

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

CIV-2016-404-

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

AND

IN THE MATTER of an appeal under section 158(1) of the LGATPA

AND

IN THE MATTER of Topic 081 - Rezoning and Precincts (Geographical Areas) of the Proposed Auckland Unitary Plan

BETWEEN **VALERIE CLOSE RESIDENTS GROUP**
Appellant

AND **AUCKLAND COUNCIL**
Respondent

NOTICE OF APPEAL BY VALERIE CLOSE RESIDENTS GROUP

16 SEPTEMBER 2016

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TO: The Registrar of the High Court at Auckland

AND TO: The Respondent

TAKE NOTICE THAT Valerie Close Residents Group ("**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 recommendation ("**Recommendation**") 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 approximately 75 ha of land accessed from Valerie Close, immediately south of Warkworth ("**Site**"). The Appellant sought that the Site be rezoned from Future Urban zone to a live residential zoning.
2. The Council accepted the Recommendation of the Panel, which resulted in the Site being zoned Future Urban rather than a live residential zoning as sought in the Appellant's submission.

SCOPE OF APPEAL

3. The Appellant appeals against the Decision insofar as it relates to the zoning of the Site, and all related provisions.

ERRORS OF LAW

4. In adopting the Panel's Recommendation in relation to the zoning of the Site, the Council made the following errors of law:

Failure to give reasons

- (a) The Panel failed to give sufficient reasons for its decision, as it is required to do under section 144(8) of the LGATPA.

Failure to consider evidence

- (b) The Panel failed to take into account a relevant matter, being the evidence for the Appellant.

Natural justice

- (c) The Panel's conclusion that it was not "able to resolve detailed concerns in the available time" constituted a breach of the Appellant's right to natural justice, on the basis that the Panel had a statutory power to extend the deadline for its Recommendation under section 147 of the LGATPA, but chose not to do so.

Consideration of future potential plan changes

- (d) The Panel took into account a matter that it should not have, being that plan changes or variations would be undertaken in the future to assess zoning requests the Panel did not have sufficient time to consider.

- 5. The above errors of law, individually and collectively, materially affected the Panel's Recommendation on the Unitary Plan in relation to the appropriate zoning for the Site.

GROUND OF APPEAL

- 6. The grounds of appeal are as follows:

Failure to give reasons

- 7. In relation to the Panel's Recommendation, section 144(8) of the LGATPA provides that:

- (8) Each report must include—
 - (a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and
 - (b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and
 - (c) the **reasons for accepting or rejecting submissions** and, for this purpose, may address the submissions by grouping them according to—
 - (i) the provisions of the proposed plan to which they relate; or
 - (ii) the matters to which they relate.

[Emphasis added]

8. The Panel erred in failing to give adequate reasons for its recommendation, as expressly required under the LGATPA. In the Panel's Recommendation to retain the notified Future Urban zoning for the Site, the only rationale given by the Panel for declining the broad class of rezoning requests (of which the Appellant's submission is one) was:¹

Live zonings have been adopted for land brought within the Rural Urban Boundary where justified by evidence. Where this has not occurred it has usually been for the reason either that insufficient work has been undertaken to satisfactorily answer outstanding questions about, for example, infrastructure provision, or because the Panel has not been able to resolve detailed concerns in the available time. In many instances it anticipates that those matters will be able to be brought forward through plan changes/variations in the near future because of work undertaken to date.

9. That single paragraph represents the Panel's entire response regarding all submissions on Future Urban land, including the Appellant's submission.
10. The legislation states that the Panel is not required to make recommendations that address each submission individually,² and provides the Panel with the ability to group the submissions according to either the provisions or matters to which they relate.³ However, the reasons provided by the Panel do not provide submitters with sufficient indication as to the reason why their submission was not accepted.
11. A failure to give reasons for a decision has been accepted to be an error of law, as:⁴

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

12. That principle is directly relevant here, particularly given the clear disagreement between the parties as to the zoning sought.
13. While a thematic approach is permissible, the Panel has grouped such a broad class of submitters together, with such wide-ranging issues. In so doing, the Panel has effectively denied those submitters the ability to assess the merits of that decision with regard to their own particular submission. "Infrastructure provision" is provided as one example of the

¹ Panel's report in relation to Topics 016 / 017, 080 and 081, page 20.

² Local Government (Auckland Transitional Provisions) Act 2010, section 144(10).

³ Local Government (Auckland Transitional Provisions) Act 2010, section 144(8)(c).

⁴ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [79].

reasons for rejecting those submissions - however, beyond that single indication as to the perceived shortcomings in the submitters' respective cases, there is no understanding of the Panel's rationale for its recommendations.

14. In its submission the Appellant sought either:
 - (a) live zoning in accordance with the Valerie Close Structure Plan, which provided for the application of Single House, Mixed Housing Suburban, Neighbourhood Centre and Reserve zoning; or
 - (b) Rural Large Lot zoning.
15. Based on the Panel's Recommendation, there is no way to decipher whether or not both aspects of the Appellant's submission were considered, and subsequently rejected.
16. Insofar as infrastructure provision (being the only express reason given) is the basis on which the Panel rejected its submission, the Panel's recommended provisions for the Rural Large Lot zone states that the zone will apply where:⁵

... the land is not suited to conventional residential subdivision because of the absence of reticulated services or there is limited accessibility to reticulated services...
17. The Panel's failure to give adequate reasons also denies the Appellant the ability to ascertain whether the Recommendation even applied the correct legal test.
18. Based on the above grounds, the Panel therefore failed to give sufficient reasons for its decision as it is required to do under section 144(8) of the LGATPA such that there was an error of law.

Failure to consider evidence

19. If infrastructure provision was the basis for the Panel's rejection of the Appellant's submission, then the Panel failed to have regard to a relevant matter, which was the evidence for the Appellant in relation to infrastructure provisions and structure planning of the Appellant's land.

⁵ IHP Version of PAUP, H1.1 Zone description.

20. The Panel was presented with extensive expert evidence in support of a live zoning for the Site by the Appellant, including engineering and planning evidence.
- (a) Based on an engineering assessment of the Valerie Close Structure Plan detailed in his evidence, Mr Shortt, the Appellant's engineering witness, concluded that:⁶
- ... development as indicated in the Structure Plan prepared is readily achievable from a civil engineering, servicing, access and stormwater / overland flow path point of view.
21. Following his substantive planning assessment of the appropriate zoning for the Site, Mr Hook, the Appellant's planner, concluded that:⁷
- ... the adoption of the Structure Plan and application of a live zoning to the land into the AUP will best achieve the purpose of the Act, would give effect to the applicable objectives and policies of the plan, and would provide the most appropriate planning provisions for the use and development of the land over the life of the Plan.
22. In that regard, the Appellant had indicated that it was willing to provide the necessary infrastructure for its proposal, given that the indicative timing for public infrastructure, to be provided by the Council, is not expected for another 15 years.⁸
23. The Appellant's evidence clearly supported the rezoning of the Site to a live zoning, and provided evidence that would satisfy the Panel's concerns regarding the requirement for additional infrastructure to service the development in accordance with the Valerie Close Structure Plan, for the Site.
24. To the extent that the Panel considered that this evidence was not sufficient to justify the application of that zoning, the Appellant also sought an alternative zoning of Large Lot, as discussed above at paragraphs 14 to 16, which does not require the provision of public infrastructure.
25. Had the Panel considered that evidence, it would have materially affected the Panel's decision.

⁶ Evidence of Chris Shortt on behalf of Valerie Close Residents Group, dated 10 February 2016, at paragraph 38.

⁷ Evidence of James Hook on behalf of Valerie Close Residents Group, dated 10 February 2016, at [56].

⁸ Legal submissions on behalf of Valerie Close Residents Group, dated 21 March 2016, at [4.5]; Hearing statement of William Endean on behalf of Valerie Close Residents Group, dated 21 March 2016, at [28].

26. The Panel's failure to consider that evidence constituted an error of law.

Natural justice

27. The right to natural justice is a fundamental pre-requisite of the quasi-judicial process, and a breach of natural justice is an accepted error of law.⁹

28. The Panel concluded in its Recommendation that:¹⁰

Where this has not occurred it has usually been for the reason either that insufficient work has been undertaken to satisfactorily answer outstanding questions about, for example, infrastructure provision, or **because the Panel has not been able to resolve detailed concerns in the available time.**

[Emphasis added]

29. However, the Panel was specifically provided with the power to extend the statutory timeframe for it to issue its Recommendation. Section 147 of the LGATPA provides that:

- (1) The Hearings Panel or the Auckland Council, or both, may request the Minister for the Environment to extend the deadline referred to in section 146 (the original deadline).
- (2) ...
- (3) A request must be in writing and—
 - (a) specify a proposed date for the extended deadline that is no later than 1 year after the original deadline; and
 - (b) if applicable, include the views of the party not making the request.

30. The Panel owed a duty to the participants in the Unitary Plan process to consider their submissions fully, and thereafter to make informed recommendations to the Council in keeping with that full and thorough consideration. By virtue of its Recommendation, it is clear that the truncated timeframes of the Unitary Plan process made that difficult. However, as set out above the Panel had the ability to extend the time available by up to 12 months.

31. The fact that the Appellant's submission, evidence and legal submissions were not properly considered is a breach of its right to natural justice.

⁹ *Kawarau Jet Services Holdings Limited v Queenstown Lakes District Council* [2015] NZHC 2343; *Te Whare o te Kaitiaki Ngahere Incorporated v West Coast Regional Council* [2015] NZHC 2769.

¹⁰ Panel's report in relation to Topics 016 / 017, 080 and 081, page 20.

Through the Unitary Plan process, the Appellant incurred significant cost in assessing the viability of the proposal and presenting its case to the Panel. For the Panel to then dismiss that case without due consideration undermines the Appellant's right to a fair hearing, especially in light of the power to extend that timeframe.

32. The Panel's conclusion that it was not "able to resolve detailed concerns in the available time" constituted a breach of natural justice, on the basis that the Panel had a statutory power to extend the deadline in order to allow time to fully consider the options available to it, but chose not to do so.
33. The lack of "available time" materially affected the Panel's conclusion regarding the appropriate zoning for the Site, leading it to take what it thought to be the path of least resistance in reverting to the zoning of the Site as notified. The failure to extend the deadline was therefore a breach of the Appellant's right to natural justice, and as such constituted an error of law.

Consideration of future potential plan change

34. The Panel also made its Recommendation on the basis that, where the Panel rejected submissions seeking a live zoning:¹¹

... those matters will be able to be brought forward through plan changes/variations in the near future because of work undertaken to date.
35. This error is connected to that identified above at paragraphs 27 to 33 regarding the breach of the Appellant's right to natural justice. The Panel indicated that it did not have enough time to properly consider the submissions, and in doing so points to the Appellant's ability to have its submission assessed under a separate plan change process. However, this is an irrelevant consideration that should not have been taken into account in making the Recommendation.
36. The fact that there were alternative methods available to the Appellant of having the proposal assessed should not have been a matter that the Panel took into account. The correct approach should have been to consider all of the evidence that was available to it and make an informed

¹¹ Panel's report in relation to Topics 016 / 017, 080 and 081, page 20.

recommendation, regardless of the submitters' ability to seek relief through a subsequent process.

37. It is clear from the Recommendation that this consideration materially affected the decision that the Panel made in relation to the zoning of the Appellant's Site. The Panel's consideration of this matter constituted an error of law.

QUESTIONS OF LAW

38. The questions of law to be decided are:

Failure to give reasons

- (a) Did the Panel fail to give sufficient reasons for its decision as it is required to do under section 144(8) of the LGATPA?

Failure to consider evidence

- (b) Did the Panel fail to consider a relevant matter, being the evidence provided on behalf of the Appellant?

Natural justice

- (c) Did the Panel's conclusion that it was not "able to resolve detailed concerns in the available time" constitute a breach of the Appellant's right to natural justice, on the basis that the Panel had a statutory power to extend the deadline for its Recommendation under section 147 of the LGATPA, but did not use it?

Consideration of future potential plan change

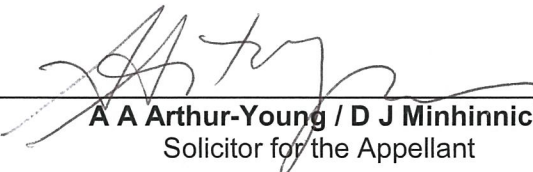
- (d) Did the Panel take into account matters that it should not have taken into account, namely that plan changes or variations would be undertaken in the future to assess zoning requests?

RELIEF SOUGHT

39. The Appellant seeks:
- (a) that its appeal be allowed;
- (b) that the High Court refer the matter back to the Panel for full reconsideration in light of the findings of the High Court;

- (c) that the High Court provides the Appellant with the opportunity to present further evidence and submissions in relation to the zoning of the Site; and
- (d) costs.

DATED 16 September 2016



A A Arthur-Young / D J Minhinnick
Solicitor for the Appellant

This document is filed by **ALLISON ANNE ARTHUR-YOUNG**, 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.