

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

**CIV-**

**UNDER THE**

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

**IN THE MATTER**

of an appeal under section 158 of the LGATPA

**BETWEEN**

**BAYSWATER MARINA LIMITED**

Appellant

**AND**

**AUCKLAND COUNCIL**

Respondent

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**NOTICE OF APPEAL BY BAYSWATER MARINA LIMITED**

**15 SEPTEMBER 2016**

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

**AND TO:** The Respondent

**TAKE NOTICE THAT** Bayswater Marina Limited ("**Appellant**") will appeal to the High Court against part of the decision ("**Decision**") of the Auckland Council ("**Council**"), dated 19 August 2016, to adopt the recommendations ("**Recommendations**") of the Auckland Unitary Plan Independent Hearings Panel ("**Panel**") on the Proposed Auckland Unitary Plan ("**Unitary Plan**") **UPON THE GROUNDS** that the Decision is erroneous in law.

### **STANDING**

1. The Appellant made a submission on the Unitary Plan in relation to the appropriate provisions for the Bayswater Marina Precinct ("**Precinct**"), as that Precinct is defined in the Unitary Plan.
2. In particular, the Appellant made a submission regarding the pre-conditions for dwellings and food and beverage within the areas referred to as sub-precincts A and B of the Precinct.
3. The part of the Precinct known as sub-precinct A relates to the 15m strip (owned by the Appellant) adjacent to the water around the edge of the Marina, which also at present includes the temporary ferry terminal building. The part of the Precinct known as sub-precinct B is an internal area of the Bayswater Marina Precinct owned by the Appellant.
4. A copy of the Precinct Plan is attached as **Appendix 1**.
5. The Council accepted the Recommendations of the Panel in relation to the Precinct.
6. The Recommendations included an Activity Table as part of the proposed provisions for the Precinct, which provided that for residential, or food and beverage activities, to qualify for discretionary activity status, certain amounts of public open space and marina berth parking (and some other activities) were required to be provided within sub-precinct B only. By contrast, the evidence for the Appellant and the Council proposed for such activities to be provided in both sub-precincts A and B. Marina berth parking and public open space is currently largely contained within sub-precinct A.

### **SCOPE OF APPEAL**

7. The Appellant appeals against the Decision insofar as it relates to the Precinct, and all related provisions.

### **ERRORS OF LAW**

8. In adopting the Panel's Recommendation in relation to the Precinct, the Council made the following errors of law:

#### **Evident logical fallacy**

- (a) The Panel made an evident logical fallacy in that, while it states that:
- (i) it agrees with the evidence of the Appellant and largely that of the Council; and
  - (ii) concludes that it was making only minor changes to the activity table for consistency reasons,

the Panel instead made a fundamental change to the Precinct provisions in its Recommendation, which was inconsistent with the evidence of the Appellant and the Council.

#### **Conclusion unsupported by evidence or Panel's own reasoning**

- (b) The Panel failed to give effect to its clear intentions such that the provisions as recommended could not reasonably have been made on the basis of the evidence before it or on the basis of its own reasoning.
- (c) There was no evidence before the Panel which was reasonably capable of supporting the changes made to the location of the listed activities.

#### **Failure to take into account mandatory relevant consideration**

- (d) In the alternative and without resiling from the above, if, notwithstanding paragraphs (a) to (c) above, it was the intention of the Panel to change the areas in which parking and public open space can be provided in the Precinct, the Panel failed to take into account a mandatory relevant consideration, being an

assessment of the implications of the amendment as required by section 32AA of the RMA.

#### **Failure to give reasons**

(e) In the alternative and without resiling from the above, if, notwithstanding paragraphs (a) to (c) above, it was the intention of the Panel to change the areas in which parking and public open space can be provided in the Precinct, the Panel failed to give adequate reasons for its decision as it is required to do under section 144(8) of the LGATPA.

9. The above errors of law, individually and collectively, materially affected the Panel's Recommendation on the Unitary Plan in relation to the appropriate provisions for the Precinct.

#### **GROUND OF APPEAL**

10. The grounds of appeal are as follows:

##### **Evident logical fallacy**

11. A key issue for the hearing was the provision for residential development (and to a lesser extent food and beverage activities) which was proposed to be enabled within sub-precinct B of the Precinct. The Council and the Appellant proposed the enablement of dwellings and food and beverage within sub-precinct B, provided that a minimum amount of selected activities (including marina berth parking and public open space) was also developed within sub-precincts A and B. By the end of the hearing, the Council and the Appellant had reached an agreed position regarding the form and content of those pre-conditions (subject to disagreement over whether storage space for boats on land should be required).
12. As agreed between the Appellant and the Council,<sup>1</sup> and recorded in the Council's closing statement in relation to Topic 081 - Rezoning and Precincts (Geographical Areas), the minimum provision for a number of primary focus activities, including marina berth parking and 7,200m<sup>2</sup> of public open space, was to be provided within both sub-precincts A and B.<sup>2</sup>

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<sup>1</sup> Subject to disagreement over whether storage space for boats on land should be required.

<sup>2</sup> Closing remarks on behalf of Auckland Council in relation to Topic 081 - Rezoning and Precincts (Geographical Areas), dated 26 May 2016, Volume 2, Attachment B,

1. Dwellings and Food and Beverage in sub-precincts A and B is a Discretionary Activity subject to the following minimum provision being reserved as being available for primary focus activities **within sub-precincts A and B**:
  - a. Gross floor area for Marine Retail and Marine Industry – 100m<sup>2</sup>.
  - b. Storage space for 120, 9m length boats.<sup>3</sup>
  - c. Marina berth parking at a ratio of no less than 0.5 spaces per berth (provided that approval may be given as a discretionary activity for these spaces to be shared with other non-residential activities).
  - d. 20 car and boat trailer parking spaces (provided that approval may be given as a discretionary activity for these spaces to be shared with other non-residential activities).
  - e. Open Space accessible to the public (not including any parking spaces or vehicle access areas) – 7,200m<sup>2</sup>.
2. ...

[Emphasis added]

13. The Panel agreed with the evidence of the Council and the Appellant,<sup>4</sup> stating in its Recommendation that:<sup>5</sup>

After having carefully considered the evidence provided, the Panel prefers the evidence of the Council and Bayswater Marina Limited.

14. The Panel then goes on to state that it:<sup>6</sup>

... has only made minor changes to the activity table to be consistent with the Panel's templating protocols.

15. However, in direct contradiction to the above findings, the provisions of the Precinct as subsequently recommended by the Panel had the effect of significantly changing the areas where parking and public open space must be provided in the Precinct, as had been put forward by both the Council and the Appellant.

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Bayswater Marina, 3.2.1 Dwellings and Food and Beverage in Sub-Precincts A and B (page 327).

<sup>3</sup> This requirement remained at issue between the Council and the Appellant.

<sup>4</sup> On the one outstanding issue between the Council and the Appellant in relation to the requirement for boat storage space on land, the Panel agreed with the Appellant.

<sup>5</sup> Panel's report in relation to Topics 016 / 017, 080 and 081, Annexure 4 Precincts - North, page 13.

<sup>6</sup> Panel's report in relation to Topics 016 / 017, 080 and 081, Annexure 4 Precincts - North, page 15.

16. In order to conform with these "templating protocols", the standards for dwellings were moved from the land use controls to the activity table, and provided for as a discretionary activity as follows (with a corresponding provision for food and beverage activities):<sup>7</sup>

Dwellings

Dwellings in Sub-precinct B subject to the following minimum provision being available for primary activity focus **within Sub-precinct B**:

- (a) Gross floor area for Marine Retail and Marine Industry - 100<sup>2</sup>
- (b) Marina berth parking at a ratio of no less than 0.5 spaces per berth
- (c) 20 car and boat trailer parking spaces
- (d) Open space accessible to the public (not including any parking spaces or vehicle access areas) – 7,200m<sup>2</sup>

Note for (b) and (c): Approval may be given as a discretionary activity for these spaces to be shared with other non-residential activities.

[Emphasis added]

17. As shown above, the provisions as set out in the Recommendation have removed the reference to sub-precinct A as originally contained in the Council's provisions (and as agreed between the Council and the Appellant), therefore requiring that all listed activities must be provided only in sub-precinct B. As currently drafted, if the minimum provisions identified above are not complied with, dwellings or food and beverage activities become a non-complying activity in sub-precinct B.<sup>8</sup>
18. The effect of the provisions as drafted is also in direct contradiction to the Panel's own Recommendation and the recommended Precinct Description itself, which sets out the activities that are contemplated in each of the sub-precincts as follows:<sup>9</sup>

The precinct is comprised of six sub-precincts as shown on the planning maps:

- Sub-precinct A provides for **public access and open space, and for marina berth holders parking** and marine-structures, around the seaward edge of the precinct land;

<sup>7</sup> Panel Recommendation, Table I504.4.1 (A1) and (A4).

<sup>8</sup> Panel Recommendation, Table I504.4.1 (A2) and (A5).

<sup>9</sup> Panel Recommendation, I504.1 Precinct Description; Panel's report in relation to Topics 016 / 017, 080 and 081, Annexure 4 Precincts - North, page 9.

- Sub-precinct B provides for the marine related uses, car parking, public pedestrian access and open space areas, food and beverage, and residential development;
- Sub-precinct C...

[Emphasis added]

19. The intention is clearly to provide for public access and open space, as well as marina berth holders parking, largely within sub-precinct A. However, the effect of the provisions as drafted removes any express provision for such activities within sub-precinct A.
20. The Panel's Recommendation therefore contains an evident logical fallacy, in that the Panel states that it agrees with the evidence of the Council and the Appellant, and that it is only making minor changes to the activity table for consistency reasons, yet has made a fundamental change to the activity table which significantly affects the overall location of parking and public open space within the Precinct.
21. There is nothing in the Panel's decision to suggest that it intended to depart from the provisions as drafted and agreed between the Council and the Appellant in relation to the location of parking and public open space within the Precinct - in fact, quite the opposite. The Panel recorded its agreement with the evidence of the Council and the Appellant. Those provisions clearly set out that the activities were to be within both sub-precinct A and B. Based on the Panel's conclusion regarding its preferred evidence and the amendments to the activity table, the Panel clearly intended to enact the provisions as agreed between the Council and the Appellant.<sup>10</sup>
22. The alteration of the location of the activities, when considered in the context of its recorded agreement with the evidence for the Appellant and the Council and in light of the agreed position between those parties, indicates that the Panel has made an evident logical fallacy such that there is an error of law. That error of law materially affected the conclusion that the Panel reached regarding the location of the listed activities.

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<sup>10</sup> On the one outstanding issue between the Council and the Appellant in relation to the in relation to the requirement for boat storage space, the Panel agreed with the Appellant.

**Conclusion unsupported by evidence or Panel's own reasoning**

23. The Panel came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come such that it made an error of law. Put another way, there was no evidence before the Panel which was reasonably capable of supporting the changes to the location of the listed activities as proposed in the Panel's Recommendation.
24. The effect of the Panel's Recommendation is such that certain pre-conditions must be met before there is to be any residential development or food and beverage activities within sub-precinct B (other than as a non-complying activity). However, no parties sought that 7,200m<sup>2</sup> of public open space and the required marina berth parking should be contained solely within sub-precinct B, and that there be no obligation to develop any public open space closest to the water's edge in sub-precinct A. On this basis, the Recommendation represents an outcome that was not open to the Panel on the evidence before it such that it made an error of law.
25. The Court has also previously considered the situation where there has been a clear disconnect between the intentions of the decision maker and the orders that have been made. In relation to a costs decision, the High Court observed that:<sup>11</sup>
- Judge Dwyer appears to have made an arithmetical error in calculating the costs that should be paid by St Heliers. A simple arithmetical error may not in itself be an error of law. However, in this case the Judge's error conflicts with his clear intentions when explaining the basis upon which he would award costs. Judge Dwyer's failure to give effect to his clear intentions meant that the costs he ordered could not reasonably have been made on the basis of the evidence before him or on the basis of his own reasoning. Therefore that failure constituted a material error of law.
26. Here, too, the Panel has erred in the application of its own findings. As set out above, having concluded that it preferred the evidence of the Council and the Appellant, and subsequently indicating that the only changes that it intended to make to the activity table were of a formatting nature for consistency with the remainder of the Unitary Plan, the provisions as recommended by the Panel could not reasonably have been made "on the basis of its own reasoning".

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<sup>11</sup> *St Heliers Capital Limited v Kapiti Coast District Council* [2015] NZHC 596 at [51].



27. As such, the Panel came to a conclusion without evidence or one to which, on the evidence, it could not reasonably have come such that it made an error of law. That error materially affected the provisions of the Precinct as set out by the Panel in its Recommendation.

**Failure to take into account mandatory relevant considerations**

28. In the alternative and without resiling from the above, if, despite paragraphs 11 to 27 above, the Panel in fact intended to fundamentally change the effect of the provisions regarding residential development and food and beverage activities within the Precinct (which is disputed by the Appellant), the Panel failed to take into account a mandatory relevant consideration, being an assessment of the implications of the amendment, as required under section 32AA of the RMA.
29. While the Panel's decision states that the suite of recommended provisions "meets the requirements of section 32", there is no reference to the implications of the change or whether it is the most appropriate way to achieve the Unitary Plan's objectives.
30. The Panel is required to include a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA.<sup>12</sup> Section 32AA provides that:

- (1) A further evaluation required under this Act—
- (a) is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the changes); and
  - (b) must be undertaken in accordance with section 32(1) to (4); and
  - (c) must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and
  - (d) must—
    - (i) be published in an evaluation report that is made available for public inspection at the same time as the approved proposal (in the case of a national policy statement or a New Zealand coastal policy statement), or the decision on the proposal, is publicly notified; or

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<sup>12</sup> Local Government (Auckland Transitional Provisions) Act 2010, section 145(1)(d).

- (ii) be referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with this section.

(2) ...

[Emphasis added]

31. In addition to the obligation to comply with section 32(1) to (4) of the RMA, the Panel must also:<sup>13</sup>

... identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions.

32. The absence of any reference to the change indicates that the significant change to the activity table was not properly considered by the Panel. The Recommendation, insofar as it relates to the Precinct, does not provide an assessment of the costs and benefits associated with the change as it is proposed.
33. The assessment of the costs and benefits associated with the provisions is a mandatory relevant consideration for the Panel, which it is required to take into account. By failing to do so, the Panel committed an error of law, which materially affected the Panel's Recommendation in relation to the appropriate provisions for the Precinct.

#### **Failure to give reasons**

34. In the alternative and without resiling from the above, if, despite paragraphs 11 to 27 above, the Panel in fact intended to fundamentally change the effect of the provisions regarding residential development and food and beverage activities within the Precinct (which is disputed by the Appellant), the Panel erred in failing to give adequate reasons for its decision, as expressly required under the LGATPA.<sup>14</sup>
35. A failure to give reasons for a decision has been accepted to be an error of law.<sup>15</sup> That is because:<sup>16</sup>

Without reasons, it may not be possible to understand why judicial authority has been used in a particular way.

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<sup>13</sup> Resource Management Act 1991, section 32(2)(a).

<sup>14</sup> Local Government (Auckland Transitional Provisions) Act 2010, section 144(8)(c).

<sup>15</sup> See, for example, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

<sup>16</sup> *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [79].

36. This is especially pertinent in this case where, in the face of a clear conclusion by the Panel that it agreed with the evidence of the Appellant and the Council (as discussed above at paragraph 11), it would be incongruous that the Panel should not then be required to articulate any areas of disagreement, let alone its reasons for that disagreement, particularly in light of such a significant amendment to the agreed position of the parties in question.
37. In this case, the circumstances are such that the failure to give reasons for the Panel's departure from the provisions as agreed between the Appellant and the Council amounts to an error of law.

### **QUESTIONS OF LAW**

38. The questions of law to be decided are:

#### **Evident logical fallacy**

- (a) Did the Panel make an evident logical fallacy in concluding that it agreed with the evidence for the Council and the Appellant, yet contradicting that evidence to make a fundamental change to the pre-conditions to the listed activities being discretionary activities?

#### **Conclusion unsupported by evidence or Panel's own reasoning**

- (b) Did the Panel fail to give effect to its clear intentions such that the provisions as recommended could not reasonably have been made on the basis of the evidence before it or on the basis of its own reasoning?

#### **Failure to take into account mandatory relevant considerations**

- (c) In the alternative, if it was the intention of the Panel to introduce a minimum provision of activities solely in relation to sub-precinct B, did the Panel err in failing to take into account a mandatory relevant consideration, being an assessment of the implications of the amendment, as required under section 32AA of the RMA?

**Failure to give reasons**

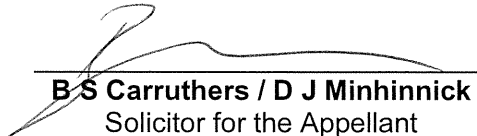
- (d) In the alternative, if it was the intention of the Panel to introduce a minimum provision of activities solely in relation to sub-precinct B, did it err in failing to give reasons for that decision?

**RELIEF SOUGHT**

39. The Appellant seeks:

- (a) that its appeal be allowed;
- (b) that the High Court correct the Council's Decision as set out in **Appendix 2**;
- (c) that if the relief in (b) is not provided, that the matter be remitted back to the Panel for reconsideration; and
- (d) costs.

**DATED** 15 September 2016



**B S Carruthers / D J Minhinnick**  
Solicitor for the Appellant

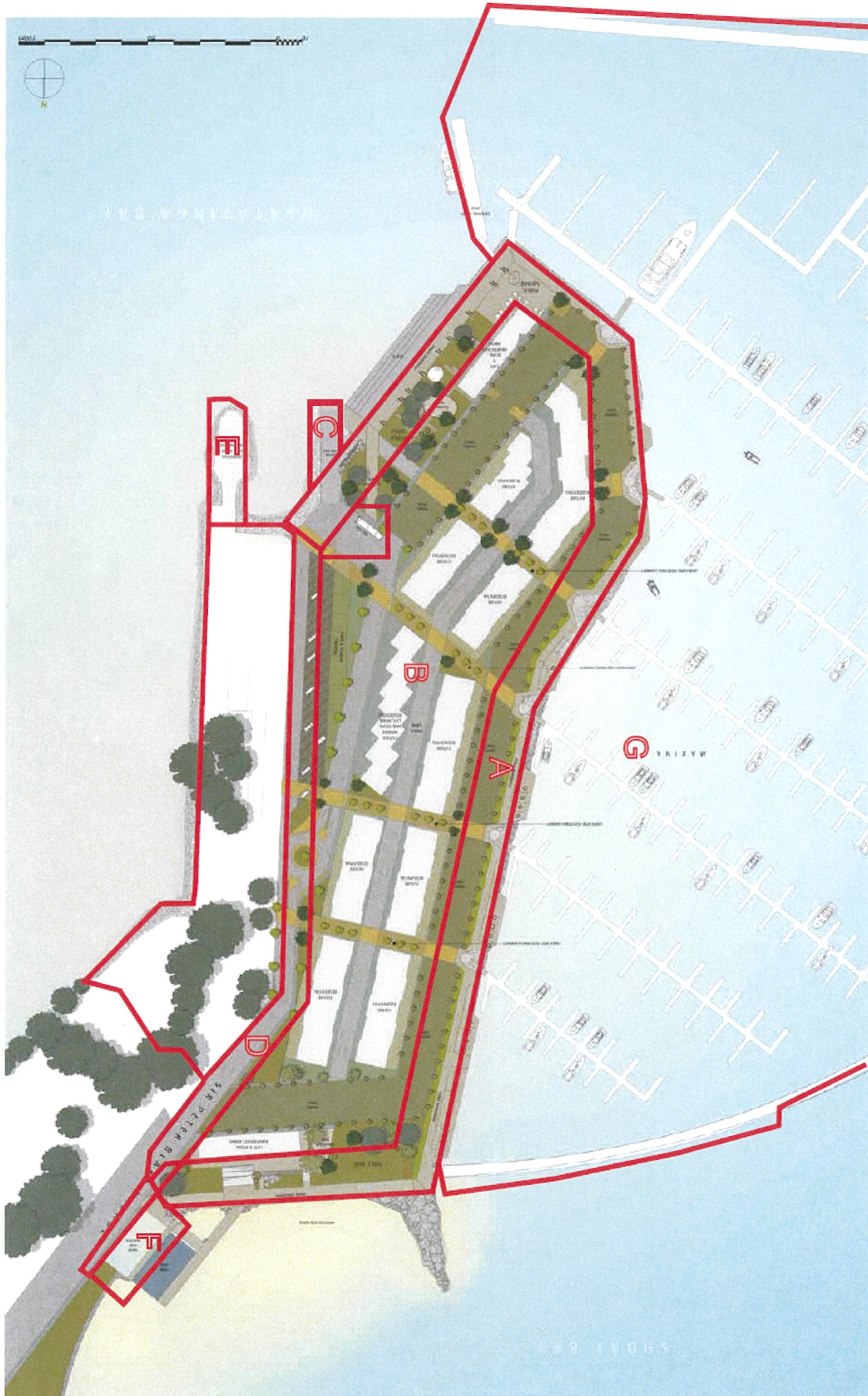
This document is filed by **Bronwyn Shirley Carruthers**, solicitor for the Appellant, of Russell McVeagh. The address for service on the Appellant is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

Documents for service on the Appellant may be left at that address for service 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.

# APPENDIX 1

## Bayswater Precinct Plan





## APPENDIX 2

### Relief sought (additions shown in underline)

Activity							
		A	B	C	D	E	F
Use							
Accommodation							
(A1)	<p>Dwellings</p> <p>Dwellings in Sub-precinct B subject to the following minimum provision being available for primary activity focus within Sub-precincts <u>A and B</u>:</p> <p>(a) Gross floor area for Marine Retail and Marine Industry - 100<sup>2</sup></p> <p>(b) Marina berth parking at a ratio of no less than 0.5 spaces per berth</p> <p>(c) 20 car and boat trailer parking spaces</p> <p>(d) Open space accessible to the public (not including any parking spaces or vehicle access areas) – 7,200m<sup>2</sup></p> <p>Note for (b) and (c): Approval may be given as a discretionary activity for these spaces to be shared with other non-residential activities.</p>	NC	D	NC	NC	NC	NC
...							
Commerce							
(A4)	<p>Food and beverage not otherwise provided for.</p> <p>Food and beverage in Sub-precinct B subject to the following minimum provision being available for primary activity focus within Sub-precincts <u>A and B</u>:</p> <p>(a) Gross floor area for Marine Retail and Marine Industry - 100<sup>2</sup></p> <p>(b) Marina berth parking at a ratio of no less than 0.5 spaces per berth</p> <p>(c) 20 car and boat trailer parking spaces</p> <p>(d) Open space accessible to the public (not including any parking spaces or vehicle access areas) – 7,200m<sup>2</sup></p> <p>Note for (b) and (c): Approval may be given as a discretionary activity for these spaces to be shared with other non-residential activities.</p>	NC	D	NC	NC	NA	NA