

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

**CIV-2016-404-2308
[2017] NZHC 2158**

BETWEEN THE AUCKLAND PRESBYTERIAN
HOSPITAL TRUSTEES
INCORPORATED
Appellant

AND AUCKLAND COUNCIL
Defendant

Hearing: On the papers

Counsel: D J Minhinnick and L J Eaton for Appellant
M J L Dickey and R Ward for Respondent

Judgment: 6 September 2017

JUDGMENT OF WHATA J

*This judgment was delivered by me on 6 September 2017 at 4.30 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Russell McVeagh, Auckland
Brookfields Lawyers, Auckland

[1] The Auckland Presbyterian Hospital Trustees Incorporated (APHTI) is a private provider of retirement accommodation and care services. It owns and operates St Andrews Village, a comprehensive aged care facility on 207 Riddell Road, Glendowie.

[2] It brought an appeal against provisions in the Auckland Unitary Plan (the Unitary Plan) relating to St Andrews Village. APHTI has now reached agreement with the Auckland Council (the Council) to amend the provisions of the Unitary Plan in a way that will resolve its appeal in its entirety. The parties filed a memorandum recording settlement on 27 July 2017.

Background

[3] The St Andrews Village site specifically sits within a 14 hectare landholding, of which half has been developed into elderly care facilities and accommodation. It has a mixture of heights ranging from single storey units to three storeys. It currently comprises 116 independent living units in a variety of building typologies, including villas, attached terraced units and apartment-style units, as well as 180 care beds and common facilities for aged care. Dove House, a holistic day care/hospice facility, is also located onsite. It is surrounded by Sacred Heart College to the west, Glendowie Primary School to the north, and on other sides residential properties zoned Mixed Housing Suburban (MHS).

[4] The site was originally zoned Special Purpose Retirement Village Zone (SPRVZ) in the Proposed Auckland Unitary Plan as notified (the PAUP). The SPRVZ was a bespoke zone in the PAUP which applied to 53 existing retirement villages across Auckland. It arose out of the Council's early engagement with the retirement village industry, who identified the need to specifically provide for retirement villages as a supplier of permanent housing accommodation for elderly Aucklanders. The density and development controls of the zone essentially mimicked the Residential Mixed Housing Urban (MHU) controls, but were intended to be bespoke to retirement village activities. The controls included a maximum permitted height of 11 m.

[5] Many submissions on the PAUP sought to either delete or replace the SPRVZ. APHTI lodged a submission:

- (a) seeking to replace the SPRVZ zoning with a retirement village precinct (with provisions largely reflecting SPRVZ provisions), supported by an underlying MHU zoning;
- (b) supporting a base maximum permitted building height of 11 m in the SPRVZ, consistent with the MHU zoning in the PAUP;
- (c) seeking amendments to the provisions in the MHU zone to reflect the nature of the activity being provided for; and
- (d) seeking further and other consequential relief as may be necessary to give full effect to its submissions and concerns.

[6] No further submissions were received in response to this submission. The Auckland Unitary Plan Independent Hearings Panel (the Panel) heard from submitters on this during the Topic 061 Retirement and Affordability hearings. A mediation was also held on the topic. As a result, Council, supported by the submitters, decided to no longer support the SPRVZ but instead to make amendments to the Residential and Business zone provisions to properly recognise retirement villages within various zones. As a consequence, all SPRVZ zoned sites in the PAUP needed to be rezoned.

[7] Consequential amendments were then discussed during the Residential (Topics 059-063) and Business (Topics 051-054) hearings, as well as the hearings for Topic 080d Rezoning and Precincts General (Retirement Villages).

[8] The Council proceeded to present evidence to the Panel on retirement village zoning. Broadly, this supported the removal of the SPRVZ along with amendments to the Residential zone text which recognised the specialised nature of retirement village accommodation, and supported enabling additional building height for retirement villages where appropriate (up to 11 m in the MHS zone, consistent with

the SPRVZ). Ms Deanne Rogers, who gave this evidence, stated the purpose of assigning an additional height of 11 m in the SPRVZ was to enable some intensification of up to three storeys, recognising that on larger sites adverse effects of tall buildings could be avoided or mitigated by locating the larger buildings away from external boundaries and through landscaping.

[9] Mr Philip Brown also gave evidence for the Council on this point at the Topic 080d hearings. He proposed a Height Variation Control for retirement village sites in the MHS zone to reflect the allowable height applied in the SPRVZ. Mr Brown's evidence for Council supported zoning the St Andrews Village site MHS, with a Height Variation Control to allow a maximum height of 11 m.

[10] Mr Craig McGarr present planning evidence for APHTI at the hearing for Topic 080d. This evidence supported a MHU zoning based on an assessment of the context and characteristics of the landholdings and neighbourhood, and the ability of landholdings to sustain additional development.

[11] The Panel recommended a MHS zoning in relation to St Andrews Village, without any Height Variation Control. In its recommendations, it made no specific reference to St Andrews Village. The following passage exemplifies the Panel's reasoning:¹

The Panel has not provided for a particular class of activity called 'retirement village' but has instead provided for 'integrated residential developments', which would include a retirement village.

...

It is the Panel's view, and that of the Council, that the focus of the Plan needs to remain on the resource management reasons relating to villages, primarily due to their typical site/building size and scale and the management of effects associated with accessory activities that tend to establish with the village – matters not determined by a particular ownership model.

...

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

¹ Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topics 059-063 Residential zones* (22 July 2016) at 22-23.

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.

These provisions, as amended, are focused on the size and scale of buildings and site development, and how that development responds to its surrounds and the planned character of the zone. The Panel considers that in terms of built form and the likely larger site sizes, a retirement village complex and a larger-scale residential development are likely to have similar effects and should therefore be subject to similar assessment matters. Furthermore, this approach fits with the structure of the residential provisions, which do not include separate lists of criteria applying to different activities.

The activity status for integrated residential developments is restricted discretionary in the Residential - Single House Zone, the Residential - Mixed Housing Suburban Zone, the Residential - Mixed Housing Urban Zone and the Residential - Terrace Housing and Apartment Buildings Zone. The provisions are largely the same as those applying to larger scale residential developments, with a focus on the effects on the neighbourhood character, residential amenity and the surrounding residential area from all of the following:

- i. building intensity, scale, location, form and appearance;
- ii. traffic;
- iii. design of parking and access; and
- iv. noise, lighting and hours of operation.

[12] The Council accepted this recommendation.

Alleged errors of law

[13] APHTI appealed against the Council's decision to apply MHS zoning to the St Andrews Village site without also applying a Height Variation Control to provide for a maximum permitted height of 11 m. It alleged three errors of law:

- (a) the Panel's recommendation could not reasonably have been made on the basis of the evidence before it;
- (b) the Panel failed to give any reasons for its recommendation to not apply a Height Variation Control to the St Andrews Village site; and
- (c) the Panel erred in failing to take into account mandatory relevant considerations, being an assessment of the implications of the

amendment as required by section 32AA of the Resource Management Act 1991 (RMA).

The Council's position

[14] The Council accepts one of the alleged errors: the Panel could not reasonably have made the recommendation it did on the basis of the evidence before it.

Relief sought

[15] The parties have agreed to the inclusion of a precinct over the St Andrews Village site as the most appropriate approach to managing its development. This precinct is to be named the Riddell Road precinct and will:

- (a) Apply the MHS zone provisions.
- (b) Include a maximum permitted height limit of 11 m over most of the site ('sub-precinct A'), and an additional 1 m height for 50 per cent of a building's roof, where the entire roof is sloped 15 degrees or more.
- (c) Include a 20 m wide 'buffer area' where the site adjoins residential zoned properties. The MHS height limit, 8 m plus an additional 1 m roof, is proposed to apply in the buffer area.
- (d) Include bespoke objectives and policies that recognise the nature of development and use of the St Andrews Village site.

[16] The precinct to which this is to apply is set out in Appendix A. The Council considers the relief is an appropriate rectification of the agreed error.

Further argument

[17] In a minute dated 1 September 2017 dealing with this appeal and another appeal, *Arena Living Ltd v Auckland Council*, I indicated some reluctance to allow the appeals, even by consent, for failure to have regard to relevant matters as a ground for review. While the present appeal is more concerned with the

unreasonableness of the decision, arguments based apparent failings to consider matters that were plainly before the Panel are not likely to resonate strongly in this Court.

[18] Mr Minhinnick helpfully clarified that in relation to the present appeal, the first ground was the main ground and that it was not presented on the basis of failure to have regard to relevant considerations.² Rather he submitted there were two main issues for the Panel to resolve:

- (a) how the Plan should provide for retirement villages generally; and
- (b) how the Plan should provide for specific sites, including the St Andrews site.

[19] Mr Minhinnick emphasised the first issue was resolved in accordance with the evidence while the second issue was resolved in way that was unsupported by any party or evidence. He says this is an error of law.

Assessment

[20] The framework for assessment was set out in *Ancona Properties Ltd*,³ which I adopt.

[21] The Panel was obliged, given the submissions, to specifically consider the site specific characteristics of the St Andrews site and decide, in accordance with Part 2, ss 32 and 76 of the RMA, whether the MHS zoning without any Height Variation Control best served the Act's sustainable management purpose. Evidence from Council witnesses at hearing, as well as Mr McGarr for APHTI, supported a height limit of 11 m, and no evidence was presented which challenged or opposed development up to 11 m in height or three storeys on the St Andrews Village site. While the Panel was not obliged to adopt that evidence, in the absence of specific reasons for rejecting it, and given the consensus reached that there was no evidential

² I convened a hearing on 6 September 2017. Only Mr Minhinnick attended. It appears other counsel had assumed the matter had been adjourned. I was content to proceed in their absence given agreement as to error and outcome had been achieved.

³ *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594. See [2]-[5] in particular.

basis for rejecting a site specific adjustment, I am left with the conclusion that the Panel did not discharge its statutory duties in relation to the appellant's site.

[22] The general reasons provided by the Panel, noted at [11] above, address the first, but not the second, of the two issues identified by Mr Minhinnick.

[23] In terms of the relief proposed, I am satisfied the creation of the Riddell Road precinct is an appropriate rectification of the admitted error. The 11 m maximum height limit is consistent with the height provided in the SPRVZ and provides additional flexibility for built form. Moreover, the 20 m buffer area means additional height will not result in adverse effects for neighbouring properties.

[24] These changes, while not specifically included in APHTI's submission, resemble the height and roof allowance provided for in the MHU zone (which APHTI initially sought as relief). The additional 1 m for roof height is also consistent with the MHU provisions of the operative plan.

[25] There being no other interested parties, the relief is final.

Outcome

[26] The appeal is allowed. The relief set out in Appendix A is granted.

APPENDIX A

Riddell Road Precinct provisions

I337. Riddell Road Precinct

I1.1. Precinct Description

The Riddell Road Precinct applies to a 14 hectare site located at 207 Riddell Road, Glendowie with an established retirement village. The precinct adjoins two long-established schools, Sacred Heart College to the west and Glendowie Primary School to the north. The remainder of the precinct adjoins established residential properties.

The purpose of the Riddell Road precinct is to provide for development with additional building height and, as a consequence, a greater intensity of development within a suburban location. The provisions are designed to reflect the existing development and to enable the future development opportunity that the site represents.

The large site area provides for additional building height within sub-precinct A, at a sufficient distance from established residential areas to manage any adverse visual or dominance effects on neighbours.

The zoning of land within this precinct is Residential – Mixed Housing Suburban zone.

The provisions in any relevant overlays, zone and the Auckland-wide apply in this precinct unless otherwise specified in this precinct.

I1.2. Objective

- (1) Development incorporating additional building height, which supports an urban built character of predominantly three storeys, is enabled within sub-precinct A while complementing buildings heights at the interface with adjacent residential areas.

The overlay, Auckland-wide and zone objectives apply in this precinct in addition to those specified above - with the exception of Objective H4.2(2) in the Residential – Mixed Housing Suburban Zone as it relates to activities and development located in sub-precinct A as shown on I1.10.1 Riddell Road : Precinct plan 1.

I1.3. Policy

- (1) Enable additional building height for development in sub-precinct A in a variety of forms which provide for an urban built character of predominantly three storeys, while managing the interface with adjacent residentially zoned areas ensuring an appropriate building height transition to adjacent residential areas.

The overlay, Auckland-wide and zone policies apply in this precinct in addition to those specified above - with the exception of policy H4.3(2) in the Residential – Mixed Housing Suburban Zone as it relates to activities and

development located in sub-precinct A as shown on I1.10.1 Riddell Road : Precinct plan 1.

I1.4. Activity table

The activity tables in any relevant overlays, zone and Auckland-wide apply unless the activity is listed in Table I1.4.1 Activity table below.

Table I1.4.1 Activity table specifies the activity status of land use activities in the Riddell Road Precinct pursuant to section 9(3) of the Resource Management Act 1991.

A blank cell in the activity status means the activity status of the overlays, zone or Auckland-wide apply for that activity.

Table I1.4.1 Activity table

Activity		Activity status
Use and development		
(A1)	Activities listed in Table H4.4.1 Activity Table in the Residential – Mixed Housing Suburban Zone	

I1.5. Notification

- (2) Any application for resource consent for three or more dwellings per site or an integrated residential development that comply with all of the relevant standards of the underlying zone and the following standard will be considered without public or limited notification or the need to obtain the written approval from affected parties unless the Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991:

(a) I1.6.1 Building height

- (3) Any application for resource consent for an activity listed in Table I1.4.1 Activity table and which is not listed in I1.5(1) above will be subject to the normal tests for notification under the relevant sections of the Resource Management Act 1991.

- (4) When deciding who is an affected person in relation to any activity for the purposes of section 95E of the Resource Management Act 1991 the Council will give specific consideration to those persons listed in Rule C1.13(4).

I1.6. Standards

- (5) The overlay, Auckland-wide and zone standards apply to all activities listed in the Table I1.4.1 Activity Table in this precinct unless specified in Standard I1.6(2) below.

- (6) The following zone standard does not apply to activities located within sub-precinct A shown on I1.10.1 Riddell Road : Precinct plan 1:

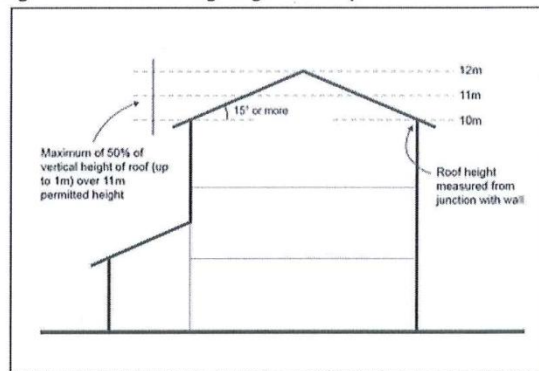
(b) Residential – Mixed Housing Suburban Zone - H4.6.4 Building height.

- (7) Activities listed in Table I1.4.1 Activity table which are located in sub-precinct A shown on I1.10.1 Riddell Road : Precinct plan 1 must comply with the standard listed in I1.6.1.

I1.6.1. Standard for Building height

- (1) Buildings in sub-precinct A must not exceed 11m in height, except that within sub-precinct A, 50 per cent of a building's roof height in elevation, measured vertically from the junction between the wall and the roof, may exceed this height by 1m, where the entire roof slopes 15 degrees or more, as shown in Figure I1.6.1.1 Building height in sub-precinct A.

Figure I1.6.1.1: Building height in sub-precinct A



I1.7. Assessment – controlled activities

There are no controlled activities.

I1.8. Assessment – restricted discretionary activities

I1.8.1. Matters of discretion

The Council will restrict its discretion to the following matters when assessing a restricted discretionary activity resource consent application, in addition to the matters specified for the relevant restricted discretionary activities in the overlay, zone or Auckland-wide provisions:

- (2) All restricted discretionary activities listed in Residential – Mixed Housing Suburban H4.4.1 Activity table that are located in sub-precinct A shown on I1.10.1 Riddell Road : Precinct plan 1:
 - (a) the effects on the neighbourhood character, residential amenity, safety, and the surrounding residential area from all of the following:
 - (i) building intensity, scale, location, form and appearance.
- (3) Infringement to standard I1.6.1 Building height:

(a) the effects on the surrounding residential environment.

I1.8.2. Assessment criteria

The Council will consider the relevant assessment criteria below for restricted discretionary activities, in addition to the assessment criteria specified for the relevant restricted discretionary activities in the overlay, zone or Auckland-wide provisions:

(4) All restricted discretionary activities listed in H4.4.1 Activity table that are located in sub-precinct A shown on I1.10.1 Riddell Road : Precinct plan 1:

(b) Refer to Policy I1.3(1).

(5) Infringements to standard I1.6.1 Building height:

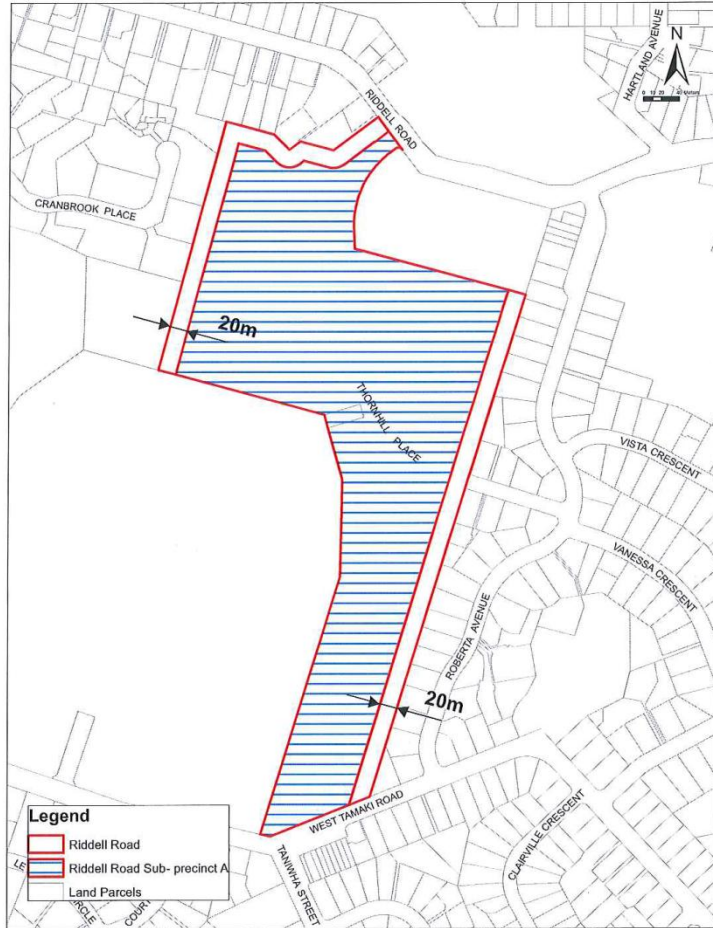
(c) Refer to Policy I1.3(1).

I1.9. Special information requirements

There are no special information requirements in this precinct.

11.10. Precinct plans

11.10.1 1 Riddell Road : Precinct plan 1



 Riddell Road : Precinct plan 1