

The High Court of New Zealand  
Auckland Registry

CIV-2016-404-

**Under** the Judicature Amendment Act 1972

**In The Matter of** Section 159 Local Government (Auckland Transitional Provisions) Act 2010

**Between** **Franco Belgiorno-Nettis** of 17a Sanders Avenue, Takapuna, mechanical engineer

Plaintiff

**And** **Auckland Unitary Plan Independent Hearings Panel** a statutory body established under the Local Government (Auckland Transitional Provisions) Act 2010

First Defendant

**And** **Auckland Council** a statutory body established under the Local Government (Auckland Council) Act 2009 having its principal office at 135 Albert Street, Auckland

Second Defendant

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**Statement of Claim**

**Dated: 16 September 2016**

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Solicitor:  
Daniel Overton & Goulding  
33 Selwyn Street  
PO Box 13-017  
Onehunga  
Auckland 1061  
Person Acting: Tim Goulding  
Telephone: 09 6222 222  
Email: [tim@doglaw.co.nz](mailto:tim@doglaw.co.nz)

Counsel:  
Stuart Ryan  
Barrister  
Level 11, Southern Cross Building  
59-67 High Street  
PO Box 1296, Shortland Street  
Auckland 1140  
Telephone: (09) 357 0599  
Email: [stuart@stuartryan.co.nz](mailto:stuart@stuartryan.co.nz) /  
[rowan@stuartryan.co.nz](mailto:rowan@stuartryan.co.nz)

The plaintiff by his solicitor says:

1. **Parties**

- 1.1 The plaintiff lives in Takapuna. He is a submitter in respect of the proposed Auckland Unitary Plan.
- 1.2 The first defendant (**the IHP**) is a hearings panel established by the Minister for the Environment and the Minister of Conservation under s 161 of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**).
- 1.3 The second defendant (**the Council**) is the local government council and Unitary Authority for the Auckland area established under the Local Government (Tamaki Makaurau Reorganisation) Act 2009, the Local Government (Auckland Council) Act 2009 and the LGATPA. It became operational on 1 November 2010.

2. **Statutory Framework for Preparation of Auckland Unitary Plan**

- 2.1 Part 4 of the LGATPA provides a bespoke process for the preparation of the initial Auckland Unitary Plan which differs from the regular plan making process specified in schedule 1 of the Resource Management Act 1991 (**RMA**).
- 2.2 Part 4 of the LGATPA provides for the notification of the Proposed Auckland Unitary Plan (**PAUP**), the lodging of submissions, hearings held before the IHP and, following the hearings recommendations by the IHP to the Council including any recommended changes to the PAUP (s 144 (1) LGATPA).
- 2.3 Section 144(7) LGATPA required the IHP to provide its recommendations to the Council in one or more reports.
- 2.4 Section 144(8) LGATPA required each report issued by the IHP to include *inter alia*:
  - a) the recommendations of the IHP on the topic or topics covered by the report, and the identification of any recommendations that were beyond the scope of the submissions made in respect of that topic or those topics (s 144 (8)(a));
  - b) the reasons for accepting or rejecting submissions. For this purpose,

the IHP was permitted to address submissions by grouping them according to the provisions of the PAUP to which they were related or the matters to which they were related (s 144 (8)(c)).

- 2.5 Section 144(10) LGATPA stipulated that for the avoidance of doubt the IHP was not required to make recommendations addressing each submission individually.
- 2.6 Section 145 LGATPA required the IHP in formulating its recommendations to include a further evaluation of the PAUP undertaken in accordance with s 32AA RMA.
- 2.7 Section 32AA RMA requires *inter alia* that a further evaluation must be:
- a) undertaken in accordance with section 32(1)-(4) RMA (s 32AA(1)(b) RMA);
  - b) either contained in a separate report or referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with s32AA (s32AA(d)(ii) RMA).
- 2.8 Section 32(1)-(4) RMA states:
- (1) An evaluation report required under this Act must—
    - (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
    - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
      - (i) identifying other reasonably practicable options for achieving the objectives; and
      - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
      - (iii) summarising the reasons for deciding on the provisions; and
    - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
  - (2) An assessment under subsection (1)(b)(ii) must—
    - (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
      - (i) economic growth that are anticipated to be provided or reduced;

and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an amending proposal) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—

(a) the provisions and objectives of the amending proposal; and

(b) the objectives of the existing proposal to the extent that those objectives—

(i) are relevant to the objectives of the amending proposal; and

(ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

2.9 Section 148 LGATPA required the Council to decide whether to accept or reject each recommendation of the IHP. For each rejected recommendation the Council was required in terms of s 148(1)(b) LGATPA to decide an alternative solution which may or may not include elements of both the PAUP as notified and the Hearing Panel's recommendation in respect of that part of the PAUP but which must be within the scope of the submissions.

### 3. **LGATPA Limited Appeal Rights to Environment Court**

3.1 The usual plan making process specified in schedule 1 of the Resource Management Act 1991 provides for rights of appeal *de novo* to the Environment Court for submitters to a proposed plan.

3.2 Sections 155-158 LGATPA limits the submitter's rights of appeal to the Environment Court in respect of the PAUP. Other than in respect of designations and heritage orders, a right of appeal to the Environment Court is available only:

a) to a person who made a submission on the PAUP which addressed a provision or matter relating to the PAUP and in relation to which the Council rejected a recommendation of the IHP and decided an

alternative solution, which resulted in:

- i) a provision being included in the proposed plan; or
  - ii) a matter being excluded from the proposed plan (s 156(1) LGATPA); or
- b) to a person who is, was, or will be unduly prejudiced by the inclusion of the provision or exclusion of the matter where the Council's acceptance of a recommendation of the IHP resulted in:
- i) the provision being included in the proposed plan; or
  - ii) the matter being excluded from the proposed plan; and
  - iii) the IHP had identified the recommendation as being beyond the scope of the submissions made on the proposed plan (s 156(3) LGATPA).

#### 4. **Auckland Unitary Plan Development Process**

- 4.1 The PAUP was notified for submissions on 30 September 2013. Submissions closed on 28 February 2014 following which the Council prepared a Summary of Decisions Requested report which was published on 11 June 2014.
- 4.2 The further submissions period which allowed for submissions in support or opposition to original submissions closed on 22 July 2014.
- 4.3 The points raised in submissions to the PAUP were then categorised by the Council into topics which related to various elements of the PAUP.
- 4.4 The IHP adopted the Council's categorisation of submissions and submissions were allocated to hearing topics numbered 001 to 081. Topic 081 concerned re-zoning and precincts in geographic areas.
- 4.5 A Submission Point Pathway Report (**SPPR**) was prepared for each hearing topic showing the allocation of submissions to that topic.
- 4.6 The SPPR for Topic 081 categorised submissions according to themes, topics and subtopics based on the geographic areas to which the

submissions related.

- 4.7 The IHP published a Parties and Issues Report for each hearing topic which included information on the matters included in the topic, key dates, preparing evidence and the hearing process. The Parties and Issues Report for Topic 081 included a diagram of the geographic area groupings from the SPPR. This diagram is **Appendix A** to this statement of claim.
- 4.8 Hearings on submissions were held before the IHP in respect of each hearing topic between September 2014 and May 2016. Some of the topics were heard together because of logical connections between the topics.
- 4.9 Following the hearings the IHP delivered its recommendations on the PAUP to the Council on 22 July 2016 in accordance with s 144 LGATPA (**the IHP's Recommendations**).
- 4.10 On 19 August 2016 in accordance with s 148 LGATPA the Council publicly notified its decisions on the IHP's Recommendations.

## 5. **Plaintiff's IHP Submissions**

- 5.1 On 19 February 2014 the plaintiff lodged a primary submission (#1667) with the IHP in respect of the PAUP as notified on 30 September 2013 including submissions concerning zone rules and seeking rezoning in the Takapuna area where the plaintiff resides.
- 5.2 Subsequently the plaintiff filed further submissions (#507).
- 5.3 The plaintiff's submission points concerning rezoning were allocated to hearing topic 081 in the SPPR. Within the Topic 081 the SPPR allocated the plaintiff's submissions to the subtopic Takauna, Milford & Smales Farm. The Submission Point Pathway Report is relied on by the plaintiff as if set out *in extenso*.
- 5.4 The plaintiff subsequently attended mediation sessions, appeared before the IHP, presented evidence and made oral submissions in support of his written submissions at hearings for topic 081 on 28 April 2016.

## 6. **The IHP's Recommendations to the Council**

- 6.1 The IHP's recommendations to the Council comprised three parts:

- a) Part 1 - The IHP's report which set out its recommendations and purported to set out its reasons for the recommendations of the IHP;
- b) Part 2 - The IHP's recommended version of the Unitary Plan provisions;
- c) Part 3 – The IHP's recommended version of the Unitary Plan maps, presented in GIS viewer  
(<https://unitaryplanmaps.aucklandcouncil.govt.nz/uprecommendation/>).

6.2 Part 1 of the IHP's Recommendations comprised:

- a) an overview report which explained the IHP's overall approach and direction; the main changes to the Unitary Plan in terms of plan structure and major policy shifts and the IHP's approach to interpreting the scope of submissions and to meeting section 32AA RMA reporting requirements (**the Overview Report**);
- b) reports on the individually numbered hearing topics numbered 001 to 081 or groups of hearing topics providing recommendations and purporting to provide reasons for the recommendations.

6.3 The Overview Report addressed (at 2.2) the requirements of section 32AA RMA:

The Panel is required to include in its recommendations a further evaluation of the proposed Auckland Unitary Plan in accordance with section 32AA of the Resource Management Act 1991. **This evaluation is only for the changes that the Panel recommends be made and is undertaken at a level of detail that corresponds to the scale and significance of the changes.**

The entire hearing process and the Panel's deliberations have constituted its review for the purposes of section 32AA of the Resource Management Act 1991. The hearing sessions for each topic enabled the Panel to test possible amendments to the provisions of the Unitary Plan as notified.

The Panel's evaluation is based primarily on the Council's original section 32A report, any section 32AA evaluation provided by Council or other submitters during the course of the hearings, and the information and analysis contained in submissions, responses and questions, and supporting evidence presented to the hearings.

During this process the Panel issued interim guidance on the topics for the regional policy statement and certain other topics. Submissions and evidence at subsequent hearings sessions included responses to that guidance and this has also been considered by the Panel.

For certain topics (residential and business capacity, the provisions for the

Waitākere Ranges, and the assessment of the volcanic viewshafts) the Panel directed that certain specific investigations be undertaken and reported on, and has taken these reports into account. Copies of the reports are available on the Panel's website.

**The Panel's evaluation is contained in the body of its recommendation report for each topic where changes are proposed to the Unitary Plan as notified. A summary of the main changes recommended by the Panel is contained in this Overview and is part of but not the full evaluation.**

(Emphasis added)

- 6.4 The IHP's reports on the individually numbered hearing topics included a report entitled "*Changes to the Rural Urban Boundary, rezoning and precincts*" which provided recommendations and purported to provide reasons for the recommendations in relation to hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas) (**the IHP's Rural Urban Boundary, Rezoning and Precincts Report**).

## 7. The Rural Urban Boundary Rezoning and Precincts report

- 7.1 The IHP's Rural Urban Boundary, Rezoning and Precincts Report set out (at page 4) the requirements in terms of s144(8)(c)(i) and (ii) LGATPA that report must include the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to the provisions of the proposed plan to which they relate or the matters to which they relate.
- 7.2 The IHP's Rural Urban Boundary, Rezoning and Precincts Report stated (page 4) that:

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.

(Emphasis added)

7.3 Further the IHP's Rural Urban Boundary, Rezoning and Precincts Report stated (page 5) that:

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.

7.4 The IHP's Rural Urban Boundary, Rezoning and Precincts Report addressed:

- a) issues of capacity (page 18);
- b) constraints (page 18);
- c) residential zoning (page 19);
- d) business zoning (page 20);
- e) countryside living (page 21).

7.5 However the IHP's Rural Urban Boundary, Rezoning and Precincts Report failed to adequately provide reasons in terms of s144(8)(c)(i) and (ii) LGATPA for accepting or rejecting submissions whether by grouping submissions according to the provisions of the proposed plan to which they relate or the matters to which they relate or otherwise.

7.6 The IHP's Rural Urban Boundary, Rezoning and Precincts Report included significant changes from the notified PAUP.

7.7 The IHP's Rural Urban Boundary, Rezoning and Precincts Report and the Overview Report failed to record any section 32AA RMA evaluation in sufficient detail to demonstrate that a further evaluation was undertaken in accordance with s 32AA RMA that corresponded to the significance of the zoning changes.

## 8. Council's Decisions on the IHP's Recommendations

8.1 The Council's decisions on the IHP's Recommendations included:

- a) the Council's decisions report (**the Decisions Report**); and

- b) a GIS maps viewer  
(<https://unitaryplanmaps.aucklandcouncil.govt.nz/upproposed/>).

- 8.2 In relation to rezoning the Decisions Report divided the recommendations contained in the IHP's Rural Urban Boundary Rezoning and Precincts Report into separate geographical areas described as "the South", "the West", "Rodney", "Central" and "the North".
- 8.3 The geographic area described as "the North" included Takapuna, Milford and Smales Farm.
- 8.4 At paragraph 51.1 of the Decisions Report the Council accepted all the IHP's Rezoning Recommendations as they relate to "the NORTH" except as listed at paragraph 51.2. None of the exceptions listed at paragraph 51.2 relate to rezoning in Takapuna.

9. **Grounds of Review – The IHP's Rezoning Recommendations Report**

The plaintiff repeats paragraphs 1 to 8 above and says further as follows.

- 9.1 The IHP's Rural Urban Boundary, Rezoning and Precincts Report constitutes the exercise of a statutory power which contained errors of law which materially affect the rights and interests of the plaintiff.

***Error of law - failure to provide adequate reasons***

- 9.2 In issuing the Rural Urban Boundary, Rezoning and Precincts Report the IHP erred in failing to provide adequate reasons in terms of s 144(8)(c) LGATPA for accepting or rejecting submissions as they relate to the Takapuna, Milford and Smales Farm area whether or not it addressed the submissions by grouping them according to:
- a) the provisions of the proposed plan to which they relate; or
  - b) the matters to which they relate.
- 9.3 Further the IHP in issuing the Rural Urban Boundary, Rezoning and Precincts Report erred in failing to provide adequate reasons for accepting or rejecting submissions as they relate to the Takapuna, Milford and Smales Farm to render rights of appeal to the High Court on questions of law effective. The IHP's failure to provide adequate reasons constitutes

procedural unfairness and a breach of the natural justice rights of submitters.

***Error of Law – Misinterpretation of s 144(8)(c) LGATPA***

9.4 In issuing the Rural Urban Boundary, Rezoning and Precincts Report on the basis that reasons were provided in terms s 144(8)(c)(i)-(ii) LGATPA, the IHP misinterpreted s 144(8)(c)(i)-(ii) which on its proper interpretation required the IHP to meaningfully:

- a) group submissions in terms of the provisions of the proposed plan or matter to which they relate; and
- b) provide reasons for accepting or rejecting submissions in terms of the grouping adopted by the IHP.

***Error of Law - Failure to Comply with S 32AA RMA***

9.5 The IHP's Rural Urban Boundary, Rezoning and Precincts Report and the Overview Report failed to record any section 32AA RMA evaluation in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with s 32AA RMA.

10. ***Relief Sought***

10.1 The plaintiff seeks:

- a) An order quashing or setting aside the IHP's recommendations as they relate to the Takapuna area.
- b) An order that the matter be remitted back to the Council for a re-hearing and reconsideration of submissions relating to the Takapuna area.
- c) Such further and/or alternative orders as the Court thinks fit;
- d) Costs.

11. ***Grounds for Review - the Decisions Report***

The plaintiff repeats paragraphs 1 to 8 above and says further as follows.

11.1 The Decisions Report constitutes the exercise of a statutory power of decision which contained errors which materially affect the rights and

interests of the plaintiff.

***Error of Law - Adoption of IHP Report***

11.2 The Council erred in accepting the IHP's Rural Urban Boundary, Rezoning and Precincts Report in paragraph 51.1 of the Decisions Report where those recommendations did not:

- a) provide adequate reasons in terms of s 144(8)(c) LGATPA for accepting or rejecting submissions as they relate to the Takapuna, Milford and Smales Farm area;
- b) provide adequate reasons for affected persons to understand the basis for those recommendations;
- c) correctly interpret s 144(8)(c) LGATPA;
- d) comply with the requirements of s 32AA RMA.

12. ***Relief Sought***

12.1 The plaintiff seeks:

- a) An order quashing or setting aside the IHP's recommendations as they relate to the Takapuna area.
- b) An order that the matter be remitted back to the Council for a re-hearing and reconsideration of submissions relating to the Takapuna area.
- c) Such further and/or alternative orders as the Court thinks fit;
- d) Costs.

This document is filed by Timothy Goulding, solicitor for the plaintiff, of the firm of Daniel Overton & Goulding. The address for service of the plaintiff is at the offices of Daniel Overton & Goulding, 33 Selwyn Street, Onehunga, Auckland.

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

1. Posted to Tim Goulding, Daniel Overton & Goulding, PO Box 13-017 Onehunga, Auckland 1643.
2. Transmitted to the solicitor by fax to 09 6222 555
3. E-mailed to the solicitor at [tim@doglaw.co.nz](mailto:tim@doglaw.co.nz)

# Appendix A

Diagram 1: Rezoning and Precincts – Geographic: Area Groupings

