

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

CIV-2016-AKL-

IN THE MATTER of the Local Government (Auckland
Transitional Provisions) Act 2010
(**LGATPA**) and the Resource
Management Act 1991 (**RMA**)

AND

IN THE MATTER of an appeal under Section 158 of the
Local Government (Auckland
Transitional Provisions) Act 2010

BETWEEN

**NORTH EASTERN INVESTMENTS
LIMITED and HERITAGE LAND
LIMITED (NEIL)** a company
incorporated under the Companies Act
1993 having its registered office at
196 Broadway Avenue Palmerston
North
Appellant

AND

AUCKLAND COUNCIL a unitary
territorial authority under the Local
Government (Auckland Council) Act
2009
Respondent

NOTICE OF APPEAL

Dated: 16 September 2016



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NOTICE OF APPEAL

To: The Registrar
High Court
Auckland

And to: Auckland Council

TAKE NOTICE THAT: North Eastern Investments Limited and Heritage Land Limited (“NEIL”) appeal to the High Court against the decision of the Auckland Council on the Proposed Auckland Unity Plan (PAUP) delivered on 19 August 2016 **UPON THE GROUNDS** that the decision is erroneous in law.

BACKGROUND AND DECISION APPEALED AGAINST

- 1 NEIL made a submission on the PAUP,¹ seeking, amongst other things, provisions relating to its land at 156 Fairview Avenue, Albany; 129 Oteha Valley Road, Albany as follows:
 - a. Rezoning to Terraced Housing and Apartment Buildings (THAB) and Mixed Use;
 - b. Precinct provisions as Precinct Albany 5.
- 2 The Independent Hearings Panel (IHP) in its report to the Auckland Council on Topics 080 and 081 – Re-zoning and Precincts (Annexure 4 Precincts North) July 2016, recommended that:
 - a. The land that NEIL sought to have re-zoned Mixed Use should not be zoned Mixed Use; and
 - b. No precinct should be provided for the land.
- 3 The Auckland Council in its decision dated 19 August 2016 accepted the IHP’s recommendations and in particular accepted that:
 - a. The land that NEIL sought to have re-zoned Mixed Use would not be zoned Mixed Use; and
 - b. No precinct be provided for the land.

¹ Submission Number 857.

ERRORS OF LAW:

- 4 NEIL contends that Auckland Council made the following errors of law:
- a. The IHP relied, in making its recommendation, on evidence of Ms Terry Conner that Auckland Council had withdrawn from the IHP and expressly stated that it did not rely upon;
 - b. The only true conclusion on the evidence was that that part of the land that NEIL requested be Mixed Use should be re-zoned Mixed Use because there was no evidence that the request should be declined. The only evidence was NEIL's uncontested evidence in support of the Mixed Use;
 - c. Auckland Council in its evidence and the IHP recommendation adopted by Auckland Council mischaracterized the precinct request as based on additional height and intensity of future development, rather than all the matters addressed in the precinct provisions including translating the provisions of recent plan changes approved by the Environment Court concerning the Waikahikatea Stream;
 - d. The evidence of Ms Conner opposing the relief sought by NEIL concerning zoning was based on the absence of a designation to construct the Medallion Drive Link. The Auckland Council, in making its decision on re-zoning and precinct, failed to consider that the Environment Court had approved the designation (that Ms Conner noted might be resolved) by decision [2016] NZEnvC 73 dated 29 April 2016;
 - e. Auckland Council relied on the evidence of the IHP which was based on the determination that Mixed Use zoning requested by NEIL did not meet the requirements of the Regional Policy Statement concerning centres, when there was no evidence for that proposition and Auckland Council's expert, Mr Patience confirmed the proposed zoning was consistent with the Proposed Regional Policy Statement. The only true conclusion was that the Mixed Use zoning did give effect to the Regional Policy Statement; and

- f. Auckland Council, in making its decision on the re-zoning and precinct request, failed to consider the decision of the Environment Court granting NEIL resource consent to Mixed Use on the portion of the land that NEIL sought to have re-zoned as Mixed Use by decision [2016] NZEnvC 139 dated 29 July 2016.

GROUND OF APPEAL:

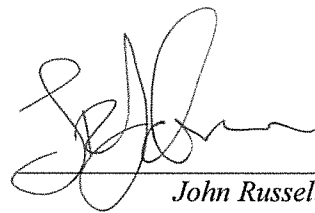
5 The grounds of the appeal are as follows:

- a. Ms Conner's evidence was withdrawn by Auckland Council. That was the only evidence opposing the relief sought by NEIL on re-zoning. No other submitter opposed this. No other evidence was presented in opposition to the request for re-zoning some of the land Mixed Use. The uncontested evidence of NEIL was that the land should be re-zoned THAB and Mixed Use. The IHP refused NEIL the right to cross-examine Ms Conner because her evidence had been withdrawn.
- b. Ms Conner's evidence opposing the re-zoning was based on the claim that there was insufficient access to the land, despite the fact that the land has frontage to Oteha Valley Road which is an arterial road. The Auckland Council failed to consider that the Environment Court issued its decision on 29 April 2016 that approved the designation. That consideration was relevant because Ms Conner identified that the issue could be resolved by a determination of the Environment Court after her evidence was prepared. In addition, Auckland Council did not advise the IHP of the Environment Court decision in its closing submissions on 18 May 2016.
- c. Auckland Council concluded that the effects of NEIL's proposed resource consent applications were unresolved by the Environment Court and did not therefore provide a basis for assessing the effects of NEIL's requested precinct. However, before Auckland Council made its decision, the Environment Court granted resource consents for Mixed Use and Intensive Residential Development. Those consents changed the receiving environment for the site and

this Court determines necessary or appropriate, having regard to its findings on the legal issues raised by the appeal;

- c. Consequential relief; and
- d. Costs.

DATED at Palmerston North this 16th day of September 2016



*John Russell Farquahar
On behalf of appellant*

This document is filed by JOHN WILLIAM MAASSEN, Solicitor for the abovenamed Appellant of the firm CR LAW. The address for service of the abovenamed Appellant is 227 Broadway Avenue, Palmerston North.

Documents for service on the abovenamed Appellant may be left at that address for service or may be:

- (a) Posted to the Solicitor at PO Box 1945, Palmerston North 4440, or
- (b) Left for the Solicitor at a document exchange for direction to DX PP80001, Palmerston North, or
- (c) Transmitted to the Solicitor by email to jmaassen@crlaw.co.nz.

approved development of the scale, character, and intensity proposed to be accommodated by the precinct. Auckland Council did not consider the decision of the Environment Court in reaching its decision.

QUESTIONS OF LAW:

- 6 The questions of law to be resolved are as follows:
- a. Did the IHP and Auckland Council err in relying on the evidence of Ms Conner?
 - b. Was the only true conclusion on the evidence that the part of the land NEIL sought to be Mixed Use should be re-zoned Mixed Use?
 - c. Did Auckland Council err by failing to consider the decision of the Environment Court in [2016] NZEnvC 073 dated 29 April 2016 in making its decision?
 - d. Did Auckland Council err by failing to consider the decision of the Environment Court in [2016] NZEnvC 139 dated 29 July 2016 in making its decision?
 - e. Did Auckland Council err by failing to consider resource management matters other than height that the Precinct Albany 5 sought to address?
 - f. Did Auckland Council err by concluding that the Mixed Use zoning would not give effect to the Regional Policy Statement?

RELIEF SOUGHT:

- 7 The appellant seeks the following relief:
- a. That the appeal be allowed and the decisions in relation to Precinct Albany 5 and re-zoning of the land at 156 Fairview Avenue and 129 Oteha Valley Road be quashed (in whole or in part);
 - b. That the Auckland Council be directed to reconsider the relevant precinct and zoning provisions, along with such other matters as