

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

CIV-2016-AKL-

IN THE MATTER of the Local Government (Auckland
Transitional Provisions) Act 2010
(**LGATPA**) and the Resource
Management Act 1991 (**RMA**)

AND

IN THE MATTER of an application for Judicial Review
under the Judicature Amendment Act
1972, in respect of statutory powers of
decision by Auckland Council under
LGATPA and RMA

BETWEEN

**NORTH EASTERN INVESTMENTS
LIMITED and HERITAGE LAND
LIMITED (NEIL)** a company
incorporated under the Companies Act
1993 having its registered office at
196 Broadway Avenue Palmerston
North
Appellant

AND

AUCKLAND COUNCIL a unitary
territorial authority under the Local
Government (Auckland Council) Act
2009
Respondent

APPLICATION FOR JUDICIAL REVIEW

Dated: 16 September 2016



Cooper Rapley Lawyers

227-231 Broadway Avenue

PO Box 1945

Palmerston North

DX PP80001



John W Maassen

06 353 5210



06 356 4345



jmaassen@crlaw.co.nz

APPLICATION FOR JUDICIAL REVIEW

The Plaintiff says:

GENERAL BACKGROUND

- [1] North Eastern Investments Limited and Heritage Land Limited, jointly referred to as “NEIL”, are both duly incorporated companies having their registered offices at Palmerston North.
- [2] NEIL is the owner of land at 56 Fairview Avenue, Albany and 139 Oteha Valley Road, Albany comprising approximately 7.8 ha (NEIL’s land).
- [3] Auckland Council is a local authority under the Local Government Act 2002 and has statutory responsibilities under the Resource Management Act 1991 (RMA) for district and regional planning. Auckland Council’s planning obligations are also addressed in the Local Government (Auckland Transitional Provisions) Act (LGATPA) that, amongst other things, under Part 4 specified the “Process for Development of First Combined Plan for Auckland Council”.
- [4] This claim relates to the exercise of statutory functions and statutory powers by Auckland Council in the preparation of the combined planning instrument known as the Proposed Auckland Unitary Plan (PAUP) under the RMA and the LGATPA.
- [5] The Auckland Council notified the PAUP on or about September 2013 and the PAUP was open for submissions in accordance with Schedule 1 of the RMA from 30 September 2013 to July 2014.
- [6] NEIL lodged submissions to the PAUP on or about 28 February 2014 which is identified as Submission No. 857.
- [7] NEIL sought re-zoning of NEIL’s land (as well as 131 Oteha Valley Road owned by Auckland Council and 135 Oteha Valley Road owned by Auckland Transport) to Terraced Housing and Apartment Buildings (THAB) and Mixed Use in its submission. This was dealt with under Topic 81 – Precincts and Re-zoning of the PAUP process. NEIL also proposed a precinct for its land (as well as 135 Oteha Valley Road owned by Auckland Transport) known as Albany 5 which would provide additional guidance in

relation to the development of the land. This was dealt with under Topic 81-Precincts and Re-zoning. The land the subject of the submission by NEIL is approximately 8 ha (the subject land).

PART 1 OF APPLICATION FOR REVIEW – BREACH OF STATUTORY DUTY

Background to Part 1 of the application for review

- [8] The Independent Hearings Panel in its Precincts decision (Annexure 4: Precincts North) dated July 2016 at pp 158 – 160 decided that the subject land should be zoned THAB. In section 3 in the penultimate paragraph of that section, the Independent Hearings Panel said:

The Panel has instead agreed with the submitter that a more intensive zoning is appropriate and has recommended that the entire 8ha site be zoned Residential-Terrace Housing and Apartment Building Zone. Proposed Building Mixed Use Zone for a portion of the land is not supported in this location which is relatively close to but physically separated from the nearby metropolitan centre at Albany. If any future specific proposal seeks to exceed the height provisions of that zoning the Panel considers that such a proposal would need to be contested by resource consent application.

- [9] The Auckland Council Decision dated 19 August 2016 (duly notified) states the following in respect of the recommendation in Topics 80 and 81 at clause 50.1:

50.1 The Council has accepted all the recommendations of the Panel contained in the Panel reports for Hearing Topic 080 Rezoning and precincts (General), and 081 Rezoning and precincts (Geographic areas) and 016 and 017 – Rural urban boundary and Annexures 1 – 6, July 2016 – (recommendations in RODNEY), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps except as listed below at paragraph 50.2.

- [10] Auckland Council listed no rejections to recommendations of the IHP relevant to the subject land.
- [11] Despite the above, the planning maps issued by the Council in accordance with its decision showed the land zoned Mixed Housing Urban, not THAB.
- [12] When queried on this matter, the Auckland Council advised by email to NEIL on 31 August 2016 the following:

I've had some discussions with colleagues this morning regarding your concern as to where you might find the information where Council rejected the recommendations of the IHP. What I have discovered is that, **there were some rejections Council made that did not follow with a report as to why they were made.** There may also be issues where Council supported the IHP recommendations and that may not have been picked up. Council is working through a process to identify and resolve these issues.

In the meantime, there is a plan change underway in March 2017, where some of these issues may be addressed. Further, you might consider lodging an appeal, this gives you an opportunity to be heard again.

Apologies for not being able to assist you further. If there is anything more we can do, please do not hesitate to contact the Unitary Plan helpdesk. (Emphasis added)

- [13] A subsequent email from the Auckland Council on 7 September 2016 said the following:

After reviewing the Panel's recommendations and the zoning shown in the Decisions Version of the GIS Viewer, the Council has decided to correct the errors pursuant to clause 16(2) of the First Schedule to the Resource Management Act 1991. For clarity, the zoning to the above properties will be changed to reflect the "Residential –Terrace Housing and Apartment Buildings" zoning recommended by the Panel within its report addressing those properties.

The Council will be publishing a list of all the clause 16 corrections made to the Decisions Version of the Proposed Auckland Unitary Plan during the week of 12 September 2016. That list will be available on the Unitary Plan modifications webpage at...

- [14] Auckland Council advised NEIL's Barrister, Asher Davidson, on 15 September 2016, that contrary to previous emails they would not amend the zoning of 135 Oteha Valley Road to THAB on the basis of advice received from Auckland Transport (AT) that the land was not within the precinct sought by NEIL. This advice was incorrect.

Relevant statutory provisions relating to Part 1 of the application for review

- [15] Auckland Council had an obligation to consider the IHP's recommendations and notify decisions on them pursuant to LGATPA.
- [16] LGATPA, s 152 says that the notified decisions of Auckland Council have the following consequences as set out in sub-section 2:

- (2) Each part of the proposed plan, other than the parts relating to the coastal marine area, designations, and heritage orders,—
- (a) is amended in accordance with the decisions of the Council; and
 - (b) is deemed to have been approved by the Council under clause 17(1) of Schedule 1 of the RMA on and from—
 - (i) the date on which the appeal period expires, if no appeals relating to that part of the proposed plan are made under section 155 of this Part;
 - (ii) the date on which all appeals, including further appeals, relating to that part of the proposed plan are determined, if appeals are made under that section.

Grounds for review under Part 1 of the application for review

[17] Auckland Council has made the following errors of law:

- (a) It has not amended the PAUP planning maps in accordance with its notified decision dated 19 August 2016; and
- (b) It has erroneously considered it has a discretion to amend its notified decision dated 19 August 2016 to accept the recommendations of the IHP as they relate to the subject land.

PART 2 OF THE APPLICATION FOR REVIEW – BREACH OF STATUTORY DUTY

Background for Part 2 of the application for review

[18] By direction, dated 3 December 2015, from the Chairperson of the IHP, (Judge David Kirkpatrick), Auckland Council was required to address three questions in relation to all precincts sought by submitters, including NEIL's requested precinct identified as Albany 5.

[19] Auckland Council purported to answer the direction by memorandum from John Duguid (General Manager, Plans and Places), dated 11 December 2015. That memorandum did not address Albany 5.

[20] After NEIL's Hearing before the IHP on Precincts and Re-zoning the IHP requested further information which NEIL filed electronically on 28 April 2016. This further information was incorrectly filed by AC under another submitter (Save our Saint Heliers Incorporated and Saint Heliers /

Glendowie Residents' Association Incorporated (EAST)) rather than North Eastern Investments Limited (NORTH) and was not considered by the IHP until on or about 29 June 2016 (if at all); and

Relevant statutory provisions for Part 2 of the application for review

[21] Auckland Council had a statutory duty pursuant to LGATAP, s 127(1)(l) to provide information requested by the IHP.

Grounds for Part 2 of the application for review

[22] Auckland Council failed in its statutory duty to comply with directions of the IHP and provide the IHP with relevant information in relation to Albany 5 with the following consequences.

- (a) The IHP was not properly informed of the purpose of the precinct (Albany 5); and
- (b) The IHP did not have timely information as to the features of the precinct that would assist the achievement of the purpose of the RMA, in addition to a zone available in the zoning typologies of the PAUP.

PART 3 OF THE APPLICATION FOR REVIEW – IMPROPER PURPOSE

Background in respect of Part 3 application for review

[23] AT is a Auckland Council controlled organization under Part 5 of the Local Government Act 2002 with specific modifications established under the provisions of Part 4 of the Local Government (Auckland Council) Act 2009 as amended in 2010. Part 4 of the Local Government (Auckland Council) Act 2009 was inserted by the Local Government (Auckland Council) Amendment Act 2010, section 31. At is responsible for all local roading and public transport activities in Auckland formerly performed by territorial authorities and the Auckland Regional Transport Authority. Auckland Council fully funds the operational requirements of Auckland Transport.

[24] At all material times, AT sought a designation over 56 Fairview Avenue and 131 and 135 Oteha Valley Road for the purpose of enabling a public work known as the Medallion Drive Link which would be a public road

connecting Fairview Avenue with Oteha Valley Road. The designation had been approved at a Council hearing and the notice of requirement was subject to an appeal before the Environment Court in ENV-2014-AKL-003.

[25] If, in accordance with the designation, AT acquired the designated land from NEIL, then it would be obliged to acquire that land and pay compensation in accordance with the Public Works Act 1981.

[26] At all material times, NEIL sought resource applications to facilitate Intensive Residential Development and Mixed Use Development on parts of its land, and those applications were before the Environment Court ENV-2009-AKL-434.

[27] Auckland Council stood to benefit from the following actions:

- (a) Zoning the land so that its development potential was not optimized; and
- (b) Introducing methods that did not support the application by NEIL.

[28] The benefits described in [26] above included:

- (a) Reducing the amount that would be payable by way of compensation for the acquisition of the designated land required for the Medallion Drive Link; and
- (b) Maximising the time available to acquire the land in view of the relationship of the Medallion Drive Link and the proposed development by NEIL.

Relevant statutory provisions

[29] The statutory function of, and requirements for planning instruments, including the PAUP, are contained in Part 5 of the RMA. All local authorities exercising functions under the RMA are required to perform those functions in accordance with Part 5 of the RMA with the purpose of achieving the overarching purpose of the RMA in Part 2. This obligation extended to Auckland Council in preparing a combined plan in accordance with LGATPA.

[30] Under the LGATPA Auckland Council had the function of assisting the IHP, including providing relevant information pursuant to LGATPA, s 137 in order for the IHP to provide reports and recommendations to Auckland Council as to how best to achieve its functions under Part 5 of the RMA in the PAUP.

Grounds for Part 3 of the application for review

[31] Auckland Council in performing its functions under the RMA and the LGATPA have a purpose that was foreign to those purposes and functions in the enabling legislation. In particular, the purpose of:

- (a) Minimising AT's liability to NEIL for compensation and acquiring the land necessary to construct the Medallion Drive Link; and
- (b) Delaying AT's liability to construct the Medallion Drive Link in a manner that fitted with NEIL's applications for resource consent for Intensive Residential and Mixed Use Development on NEIL's land.

Particulars for Part 3 of the application for review

[32] Particulars of Part 3 of the application for review include:

- (a) AT proposed 20 years for its Notice of Requirement for the Medallion Drive Link in 2012 and proposed taking approximately 9000m² of land in circumstances where:
 - (i) AT had previously advised the Environment Court in ENV-2010-AKL-177 that it had budgeted for the Medallion Drive Link in its annual planning process;
 - (ii) The area of 9000m² of land was significantly greater than the amount required to construct the Medallion Drive Link; and
 - (iii) AT and its predecessor Auckland Council had sought agreement from NEIL on the Medallion Drive Link on the basis later demonstrated to be false, that the Medallion Drive Link would be constructed to facilitate NEIL's

proposed Intensive Residential and Mixed Use development.

- (b) AT in making a decision in the Notice of Requirement documented in its decision making process the desirability of insuring the Notice of Requirement was finalized before the resource consent applications by NEIL were determined.
- (c) In the draft PAUP proposing that NEIL's land be zoned Single Housing in circumstances where:
 - (i) Such a proposal failed to take into account existing zoning rights which included a Mixed Use zone.
 - (ii) The zoning most appropriate based on the zoning typologies in the PAUP for land to enable NEIL's development was THAB and Mixed Use;
 - (iii) The development that NEIL proposed for Intensive Residential Development and Mixed Use Development had been confirmed by Auckland Council's Policy Planner, Mr Reidy, in Environment Court decision [2011] NZEnvC 082 as appropriate for the site;
 - (iv) Auckland Council experts for zoning and master planning had filed Joint Witness Statements in ENV-2009-AKL-434 that supported the scale, character and intensity of development that corresponded with THAB and Mixed Use between 2010 and 2012;
 - (v) Auckland City required intensive housing development in locations close to key transport routes, and this site achieved that;
 - (vi) Auckland Council by resolution on 18 May 2012 supported in principle development on NEIL's land that had a character, scale and intensity that was consistent with what would be enabled by THAB and Mixed Use zoning with additional height under the PAUP;

- (vii) Auckland Council advised the Environment Court of its decision in (iv) by memorandum dated July 2012 in ENV-2009-AKL-434;
 - (viii) In proceeding ENV-2009-AKL-434, Auckland Council advised the Environment Court that consent orders enabling Intensive Residential and Mixed Use were anticipated and that expectation was recorded in a decision [2012] NZEnvC 266;
 - (ix) The Auckland Transport Corridor Management Plan, dated 22 December 2014 (draft 16 December 2013) identified the site for intensive residential development.
- (d) In response to NEIL's request to notify the PAUP with NEIL's land zoned as THAB and Mixed Use, Auckland Council rezoned the land as Mixed Housing Urban and Mixed Housing Suburban and despite the factors listed in 31(a)(i)-(iv) above and despite the following factors:
- (i) The feedback on the Draft Unitary Plan of NEIL was supported by the NZ Institute of Architects, Urban Design Forum and, Konstrukt Architects; and
 - (ii) Auckland Council did not carry out a s 32 analysis in respect of the zoning of the site.
- (e) Auckland Council filed irrational evidence proposing the THAB and Mixed Use zoning and Precinct Albany 5 including as pleaded in [34] and [35] of this statement of claim.
- (f) Auckland Council failed to advise the IHP of the decision of the Environment Court in [2016] NZEnvC 073 in its closing submissions.

PART 4 OF THE APPLICATION FOR REVIEW – IRRATIONALITY AND UNREASONABLENESS

Background in respect to Part 4 of the Application for Review

[33] In addition to the matters addressed in Part 3 of the Application for Review, the Auckland Council relied on the evidence of Ms Conner and Mr Patience.

Grounds for Part 4 of the Application for Review

[34] The evidence of Ms Conner was based on the premise that Mixed Use zoning may be appropriate once the status of Medallion Drive Link had been established but could not be supported until that issue was resolved. This was irrational because NEIL's land that was sought to be Mixed Use had frontage to Oteha Valley Road and did not rely on the Medallion Drive Link.

[35] The evidence of Mr Patience was that there was insufficient evidence to demonstrate the appropriateness of the effects of the additional height requested in the precinct despite those matters listed in [32](c) of this statement of claim. In addition, Mixed Use was already part of the zoning of the subject land and Auckland Council had recommended those rights be transferred to that part of NEIL's land on Oteha Valley Road as recommended by a consultancy report from Kingston Morrison Report dated 2002. The opinion was irrational.

[36] The reliance by Auckland Council in the evidence of Ms Conner and Mr Patience was similarly unreasonable and irrational.

PART 5 OF THE APPLICATION FOR REVIEW – FAILURE TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

Background to Part 5 of the Application for Review

[37] Ms Conner presented evidence as pleaded in [34] of this statement of claim. However before Auckland Council made a decision on 19 August 2016, the Environment Court had determined that the designation for the Medallion Drive Link should be granted in [2016] NZEnvC 073.

[38] Mr Patience presented evidence as pleaded in [35] of this statement of claim. However before Auckland Council made a decision on 19 August 2016, the Environment Court had determined NEIL's resource consent applications.

Grounds for Part 5 of the Application for Review

[39] The decisions of the Environment Court in [2016] NZEnvC 073 and [2016] NZEnvC 139 were relevant matters to consider by Auckland Council before making its decisions on the recommendations of the IHP and Auckland Council failed to have regard to those matters.

GENERAL PRAYER FOR RELIEF IN RESPECT OF ALL APPLICATIONS FOR REVIEW

[40] In respect of Part 1 of the Application for Review, NEIL seeks an order directing the planning maps to be amended in accordance with the decision of Auckland Council in respect of the subject land.

[41] In respect of all other parts of the Application for Review, the relief sought is individually or cumulatively, an order, quashing the decision of the Auckland Council and directing that NEIL's submission be re-heard by independent commissioners.

[42] NEIL seeks all other consequential and appropriate relief, including costs.

This document is filed by JOHN WILLIAM MAASSEN, Solicitor for the abovenamed Appellant of the firm CR LAW. The address for service of the abovenamed Appellant is 227 Broadway Avenue, Palmerston North.

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

- (a) Posted to the Solicitor at PO Box 1945, Palmerston North 4440, or
- (b) Left for the Solicitor at a document exchange for direction to DX PP80001, Palmerston North, or
- (c) Transmitted to the Solicitor by email to jmaassen@crlaw.co.nz.

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NOTICE OF PROCEEDING

Dated: 16 September 2016



Cooper Rapley Lawyers

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PO Box 1945

Palmerston North

DX PP80001



John W Maassen

06 353 5210



06 356 4345



jmaassen@crlaw.co.nz

NOTICE OF PROCEEDING

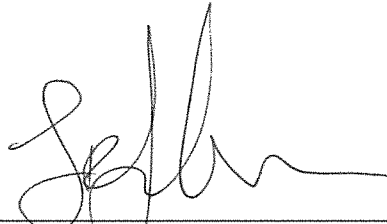
To: The Registrar, High Court, Auckland

And: Auckland Council

This document notifies you that you must file in this registry of the Court a statement of defence to the Plaintiff claim (a copy of which is served with this notice). You must do this within 25 working days after the date on which you have been served with this notice. If you do not, the Plaintiff may at once proceed to judgment on the Plaintiff's claim, and judgment may be given in your absence.

If a trial of the proceeding is necessary, it will be held in this Court at Auckland at a time to be fixed by the Court.

Date: 16 August 2016



John Russell Farquhar
On behalf of plaintiff

If you file a statement of defence in the Court, you must also provide the Plaintiff with initial disclosure of documents in accordance with rule 8.4.

If you file a statement of defence in the Court, you will be notified of the date and time of the first case management conference.

The purpose of the conference is to assist the parties in the just, speedy, and inexpensive determination of the proceeding, to make directions as to the conduct of the proceeding, and, where practicable, to make interlocutory orders. The parties will also be assisted to identify, define, and refine the issues in dispute.

You must prepare for and attend the first case management conference. You will be expected to have discussed with the Plaintiff the matters set out in Schedule 5 of the High Court Rules. You or your solicitor must file a memorandum relating to the procedural matters set out in rule 7.3 of the High Court Rules.

Date:

Registrar / Deputy Registrar

Note: Please carefully read the memorandum attached to this notice.

Memorandum

Advice

1. Although you do not have to employ a solicitor for the purpose of this application, it is recommended that you consult a solicitor about this matter immediately. However, a company or other corporation that wants to oppose this application or appear at any hearing must consult a solicitor immediately because:
 - (a) it can only carry on proceedings in the Court by a solicitor; and
 - (b) it cannot appear to conduct a proceeding except by counsel (unless there are exceptional circumstances).

Legal aid

2. If you cannot afford to meet the cost of the proceeding, you may be entitled to assistance under the Legal Services Act 2011 and regulations made under that Act.
3. The Plaintiff is not in receipt of legal aid for the purpose of this proceeding.

Statement of defence

4. If the last day for filing your statement of defence falls on a day on which the registry of the Court is closed, you may file your statement of defence on the next day on which that registry is open.
5. In calculating the time for filing your statement of defence you must disregard the period that commences with 25 December and ends with 15 January.
6. If you file a statement of defence, you must serve a copy of it on the Plaintiff and on any other defendant who has given an address for service. This must be done within the same period of time you have for filing the statement of defence.

Counterclaim

7. If you have a counterclaim against the Plaintiff, you must file a statement of that counterclaim in the registry of the Court, and serve it on the Plaintiff and on any other person against whom the same claim is made. This must be done within the same period of time you have for filing a statement of defence.

Witnesses

8. Summonses for the attendance of witnesses will be issued on application at the registry of the Court.

Registry hours

9. The registry hours of the Court are from 9 am to 5 pm, except on Court holidays.

Date:

Registrar / Deputy Registrar