

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

**CIV-2016-**

**UNDER** the Judicature Amendment Act 1972

**AND**

**IN THE MATTER** of an application for review under section 159 of the Local Government (Auckland Transitional Provisions) Act 2010

**IN THE MATTER** of Proposed Plan Hearing Topic 081 - Rezoning and Precincts (Geographic areas)

**BETWEEN** **BUNNINGS LIMITED**, a registered company having its office at 78 Carbine Road, Mount Wellington, Auckland

**Plaintiff**

**AND** **THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL**, a statutory body established by section 161 of the Local Government (Auckland Transitional Provisions) Act 2010

**First Defendant**

**AND** **AUCKLAND COUNCIL**, a unitary authority established by section 6 of the Local Government (Auckland Council) Act 2009, having its public office at 135 Albert Street, Auckland

**Second Defendant**

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**STATEMENT OF CLAIM**

**16 SEPTEMBER 2016**

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## THE PLAINTIFF BY ITS SOLICITOR SAYS:

### INTRODUCTION

#### Parties

1. The Plaintiff is a registered company having its office at 78 Carbine Road, Mount Wellington, Auckland. The Plaintiff owns and operates numerous building improvement and outdoor living stores throughout New Zealand.
2. The First Defendant is a statutory body appointed by the Ministers of Environment and Conservation and established pursuant to section 161 of the Local Government (Auckland Transitional Provisions) Act 2010 ("**LGATPA**").
3. The Second Defendant is a unitary authority established under section 6 of the Local Government (Auckland Council) Act 2009, having its public office at 135 Albert Street, Auckland.
4. The Second Defendant has jurisdiction in respect of the preparation of planning instruments under the Resource Management Act 1991 ("**RMA**") and the LGATPA, in particular in relation to the Proposed Auckland Unitary Plan ("**Unitary Plan**").

#### Proposed Auckland Unitary Plan

5. The Plaintiff owns 2.8ha of land at 21 Fred Taylor Drive, on the corner of Fred Taylor Drive and Te Oranui Way, at which it has resource consent to construct a Bunnings Warehouse ("**Site**").
6. The primary access for the Site is via Te Oranui Way. Te Oranui Way is one of the four arms of the roundabout intersection of Fred Taylor Drive and Don Buck Road ("**Roundabout**"). Te Oranui Way is also used to service the existing Pak'n'Save and provide a link through to the adjoining mall.
7. Immediately to the west of the Site and adjacent to the Roundabout is an area of approximately 600ha of greenfields land, known as Redhills ("**Redhills Area**"). The Redhills Area is bordered by Fred Taylor Drive and Don Buck Road to the east, Redhills Road to the south and west and Henwood Road to the north, with the exception of a small portion that

extends north of Henwood Road, between the Ngongotepara Stream and Fred Taylor Drive up to the northern cadastral boundary of 132-140 Fred Taylor Drive (opposite Northside Drive).

8. The Second Defendant notified the Unitary Plan on 30 September 2013 ("**Notified Plan**").
9. Under the Notified Plan, the Site was part of the Westgate Precinct. The Redhills Area was zoned Future Urban.
10. The Plaintiff filed submissions in relation to its landholdings in the Westgate Precinct.
11. Two submitters (Hugh Green Limited and Westgate Partnership, both landowners of part of the Redhills Area) sought residential zoning for the Redhills Area and a new precinct to be known as Redhills Precinct ("**Redhills Precinct**").
12. The original submissions on behalf of Hugh Green Limited and Westgate Partnership attached proposed precinct plans for the Redhills Precinct. Those proposed precinct plans each contained an indicative roading layout for the Redhills Area. However, neither proposed precinct plan showed any road with a direct connection to the Roundabout.
13. The Plaintiff did not file a further submission on the submissions for the proposed Redhills Precinct.
14. The submissions on the Unitary Plan were heard by the First Defendant. The submissions for the proposed Redhills Precinct were heard under Topic 081 Rezoning and Precincts - West.
15. The Second Defendant produced its evidence in relation to the submissions for the proposed Redhills Precinct on 26 January 2016. That evidence opposed the introduction of the proposed Redhills Precinct.
16. Hugh Green Limited and Westgate Partnership provided evidence to the First Defendant on 14 March 2016 in support of their submissions for the proposed Redhills Precinct. That evidence attached a materially different proposed precinct plan from that included in the original submissions, which included an arterial road connecting to the Roundabout.

17. Development of the Redhills Area with the new road alignment (including an arterial road connection to the Roundabout) will necessitate the closure of Te Oranui Way or, at the very least, a reduction in available movements to and/or from Te Oranui Way.
18. Any reduction in accessibility to or from Te Oranui Way would have significant impacts on the Plaintiff and on the efficient operation of the transport network.
19. The new road alignment shown on the precinct plan (including an arterial road connection to the Roundabout) was not a foreseeable consequent of the original submissions by Hugh Green Limited and Westgate Partnership.
20. The First Defendant was required to:
  - (a) deliver its recommendations report ("**Recommendation**") to the Council on 22 July 2016, pursuant to section 144 of the LGATPA; and
  - (b) within the Recommendation identify any recommendations that were beyond the scope of submissions, pursuant to section 144 (8)(a) of the LGATPA.
21. The First Defendant's Recommendation:
  - (a) recommended that the Redhills Precinct be incorporated into the Unitary Plan with a precinct plan as submitted in evidence with an arterial road connecting to the Roundabout; and
  - (b) failed to identify any matters as being out of scope.
22. A copy of the Recommendation was made publicly available, including to the Plaintiff on 27 July 2016.
23. The Second Defendant released its Decisions on the Unitary Plan on 19 August 2016. In the Decision, the Second Defendant accepted the First Defendant's Recommendation that the Redhills Precinct be included in the Unitary Plan.

**FIRST CAUSE OF ACTION: WRONG LEGAL TEST**

24. The Plaintiff repeats paragraphs 1 to 23 above.
25. In making the Recommendation, the First Defendant acted pursuant to an error of law and in breach of section 144 LGATPA.

**Particulars**

- (a) Under section 144(8)(a) of the LGATPA, the First Defendant was required to:
- identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics.
- (b) The identification of any recommendations that are beyond the scope of submissions is a critical step that establishes substantive rights of appeal for affected persons.
- (c) In relation to the proposed Redhills Precinct the only relevant original submissions were from Hugh Green Limited and Westgate Partnership.
- (d) Those submissions did not seek a proposed road connecting to the Roundabout, let alone an arterial road serving the entire precinct.
- (e) There was no scope to introduce a precinct plan with an arterial road connecting to the Roundabout, with consequential closures or restrictions on existing connections to that Roundabout.
- (f) In making its Recommendation in relation to the proposed Redhills Precinct, the First Defendant:
- (i) applied the incorrect legal test; or
- (ii) misapplied the correct legal test.
- (g) As a consequence, the First Defendant failed to identify the amended proposed precinct plan as being out of scope.
- (h) Had the First Defendant applied the correct legal test, it would have identified the amended proposed precinct plan as being out of scope.

**The Plaintiff seeks:**

- (a) a declaration that the First Defendant made an error of law;
- (b) a declaration that the introduction of the amended proposed Redhills Precinct plan was outside the scope of submissions;
- (c) an order setting aside the Recommendation as it relates to whether the proposed Redhills Precinct Plan is within the scope of submissions, and substituting it with identification of the introduction of the proposed Redhills Precinct Plan as being beyond the scope of submissions;
- (d) such other orders as the Court thinks appropriate; and
- (e) costs.

This document is filed by **BRONWYN SHIRLEY CARRUTHERS**, solicitor for the Plaintiff, of Russell McVeagh. The address for service of the Applicant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

Documents for service may be left at that address 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.