

6. Landscape Rd,
Mt Eden,
Auckland 1024
15 September 2016

The Registrar,
High Court,
Waterloo Quadrant,
Auckland.

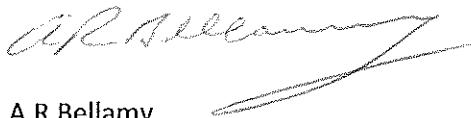
Dear Sir / Madam:

Notice of Appeal

Enclosed for filing is Notice of Appeal and copy of relevant part of decision appealed against.

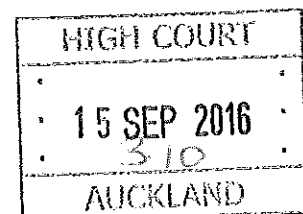
Details of the instructing Solicitor and our Counsel are included in the Appeal.

Yours faithfully,



A.R. Bellamy,

President, South Epsom Planning Group (Inc)



IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2016

UNDER s158 of the Local Government (Auckland Transitional Provisions) Act
2010

AND IN THE MATTER of an appeal under s299 of the Resource Management Act 1991

BETWEEN SOUTH EPSOM PLANNING GROUP INCORPORATED an incorporated
society with its registered office at 6 Landscape Rd, Mt Eden,
Auckland 1024

Appellant

AND AUCKLAND COUNCIL a local authority constituted pursuant to the
provisions of the Local Government (Auckland Council) Act 2009
having its principal office at 135 Albert Street, Auckland

Respondent

NOTICE OF APPEAL

15 September 2016

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TAKE NOTICE that the Appellant hereby appeals to the High Court against a decision of the Respondent (Council) publicly notified on 19 August 2016 UPON THE GROUNDS that the decision is wrong in law.

DECISION APPEALED

- 1 This appeal is against a decision made by Council on a provision or matter relating to the Proposed Auckland Unitary Plan (proposed plan). The provision or matter:
 - (A) Was the subject of primary and further submissions by the Appellant on the proposed plan;
 - (B) Council accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel (Hearings Panel) which resulted in the provision or matter being included in the proposed plan. As Council accepted the recommendations of the Hearings Panel, references to the findings and reasoning of the Hearings Panel in this appeal are to be read as references to the Council decision.

- 2 The provision or matter was the recommendation to include the Three Kings Precinct in the decisions version of the proposed plan:

333 Three Kings Precinct

 1. Summary of recommendations

The Panel recommends that the Three Kings Precinct is included in the Unitary Plan as largely agreed between the Council and the predominant land owner, Fletcher Construction Developments Limited (Fletcher).

The Panel also recommends that the Three Kings Residential Design Guide is included in the Unitary Plan.

This precinct was heard in Topic 081.

- 3 This appeal relates to the recommendations in the Hearings Panel "Report to Auckland Council Hearing Topics 016, 017; Changes to the Rural Urban Boundary; 080, 081 Rezoning and precincts" at pp 64-73 (precinct decision/Three Kings precinct). Council adopted without alteration the precinct decision. Accordingly, reasons given by the Hearings Panel are also reasons of Council as decision-maker.

- 4 Recommendations made by the Hearings Panel are to be read as an integrated whole, meaning that other recommendations (and Council's decision adopting same) may have some

relevance to the appeal (such as Topic 080). Also relevant is the Hearings Panel's "Overview of Recommendations" (In particular "Scope", which outlines case law, methodology and approach to scope).

- 5 At [4.4] the Panel noted parallel proceedings in the Environment Court, relating to Private Plan Change 372 (PC372):

The Panel was advised about, and received submissions and evidence on, a parallel planning process under the Auckland Council District Plan - Operative Auckland City - Isthmus Section that is now subject to appeals to the Environment Court (*Ngati Te Ata v AC* (ENV-2015-AKL-000158) and *South Epsom Planning Group Inc v AC* (ENV-2016-AKL-000001)). It is understood that these appeals have been heard in the Environment Court.

- 6 The Panel acknowledged that issues in both sets of proceedings were similar. The higher level policy frameworks were different:

The Panel acknowledges that the issues raised in both sets of proceedings may be similar but the higher level policy frameworks of the operative Auckland Council Regional Policy Statement and the Unitary Plan regional policy statement section are different. The Panel's recommendations on the Three Kings Precinct are based on the statutory planning framework, the submissions and the evidence that it has heard.

- 7 Because issues were similar, the appellant says that any decision by the Environment Court issued prior to release of the decisions version of the proposed plan would be relevant to Council's decision-making process.

- 8 The Hearings Panel issued recommendations on 22 July 2016. An interim Environment Court decision was released to all parties (including Council, the appellant, and the landowner, Fletcher Residential Limited (Fletcher)) on 29 July 2016. Because of its public importance, and involvement of the Minister for Environment, this was a Full Court decision: [2016] NZEnvC 140 (EC decision). Council released the decisions version of the proposed plan on 19 August 2016. Accordingly, the EC decision was released after issue of the Hearings Panel recommendations but prior to Council making a decision on the Three Kings precinct.

ERRORS OF LAW

- 9 The EC decision was relevant to Council's deliberations on the Three Kings precinct. Council failed to consider or address impacts of the EC decision for the Three Kings precinct. This was unlawful (first error). The errors of law were:

- (A) The EC decision was disregarded despite being relevant. This was failure to consider relevant matter.
 - (B) The EC decision addressed similar issues to the precinct decision. It was wrong legal test or breach of doctrine of precedent for Council to disregard a relevant decision of a superior Court.
 - (C) The EC decision was not "submission or evidence" and it was wrong legal test to disregard the EC decision in reliance on s148(2) Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA).
 - (D) Council acted unreasonably or irrationally in not having regard to the EC decision.
- 10 Council failed to consider a factual finding by the Environment Court that Fletcher breached condition 77 of the resource consent granted in [2011] NZEnvC 214 (condition 77). Given Fletcher's breach of condition 77, there was consequential error by Council in its assessment of the consented and receiving environment for the Three Kings precinct (second error).
- 11 The Hearings Panel recommended the Three Kings precinct as being within scope. The Hearings Panel was wrong and there was no scope in relation to:
- (A) Maximum building height;
 - (B) Excavation and quarrying of Council owned land;
 - (C) Location of buildings on Fletcher and Council land (building footprints).
- Council adopted that recommendation. It therefore acted unlawfully (third error).
- 12 The Hearings Panel was wrong that it had no power to impose a contour level higher than that offered by Fletcher.¹ Council adopted this error (fourth error). This was error of law, due to:
- (A) It was within jurisdiction to do so, demonstrated by the EC decision which imposed a higher contour than offered by Fletcher;
 - (B) wrong legal test;
 - (C) error in interpretation of condition 77.

QUESTIONS OF LAW TO BE RESOLVED

¹ 4.1(iii) "The Panel is not in a position to compel Fletcher to, for example, fill the quarry floor to a higher level or to arrange development in a manner that the Societies propose. The Panel heard evidence that to fill to the level proposed by the Societies would take many years and significantly delay development." IHP Report at pp69

- 13 Whether Council failed to consider or address the EC decision for the Three Kings precinct, prior to release of the decisions version of the proposed plan. If so, whether this was unlawful on the basis of:
- (A) failure to consider relevant matter;
 - (B) wrong legal test or breach of doctrine of precedent for Council to disregard a relevant decision of a superior Court;
 - (C) wrong legal test to disregard the EC decision in reliance on s148(2) Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA).
 - (D) Council acting unreasonably or irrationally. (first question)
- 14 Whether Council failed to consider a relevant matter, thereby acting unlawfully (factual finding in the EC decision of breach of condition 77); whether, in light of the breach of condition 77, there was consequential error by Council in assessment of consented and receiving environment. (second question)
- 15 Whether Council wrongly decided that there was scope, and thereby acted unlawfully in relation to:
- (A) Maximum building height;
 - (B) Excavation and quarrying of Council owned land;
 - (C) Location of buildings on Fletcher and Council land (building footprints).
- (third question)
- 16 Whether Council was wrong that it had no power to impose a contour level higher than that offered by Fletcher. If so, whether this was unlawful on the basis of:
- (A) It was within jurisdiction to do so, demonstrated by the EC decision which imposed a higher contour than offered by Fletcher;
 - (B) wrong legal test;
 - (C) error in interpretation of condition 77.
- (fourth question)

GROUNDS OF APPEAL

- 17 General grounds for the 4 errors of law are:
- (A) Each error is a material error of law;

- (B) The errors of law adversely impact matters of national importance and matters under s7 RMA in relation to the Three Kings environment;
- (C) The scope finding (third question of law) means that there is no merits-based appeal available to the Environment Court. If wrongly decided, the Appellant is impaired or prevented from bringing an appeal on the merits;
- (D) Relevant case law and statutory provisions support the alleged errors of law, including statutory purpose in the LGATPA and Resource Management Act.

18 Specific grounds for the 4 errors of law are:

19 As to the first error, issues before the Hearings Panel and Environment Court were similar.

There was factual, evidential and legal overlap:

- (A) Commonality of witnesses and evidence;
- (B) Planning framework (legacy planning instruments were relevant to the proposed plan process);
- (C) Contour levels ("...the single most significant decision to be made concerning PC372 was the extent of filling that was to take place in the quarry.."²);
- (D) Condition 77;³
- (E) Volcanic features and s6(b) RMA considerations;
- (F) Super-lot G;
- (G) Adequacy of reserve/open space proposals;
- (H) Design, location and footprints of buildings;
- (I) Scope in relation to maximum building height and excavation/quarrying of Council owned land.

20 Fletcher made concessions to the Environment Court, relevant to Council's decision on the proposed plan:

- (A) A higher contour for the quarry floor was appropriate (RL63-64, not RL60);⁴
- (B) Remnant cone in north-western corner required protection;⁵

² EC decision at [57]; also [91]-[92]

³ Ibid at [58], [61]-[62]; "The issue of fill levels has been a live issue at least since the issue of [2011] NZEnvC 214, which had imposed a condition negotiated by the parties (Condition 77). This established a consultation process for preparation of a final contour plan, which was to form part of any plan change or resource consent application for development in the quarry at the cessation of clean fill operations."

⁴ Ibid at [90], [185], [193]

⁵ Ibid at [107], [119]

- (C) Fyvie and Barrister exposures were of significance so as to warrant retention as open space and not have structures against them;⁶
- (D) Reduced height of buildings;⁷
- (E) Intended number of units for construction (800-1200);⁸
- (F) Deletion of Superlot G located on Western Park (“..In his closing submissions Mr Loutit indicated that Fletchers was prepared to abandon its proposal for Superlot G but sought a ruling from the Court in that regard.”⁹);
- (G) Staging rules to address delivery of sports fields for public use.¹⁰

21 Evidence and submissions before the Hearings Panel referred to the pending EC decision and the Hearings Panel noted in its recommendations that there were parallel proceedings, dealing with similar issues. Council was aware of the EC decision and had sufficient time to have regard to it prior to release of the decisions version of the proposed plan. Council disregarded the EC decision in breach of Hearings Panel Guidelines for consideration of recent Environment Court decisions on legacy plan provisions.

22 As to the second error, Fletcher breached condition 77.¹¹ It did not consult with the Appellant (and 3rd parties) to prepare a final contour plan prior to seeking changed zone for the Fletcher land. Council failed to consider this breach of consent condition in relation to precinct provisions, and failed to consider how this impacted the consented and receiving environment. Condition 77 was relevant to:

“An integrated landform;
Relationship to the Council reserve sites;
Whether the contour should rise to Big King in the north, and if so how.”¹²

23 As to the third error, scope is defined by reference to the plan provisions as notified, relief sought in submissions made on the proposed plan, consequential amendment, and the test as to scope identified in High Court authority including the “Clearwater” tests. Relevant case law was referred to and adopted by the Hearings Panel at [4.2] of its “Overview of Recommendations.” In rezoning the Three Kings precinct, the Hearings Panel acted outside

⁶ Ibid at [119], [120]

⁷ Ibid at [140]

⁸ Ibid at [144]

⁹ Ibid at [147]

¹⁰ Ibid at [166]

¹¹ Ibid at [60]-[62]

¹² Ibid at [61]

s144(5) LGATPA and the High Court authority it cited. Decisions on scope have material consequences. There is "potential for adversely affected persons to be disenfranchised and unable to ascertain that their interests have been appropriately addressed."¹³ Maximum building height exceeded relief sought by all relevant submitters. Building footprint affects density of development. Blasting "has potential adverse effects which cannot readily be identified and are peculiar to the circumstances of the Site." Quarrying "..was completed some years ago. Therefore any renewal of that activity will need rigorous assessment..¹⁴

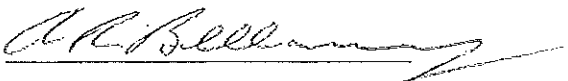
24 As to the fourth error, Council was wrong for reasons stated at [12] above.

RELIEF

25 The appellant seeks the following relief:

- (A) That the appeal be allowed and the decisions on the Three Kings precinct be quashed (in whole or in part);
- (B) That Council (or the Hearings Panel, prior to consideration by Council) be directed to rehear and reconsider the Three Kings precinct provisions, along with such other matters as this Court determines necessary or appropriate having regard to its findings on the legal issues raised by the appeal;
- (C) Where the finding is that provisions of the Three Kings precinct are outside the scope of any submission, that the matter be referred to the Environment Court for a hearing on the merits under s156 LGATPA;
- (D) Consequential relief;
- (E) Costs.

Dated this 15th day of September 2016



A.R. Bellamy, President, South Epsom Planning Group (Inc)

¹³ Ibid at [211]

¹⁴ Ibid at [211]

This Notice of Appeal is filed by Colin Lucas, Solicitor for the Appellants, of the firm Sellar Bone. Documents for service on the Appellant may be served by courier, post or email at the following address, with copy by email to Counsel:

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AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Report to Auckland Council
Hearing topics 016, 017
Changes to the Rural Urban
Boundary; 080, 081 Rezoning
and precincts

Annexure 2
Precincts Central

July 2016

Annexure 2 Precincts Central

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333 Three Kings Precinct

1. Summary of recommendations

The Panel recommends that the Three Kings Precinct is included in the Unitary Plan as largely agreed between the Council and the predominant land owner, Fletcher Construction Developments Limited (Fletcher).

The Panel also recommends that the Three Kings Residential Design Guide is included in the Unitary Plan.

This precinct was heard in Topic 081.

2. Precinct description

The Three Kings Precinct is intended to enable the redevelopment of the Three Kings Quarry which is zoned Business 7 in the Auckland Council District Plan - Operative Isthmus Section. The precinct covers 21.6ha and Fletcher owns 15.2ha and the Crown/Council owns 6.4ha (evidence in chief of Mr Duthie dated 10 Feb 2016 and loaded to the aupihp website on 11 February). Approximately 8ha of the site will be open space, or 37 per cent of the site.

Having been operated as a quarry, the site has been excavated and the quarry floor (riu) is well below the neighbouring ground level. The quarry is in the process of being clean filled and compacted in accordance with relatively recent decisions of the Environment Court (*Envirowaste Services Limited v Auckland Council* [2011] NZ EnvC130 and 214). The Panel understands that once the ground level reaches the level provided for in the precinct, which will be approximately 15 metres below Mt Eden Road, development will then be able to be undertaken within the quarry area itself.

The features of the proposed precinct were comprehensively set out in Fletcher's and the Council's evidence, as listed in their respective legal submissions. This description section therefore is a selection of matters that the Panel wishes to highlight.

The Panel understands from the evidence that a special housing area has been granted over part of the precinct and consent has been granted for a residential development that is currently being constructed.

2.1 Te Tātua a Riukiuta – Big King

The Precinct adjoins Te Tātua a Riukiuta – the Big King maunga which is a valued volcanic cone and the last remaining cone of the original three cones in the vicinity. The cone is a public open space reserve and is much used for passive recreation activities. It is important to note that the Panel is recognising the importance of Big King, as part of Topic 020, by recommending that:

- i. the Height Sensitive Area Overlay in the proposed Auckland Unitary Plan be retained and that Fletcher's relief seeking its reduction in the southern part be refused; and

- ii. that two existing viewshafts in the operative Auckland Council Regional Policy Statement, K1 and K2 be retained in the Unitary Plan, notwithstanding evidence from technical witnesses to the hearing on Topic 020 Viewshafts agreeing to the removal of those two viewshafts.

(See the Panel's Report to Auckland Council – Hearing topic 020 Viewshafts July 2016.)

The Panel also notes that the precinct provides for the retention of sightlines to the maunga as shown on Three Kings: Precinct Plan 2.

2.2 Proposed provisions

The Three Kings Precinct provisions were set out by the parties in the:

- i. Council's closing remarks which included blue text for the Council's right of reply and purple text which are revisions following the Environment Court's declaration on framework plan provisions;
- ii. the Council's evidence in rebuttal of Mr van Kampen dated 24 February 2016;
- iii. the proposed Three Kings Residential Design Guide attached to the evidence of Mr van Kampen for the Council dated 26 January 2016; and
- iv. for Fletcher, an updated rebuttal version of the precinct provisions dated 29 March 2016 attached to the summary statement of John Duthie.

The Panel notes that after the hearing, on 2 June 2016, it received a memorandum from Fletcher with planning evidence from Mr Duthie attached that it requested be accepted by the Panel. The evidence was primarily a revised precinct plan that Fletcher indicated was the outcome of expert caucusing by party witnesses from the Environment Court plan change appeal process. The main change on the revised plan was an increased area of open space between the maunga and the development. The Panel forwarded the material on to other parties that had submitted on the precinct and inquired as to whether or not there were any objections to the revised evidence being placed before the Panel. The Societies (South Epsom Planning Group Incorporated and Three Kings United Group Incorporated) objected so that Panel has not considered that evidence further.

As the precinct description outlines, the intention of the precinct is to create a vibrant sustainable urban village on the former quarry land. The main underlying zonings sought in the precinct are: Business - Town Centre Zone, Residential - Terrace Housing and Apartment Buildings Zone, Open Space - Informal Recreation Zone and Open Space - Sport and Active Recreation Zone.

The Panel heard that a master planning exercise had been undertaken to create the opportunity for between 1,200 to 1,500 additional homes with different typologies, including apartments that cascade over the rock faces. The Council and Fletcher considered the precinct maintains the sight lines and amenity and heritage values of Big King, provides open space linkages, reinforces public transport, supports the Three Kings town centre and will appropriately manage stormwater onsite. The intention is to develop a high-quality urban design outcome as reflected in the request to include the Three Kings Residential Design Guide in the Unitary Plan.

The maps showing the zoning within the precinct recommended by the Panel can be seen in the recommendation version of the GIS map viewer on the Auckland Council website.

The precinct provisions contain:

- i. a description;
- ii. objectives;
- iii. policies;
- iv. activity tables for the Residential - Terrace Housing and Apartment Buildings Zone and open space zones that modify the underlying generic zoning;
- v. notification rules that limit the circumstances for notification;
- vi. standards for land use and development;
- vii. assessment for controlled activities; and
- viii. assessment for restricted discretionary activities, including criteria and information requirements.

The maps for the precinct attached to the Council's closing remarks include:

- i. Three Kings: Precinct Plan 1 - Zoning;
- ii. Three Kings: Precinct Plan 2 - Precinct Provisions;
- iii. Three Kings: Precinct Plan 3 - Building Height;
- iv. Three Kings: Precinct Plan 4 - Te Tātua a Riukiuta Sightlines; and
- v. Three Kings: Precinct Plan 5 - Stormwater Management Concept Plan.

3. Key issues

In submissions and evidence the Panel identified the following key issues regarding the Three Kings Precinct.

- i. The potential adverse amenity and visual effects of the intensity of development enabled by the precinct on the amenity values of the Big King Reserve (an outstanding natural feature) and surrounding neighbourhoods.
- ii. Whether or not the precinct has properly taken into account the relationships of Mana Whenua with the maunga.
- iii. Whether or not an alternative layout proposed by the South Epsom Planning Group Incorporated and Three Kings United Group Incorporated (the Societies) would better promote the purpose of the Resource Management Act 1991. They proposed to fill the quarry to a higher reduced level and then locate development further to the west and closer to Mt Eden Road, thereby creating more horizontal separation between the maunga and development.
- iv. The relative merits of the urban design outcomes, including providing for cascading apartments on the western quarry wall.

- v. Whether or not the precinct is properly integrated with the wider Three Kings area and the town centre.
- vi. Whether or not the precinct could benefit from broader structure planning to better integrate it and whether or not it should be included in the Unitary Plan at this stage, pending the outcome of that process.
- vii. Related to the above, whether or not consultation and community engagement had been adequate.
- viii. The amount of roading required to service the development.
- ix. The treatment and management of stormwater.
- x. The procedural relationship with Private Plan Change 372 to the operative plan.

4. Panel recommendations and reasons

The submissions and evidence presented to the Panel in regard to the Three Kings Precinct were relatively polarised. On the one hand, Fletcher and the Council told the Panel that the precinct would enable a unique, innovative and vibrant living opportunity to be created that would achieve high amenity outcomes for the residents and the local community. That position was supported by submissions and evidence from Housing New Zealand, the Ministry of Business, Innovation and Employment and the Minister for the Environment (refer to legal submissions on behalf of the Minister for the Environment from Ellis Gould dated 29 March 2016).

On the other hand, the Panel heard from the Societies that the development proposed was too intensive and too close to the maunga and would therefore dominate the outstanding natural feature and did not properly respect the amenity values of the maunga. The Societies and the Local Board were also concerned about the process leading to the notification of the precinct and criticised Fletcher for an alleged lack of consultation and community engagement.

The Panel was greatly assisted by the effort that parties, both in support and in opposition to the precinct, put into providing the Panel with detailed submissions and expert evidence on topics including:

- i. planning;
- ii. urban design;
- iii. landscape architecture;
- iv. Mana Whenua values;
- v. traffic; and
- vi. engineering issues, including stormwater, wastewater, contaminated land, geotechnical and infrastructure.

At least some of the expert evidence from parties was also peer reviewed by other consultants.

Having heard all of the evidence, the Panel recommends that the Three Kings Precinct be included in the Unitary Plan for the reasons set out below.

- i. The quarry represents a significant resource management opportunity to develop a large brownfield site that is centrally located on the isthmus (8km from the Central Business District). The precinct will enable people to provide for their social and economic well-being and for their health and safety, by meeting their housing needs.
- ii. The high level strategic policy framework from the Auckland Plan, as reflected in the recommendations of the Panel on the regional policy statement, is to achieve a quality compact city. Therefore, in accordance with the evidence from the Council, Fletcher and as supported by the central government agencies, the Panel concludes that the intensity of development proposed will promote the purpose of the Resource Management Act 1991.
- iii. The Panel is satisfied that the relationships between Mana Whenua and the maunga have been properly taken into account in the design of the precinct and the consultation with Mana Whenua and the evidence of Rau Hoskins for Fletcher is referred to (evidence in chief dated 10 February 2016 and summary statement dated 29 March 2016).
- iv. There is generous provision of open space for recreational opportunities that will be available for the new residents and the wider community (8ha). For example, the two new playing fields and the cycle and walkways will provide significant public benefit outcomes that will improve the social and cultural well-being of people.
- v. The Panel heard contested evidence on landscape and urban design from the Council (Mr Jew and Mr Reeve) and Fletcher (Mr De Keijzer, Mr Ray, Mr Lord and Ms de Lambert) on the one hand and for the Societies (Ms McCredie and Mr Reid) on the other. After weighing the respective evidence, the Panel prefers the evidence of the Council and Fletcher. For example, the Panel considered that the evidence of Mr Lord and Mr De Keijzer showed that the precinct:
 - i. respects the unique historical quarrying activity by maintaining a height differential of 15 metres between Mt Eden Road and the river;
 - ii. enables a high quality, innovative and exciting urban design outcome, including cascading apartments, in direct response to the unique topography;
 - iii. provides sufficient separation between the maunga and development by the use of both horizontal and vertical intervening open space; and
 - iv. enables housing choice and opportunities not currently available in Auckland.
- vi. The framework plan provisions have been deleted.

- vii. The notification provisions are appropriate because the precinct has been extensively master planned and, apart from the exceptions listed, the adverse effects from the development are known.
- viii. The Panel concludes that the precinct promotes the purpose of Part 2 of the Resource Management Act 1991 and also satisfies other statutory requirements including those outlined in section 32 (refer to the evidence of Mr Duthie for his section 32 analysis for Fletcher).

The Panel was also persuaded by the favourable respective peer reviews of the Fletcher evidence by consultants that had not been involved in the development of the master plan for the precinct.

4.1. Societies' submissions and evidence

For the Societies in opposition to the precinct, their main focus appeared to be to persuade the Panel that an alternative layout and design for the Three Kings Precinct would be a superior outcome to that proposed by Fletcher. Their proposal involved filling the base of the quarry to a higher level and creating a larger area of horizontal open space adjacent to Big King Reserve.

The Panel can see that the Societies put a lot of effort into this alternative proposal, but it was not persuaded to reject the proposed precinct by the Societies' submissions and evidence for the reasons set out below.

- i. The test for the Panel under the Resource Management Act 1991 is not to determine the best proposal from alternatives but to determine whether the proposed provisions, that have been notified and modified by submissions, meet the purpose of Part 2 of the Act. The Panel concludes that the precinct it is recommending does meet that purpose.
- ii. In any event, the Panel prefers the Fletcher proposal on its merits because the Societies' proposal to fill the whole quarry area almost to the original ground level pays little homage to the quarrying history and the very unique topography of the site. The Panel considers that the Societies' approach undervalues a significant design opportunity.
- iii. The Panel is not in a position to compel Fletcher to, for example, fill the quarry floor to a higher level or to arrange development in a manner that the Societies propose. The Panel heard evidence that to fill to the level proposed by the Societies would take many years and significantly delay development.
- iv. The Societies' proposal also needs the co-operation and agreement of landowners that were not before the Panel and their positions are unknown.
- v. The Panel also heard there would be significant commercial implications for the supporters of the precinct if the Panel did recommend the layout proposed by the Societies.

4.2. Three Kings Residential Design Guide

The Panel supports the inclusion of the Three Kings Residential Design Guide into the Unitary Plan to facilitate a quality urban design and landscape outcome. The guide has been developed to support the bespoke objectives, policies and rules by the main landowner and therefore if this guide can be used as part of future consenting processes, the Panel sees no reason not to include it in the Unitary Plan.

4.3. Special housing area

The Panel was told that an intensive housing development has already been consented for part of the site as a special housing area which was approved in February 2015 and construction is underway (refer to the evidence in chief of Mr van Kampen (26 January 2016 – Section 8) and the Fletcher Fact Sheet dated 29 March 2016). The Panel understands that this development is proceeding by way of resource consent (not a variation to the proposed Unitary Plan) so there is no need to remove this area from the precinct.

4.4. Private Plan Change 372

The Panel was advised about, and received submissions and evidence on, a parallel planning process under the Auckland Council District Plan - Operative Auckland City - Isthmus Section that is now subject to appeals to the Environment Court (*Ngati Te Ata v AC* (ENV-2015-AKL-000158) and *South Epsom Planning Group Inc v AC* (ENV-2016-AKL-000001)). It is understood that these appeals have been heard in the Environment Court.

The appeals are from Private Plan Change 372 to the operative plan. The Council decision being appealed was made by a commissioner on 2 November 2015. The Panel understands that the parties to the Unitary Plan precinct hearings are similar to those also involved in the private plan change application and its appeals.

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The Panel also noted that it is very respectful of separate Environment Court processes. The Panel observes that it does not have the ability to control the statutory opportunities available to applicants under the Resource Management Act 1991 and the special planning provisions for the proposed Auckland Unitary Plan. Therefore, whether or not Fletcher pursues both planning opportunities is a matter for it alone to determine.

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4.5. Structural Changes

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333 Three Kings Precinct

1. Summary of recommendations

The Panel recommends that the Three Kings Precinct is included in the Unitary Plan as largely agreed between the Council and the predominant land owner, Fletcher Construction Developments Limited (Fletcher).

The Panel also recommends that the Three Kings Residential Design Guide is included in the Unitary Plan.

This precinct was heard in Topic 081.

2. Precinct description

The Three Kings Precinct is intended to enable the redevelopment of the Three Kings Quarry which is zoned Business 7 in the Auckland Council District Plan - Operative Isthmus Section. The precinct covers 21.6ha and Fletcher owns 15.2ha and the Crown/Council owns 6.4ha (evidence in chief of Mr Duthie dated 10 Feb 2016 and loaded to the aupihp website on 11 February). Approximately 8ha of the site will be open space, or 37 per cent of the site.

Having been operated as a quarry, the site has been excavated and the quarry floor (riu) is well below the neighbouring ground level. The quarry is in the process of being clean filled and compacted in accordance with relatively recent decisions of the Environment Court (*Envirowaste Services Limited v Auckland Council* [2011] NZ EnvC130 and 214). The Panel understands that once the ground level reaches the level provided for in the precinct, which will be approximately 15 metres below Mt Eden Road, development will then be able to be undertaken within the quarry area itself.

The features of the proposed precinct were comprehensively set out in Fletcher's and the Council's evidence, as listed in their respective legal submissions. This description section therefore is a selection of matters that the Panel wishes to highlight.

The Panel understands from the evidence that a special housing area has been granted over part of the precinct and consent has been granted for a residential development that is currently being constructed.

2.1 Te Tātua a Riukiuta – Big King

The Precinct adjoins Te Tātua a Riukiuta – the Big King maunga which is a valued volcanic cone and the last remaining cone of the original three cones in the vicinity. The cone is a public open space reserve and is much used for passive recreation activities. It is important to note that the Panel is recognising the importance of Big King, as part of Topic 020, by recommending that:

- i. the Height Sensitive Area Overlay in the proposed Auckland Unitary Plan be retained and that Fletcher's relief seeking its reduction in the southern part be refused; and

- ii. that two existing viewshafts in the operative Auckland Council Regional Policy Statement, K1 and K2 be retained in the Unitary Plan, notwithstanding evidence from technical witnesses to the hearing on Topic 020 Viewshafts agreeing to the removal of those two viewshafts.

(See the Panel's Report to Auckland Council – Hearing topic 020 Viewshafts July 2016.)

The Panel also notes that the precinct provides for the retention of sightlines to the maunga as shown on Three Kings: Precinct Plan 2.

2.2 Proposed provisions

The Three Kings Precinct provisions were set out by the parties in the:

- i. Council's closing remarks which included blue text for the Council's right of reply and purple text which are revisions following the Environment Court's declaration on framework plan provisions;
- ii. the Council's evidence in rebuttal of Mr van Kampen dated 24 February 2016;
- iii. the proposed Three Kings Residential Design Guide attached to the evidence of Mr van Kampen for the Council dated 26 January 2016; and
- iv. for Fletcher, an updated rebuttal version of the precinct provisions dated 29 March 2016 attached to the summary statement of John Duthie.

The Panel notes that after the hearing, on 2 June 2016, it received a memorandum from Fletcher with planning evidence from Mr Duthie attached that it requested be accepted by the Panel. The evidence was primarily a revised precinct plan that Fletcher indicated was the outcome of expert caucusing by party witnesses from the Environment Court plan change appeal process. The main change on the revised plan was an increased area of open space between the maunga and the development. The Panel forwarded the material on to other parties that had submitted on the precinct and inquired as to whether or not there were any objections to the revised evidence being placed before the Panel. The Societies (South Epsom Planning Group Incorporated and Three Kings United Group Incorporated) objected so that Panel has not considered that evidence further.

As the precinct description outlines, the intention of the precinct is to create a vibrant sustainable urban village on the former quarry land. The main underlying zonings sought in the precinct are: Business - Town Centre Zone, Residential - Terrace Housing and Apartment Buildings Zone, Open Space - Informal Recreation Zone and Open Space - Sport and Active Recreation Zone.

The Panel heard that a master planning exercise had been undertaken to create the opportunity for between 1,200 to 1,500 additional homes with different typologies, including apartments that cascade over the rock faces. The Council and Fletcher considered the precinct maintains the sight lines and amenity and heritage values of Big King, provides open space linkages, reinforces public transport, supports the Three Kings town centre and will appropriately manage stormwater onsite. The intention is to develop a high-quality urban design outcome as reflected in the request to include the Three Kings Residential Design Guide in the Unitary Plan.

The maps showing the zoning within the precinct recommended by the Panel can be seen in the recommendation version of the GIS map viewer on the Auckland Council website.

The precinct provisions contain:

- i. a description;
- ii. objectives;
- iii. policies;
- iv. activity tables for the Residential - Terrace Housing and Apartment Buildings Zone and open space zones that modify the underlying generic zoning;
- v. notification rules that limit the circumstances for notification;
- vi. standards for land use and development;
- vii. assessment for controlled activities; and
- viii. assessment for restricted discretionary activities, including criteria and information requirements.

The maps for the precinct attached to the Council's closing remarks include:

- i. Three Kings: Precinct Plan 1 - Zoning;
- ii. Three Kings: Precinct Plan 2 - Precinct Provisions;
- iii. Three Kings: Precinct Plan 3 - Building Height;
- iv. Three Kings: Precinct Plan 4 - Te Tātua a Riukiuta Sightlines; and
- v. Three Kings: Precinct Plan 5 - Stormwater Management Concept Plan.

3. Key issues

In submissions and evidence the Panel identified the following key issues regarding the Three Kings Precinct.

- i. The potential adverse amenity and visual effects of the intensity of development enabled by the precinct on the amenity values of the Big King Reserve (an outstanding natural feature) and surrounding neighbourhoods.
- ii. Whether or not the precinct has properly taken into account the relationships of Mana Whenua with the maunga.
- iii. Whether or not an alternative layout proposed by the South Epsom Planning Group Incorporated and Three Kings United Group Incorporated (the Societies) would better promote the purpose of the Resource Management Act 1991. They proposed to fill the quarry to a higher reduced level and then locate development further to the west and closer to Mt Eden Road, thereby creating more horizontal separation between the maunga and development.
- iv. The relative merits of the urban design outcomes, including providing for cascading apartments on the western quarry wall.

- v. Whether or not the precinct is properly integrated with the wider Three Kings area and the town centre.
- vi. Whether or not the precinct could benefit from broader structure planning to better integrate it and whether or not it should be included in the Unitary Plan at this stage, pending the outcome of that process.
- vii. Related to the above, whether or not consultation and community engagement had been adequate.
- viii. The amount of roading required to service the development.
- ix. The treatment and management of stormwater.
- x. The procedural relationship with Private Plan Change 372 to the operative plan.

4. Panel recommendations and reasons

The submissions and evidence presented to the Panel in regard to the Three Kings Precinct were relatively polarised. On the one hand, Fletcher and the Council told the Panel that the precinct would enable a unique, innovative and vibrant living opportunity to be created that would achieve high amenity outcomes for the residents and the local community. That position was supported by submissions and evidence from Housing New Zealand, the Ministry of Business, Innovation and Employment and the Minister for the Environment (refer to legal submissions on behalf of the Minister for the Environment from Ellis Gould dated 29 March 2016).

On the other hand, the Panel heard from the Societies that the development proposed was too intensive and too close to the maunga and would therefore dominate the outstanding natural feature and did not properly respect the amenity values of the maunga. The Societies and the Local Board were also concerned about the process leading to the notification of the precinct and criticised Fletcher for an alleged lack of consultation and community engagement.

The Panel was greatly assisted by the effort that parties, both in support and in opposition to the precinct, put into providing the Panel with detailed submissions and expert evidence on topics including:

- i. planning;
- ii. urban design;
- iii. landscape architecture;
- iv. Mana Whenua values;
- v. traffic; and
- vi. engineering issues, including stormwater, wastewater, contaminated land, geotechnical and infrastructure.

At least some of the expert evidence from parties was also peer reviewed by other consultants.

Having heard all of the evidence, the Panel recommends that the Three Kings Precinct be included in the Unitary Plan for the reasons set out below.

- i. The quarry represents a significant resource management opportunity to develop a large brownfield site that is centrally located on the isthmus (8km from the Central Business District). The precinct will enable people to provide for their social and economic well-being and for their health and safety, by meeting their housing needs.
- ii. The high level strategic policy framework from the Auckland Plan, as reflected in the recommendations of the Panel on the regional policy statement, is to achieve a quality compact city. Therefore, in accordance with the evidence from the Council, Fletcher and as supported by the central government agencies, the Panel concludes that the intensity of development proposed will promote the purpose of the Resource Management Act 1991.
- iii. The Panel is satisfied that the relationships between Mana Whenua and the maunga have been properly taken into account in the design of the precinct and the consultation with Mana Whenua and the evidence of Rau Hoskins for Fletcher is referred to (evidence in chief dated 10 February 2016 and summary statement dated 29 March 2016).
- iv. There is generous provision of open space for recreational opportunities that will be available for the new residents and the wider community (8ha). For example, the two new playing fields and the cycle and walkways will provide significant public benefit outcomes that will improve the social and cultural well-being of people.
- v. The Panel heard contested evidence on landscape and urban design from the Council (Mr Jew and Mr Reeve) and Fletcher (Mr De Keijzer, Mr Ray, Mr Lord and Ms de Lambert) on the one hand and for the Societies (Ms McCredie and Mr Reid) on the other. After weighing the respective evidence, the Panel prefers the evidence of the Council and Fletcher. For example, the Panel considered that the evidence of Mr Lord and Mr De Keijzer showed that the precinct:
 - i. respects the unique historical quarrying activity by maintaining a height differential of 15 metres between Mt Eden Road and the river;
 - ii. enables a high quality, innovative and exciting urban design outcome, including cascading apartments, in direct response to the unique topography;
 - iii. provides sufficient separation between the maunga and development by the use of both horizontal and vertical intervening open space; and
 - iv. enables housing choice and opportunities not currently available in Auckland.
- vi. The framework plan provisions have been deleted.

- vii. The notification provisions are appropriate because the precinct has been extensively master planned and, apart from the exceptions listed, the adverse effects from the development are known.
- viii. The Panel concludes that the precinct promotes the purpose of Part 2 of the Resource Management Act 1991 and also satisfies other statutory requirements including those outlined in section 32 (refer to the evidence of Mr Duthie for his section 32 analysis for Fletcher).

The Panel was also persuaded by the favourable respective peer reviews of the Fletcher evidence by consultants that had not been involved in the development of the master plan for the precinct.

4.1. Societies' submissions and evidence

For the Societies in opposition to the precinct, their main focus appeared to be to persuade the Panel that an alternative layout and design for the Three Kings Precinct would be a superior outcome to that proposed by Fletcher. Their proposal involved filling the base of the quarry to a higher level and creating a larger area of horizontal open space adjacent to Big King Reserve.

The Panel can see that the Societies put a lot of effort into this alternative proposal, but it was not persuaded to reject the proposed precinct by the Societies' submissions and evidence for the reasons set out below.

- i. The test for the Panel under the Resource Management Act 1991 is not to determine the best proposal from alternatives but to determine whether the proposed provisions, that have been notified and modified by submissions, meet the purpose of Part 2 of the Act. The Panel concludes that the precinct it is recommending does meet that purpose.
- ii. In any event, the Panel prefers the Fletcher proposal on its merits because the Societies' proposal to fill the whole quarry area almost to the original ground level pays little homage to the quarrying history and the very unique topography of the site. The Panel considers that the Societies' approach undervalues a significant design opportunity.
- iii. The Panel is not in a position to compel Fletcher to, for example, fill the quarry floor to a higher level or to arrange development in a manner that the Societies propose. The Panel heard evidence that to fill to the level proposed by the Societies would take many years and significantly delay development.
- iv. The Societies' proposal also needs the co-operation and agreement of landowners that were not before the Panel and their positions are unknown.
- v. The Panel also heard there would be significant commercial implications for the supporters of the precinct if the Panel did recommend the layout proposed by the Societies.

4.2. Three Kings Residential Design Guide

The Panel supports the inclusion of the Three Kings Residential Design Guide into the Unitary Plan to facilitate a quality urban design and landscape outcome. The guide has been developed to support the bespoke objectives, policies and rules by the main landowner and therefore if this guide can be used as part of future consenting processes, the Panel sees no reason not to include it in the Unitary Plan.

4.3. Special housing area

The Panel was told that an intensive housing development has already been consented for part of the site as a special housing area which was approved in February 2015 and construction is underway (refer to the evidence in chief of Mr van Kampen (26 January 2016 – Section 8) and the Fletcher Fact Sheet dated 29 March 2016). The Panel understands that this development is proceeding by way of resource consent (not a variation to the proposed Unitary Plan) so there is no need to remove this area from the precinct.

4.4. Private Plan Change 372

The Panel was advised about, and received submissions and evidence on, a parallel planning process under the Auckland Council District Plan - Operative Auckland City - Isthmus Section that is now subject to appeals to the Environment Court (*Ngati Te Ata v AC* (ENV-2015-AKL-000158) and *South Epsom Planning Group Inc v AC* (ENV-2016-AKL-000001)). It is understood that these appeals have been heard in the Environment Court.

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