

**UNDER** The Resource Management Act 1991 (RMA) and the Local  
Government (Auckland Transitional Provisions) Act 2010 (LGATPA)

**AND**

**IN THE MATTER** of an appeal under Section 158 of the LGATPA

**BETWEEN** **ARENA LIVING LIMITED**, a registered company whose principal  
offices are located at 95 Hurstmere Road, Takapuna, Auckland.

**Appellant**

**AND** **AUCKLAND COUNCIL**

**Respondent**

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**NOTICE OF APPEAL**

**Dated this 16<sup>th</sup> day of September 2016**

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Next Event Date: 2016

Before:

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**Anthony Harper**

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**TO:** The Registrar of the High Court at Auckland

**AND TO:** The Respondent

**TAKE NOTICE THAT** Arena Living Limited (the **Appellant**) appeals to the High Court against part of the decision (**Decision**) of the Auckland Council (**Respondent**) dated 19 August 2016, to adopt the recommendations of the Auckland Unitary Plan Independent Hearings Panel (**Panel**) on the Proposed Auckland Unitary Plan (PAUP), on the grounds that the Decision is erroneous in law.

**STANDING**

1. Arena Living Limited (Arena) is the successor to Primecare Holdings Limited, who lodged a submission on the PAUP.

**SCOPE OF APPEAL:**

2. The parts of the Decision appealed are:
  - (a) The failure to include an 11 metre Additional Height Control (**Additional Height Control**) for existing retirement village sites within the Mixed Housing Suburban (MHS) Zone; and
  - (b) Failure to include further height allowances (**Further Height Allowances**) beyond the Additional Height Control for the existing retirement village sites owned by Arena; and
  - (c) Failure to rezone a retirement village site owned by Arena at 21 Graham Collins Drive, Windsor Park as Terraced Housing and Apartment Building Zone.

**QUESTIONS OF LAW:**

3. Arena alleges that the following questions of law arise:
  - (a) Was the failure to provide the Additional Height Control for existing retirement village sites within the Mixed Housing Suburban (MHS) Zone a decision which was open to the Panel on the evidence?
  - (b) Has there been a failure to provide reasons for not applying the Additional Height Control to existing retirement village sites within the MHS Zone?
  - (c) Did the Panel undertake an assessment of the failure to provide the Additional Height Control, as required by section 32 of the RMA?
  - (d) Has there been a failure to provide reasons for not permitting Further Height Allowances on retirement village sites belonging to Arena?
  - (e) Did the Panel undertake an assessment of the failure to recommend Further Height Allowances for the retirement village sites belonging to Arena, as required s 32 of the RMA?

- (f) In deciding to rezone the Knightsbridge retirement village site as Mixed Housing Suburban, did the Panel fail to take into account a relevant matter?
- (g) Did the Panel fail to give reasons for rezoning the Knightsbridge retirement village site as Mixed Housing Suburban?

#### **BACKGROUND**

- 4. The Appellant is a provider of retirement villages in New Zealand, of which four are located within the Auckland Region. Retirement villages are a comprehensive form of residential living that typically includes a range of accommodation options together with care facilities within a single site.
- 5. The Arena Villages are:
  - (a) Knightsbridge, a 12.63 hectare complex located at 21 Graham Collins Drive, Windsor Park;
  - (b) Parklane, a 4.5 hectare complex located at 106 Becroft Drive, Forest Hill;
  - (c) Mayfair, a 7.29 hectare complex located at 14 Oteha Valley Road, Albany; and
  - (d) The Peninsula Club, a 14.38-hectare complex located at 441 Whangaparaoa Road, Stanmore Bay.
- 6. Until 11 July 2016, the previous name of Arena was Primecare Holdings Limited ("Primecare").
- 7. The Respondent notified the PAUP for public submissions in September 2013.
- 8. The notified PAUP included a Special Purpose Retirement Village Zone (SPRVZ), which applied to 53 retirement village sites across Auckland. The SPRVZ was identified as the most appropriate method to achieve the PAUP's broader housing objectives, particularly housing supply and choice for older people and to tailor development controls and assessment criteria to better accommodate the retirement village typology.
- 9. Of the Arena villages, the SPRZ applied to the Knightsbridge and Mayfair village sites in the PAUP as notified.
- 10. The notified PAUP also included bespoke concept plans for four individual retirement village sites within the SPRVZ to enable development in accordance with those plans. Generally speaking, these concept plans incorporated more enabling height controls than the 11-metre maximum height limit proposed for development throughout the SPRZ.
- 11. The Parklane site was mainly zoned Medium Housing Urban (MHU) and a small portion Medium Housing Suburban (MHS) in the PAUP as notified.
- 12. The Peninsula Club site had a mixture of residential zonings, being mainly Single Housing Zone (SHZ) and part Large Lot Zone (LLZ) in the PAUP as notified.

13. The submission period on the notified PAUP ended in February 2014. A summary of decisions requested was notified on 11 June 2014, with the period for further submissions expiring on 22 July 2014.
14. The SPRZ provisions of the PAUP as notified attracted a number of submissions. These included submissions from retirement village providers and the Retirement Village Association of New Zealand seeking, amongst other matters, that the SPRZ be deleted from the PAUP and
15. Primecare lodged a submission on the notified PAUP in respect of each of its villages (Submission #4149). Amongst other matters, the Primecare submission sought that the SPRZ apply to all of the Arena Villages and that additional site-specific height limits apply across each village by means of the concept plan approach.
16. No further submissions were lodged in opposition to the relief sought in Primecare's submission.
17. At some stage in the period from the closing of further submissions to a hearing by the Panel of matters relating to retirement villages, the Respondent changed its position to one of no longer supporting the SPRVZ. In its place, the Respondent developed an approach of managing retirement village development within the framework of existing residential (and business) provisions within the PAUP. In simple terms, the rules and development controls contained within residential zones, including the MHS, MHU and THAB, were to be amended with the overall intent of more appropriately enabling development and redevelopment of existing and new retirement villages.
18. As part of this revised approach, the Respondent also proposed to delete the concept plan approach, to be replaced where appropriate through other zone methods such as spatially mapped zone height development controls or precinct provisions where required to manage site-specific issues.
19. Mediation in respect of retirement village issues and appropriate PAUP provisions took place on 25-26 May 2015, with a Mediation Joint Statement being issued on 28 May 2015. The Mediation Joint Statement included a track-change document used as a record to record the comments/proposals for amendments to the Residential and Business Zone Provisions that were "in principle" favoured by the parties in order to make appropriate provision within those zones for the development of retirement villages.
20. Amendments included the addition of three retirement village specific policies for the Residential MHS, MHU and THAB Zones, of which two directly recognised that retirement villages may be developed at a greater height, and that graduated building heights were appropriate for village sites:

*"To enable the development of specialist residential activities such as retirement villages.*

*Recognise that retirement villages may be developed at a greater height and intensity of activity than would otherwise apply in the zone and ensure that any adverse effects of infrastructure and the amenity of neighbouring sites are avoided, remedied, or mitigated.*

*Use graduated retirement village building heights and locate higher buildings away from site boundaries when the site adjoins a residentially zoned property where necessary to avoid, remedy or mitigate adverse effects of over-shadowing and visual dominance."*

21. Matters relating to retirement village provisions for the PAUP were considered at two separate hearings before the Panel.
22. The first hearing commenced on 14 October 2015, and addressed *Residential objectives and policies, activities, development controls and assessment matters* (Topics 059, 060,062 and 063).
23. The second hearing commenced on 26 February 2016 and addressed *Rezoning and Precincts (General) –Retirement Villages* (Topic 80D).
24. At the February 2016 hearing, Primecare provided planning (Mr John Childs) and landscape (Ms Sally Peake) evidence in support of the relief sought in Primecare's submission on the notified PAUP.
25. Recognising the Council's position of no longer supporting the SPRVZ approach, Primecare's evidence supported a THAB for each of the Arena Villages, with the exception of the Peninsula Club site. For that site, a MHU Zone was sought for the majority of the land, together with adjustment of the part, which was to be, zoned Large Lot Zone.
26. In its "*Report to Auckland Council Hearing topics 059-063 – Residential Zones, July 2016*", the Panel's Recommendation on providing for retirement village development was as follows:

*It is the Panel's position that using the residential provisions that apply to residential developments which are a restricted discretionary activity in the Residential –Mixed Housing Suburban, Residential – Mixed Housing Urban and Residential – Terrace Housing and Apartment Buildings zones (i.e. those involving five or more dwellings) is appropriate as the criteria are applicable to assessing a retirement village or other forms of integrated residential development.*
27. At no point in the Recommendation on topics 059-063, does the Panel refer to the issues of either the Additional Height Control for existing retirement villages within the MHS Zone, or Further Height Allowances for existing retirement village sites, Arena's included.
28. A separate *Report to Auckland Council - Changes to the Rural Urban Boundary, rezoning and precincts* refers to Topic 80, which included retirement villages (Topic 80D at the February 2016 hearing).

29. This further Report does not refer to the issues of either the Additional Height Control for existing retirement villages within the MHS Zone, or Further Height Allowances.
30. By its Decision dated 19 August 2016, and to the extent relevant to this Appeal, the Respondent accepted the Panel's recommendations. At or about the same time, the Respondent issued a Decisions Version of the PAUP.
31. Under the Decisions Version, the following zoning and height provisions apply to the Arena Villages:
  - (a) In respect of the Knightsbridge Village, the Zone is MHS, with a maximum permitted height limit of 7 to 9 metres i.e. no Additional Height Control has been provided;
  - (b) The Mayfair and Parklane Villages are zoned as MHU; and
  - (c) The Peninsula Club is zoned mainly as MHU with part zoned as Large Lot Zone. The MHU Zone has a maximum height limit of 12-metres.
32. The further height allowances sought by Primecare in its submission, and as supported by its evidence, have not been provided for in the Decision Version of the PAUP.
33. Failure to provide the relief sought in submissions will adversely affect the redevelopment and intensification of the Arena Villages.

#### **GROUND OFS OF APPEAL**

##### **Additional Height Control – decision unsupportable on the evidence/Failure to Give Reasons**

34. Before the Panel, the Respondent supported the Additional Height Control applying to existing retirement villages in the MHS Zone.
35. For the first hearing in October 2015, the Respondent led planning evidence from Ms Deanne Rogers, dated 8 September 2015. Ms Rogers' evidence included the following:

9.29 *With respect to building height, I support the addition of a new policy in the MHS zone (policy 1.9) that would enable greater building heights on existing retirement village sites as provided for by the SPRZ:*

*Enable more efficient use of identified retirement village sites that existed as at 30 September 2014, through the provision of greater building height as specified in the Additional Height Control.* [Emphasis in original]

9.30 *The notified SPRZ provided for building heights of up to 11 metres on all existing retirement villages to encourage some further intensification and more efficient use of land and existing infrastructure. The retention of the 11 metre height control is supported by a number of submissions. I also support the retention of this rule given the potential efficiency benefits associated with intensification and the ability to locate larger*

*buildings on larger retirement village sites away from neighbouring properties. In the absence of the SPRVZ, the rule would need to be included in the building height development control rule for the MHS zone as "an additional height control rule" and shown on each site as identified on the PAUP Zone maps and at proposed rule 7.2.2.*

36. At the February 2016 hearing, the Respondent led planning evidence from Philp Michael Brown, dated 4 September 2015. At paragraph 1.4 of his evidence, Mr. Brown summarised his opinion on enabling additional building height for retirement villages within the MHS Zone:

*"I support the Council's proposal to enable additional building height on sites containing retirement villages that fall within the MHS zone through the use of the Additional Zone Height Control as shown in the PAUP planning maps. Buildings on such sites would be enabled up to a height of 11m through the additional zone height notation on the planning maps."*

37. The evidence of Ms Rogers and Mr Brown was unchallenged in either of the hearings. No evidence in opposition to the Additional Height Control was provided to the Panel by any other party.

38. Failure to provide for the Additional Height Control was therefore not a decision supportable on the evidence before the Panel, nor is it an outcome that could reasonably have been arrived at by the Panel. It is therefore an error of law.

39. No reasons were provided to support a decision not to apply the Additional Height Control for existing retirement villages within the MHS Zone. Failure to provide reasons is an error of law.

***Further Height Allowances – Failure to provide reasons/Failure to Take into Account Relevant Matters***

40. The Panel's reports and, as a consequence the Respondent's Decision, does not provide reasons, partial or otherwise, for the failure to provide Further Height Allowances above and beyond a permitted 11-metre height limit for any part of the existing Arena Villages.

41. As a corollary to this failure to give reasons, there has been an apparent failure to undertake the appropriate analysis required under section 32 of the RMA. Failure to undertake the required section 32 analysis materially affects the decision not to provide Further Height Allowances.

***Knightsbridge Village Zoning – Failure to Take into Account Relevant Matters/ Failure to Give Reasons***

42. The Knightsbridge Village site is surrounded on all boundaries by non-residential development including light industrial, a secondary school, the AUT Millennium Centre, open space and a road. The school (Rangitoto College) is designated in the Decisions Version of the PAUP with an underlying zoning of MHS only applying if works are undertaken on school land, which are outside the designated purpose.

43. Although no reasons are given for zoning the Knightsbridge site as MHS, the Council's Planner recommended this Zone apply on the basis that the adjacent Rangitoto College land was to be rezoned MHS. The existence of the designation for the College land and its legal and factual implications were not addressed in evidence and were therefore not considered by the Panel.
44. Failure to acknowledge the surrounding land uses and the existence of the designation for Rangitoto College were material factors that make the decision to rezone the Knightsbridge site as MHS and not THAB unsupported.
45. Further, the Panel failed to undertake an analysis under section 32 of the RMA of what was the most appropriate zone for the Knightsbridge Village site.
46. The Panel failed to give reasons why the Knightsbridge Village should be zoned MHS and not THAB.

#### **RELIEF SOUGHT**

47. Arena seeks the following relief:
  - (a) That the Appeal be allowed;
  - (b) That the Unitary Plan be amended to incorporate the Additional Height Control for retirement villages within the MHS Zone;
  - (c) That the matter of Further Height Allowances for the Arena Villages be referred back to the Panel;
  - (d) That the decision on whether or not the Knightsbridge Village site be rezoned as either MHS or THAB be referred back to the Panel;
  - (e) Such further and other alternative relief as the Court may consider appropriate; and
  - (f) Costs of, and incidental to, the Appeal.

#### **ATTACHMENTS**

48. The Appellant attaches the following documents to this Appeal:
  - (a) The Respondent's Decision; and
  - (b) The Panel's *Report to Auckland Council Hearing Topics 059-063 – Residential Zones, July 2016*.



**Date:** 16 September 2016

A handwritten signature in blue ink, appearing to be 'G J Cleary' or 'L Player', written over a horizontal line.

G J Cleary/ L Player- Bishop

Solicitors for Arena Living Limited

**THIS NOTICE** is filed by **Gerard Joseph Cleary/Lucy Player- Bishop**, Solicitors for the Appellant, whose address for service is at the offices of Anthony Harper at Level 9, HSBC Tower, 62 Worcester Boulevard, Christchurch.