

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

CIV-

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

IN THE MATTER of an appeal under section 158(1) of the LGATPA

BETWEEN **JPR ENTERPRISES, DEREK SULLIVAN AND WENDY DRAGT, COUNTIES STORAGE LIMITED, L & L ENTERPRISES, AND ANTHONY AND NICKY WIJDEVEN**

Appellants

AND **AUCKLAND COUNCIL**

Respondent

NOTICE OF APPEAL

16 September 2016

Counsel

R A MAKGILL
BARRISTER

P 09 815 6750 F 09 849 7742 E robert@robertmakgill.com
PO Box 77-037, Mt Albert, Auckland 1350

Solicitor On Record

J A CARR
BURTON PARTNERS

P 09 300 3775 F 09 300 3770 E jeremy.carr@burtonpartners.nz
PO Box 8889, Symonds Street, Auckland 1150, DX CP24147

TAKE NOTICE that at _____ on _____ 2016 or as soon as Counsel may be heard Counsel for the Appellants will move an appeal to the High Court against parts of the decision of the Auckland Council on the Proposed Auckland Unitary Plan delivered on 19 August 2016 **UPON THE GROUNDS** that the decision is erroneous in law.

APPEAL

1. The parts of the decision appealed against relate to the zoning of the Paerata land block located north of the Pukekohe urban area bounded by Paerata Road to the west, the North Island Main Trunk Line and the Glenbrook Branch Railway Line to the east and north respectively, and Adams Drive to the south which was part of Hearing Topic 028 (Future Urban Zone) and Topic 081 (Rezoning and Precincts Geographic Areas) (**Decision**).
2. The Appellants' original submissions sought Business – Light Industry Zone for the Paerata land block.
3. The Independent Hearings Panel (**Hearings Panel**) report on Hearing Topic 081 (22 July 2016) recommended applying the Future Urban Zone to approximately 11,100 hectares of land within the Rural Urban Boundary, and live zones to a further 1,900 hectares of land within the Rural Urban Boundary. The Paerata land block is notated Future Urban Zone in the planning maps included with the Hearings Panel's recommendations.
4. The Decision accepted the Hearings Panel's recommendations with respect to the zoning of the Paerata land block. Paragraph 48.1 of the Decision records:

“48.1 The Council has accepted all the recommendations of the Panel contained in the Panel reports for Hearing Topic 080 (Rezoning and precincts (general) and 081 Rezoning and precincts (Geographic areas) and 016 and 017 - Rural urban boundary and Annexures 1 – 6, July 2016 – (recommendations in the SOUTH), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps except as listed below at paragraph 48.2.”
5. As the Auckland Council has accepted the recommendations of the Hearings Panel, references to the findings and reasoning of the Hearings Panel in the extracts below are to be read as references to the Auckland Council.

6. Those parts of the Decision appealed are more specifically contained in:
- (a) Auckland Unitary Plan Hearings Panel Report to the Auckland Council Hearing Topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas), July 2016 (**Decision Report (081)**). Relevant extracts record:

“1. Hearing topic overview

1.1 Topic description

...

Under 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.

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 and refer to the maps in the GIS viewer which forms part of the Panel’s recommendation and report to Auckland Council.”

“1.2 Overview

...

The changes recommended by the Panel can be seen at an individual property level in the planning maps on the GIS viewer which forms part of the Panel’s recommendation and report to Auckland Council.

The topics addressed in this report are collectively referred to as the site specific topics and received the largest number of submissions, had the most submitters attending a hearing, the highest rate of submitter participation in the hearings and the most hearing days.

Many submissions relating to a specific site sought changes to the Rural Urban Boundary combined with proposals for rezoning and creation of or change to existing precincts, as these changes are closely interrelated. For this reason the Panel took a flexible approach to these hearings and has combined these topics into a single report so that its recommendations and reasons can address changes to a particular location as an integrated whole.”

“1.3 Interim guidance

...

On 1 March 2016 the Panel issued further interim guidance regarding rezonings and precincts sought in greenfield situations proposed to be located within the Rural Urban Boundary. It cautioned that given the extensive submissions made and the time available to it, the Panel might not be able to satisfactorily resolve all outstanding Resource Management Act 1991 matters and be in a position to make a detailed recommendation in support of adopting the precinct at this time. Following receipt of legal submissions on this interim guidance, further clarification was given at the hearing on 7 March 2016.”

“2. Rural Urban Boundary

2.1 Summary of recommendations

...

The notified Proposed Auckland Unitary Plan included approximately 10,100 hectares of land zoned Future Urban Zone (almost all of which was within the Rural Urban Boundary) and the Council in evidence proposed an increase to that area. The changes to the Rural Urban Boundary recommended above would result in an expansion of those areas to approximately 13,000 hectares (an increase of about 30 per cent relative to the Proposed Auckland Unitary Plan as notified). Within those areas the Panel recommends live zones for approximately 1,900 hectares (all within the recommended Rural Urban Boundary) and that the remaining 11,100 hectares be zoned Future Urban Zone.”

“3. Rezoning and precincts

...

“3.3 General principles

3.3.1 Caselaw and scope

...

The Panel’s recommended changes from the notified Proposed Auckland Unitary Plan have been mapped onto and use Council’s 26 January 2016 zoning data (which represented Council’s position prior to the 24 February 2016 decision of the Governing Body). However, the Panel has cross-checked for full consideration those zonings with the post 24 February 2016 position advised by Council and the Panel has either confirmed those zonings or modified them.”

“3.3.5. Business zoning

While the Panel accepts the thrust of Council’s evidence from Messrs Wyatt, Akehurst and Ms Fairgray in respect of the geographic shortage of land zoned Business - Light Industry Zone, it has recognised the existing reality of many of those proposed zones. That is, many of these proposed zones are not currently used for or by light industry, and the clear commercial evidence is that they are most unlikely to revert to light industry even if zoned as such.

Accordingly the Panel has rezoned many instances to the underlying zone sought, being either Business - Mixed Use Zone or Business - General Business Zone. This further reduces the amount of land zoned Business – Light Industry Zone in the Plan, making more transparent this issue of shortage raised by Council. However, the Panel does not consider that hiding the reality under what is effectively a false zone would address the shortage. The Panel notes that large areas of land zoned Future Urban Zone will be available as Business – Light Industry Zone if that is deemed appropriate at the time of structure planning for live zoning. That has been taken into account in zoning Future Urban Zone areas.”

- (b) Auckland Unitary Plan Hearings Panel Report to the Auckland Council Hearing Topic 028 (Future Urban Zone), July 2016 (**Decision Report (028)**). Relevant extracts record:

“1. Hearing topic overview

...

1.2. Summary of the Panel’s recommended changes to the proposed Auckland Unitary Plan

- i. The Future Urban Zone should be applied to land which does not have major constraints to urbanisation, although it may include areas with lesser constraints where those can be accommodated by appropriate subdivision and development.

...

- vi. The primary method for managing the transition from rural to urban land use is to require careful planning of any substantial change, following the structure planning guidelines as set out in Appendix 1 to the Unitary Plan.”

“1.3. Overview

The Future Urban Zone is applied to over 11,000 ha of land on the periphery of existing urban areas.

...

There are also significant areas around the satellite towns of Warkworth and Pukekohe (including Paerata).”

“2. Reasonable use

2.1. Statement of issue

The main purpose of the Future Urban Zone is to identify its transitional status. While its existing development and use is rural, it is applied to areas that are expected to become urban sometime in the next 30 years. It is the bulk of the greenfield (as defined in the Unitary Plan) land in the region. This transitional purpose creates a number of issues where the potentially conflicting interests of strategic planning and property rights meet:

- i. pre-emption of structure planning balanced against enabling reasonable use on an interim basis;
- ii. efficient development overall can be hindered by small-scale ad hoc developments;
- iii. end-use development can be disconnected from bulk infrastructure;
- iv. limited heritage/hazard assessment;
- v. urbanisation without full information.”

“2.2. Panel recommendation and reasons

During the period before urbanisation occurs (which may be as long as 30 years) the degree of restriction on the use and development of the land must not render it incapable of reasonable use (see section 85 Resource Management Act 1991). In broad terms, landowners and occupiers must still be able to use the land generally for rural purposes.

...

The Panel considered a range of options to address the issues relating to the Future Urban Zone, including:

- i. delete the Future Urban Zone entirely and rely on the Rural Urban Boundary and zone changes to manage transition and urbanisation – requires amendment of rural zone activity and subdivision rules to create inside/outside Rural Urban Boundary differences;
- ii. use the Future Urban Zone together with the Rural Urban Boundary and zone changes to add transitional layer based on subdivision; and
- iii. use special housing area-type processes for all Future Urban Zone proposals (including business as well as residential areas).

The Panel’s preferred option is the second: to use the Future Urban Zone together with the Rural Urban Boundary and zone changes. This method helps identify areas suitable for urbanisation, providing clear signals to landowners, infrastructure providers and developers. This approach is adaptable to circumstances where there is no Rural Urban Boundary. Clarification of objectives and policies for urban growth, together with structure planning guidelines, provide clear thresholds for rezoning proposals.”

“3. Capacity for urbanisation

3.1. Statement of issue

An essential characteristic of land zoned future urban is that it must be capable of being urbanised. This involves both the intrinsic capacity of the land itself to be developed for urban uses and its extrinsic capacity to fit into the existing urban form and to be efficiently provided with infrastructure.

3.2. Panel recommendation and reasons

The Future Urban Zone should be applied to land which does not have major constraints to urbanisation, although it may include areas with lesser constraints where those can be accommodated by appropriate subdivision and development. Such constraints should be explicit in the Plan: that is, they should be mapped with clear boundaries.”

“4. Avoidance of pre-emptive urbanisation

4.1. Statement of issue

Uncoordinated small-scale or ad hoc subdivision and development for urban purposes are likely to create cumulative adverse effects on urban form, compromising its sustainability.

4.2. Panel recommendation and reasons

The objectives and policies for the Future Urban Zone are designed to make the transitional nature of the zone clear, enabling on-going rural use while preventing subdivision, use and development which might prevent or hinder sustainable urbanisation at an appropriate time in the future.

...

The primary method for managing the transition from rural to urban land use is to require careful planning of any substantial change, with full assessment of both the most appropriate methods and the effects (both positive and adverse) of urbanisation in advance of urban zoning. The format of structure planning, as set out in Appendix 1 of the Panel’s recommendation version of the Plan (Appendix 1 - Structure plan guidelines), is the recommended guideline for such a planning exercise.

In very broad terms the key control required is to avoid the pre-emption of sustainable urban form resulting from irreversible changes to the current rural environment before there has been a process of planning for urbanisation.”

- (c) Auckland Unitary Plan Hearings Panel’s recommended planning maps (22 July 2016) depicting a Future Urban Zone for the Paerata land block.
- (d) Auckland Council Decisions Report (19 August 2016) (**Decisions Report**). Relevant extracts read:

“2. Statutory Context

...

Decision-making by the Council

- 2.7 In making its decisions the Council must either accept or reject the Panel’s Recommendations.
- 2.8 For the Panel’s Recommendations that it decides to **accept**, the Council will be able to fulfil its decision-making obligations by considering the

Panel's Recommendations and reasons only. This is because the Panel, in making its recommendations, was required to comply with all the requirements of section 145 of the LGATPA, including obligations on the Panel to:

- a) ensure that if the Council accepts each/any/all of the Panel's Recommendations, all relevant requirements (and legal tests) of the RMA, and other enactments which apply to the Council's preparation of the PAUP, are complied with (FN: See section 145(1)(f), LGATPA); and
- b) prepare, and include with its recommendations, a further evaluation in accordance with section 32AA of the RMA (FN: See section 145(1)(d) and (f)(i) and (ii), LGATPA)."

"3. The Panel's Recommendations

...

- 3.3 It is noted that the Panel's Recommendations contain a number of separate hearing topic reports, and that recommendations are often provided throughout the body of each report (including the overview reports referred to at paragraph 3.1(a) above). As a result, where the Council has made a decision which accepts all of the Panel's Recommendations in relation to a specific hearing topic / designation, this Decisions Report will need to be read in conjunction with the related hearing topic report provided to the Council as part of the Panel's Recommendations as well as the decisions (and recommended) version of the PAUP text and maps."

"7. Decisions of Auckland Council

- 7.1 The Council's decisions on the Panel's Recommendations are set out below, addressed in relation to each hearing topic report provided by the Panel in numerical order.
- 7.2 The Council's Decisions Report addresses those Panel Recommendations which have been accepted by the Council first, with the Panel Recommendations that have been rejected following."

"24. Council decisions relating to Panel report entitled "Report to Auckland Council Hearing Topic 028 (Future urban zone), July 2016"

Panel recommendations accepted:

- 24.1 The Council has accepted all the recommendations of the Panel contained in the Panel report for Hearing Topic 028 (Future urban zone), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps except as listed below at paragraph 24.2."

"48. Council decisions relating to Panel report entitled "Report to Auckland Council Hearing Topic 080 (Rezoning and precincts (general) and 081 Rezoning and precincts (Geographic areas) and 016 and 017 - Rural urban boundary and Annexures 1 – 6, July 2016 – (recommendations in the SOUTH)"

Panel recommendations accepted:

48.1 The Council has accepted all the recommendations of the Panel contained in the Panel reports for Hearing Topic 080 (Rezoning and precincts (general) and 081 Rezoning and precincts (Geographic areas) and 016 and 017 - Rural urban boundary and Annexures 1 – 6, July 2016 – (recommendations in the SOUTH), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps except as listed below at paragraph 48.2.”

- (e) Decisions Version of the Proposed Auckland Unitary Plan planning maps (19 August 2016) depicting a Future Urban Zone for the Paerata land block.

ERRORS OF LAW

- 7. The Appellants allege that Auckland Council and the Hearings Panel erred as follows in the Decision in relation to the zoning for the Paerata land block:
 - (a) By failing to record a decision on submissions seeking live zoning for the Paerata land block and to provide any reasons for rejecting the submissions contrary to the obligation in section 144(6) of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**).
 - (b) By failing to have regard to relevant considerations, namely the evidence and legal submissions presented at the hearing on Hearing Topic 081 on behalf of the Appellants and the legal submissions presented after the hearing in the Closing Statement on behalf of Auckland Council in relation to Topic 081 – Rezoning only (16 May 2016).

QUESTIONS OF LAW

- 8. The questions of law to be resolved are:
 - (a) Whether the Hearings Panel was required to provide a decision on the submissions seeking a live zoning for the Paerata land block, and to give reasons for rejecting the submissions and, if so, did the Hearings Panel fail to provide a decision on the Appellants’ submissions and give sufficient reasons for rejecting the submissions?

- (b) Did the Hearings Panel err in law by failing to have regard to evidence and legal submissions presented at the Hearing Topic 081 when making its Recommendations for a Future Urban Zone for the Paerata land block?
- (c) Did Auckland Council in its Decision adopt and repeat the errors in law identified in paragraphs 8(a) and 8(b) above?

GROUNDS OF APPEAL

Failure to provide a decision on submissions and reasons

- 9. Pursuant to section 144(7) of the LGATPA the Hearings Panel must provide its recommendations to the Council in 1 or more reports. With respect to submissions made on the Proposed Plan, each report must include:
 - (a) the Panel's decisions on the matters raised in submissions made in respect of the topic or topics covered by the report: section 144(8)(b); and
 - (b) the reasons for accepting or rejecting submissions: section 144(8)(c).
- 10. Section 144(8)(c) provides that in recording the reasons for accepting or rejecting submissions the report may group submissions according to:
 - (a) the provisions of the Proposed Plan to which they relate; or
 - (b) the matters to which they relate.
- 11. The Hearings Panel provided reports on Hearing Topic 028 (Future Urban Zone) and Topic 081 (Rezoning and Precincts Geographic Areas).
- 12. Decision Report (028) contains the Hearings Panel's recommendations to apply the Future Urban Zone to "*land which does not have major constraints to urbanisation*" and as "*the primary method for managing the transition from rural to urban land use*" by way of the structure planning process. Decision Report (081) contains the Hearings Panel's recommendations to expand the areas of land available for future urbanisation to "*approximately 13,000 hectares*", and to apply "*live zones for approximately 1,900 hectares (all within*

the recommended Rural Urban Boundary) and that the remaining 11,100 hectares be zoned Future Urban Zone.”

13. Decision Report (081) records the Hearings Panel’s acceptance of evidence *“in respect of the geographic shortage of land zoned Business - Light Industry Zone”* and accepts that this shortage will be exacerbated by Recommendations to change the zoning of some areas from Business – Light Industry Zone to Business - Mixed Use Zone or Business - General Business Zone. The report records:

“The Panel notes that large areas of land zoned Future Urban Zone will be available as Business – Light Industry Zone if that is deemed appropriate at the time of structure planning for live zoning. That has been taken into account in zoning Future Urban Zone areas.”
14. The Appellants’ submissions on the proposed Auckland Unitary Plan sought Business - Light Industry Zone for the Paerata land block. The relief sought was site-specific, and was not addressed by the Recommendations on Hearing Topic 028 (Future Urban Zone) or Hearing Topic 081 (Rezoning and Precincts). The reports do not reference the Appellants’ submissions seeking a live zoning for the Paerata land block either directly or as part of a group of submissions.
15. The Hearings Panel therefore erred in law in failing to provide a decision on the submissions seeking a live zoning for the Paerata land block, and in failing to record reasons for rejecting the submissions.
16. The Decision adopted the reasons set out in Decision Report (081) in respect of matters on which Auckland Council accepted the Hearings Panel’s recommendations. The Decision contains no reference to the Appellants’ submissions, and no additional reasons for accepting the Recommendations with respect to the Future Urban Zone. Accordingly, the Decision repeats the Hearings Panel’s failure to provide decisions on submissions and reasons for rejecting submissions.

Failure to have regard to submissions and evidence

17. The Appellants presented a joint legal submission at the Topic 081 hearing and called evidence from four expert witnesses.
18. To assist parties in their preparation of submissions and representations for the Rural Urban Boundary, rezoning and precinct hearings scheduled for the first half of 2016, and ensure that the panel was provided with a robust evidence base the Hearings Panel issued Interim Guidance on 'Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary' in July 2015. Decision Report (081) records:

"The Panel's interim guidance requested that parties should ensure any evidence provided for the hearings on these topics clearly and succinctly addresses the matters identified in the guidance."
19. The Appellants' evidence addressed all of the matters set out in the Hearings Panel's Interim Guidance including flooding and infrastructure constraints. The evidence concluded that the Business - Light Industry Zone was the most appropriate zoning for the Paerata land block.
20. Auckland Council supported the notified Future Urban Zone in legal submissions presented at the Topic 081 hearing. No evidence was called in support of that notified zoning. The Closing Statement on behalf of Auckland Council in relation to Topic 081 – Rezoning only (16 May 2016) records:

"In conclusion, although the Council's preferred outcome is to retain the notified FU zone pending structure planning, if the Panel is minded to rezone to LI, the Council considers that a precinct is appropriate for the reasons above. The Council considers that Mr Serjeant's draft provisions and draft precinct plan will be a reasonable starting point although the Panel may see some matters that can be improved, including specific reference to the geotechnical constraints of the properties."
21. The Decision Report (081) and Decision have no regard to the following relevant considerations:
 - (a) The Appellants' uncontested evidence that Business - Light Industry Zone was the most appropriate zoning for the Paerata land block.
 - (b) Auckland Council's Closing Statement, and the draft precinct plan referred to in that statement.

- (c) Evidence establishing a “*geographic shortage of land zoned Business - Light Industry Zone*” could be met, in part, by applying a live Business - Light Industry Zone to suitable land within the Rural Urban Boundary.
 - (d) The failure of the notified Future Urban Zoning to give effect to the Proposed Plan’s objectives for quality compact growth and promote sustainable management of resources (section 5 of the Resource Management Act 1991).
22. Pursuant to section 148(2) of the LGATPA when making decisions to accept or reject each recommendation of the Hearings Panel Auckland Council may have regard to submissions or evidence before the Hearings Panel. The Decision adopted the reasons set out in Decision Report (081) in respect of matters on which Auckland Council accepted the Hearings Panel’s recommendations. The Decision has no regard to the evidence presented at the Topic 081 hearing or any of the other relevant considerations in paragraph 21. Accordingly, the Decision repeats the Hearings Panel’s failure to consider those relevant matters.

RELIEF SOUGHT

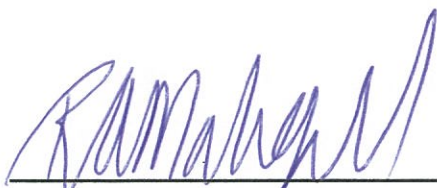
23. The Appellants seek:
- (a) That the appeal be allowed.
 - (b) That the Decision be remitted back to the Council for reconsideration, and the Council be directed to provide a decision addressing the matters raised in the Appellants’ submissions with reasons.
 - (c) Costs.

ATTACHMENTS

24. The Appellants **attach** the following documents to this Notice of Appeal:
- (a) Copies of the Appellants’ original submissions seeking Business – Light Industry Zone for the Paerata land block (**Annexure A**).
 - (b) A copy of the Decision Report (081) and Decision Report (028) (**Annexure B**).

- (c) A copy of the relevant parts of the Decision (**Annexure C**).

Dated this 16th day of September 2016



R A Makgill / B C Parkinson

Counsel for JPR Enterprises, Derek Sullivan and Wendy Dragt, Counties Storage Limited, L & L Enterprises, and Anthony and Nicky Wijdeven

- To:** the Registrar of the High Court at Auckland
- And to:** the Respondent and interested parties to the decision to which this appeal relates

This Notice of Appeal is filed by Jeremy A Carr, solicitor on record for the Appellants of the firm Burton Partners.

The address for service of the Appellants is at the offices of Burton Partners, Level 3, 16 Viaduct Harbour Avenue, Auckland 1150.

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

- (a) Posted to the solicitor at PO Box 8889 Symonds Street; or
- (b) Transmitted to the solicitor by fax to (09) 300 3770; or
- (c) Emailed to the solicitor at jeremy.carr@burtonpartners.nz