

**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 Topics 050 - 054 City Centre and business zones

**BETWEEN** **STRAND HOLDINGS LIMITED**, a registered company having its office at 5a, 125 The Strand, Parnell, 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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**RUSSELL McVEAGH**\_\_\_\_\_

A A Arthur-Young / S H Pilkinton  
Phone +64 9 367 8000  
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PO Box 8  
DX CX10085  
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**THE PLAINTIFF BY ITS SOLICITOR SAYS:****Parties**

1. The Plaintiff is a registered company having its office at 5a, 125 The Strand, Parnell, Auckland. The Plaintiff owns the land at 117-133 The Strand, Parnell ("**Property**").
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 notification and determination of plan changes under the Resource Management Act 1991 ("**RMA**") and the LGATPA, in particular in relation to the Proposed Auckland Unitary Plan ("**Unitary Plan**").

**Plaintiff's Property**

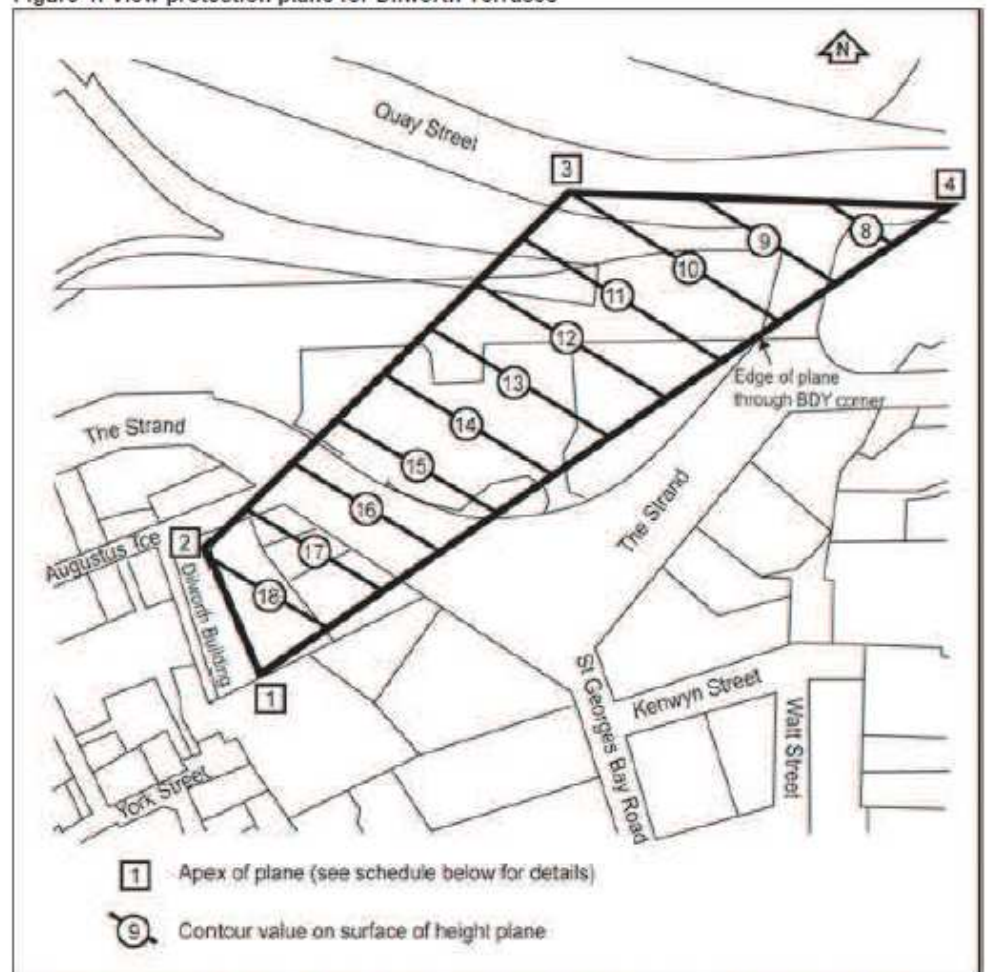
5. The Property includes the Saatchi & Saatchi Building, which is a large brick building constructed in 1911. The Plaintiff leases commercial office space in the Saatchi & Saatchi Building to various tenants.
6. The Plaintiff also owns and operates a carpark building on its Property. This building provides parking for tenants and customers of the Saatchi & Saatchi Building.

**Proposed Unitary Plan**

7. The Second Defendant notified the Unitary Plan on 30 September 2013 ("**Notified Plan**").
8. The Dilworth Terraces are a row of heritage houses at the top of the escarpment above The Strand.
9. The Notified Plan proposed the inclusion of the Dilworth Terraces View Protection Plane ("**Proposed Viewshaft**").

10. The purpose of the Proposed Viewshaft is to manage the scale of development on land affected by the Proposed Viewshaft, to protect the view of the Dilworth Terraces from Quay Street.
11. The Proposed Viewshaft is an overlay. The effect of the Proposed Viewshaft is that where a proposal will take place on land affected by the Proposed Viewshaft, it must comply with both the rules imposed by the Proposed Viewshaft and the rules of the relevant underlying zone.
12. The Proposed Viewshaft originates from identified locations on the eastern end of Quay Street.
13. The Proposed Viewshaft from the Notified Plan is set out below.

Figure 4: View protection plane for Dilworth Terraces



Showing maximum allowable building height above mean sea level (L&S Auckland Datum 1946)

14. Under the Notified Plan:
  - (a) The Plaintiff's Property was zoned Light Industrial.

- (b) The Saatchi & Saatchi Building was scheduled as:
- (i) Historic Heritage Extent of Place - 1889, NZ Loan and Mercantile Wool Store (The Strand Building Commercial); and
  - (ii) Historic Heritage Place - 1889, NZ Loan and Mercantile Wool Store (The Strand Building Commercial).
- (c) The Plaintiff's Property was not affected by the Proposed Viewshaft.

### **Submissions on Proposed Viewshaft**

15. The Plaintiff made a primary submission on the Notified Plan (submission 8938). That submission sought that the Property be re-zoned from Light Industry to Business Mixed-Use. The submission did not relate to the Proposed Viewshaft.
16. Ngati Whatua Whai Rawa Ltd ("**Whai Rawa**") owns most of the land in the Quay Park Precinct, which is affected by the Proposed Viewshaft.
17. Whai Rawa made a submission (submission 872, points 3 and 37) on the Proposed Viewshaft on 28 February 2014. That submission sought the following relief:
- That changes be made to the PAUP ... and in particular make provision for ... an amendment to the area affected by the Dilworth Terraces Special Height Plane. (**submission point 3**)
- ....
- The Dilworth Terraces View Protection Plane (I.4.4.6 and any associated assessment criteria) are reviewed and further investigated in accordance with Council's report and any resulting amendments to the relevant provisions, as a result of the further investigation be implemented. It is recommended that views from the Strand potentially be explored. (**submission point 37**)
18. On 11 June 2014, the Second Defendant publicly notified its summary of decisions requested by persons making submissions on the Notified Plan, pursuant to clause 7 of schedule 1 of the RMA.
19. The Second Defendant summarised Whai Rawa's submission on the Proposed Viewshaft as follows:

- (a) In relation to Whai Rawa submission point 3:

Refine the location and extent of the Dilworth Terraces Height Plane as it applies to the Quay Park precinct. Refer to page 3-4 of 11 volume 1 of submission for details.

- (b) In relation to Whai Rawa submission point 37:

Review and further investigate development control 4.6 'Dilworth Terraces View Protection Plane (and any associated assessment criteria) in accordance with Council's report and implement any resulting amendments to the relevant provisions. Also explore views from The Strand. Refer to details in submission at page 14/25 of volume 4.

20. Primary submissions on the Proposed Viewshaft were also made by New Zealand Historic Places Trust (Heritage New Zealand) Pouhere Taonga (submission 371); The Strand Bodies Corporate (submission 1615); Dilworth Body Corporate (submission 6152); and Charles R Goldie (submission 6496). None of those submissions sought that the origin of the Proposed Viewshaft be relocated.
21. Fifteen persons made further submissions on the primary submissions concerning the Proposed Viewshaft.
22. The Plaintiff did not make any further submissions, including on submissions relating to the Proposed Viewshaft.

**Procedure in relation to submissions that seek to modify site-specific provisions**

23. On 5 August 2014, the First Defendant issued Procedural Minute 6 ("**Minute 6**").
24. Minute 6 gave directions to the Second Defendant regarding (among other matters) submissions seeking re-zoning of specific sites and changes to overlays that may apply to those sites.
25. The First Defendant identified the following as relevant considerations in issuing the directions in Minute 6:
- (a) At paragraph 6:

...If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought and the basis on which they ought to be included in the Plan.

(b) At paragraph 8:

A key issue is whether someone might be taken by surprise by changes sought through the submission process, especially by submitters who are not the owner of the affected property.

(c) At paragraph 10:

Again subject to fuller consideration in any particular case, where the submission seeks to add an item not identified in the proposed Plan as notified or to modify an item in a substantial way, then a fundamental issue of procedural fairness is the extent to which the submission may directly affect a third party. Where a submission seeks to schedule land or buildings which are privately owned by someone other than the submitter, then the effects on that owner are likely to be such that we will need to be sure that the affected owner has an effective opportunity to participate before proceeding to a merits assessment. The submission and further submission process in Schedule 1 is not likely to be sufficient on its own to ensure adequate notice.

26. The First Defendant directed the Second Defendant to set out its approach to the categorisation of submissions on scheduled items, changes to the Rural Urban Boundary, rezoning and changes to precincts.
27. The Second Defendant provided the information requested by the First Defendant. In particular, where a submission related to land not owned by the submitter, the Second Defendant identified whether landowner support or approval for the relief requested had been provided with the submission.
28. In response to concerns raised about Minute 6, the First Defendant issued a revision of the Minute on 27 November 2014. That revision relevantly provided:

Environmental Defence Society (EDS) expressed a concern that this approach [in Minute 6] would give a landowner a veto over the consideration of a lawful submission. That is not correct: the submission will remain for consideration by the Panel. However, the Panel consider it relevant and important to know what effect the submission may have, and therefore regards the position of the landowner as a necessary part of its overall consideration.

### **Topic 050 hearing**

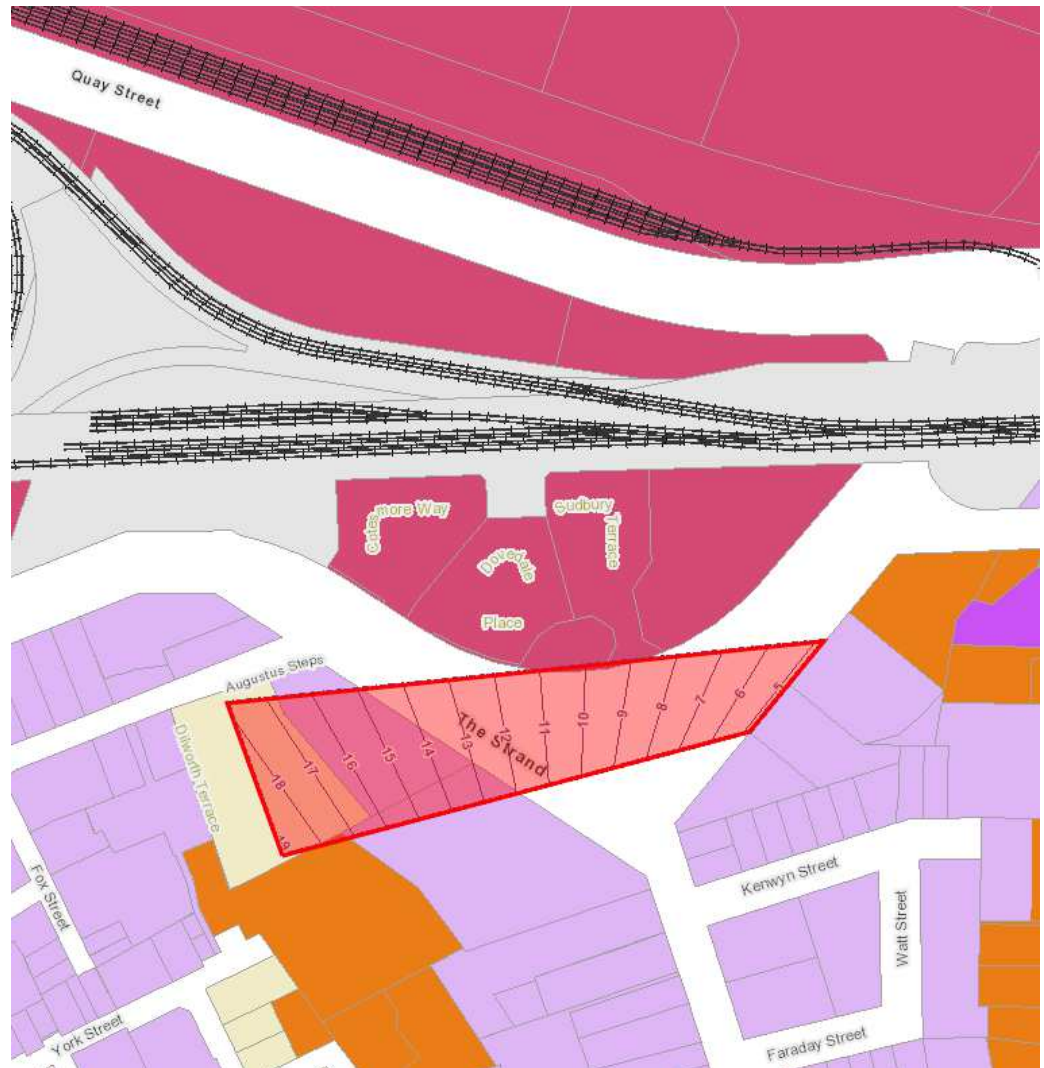
29. Submissions on the Notified Plan were heard by the First Defendant.

30. The submissions for the Proposed Viewshaft were heard under Topic 050 - City Centre hearing ("**Topic 050**"). The Topic 050 hearing was held between 7 - 13 May 2015.
31. In its legal submissions, Whai Rawa made three alternative requests in respect of the Proposed Viewshaft:
- (a) Deletion of the Proposed Viewshaft in its entirety, together with the inclusion of assessment criteria requiring consideration of additional views to the Dilworth Terraces houses throughout the proposed Quay Park Precinct.
  - (b) Relocation of the Proposed Viewshaft to The Strand, together with the assessment criteria discussed in (a) above.
  - (c) If the Proposed Viewshaft was to remain in its current location, the reduction in the width of the Viewshaft of 100m from its western end.
32. In its closing remarks, the Second Defendant confirmed that it supported the retention of the Proposed Viewshaft as per the Notified Plan.
33. It was acknowledged by Whai Rawa at the hearing that the Plaintiff's Property would be affected if the Proposed Viewshaft was relocated to The Strand.
34. It was also acknowledged by Whai Rawa at the hearing that the Plaintiff's Property would be the only land affected by the relocation of the Viewshaft that was not already affected by the Proposed Viewshaft in the Notified Plan.

### **Recommendations**

35. The First Defendant delivered its recommendations report to the Second Defendant on 22 July 2016, pursuant to section 144 of the LGATPA.
36. In respect of the Plaintiff's Property, the First Defendant recommended:
- (a) the Property be re-zoned to Business - Mixed-Use; and
  - (b) the Saatchi & Saatchi Building be registered on the Historic Heritage Extent of Place and Historic Heritage Place schedules.

37. In relation to the Proposed Viewshaft, the First Defendant recommended relocating the Viewshaft's origin point to The Strand, as set out below:



38. The First Defendant did not identify that recommendation as being out of scope.

#### **Decision on recommendation**

39. The Second Defendant released its decisions on the Unitary Plan on 19 August 2016 ("**Decision**").
40. In the Decision, the Second Defendant:
- (a) Accepted the recommendation that the Viewshaft be relocated to The Strand ("**Decisions Viewshaft**").



- (b) Accepted the recommendation that the Plaintiff's Property be re-zoned to Business - Mixed-Use.
41. The Decisions Viewshaft has a substantial effect on the Plaintiff's Property:
- (a) The height limit for the Property under the Business - Mixed-Use zone is 18m. The Decisions Viewshaft imposes a lower height limit on the northern portion of the Property, ranging from 12m on the Property's frontage to The Strand to approximately 17m on the Property's north-western boundary. Resource consent as a non-complying activity is required to infringe the height limit imposed by the Decisions Viewshaft.
  - (b) The portion of the Property affected by the Decisions Viewshaft represents approximately half of the remaining part of the Property that is available for future redevelopment. The Saatchi & Saatchi Building, which occupies the majority of the Property, is included on the Historic Extent of Place and Historic Heritage Place schedules.
  - (c) The overall result is that the development potential of the Property is significantly less than under the Notified Plan, because of the Decisions Viewshaft.
42. The Plaintiff did not become aware of the proposal to move the origin of the Proposed Viewshaft in a manner that would substantially affect its Property until after the First Defendant released its recommendations on the Unitary Plan.

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

43. The Plaintiff repeats paragraphs 1 to 42 above.
44. In making its recommendation regarding the Proposed Viewshaft, the First Defendant acted pursuant to an error of law and in breach of section 144 of the 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 Viewshaft, the only relevant submissions were from Whai Rawa (submission 872); New Zealand Historic Places Trust (Heritage New Zealand) Pouhere Taonga (submission 371); The Strand Bodies Corporate (submission 1615); Dilworth Body Corporate (submission 6152); and Charles R Goldie (submission 6496).
- (d) Those submissions did not seek the relocation of the origin of the Proposed Viewshaft in the manner of the Decisions Viewshaft.
- (e) The Plaintiff was not made aware of the proposal by Whai Rawa at the Topic 050 hearing to relocate the Proposed Viewshaft.
- (f) In making its recommendation on the Proposed Viewshaft, 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 Decisions Viewshaft as being out of scope.
- (h) Had the First Defendant applied the correct legal test, it would have identified the Decisions Viewshaft 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 Decisions Viewshaft was outside the scope of submissions;
- (c) an order pursuant to section 4(2) of the Judicature Amendment Act 1972 setting aside the recommendation as it relates to whether the Decisions Viewshaft is within the scope of submissions;
- (d) such other orders as the Court thinks appropriate; and
- (e) costs.

### **SECOND CAUSE OF ACTION: BREACH OF NATURAL JUSTICE**

- 45. The Plaintiff repeats paragraphs 1 to 42 above.
- 46. The Second Defendant's conduct resulted in a breach of the Plaintiff's right to natural justice.

#### **Particulars**

- (a) The Second Defendant's role in the Unitary Plan process was as architect, de facto respondent and decision-maker regarding the appropriate provisions for the Unitary Plan.
- (b) In exercising its powers through its various roles, the Second Defendant was obliged to act fairly, reasonably, and in a manner that did not have the effect of depriving a submitter of its rights to natural justice.
- (c) At the hearing of Topic 050, Whai Rawa made a proposal to relocate the origin of the Proposed Viewshaft to The Strand. Whai Rawa brought it to the attention of the First and Second Defendants that:
  - (i) the relocation of the Proposed Viewshaft would affect the Plaintiff's Property; and
  - (ii) the Plaintiff's Property was the only property affected by the proposed relocation that was not already affected by the Proposed Viewshaft in the Notified Plan.

- (d) The Second Defendant failed to ensure that the First Defendant was aware of the position of the Plaintiff as part of the overall consideration of the merits of the proposal to move the Proposed Viewshaft.
- (e) As such, the Second Defendant's conduct deprived the Plaintiff of its right to natural justice.
- (f) As a result, the First Defendant's recommendations regarding the Proposed Viewshaft were defective.
- (g) In accepting the defective recommendations, the Second Defendant's decision was invalid.

**The Plaintiff seeks the same relief as for the First Cause of Action.**

**THIRD CAUSE OF ACTION: IRRATIONALITY AND UNREASONABLENESS**

- 47. The Plaintiff repeats paragraphs 1 to 42 above.
- 48. In making the Decision, the Second Defendant made an irrational and unreasonable decision in accepting the recommendations of the First Defendant.

**Particulars**

- (a) The Plaintiff repeats the pleadings in paragraphs 44 and 46 above.
- (b) The Decision was further irrational and unreasonable, having regard to:
  - (i) The substantial effect the Decisions Viewshaft will have on the Plaintiff's Property.
  - (ii) Resource consents granted by the Second Defendant for development on The Strand which would prevent the Decisions Viewshaft from serving its intended purpose.

- (iii) The First Defendant not being aware of the Plaintiff's position on the proposal made at the hearing to move the Proposed Viewshaft.

**The Plaintiff seeks the same relief as for the First Cause of Action**

This document is filed by Allison Anne Arthur-Young, 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.

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**STATEMENT OF CLAIM**

**16 SEPTEMBER 2016**

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**RUSSELL McVEAGH**\_\_\_\_\_

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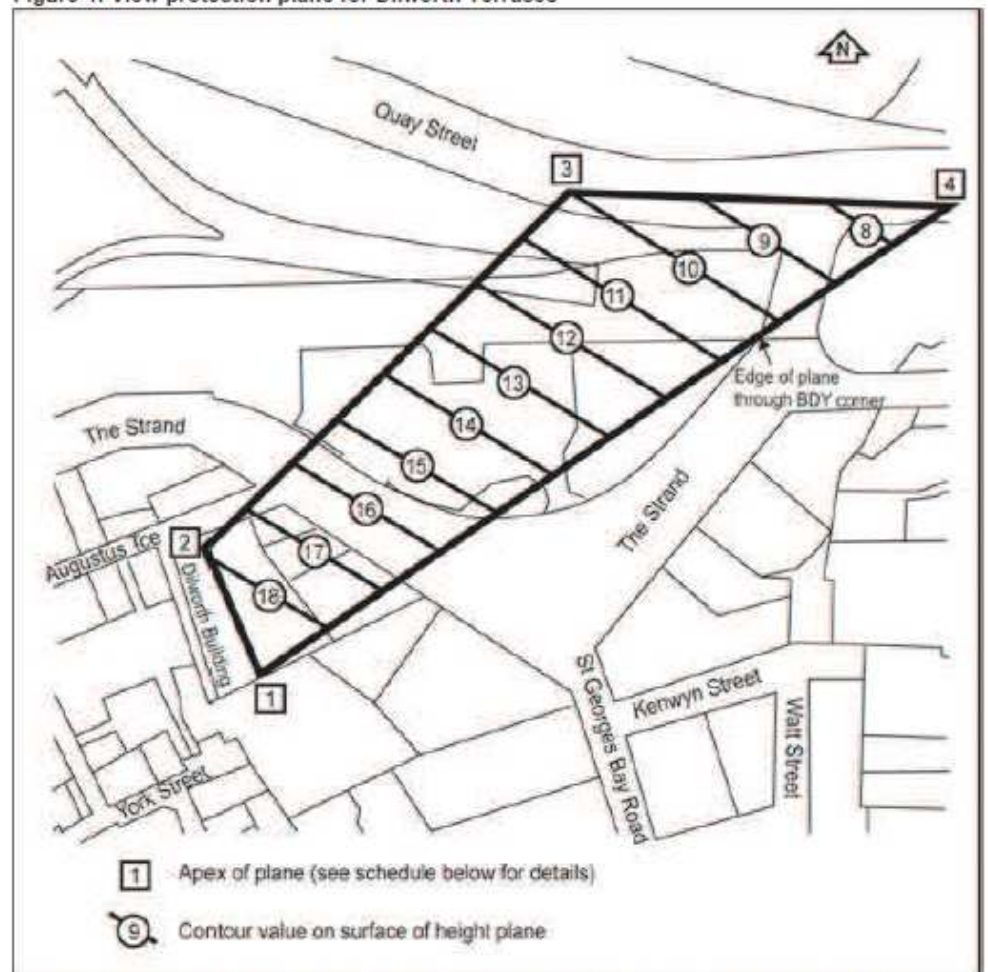
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Figure 4: View protection plane for Dilworth Terraces



Showing maximum allowable building height above mean sea level (L&S Auckland Datum 1946)

14. Under the Notified Plan:
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- (b) The Saatchi & Saatchi Building was scheduled as:
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22. The Plaintiff did not make any further submissions, including on submissions relating to the Proposed Viewshaft.

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Environmental Defence Society (EDS) expressed a concern that this approach [in Minute 6] would give a landowner a veto over the consideration of a lawful submission. That is not correct: the submission will remain for consideration by the Panel. However, the Panel consider it relevant and important to know what effect the submission may have, and therefore regards the position of the landowner as a necessary part of its overall consideration.

### **Topic 050 hearing**

29. Submissions on the Notified Plan were heard by the First Defendant.

30. The submissions for the Proposed Viewshaft were heard under Topic 050 - City Centre hearing ("**Topic 050**"). The Topic 050 hearing was held between 7 - 13 May 2015.
31. In its legal submissions, Whai Rawa made three alternative requests in respect of the Proposed Viewshaft:
- (a) Deletion of the Proposed Viewshaft in its entirety, together with the inclusion of assessment criteria requiring consideration of additional views to the Dilworth Terraces houses throughout the proposed Quay Park Precinct.
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  - (c) If the Proposed Viewshaft was to remain in its current location, the reduction in the width of the Viewshaft of 100m from its western end.
32. In its closing remarks, the Second Defendant confirmed that it supported the retention of the Proposed Viewshaft as per the Notified Plan.
33. It was acknowledged by Whai Rawa at the hearing that the Plaintiff's Property would be affected if the Proposed Viewshaft was relocated to The Strand.
34. It was also acknowledged by Whai Rawa at the hearing that the Plaintiff's Property would be the only land affected by the relocation of the Viewshaft that was not already affected by the Proposed Viewshaft in the Notified Plan.

### **Recommendations**

35. The First Defendant delivered its recommendations report to the Second Defendant on 22 July 2016, pursuant to section 144 of the LGATPA.
36. In respect of the Plaintiff's Property, the First Defendant recommended:
- (a) the Property be re-zoned to Business - Mixed-Use; and
  - (b) the Saatchi & Saatchi Building be registered on the Historic Heritage Extent of Place and Historic Heritage Place schedules.

37. In relation to the Proposed Viewshaft, the First Defendant recommended relocating the Viewshaft's origin point to The Strand, as set out below:



38. The First Defendant did not identify that recommendation as being out of scope.

#### **Decision on recommendation**

39. The Second Defendant released its decisions on the Unitary Plan on 19 August 2016 ("**Decision**").
40. In the Decision, the Second Defendant:
- (a) Accepted the recommendation that the Viewshaft be relocated to The Strand ("**Decisions Viewshaft**").

- (b) Accepted the recommendation that the Plaintiff's Property be rezoned to Business - Mixed-Use.
41. The Decisions Viewshaft has a substantial effect on the Plaintiff's Property:
- (a) The height limit for the Property under the Business - Mixed-Use zone is 18m. The Decisions Viewshaft imposes a lower height limit on the northern portion of the Property, ranging from 12m on the Property's frontage to The Strand to approximately 17m on the Property's north-western boundary. Resource consent as a non-complying activity is required to infringe the height limit imposed by the Decisions Viewshaft.
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  - (c) The overall result is that the development potential of the Property is significantly less than under the Notified Plan, because of the Decisions Viewshaft.
42. The Plaintiff did not become aware of the proposal to move the origin of the Proposed Viewshaft in a manner that would substantially affect its Property until after the First Defendant released its recommendations on the Unitary Plan.

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

43. The Plaintiff repeats paragraphs 1 to 42 above.
44. In making its recommendation regarding the Proposed Viewshaft, the First Defendant acted pursuant to an error of law and in breach of section 144 of the 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.
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- (i) applied the incorrect legal test; or
- (ii) misapplied the correct legal test.
- (g) As a consequence, the First Defendant failed to identify the Decisions Viewshaft as being out of scope.
- (h) Had the First Defendant applied the correct legal test, it would have identified the Decisions Viewshaft 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 Decisions Viewshaft was outside the scope of submissions;
- (c) an order pursuant to section 4(2) of the Judicature Amendment Act 1972 setting aside the recommendation as it relates to whether the Decisions Viewshaft is within the scope of submissions;
- (d) such other orders as the Court thinks appropriate; and
- (e) costs.

### **SECOND CAUSE OF ACTION: BREACH OF NATURAL JUSTICE**

- 45. The Plaintiff repeats paragraphs 1 to 42 above.
- 46. The Second Defendant's conduct resulted in a breach of the Plaintiff's right to natural justice.

#### **Particulars**

- (a) The Second Defendant's role in the Unitary Plan process was as architect, de facto respondent and decision-maker regarding the appropriate provisions for the Unitary Plan.
- (b) In exercising its powers through its various roles, the Second Defendant was obliged to act fairly, reasonably, and in a manner that did not have the effect of depriving a submitter of its rights to natural justice.
- (c) At the hearing of Topic 050, Whai Rawa made a proposal to relocate the origin of the Proposed Viewshaft to The Strand. Whai Rawa brought it to the attention of the First and Second Defendants that:
  - (i) the relocation of the Proposed Viewshaft would affect the Plaintiff's Property; and
  - (ii) the Plaintiff's Property was the only property affected by the proposed relocation that was not already affected by the Proposed Viewshaft in the Notified Plan.



- (d) The Second Defendant failed to ensure that the First Defendant was aware of the position of the Plaintiff as part of the overall consideration of the merits of the proposal to move the Proposed Viewshaft.
- (e) As such, the Second Defendant's conduct deprived the Plaintiff of its right to natural justice.
- (f) As a result, the First Defendant's recommendations regarding the Proposed Viewshaft were defective.
- (g) In accepting the defective recommendations, the Second Defendant's decision was invalid.

**The Plaintiff seeks the same relief as for the First Cause of Action.**

**THIRD CAUSE OF ACTION: IRRATIONALITY AND UNREASONABLENESS**

- 47. The Plaintiff repeats paragraphs 1 to 42 above.
- 48. In making the Decision, the Second Defendant made an irrational and unreasonable decision in accepting the recommendations of the First Defendant.

**Particulars**

- (a) The Plaintiff repeats the pleadings in paragraphs 44 and 46 above.
- (b) The Decision was further irrational and unreasonable, having regard to:
  - (i) The substantial effect the Decisions Viewshaft will have on the Plaintiff's Property.
  - (ii) Resource consents granted by the Second Defendant for development on The Strand which would prevent the Decisions Viewshaft from serving its intended purpose.

- (iii) The First Defendant not being aware of the Plaintiff's position on the proposal made at the hearing to move the Proposed Viewshaft.

**The Plaintiff seeks the same relief as for the First Cause of Action**

This document is filed by Allison Anne Arthur-Young, 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.