

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

**CIV-**

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

**IN THE MATTER** of an appeal under section 158 of the LGATPA

**AND**

**IN THE MATTER** of hearing Topic 061 - Retirement and affordability;  
Topics 059, 060, 062, 063 - Residential; and Topic  
080 - Rezoning and Precincts (General)

**BETWEEN** **THE AUCKLAND PRESBYTERIAN HOSPITAL  
TRUSTEES INC**

Appellant

**AND**

**AUCKLAND COUNCIL**

Respondent

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**NOTICE OF APPEAL BY THE AUCKLAND PRESBYTERIAN HOSPITAL  
TRUSTEES INC**

**16 SEPTEMBER 2016**

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**RUSSELL McVEAGH**

B S Carruthers / D J Minhinick  
Phone +64 9 367 8000  
PO Box 8  
DX CX10085  
Auckland 1140

**TO:** The Registrar of the High Court at Auckland

**AND TO:** The Respondent

**TAKE NOTICE THAT** The Auckland Presbyterian Hospital Trustees Inc ("**Appellant**") will appeal to the High Court against part of the decision ("**Decision**") of the Auckland Council ("**Respondent**"), dated 19 August 2016, to adopt the recommendations ("**Recommendations**") of the Auckland Unitary Plan Independent Hearings Panel ("**Panel**") on the Proposed Auckland Unitary Plan ("**Unitary Plan**") **UPON THE GROUNDS** that the Decision is erroneous in law.

### **STANDING**

1. The Appellant made a submission on the Unitary Plan in relation to the St Andrews retirement village at 207 Riddell Road, Glendowie ("**Site**"), including in relation to the zoning and permitted height. The Appellant is the owner and operator of the retirement village at the Site.
2. The Panel, in its Recommendations, applied a Mixed Housing Suburban ("**MHS**") zone to the Site without any additional height enablement, resulting in a maximum permitted height at the Site of 8 metres.
3. The Respondent adopted the Panel's recommendation in relation to the Site in its Decision on the Unitary Plan.

### **SCOPE OF APPEAL**

4. The Appellant appeals against the Decision insofar as it relates to the application of a MHS zoning to the Site without also applying an additional zone height control overlay of 11 metres ("**Height Control**") at the Site.

### **ERRORS OF LAW**

5. In adopting the Panel's recommendation in relation to the Site, the Respondent made the following errors of law:

#### **Conclusion unsupported by evidence**

- (a) There was no evidence before the Panel which opposed the application of the Height Control at the Site.

- (b) The Panel's recommendation, therefore, could not reasonably have been made on the basis of the evidence before it.

**Failure to give reasons**

- (c) The Panel failed to give any reasons for its recommendation to not apply the Height Control to the Site, as required by section 144(8) of the LGATPA.

**Failure to take into account mandatory relevant consideration**

- (d) The Panel erred in failing to take into account mandatory relevant considerations, being an assessment of the implications of the amendment as required by section 32AA of the RMA.

6. The above errors of law, individually and collectively, materially affected the Panel's recommendation on the Unitary Plan in relation to the application of the Height Control to the Site.

**GROUNDS OF APPEAL**

**Conclusion unsupported by evidence**

7. There was no evidence before the Panel which opposed the application of the Height Control within the MHS zone at the Site.
8. The notified version of the Unitary Plan contained a Special Purpose Retirement Village ("**SPRV**") zone. The Appellant's Site was zoned SPRV in the Unitary Plan, as notified. The SPRV zone had a maximum permitted height control of 11 metres.
9. The Appellant lodged a submission seeking to rezone the Site from SPRV to an underlying zone of Mixed Housing Urban ("**MHU**") and that the Site be the subject of a retirement village precinct. The Appellant also supported the base maximum permitted building height in the SPRV. No other submissions were received in relation to the Appellant's Site, and no further submissions were received either in support or opposition to the Appellant's submission.
10. One issue raised by submitters, including the Appellant, was whether the SPRV zone was the most appropriate mechanism to provide for retirement villages or whether an alternative mechanism, such as a more

intensive residential zone or a retirement village precinct, was more appropriate.

11. During the Unitary Plan process, there were a series of mediations and hearings relating to the zoning of retirement villages and associated planning provisions. Through mediation, it was agreed that the SPRV zone should be deleted and an underlying residential zoning be applied to those sites.
12. The Respondent, in evidence, supported the application of an underlying residential zoning and proposed:<sup>1</sup>

... a more tailored residential rule framework as a specialised form of residential activity including:

[...]

(f) establishing an amended residential policy and rule framework that would:

**(i) enable additional building height on existing retirement village sites up to 11 metres (total) in the MHS zone which is consistent with the notified SPRVZ; and**

(ii) potentially enable additional building heights over and above 11 metres on sites where it is decided such building heights above the permitted zone height are appropriate.

[emphasis added]

13. The Respondent went on to state that:<sup>2</sup>

I also support the retention of [the 11 metre height control] given the potential efficiency benefits associated with intensification and the ability to locate larger buildings on larger retirement village sites away from neighbouring properties. In the absence of the SPRV [zone], the rule would need to be included in the building height development control for the MHS zone as "an additional height control rule" and shown on each site as identified on the [Unitary Plan] Zone maps and at proposed rule 7.2.2.

14. In relation to the Site, the Respondent supported a MHS zoning (which has a permitted height limit of 8 metres) and the application of the Height Control (which increases the permitted height from 8 metres to 11

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<sup>1</sup> Statement of evidence of Deanne Marie Rogers on behalf of Auckland Council, dated 8 September 2015, at paragraph 9.7.

<sup>2</sup> Statement of evidence of Deanne Marie Rogers on behalf of Auckland Council, dated 8 September 2015, at paragraph 9.30. See also Statement of evidence of Philip Michael Brown on behalf of Auckland Council, dated 4 September 2015, at paragraphs 1.4 and 9.9.

metres). The Respondent's evidence on that matter was not opposed by any submitters.

15. The Appellant, in its submission, supported the base maximum permitted building height of 11 metres provided in the SPRV zone in the notified version of the Unitary Plan. While the Appellant sought a MHU zoning for the Site in its evidence (which also enables height of up to 11 metres), the Respondent's approach achieves the same outcome (ie enabling additional height of up to 11 metres at the Site). Further, no other party (in submissions or in evidence) opposed the application of the Height Control at the Site.
16. The effect of the Panel's recommendation is that further intensification of the existing retirement village at the Site will be limited, which could inhibit future development at the Site. That outcome is inconsistent with the SPRV zone in the notified version of the Unitary Plan as well as the Respondent's and the Appellant's evidence.
17. On this basis, the recommendation represents an outcome that was not open to the Panel on the evidence before it such that the Respondent made an error of law in adopting that recommendation.

#### **Failure to give reasons**

18. The Panel erred in failing to give adequate reasons for its recommendation to not apply the Height Control to the Site, as expressly required under the LGATPA.<sup>3</sup>
19. A failure to give reasons for a decision has been accepted to be an error of law on the basis that "without reasons, it may not be possible to understand why a judicial authority has been used in a particular way".<sup>4</sup>
20. The Panel's Recommendations acknowledged that it had been agreed that it was appropriate to remove the SPRV zone from the Unitary Plan and therefore, the Panel's Recommendations focussed on what specific retirement village provisions should be incorporated into the residential zone provisions.<sup>5</sup>

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<sup>3</sup> Local Government (Auckland Transitional Provisions) Act 2010, section 144(8)(c).

<sup>4</sup> *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [79].

<sup>5</sup> Auckland Unitary Plan Independent Hearings Panel, Report to Auckland Council Hearing Topics 059 - 063, Residential zones, dated July 2016, section 7.1 on page 22.

21. In providing its Recommendations on those provisions, the Panel failed to discuss the Height Control and in particular did not provide any reasons for excluding its application to the Site, or any other existing retirement villages in the MHS zone.
22. The failure to give reasons for the departure from the provisions that were supported by the Respondent and the Appellant in evidence, and not opposed by any other submitter, constitutes an error of law.

**Failure to take into account mandatory relevant consideration**

23. The Panel failed to consider whether its recommendation was the most appropriate method to achieve the objectives of the Unitary Plan as required under section 32 of the RMA.
24. The Panel is required to include a further evaluation of the Unitary Plan undertaken in accordance with section 32AA of the RMA, which provides:<sup>6</sup>

- (1) A further evaluation required under this Act—
  - (a) is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the changes); and
  - (b) must be undertaken in accordance with section 32(1) to (4); and
  - (c) must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and
  - (d) must—
    - (i) be published in an evaluation report that is made available for public inspection at the same time as the approved proposal (in the case of a national policy statement or a New Zealand coastal policy statement), or the decision on the proposal, is publicly notified; or
    - (ii) **be referred to in the decision-making record in sufficient detail** to demonstrate that the further evaluation was undertaken in accordance with this section.

(2) ...

[Emphasis added]

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<sup>6</sup> Local Government (Auckland Transitional Provisions) Act 2010, section 145(1)(d).

25. In addition to the obligation to comply with section 32(1) to (4) of the RMA, the Panel must also:<sup>7</sup>

...identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions.

26. The Panel's Recommendations failed to consider the Height Control which indicates that it did not properly assess the provisions in accordance with section 32 of the RMA.
27. The assessment of the costs and benefits associated with the provisions is a mandatory relevant consideration for the Panel, which it is required to take into account. By failing to do so, the Panel committed an error of law, which materially affected the Panel's recommendation in relation to the Height Control for the Site.

#### **QUESTIONS OF LAW**

28. The questions of law to be decided are:

#### **Conclusion unsupported by evidence**

- (a) Was the Panel's recommendation to apply a MHS zoning without the accompanying Height Control for the Site, one it could have reasonably made on the basis of the evidence before it?

#### **Failure to give reasons**

- (b) Did the Panel err in failing to give reasons for its recommendation not to apply the Height Control to the Site?

#### **Failure to take into account mandatory relevant consideration**

- (c) Did the Panel err in failing to take into account a mandatory relevant consideration, being an assessment of the implications of not applying the Height Control to the Site, as required under section 32AA of the RMA?

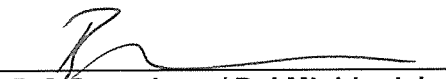
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<sup>7</sup> Resource Management Act 1991, section 32(2)(a).

## RELIEF SOUGHT

29. The Appellant seeks:
- (a) that its appeal be allowed;
  - (b) that the High Court introduce the Height Control in relation to the Site;
  - (c) that if the relief in (b) is not provided, that the matter be remitted back to the Panel for reconsideration; and
  - (d) costs.

**DATED** 16 September 2016

  
**B S Carruthers / D J Minhinnick**  
Solicitor for the Appellant

This document is filed by **Bronwyn Shirley Carruthers**, solicitor for the Appellant, of Russell McVeagh. The address for service on the Appellant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

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

- (a) posted to the solicitor at PO Box 8, Auckland 1140; or
- (b) left for the solicitor at a document exchange for direction to DX CX10085.