

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

CIV-2016-

UNDER the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991 (“RMA”)

AND

IN THE MATTER An appeal under section 158 of the Local Government (Auckland Transitional Provisions) Act 2010 (“LGATPA”) and s 299 of the RMA

BETWEEN **Wallace Group Limited** an incorporated company with its registered office at Level 8, 120 Albert Street, Auckland

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 BY WALLACE GROUP LIMITED

Dated 16 September 2016

Solicitors for the Appellant

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To: The Registrar of the High Court at Auckland
And To: Respondent

TAKE NOTICE THAT Wallace Group Ltd (“WGL”) will appeal to the High Court against the decision of the Auckland Council (“Council”) notified on 19 August 2016, **UPON THE GROUNDS** that the decision is erroneous in law.

DECISION APPEALED

1. WGL appeals 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 submissions made by WGL on the Proposed Plan;
 - b. Council accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel (“Panel”) which resulted in the provision or matter being included in the Proposed Plan;
 - c. Council accepted the recommendation of the Panel to rezone the northern part of 55 Takanini School Road, Takanini (“Site”) to Residential – Mixed Housing Suburban Zone (“MHS”), resulting in the entire Site being zoned MHS (“Zoning Decision”). As Council has accepted the recommendations of the Panel, all references to the findings and reasoning of the Panel in this appeal are to be read as references to the Council decision.
 - d. With respect to the northern part of the Site:
 - i. the provisions of the Proposed Plan as notified by the Council proposed a Light Industrial zone; and
 - ii. the relief sought in the submissions by WGL and the landowner Takanini Central Ltd (TCL) on the Unitary Plan, sought a Light Industrial zone.
 - e. The Panel recommendation in Annexure 3 to the Topic 081 Hearings Panel Report states:

It considers the removal of the Business – Light Industry Zone from the northern half of the site at 55 Takanini School Road and rezoning the entire

site to Residential – Mixed Housing Suburban Zone **as sought** better meets the purpose...

- f. Rezoning the entire Site to MHS was not sought in any submission, and is not within scope.
- g. The Zoning Decision has not been identified as out of scope by the Panel:
 - i. Section 144(5) of the LGATPA empowers the Panel to make recommendations outside the scope of the boundaries set by what was proposed in the Proposed Plan and what was sought in submissions, subject to the requirement in section 144(8)(a) that the Panel's report must identify any recommendation that is beyond the scope of the submissions made.

ERRORS OF LAW

- 2. The Council adopted without alteration the zoning recommendation of the Panel for the northern part of the Site, which recommendation is out of scope. There was no submission seeking application of the MHS to the northern part of the Site, and no statement in the recommendation of the Panel that the decision was made outside the scope of any submission.
- 3. The Panel failed to undertake an assessment of the costs and benefits of rezoning the northern part of the Site to MHS in terms of section 145(1)(d) of the LGATPA in sections 32 AA and section 32 of the RMA.

QUESTIONS OF LAW

- 4. The questions of law to be decided are:
 - a. Did the Council err in law by publicly notifying a zoning map showing a MHS zone applying to the northern part of the Site, when that zoning is out of scope and the Panel has failed to identify that the recommendation is out of scope in accordance with section 144(8)(a) of the LGATPA, in which case WGL would have a right of appeal to the Environment Court?

- b. Was the Panel required to undertake and include in its Report on assessment of the costs and benefits of rezoning the northern part of the site to MHS, and if so did the Panel undertake and include in the Report an appropriate assessment of such costs and benefits?
- c. Did the Council err in law by accepting the Panel's recommendation, if that recommendation did not incorporate an assessment of costs and benefits of rezoning the northern part of the Site to MHS?

GROUNDS OF APPEAL

- 5. General grounds of appeal:
 - a. The error of law is to publish a zone map for the Site imposing a zoning which is out of scope, when there was no submission seeking that zoning for the northern part of the Site, and the Panel recommendation did not state that the recommended zoning is out of scope;
 - b. The failure of the decision to identify that the recommendation is out of scope in accordance with section 144(8)(a) of the LGATPA results in prejudice to WGL, as WGL is prevented from exercising a right to appeal to the Environment Court under section 156(3) of the LGATPA for a hearing on the merits.

- 6. Specific grounds of appeal:
 - a. WGL owns property at 296 Porchester Road, Takanini. The abutting Site is owned by Takanini Central Ltd ("TCL"). The southern portion of 296 Porchester Road abuts the northern portion of the Site.
 - b. The notified PAUP zoned 296 Porchester Road as Light Industry, and that zoning has been confirmed in the Decisions Version of the Unitary Plan.
 - c. The notified PAUP zoned the Site as Light Industry to the north and Single House to the south (a split zoning). The operative zoning for the Site was split between industrial to the north and residential to the south.

- d. The TCL submission on the PAUP opposed the notified zoning for the Site. The relief sought:
 - i. Retained a split zoning;
 - ii. On the southern portion, sought residential zoning to be intensified to MHS;
 - iii. On the northern portion, sought a broader range of activity outcomes than provided for by the Light Industry Zone, as notified. The removal of the Light Industry zone was not sought – rather additional development opportunities by way of amendments to the overlying sub precinct rules were requested.
- e. WGL's further submission with respect to the northern portion, opposed the particular proposed site-specific activity standard changes sought by TCL.
- f. There was no submission requesting a different zoning of the northern portion of the Site;
- g. Specifically, no submission sought rezoning of the entire Site to MHS.
- h. Therefore, the scope for the Panel's recommendations for the zoning of the northern portion of the Site, which lay between the provisions of the Unitary Plan as notified by the Council and the relief sought in the submissions on the Unitary Plan, was limited to:
 - i. Light Industry or
 - ii. Light Industry with additional development outcomes by way of amendments to overlying sub precinct rules.

Evidence

- i. For completeness, evidence put to the Hearings Panel is summarised below. However, scope for the Hearing Panel's recommendations cannot be enlarged by evidence.
- j. In pre-exchanged evidence:
 - i. Council purported to amend its position with respect to the notified zoning for the Site and its primary evidence supported a Single House zoning across the entire Site

- this did not reflect the PAUP zoning as notified or any submission lodged;
- ii. TCL primary evidence supported Light Industry for the northern portion of the Site;
- iii. WGL rebuttal evidence opposed any site-specific activity standard changes, but did not oppose Light Industry for the northern portion of the Site;
- iv. Council rebuttal evidence was unclear as to which zone its witness supported for the northern portion of the Site.
- v. In supplementary evidence presented to the Hearings Panel on the day of TCL’s appearance, TCL changed its position and supported a MHS zoning across the entire site. The evidence did not acknowledge that there was no submission providing a basis for this last-minute request for a zoning change.

Hearing Panel’s Recommendation

- k. Commentary in Annexure 3 to the Topic 081 Hearings Panel Report states:

The Panel does not agree with Council regarding the submissions from Takanini Centre Limited. It considers the removal of the Business – Light Industry Zone from the northern half of the site at 55 Takanini School Road and rezoning the entire site to Residential – Mixed Housing Suburban Zone **as sought** better meets the purpose of the precinct and otherwise avoids split zoning [my emphasis]
- l. It is unclear whether the Panels use of the term “*as sought*” reflected an understanding by the Panel that submissions lodged sought a MHS zoning outcome for the northern half of the site. If so, that understanding was wrong.
- m. In the alternative the Panels use of the term “as sought” must be a reference to evidence put before the Panel on the day of hearing. If so, that evidence did not create scope for the subsequent recommendation of the Panel.
- n. The Panel Recommendation with respect to the zoning of the northern portion of the Site:

- i. is potentially founded on a mistaken understanding of submissions lodged;
- ii. in any event is out of scope; and
- iii. is not as the law requires supported by a statement that the recommendation is out of scope.

Failure to undertake assessment of costs and benefits

- o. Pursuant to section 145(1)(d) of the LGATPA, the Panel was required to include in its recommendations a further evaluation of the Proposed Plan in accordance with section 32 AA of the RMA, which must be undertaken in accordance with section 32 (1) – (4) of the RMA.
- p. The Panel failed to include in the Report a further evaluation of rezoning the northern part of the Site to MHS, and in particular failed to:
 - i. identify and assess the benefits and costs of the effects that are anticipated from the implementation of the rezoning; and
 - ii. quantify the benefits and costs referred to above.
- q. The Council adopted the reasons set out in the Panel's recommendations, and did not undertake any further evaluation in accordance with sections 32 AA and section 32 (1) – (4) of RMA of rezoning the northern part of the Site to MHS.

Council Decision

- r. The Council Decision accepted the Panel's Recommendation for the zoning of the Site, and therefore is subject to the same errors of law.

Undue prejudice

- s. Rezoning of the northern portion of the Site to MHS adversely impacts upon future development at 296 Porchester Road, Takanini because:
- i. zoning the northern portion of the Site MHS, immediately abutting the Light Industry zone on 296 Porchester Road, triggers specific plan rules which impact upon 296 Porchester Road;
 - ii. Rule H17.6.0 Activities within 30m of a residential zone – activity status of identified activities located within 30 m of a residential zone changes from permitted to restricted discretionary;
 - iii. Rule H17.6.2. Height in relation to boundary – rule does not apply as between industrial zoned sites;
 - iv. Rule H17.6.4. Yards – buildings must be set back from a rear or side boundary where it adjoins a residential zone and additional planting obligations apply;
 - v. Rule H17.6.5. Storage and screening – screening obligations for outdoor storage or rubbish collection areas that directly face and are visible from a residential zone adjoining a boundary with an industrial zone.

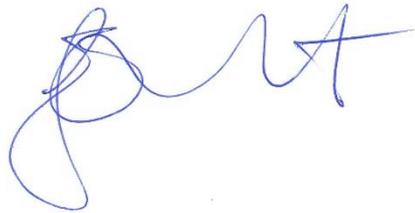
RELIEF

7. The Appellant seeks the following relief:
- a. That this appeal be allowed and the decision to rezone the northern part of 55 Takanini School Road, Takanini as MHS be cancelled;
 - b. That the Council be directed to amend its decision by zoning the northern part of 55 Takanini School Road, Takanini as Light Industry;
 - c. In the alternative, where the finding is that the MHS rezoning is 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; and
- e. Costs.

Dated 16 September 2016



Jeremy Brabant
Counsel for the Appellant

This Notice of Appeal is filed by Andrew Macdonald, solicitor for the Appellant,
of Hornabrook Macdonald.

The address for service on the Appellant is Level 5, 12 O'Connell 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 PO Box 91845, Auckland 1142; or
- b. Emailed to the solicitor at andrew.macdonald@hmlaw.co.nz

And in either case copies to counsel sent by email to jeremy@brabant.co.nz