

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU**

CIV-2018-404- _ _ _ _

UNDER the Resource Management Act 1991 ("the Act") and the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA")

AND

IN THE MATTER of an appeal against a decision of the Environment Court pursuant to sections 299 and 300 of the Act

BETWEEN **OKURA HOLDINGS LIMITED**, a duly incorporated company having its registered office Level 28, Pricewaterhousecoopers Tower, 188 Quay Street, Auckland, New Zealand.

Appellant

AND **AUCKLAND COUNCIL**, a unitary authority pursuant to the Local Government (Auckland Council) Act 2009 having its principal offices at 135 Albert Street, Auckland Central, Auckland.

Respondent

**NOTICE OF APPEAL AGAINST A DECISION OF THE ENVIRONMENT
COURT**

DATED 27 JUNE 2018

**Next Event:
Case Manager:**



Solicitors: S J Simons /
A W Braggins

Berry Simons
Level 1, Old South British Building
3-13 Shortland Street
PO Box 3144
Auckland 1140
Phone (09) 969 2300
Fax (09) 969 2304

sue@berrysimons.co.nz
andrew@berrysimons.co.nz

- TO** The Registrar of the High Court at Auckland
- AND TO:** The Registrar of the Environment Court at Auckland
- AND TO:** Auckland Council
- AND TO:** Zhi Li, Jing Nio and Weili Yang
- AND TO:** Royal Forest and Bird Protection Society of New Zealand Incorporated
- AND TO:** Long Bay-Okura Great Park Protection Society Incorporated
- AND TO:** Okura Rural Landowners Group

TAKE NOTICE THAT Okura Holdings Limited (“OHL”) will appeal to the High Court against the decision of the Environment Court (*Zhi Li, Jing Niu and Weili Yang and Okura Holdings Limited v Auckland Council* [2018] NZEnvC 87) dated 5 June 2018 (“the Decision”) on the ground that the Decision is erroneous in law as set out in this notice of appeal.

THE DECISION

1. The Decision appealed is *Zhi Li, Jing Niu and Weili Yang and Okura Holdings Limited v Auckland Council* [2018] NZEnvC 87. The appeal relates to the whole decision.

FIRST ERROR

2. The Environment Court (“the Court”) applied a wrong legal test in relation to its findings on the level of certainty of outcome required when considering submissions and appeals on a proposed plan (and by association, the proposed OHL Precinct) and / or failed to have regard to or correctly interpret the provisions of the partly operative Auckland Unitary Plan (“AUP”) including:
 - (a) Region wide rules (including subdivision rules), matters of discretion, assessment criteria and objectives and policies; and
 - (b) Zone rules from the underlying residential zone(s) (predominantly Mixed Housing Suburban).

SECOND ERROR

3. The Court misinterpreted / misapplied the provisions of the AUP which relate to land zoned “Future Urban” (“FUZ”) and associated restrictions

that such a zoning imposes. The Court further failed to have regard or had insufficient regard to the intervening steps required by the Act to change the zoning of the AUP in accordance with section 32 and Schedule 1 of the Act in reaching findings regarding the uncertainty of development proposals on FUZ land and multiple ownership, such that it came to a conclusion that no Court could reasonably have come to.

THIRD ERROR

4. The Court applied a wrong legal test in relation to its findings as to when and how to apply the precautionary approach as directed by the Regional Policy Statement ("RPS") of the AUP.

FOURTH ERROR

5. The Court applied a wrong legal test in relation to its interpretation and application of section 6 of the Act.

FIFTH ERROR

6. The Court came to a conclusion without evidence or one to which, based on the evidence presented, it could not reasonably have reached in relation to its conclusion that the:
 - (a) Proposed development was a product of OHL's development requirements; and
 - (b) Extent of open space would not result in significant benefits because it erroneously referred to this open space as a "walkway" and "riparian margin".

SIXTH ERROR

7. The Court erred in having regard to *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (NZEnvC) and *Keep Okura Green Society Inc v North Shore City Council* NZEnvC A95/2003 without undertaking a necessary comparison of the distinctions between the proposal in 1996 and the OHL proposal in 2018 particularly given the changes to the environment and to the legislative regimes.

SEVENTH ERROR

8. The Court misinterpreted / misapplied provisions of the New Zealand Coastal Policy Statement and the RPS that promote coastal access.

EIGHTH ERROR

9. In considering the coastal sediment dispersion modelling ([99] – [313] of the Decision), the Court erred:
- (a) At paragraph [201] in having regard to a speculation that the Countryside Living Zone (“CLZ”) provides lesser long term sediment volumes than the OHL option;
 - (b) At paragraph [201] in taking an inappropriately short term view of the definition of environment, inconsistent with case law and the identified long term importance of the Okura estuary (“the Estuary”); and
 - (c) In misinterpreting / misapplying AUP Policy B8.3.2.

NINETH ERROR

10. In considering avifauna ([314] – [396] of the Decision), the Court erred:
- (a) At paragraph [374] in wrongly interpreting and applying RPS provision B.7.2.1 in relation to the SEA-M1 and the SEAM1w overlays;
 - (b) At paragraph [380] in its interpretation of policies which lead to a conclusion that adverse effects on bird life should be avoided;
 - (c) At paragraph [387] in reaching a conclusion without evidence or one to which, on the evidence and its earlier findings that could not reasonably have reached, in that it had not identified a positive effect that would cause the SEA to be enhanced, when it had previously concluded:
 - (i) That there would be a long term reduction in sediment; and
 - (ii) Long term sediment loads were one of the top long-term threats to the ecology of the Estuary.
 - (d) At paragraph [390] by wrongly interpreting the SEA-M1 overlay as relating to bird feeding habitat in contrast to the SEA-M1w overlay.

TENTH ERROR

11. In considering freshwater and terrestrial ecology ([397] – [457] of the Decision), the Court erred:
- (a) When interpreting and applying the relevant provisions of the AUP regarding SEV guidelines;
 - (b) At paragraph [454] in finding that the SEV methodology is not expressly recognised in the AUP;
 - (c) Failing to take account of the benefits associated with the protection and enhancement of streams which would not otherwise occur and therefore misdirected itself as to the overall ecological benefits of the proposal; and
 - (d) When interpreting and applying the National Policy Statement for Freshwater Management 2014 (amended 2017).

ELEVENTH ERROR

12. In considering economics ([504] – [538] of the Decision), the Court erred:
- (a) In having regard to an irrelevant consideration – being the non-market costs of the effects of the OHL development on the biophysical environment, thereby double-counting effects in its evaluation;
 - (b) By failing to have regard to the Housing Accords and Special Housing Areas Act 2013, associated Orders in Council and the Independent Hearing Panel (“IHP”)’s recommendation when assessing whether the OHL Land and the FUZ land are required to be included in the Rural Urban Boundary (“RUB”) to address Chapter B2 of the RPS as well as the National Policy Statement on Urban Development Capacity and otherwise reaching a conclusion that no reasonable Court could have reached in relation to the positive economic effects of the OHL proposal; and
 - (c) In misinterpreting and / or misapplying RPS Policy B2.2.2(1).

TWELVETH ERROR

13. In considering natural character and landscapes ([539] – [692] of the decision) the Court erred in:
- (a) Misinterpreting / misapplying the methodology used by landscape architects to assess effects on the environment, such that the Court's conclusions from the evidence are conclusions that no reasonable Court could have reached;
 - (b) Recognising that a comparative approach between OHL's proposal and a CLZ was required, but failing to adopt such a comparative approach when assessing OHL's proposal;
 - (c) Misinterpreting / misapplying sections 6(a) and 6(b) of the Act in relation to the natural character of the Estuary *vis* the land subject to OHL's submission;
 - (d) Misinterpreting / misapplying the values described in the AUP as they apply to Outstanding Natural Landscape ("ONL") Area 51, ONL Area 54 and High Natural Character ("HNC") Areas 94 and 95 and the land subject to OHL's submission;
 - (e) Misinterpreting / misapplying Chapters B4 and B8 of the AUP; and
 - (f) Misinterpreting / misapplying schedules 7 and 8 of the AUP in regard to landscape and natural character values of the Okura Estuary and the land subject to OHL's submission; and
 - (g) Attributing the values of the ONL and HNC areas to the subject land which has never been scheduled for the purposes of recognising its unique landscape character or values.

THIRTEENTH ERROR

14. The Court erred in failing to have regard to the evidence in respect to the views of the Landowners Group or the potential incoming residents and their appreciation, and therefore the values of, the landscape.

FOURTEENTH ERROR

15. The Court failed to have regard to the cultural impact assessments and views of iwi other than the iwi represented by Mr Ashby in opposition to the OHL proposal.

FIFTEENTH ERROR

16. The Court misinterpreted / misapplied the provisions of the following other relevant legislation as well as management plans and strategies prepared under other Acts, which it properly had regard to:
- (a) The Auckland Plan;
 - (b) The Marine Reserves Act 1971;
 - (c) Land Transport Management Act 2003;
 - (d) The Auckland Regional Transport Plan; and
 - (e) The Local Government Act 2002 and associated plans and policies promulgated under that Act.

SIXTEENTH ERROR

17. The Court erred in considering section 32 of the Act and the location of the RUB ([693] – [726] of the decision) the Court compounded the earlier errors of law by relying on its errant findings.

SEVENTEENTH ERROR

18. In considering section 290A of the Act, the Court erred in failing to have regard to the evidence underlying the IHP's decision, refusing to issue a subpoena for relevant witnesses and refusing to consider the underlying evidence which lead to the absence of an HNC or ONL overlay on the relevant parts of the land subject to OHL's submission.

QUESTIONS OF LAW

19. Did the Court err in law in any of the respects noted above and in particular:
- (a) Did the Court err in law by misinterpreting / misapplying Part 1 of the 1st Schedule to the Act as well as Part II, sections 31, 32 and 72 to 76 of the Act?
 - (b) Did the Court err in law by failing to take into account relevant considerations?
 - (c) Did the Court err in law by taking into account irrelevant considerations?

- (d) Did the Court err in law by reaching conclusions that no reasonable Court could have reached?
- (e) As a result of the foregoing was there a breach of natural justice?

GROUND OF APPEAL

- 20. The grounds of appeal are set out in paragraphs [2] to [13] of this notice of appeal.

RELIEF SOUGHT

- 21. OHL seeks the following relief:
 - (a) That the appeal be allowed together with a declaration that the Court erred in law;
 - (b) That the matter be referred back to the Court for reconsideration in light of the findings of this Honourable Court;
 - (c) Such further or other relief as may be appropriate; and
 - (d) Costs of and incidental to this proceeding including disbursements.
- 22. This notice of appeal is filed in reliance on sections 156(5) of the Local Government (Auckland Transitional Provisions) Act 2010, sections 299 to 308 of the Resource Management Act 1991 and Part 20 of the High Court Rules.

DATED at Auckland on 27 June 2018



**S J Simons / A W Braggins
Counsel for the Appellant**

This document is filed by **Sue Simons**, solicitor for the Appellant, of the firm Berry Simons. The address for service of the Appellant is Level 1, South British Insurance Building, 3-13 Shortland Street, Auckland 1140.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at PO Box 3144, Auckland 1140; or
- (b) emailed to the solicitor at sue@berrysimons.co.nz or andrew@berrysimons.co.nz