behalf) on the www.aupihp.govt.nz website or, in circumstances where the matters affect only a limited number of parties, by way of email or post.
>
> …
>
> 26. Any communication that directly affects other parties (including a communication in relation to an issue, plan provision or site in which other submitters are interested) must be provided by the sender of that communication to those other affected parties.
>
> 27. Where more than 30 parties are directly affected by a communication required by the Hearings Panel, then service of documents is likely to be by posting the communication on the www.aupihp.govt.nz website.
>
> 28. Formal service of documents for the hearings process will be by way of the www.aupihp.govt.nz website unless submitters have been advised directly by the Hearings Panel then another form of service is required.
>
> 29. The Hearings Panel support staff will not directly notify submitters of documents being posted on the www.aupihp.govt.nz website unless there is a legal requirement to do so or otherwise directed to do so by the Hearings Panel.

[22] The procedure therefore operated on the basis that it was for the parties themselves to keep abreast of procedural developments which may affect or be of interest to them through checking the Panel's website.

Ms Conner's statement of evidence

[23] Ms Conner was a principal planner for the Council. She made a report, dated 26 January 2016, to the Panel on submissions received by the Council in relation to zoning in the Albany and Greenhithe areas. She did not support rezoning to Terrace Housing and Apartment Buildings zone due to access concerns. She proposed that the existing Mixed Housing Urban zone be retained as access to much of the land was constrained by a one lane bridge and was not conducive to a safe pedestrian walk to

public transport. She was of the opinion that retention of the Mixed Housing Urban zone was the most appropriate way to give effect to the Regional Policy Statement (RPS). She did note that the outcome of the Environment Court hearing on the proposed Auckland Transport requirements for improvements to Medallion Road (currently underway) may have a material impact on the issue.

[24] As to the particular issue of a precinct designation, Ms Conner was a co-author with two other planners, Mr Joseph Jeffries and Mr Ewen Patience, of a report to the Panel on submissions received by the Council in relation to requests for new precincts, including the proposed precinct for the land and three existing precincts. This report drew upon the evidence of Ms Conner that a change to a Terrace Housing and Apartment Buildings zone was not supported. It concluded that the precinct provisions would conflict with the intent of the underlying zones by enabling a far greater intensity of residential activities not anticipated within the zone without appropriate provisions to manage the effects. It also concluded that the precinct was not consistent with the Panel's interim guidance as the intended development could be pursued through a resource consent application.

[25] Ms Conner's reports were uploaded to the Panel's website on 26 January 2016 in accordance with s 139 of the Act and paragraph 86 of the hearing procedures.

[26] At about this time, there was significant public controversy about the Council's support for zoning changes which had not been raised in submissions on the proposed plan because of concerns of possible unfairness to potentially affected persons who had not made submissions. At an extraordinary meeting on 24 February 2016 the Council resolved to withdraw that part of its evidence relating to so-called "out of scope" residential zoning changes. On 29 February 2016, the Council filed a memorandum with the Panel seeking leave to withdraw out of scope evidence. Ms Conner's evidence on the underlying zoning for the land at issue was not in this category. However, Ms Conner's report did make out of scope recommendations in relation to other unrelated land on Auckland's North Shore.

[27] On 1 March 2016, the Panel responded to the Council's memorandum saying that parties could present their cases as they wished, but that expert witnesses were

giving evidence on an independent basis unaffected by the position of the submitter calling the witness.

[28] In response the Council advised the Panel at a hearing on 8 March 2016 that the relevant witnesses would not be called to confirm their evidence. That included Ms Conner. Parties responded to this state of affairs in various ways. On 16 March 2016, HNZ applied to the Panel for summonses for a number of witnesses, including Ms Conner. These were granted on the same day. Ms Conner responded to her summons by filing the requested statement of evidence on 18 March 2016. This was then posted on the Panel's website in accordance with the hearing procedures.

[29] NEIL allege that the summons was invalid for four reasons:

(i) It did not comply with the relevant regulations;

(ii) It did not require Ms Conner to attend a public hearing;

(iii) It did not identify the content of any report that was relied on that related to the case of the requestor of the summons – HNZ; and

(iv) It post-dated HNZ's case.

[30] It is accepted that the summons was not in exactly the same form as prescribed in Form 4 of the Resource Management (Forms, Fees, and Procedure for Auckland Combined Plan) Regulations 2013. However, for the reasons advanced in the submissions of the Council, it did not need to be. Form 4 was appropriately modified to reflect the more limited scope of the evidence being summonsed. It did not refer to Ms Conner having to attend the hearing because the Panel was not requiring her to do that. It was limited to the production of her report because that was the extent of what HNZ had applied for and the Panel had ordered. There was no material non-compliance with Form 4 or s 138(2) of the Act.

[31] It is also accepted that the summons did not identify the content of any report that was relied on that related to HNZ's case, but it was not required to. The summons

clearly set out what Ms Conner was being asked to produce and she complied without difficulty.

[32] The summons did not, in fact, post-date the HNZ case as HNZ called evidence and made submissions to the Panel as late as 26 April 2016. In any event, there is no time limit on the application of s 4D(1) of the Commissions of Inquiry Act. Furthermore, the purpose of summonsing witnesses under s 4D was in order to assist the Panel, rather than a particular party or submitter.

[33] I am therefore of the view that the summons was not invalid, but even if it was, Ms Conner's report was properly before the Panel and able to be considered by it either as evidence or simply material before it, which was relevant to its statutory task, again for the reasons advanced in the submissions of the Council.

[34] Apart from the claim that the summons was invalid, NEIL makes a wider submission that the Panel's reliance on Ms Conner's report was, in all the circumstances, unfair. The key elements of this alleged unfairness are said to be:

(i) It was unaware that Ms Conner's evidence had been summonsed by HNZ;

(ii) It relied on advice from the Council to the Panel that the evidence had been withdrawn;

(iii) It believed, based on interaction with the Panel, that the evidence of Ms Conner would not be relied on. The Panel never advised NEIL that it intended to rely on Ms Conner's evidence; and

(iv) It waived its right to cross-examine Ms Conner as a result of this belief.

[35] In an affidavit sworn on 7 August 2017, Mr John Farquhar, a consultant for NEIL, says that NEIL's participation throughout the hearing process was comprehensive dealing with Auckland wide policies and objectives as well as specific issues relating to the land. He says that he spent considerable time at the Panel's offices and developed a good working relationship with Panel members and support

staff. As such, Mr Farquhar must have had a reasonable familiarity with the procedures adopted by the Panel to make hearing directions, advisory notices, and evidential reports received by the Panel available to interested parties.

[36] Nonetheless, Mr Farquhar says that he was unaware that HNZ had applied for, and been granted, a summons for Ms Conner to produce her report as evidence to the Panel. I am prepared to accept that is the case because of the complex and voluminous nature of the hearing process, notwithstanding the widespread public interest and media reports.

[37] NEIL also says that it relied on advice from the Council to the Panel that Ms Conner's evidence had been withdrawn. In its memorandum to the Panel dated 29 February 2016, the Council stated quite broadly that on the basis of the Council's resolution of 24 February 2016, it sought leave of the Panel to withdraw all those parts of the evidence filed on its behalf that related to residential out of scope changes. The memorandum did not identify Ms Conner or any other witness. It is also important to note that Ms Conner's evidence on the underlying zoning for the land was not out of scope, although her evidence on other land in the Albany/Greenhithe area was out of scope. Her evidence, therefore, addressed both in scope and out of scope matters.

[38] On 1 March 2016, the Chair of the Panel responded in a memorandum advising the Council that the Panel would be proceeding with the hearings in accordance with its existing procedures. He advised the Council that parties may present their cases generally as they wished within the scheduling constraints of the process. Importantly, the Chair noted that the presentation of evidence by persons who appeared as witnesses must be in accordance with the code of conduct for expert witnesses and that it was essential that a person giving the expert evidence did so on an independent basis and not affected by the position of the submitter calling that witness.

[39] A memorandum from the Panel's hearings manager on the same day was to the same effect by confirming that the evidence pre-circulated by the Council's witnesses would remain online and that any party was free to adopt or to refer to it as part of its case.

[40] On 9 March 2016, the Council filed another memorandum. It noted that the Panel had requested a list of those witnesses that the Council was not calling in support of its rezoning evidence. It specified that, among other witnesses, the Council would not call Ms Conner on her rezoning evidence. It was following this memorandum that HNZ applied for and was granted a summons to Ms Conner to produce her report. HNZ had no particular interest in the land, but was interested in other aspects of her evidence.

[41] Over the next month or so, prior to the hearing of NEIL's submissions, there were a number of memoranda exchanged between NEIL and the Council about witnesses to be called and made available for cross-examination.

[42] Given the exchange of memoranda between NEIL and the Council, Mr Farquhar said he contacted the Panel on 5 April 2016 and spoke with Ms McKee about the cross-examination of Council witnesses. Mr Farquhar says that during that conversation Ms McKee confirmed that the Council was not putting forward any experts on rezoning with reference to the Council's memorandum dated 9 March 2016 listing Council witnesses that were not to be called. According to Mr Farquhar, Ms McKee advised him that the Panel would rely only on the evidence filed by submitters and that NEIL may not cross-examine Ms Conner.

[43] Ms McKee disputes Mr Farquhar's version of the conversation. At the time of the conversation Ms McKee says she knew that the Council had withdrawn certain zoning evidence, including the evidence of Ms Conner. She also knew that the Panel had summonsed a number of witnesses to produce various reports, but not to attend the hearing. This included Ms Conner and her statement of evidence, which had previously been withdrawn by the Council. Ms McKee says that documents relating to these developments had been uploaded on the Panel website and so she assumed Mr Farquhar was aware of them. She recalls informing Mr Farquhar that NEIL would not be able to cross-examine Ms Conner as she was not attending the hearing. Ms McKee says that is just a statement of fact.

[44] Ms McKee disagrees, however, with Mr Farquhar when he says that she told him that the Panel would only be relying on the submitted evidence. Ms McKee says

she would not have said that. She knew from long experience with hearings administration that it was not her place to tell parties or submitters what evidence would or would not be relied upon by the decisionmaker. Further, as a matter of fact, Ms McKee did not know what evidence the Panel would rely on in making its recommendations. She says that her role with the Panel was limited to procedural aspects of the hearings process and she had no involvement with its deliberations. She would not have told Mr Farquhar something which she did not know herself.

[45] Having heard from Ms McKee when she gave evidence and was cross-examined on her affidavit, I accept her evidence. It is inherently credible and accords with her role in the process.

[46] In any event, Mr Farquhar sent an email to NEIL's team following his conversation with Ms McKee, in which he stated:

> I attach a memorandum of AC containing a list of AC planners that HAVE NOT BEEN CALLED in relation to rezoning 081.
>
> This list includes:
>
> Joseph Jeffries
> Terry Conner
> Ewen Patience
>
> NOTE: Ewen Patience evidence for Albany 5 PRECINCT has been presented.
>
> What this means (following a conversation with Julie McKee) is:
>
> (1) We may not cross-examine Terry Conner for Rezoning.
>
> (2) The Panel will rely on the Planning Evidence filed by the submitter (the AC remains on the AUP website, it has been read but that is the extent of it).
>
> (3) As far as she is aware, AC did not put forward any experts for rezoning.
>
> (4) AC have structured their Planning response to be fed through legal submissions and legal counsel.

In that email to the NEIL team, Mr Farquhar acknowledges that Ms Conner's evidence remained on the website and had been read.

[47] Mr Farquhar seems to have assumed that because Ms Conner's report was no longer being relied upon by the Council as part of its case, then it could not be evidence before the Panel or have any relevance to the hearing. I am of the view that assumption was mistaken, but that mistake was not the result of anything said by Ms McKee or other Panel staff, but because of a misapprehension on Mr Farquhar's part about the nature of the hearing process. This misapprehension continues when NEIL submits that it was significant that the Panel never advised NEIL that it intended to rely on Ms Conner's evidence. I am of the view that as a matter of principle it is not the responsibility of a decisionmaker to advise a submitter or a party of the evidence to which it must respond. Rather, it is for the submitter or party to inform itself as to the issues which it may wish to address in terms of its own evidence or submissions.

[48] I am therefore of the view that any reliance by the Panel on Ms Conner's report was, in all the circumstances, not unfair. I am also not persuaded that if Ms Conner was cross-examined the Panel may have made a different recommendation to Council. The Panel did not in fact agree with Ms Conner on the underlying zone, preferring the evidence of the NEIL experts who sought a Terrace Housing and Apartment Buildings zone for most of the land. It stated:

> The Panel has instead agreed with the submitter that a more intensive zoning is appropriate.

[49] The Panel did not support NEIL's position only in respect of part of the land – the rezoning of a strip of the land fronting Oteha Valley Road as Mixed Use. The Panel gave reasons which had nothing to do with Ms Conner's evidence. She favoured retention of the Residential – Mixed Housing Urban zoning.

Zoning and precinct designation

[50] NEIL claims that the Panel decision to recommend a Terrace Housing and Apartment Buildings zone rather than a Mixed Use zone for the strip of land fronting Oteha Valley Road was not based on evidence or was irrational. It also alleges that the Panel failed to consider attachment C to the evidence of Mr Thomas when making its decision.

[51] Although it is possible for a Court to find that a Tribunal's decision was not based on evidence or was irrational, an applicant faces a heavy burden to persuade a Court to overturn a Tribunal's decision on that basis. It is not sufficient for the Court to find that it would have come to a different conclusion. An applicant must establish that the Tribunal's decision was not open to it based on the evidence before it.

[52] The decision at issue, namely, to recommend a Terrace Housing and Apartment Buildings zone for all of the land is also not a finding of fact, which is readily amenable to review. It is a recommendation based not just on the evidence presented to it by NEIL, the Council and other submitters, but on a wide range of other matters, including general policy considerations adopted by the Panel on issues such as the role of precincts in the proposed plan. The Panel also had to have regard to statutory considerations in the Resource Management Act and the Local Government (Auckland Transitional Provisions) Act.

[53] The Panel was not acting as a judge deciding which party had proven its case. It was not obliged to accept any evidence, even if uncontradicted. The Panel's recommendations were very much a value judgment and there was no right or wrong decision.

[54] In this case, the Panel agreed with NEIL (contrary to Ms Conner's evidence) that the land should have a more intensive zoning, but did not agree that the strip of land fronting Oteha Valley Road should be zoned as Mixed Use. It therefore adopted a middle position between that advocated by NEIL and that advocated by the Council. On its face, this is quite rational.

[55] The Panel also gave reasons:

(i) It did not support a Mixed Use zone in the location as it was relatively close to but physically separated from the nearby metropolitan centre at Albany.

(ii) Any future specific proposal that sought to exclude the height provisions of the Terrace Housing and Apartment Buildings zone should be tested by way of a resource consent application.

(iii) The Auckland-wide provisions of the proposed plan together with the Terrace Housing and Apartment Buildings zone would appropriately enable the future development of the land, give effect to the regional policy statement and achieve the purpose of the Resource Management Act.

[56] The Panel's recommendations therefore cannot be said to have been made with no evidence or to be irrational.

[57] NEIL alleges, however, that the Panel failed to have regard to what has to have been a mandatory consideration, namely, attachment C to the evidence of Mr Thomas. Mr Thomas is a resource management planner who made a submission to the Panel on behalf of NEIL. Attachment C was a joint statement of Master Planning, Urban Design, Planners and Landscape Architects Experts, dated 23 October 2015, in relation to an appeal to the Environment Court against decisions of the North Shore District Council on three applications to change conditions of existing resource consents and two applications for new resource consents. In summary, the statement signed by experts from the Council and from NEIL agreed that there were no unresolved issues in relation to NEIL's Mixed Use application.

[58] Although the Panel did not specifically refer to Mr Thomas' evidence, it was not obliged to specifically refer to all the evidence and submissions it heard. Mr Thomas' evidence was, however, listed as a reference document in section 5 of the Panel's report. NEIL has also been unable to point to any material suggesting that Mr Thomas' evidence was not considered by the Panel. In fact, during the course of NEIL's hearing before the Panel, NEIL's counsel sought to refer such statements to a Council planner, Mr Patience. An objection as to relevance was made by the Council's lawyer. The existence of the joint statement and its relevance was therefore clearly before the Panel.

[59] Furthermore, I am of the view that the Panel was not obliged to take into account the joint statement made in a different proceeding, namely, an appeal to the Environment Court. The joint statement was also not evidence of the Council agreeing to anything at all or anything relevant to the hearing before the Panel. It seems to me that the Council had not agreed to land use consent providing for development of the type that was sought to be addressed by NEIL's precinct request and even if it had, this was not necessarily relevant to the hearing before the Panel. There is, therefore, no substance to the claim that the Panel acted on the basis of no evidence or acted irrationally.

Environment Court decisions

[60] In its amended statement of claim, NEIL alleges that after the Panel made its recommendations on 22 July 2016, but before the Council accepted the recommendations on 19 August 2016, the Environment Court issued two decisions of relevance. In the first decision, the Environment Court determined that part of the land should be designated as a road called the Medallion Drive Link.[3] In the second decision, the Environment Court granted NEIL's resource consent application in respect of the land.[4] NEIL alleges that the Council was required to consider the decisions before adopting the Panel's recommendations, but failed to do so. NEIL points to Ms Conner's report in which she noted that both of the pending Environment Court decisions may be relevant to zoning and precinct issues and submits that the Council should therefore have considered them.

[61] The statement of claim is, however, in error in alleging that the first decision was issued after the Panel had made its recommendations. It was in fact issued on 29 April 2016 before the Panel made its recommendations. The second decision was issued after the Panel had made its recommendations.

[62] The Council admits that it did not specifically consider the two Environment Court decisions when adopting the Panel's recommendations, but says it was not required or permitted to do so.

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3 *North Eastern Investments Ltd v Auckland Transport* [2016] NZEnvC 73.
4 *North Eastern Investments Ltd v Auckland Council* [2016] NZEnvC 139.

[63] I am of the view that this ground of review must also fail. First, s 148(2)(a) of the Act specifically provides that the Council was not required to consider any submission or other evidence when deciding whether to accept or reject each recommendation of the Panel and was prohibited from considering any submission or evidence if the submission or evidence was not made available to the Panel before the Panel made its recommendations. While an Environment Court decision is not a submission or evidence, factual findings in a Court decision may perhaps be categorised as evidence. It would also have been procedurally unfair for the Council to consider any factual material which was not part of the hearing before the Panel.

[64] Second, the Environment Court decisions were not mandatory relevant considerations for either the Panel or the Council. The first Environment Court decision related to a notice of requirement for roading purposes. It contained nothing of relevance for the proposed plan. While the second decision did relate to development of the land, it arose in the context of a resource consent application, not a planning process. The considerations are fundamentally different. There was nothing in the decision that would assist in determining the appropriate zone for the land or in determining whether there should be a precinct designation over the land.

[65] Third, the Panel specifically noted that the relevant history in relation to the Auckland Transport notice of requirement and the resource consent application had been set out on behalf of both parties so it was well aware of the issues, although not the actual decision of the Environment Court on the resource consent application.

Macroinvertebrate Community Index (MCI) Layer

[66] The MCI is an index of stream health based on the type and number of macroinvertebrates (animals such as insects, crustaceans, snails and worms) that live in rivers. Macroinvertebrates have been used extensively for the assessment of river health since the early 1900's and are said to be well suited to this role. They act as continuous indicators of the health of the river they inhabit and consequently are established as the indicator of choice in most biological river monitoring programmes.

[67] The MCI was one of the non-statutory layers of the proposed plan.[5] These were searchable on a property by property basis through the online version of the proposed plan planning maps (GEOMAPS). The MCI layer divided all land into one of four identified land use types (Urban, Rural, Exotic Forest and Native Forest) with an associated indicative MCI value.

[68] The use of non-statutory layers in the maps was to provide users with the Council's most faithful representation of a particular type of information. Some of the information was dynamic (for example, the location of different flood hazards). Some of the information was based around processes outside of the proposed plan (for example, the location of Maori land). The use of this information served purely as information or guidance in the context of certain rules in the proposed plan. The information did not automatically entail the application of those rules in the context of a particular site. The rules could stand alone without any reference to, or use of, the information in non-statutory layers.

[69] The Panel recommended only the inclusion of maps that served a resource management purpose within the structure of the proposed plan. The Panel considered that other information should be located in ways that avoided any confusion as to whether the information was part of the proposed plan. This was seen as important to avoid giving a false impression to users of the proposed plan about whether these maps had any regulatory effects.

[70] On that basis, the Panel recommended that six of the nine non-statutory layers be deleted from the planning maps. It recommended that the layers for street addresses and the indicative coastline should, however, remain. As to the macroinvertebrate community index, it recommended relocating the MCI layer to a control layer in the planning maps. In other words, it was to be part of the proposed plan rather than non-statutory. The Panel saw this as an interim measure that sought to at least maintain and where practicable enhance the current health of Auckland streams until such time as more specific attributes objectives and limits were determined in accordance with

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5 They were nine non-statutory layers altogether - addresses, indicative coastline, soil types, flood hazards, Auckland Council Boards, Maori land, Treaty settlement alert layer, Hauraki Gulf Marine Park and the Macroinvertebrate Community Index (MCI).

the National Policy Statement for Freshwater Management. The Council accepted this recommendation.

[71] NEIL alleges that there was no planning evidence presented to the Panel that the MCI index should be used as a statutory layer governing policies. It submits that evidence for the Council and its submissions were very clear that it was an appropriate tool providing information, but was not appropriate as a method having a statutory effect, whether that was by means of rules or used as part of policy.

[72] NEIL further alleges that it was the Council's consistent position through the hearing process that the non-statutory layers would not be used to govern rules or policy and submitters engaged in the process on that basis. It was, therefore, unfair of the Panel to decide to incorporate the MCI as a statutory layer referenced to policy E.1.3 in Chapter E of the (now) operative part of the Auckland Unitary Plan without providing submitters with an opportunity to be heard.

[73] Finally, NEIL alleges that the elevation of the MCI to a statutory layer in planning maps and then not identified by the Panel as an outside scope recommendation deprived NEIL of the opportunity of a merits appeal to the Environment Court in relation to that matter. In relation to scope, NEIL claims if the reasonably foreseeable logical consequence test was an appropriate one for the Panel to apply, then the inclusion of the MCI non-statutory layer was not a reasonably foreseeable logical consequence of any submissions and based on the unfairness leg of the scope assessment, the elevation of that non-statutory layer to a control layer was so "out of left field" that it was a matter that should not properly be treated as within scope.

[74] There was, however, already a focus on water quality in the proposed plan which was designed in part to provide an overall framework for managing the individual and cumulative adverse effects of activities that affected freshwater systems and coastal waters. The proposed plan also set out a range of objectives and policies to protect water quality from further degradation and to be enhanced where possible. Adverse effects were to be specifically managed by the use of the MCI as a surface water quality interim guideline and a range of discharge and activity based land use

management controls. The proposed plan noted that the MCI would be replaced over the next 10 years by more comprehensive water quality and quantity objectives and limits to be developed in accordance with the National Policy Statement for Freshwater Management and subsequently given effect to through the Unitary Plan.

[75] The proposed use of the MCI was queried by submitters other than NEIL. For instance, the Westgate partnership opposed the provision in the proposed plan on water quality and integrated management on the basis that the MCI was notated as a non-statutory layer, yet it was included in objectives and policies. The Westgate partnership requested confirmation of the legitimacy of provisions reliant on non-statutory layers in the maps.

[76] Planners Cardno (NZ) Ltd, on behalf of a large nursery in Whenuapai, also sought confirmation of the purpose of the MCI layer. Cardno noted that it did not seem to relate to existing waterways and the implications were unclear in the proposed plan.

[77] More generally, other submitters queried the legitimacy of non-statutory layers in the proposed plan. For example, HNZ submitted that the non-statutory layer determined, albeit indirectly, whether or not resource consent was required for a proposed activity on a property. HNZ instanced the flood hazard layer, which created a default presumption (in the absence of a site specific report by a suitably qualified and experienced person) as to whether or not a property was within a flood plan. As a consequence, the non-statutory layer indirectly determined whether consent was required under the flooding provisions of the Plan. HNZ submitted that property owners should have rights of participation and appeal, which were not available if the flood hazard layer was altered through a non-statutory process.

[78] NEIL itself made submissions through a planner, Ms Coats, expressing concern in relation to the inclusion of "flood and other information in the non-statutory layers" where changes to the information had the potential to affect resource consent requirements.

[79] In its opening submissions to the Panel the Council highlighted the role of guideline values rather than limits as an issue arising from the National Policy Statement for Freshwater Management pending the adoption of limits by way of plan change once they could be established in accordance with the processes required by the National Policy Statement for Freshwater Management.

[80] Mr Martin Neale also gave evidence on behalf of the Council supporting the inclusion of policies and objectives that allowed for the management and progressive reduction of existing impacts on freshwater systems. He submitted that the current status of many of Auckland's rivers below National Objectives Framework national bottom lines meant the Council was required to take action.

[81] I am of the view that it should have been clear to all participants in the hearing process that Council was required by the National Policy Statement for Freshwater Management to improve the conditions of freshwater bodies that had been degraded by human activities.

[82] It also seems that the inclusion of the MCI as a non-statutory layer on planning maps had certain disadvantages. Given the requirements of the National Policy Statement for Freshwater Management, it was unlikely that the Panel would recommend the deletion of the MCI from planning processes altogether. It was much more likely that the Panel would recommend a broader use of the MCI than just a non-statutory layer on planning maps for information purposes.

[83] I am of the view that the Panel's recommendation on the MCI layer was based on evidence and submissions received and clearly within scope. Shifting the MCI layer to a control layer in the planning maps was a reasonably foreseeable logical consequence of submissions made about the uncertain status of the non-statutory layers and their relationship to policies in the proposed plan. There was ample material before the Panel which gave it a principled basis for the recommendation it made. The recommendation was not "out of left field". The process was also not unfair.

Result

[84] NEIL's application for judicial review is declined. Costs are payable to both the Council and HNZ.

Woolford J

Solicitors: Cooper Rapley Lawyers, Palmerston North, for the Plaintiffs
Simpson Grierson, Barristers & Solicitors, Auckland, for the First Defendant
Ellis Gould, Lawyers, Auckland, for the Third Defendant