

**IN THE HIGH COURT
AT AUCKLAND**

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 156(3) of the LGATPA against a decision of the Auckland Council on a recommendation of the Auckland Unitary Plan Independent Hearings Panel (**Hearings Panel**) on the proposed Auckland Unitary Plan (**Proposed Plan**)

AND

IN THE MATTER of Proposed Plan Hearing Topic(s) 081, Rezoning and Precincts *used during Hearings Panel hearing process, including Decision I602 relating to the Birdwood Precinct*

AND

IN THE MATTER of a request for a declaration that two minor errors be corrected in the Proposed Plan as they relate to 93 Sunnyvale Rd, and 16 Red Hills Rd within the Birdwood Precinct Plan.

BETWEEN Malcolm Woolmore
93 Sunnyvale Rd
Massey
Auckland 0614

Appellant

Alastair Morris & Sonya Morris
16 Red Hills Rd
Massey
0614

Appellant

AND

AUCKLAND COUNCIL

Respondent

NOTICE OF APPEAL

Dated 16 September 2016

To: The Registrar
 High Court
 Auckland

Introduction:

This appeal to the High Court is due to the fact that what we believe is a simple error in interpreting the Auckland Unitary Plan Independent Hearing Panel's decision as it relates to our two properties.

Also, we have been advised that there appears to be an anomaly in the legislation relating to appeals, in particular under section 156(3) of the LGATPA, it that only out of scope decisions by the IHP can be considered if they had identified them to be such, and that no provision has been made for unidentified out of scope decisions.

As outlined in our appeal to the Environment Court, we have been advised to apply to the High Court asking for the Court to declare that, firstly, an error of interpretation and translation into the Birdwood Precinct Plan was made that can be corrected under clause 16 of Schedule 1 of the RMA, or alternatively, an out of scope decision was made which needs to be reviewed, or alternatively that a breach of natural justice has occurred which needs to be put right.

1. We, **Malcolm Woolmore** of 93 Sunnyvale Rd, Massey, Auckland 0614, and **Alastair & Sonya Morris**, of 16 Red Hills Rd, Massey, 0614, hereby appeal against a decision (or part of a decision) of the Auckland Council (the Council) on the proposed Auckland Unitary Plan (Proposed Plan) as they relate to our properties in the Birdwood Precinct as identified in the Unitary Plan. We are not appealing any decision that relates to other properties.
2. Whilst our circumstances are different, we believe that the key issue is the same, that Auckland Council staff have confused the status of our subdivision rights existing under the previous Auckland District Plan (Waitakere) as contained in the Birdwood Structure Plan which was in essence carried over into the Proposed Auckland Unitary Plan with some amendments.
3. Malcolm Woolmore has owned the property at 93 Sunnyvale Rd for over 20 years, was a submitter on the Proposed Unitary Plan and participated in the Independent Hearing Panel's Hearings.
4. Alastair & Sonya Morris purchased 16 Red Hills Rd on 2 August 2013. During due diligence the property file revealed that the previous owners had undertaken a boundary change with their daughter's property [in order to gift her one of the three lots provided for in the Structure Plan leaving a residual 2 lots for further development.] The previous owners had made application for a resource consent to Council to subdivide 16 Red Hills Rd into two lots but this application was abandoned prior to resource consent being granted. Having just purchased the property when the Proposed Unitary Plan was notified we were busy with other aspects of life and had no cause to make submissions at the time as the proposed Unitary Plan retained our right to subdivide into two lots.
5. Both appellants believe that we have an implied right to appeal the Council's decision under section 156(3) of the LGATPA. We believe that two errors have been compounded causing the recommendations of the Hearings Panel to be misinterpreted resulting in translating that to the

Precinct Plan and hence two unidentified out of scope changes to the Proposed Plan. The IHP failed to recognise that they had effectively made an out of scope decision, and that the Birdwood Precinct Plan was amended as a result of misinterpretation of the IHPs decision. The Council's decision resulted in legitimate subdivision allocation being excluded from the Proposed Plan as it relates to our two properties. We are unduly prejudiced by the exclusion of the matter and believe that there has been a breach of natural justice.

Further details of the reasons for our request for a declaration to correct and error or appeal.

6. Firstly, we believe that the circumstances relating to our appeal derive from a simple misunderstanding and hence error that could be corrected as provided for under clause 16(2) of Schedule I in the RMA;

16(2) A local authority may make an amendment, without using the process in this schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

7. Auckland Council have advised that they do not accept that a minor error has occurred and that it would require a Plan Change to correct any perceived error. We disagree with that.
8. We note that there were no submissions made asking for us to lose our existing subdivision rights.
9. We have sought legal advice which has outlined options to appeal to both the Environment Court and the High Court as the circumstances relating to our properties are not explicitly covered under section 156(3) of the LGATPA although they could be construed as an outside of scope issue not identified by the IHP or Council. Regardless, we believe that we are the victims of a breach of natural justice.
10. The following is the relevant wording of the IHP's report highlighting amendments to the Notified Proposed Unitary Plan: ¹

"Accordingly, the Panel has made the following amendments to the Birdwood Precinct provisions:

- *removed allocations from sites that have utilised their numbers as originally denoted on the precinct plan;*
- *increased by two lots the numbers denoted for all sites where the allocated number has not yet been taken up;*
- *provided for subdivisions that do not comply with the standards in H1.6.1 as non-complying activities (no longer prohibited), and*
- *provided for minor dwelling units as non-complying activities to give effect to Policy H1.3(c) – no more than one dwelling per site.*

¹ Pg 7, Report to Auckland Council Hearing topics 016, 017 Changes to the Rural Urban Boundary; 080, 081 Rezoning and precincts , Annexure 5 Precincts West, July 2016

Consequently, for sites that have utilised their entitlements, additional lots require consent as a non-complying activity. For sites that have not utilised their entitlements, two more lots have been allocated over and above the initial allocation and the activity status of subdivision is restricted discretionary. A consequential amendment providing for minor dwelling units as non-complying activities gives effect to Policy H1.3(c) – no more than one dwelling per site.”

11. In the operational Birdwood Structure Plan, carried over into the notified Birdwood Precinct Plan, subdivision potential is shown by the allocation of a ‘number’ on each parent lot, indicating total subdivision potential for that lot. In the case of both properties, that number is ‘3’. **Attachment A** is a copy of the Notified Precinct Plan showing 3 lots on 93 Sunnyvale Rd, and 3 lots on 16 Red Hills Rd.
12. It is noted that the ‘3’ on 16 Red Hills Rd applied to the original allocation in the Birdwood Structure Plan and should have been amended to ‘2’ as a boundary change was undertaken with then 14 Red Hills Rd, by the previous owners, to gift their daughter (owner of 14 Red Hills Rd) one of their allocated lots. This was discussed and addressed during the 2002 Waitakere City Council District Plan Hearings and is described in Decision Notice 61.
13. Just as there are formalities preliminary to marriage, so are there formalities preliminary to subdivision; the issuing of a resource consent is akin to the issuing of a marriage license. It is simply permission to proceed with certain conditions. A marriage license isn’t ‘utilised’ until subsequent formalities are complete.
14. Likewise, subdivision rights aren’t ‘utilised’ until the conditions of consent are complied with, the cadastral survey has been lodged and accepted, the s224c certificate has been issued and title has been applied for and issued by LINZ.
15. Neither property has ‘utilised’ [note past tense] their subdivision rights as originally annotated on either the Birdwood Structure Plan, or the notified Birdwood Precinct Plan.
16. The owners of 93 Sunnyvale Rd have been granted permission to subdivide, (January 2016) by way of a resource consent for a 3 lot subdivision, but have not yet undertaken that subdivision, therefore, they have not yet ‘utilised’ [past tense] their numbers as originally denoted on the precinct plan. If the owners were not to proceed with their subdivision then their existing rights to lodge a subsequent resource consent application to subdivide as a limited discretionary activity would be lost as a result of the administrative error.
17. The previous owners of 16 Red Hills Rd applied for resource consent to undertake a two lot subdivision, but they abandoned that due to ill health and red tape. They put the property on the market shortly after and the property was sold to us in August 2013.
18. We note that two other properties within the precinct have also been granted permission to subdivide and have been correctly allocated the two additional lots provided for in the decision version of the Unitary Plan. (15 Mudgeways Rd (February 2016) and 198 Birdwood Rd (4 April 2016). These resource consents were issued before the IHPs decision.

Relief Sought

19. As such, we ask the Environment Court to address our appeal of the Council’s decision in one of the following ways.

Either...

- a. Declare that the loss of subdivision rights relating to our respective properties is the result of an administrative error and instruct Auckland Council to correct the error so that 93 Sunnyvale Rd is annotated with the number ‘5’ and 16 Red Hills Rd is annotated with the

number '4';

- b. Rule that neither property has utilised their previous subdivision rights and that the allocation numbers as set out in the notified version of the Proposed Plan for 93 Sunnyvale Road and 16 Red Hills Road, increased by two lots, be included in the Birdwood Precinct Plan.

Or...

- c. Recognise that there is an implied right to appeal under section 156(3) of the LGATPA in that whilst neither the IHP nor Council recognised out of scope decisions relating to our properties, the unintended consequences of the decision is, in fact, out of scope.
- d. The out of scope provisions apply to both properties in that the IHP recommendation, adopted by Council, stated that allocations be removed from sites that have utilised [past tense] and that their numbers as originally denoted on the precinct plan be increased by two lots where the allocated number has not yet been taken up;
- e. The out of scope provisions apply to 16 Red Hills Rd in that there were no submissions made by any party asking for the residual 2 lot subdivision potential to be revoked.

Or...

- f. Such further, other or consequential relief to these or other provisions as considered appropriate and necessary to address the concerns set out in this notice of appeal.

20. The end result of all options is the following relief;

- that the allocation numbers as set out in the notified version of the Proposed Plan for 93 Sunnyvale Road and 16 Red Hills Road, increased by two lots, be included in the Birdwood Precinct Plan.

21. We are not a trade competitor for the purposes of section 308D of the RMA.

22. We received notice of the decision on 19 August 2016.

23. The decision (or part of the decision) that we are appealing is:

- *Removal of existing subdivision allocation from the Birdwood Precinct Plan as it relates to our two properties at 93 Sunnyvale Rd and 16 Red Hills Rd respectively;*
- *Failure to add the two additional lots allocated by the IHP.*
- *The original Hearings Panel topic number(s) relevant to the decision or part of the decision are;*
 - *Report to Auckland Council, Hearing topics 016, 017 Changes to the Rural Urban Boundary; 080, 081 Rezoning and precincts, Annexure 5 Precincts West, July 2016... and*
 - *Auckland Unitary Plan Independent Hearings Panel Recommendation Version 22 July 2016, I602. Birdwood Precinct which includes the policies, rules and modified Birdwood Precinct Plan*
- *the specific matter excluded from the Proposed Plan by the decision are that both properties have lost subdivision rights due to misinterpretation and/or error.*

24. An electronic copy of this notice is being served today by email on the Auckland Council at unitaryplan@aucklandcouncil.govt.nz. Waivers and directions have been made by the Environment Court in relation to the usual requirements of the RMA as to service of this notice on

other persons.

25. We attach the following documents to this notice: (To be served via separate email)
- (a) a copy of the relevant decision
 - (b) Birdwood Precinct Plan: notified version
 - (c) Birdwood Precinct Plan: decision version
 - (d) a copy of Malcolm Woolmore's submission or further submission (with a copy of the submission opposed or supported by my further submission);
 - (e) Note: there were several further submissions of the same nature as those attached.
26. We are lodging the following related proceedings concerning the Proposed Plan in the High Court:
- (a) That an error of law has occurred resulting in a miscarriage of natural justice and that the allocation numbers as set out in the notified version of the Proposed Plan for 93 Sunnyvale Road and 16 Red Hills Road, increased by two lots, be included in the Birdwood Precinct Plan.



Ron Law

Signature of appellant (or person authorised to sign
on behalf of appellant)

On behalf of

Malcolm Woolmore, 93 Sunnyvale Rd
Alastair Morris, 16 Red Hills Rd
Sonya Morris, 16 Red Hills Rd

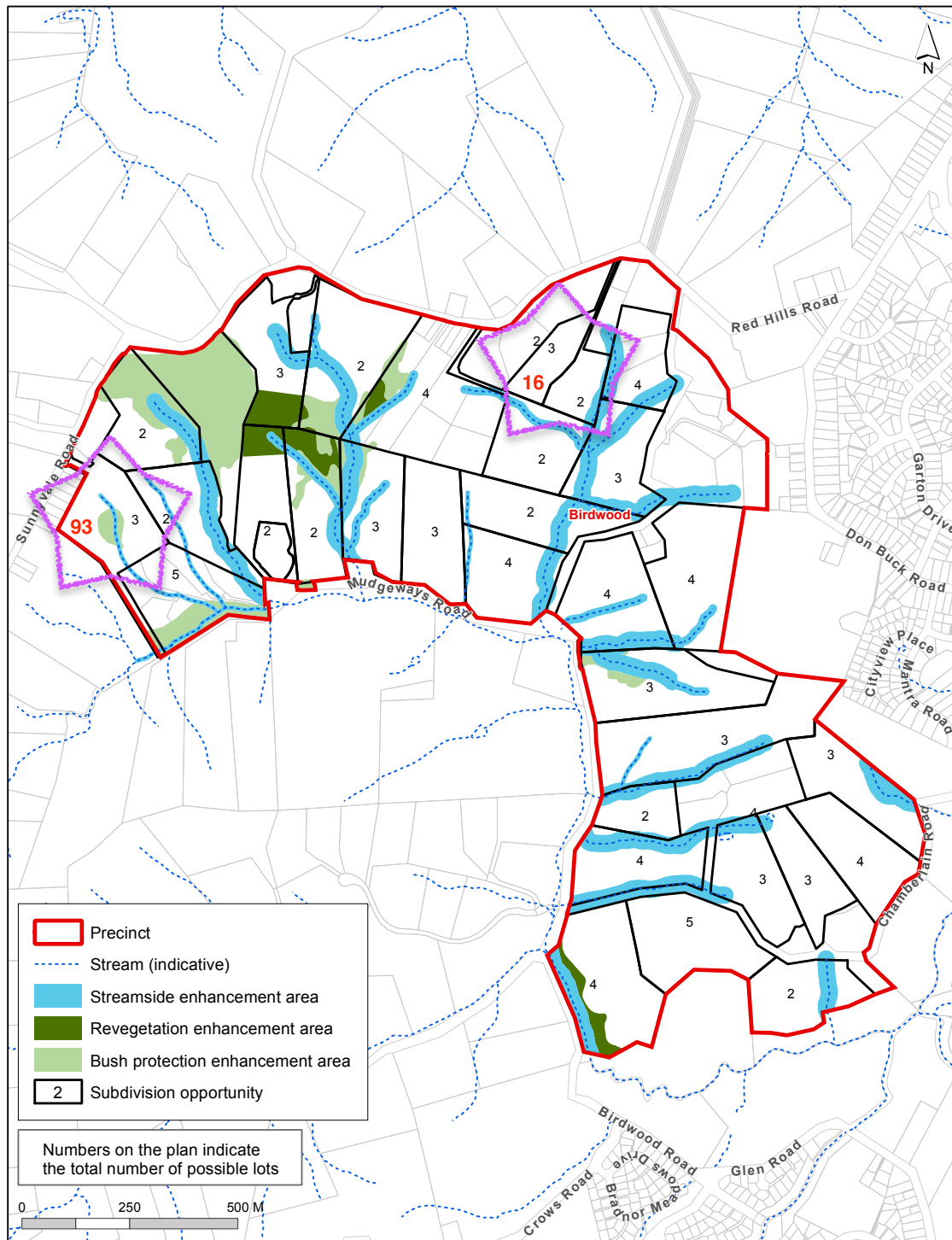
16 September 2016

Address for service of appellant:

Ron Law
25 Mudgeways Rd
Massey
Auckland 0614

Telephone: 09-832 4773
Email: Juderon@gmail.com
Contact person: Ron Law, Risk & Policy Adviser

Attachment A: Birdwood Precinct Plan as Notified



Birdwood precinct plan 1

As Notified September 2013



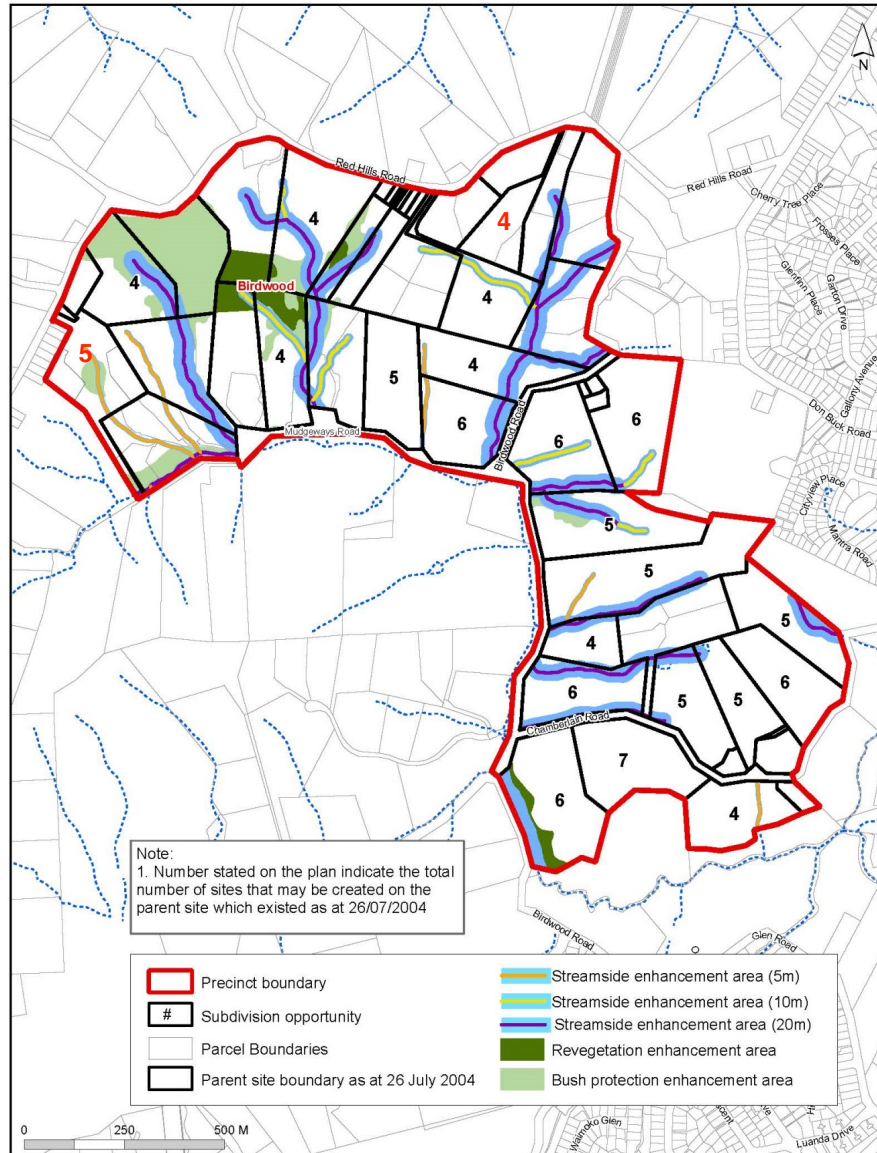
Property identifiers added (street number)

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Attachment B: Decision Birdwood Precinct Plan showing relief sought

I602 Birdwood Precinct

I602.10.1 Birdwood: Precinct plan 1



Decision Birdwood Precinct Plan

Red numbers show relief sought