

Under: Part 1 Judicature Amendment Act 1972

in the matter of: an application for review

between: **Waste Management NZ Limited**, a duly incorporated company having its registered office at Auckland and carrying on business as a provider of waste disposal services
Applicant

and: **Auckland Council**, being a Unitary Council established under the Local Government (Auckland Council) Act 2009, of Auckland
Respondent

Notice of proceeding (application for review)

Dated: 16 September 2016

REFERENCE: Bruce Scott (bruce.scott@chapmantripp.com)
Jill Gregory (jill.gregory@chapmantripp.com)


NOTICE OF PROCEEDING

To the respondent (**Auckland Council**) and any other person directed to be served

This document notifies you that you must file in this registry of the court a statement of defence to the applicant's claim (a copy of which is served with this notice). You must do this within 25 working days after the date on which you have been served with this notice. If you do not, the applicant may at once proceed to judgment on the applicant's claim, and judgment may be given in your absence.

If a trial of the proceeding is necessary, it will be held in this court at Auckland at a time to be fixed by the court.

Date: 16 September 2016



Bruce A Scott
Solicitor for applicant

If you file a statement of defence in the court, you must also provide the applicant with initial disclosure of documents in accordance with rule 8.4.

If you file a statement of defence in the court, you will be notified of the date and time of the first case management conference.

The purpose of the conference is to assist the parties in the just, speedy, and inexpensive determination of the proceeding, to make directions as to the conduct of the proceeding, and, where practicable, to make interlocutory orders. The parties will also be assisted to identify, define, and refine the issues in dispute.

You must prepare for and attend the first case management conference. You will be expected to have discussed with the plaintiff the matters set out in Schedule 5 of the High Court Rules. You or your solicitor must file a memorandum relating to the procedural matters set out in rule 7.3 of the High Court Rules.

Date:

(Registrar/Deputy Registrar*)

Note: Please carefully read the memorandum attached to this notice.

MEMORANDUM

Advice

- 1 Although you do not have to employ a solicitor for the purpose of this proceeding, it is recommended that you consult a solicitor about this matter immediately. However, a company or other corporation that wants to defend this proceeding or appear at any hearing must consult a solicitor immediately because —
 - (a) it can only carry on a proceeding in the court by a solicitor; and
 - (b) it cannot appear to conduct a proceeding except by counsel (unless there are exceptional circumstances).

Legal aid

- 2 If you cannot afford to meet the cost of the proceeding, you may be entitled to assistance under the Legal Services Act 2000 and regulations made under that Act.
- 3 The applicant is not in receipt of legal aid for the purpose of this proceeding.

Statement of defence

- 4 If the last day for filing your statement of defence falls on a day on which the registry of the court is closed, you may file your statement of defence on the next day on which that registry is open.
- 5 In calculating the time for filing your statement of defence you must disregard the period that commences with 25 December and ends with 15 January.
- 6 If you file a statement of defence, you must serve a copy of it on the applicant and on any other respondent who has given an address for service. This must be done within the same period of time you have for filing the statement of defence.

Counterclaim

- 7 If you have a counterclaim against the applicant, you must file a statement of that counterclaim in the registry of the court, and serve it on the applicant and on any other person against whom the same claim is made. This must be done within the same period of time you have for filing a statement of defence.

Witnesses

- 8 Summonses for the attendance of witnesses will be issued on application at the registry of the court.

Registry hours

- 9 The registry hours of the court are from 9 am to 5 pm except on court holidays.

Date:

(Deputy) Registrar

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Statement of Claim (application for review)

Dated: 16 September 2016

REFERENCE: Bruce Scott (bruce.scott@chapmantripp.com)
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STATEMENT OF CLAIM

16th day of September 2016

The applicant (**Waste Management**) says:

Parties

1 Waste Management:

- 1.1 is a duly incorporated company having its registered office at 86 Lunn Avenue, Mt Wellington, Auckland and carries on business as a provider of waste and environmental services in Auckland and other centres around New Zealand; and
- 1.2 is the owner of a block of approximately 0.8944 ha of land on the North Shore of Auckland, at 117 Rosedale Road, shown in red outline in *Diagram 1* below (the **Site**).

Diagram 1



- 2 The respondent is the Auckland Council (**Auckland Council**) and:
 - 2.1 is a Unitary Council established under the Local Government (Auckland Council) Act 2009; and
 - 2.2 is empowered under Part 4 of the Auckland Council (Auckland Transitional Provisions) Act 2010 (**ATP Act**) to promulgate a combined plan for Auckland to replace seven operative district plans, including the operative North Shore District Plan 2002 (**Auckland Unitary Plan**).

Background

The Site

- 3 Waste Management:
 - 3.1 has owned the Site and used it as a refuse transfer station since 1999; and
 - 3.2 selected the Site as it was in an isolated area, bounded by an operating landfill to the north, in close proximity to State Highway 1, and with an industrial zone (the heaviest available under the District Plan at the time), at that time undeveloped, to the south.
- 4 As a refuse transfer station, Waste Management uses the Site to:
 - (a) receive inbound waste;
 - (b) sort waste and recover material able to be reused or recycled;
 - (c) compact and consolidate waste into larger payloads; and
 - (d) load the consolidated waste for transportation to landfill.
- 5 The Site is presently:
 - 5.1 strategically located in close proximity to State Highway 1 to enable Waste Management to collect, sort and transfer waste from the North Shore catchment;
 - 5.2 the largest of a group of four lots located on a triangular block of land bounded by Rosedale Road, and State Highway 1;
 - 5.3 adjoins three properties on that triangular block of land (also shown on *Diagram 1*), being:
 - (a) 123 Rosedale Road (which Waste Management currently leases to store rubbish skips);
 - (b) 121 Rosedale Road (a unit titled site with various owners and used as a small business park/retail complex), which is in the process of being taken in part for State highway purposes; and
 - (c) 115 Rosedale Road (previously owned by Waste Management, subsequently subdivided and sold to

Vector Limited and used for industrial purposes as an electrical substation).

North Shore District Plan

6 With effect from 1 November 2010, seven district councils in the Auckland Region and Auckland Regional Council were dissolved, and the Auckland Council established, in accordance with the Local Government (Tamaki Makaurau Reorganisation) Act 2009 and Local Government (Auckland Council) Act 2009 (the **Amalgamation**).¹

7 Prior to the Amalgamation:

7.1 the Site was located within the boundaries of the North Shore District Council;

7.2 the operative North Shore District Plan 2002 contained a number of business zones for the district. The most permissive for industrial activities was the Business 10 zone, which applied to established industrial areas, restricted residential activities and contemplated a moderate level of air quality amenity;

7.3 the Site together with other surrounding land, was zoned "Business 10";

7.4 a nearby site (11 Holder Place) owned by another waste services provider, EnviroWaste Services Limited, and used for a refuse and recycling transfer station, was zoned "Business 9" (the **EnviroWaste Constellation Drive refuse and recycling transfer station**).

Auckland Unitary Plan

8 In accordance with the provisions of Part 4 of the ATP Act, the Auckland Council was required to establish the Auckland Unitary Plan, which is the first combined plan for the Auckland Region, meeting the requirements of a Regional Policy Statement, Regional Plan and District Plan.

9 In order to establish the Auckland Unitary Plan, the Auckland Council was required under the provisions of the ATP Act to:

9.1 notify a Proposed Auckland Unitary Plan (**PAUP**) (section 123);

9.2 receive recommendations from an Independent Hearings Panel (the **Panel**) on the submissions made by persons or organisations having an interest the PAUP (section 144); and

¹ Local Government (Tamaki Makaurau Reorganisation) Act 2009, s 35; Local Government (Auckland Council) Act 2009, s 6.

9.3 make decisions on the final provisions of the PAUP, by either accepting or rejecting the recommendations of the Panel (section 148).

10 The Auckland Unitary Plan will eventually replace the operative district plans of each of the seven amalgamated district councils, including the operative North Shore District Plan.

Proposed Auckland Unitary Plan

11 The Auckland Council notified the PAUP on 30 September 2013.

12 Following notification, certain provisions of the PAUP came into legal effect, as provided for in section 153 of the ATP Act.

13 Insofar as is relevant, the PAUP:

13.1 zoned the Site, together with adjacent land to the south, east and west (across State Highway 1) of the Site, as "Light Industry", as shown in *Diagram 2* below;

13.2 zoned the adjacent land to the north of the Site, being the former Rosedale landfill site, as "Public Open Space – Sport and Active Recreation", although as a closed landfill, that land is not open to public, and in the southwest corner contains landfill gas extraction and destruction facilities;

13.3 zoned the nearby EnviroWaste Constellation Drive refuse and recycling transfer station as "Light Industry";

13.4 included certain "permitted activities" within a Light Industry zone. Those permitted activities included the use of land as a refuse transfer station, as a defined industrial activity.

Diagram 2



14 The proposed zoning of the Site as Light Industry was generally consistent with the previous Business 10 zoning in the North Shore District Plan, insofar as it affected Waste Management’s ability to use the Site as a refuse transfer station.

Submissions on the Proposed Auckland Unitary Plan

15 Extensive submissions on the PAUP were made to the Panel by persons and organisations, including:

- 15.1 in excess of 9000 primary submissions;
- 15.2 and a further approximately 3800 further submissions either supporting or opposing original submissions;
- 15.3 approximately 22,900 submission points on zoning decisions (allocated to Topic 081 Rezoning and Precincts);

- 15.4 in excess of 93,000 unique requests by submitters; and
- 15.5 over 1.4 million further submission points.
- 16 Included amongst these submissions and further submissions were submissions by:
- 16.1 Waste Management (on 15 January 2014), seeking a rezoning of the Site to "Heavy Industry" or alternatively to amend the provisions of the Light Industry zone to better provide for waste disposal activities;
- 16.2 the North Harbour Business Association (on 28 February 2014) seeking to rezone all Light Industry within the North Harbour Business Improvement District (as identified in the submission) to General Business on the basis that it would better reflect current and potential future demands for business applications/services in the area (the **NHB Association Submission**);
- 16.3 Waste Management (on 22 July 2014), through its planning consultants, opposing by way of further submission in table form, the NHB Association Submission.
- 17 The Panel issued various procedural minutes and guidance notes including certain material relating to situations where rezoning was sought:
- 17.1 On 5 August 2014, the Panel issued a Procedural Minute 6 (the **Procedural Minute**) which noted that:
10. ...Where a submission seeks to schedule land or buildings which are privately owned by someone other than the submitter, then the effects on that owner are likely to be such that we will need to be sure that the affected owner has an effective opportunity to participate before proceeding to a merits assessment. The submission and further submission process in Schedule 1 is not likely to be sufficient on its own to ensure adequate notice.
- 17.2 On 31 July 2015, the Panel published guidance on "Best practice approaches to re-zoning, precincts and changes to the Rural Urban Boundary (RUB)", which included at para 1.16 (the **Guidance Note**)
- If the zoning relates to someone else's land, provide details of your consultation with the owner and their position on the proposed change.
- 18 The NHB Association Submission was made without any consultation with or prior notification to Waste Management.

- 19 The Auckland Council presented expert evidence to the Panel supporting the retention of the Light Industry zoning.
- 20 Evidence on rezoning requests was presented by hundreds of submitters over a period of weeks in a manner that gave other submitters limited practical visibility of what other evidence was being presented.
- 21 Waste Management filed evidence with the Panel (dated 10 February 2016) and made submissions before the Panel (on 18 April 2016) seeking Heavy Industry zoning for the Site, reflecting the existing and future activities likely to be undertaken by Waste Management.
- 22 At the hearing:
 - 22.1 Waste Management representatives present were not aware of any proposal or submissions seeking the downgrading of the zoning from Light Industry to General Business;
 - 22.2 in light of the evidence of the Auckland Council, Waste Management believed the only substantive issue was whether Waste Management's proposal, to upgrade the zoning from Light Industry to Heavy Industry zoning, should be adopted;
 - 22.3 Waste Management representatives were not questioned in any manner that indicated the Panel was considering the possibility of downgrading the zoning of the Site from Light Industry to General Business;
 - 22.4 Waste Management had no practical opportunity to call evidence and make submissions addressing the possibility of downgrading the zoning of the Site from Light Industry to General Business.

Panel Recommendation

- 23 On 22 July 2016 the Panel:
 - 23.1 released its recommendations to Auckland Council on the PAUP, in the form of its Recommendation Report, Recommended Plan, and new Recommended Planning Maps (**Panel's Recommendations**);
 - 23.2 only provided short generalised reasons for its various recommendations in the Recommendation Report, based in part on the submissions it received;
 - 23.3 did not address the particular circumstances, or evidence relating to the zoning of, the Site;

23.4 recommended, in so far as is relevant, that:

- (a) the Site be rezoned from "Light Industry" to "General Business" (based on the content of the Recommended Planning Maps);
- (b) the EnviroWaste Constellation Drive refuse and recycling transfer station site retain Light Industry zoning (again, based on the content of the Recommended Planning Maps);
- (c) the General Business zone allow certain permitted activities, which do not include any industrial activities of the type undertaken by Waste Management at the Site.

24 In giving its reasons for its recommendations, the Panel included only a general statement concerning the business zoning across the whole of the Auckland region (**Panel's zoning rationale**), the totality of which read:

While the Panel accepts the thrust of Council's evidence from Messrs Wyatt, Akehurst and Ms Fairgray in respect of the geographic shortage of land zoned Business – Light Industry, it has recognised the existing reality of many of those proposed zones. That is, many of these proposed zones are not currently used for or by light industry, and the clear commercial evidence is that they are most unlikely to revert to light industry even if zoned as such. Accordingly the Panel has rezoned many instances to the underlying zone sought, being either Business – Mixed Use Zone or Business – General Business Zone. This further reduces the amount of land zoned Business – Light Industry Zone in the Plan, making more transparent this issue of shortage raised by Council. However, the Panel does not consider that hiding the reality under what is effectively a false zone would address the shortage. The Panel notes that large areas of land zoned Future Urban Zone will be available as Business – Light Industry Zone if that is deemed appropriate at the time of structure planning for live zoning. That has been taken into account in zoning Future Urban Zone areas.

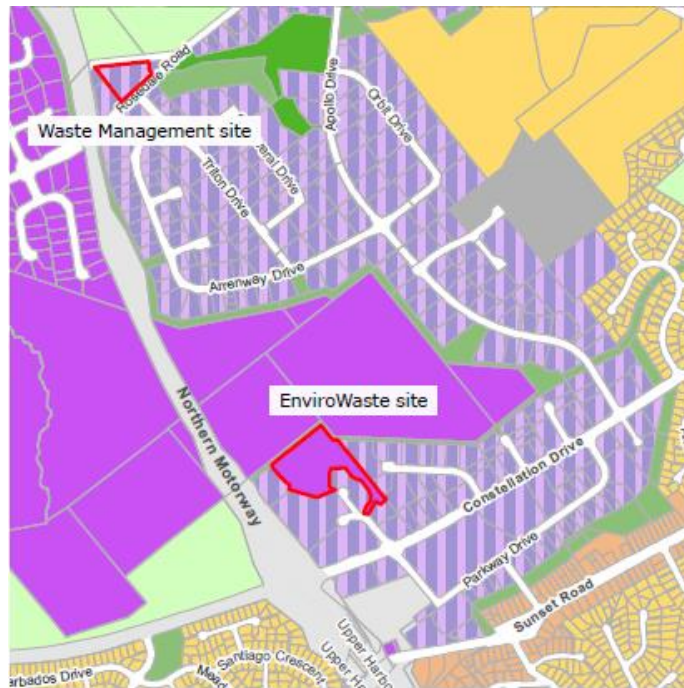
The Panel notes that the Interim Guidance on 'spot zoning' was not intended to apply to small neighbourhood centre zones or larger complex sites such as retirement homes or large-format retail outlets. Those activities by their very nature tend to be 'spots' in a pure sense. The Panel has not, therefore, accepted that as a reason for not zoning such activities appropriately.

Auckland Council's decision to accept Panel's Recommendations
25 On 19 August 2016, Auckland Council resolved to accept the Panel's Recommendations insofar as they related to the Site and surrounding land from Light Industry to General Business. The Site was zoned General Business in the Council's Decisions Version of the Planning Maps and no further rationale was provided in the Decisions Report (the **Council's Decision**).

26 The effect of the Council's Decision is to:

- 26.1 apply General Business zoning to the Site, while the nearby waste transfer site owned by EnviroWaste retained its Light Industry zoning, as shown on *Diagram 3* below;
- 26.2 impose "non-complying" activity status on Waste Management's transfer station at the Site (as a waste management facility), in the event of any land use application to redevelop or extend the Site;
- 26.3 severely impact on Waste Management's ability to continue operating the refuse transfer station in the future, particularly as relevant discharge consents come up for renewal.

Diagram 3



27 The decisions of:

- 27.1 the Panel to make its recommendations; and
 - 27.2 the Council to accept the recommendation of the Panel,
- to rezone the Site from "Light Industry" to "General Business" are the exercise of statutory powers of decision in terms of section 4 of the Judicature Amendment Act 1972.

28 Waste Management seeks a judicial review of:

28.1 the Council's Decision; and

28.2 the Panel's Recommendations.

Grounds for review

Obligations when making recommendation and decisions

29 In making recommendations and decisions on the zoning and rezoning of land under the PAUP, the Panel and the Auckland Council were required to make recommendation and decisions that:

29.1 took into account all relevant considerations;

29.2 were consistent and treated the zoning of land in like circumstance in a like manner;

29.3 did not breach Waste Management's right to natural justice and its legitimate expectation as to the process that would be followed;

29.4 were not based on a material mistake of fact;

29.5 were not based on an error of law.

29.6 were rational.

Failing to take account of relevant considerations

30 In making the Panel's Recommendations and the Council's Decision, the Panel and the Auckland Council failed to take into account all relevant considerations.

Particulars

30.1 It repeats paragraphs 1 -27 above;

30.2 The Panel and Auckland Council failed to consider the following relevant considerations:

- (a) The Site had been used by Waste Management for industrial activities since 1999 and the evidence presented by Waste Management to the Panel confirmed that that use was to continue;
- (b) Throughout that period the Site had been zoned under the North Shore District Plan in a manner that permitted a range of industrial uses, including a refuse transfer station;
- (c) The impact that the decision to rezone the Site as General Business would have on Waste Management's

ability to continue to operate the refuse transfer station in the future, particularly as relevant discharge consents come up for renewal;

- (d) Waste Management had not had the opportunity to be consulted and/or to meaningfully participate in any assessment of whether the zoning of the Site should be downgraded and/or the impact of any such change on it before any such decision was made;
- (e) A further evaluation in accordance with section 32AA of the Resource Management Act, pursuant to section 145 of the ATP Act for the change of zoning to the Site.

Requirement to act consistently

- 31 In making the Panel's Recommendations and the Council's Decision, the Panel and the Auckland Council breached their duty to act in a manner that was consistent and which treated the zoning of land in like circumstance in a like manner;

Particulars

- 31.1 It repeats paragraphs 7, 13 and 23 above;
- 31.2 Waste Management and EnviroWaste:
- (a) both operate refuse transfer stations in close proximity, undertaking similar activities;
 - (b) were both zoned previously under the Operative North Shore District Plan in a similar manner (Waste Management with the heavier zoning), which permitted the industrial activity that they were undertaking;
 - (c) were both zoned Light Industry in the notified PAUP;
 - (d) both had sites that fall within the area identified in the NHB Association Submission, which sought to rezone their respective sites as General Business zones;
 - (e) both had sites that were on the fringe or boundary of areas that the Panel and Auckland Council considered should be zoned as Light Industry.
- 31.3 The Panel recommended and the Auckland Council decided, for no apparent or explained reason, despite the fact that the two sites were not materially different in terms of the relevant zoning considerations, that they should be zoned differently, providing for:

- (a) an irregular shaped Light Industry zone boundary around the EnviroWaste site, in order to keep it part of the Light Industry zone; but
- (b) rezoning of the Waste Management site to General Business despite the Site being immediately adjacent to land that retained its Light Industry zoning.

Mistake of Fact

- 32 In making the Panel's Recommendations and the Council's Decision, the Panel and the Auckland Council breached their duty not to base their recommendations and decisions on a material mistake of fact.

Particulars

- 32.1 The Panel's zoning rationale (quoted in paragraph 24 above) proceeded on the assumption that land that the Panel was recommending be rezoned from Light Industry to General Business was currently not being used for light industrial activities;
- 32.2 The Site had in fact been used for industrial activities since 1999 and the evidence presented by Waste Management to the Panel had confirmed that that use was to continue.

Breach of natural justice and legitimate expectations

- 33 In making the Panel's Recommendations and the Council's Decision, the Panel and the Auckland Council breached Waste Management's right to natural justice and breached its legitimate expectation as to the process that would be followed.

Particulars

- 33.1 It repeats paragraphs 7, 17 and 18 above;
- 33.2 In circumstances where:
- (a) the Site had been zoned under the operative North Shore District Plan in a manner that permitted a range of industrial uses, including a refuse transfer station;
 - (b) Waste Management had used the site for industrial activities for over a decade;
 - (c) the Panel had issued Procedural Minute 6 and the Guidance Note,

Waste Management had a right to and legitimate expectation that it would be consulted and/or that it would have the opportunity to meaningfully participate in any assessment of whether the zoning of the Site should be downgraded and/or

the impact of any such change on it before any such decision was made;

- 33.3 No party that sought a downgrading to the zoning of the Site consulted with Waste Management about any such proposal;
- 33.4 The Panel did not provide Waste Management with any opportunity to call evidence on or make any submissions concerning any proposal by the Panel to downgrade the zoning of the Site;
- 33.5 Waste Management did not in all the circumstances have a fair or reasonable opportunity to call evidence or make submissions on the impact of the downgrading of the zoning of the Site on it.

Error of law

- 34 In making the Panel's Recommendations and the Council's Decision, the Panel and Auckland Council based their recommendation and decision on an error of law.

Particulars

- 34.1 It repeats paragraphs 1-27 above;
- 34.2 In the circumstances pleaded above, the only true and reasonable conclusion on the evidence available to the Panel and Auckland Council, contradicts the determination made to rezone the Site from Light Industry to General Business.

Rationality

- 35 In making the Panel's Recommendations and the Council's Decision, the Panel and the Auckland Council made a recommendation and decision that was not rational.

Particulars

- 35.1 It repeats paragraphs 1-27 above;
- 35.2 In the circumstances pleaded above, the only rational conclusion on the evidence available to the Panel and Auckland Council was for the Site to, at least, retain its Light Industry zoning.

Accordingly, the applicant seeks:

- (a) An order setting aside the Panel's Recommendations and the Auckland Council's Decision in so far as it rezoned the land owned by the applicant at 117 Rosedale Road, Auckland to "General Business"

- (b) A direction that the Panel reconsider its recommendations insofar as they relate to the applicant's land at 117 Rosedale Road, Auckland; and giving such directions as the Court considers appropriate to that reconsideration;
- (c) A direction that, following the Panel's reconsideration, the Auckland Council reconsider its decision insofar as it relates to the applicant's land at 117 Rosedale Road, Auckland; and giving such directions as the Court considers appropriate to that reconsideration;
- (d) Costs.

This document is filed by Bruce Scott, solicitor for the applicant, of the firm Chapman Tripp.

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