

**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 against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearing Panel ("Hearing Panel") on the proposed Auckland Unitary Plan ("Proposed Plan")

AND

IN THE MATTER of Proposed Plan Hearing Topic 050-054 – City Centre and Business zones

BETWEEN **KIWI PROPERTY GROUP LIMITED and KIWI PROPERTY HOLDINGS LIMITED**

Appellants

AND **AUCKLAND COUNCIL**

Respondent

NOTICE OF APPEAL

RE PROPOSED PLAN TOPIC 050-054 BUSINESS ZONES

DATED: 14 September 2016

**ELLIS GOULD
SOLICITORS
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REF: D A ALLAN

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AUCKLAND**

TAKE NOTICE that at _____ on _____ 2016 or as soon as Counsel may be heard Counsel for the Appellants will move the High Court at Auckland on appeal from the decision of the Auckland Council ("**Council**") dated 19 August 2016 regarding Hearing Topic 050-054 – City Centre and Business Zones ("**the Decision**") of the Proposed Auckland Unitary Plan ("**the Proposed Plan**") as follows:

Background

1. The Appellants have the right to appeal the Decision to the High Court under section 158(1) of the LGATPA because this Appeal relates to provisions or matters relating to the Proposed Plan:
 - (a) That the Appellants addressed in submissions; and
 - (b) In relation to which the Council accepted recommendations of the Auckland Unitary Plan Independent Hearings Panel ("**Hearing Panel**") which resulted in provisions being included in the Proposed Plan or a matter being excluded from the Proposed Plan.
2. Kiwi Income Property Trust and Kiwi Property Holdings Limited lodged original submissions dated 27 February 2014 and further submissions dated 21 July 2014 (collectively, "**the Submissions**") on the Proposed Plan. Kiwi Property Group Limited is the successor to Kiwi Income Property Trust with respect to the Submissions.
3. This Appeal relates to a matter that was addressed in the Submissions, being the manner in which "*offices*" are provided for in the Business zones in the Proposed Plan. In particular:
 - (a) The Proposed Plan as publicly notified used a "*per site*" threshold for offices in the Business zones (eg: "*Offices up to 500 m² GFA per site*" were a Permitted Activity in both the General Business and Mixed Use zones and "*Offices greater than 500 m² GFA per site*" were a Discretionary Activity in both the General Business and Mixed Use zones).
 - (b) The Appellants' original submission dated 27 February 2014 generally supported the Proposed Plan provisions, subject to amendments to specific provisions. No changes were sought by the Appellants to the use of the "*per site*" threshold mechanism referred to in (a) above.

- (c) The Appellants' further submissions opposed submissions by third parties that sought, for example, to amend the office size thresholds in the General Business, Mixed Use and Light Industry zones from a "*per site*" basis to a per activity or per tenancy basis.
 - (d) Collectively, the Submissions sought retention of thresholds regarding offices in the Business zones calculated on a "*per site*" basis.
 - (e) In evidence and legal submissions presented to the Hearing Panel at the hearing on Hearing Topics 050-054 – City Centre and Business Zones, the Submitters, the Council and some but not all other parties supported the retention of "*per site*" thresholds for offices in the Business zones.
4. In its recommendations report dated 22 July 2016 on Hearing Topics 050-054 – City Centre and Business Zones ("**the Report**"), the Hearing Panel replaced the "*per site*" thresholds regarding offices in the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones with "*per tenancy*" thresholds ("**the Threshold Change**").
5. The Decision accepted the recommendations in the Report regarding the Threshold Change.
6. The Decision adopted the reasons of the Hearing Panel as expressed in its recommendation reports with respect to recommendations that were accepted by the Council.
7. The Appellants are not trade competitors for the purposes of section 308D of the RMA. In any event:
- (a) The Appellants have interests in Mixed Use zoned land.
 - (b) The activities that the Appellants and neighbouring landowners may establish as of right on their Mixed use zoned sites, together with the effects on the environment that may be generated by those activities and experienced in the locality, will be directly affected by the Threshold Change.
 - (c) Accordingly, the Appellants are directly affected by effects of the subject matter of the Appeal that:
 - (i) Adversely affect the environment; and

- (ii) Do not relate to trade competition or the effects of trade competition.

Errors of Law

8. The Appellant alleges that the Council and the Hearing Panel erred as follows in the Decision in relation to the Threshold Change:
- (a) By failing to provide any reasons for the Threshold Change, contrary to the obligation on the Hearing Panel pursuant to section 144(6) of the LGATPA to provide written reasons for accepting or rejecting submissions;
- (b) By failing to undertake an assessment of the costs and benefits of the Threshold Change in terms of section 145(1)(d) of the LGATPA and sections 32AA and section 32 of the RMA.
- (c) By failing to take into account relevant considerations, including:
- (i) The evidence and legal submissions presented to the Hearing Panel hearing on Topic 050–054 on behalf of the Council and the Appellants in support of the “*per site*” threshold.
- (ii) The ineffectiveness of a “*per tenancy*” threshold adopted by the Hearing Panel in the Report.
- (iii) The failure of the Threshold Change to:
- Give effect to the relevant Proposed Plan objectives and policies relating to the Mixed Use and General Business zones.
 - Promote the sustainable management of resources (section 5 of RMA).
 - Warrant approval in terms of section 32 of RMA.
- (d) By implementing provisions that are so unreasonable that no reasonable hearing panel or council could have implemented them.

Questions of Law to be Resolved:

9. The questions of law to be resolved are:

- (a) Was the Hearing Panel required to provide reasons in support of the Threshold Change in the Report and, if so, did the Hearing Panel provide any or sufficient reasons in support of the Threshold Change?
- (b) Was the Hearing Panel required to undertake and include in the Report an assessment of benefits and costs with reference to the Threshold Change and, if so, did the Hearing Panel undertake and include in the Report an appropriate assessment of benefits and costs with reference to the Threshold Change?
- (c) Did the Hearing Panel err in law by failing to take into account relevant considerations including those specified in paragraph 8(c) above?
- (d) Are the package of Proposed Plan provisions governing offices in the Local Centre, Neighbourhood Centre, Mixed Use and General Business zone as a consequence of the Threshold Change so unreasonable that no reasonable hearing panel or council could have implemented them?
- (e) Did the Council in the Decision incorporate and repeat the errors of law identified in paragraphs 9(a), (b) and (c) above by accepting the Hearing Panel's recommendation regarding the Threshold Change without rectifying the Hearing Panel's errors?

Grounds of Appeal:

Failure to Provide Reasons

- 10. Pursuant to section 144(8)(c) of the LGATPA, the Report is required to include the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to:
 - (a) The provisions of the Proposed Plan to which they relate; or
 - (b) The matters to which they relate.
- 11. No reasons were provided in the Report for the Threshold Change:
 - (a) Paragraph 1.2 of the Report summarises the Hearing Panel's recommended changes to the Proposed Plan.

- (b) Paragraph 1.2(iii) of the Report notes that, further to amendments agreed between the Council and submitters, the Hearing Panel recommends as follows:

“Amend the gross floor area limits for offices to be on a per tenancy basis rather than on a per site basis.”

- (c) A number of the alterations summarised in paragraph 1.2 of the Report are the subject of detailed reasoning in the balance of the Report but no additional comments or reasons are provided with respect to the Threshold Change.

12. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel's recommendations, including the Threshold Change. The Decision contains no additional reasons with respect to the Council's acceptance of the recommendation regarding the Threshold Change. Accordingly, the Decision has incorporated and repeated the failure of the Hearing Panel to provide reasons in the Report.
13. The Threshold Change is a provision and matter that was the subject of submissions and in respect of which the Hearing Panel was required pursuant to section 144 to provide reasons.

Failure to undertake assessments of costs and benefits

14. Pursuant to section 145(1)(d) of the LGATPA, the Hearing Panel was required to include in its recommendations a further evaluation of the Proposed Plan in accordance with section 32AA of the RMA, which must be undertaken in accordance with section 32(1) to (4) of the RMA.
15. The Hearing Panel failed to include in the Report a further evaluation in terms of the Threshold Change and in particular failed to:
- (a) Examine whether the Threshold Change was the most appropriate way to achieve the relevant objectives of the Proposed Plan by (section 32(1)(b));
- (i) Identifying other reasonably practicable options for achieving the objectives, including the “*per site*” thresholds proposed and supported by the Council and the Appellants;

- (ii) Assessing the efficiency and effectiveness of the provisions in achieving the objectives;
 - (iii) Summarising the reasons for deciding on the provisions.
- (b) Identify and assess the benefits and costs of the effects that are anticipated from the implementation of the provisions (section 32(2)(a)); and
- (c) Quantify the benefits and costs referred to in (b) above (section 32(2)(b)).
16. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel's recommendations, including the Threshold Change. The Decision contains no evaluation in accordance with sections 32AA and 32(1) to (4) of the RMA with respect to the Threshold Change. Accordingly, the Decision has incorporated and repeated the failure of the Hearing Panel to provide in the Report a further evaluation in accordance with sections 32AA and 32(1) to (4) of the RMA with respect to the Threshold Change.

Failure to take account of relevant considerations regarding Threshold Change

17. The Report and Decision have no regard to the following relevant considerations:
- (a) The evidence presented to the Hearing Panel hearing on Topic 050–054 on behalf of the Council and the Appellants in support of the “*per site*” threshold.
 - (b) The ineffectiveness of a “*per tenancy*” threshold given that:
 - (i) There is no practical difference in the quantum and nature of adverse environmental effects generated by a given quantum of office space that is comprised in a single tenancy or is subdivided into multiple tenancies.
 - (ii) Resource consent applications to convert office space in Local Centre, Neighbourhood Centre, General Business and Mixed Use zones comprised in multiple tenancies and permitted as of right pursuant to the “*per tenancy*” threshold mechanism into

larger tenancies that exceed the 500 m² per tenancy threshold will almost inevitably be successful as they will generate no increase in or different adverse effects in comparison with the permitted office development.

- (iii) As a consequence, the Threshold Change will not act as an effective filter to the resource consenting of unlimited offices in the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones.
- (iv) That will compromise the purpose of imposing a threshold on offices in the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones, being to promote and encourage the location of offices in suitably scaled and located zoned centres and to limit their location outside those zoned centres so as to:
 - Maximise the extent to which office occupants are able to make use of and support public transport networks;
 - Maximise the contribution that office activities in centres make to the city's social, economic and cultural wellbeing; and
 - Minimise the adverse local and cumulative traffic, amenity and other effects that would be generated by significant office development in the relevant Business zones.

(c) The failure of the Threshold Change to:

- (i) Give effect to the relevant objectives and policies relating to the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones.
- (ii) Promote the sustainable management of resources (section 5 of RMA).
- (iii) Warrant approval in terms of section 32 of RMA.

18. The Decision adopted the reasons set out in the Report in respect of matters on which the Council accepted the Hearing Panel's recommendations, including the Threshold Change. The Decision contains no consideration of the relevant considerations listed in paragraph 17 above. Accordingly, the Decision has incorporated and repeated the failure of the Hearing Panel to consider those matters.
19. Had the Hearing Panel and Council had regard to the relevant considerations listed in paragraph 17 above they would not have upheld the Threshold Change.

Unreasonableness regarding Threshold Change

20. For the reasons set out in paragraph 17 above, adoption of the Threshold Change renders the Proposed Plan provisions governing offices in the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones so ineffective and counter-productive that no reasonable hearing panel or council could have upheld them.

Relief Sought

21. The Appellant seeks:
 - (a) That the appeal be allowed.
 - (b) That the Decision be disallowed to the extent that it approves the Threshold Change.
 - (c) That the Council be directed to amend the Decision by changing the thresholds governing the activity status of "offices" in the Business zones in the Proposed Plan by replacing the words "*per tenancy*" with the words, "*per site*".
 - (d) In the event that the relief sought in paragraph 21(c) above is not granted by the Court:
 - (i) That the Decision be remitted back to the Council for reconsideration; and
 - (ii) That the Court direct the Council to provide the Appellants with an opportunity to make further submissions and provide further evidence in relation to the manner in which "*offices*" are

provided for in the Business zones in the Proposed Plan and in particular the nature of the thresholds that determine activity status.

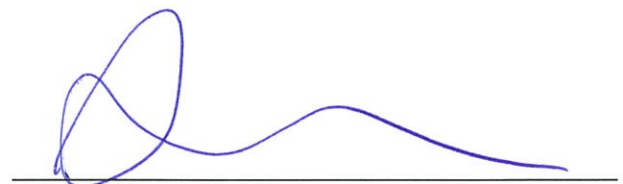
- (e) Costs.

Attachments

22. The Appellants **attach** the following documents to this Notice of Appeal:
- (a) Copies of the parts of the Appellants' original and further submissions that relate to the manner in which "*offices*" are provided for in the Business zones in the Proposed Plan (**Annexure A**).
 - (b) A copy of the Report (**Annexure B**)
 - (c) A copy of the relevant parts of the Decision (**Annexure C**).
 - (d) A list of persons who are parties to the proceedings concerning or who appeared before the Hearing Panel with regard to the manner in which "*offices*" are provided for in the Business zones in the Proposed Plan and on whom the Appellants will serve a copy of this Appeal (**Annexure D**).

This notice is filed in reliance on section 158 of the Local Government (Auckland Transitional Provisions) Act 2010, sections 299 and 300 of the Resource Management Act 1991 and Part 20 of the High Court Rules.

DATED 14 September 2016



D A Allan

Solicitor for the Appellant

TO: The Auckland Council

AND TO: The Registrar
The High Court
Auckland

AND TO: The persons listed in Annexure D.

This Notice of Appeal is filed by **Douglas Andrew Allan**, solicitor for the appellant whose address for service is at the offices of Ellis Gould, Solicitors, Level 17, Vero Centre, 48 Shortland Street, PO Box 1509, Auckland 1140, DX CP22003, Auckland, Telephone: (09) 307-2172, Facsimile: (09) 358-5215.

Documents for service on the appellant may be left at the above address for service or may be:

- (a) Posted to the solicitor at PO Box 1509, Auckland; or
- (b) Left for the solicitor at a Document Exchange for direction to DX CP22003, Auckland; or
- (c) Emailed to the solicitor at dallan@ellisgould.co.nz.