

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

**CIV-2016-404-002333
CIV-2016-404-002335
[2017] NZHC 2387**

UNDER the Judicature Amendment Act 1972 and
the Local Government (Auckland
Transitional Provisions) Act 2010 and the
Resource Management Act 1991

IN THE MATTER OF Section 159 Local Government (Auckland
Transitional Provisions) Act 2010

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

BETWEEN FRANCO BELGIORNO-NETTIS
Plaintiff/Applicant

AND AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL
First Defendant

AND AUCKLAND COUNCIL
Second Defendant/Respondent

Hearing: 19 and 20 June 2017

Appearances: S J Ryan and R H Ashton for Appellant/Plaintiff
M J L Dickey and R S Ward for Respondent/Second Defendant
Dr C E Kirman and A K Devine for Housing New Zealand
Corporation (Intervenor)
R E Bartlett QC for McConnell Clearmont (Intervenor)
D A Allan for Northcote RD1 Holdings Ltd, W Smale Ltd, Fred
Thomas Drive Investments Ltd (Intervenors)

Judgment: 29 September 2017

JUDGMENT OF PAUL DAVISON J

*This judgment was delivered by me on 29 September 2017 at 2:00 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Introduction

[1] The appellant, Mr Franco Belgiorno-Nettis, was one of the thousands of people and parties who made submissions to the Independent Hearings Panel which was established pursuant to the provisions of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act), to hear and make recommendations to the Auckland Council as part of the statutory process by which it developed and produced the Auckland Unitary Plan. His submissions principally related to the proposed zoning and building height controls on properties located in Takapuna, but he also made submissions regarding zoning in Devonport and Grey Lynn. Following the hearing of submissions the Panel reported to the Council by means of an Overview Report, topic reports and revised planning maps which contained its detailed recommendations regarding the proposed Plan. With some exceptions the Council accepted and adopted the Panel's recommendations.

[2] On 19 August 2016 the Council publicly notified its decisions on the Panel's recommendations by issuing a "Decisions Report"; a "Decisions Version" of the proposed Plan; and a "Decisions Version" of the planning maps that are part of the Plan.

[3] The appellant now appeals on a question of law against the decision of the Council by which it adopted and applied the Panel's recommendations relating to the topics that he submitted on. He alternatively seeks judicial review of the Panel's recommendations and the Council's decisions relevant to his submissions. His principal ground on both the appeal and the judicial review is based on the proposition that both the Panel and the Council failed to provide reasons (or adequate reasons) for their recommendations and decisions in relation to the matters covered by the submissions he made to the Panel. He further says that the Panel and the Council made errors of law in their interpretation and application of the relevant provisions of the Act, and that the Council made an error of law by accepting the Panel's recommendations where the recommendations were not supported by adequate reasons.

[4] The appellant seeks relief by way of an order setting aside the Panel's recommendations and the Council's decisions concerning zoning and height controls in the Takapuna area on which he made submissions to the Panel. He seeks an order that those matters be remitted back to the Council for re-hearing and reconsideration.

Statutory Framework and Background¹

Notifying the plan and receiving submissions

[5] The purpose of the Act when enacted in 2010 was explained as being to further resolve matters relating to the reorganisation of local government in Auckland, a process that had already been commenced in accordance with legislation enacted in 2009.² The Act included a process for the development of the first combined planning document for the Auckland Council under the Resource Management Act 1991.³

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

[7] Part 4 of the Act was inserted on 4 September 2013. 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.

[8] The Council was required by ss 121 to 126 to prepare a plan, notify that plan and call for submissions – which it did. 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”. The appellant made a primary submission. There was then an opportunity to make further submissions. The Council received 3,800 further submissions containing

¹ The parties filed a Statement of Agreed Facts from which the background set out is substantially drawn.

² Local Government (Tamaki Makaurau Reorganisation) Act 2009; Local Government Auckland Council Act 2009.

³ Local Government (Auckland Transitional Provisions) Act 2010, s 3.

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 appellant made a further submission. The content of the appellant's primary submission and further submission will be discussed in detail below.

The Panel

[9] The Minister for the Environment and the Minister for Conservation established the Panel comprising a chairperson and three to 10 other members as required by the Act.⁴ The role of the Panel was to convene public hearing sessions and to thereafter prepare a report (or reports), and make recommendations to the Council on the Plan.⁵ At the hearings the public could make submissions and call evidence.⁶ 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.⁷

[10] It is relevant to note here that an amendment to the Act was passed in 2015, the effect of which was to amend s 144 of the Act to confer power on the Panel to report to the Council in one or more reports, and to divide its reports into topics and make recommendations in respect of the topics covered by each report.⁸ The 2015 amendment was a legislative response to the enormous volume of submissions that had been received by the Council. The introduction of provisions enabling the Panel to present its recommendations by reference to topics and separate reports was intended to streamline the process and assist the Panel to cope with the large volume of submissions.

[11] During 2014, the Council had allocated each submission point to a "Topic". For example, Topic 001 was "Whole Plan and General", Topic 020 was "Viewshafts", and Topic 030 was "Pre-1944". The Panel adopted and amended these categorisations for its process.

⁴ The section provided for a chairperson and seven members however this was amended in 2015 with the intention of assisting the Hearings Panel to meet its statutory deadline.

⁵ Sections 127(1), 128 and 164.

⁶ Section 129(1).

⁷ Section 137.

⁸ The Local Government (Auckland Transitional Provisions) Amendment Act 2015.

[12] Submission points seeking changes to the zoning in geographic areas and precincts were allocated to Topic 081 “Rezoning and Precincts (Geographical Areas)”. Topic 081 was later divided into seven sub-topics. Sub-topic 081(c) included the Takapuna area.

[13] Where submissions sought amendments to height controls and related to a single property or group of properties they were treated as site or area-specific, as opposed to those seeking changes to the zone-wide height controls. These submissions were either allocated to Topics 051-054 which were, broadly speaking, business zone topics; Topics 059-063 which were residential zone topics or to Topic 078, which was the topic for “Additional Zone Height Control” (AZHC).

[14] The appellant’s primary submission points and further submission points regarding zonings in Takapuna were allocated initially to Topic 081, and later reallocated to Topic 081(c). The appellant’s submission points in relation to AZHC’s in the Takapuna area were allocated as follows:

- (a) His primary submission points relating to land zoned Mixed Use on the east and west sides of Lake Road were allocated to the business zone topics.
- (b) His further submission points responding to the submissions of another submitter and relating to the AZHC on the Promenade block were allocated to Topic 078.

[15] The Council elected to file its evidence for all site and area-specific height requests at the hearings on the business and residential zone topics, but submitters were able to respond to the Council’s evidence either as part of the residential or business zone topics or the AZHC topic – Topic 078. Some submitters, including the appellant elected to present evidence at more than one hearing.

[16] It is also relevant that at the hearing on Topic 013 – Urban Growth, the Council’s position was that a compact urban form should be achieved by means of the primary focus for residential intensification being on land adjacent to centres

with close proximity to the rapid and frequent service network and urban facilities, and with a lesser degree of intensification in surrounding neighbourhoods. The appellant did not make a submission on Topic 013.

[17] The appellant appeared in person at the hearings on the business zone topics and residential zone topics. At each of these hearings, evidence was given by Council witnesses addressing the appellant's submissions, as well as those of other submitters. At the business zone topics hearing the Council's evidence included the evidence of a planner who addressed the appellant's submissions in relation to AZHC's for Mixed Use land on either side of Lake Road. The planner recommended that lower height limits be adopted for this land than provided for in the Plan. He recommended that the 24.5 metre height control on the western side of Lake Road be reduced to 21 metres, and on the eastern side of Lake Road to 18 metres. These proposals were supported by the Council. The appellant responded to the planner's evidence by filing evidence opposing the planner's recommendations in relation to both the eastern and western sides of Lake Road.

[18] Prior to the hearing on the residential zone topics, the Council had filed its evidence which also included evidence from a planner addressing the matters raised in the appellant's submissions in relation to the AZHC applicable to the properties located within the Promenade block. The Council planner recommended that the proposed AZHC be retained and increased to 22.5 metres consistently with a recommendation that AZHC height in the Terraced Housing and Apartment Building (THAB) zone be increased from 19.5 metres to 22.5 metres in specific locations adjacent to centres. The appellant filed four statements of evidence addressing the AZHC in relation to the Promenade block and Tennyson Avenue, and the Council filed rebuttal evidence responding to the appellant's evidence.

[19] A prehearing meeting was held for Topic 078-AZHC, following which the Panel released a Pre-Hearing Meeting Report which recorded:

The Panel acknowledges linkages between Topic 078 and the residential and business zone topics. Accordingly, the Panel considers it appropriate that evidence submitted in Topic 078 can discuss other relevant provisions which put the relief sought in context.

...

Council's [sic] has already submitted evidence in topics 051-054 which addresses its position on the Additional Zone Height Control. This evidence discusses all of the sites submitted on in Topic 078. Parties are encouraged to review this evidence. ...

[20] A similar statement was included in the Parties and Issues Report issued by the Panel prior to the hearing of Topic 078 and in a memorandum filed on behalf of the Council.

[21] The appellant filed evidence and appeared at the hearing on Topic 078. His evidence largely reiterated the evidence he had given at the prior hearings, however, he also raised concerns about the allocation of submissions. Rebuttal evidence was presented by a Council witness addressing, inter alia, the appellant's evidence.

[22] Hearings on Topic 081 were conducted by two panels, one covering the south and one covering the north. The appellant made submissions to the North Panel on 28 April in which he presented detailed evidence regarding both business and residential zonings and height controls applicable in the Takapuna area.

[23] The Council's evidence relating to Topic 081 covered its general strategic overview, sub-regional overview and included site and location-specific submissions. A joint statement of evidence from Council planners, Mr Ewen Patience and Ms Emily Ip addressed zoning submissions in relation to the Takapuna, Milford and Smales Farm area. A total of 158 submission points were identified by the Council as relating to that area, which included 110 submission points relating to Takapuna. The Council's evidence identified a number of submission themes arising from the submissions relating to the Takapuna, Milford and Smales Farm area. Submission theme 1 was identified as "Centres/Terrace Housing and Apartment Buildings/Mixed Use, Expansion/Contraction". Submission points relating to this theme, which included the appellant's submission points, were grouped under the following headings:

- (a) Hurstmere Road/Earnoch Avenue/The Promenade Block.
- (b) Extent of THAB in Takapuna.

- (c) Lake Road Mixed Use Zone.

[24] The Council also filed evidence relating to the two Takapuna Precincts provided for in the Plan. The appellant filed evidence dated 9 February 2016 relating to zoning in Takapuna, with which he included a petition signed by members of the local community who expressed their opposition to the THAB zoning of the Promenade block.

The Panel's report(s)

[25] The Panel was required to provide its report (or reports) to the Council no later than the date 50 working days before the expiry of three years from the date on which the Council had notified the Plan, unless that time was extended by the Minister for the Environment.⁹

[26] Section 144 specifies certain requirements for the Panel's recommendations:

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

⁹ Sections 146 and 147.

- (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.

[27] The Panel's recommendations on the Plan were delivered 60 working days after the conclusion of the hearings of submissions on Topic 081. The Panel's

recommendations were in three parts: an “Overview Report”,¹⁰ together with separate reports on hearing topics or groups of topics; the Panel’s recommended version of the Plan provisions; and the Panel’s recommended version of the maps presented in the electronic “GIS Viewer” format.

[28] Upon receipt of the Panel’s reports the Council was required to consider the recommendations and make decisions to either accept or reject each recommendation and within 20 working days, notify its decisions on the recommendations,¹¹ and release the Panel’s report or reports containing the recommendations to the public.¹²

[29] Once the Council publicly notified its decisions on the Panel’s recommendations, each part of the proposed plan (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.¹³

Mr Belgiorno-Nettis’s submissions to the Panel

[30] At this stage it is necessary to consider in more detail the substance of the appellant’s submissions to the Panel.

[31] The appellant has lived in Takapuna for approximately the past six years and prior to that he had lived in Scanlan Street, Grey Lynn for 20 years. When the Plan was first notified he decided to make submissions to the Panel in relation to the provisions of the proposed plan that related to Takapuna and Grey Lynn and which he considered adversely impacted the amenity values for the existing residents of the respective areas. Although he accepted that intensification of land development was necessary to accommodate Auckland’s growing population, he was concerned that Takapuna had been identified as a centre that could provide for a significant degree of intensification. He was concerned at how that intensification would be achieved in Takapuna and the potential for adverse effects of shading and of dominance caused

¹⁰ Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) [Overview Report].

¹¹ Section 148.

¹² Section 150.

¹³ Sections 152(1) and (2).

by neighbouring or nearby intensive development. His concerns were area and location specific. He considered that in some respects the proposed zoning was too limiting and did not take account of particular site characteristics or topography.

[32] Following the Council's notification of the Plan the appellant filed four written submissions in relation to proposed zoning and height controls applying to Takapuna in which he sought :

- (a) Rezoning of the land bounded by The Promenade, Alison Avenue, Earnoch Avenue and Hurstmere Road (the Promenade block), from the proposed zoning of Terraced Housing and Apartment Buildings (THAB), to a Mixed Housing Urban zoning. The proposed plan zoning of THAB permitted buildings with a height of up to 20.5m or six storeys on the Promenade side of the block, and up to 14.5m or four storeys on the Earnoch Avenue side of the block. The appellant was concerned that six storey buildings along the Promenade and possibly down Alison Avenue would adversely affect the existing residents nearby, especially those with properties to the west. He submitted that buildings of that height would affect the privacy and sunlight amenities of existing properties, block the views of properties on the west side and adversely affect their market values. He submitted that the appropriate zone for the Promenade block would be a residential Mixed Housing Urban zone with a maximum height of 10m and therefore only three storeys.
- (b) To remove the additional zone height control permitting building up to 24.5m, from mixed used properties on the west side of Lake Road from Bracken Avenue to Esmonde Road. The appellant submitted that the 24.5m height control would allow buildings of up to seven or eight storeys which was too high and which would have a negative effect on the nearby residential area. He submitted that buildings of that height would ruin the sunlight amenities and privacy of the residential properties nearby and cause a shadowing effect along the western side of Lake Road which would probably make the land in that area less

attractive for eventual use for terrace housing and apartment buildings. He submitted that the proposed Mixed Use zone allowing building up to 24.5m should be replaced with the standard Mixed Use removing the additional height overlay applicable for that specific area.

- (c) The additional height control for Mixed Use zoned properties on the east side of Lake Road from Blomfield Spa to Park Avenue permitting building to a height of 24.5m (seven to eight storeys) be amended to allow a maximum building height of three storeys. The appellant submitted that the Mixed Use zone with an additional height control permitting buildings of up to 24.5m along both sides of Lake Road between Blomfield Spa to Park Avenue would lead to a wall of tall and narrow buildings along Lake Road, especially on the eastern side. He submitted that such development would adversely affect the sunlight and privacy amenities of the existing properties closer to Lake Road and that the shadowing effect of the tall buildings would be exacerbated by the sloping topography of the land going down towards Takapuna Beach. He submitted that the appropriate zoning of the eastern part of Lake Road would be Mixed Use permitting buildings of up to three storeys.
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- (d) To change the zoning of land on the west side of Lake Road from Bracken Avenue to Byron Avenue from the proposed Metropolitan Centre zone to Mixed Use with no additional height control. The appellant submitted that the proposed Metropolitan Centre zoning with an unlimited height control, and only controlled by set-back from boundary rules, was illogical having regard to its proximity to the residential area zoned Metropolitan Centre. He submitted that building on that scale would badly affect the sunlight and privacy of many properties close to Lake Road, and that the buildings would have a shadowing effect to the eastern side of Lake Road which would be exacerbated by the sloping nature of the land between Lake Road and Takapuna Beach.

[33] The appellant also made submissions in relation to Scanlan Street, Grey Lynn and Devonport. Those submission are not relevant on appeal.

[34] Following the release of a Summary of Decisions Requested Report by the Council, the appellant filed a further submission in June 2014. In his further submission in relation to the Takapuna area, the appellant:

- (a) Supported a freeze on the THAB zoning in Takapuna and submitted that all THAB land be zoned Mixed Housing Suburban pending further consideration.
- (b) Supported a Mixed Housing Suburban zone being applied for the area between Blomfield Spa and Park Avenue.
- (c) Opposed the Mixed Urban zoning of the property at 5 Blomfield Spa.
- (d) Opposed a submission that supported THAB zoning applying to land in the Promenade block, and opposing an AZHC applying to all that land except for a specified property at Alison Avenue and another at Earnoch Avenue. The appellant generally sought what he described as a “more balanced approach” to residential intensification.
- (e) Requested that the height controls for Takapuna 1 sub-precinct A remain as proposed in the Plan, and in particular that the five storey maximum height control remain for the Metropolitan Centre zoned land bounded by Lake Road, Byron Avenue, Bracken Avenue and a tennis club.
- (f) Opposed zoning of the property at 7 Blomfield Spa as Mixed Use with a 24.5m AZHC, proposing a Mixed Housing Suburban zoning instead.
- (g) Supported rezoning of the area along Lake Road from Blomfield Spa to Park Avenue to allow buildings of a maximum of three storeys, or around 12.5m.

- (h) Opposed removal of the requirement of a Cultural Impact Assessment for a Takapuna property.
- (i) Supported a submission proposing a change of zoning from Mixed Use to Mixed Housing Urban for land on Lake Road from Blomfield Spa to Park Avenue.

The Panel's Overview Report

[35] The Panel presented its Overview Report on 22 July 2016. In the foreword to the report the Panel noted that following notification of the Plan on 30 September 2013, the Panel had received the Plan together with over 13,000 submissions. The Panel noted that having conducted an extensive hearing process, by May 2016 it had considered over 10,000 items of evidence presented during 249 sitting days involving 70 hearing topics, with in excess of 4000 appearances by submitters before the Panel. The Panel said:¹⁴

The Panel has read many documents and listened to many people. The Panel has taken all that it has read and heard and has weighed this carefully, its members working together over more than two years to integrate the many strands into a single document. The Panel, and each member of it, have done their best to ensure that the high-level objectives and policies of the regional policy statement flow through into the objectives and policies of the regional, regional coastal and district plans and then into the rules that govern subdivision, use and development so that the approach is consistent throughout. The Panel has tried to ensure that the provisions of the Plan are reasonably easy to navigate, understand and apply. The Panel believes that these recommended provisions will help the people of Auckland to use, develop and protect the region's resources in ways that promote the sustainable management of them.

[36] The Panel further explained:¹⁵

The reasons for the Panel's recommendations whether to keep or to 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.

¹⁴ *Overview Report* at 5.

¹⁵ *Overview Report* at 5.

[37] In the Executive Summary of the Overview Report the Panel explained the overarching and strategic approach to a combined resource management plan for Auckland:¹⁶

The overarching approach to a combined resource management plan for Auckland starts with the development strategy for a quality compact urban form as set out in the Auckland Plan. Based on existing centres and corridors, and taking into account over 50 years of statutory planning, this strategy recognises the multi-nodal framework of urban development within Auckland's geographic constraints.

The current resource management issue of greatest significance facing Auckland is its capacity for growth. This means both physically accommodating more people and also devising planning controls which most appropriately enable growth. It is important to keep in mind that growth must be provided not only for residential purposes but also for employment, transport, recreation and cultural activities. The recommended response to this issue is to enable greater capacity both by identifying areas at the edges of the existing metropolis which are suitable for urbanisation and by allowing greater intensification of existing urban areas with a strong focus on the existing centres. By utilising several methods for greenfield development and brownfield redevelopment, this response provides multiple ways of accommodating growth. It also protects existing values of significant areas and items of natural and historic heritage and of ecological value, the taonga held closely by Mana Whenua, volcanic viewshafts and the maunga themselves, air and water quality, the natural character of the coastal environment and the special character of many places.

[38] The Panel further explained:¹⁷

In all cases, the changes 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.

[39] The Panel also explained in the introduction to the Overview Report that:¹⁸

The Panel's report (Part 1) is made up of this Overview section plus separate reports on individual hearing topics. Some topics were heard together and some topic reports have been combined, where the subject matter makes this appropriate. These hearing topic reports are listed in Appendix 1 of this document.

The Overview section explains the Panel's overall approach and direction, summarises the main changes made to the Unitary Plan in terms of the plan

¹⁶ *Overview Report* at 9 (footnote omitted).

¹⁷ *Overview Report* at 14.

¹⁸ *Overview Report* at 15–16.

structure and major policy shifts and sets out the Panel's approach to scope and to meeting section 32AA reporting requirements. Reading the Overview first will help the reader to find their way around the Panel's recommendations – to understand what has been changed and why, and the extent to which the changes are in scope and therefore whether they are subject to the opportunity to appeal.

The reports on individual hearing topics provide the next level of detail about the Panel's recommendations and changes. The reports provide the following:

- i. reference to the relevant provisions in the proposed Unitary Plan and the corresponding provisions in the recommended Unitary Plan;
- ii. a summary of the Panel's recommendations on this topic;
- iii. an overview of the Panel's position on this topic, including the extent of agreement with the Council and submitters and whether there are any changes considered out of scope;
- iv. a section on each of the key issues identified by the Panel, which includes a statement of the issue, the Panel's recommendations and the reasons for the recommendation;
- v. identification of any consequential changes to other parts of the Unitary Plan, or to this part of the Unitary Plan as a result of changes made elsewhere;
- vi. a list of reference documents, including the relevant hearing process documents and any evidence referred to in the hearing topic report. These references are set up as direct links to the documents on the Panel's website.

[40] In the introduction to the Overview Report the Panel explained how its report and recommendations were made up of the three parts referred to above. The Panel explained:¹⁹

Given the large number of submitters (9,361 primary submitters and 3,915 further submitters) and the volume of individual submission points (nearly 100,000 primary submission points and over one million further submission points), the Panel has grouped all of the submissions in terms of [s 144(8)(c)(i)(ii)]. While individual submissions and points may not be expressly referred to in the reports and recommendations, all points have nevertheless been taken into account by the Panel when making its recommendations (see section 2.2 for more detail of the Panel's process).

[41] The Panel explained that the version of the Plan comprising Part 2 of its report was developed following the consideration of submissions resulting in amendments to the text of the Plan or in some instances amendments which were the

¹⁹ *Overview Report* at 16–17.

result of agreement between the Council and parties attending mediations. The Panel also explained the maps comprising Part 3 of the report showed its recommendations on the many submission points relating to rezoning precincts and the location and extent of map overlays. The Panel said that the maps represented the Panel's recommended version of the Plan, and were presented in the GIS viewer format.

Rights of Appeal and Judicial Review

[42] Section 156(1) confers on a person who made a submission on the Plan a right of appeal to the Environment Court in respect of a provision or matter that the person addressed in their submission, and in respect of which the Council rejected a recommendation of the Panel, and decided an alternative solution resulting in a provision being included or excluded from the proposed plan. Section 156(3) also confers a right of appeal to the Environment Court in respect of a provision or matter relating to the proposed plan, where the Council's acceptance of a recommendation of the Panel, which it had identified as being beyond the scope of the submissions presented to it, resulted in the recommendation either being included or excluded from the proposed plan, and where the appellant is unduly prejudiced by the inclusion or exclusion of the provision.

[43] Section 158 confers a right to appeal on a question of law to the High Court, and relevantly provides:

158 Right of appeal to High Court on question of law

- (1) A person who made a submission on the proposed plan may appeal to the High Court in respect of a provision or matter relating to the proposed plan -
 - (a) that the person addressed in the submission; and
 - (b) in relation to which the Council accepted a recommendation of the Hearings Panel, which resulted in –
 - (i) a provision being included in the proposed plan; or
 - (ii) a matter being excluded from the proposed plan.

...

- (4) However, an appeal under the section may only be on a question of law.

[44] Section 159 provides for judicial review:

159 Judicial review

- (1) Nothing in this Part limits or affects any right of judicial review a person may have in respect of any matter to which this Part applies, except as provided in sections 156(4) and 157(5) (which apply section 296 of the RMA, that section being in Part 11 of that Act).
- (2) However, a person must not both apply for judicial review of a decision made under this Part and appeal to the High Court under section 158 in respect of the decision unless the person lodges the applications for judicial review and appeal together.
- (3) If applications for judicial review and appeal are lodged together, the High Court must try to hear the judicial review and appeal proceedings together, but need not if the court considers it impracticable to do so in the circumstances of the particular case.

The role of the Panel

[45] A review of the relevant provisions of the Act shows how the objective of providing a streamlined procedure for the preparation and development of the first combined Auckland Unitary Plan was to be achieved. The Council's preparation and notification of a combined regional policy statement, regional plan and district plan, coupled with the procedures prescribed by the Act established a tailored process to produce the Plan. The Panel played the key role of hearing submissions on the Plan and producing the recommendations which, having regard to the scheme of Part 4 of the Act and particularly the short timeframe within which the Council was required to decide whether to accept or reject the Panel's recommendations, it was expected would be substantially adopted by the Council. Accordingly the Panel had the major responsibility of hearing and considering a vast number of submissions on the proposed plan, and then making detailed recommendations to the Council as to the provisions of the Plan.

[46] The scale of the Panel's task was truly vast, and in recognition of the volume of material and submissions to be considered, a period of almost three years was

allocated to enable it to complete the work. The nature of the Panel's task can be further seen by contrasting the three year period within which it was required to report, with an expected period of eight to 10 years which the parties agree would be the likely time required to complete the preparation of a regional plan and district plan if proceeding in accordance with the standard provisions of the Resource Management Act. Although the Council itself obviously had a detailed knowledge of the Plan and had fully participated in the process of the hearing of submissions conducted by the Panel, the 20 working day time allowed to the Council to make its own decisions as to whether to accept or reject the Panel's recommendations emphasises the significance of the key role of the Panel in the process. That key role coupled with the expertise of the members of the Panel, and the nature and scale of the task undertaken by the Panel, are factors which must inform an assessment of the scope and extent of the statutory and legal obligations upon the Panel and the Council to provide reasons.

Appellant's submissions

[47] Mr Ryan for the appellant submits that both the appeal and the alternative application for judicial review are founded on the Panel's failure to provide any, or sufficient, reasons for the acceptance or rejection of the appellant's submissions made to the Panel regarding the zoning and AZHCs applying in Takapuna. He says that pursuant to s 144(8) of the Act, the Panel had an express statutory duty to give reasons for either accepting or rejecting the appellant's submissions.

[48] He further says that the context of limited time frames within which the Panel was required to hear all the submissions and prepare and present its report to the Council does not mean that the requirements of s 144(8)(c) can be interpreted to permit a lesser standard of reasons such as would exclude an obligation to specifically address area and site-specific submissions made to the Panel. Mr Ryan submits that having regard to the scheme of the Act, the requirement to give reasons for its recommendations contained in s 144(8) is a legislative "bottom line", the requirements of which are not to be read down or reduced by reason of the scale of the task being undertaken or the time constraints under which the Panel's task was required to be completed.

[49] Mr Ryan says that while s 144(10) of the Act operates to excuse the Panel from an obligation to address and respond to each submission individually, the submissions must still be answered. If not individually – at least collectively. That is evident from the conferring of the statutory power enabling the Panel to group submissions together.

[50] Mr Ryan notes that the Act allowed the Panel or the Council to request the Minister for the Environment to extend the original deadline for reporting and presenting the Panel's recommendations to the Council by up to a year pursuant to s 147. He submits that if time pressures prevented the Panel from providing reasons dealing with submissions that were area and site-specific, the proper course was for the Panel or the Council to request the Minister to extend the deadline, not to proceed to report without giving adequate reasons for accepting or rejecting site-specific submissions.

[51] Mr Ryan also referred to four examples where area and site-specific submissions were made to the Panel by a number of submitters relating to properties or groups of properties located in the Takapuna area. In each case, says Mr Ryan, there was not a single submission but a number of submissions made by a number of submitters, and the Panel should have grouped the submissions relevant to each site or area, and addressed them collectively in giving its reasons for recommendations affecting those properties or areas.

[52] Mr Ryan says that there is an evident mismatch between the Panel's hearings process, which had involved submissions being assigned to topics on the basis of geographic areas or sub areas, and the Panel's recommendations such that the reasons expressed by the Panel failed to engage with the determinative issues raised by submissions made by the appellant that sought site-specific relief. He submits that the provision of adequate reasons for a decision is critical, as those affected must be able to understand why a decision has been made, both to avoid any perception of arbitrariness and to render appeal rights effective.

[53] He further submits that the Panel's reasons on the zoning and AZHC topics for Takapuna were generic, "macro" or high level and as a result did not address the

site-specific issues raised in the appellant's submissions relating to Takapuna. He takes issue with the Council's submission that the Panel's reasons can be identified from the general statements contained in the reports. Mr Ryan says that those statements and the maps referred to by the Council as containing adequate reasons for the Panel's recommendations are not reasons that satisfy the duty on the Panel to give reasons. He says it is not clear from those passages of the reports relied on by the Council what parts of the appellant's submission were accepted or rejected or why they were accepted or rejected. He says the appellant is required to "pick through" the Panel's reports to look for the reasons that apply to recommendations relevant to his submissions. He says that in the absence of clearly expressed reasons it is not possible to reasonably infer that the Panel did in fact take particular submissions into account in reaching its recommendations. In this regard, he says that the appellant is left to rely on the broad statement by the Panel saying that it took all submissions into account in considering its recommendations, and otherwise assume that matters were appropriately considered and dealt with by the Panel. Mr Ryan submits that the nature and degree of the inference that the appellant is required to draw in order to conclude that the Panel acted according to its legal obligations is too great to be acceptable when contrasted with the express obligation to give reasons in s 144(8)(c).

Duty to give adequate reasons

[54] Mr Ryan submits that where there is a duty upon a decision maker to give reasons, an inadequate statement of reasons is a reviewable error. He submits that such a failure is to be treated as a breach of natural justice and an error of law which may make the decision invalid.²⁰

[55] Mr Ryan further submits that reasons given for a decision must be sufficient to address the issues arising from the submissions:²¹

What is required is a substance over form approach to reading decisions such that reasons must be sufficient, adequate to the occasion, demonstrate that

²⁰ *Zhang v Minister of Immigration* [2013] NZHC 790.

²¹ Matthew Smith *The New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [62.6].

the right criteria were applied, and do more than merely repeating the discretion or test.

[56] Mr Ryan says that the Panel's reasons are inadequate as regards the appellant and his submissions, as they do not address the location specific issues and the AZHC issues raised in his submissions in relation to Takapuna. He says that, as a consequence, the Panel has failed to comply with the requirements of s 144(8)(c) of the Act. He submits that the Panel was required to do more and go further than providing high level or macro reasons, and was under a legal duty to address issues raised by submissions at the level of the particular, as that was the level at which the appellant's zoning and AZHC submissions engaged with the Plan. Mr Ryan notes that submitters seeking site-specific relief were the largest category of submitters and that site-specific issues were important as shown by the numbers engaged in the process. He says that the appellant always knew and understood that the Plan provided for intensification, but that he was concerned with the detail. He submits that the high level reasons relating to intensification provided by the Panel are not an adequate response to the appellant's submissions, and give rise to a perception of an arbitrary exercise of power by the Panel.

[57] Counsel submits that the obligation on the Panel to provide area and site-specific reasons for its recommendations in order to discharge its statutory duty to give reasons is supported by both the statutory context and by the nature of the engagement of the submitters with the Panel, which involved the Panel hearing considerable evidence from submitters relating to area and site-specific issues.

[58] Mr Ryan submits that because the site-specific issues raised in the appellant's submissions were not addressed, the appellant's right of appeal on a question of law has been rendered moot, as it cannot be determined what matters the Panel did or did not take into account, or what legal tests were applied.

Council decisions accepting the Panel's recommendations adopt the Panel's error

[59] The appellant notes that the Council's decisions in relation to zoning and the AZHCs in Takapuna accepted the Panel's recommendations. Other than accepting the recommendations, the Council gave no reasons for its decision. Mr Ryan submits

that where the Panel's recommendation suffers from an error of law, so too does the Council's decision to accept and adopt such a recommendation. He relies on the observations of Whata J in *Albany North Landowners v Auckland Council*.²²

The purpose of any appeal on a point of law is to test the legality of the Council decision. While the issue of scope is essentially about procedural fairness, a recommendation assuming scope when there is none is contrary to the scheme and policy of public participation of Part 4 and the RMA. It is unlawful. Plainly, the Council cannot lawfully accept an unlawful recommendation. If that were not the case, the right of appeal to the High Court would be largely meaningless.

[60] In response to the submission made for the Council that it had provided reasons relating to the Takapuna area in the explanation of its decision to reject the Panel's recommendation to delete the Takapuna 2 Precinct from the Plan, Mr Ryan says that such reasons have no relevance to the issues raised by the appellant in his submissions to the Panel. He notes that the appellant was not a submitter in relation to the Takapuna 2 Precinct. Furthermore, the Council's reasons for rejecting the Panel's recommendation that the Takapuna 2 Precinct be deleted relate to intensification at a high level and to an intention to maintain consistency with other parts of Takapuna and do not address the site-specific issues raised by the appellant in his submissions.

Auckland Council's submissions

[61] Ms Dickey for the Council accepted that the Panel and the Council were required by the provisions of s 144(8) of the Act to provide reasons for their decisions, while noting that the duty on the Council to do so was, by comparison, more confined than the duty on the Panel. She submits, however, that the appellant has not demonstrated that the Panel or the Council made any error of law in relation to their obligation to provide reasons, and says that the Panel and the Council's reasoning relating to zoning and the AZHCs in the Takapuna area was clearly explained in the Panel's reports and recommendations which were adopted by the Council.

²² *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [298].

[62] Ms Dickey says that it is critical to understand the statutory requirement to provide reasons in the context of the scheme of Part 4 of the Act. The purpose of that part is to streamline the process that would otherwise be required by Schedule 1 of the Resource Management Act. She submits that, having regard to that statutory context and to the nature of the decisions and recommendations being made by the Panel, it was entirely sufficient for the Panel to provide brief, succinct and abbreviated reasons. Those reasons contained the essence of its reasoning without addressing issues on a submission by submission, or area by area, level of detail. Ms Dickey says that it was sufficient for the Panel to explain that its reasons were contained in Part 1 of the Report together with the revised text and maps (being Parts 2 and 3).

[63] So far as zoning is concerned, Ms Dickey submits that the Panel provided clear reasons for its findings as to the need for intensification and zoning across the Auckland region. These reasons were included within the Panel's report regarding a "centres and corridors" approach, with significant up-zoning and recommended provision of greater building heights around centres such as the Takapuna Metropolitan Centre, notwithstanding that the height controls recommended in some parts of Takapuna were reduced from the underlying zone height limit. Ms Dickey says that key statements are to be found in a number of the specific reports which are included within Part 1 of the Panel's Report. (This includes, inter alia, the Overview Report, the Rezoning and Precincts Report,²³ the Urban Growth Report,²⁴ and the Residential Zones Report relating to Topics 059, 060, 062, and 063.²⁵) Reasons for the Panel's decisions are also contained in Part 2 (the Panel's amended version of the Plan) and Part 3, (being the planning maps). She submits that in ascertaining the Panel's reasons for its zoning recommendations, it is important to consider the Panel's reports and recommendations as a whole, including the Panel's versions of the Plan and planning maps, which themselves also contain and constitute recommendations.

²³ Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts* (July 2016) [*Rezoning and Precincts Report*].

²⁴ Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council – Hearing topic 013 Urban Growth* (July 2016) [*Urban Growth Report*].

²⁵ Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council Hearing topics 059 – 063 Residential Zones* (July 2016) [*Residential Zones Report*].

Reasons relating to zoning

[64] Ms Dickey refers specifically to several statements made by the Panel which she says give reasons for the decisions relating to the appellant's submissions. The Council first refers to the Panel's Overview Report. Ms Dickey notes that the Panel explained in the Overview Report that because of the substantial number of submission points presented by submitters, its report and recommendations do not address individual points of relief, stating:²⁶

The Panel's report and recommendations do not address individual points of relief sought in submissions. The Local Government (Auckland Transitional Provisions) Act 2010, section 144 (8) (c) requires the Panel to set out:

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.

Given the large number of submitters (9,361 primary submitters and 3,915 further submitters) and the volume of individual submission points (nearly 100,000 primary submission points and over one million further submission points), the Panel has grouped all of the submissions in terms of (c) (i) and (ii). While individual submissions and points may not be expressly referred to in the reports and recommendations, all points have nevertheless been taken into account by the Panel when making its recommendations ...

[65] Ms Dickey submits that the separate topic reports also contain further statements reaffirming the Panel's application of the approach as explained in the Rezoning and Precincts Report, the Panel said:²⁷

This report covers all of the submissions in the Submission Points Pathways report (SPP) for these topics. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) 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. Because the Panel has grouped matters rather than addressed individual submission points, submitters need to read this report to understand the Panel's approach and how this has been applied, then read the relevant sections in the annexures to this report as refer to the maps in the GIS viewer which forms part of the Panel's recommendation and report to the Auckland Council.

²⁶ *Overview Report* at 16-17.

²⁷ *Rezoning and Precincts Report* at 4.

[66] Ms Dickey submits that the Panel's process of grouping the submissions on zoning matters was entirely in accordance with the provisions of s 144(8)(c).

[67] Ms Dickey also refers to the Panel's reference in the Overview Report to the Plan maps as containing its recommendations regarding zoning issues:²⁸

The Panel has provided a full set of amended Unitary Plan maps to show its recommendations on the many submission points relating to rezoning, precincts, the location of the Rural Urban Boundary and the extent of the overlays.

The maps are presented in the Independent Hearings Panel 'recommended' version of the GIS viewer.

[68] In relation to the Panel's recommendations that relate to zoning in Takapuna, Ms Dickey submits that the reasons for the recommendations are to be ascertained by referring to all the above mentioned reports. Ms Dickey notes that the Topic 013 Report dealing with Urban Growth includes the Panel's discussion of the centres-based approach to zoning which was subsequently applied by the Panel in relation to many of the rezoning decisions. The Panel said:²⁹

Urban growth issues permeated most topics heard by the Panel. The Panel's response to urban growth issues likewise permeates most topics in order for the recommended Plan to provide a coherent response to the growth issues facing the Auckland region. ... Due to the interrelated nature of urban growth with other topics evidence in this topic has influenced the Panel's response under other topics, for example Topic 012 Infrastructure energy and transport, Topic 016/017 Rural Urban Boundary, Topic 043/44 Transport or Topics 059/060/062/063 Residential.

...

Thus a central theme in the Panel's work has been to enable greater residential capacity and to a lesser extent, greater commercial and industrial capacity, while promoting the centres and corridors strategy, greater housing choice and more affordable housing.

The Panel considers the Unitary Plan should err toward over-enabling, as there is a high level of uncertainty in the estimates of demand and supply over the long term, and the costs to individuals and the community of under-enabling capacity are much more severe than those arising from over-enabling capacity. To provide for sufficient residential capacity the Plan needs to both enable a large

²⁸ *Overview Report* at 18.

²⁹ *Urban Growth Report* at 6-7.

step-change in capacity in the short to medium term and to provide a credible pathway to ongoing supply over the long term.

The Panel recommends the following approaches to increase residential, commercial and industrial capacity.

- i. Enable the centres and corridors strategy in line with the development strategy envisaged in the Auckland Plan. This involves significant rezoning with increased residential intensification around centres and transport nodes, and along transport corridors (including in greenfield developments).
- ii. Modify some of the objectives, policies and rules in residential, commercial and industrial zones to be more enabling of capacity (e.g. remove density rules in the more intensive residential zones and provide for greater height in some of the centres).

[69] Counsel also refers to the Panel's Residential Zones Report (Topics 059–063), which also contained reasons. In this report the Panel expressed its agreement with a statement made in the evidence presented on behalf of Housing New Zealand in which a bold “transformational shift” was sought with regard to how urban growth and intensification in Auckland should occur in the future.³⁰

This transformational shift requires an innovative response, and recognition that the planning framework of the past will not achieve the urban growth and ‘quality compact city’ aspirations which both the Auckland Plan and Unitary Plan are seeking. ... We suggest that such a bold and innovative approach within the key ‘urban’ zoned locations, which will provide for residential activities and development, would need to include:

- Moderate increases to the permitted height limits in appropriate locations (being around centres, and within walking distance of public transport facilities and other recreational, community, commercial and employment opportunities and facilities);

...

[70] The Panel commented:³¹

The Panel in general terms agrees with the evidence presented by Housing New Zealand, as set out above. In response to Housing New Zealand's evidence and other submitters' evidence the Panel has amended the residential provisions to enable greater residential capacity. At the same time the Panel believes the amended provisions will also enable good urban design and planning outcomes. This is necessary to give effect to the regional policy statement and to have due regard to the Auckland Plan.

³⁰ *Residential Zones Report* at 11-12.

³¹ *Residential Zones Report* at 12.

[71] Ms Dickey also refers to the Panel's comments in Annexure 4 to the Rezoning and Precincts Report, in which it directly addressed the issue of the height of buildings in and around the Takapuna metropolitan centre.³² Ms Dickey submits that the Panel's concern with the height implications of buildings upon the coastal environment and existing development is evident from its comments. In relation to Takapuna Precinct 1, which incorporates the central area of Takapuna, the Panel said:³³

The Takapuna 1 Precinct is recommended to be included in the Plan because it provides for a more nuanced building height outcome that will avoid, remedy and mitigate adverse effects on the amenity Business-Metropolitan Centre Zone.

...

The Precinct is considered appropriate because it provides for an urban design outcome in regard to building heights that will better maintain the amenity values of the coastal environment and the existing developments than the default heights in the underlying Business- Metropolitan Centre Zone. The Precinct will provide for a graduated increase in building heights from four to five storeys on the coastal edge to unlimited heights mid-block to the west of Lake Road. The Panel relies of the modelling evidence of Mr Sills for the Council that demonstrated that the shadowing and dominance effects of the precinct heights on the coastal reserve would be acceptable.

[72] In relation to Takapuna Precinct 2, which is an area located on the western fringe of the Takapuna Metropolitan Centre and zoned THAB, the Panel said:³⁴

Having reviewed the evidence, the Panel finds that the precinct is no longer necessary with the changes recommended to the general provisions for Residential –Terrace Housing and Apartment Buildings Zone and the associated Business –Metropolitan Zone, along with other Auckland-wide requirements. It agrees with those submitters [name omitted] who recognised that Takapuna is a key metropolitan centre around which intensification must follow in order to give effect to the compact quality urban form principle. Concerns regarding urban design and spatial form can and will be addressed through the relevant provisions.

[73] By reference to these statements of the Panel, Ms Dickey says that the zoning changes recommended clearly gave effect to the Panel's "centres and corridors" approach to addressing capacity concerns and to achieving a compact urban form. She submits that the Panel's reasoning as appears from the reports and maps, when

³² *Rezoning and Precincts Report* Annexure 4.

³³ *Rezoning and Precincts Report* Annexure 4 at 127 - 128.

³⁴ *Rezoning and Precincts Report* Annexure 4 at 195.

read together, provides a complete answer to the concerns expressed by the appellant in his submissions to the Panel regarding building heights and intensity of development. Furthermore, says Ms Dickey, the Panel's reasons in relation to Takapuna Precincts 1 and 2 clearly show the Panel provided for intensification in a way that sought to maintain amenity values of the coastal environment and existing development.

[74] Ms Dickey submits that having regard to the streamlined process established by Part 4 of the Act and to the nature and scale of the task undertaken by the Panel, the Panel's reasons did not need to be elaborate or lengthy. She submits that it was appropriate for the Panel to state its reasons briefly and succinctly. She says that, provided the reasons the Panel gave were proper, adequate and intelligible so as to enable a person affected by the outcome to know why they have "won or lost", and dealt with the substantial issues raised by the submissions, the reasons given would be sufficient to discharge the statutory obligation upon it to give reasons.

[75] Ms Dickey says that the required standard was met. She says that an example is the Panel's recommendation to "up-zone" some land along Lake Road from Mixed Housing Suburban to Mixed Housing Urban, contrary to the appellant's submission that the land should remain zoned Mixed Housing Suburban, which was consistent with the Panel's "centres and corridors" approach. Ms Dickey submits that although there is no specific reference made by the Panel to the appellant or his submissions, there can be no reasonable suggestion that it was unclear what the Panel had recommended, or as to the reasons for its recommendations.

Reasons relating to height controls

[76] In reply to the appellant's submission that the Panel failed to provide adequate reasons for accepting or rejecting submissions relating to additional height controls, Ms Dickey repeats her submission that the Panel's omission of a Topic 078 report was clearly deliberate. She says that the reasons for the Panel's recommendations as to height controls applicable to the various parts of Takapuna can be clearly seen in its reports including the Takapuna precinct reports. Ms Dickey notes that, as regards AZHCs in the Takapuna area, the issues raised by the appellant

were the subject of evidence presented to the Panel by the Council at the hearings of both the business zone topics and the residential zone topics, and that the Council's evidence presented at those hearings was essentially repeated at the Topic 078 AZHC hearing. Similarly, Ms Dickey notes, it is agreed that the appellant also largely reiterated the evidence and submissions he made at the business and residential zone topics hearing as regards the Takapuna AZHCs, when making submissions at the Topic 078 hearing.

[77] As regards the absence of a specific Panel report on Topic 078, Ms Dickey submits that it is clear that the Panel had decided that a separate report was not necessary. She says that a review of the Panel's Part 1 reports together with the Panel's recommended Plan and maps clearly shows that height controls were considered in detail by the Panel, including those applicable specifically in the Takapuna area. Reference to the maps and Plan include AZHC³⁵ provisions, and those documents are to be read together with the Part 1 reports and recommendations. Ms Dickey submits that when the Panel's statements and the planning maps are considered together, it is very clear what the Panel's and the Council's reasons were for the AZHCs which were included in the Plan.

[78] As regards Topic 078 Ms Dickey notes that site-specific submissions addressing height controls were not addressed by the Panel solely in relation to Topic 078. The appellant's primary submission points concerning the AZHCs in Takapuna were addressed in the business zone topics, not Topic 078. The Council had decided to present its evidence in relation to all site-specific height requests at an early stage of the submission process when the business and residential zone topics were heard, rather than presenting some height control related evidence at the hearings of the business and residential zone topics, and some at the Topic 078 hearing. Issues relating to height controls were also heard as part of the Topic 080 and 081 hearings. The appellant himself presented evidence and submissions regarding AZHCs at more than one hearing: the business zone topics, residential zone topics, Topic 081 and Topic 078 hearings.

³⁵ Note that in the Council's decision version of the Plan the additional zone height controls are referred to as height variation controls, "HVC".

[79] In summary, as regards Topic 078 and the absence of a specific report on that topic by the IHP, Ms Dickey submits that all issues relating to the AZHCs were well and truly covered at several hearings at which height controls were addressed. Having regard to the Panel's recommendations which dealt with height controls by means of the application of height controls applicable to the THAB zone and business zones as a variation to the standard zone heights, Ms Dickey submits that it can be reliably inferred that the Panel considered that a further specific report dealing with height control issues was therefore unnecessary.

[80] She further submits that the Panel's generally expressed reasons in those reports provide clear and sufficient support for the Panel's recommendations regarding zoning and height controls in centres such as Takapuna, and the absence of any specific mention of Takapuna in those reports is of no significance.

The Council's Decision

[81] So far as the Council is concerned, Ms Dickey notes that the Council did provide reasons for its decision to reject the Panel's recommendation that the Takapuna Precinct 2 be deleted from the Plan. The Takapuna Precinct 2 is zoned THAB. The Council explained its reasons for rejecting the Panel's recommendation and thereby retaining the Takapuna Precinct 2 in the Plan as follows:³⁶

Deletion of the precinct means that less intensive development is provided for, contrary to the intent of the Panel's recommendation to provide for intensification around the Takapuna metropolitan centre.

It is also contrary to the recommended provisions of the [Regional Policy Statement], and is inconsistent with the application of Height Variation Controls across the rest of the Terrace Housing and Apartment Building zone surrounding the Takapuna Metropolitan Centre.

[82] Ms Dickey submits that while these reasons are briefly expressed, they are clear.

Submissions for Housing New Zealand Corporation

[83] Dr Kirman presented detailed and helpful submissions for Housing New

³⁶ Auckland Council Decisions Report (19 August 2016), paragraph 51.2(b).

Zealand Corporation on the legal duty for the Panel to provide reasons. She also adopted the submissions made by Ms Dickey for the Auckland Council. Dr Kirman's principal submission was that the Panel had not breached the statutory requirement to give reasons in relation to the appellant's submissions and specifically that the Panel made no error of law in relation to its obligation to give reasons in respect of the appellant's submissions.

[84] Dr Kirman explained that Housing New Zealand is interested in the appeal because it is concerned of a potential finding of the Court that the Panel had made an error of law. Housing New Zealand has a direct interest in the zoning outcome sought by the appellant. It owns land in the area and it has a contractual relationship involving the redevelopment of its land. Moreover, Housing New Zealand manages a large housing portfolio in the Auckland Region.

[85] Housing New Zealand presented extensive submissions to the Panel on the Plan, including on the provisions in the plan relating to residential zoning of land. Housing New Zealand's intention through the process was to promote provisions that would enable it to reconfigure its portfolio, so as to be able to deliver additional social and affordable dwellings.

[86] In her submissions Dr Kirman reviewed the legislative background to the Act, compared the provisions of Part 4 (particularly s 144) with the analogous and almost identical provision contained in Schedule 1 of the Resource Management Act which imposes an obligation on local authorities to give reasons for their decisions on matters raised in submissions.

[87] As regards the duty on the Panel to provide reasons, Dr Kirman relied on the Court of Appeal's judgment in *Lewis v Wilson & Horton Ltd*,³⁷ in support of her submission that having regard to the scheme of the Act, the Panel was not required to make recommendations in respect of each individual provision of the Plan nor each individual submission. She says that Part 4 of the Act largely replaces the Resource Management Act Schedule 1 plan making process, and submits that the clear policy

³⁷ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

of the Act was to facilitate and enable the development of the Plan in the shortest possible timeframe.

[88] Dr Kirman further submits that, having regard to the statutory provisions and context, it cannot have been Parliament's intention to require the Panel to provide detailed reasons in relation to submissions at a site-specific level, unless it considered there to be good reason to do so. She says that dealing with submissions at that level would not only delay the delivery of the Panel's recommendations, but would be contrary to a statutory scheme clearly enacted to yield a fast-tracked production of the Plan.

[89] As regards the Council's decisions to accept or reject the Panel's recommendations, Dr Kirman submits that it would similarly be inconsistent with the statutory scheme to read in a requirement for the Council to provide reasons when adopting the Panel's recommendations. She submits that the short timeframe of 20 working days within which the Council was required to make its decisions is a clear indication that the legislative intention was that where the Council accepted and adopted a recommendation of the Panel, it was not itself required to give reasons. Such an approach she submits is consistent with the observations of Whata J in *Albany North Landowners v Auckland Council*.³⁸

[90] Dr Kirman also identified the various parts of the Panel's Overview Report and the topic reports within which she submits the Panel explained its approach and reasons for zoning and height controls to achieve the objective of a compact urban form. She submits that the Panel's recommendations either did provide reasons in a general sense with respect to the issues raised by the appellant, or that the reasons for the Panel's recommended approach with respect to Takapuna were self evident from its overall approach to zoning, such that further reasons are not required.

[91] Finally, Dr Kirman submits that should the Court find that the Panel has made an error of law or has breached natural justice, the Court should exercise the power conferred by s 303(1)(c) of the Resource Management Act to make an order directing the Panel to provide a report recording any findings of fact that are not

³⁸ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [140] – [144].

otherwise set out in its recommendations regarding Takapuna, and setting out the considerations and reasons for its recommendations that are not otherwise contained in its report and recommendations provided to the Council.

Submissions for Northcote RD1 Holdings Ltd, W Smale Ltd and Fred Thomas Drive Investments Ltd

[92] Mr Allan made submissions on behalf of the intervenors Northcote RD1 Holdings Ltd, W Smale Ltd, and Fred Thomas Drive Investments Ltd (the Smales Farm group). Mr Allan explained that the Smales Farm group had applied for leave to be joined as intervenors in the proceedings at a time when it appeared that the breadth of the issues raised by appellant could affect the zoning of land owned by the group within the Smales 1 and 2 Precincts and within the Mixed Use zoned land in Fred Thomas Drive. Mr Allan further explained that, as the appellant's amended statement of claim had reduced the scope of the proceedings, the group's properties are no longer directly affected. Therefore, while supporting the submissions made by the Council and Housing New Zealand, the Smales Farm group elected to make no further submissions.

Submissions for McConnell Clearmont Ltd Partnership

[93] Mr Bartlett QC appeared for another intervenor, the McConnell Clearmont Ltd Partnership (McConnell Clearmont) which owns property in Killarney Street, Takapuna. He too supported the submissions made on behalf of the Council by Ms Dickey.

[94] Mr Bartlett referred to the Panel's hearing of evidence and submissions regarding the zoning of the McConnell Clearmont land at Killarney Street, Takapuna, and noted that substantial evidence and submissions were presented to the Panel by the Council, the previous owner of the property, the Extend Killarney Street Community Group, and McConnell Clearmont.

[95] Mr Bartlett submitted that the Panel's explanation in the Rezoning and Precincts Report contains an entirely statement of its reasons. He submits those

reasons leave a reader in no doubt as to why the THAB zoning was applied in the case of the Killarney Street property.

[96] Mr Bartlett refers to the Panel's statement in its Rezoning and Precincts Report:³⁹

The capacity modelling (both residential and business) has, as discussed in the Panel's Report to the Auckland Council – Overview of recommendations July 2016, pointed the Panel in the direction of increased enablement of capacity. The Panel's approach has been in line with the Auckland Plan's promotion of a quality compact urban form by focusing capacity in and around centres, transport nodes and corridors. That has resulted in recommending a more focussed concentration of increased capacity through rezoning around those identified metropolitan and town centres (in particular) so that their function and role is appropriately strengthened, while recognising the multi-nodal transportation efficiencies thereby gained through road, rail and ancillary access linkages.

[97] And from the Panel's Overview Report:⁴⁰

Lastly the implications for individuals and the community from an under-supply of enabled residential capacity (e.g. house price escalation, over-crowding, extended commuting distances, and migration out of the region) are much more severe than those of an over-supply of enabled capacity (e.g. the inefficient use for a period of land zoned for future urban use). Thus the Auckland region can be expected to perform more efficiently if the Unitary Plan errs towards an over-supply of enabled capacity than toward an under-supply.

[98] Mr Bartlett submits that the rationale for the THAB zoning of the Killarney Street land is clearly set out in the Panel's decision. He submits that, with regard to the McConnell Clearmont site at least, the appellant's appeal and review should fail.

Requirement to give reasons

[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.⁴¹ 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

³⁹ *Rezoning Precincts Report* at 18.

⁴⁰ *Overview Report* at 51.

⁴¹ *R v Awatere* [1982] 1 NZLR 644 (CA).

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.⁴²

- (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.
- (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*,⁴³ 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.⁴⁴

[102] The Court of Appeal's observations in *Lewis v Wilson & Horton Ltd* were endorsed by the Privy Council in *Taito v R*,⁴⁵ and have been applied in the resource management context by the High Court.⁴⁶

⁴² *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [74]-[82].

⁴³ At [76].

⁴⁴ *Singh v Department of Labour* [1999] NZAR 258 at 262-263.

⁴⁵ *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577 at [17].

⁴⁶ *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).

[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.”⁴⁷ 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:⁴⁸

... 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.

Asher J found that in the circumstances of that case, the reasons given were adequate as, although concise, the decision process was sufficiently transparent, explained the standards, facts and findings relied upon, and were sufficiently discernible to be susceptible to analysis and criticism.⁴⁹

[105] Having regard to the purposes that reasons serve, I now turn to the statutory and factual context of reasons in this case. Section 144 of the Act requires the Panel to make recommendations on the proposed Plan and stipulates the form and content of those recommendations:

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.

⁴⁷ At [81].

⁴⁸ *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [82].

⁴⁹ At [84].

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.

[106] The mandatory language employed in s 144(8)(c) makes it clear that the Panel was required to give reasons for accepting or rejecting submissions. It is also clear that the Panel is able to group submissions together by reference to their common application to provisions of the proposed plan or other matters, and is not required to address each submission individually.

[107] As Dr Kirman noted, s 144 of the Act has a closely analogous provision in the Resource Management Act, cl 10 of sch 1, which provides:

10 Decisions on provisions and matters raised in submissions

- (1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.
- (2) The decision—
 - (a) must include the reasons for accepting or rejecting the submissions and, for that purpose, may address the submissions by grouping them according to—
 - (i) the provisions of the proposed statement or plan to which they relate; or
 - (ii) the matters to which they relate; and
 - (ab) must include a further evaluation of the proposed policy statement or plan undertaken in accordance with section 32AA; and
 - (b) may include—
 - (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and
 - (ii) any other matter relevant to the proposed statement or plan arising from the submissions.
- (3) To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.
- (4) The local authority must—
 - (aaa) have particular regard to the further evaluation undertaken in accordance with subclause (2)(ab) when making its decision; and

- (a) give its decision no later than 2 years after notifying the proposed policy statement or plan under clause 5; and
 - (b) publicly notify the decision within the same time.
- (5) On and from the date the decision is publicly notified, the proposed policy statement or plan is amended in accordance with the decision.

[108] Clause 10 was revised and amended by the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The Regulatory Impact Statement prepared for the Bill by the Ministry for the Environment noted that removing the need for local authorities to provide decisions and reasons on every submission point from every submitter, and instead group the decisions according to provision or topic would:⁵⁰

... remove considerable repetition in responding to submissions and will reduce the time needed by councils to move on to the more substantive issue of appeals. It should also make reports on reasoning more coherent. There could be some disadvantage to individual submitters whose reasons for opposition or support may be subtly different to the general thrust of other similar submissions but this downside is outweighed by the cost savings to local authorities.

[109] In *Albany North Landowners v Auckland Council*, Whata J considered whether the Panel had a duty to identify specific submissions seeking relief on an area by area basis with specific reference to suburbs, neighbourhoods or streets. Whata J concluded:⁵¹

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...

⁵⁰ Ministry for the Environment *Regulatory Impact Statement: Resource Management (Simplifying and Streamlining) Amendment Bill 2009* 9 February 2009, at 24.

⁵¹ At [143] and [144].

The Act plainly envisages resolution of issues by topic not by individual submission or area.

[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.⁵² 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

⁵² Interpretation Act 1999, s 5(1).

suggests the legislative intention for the use of higher-level grouping criteria to be 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 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.

The Panel's reasons are clearly expressed in its reports and conclusions

[117] While the Panel did not specifically express its reasons for accepting or rejecting the contentions and submissions advanced by the appellant in relation to the properties and areas he identified in his submissions, in my view the Panel nevertheless satisfied the statutory obligation upon it to give reasons on the provisions and matters raised in the appellant's submissions.

[118] In the Overview Report the Panel clearly expressed its reasons for adopting an approach to both zoning and height controls that would enable intensification of development in and around metropolitan and town centres and transport corridors. The rationale was that such an approach would respond to the rapid population growth that has occurred in the region and which is anticipated to continue. This growth requires an increase of residential development in and around the established centres to promote a compact urban form. The Panel noted that the Plan envisaged the need for approximately 400,000 additional dwellings in the Auckland region by 2041 to accommodate between 700,000 to 1,000,000 residents over that period, with corresponding demand for additional commercial and industrial capacity.

[119] The Panel explained in the Overview Report that its site-specific topics were included in its Rezoning and Precincts Report, which addressed the Panel's overall approach to rezoning and precincts and key changes in relation to zoning. The Panel further explained in the Overview Report that given the large number of submitters, it had grouped all of the submissions in terms of s 144(8)(c)(i) and (ii). The Panel

stated that while individual submissions may not have been expressly referred to in the reports, all points had been taken into account. The Panel further explained that the reasons for its recommendations whether to retain or change provisions of the proposed Plan are set out in the recommendations and, like the Plan itself, are intended to be read as an integrated whole.

[120] In the Rezoning and Precincts Report the Panel explained that the changes it recommended can be seen at an individual property level in the planning maps on the GIS viewer. The Panel explained that its overall approach was to ensure that a principled approach was applied to specific locations to achieve as far as appropriate a sensible and consistent pattern of development across the Auckland region, and strengthen integration across the plan by ensuring that “higher order plan principles were given effect to ...”⁵³

[121] In an annexure to the Panel’s Rezoning and Precincts Report the Panel explained the reasons for its recommendations regarding Takapuna Precincts 1 and 2. Although the appellant did not make specific submissions regarding Takapuna Precincts 1 and 2, the Panel’s reasons for its recommendations are relevant to the issues raised by the appellant in his submissions. The Panel explained that the Takapuna Precinct 1 was recommended for inclusion in the Plan as it provides for a more nuanced building and height outcome and that it considered the Precinct appropriate.⁵⁴

... because it provides for an urban design outcome in regard to building heights that will better maintain the amenity values of the coastal environment and the existing developments than the default heights in the underlying Business-Metropolitan Centre Zone. The precinct will provide for a graduated increase in building heights from four to five storeys on the coastal edge to unlimited heights mid-block to the west of Lake Road. The Panel relies on the modelling evidence of Mr Sills for the Council that demonstrated that the shadowing and dominance effects of the precinct heights on the coastal reserve would be acceptable.

[122] And in relation to Takapuna Precinct 2 the Panel said:⁵⁵

⁵³ *Rezoning and Precincts Report* at 5.

⁵⁴ *Rezoning and Precincts Report* Annexure 4 at 128.

⁵⁵ *Rezoning and Precincts Report* Annexure 4 at 195.

Having reviewed the evidence, the Panel finds that the precinct is no longer necessary with the changes recommended to the general provisions for the Residential – Terrace Housing and Apartment Buildings Zone and the associated Business - Metropolitan Zone, along with other Auckland-wide requirements. It agrees with those submitters [details omitted] who recognised that Takapuna is a key metropolitan centre around which intensification must follow in order to give effect to the compact quality urban form principle. Concerns regarding urban design and spatial form can and will be addressed through the relevant provisions.

[123] In my view the rationale for the Panel's zoning and height control recommendations are evident and clearly expressed in these statements which can be readily seen to relate to the issues raised by the appellant in his submissions, in particular the effects of intensification, height of development and the effect upon privacy, sunlight and shadow caused by the heights permitted under the Plan.

[124] The maps issued by the Panel clearly set out the zoning and height controls applicable to the properties and areas addressed by the appellant in his submissions. Although not directly relevant to the sufficiency of the Panel's reasons, I note that in a number of respects the Panel responded positively to the appellant's submissions by recommending amendments to the proposed plan that reduced the level of height controls for future developments, and changed the zoning as regards the properties in respect of which the appellant had made submissions. For example, in the notified version of the Plan, the Promenade block was zoned Residential THAB with part of the block subject to a AZHC of 20.5 metres. The Panel recommended that a part of the Promenade block located on the corner of Hurstmere Road and the Promenade be retained as THAB zone with an increased height control level of 22.5 metres, but the rest of the block, including the properties along part of the Promenade, Alison Avenue, Earnoch Avenue and part of Hurstmere Road, be changed to Mixed Housing Urban zone. Other properties situated in Lake Road Takapuna, and in respect of which the appellant made submissions, were the subject of recommended changes to the Plan which either reduced the height control level or reduced the number storeys permitted. From those changes it can be reasonably concluded that the Panel made those recommendations as a response to and in recognition of the matters advanced in the submissions of the appellant and other submitters regarding the Takapuna area generally or as were focussed on those properties.

[125] In my view any reasonably informed reader of the Panel's reports in combination with the planning maps the Panel produced, would have no difficulty identifying and understanding the Panel's reasons for its recommendations. While the Panel's reasons for zoning and height control recommendations are set out in a number of places in its Overview Report, topic reports and maps, the reports are clearly organised by subject matter as enables a reader to locate parts of particular relevance. Given the approach of grouping the submissions, it is inevitable that individual submitters must look to the Panel's reasons as expressed in general terms, and apply that reasoning to the zoning and height controls as appear in the Panel's version of the planning maps, in order to determine the Panel's reasons.

[126] Furthermore, having regard to the statutory process prescribed, to a significant extent the Panel's conclusions, as contained in its recommendations, inform an understanding of its reasons.

The Council's Decision

[127] The Council dealt with the Panel's recommendations in its Decisions Report. I agree with the submission made on behalf of the Council that the comparatively brief timeframe and the requirement to only give reasons for its decisions where the Council rejected a recommendation are clear indications that the Council was not itself required to give reasons where it accepted the Panel's recommendations. The only reasons that would be given for recommendations that the Council accepted were those already given by the Panel.

[128] The appellant pleads that the Council erred in accepting the Panel's Rezoning and Precincts Report where the report did not provide adequate reasons in terms of s 144(8)(c) of the Act and failed to correctly interpret that section.

[129] As I have found that the Panel did provide adequate reasons for accepting or rejecting the appellant's submissions, it follows that the Council in accepting the Panel's recommendations discharged its legal obligation and complied with the requirements of the Act.

No error of law

[130] For the reasons set out above, I find that neither the Panel nor the Council made any error of law in relation to their interpretation or application of s 144(8)(c) of the Act. While required to give reasons for accepting or rejecting submissions, the Panel was not required to address submissions in any more detail than was appropriate to explain its reasons in relation to topics within which issues and matters raised in the submissions were grouped. Having regard to that finding, the appellant's appeal on the grounds that the Panel and the Council made an error of law by failing to provide adequate reasons; misinterpreting s 144(8)(c); and by the Council's adoption of the Panel's report, fails and is dismissed.

Judicial Review

[131] As I noted at the commencement of this judgment, the appellant also applied for judicial review, alleging that the Panel had failed to provide reasons or adequate reasons for accepting or rejecting the appellant's submissions to the Panel relating to Takapuna, Smales Farm and Devonport and thereby rendering the appellant's rights of appeal to the High Court on questions of law ineffective. The appellant alleges that the Panel's failure to give reasons constitutes procedural unfairness and a breach of natural justice.

[132] The requirements of natural justice are to be determined by reference to the circumstances and context of the decision making that affects the rights of a plaintiff. In construing legislation a court will respect the procedure prescribed by statute regarding matters that would otherwise be encompassed within the procedural requirements of natural justice. In *Furnell v Whangarei High Schools Board*,⁵⁶ the Privy Council referred to the observations of Lord Hailsham in *Pearlberg v Varty*:⁵⁷

It is true, of course, that the courts will lean heavily against any construction of a statute which would be manifestly unfair. But they have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the function of the courts to form first a judgment on the fairness of an Act of Parliament

⁵⁶ *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (HC).

⁵⁷ *Pearlberg v Varty* [1972] 1 WLR 534 (HL).

and then to amend or supplement it with new provisions so as to make it conform to that judgment.

[133] While the Court in *Furnell* was dealing with a complaint that the plaintiff had not been given an adequate opportunity to be heard, the same principle applies to another aspect of natural justice, namely the obligation upon a decision maker to provide reasons. However, here the Act established a codified and tailored process by which the Panel was to hear and consider submissions and thereafter report its recommendations to the Council. The statutory purpose, framework and requirements coupled with the context in which the Panel was undertaking its task, in my view informs and defines the nature and extent of the common law obligation on the Panel to give reasons in accordance with the principles of natural justice. Having regard to what I find to be the proper interpretation and application of s 144(8) which expressly imposes an obligation upon the Panel to give reasons for accepting or rejecting submissions, I consider that the nature and extent of that statutory obligation also defines the nature and extent of the common law obligation as regards the observance of the requirements of natural justice.

[134] Accordingly, I find that the appellant's application for judicial review fails.

Conclusion and result

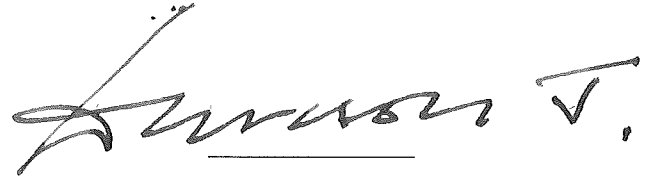
[135] For the reasons set out above, the appellant's appeal under s 158 of the Act on a question of law fails and is dismissed. For substantially the same reasons and as further set out above, the appellant's application for judicial review fails and is dismissed.

[136] My preliminary view regarding costs is that the respondent/defendant Council is entitled to an award of costs and disbursements. I offer no preliminary view as to the costs of the intervenors pending the filing of memoranda as to costs on behalf of the intervenors.

[137] The Council and intervenors are to file memoranda as to costs and disbursements within ten working days of delivery of this judgment. The appellant is

to file a memorandum as to costs within a further ten working days following the filing and service of memoranda by the Council and the intervenors.

[138] No memorandum as to costs is to exceed three pages in length, excepting annexures or schedules.

A handwritten signature in black ink, appearing to read "Paul Davison J.", with a horizontal line underneath the name.

Paul Davison J

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