IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **CIV-2016-404**

UNDER	the Judicature Amendment Act 1972
AND	
IN THE MATTER	of an application for review under section 159 of the Local Government (Auckland Transitional Provisions) Act 2010
BETWEEN	**WEITI DEVELOPMENT LIMITED PARTNERSHIP**, a limited partnership having its office at Suite 203/100 Parnell Road, Parnell, Auckland **Plaintiff**
AND	**AUCKLAND COUNCIL**, a unitary authority established by section 6 of the Local Government (Auckland Council) Act 2009, having its public office at 135 Albert Street, Auckland **Defendant**

STATEMENT OF CLAIM

16 SEPTEMBER 2016

RUSSELL McVEAGH

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THE PLAINTIFF BY ITS SOLICITOR SAYS:

INTRODUCTION

Parties

1. The Plaintiff is a limited partnership having its office at Suite 203/100 Parnell Road, Parnell, Auckland. The Plaintiff has an interest in the approximately 860 hectare area of land near the Whangaparaoa Peninsula known as the Weiti Precinct, as that precinct is defined in the Proposed Auckland Unitary Plan ("**Unitary Plan**").

2. The Defendant is a unitary authority established under section 6 of the Local Government (Auckland Council) Act 2009, having its public office at 135 Albert Street, Auckland.

3. The Defendant has jurisdiction in respect of the notification and determination of the Unitary Plan under the Resource Management Act 1991 ("**RMA**") and the Local Government (Auckland Transitional Provisions) Act 2010 ("**LGATPA**").

Proposed Auckland Unitary Plan

4. The Draft Unitary Plan, released in March 2013, allowed for 550 dwellings in the Weiti Precinct as per the Special 8 - Weiti Forest Park zone under the Auckland Council District Plan - Operative Rodney Section 2011 ("**Operative Plan**"). The Defendant invited the public to provide feedback on the Draft Unitary Plan between March and May 2013.

5. As part of that process, the Plaintiff undertook a number of studies to support an increase in the maximum number of dwellings enabled within the Weiti Precinct, and provided this information to the Defendant by way of feedback on the Draft Unitary Plan.

6. The Unitary Plan, as notified on 30 September 2013, allowed for 1200 dwellings within the Weiti Precinct.

7. The Plaintiff lodged a submission on the Unitary Plan, supporting the increase from 550 to 1200, as well as seeking expansion of the

development capacity within the precinct beyond 1200 dwellings without specification of an overall limit, or controls on its location.

Unitary Plan hearing process

8. The Auckland Unitary Plan Independent Hearings Panel ("**Panel**") were granted the statutory authority to oversee the Unitary Plan process under Part 4 of the LGATPA.

9. As part of that process, the Panel was required to hold hearings in relation to submissions on the Unitary Plan,[1] and thereafter to provide its recommendation to the Council regarding the most appropriate provisions for the Unitary Plan.[2]

10. Concerns regarding the effects of stormwater discharges from development on the Okura Estuary and the Long Bay - Okura Marine Reserve were raised by submitters during the course of hearings on submissions seeking changes to the Rural Urban Boundary ("**RUB**"), which were heard as part of Topic 016 / 017 - Changes to the RUB ("**Topic 016 / 017**").

11. The nature of these concerns led the Panel to facilitate expert conferencing with the Defendant and submitters in relation to these issues, prior to the filing of evidence for Topic 016 / 017. The expert conference was held on 15 October 2015.

12. The Council subsequently filed primary evidence for Topic 016 / 017 in relation to the Okura area on or about 30 October 2015. Other submitters filed primary evidence for Topic 016 / 017 on or about 27 November 2015. The parties had the opportunity to file rebuttal evidence in relation to Topic 016 / 017 on or about 18 December 2015.

13. Representatives of the Plaintiff (Mr Evan Williams, Mr Simon Matthews, Ms Bronwyn Carruthers and Mr Daniel Minhinnick) and the Defendant (Mr Peter Vari and Mr Robert Scott) met on 2 December 2015 to discuss the level of residential development that could be enabled within the Weiti Precinct ("**2 December meeting**").

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1 Local Government (Auckland Transitional Provisions) Act 2010, section 128.
2 Local Government (Auckland Transitional Provisions) Act 2010, section 144.

14. The Plaintiff tabled plans which included additional development within those parts of the Weiti Precinct within the Weiti and Karepiro catchments, and a proposal for development within the Okura catchment immediately above the Okura Estuary. The Plaintiff sought the Defendant's support for the increases in the dwellings enabled within the proposed Weiti Precinct beyond 1200 dwellings (as enabled under the notified Unitary Plan).

15. At the 2 December meeting the Defendant represented that:

    (a) it was strongly opposed to any proposed development within the Okura catchment;

    (b) it would be supporting 1200 dwellings within the Karepiro catchment in evidence and at the hearing;

    (c) it was open to considering an increase above that if development was to occur in the Karepiro and Weiti catchments; and

    (d) a preferred method may be to initiate a private plan change to pursue that greater development beyond 1200 dwellings. A multiparty agreement entered into in 2010 would need to be amended to enable that method to be adopted.

16. In that meeting, based on the Defendant's representations the Plaintiff indicated that it would be prepared to withdraw the proposals for development within the Okura catchment.

17. The Plaintiff subsequently amended its plans to no longer include development within the Okura catchment.

18. In mid-January 2016 the Defendant (via Mr Peter Vari) advised the Plaintiff that it would not be able to amend the multiparty agreement in the time available and that, as a consequence, the increase of enablement that the Plaintiff sought beyond 1200 dwellings within the Weiti Precinct would need to be pursued through the hearing for Topic 081 - Rezoning & Precincts (Geographical Areas) ("**Topic 081**") of the Unitary Plan.

Topic 081 hearing

19. Submissions on the Weiti Precinct were heard as part of Topic 081.

20. The Defendant filed primary evidence for Topic 081 on 26 January 2016.

21. In primary evidence and consistent with its earlier representations the Defendant's expert witnesses supported a limit of 1200 dwellings within the Weiti Precinct, comprising the existing approved 150 dwellings in sub-precinct A and 1050 dwellings in sub-precinct B, as provided in the notified version of the Unitary Plan. The Defendant's planning expert, Mr Robert Scott, concluded that:[3]

> In my view, allowing for the additional intensity in sub-precinct B is appropriate and meets the purpose of the Resource Management Act 1991 (Act). The additional intensity meets an identified increase in housing demand, in an area already identified and sanctioned for limited residential development, while remaining contained within an existing development catchment area that avoids adverse landscape effects or ecological effects. The increase in intensity does not require a change to the RUB. It has also been satisfactorily demonstrated, in my view, that the development can be adequately accommodated by additional infrastructure and proposed roading.

22. The Defendant's expert witnesses did not raise any issues regarding stormwater effects in primary evidence filed for Topic 081 in relation to the Weiti Precinct.

23. The Plaintiff continued to seek that 1750 dwellings were enabled within the Weiti Precinct, including:

    (a) 150 dwellings within sub-precinct A within the Karepiro catchment;

    (b) additional enablement within sub-precinct B within the Karepiro catchment amounting to a combined total of 1450 dwellings (rather than 1050);

    (c) the introduction of a new area for large lot development (sub-precinct A2) in the north of Weiti near Stillwater within the Weiti catchment, providing for 150 dwellings; and

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3 Primary evidence of Robert Scott on behalf of Auckland Council, dated 26 January 2016, at [6.9].

(d) further changes to the controls including additional flexibility regarding the locations of the proposed development areas.

24. Consistent with the Plaintiff's representations at the 2 December meeting, as stated in paragraph 16 above, no development was proposed within the Okura catchment.

25. In rebuttal evidence, filed on 11 March 2016, the Defendant changed its position from that put forward in primary evidence, and instead sought no additional enablement beyond the 550 dwellings provided for in the Operative Plan.

26. The rebuttal evidence as filed was the first indication from the Defendant that it was unwilling to support the position it had put forward consistently since notification of the Unitary Plan, being the enablement of 1200 dwellings.

27. The Defendant stated that this change in position was based on concerns regarding stormwater. Concerns regarding stormwater had not previously been raised by the Defendant in relation to the Weiti Precinct during the course of the Unitary Plan process.

28. Following the Defendant's change of position, the Plaintiff filed several statements of supplementary evidence on 11 April 2016 in order to respond to the best of its ability in the limited time available to the matters raised by the Defendant's team. This evidence reinforced the Plaintiff's primary evidence regarding the level of development that was appropriate for the Weiti Precinct.

29. Further discussions between the Plaintiff and Defendant's experts were held in the lead up to the Topic 081 hearing in order to address the Defendant's concerns and to seek to reach agreement.

30. Expert conferencing was held between the parties, and a further independent expert, Mr Richard Reinen-Hamill, was engaged jointly by the Plaintiff and Defendant to provide a further independent view, which reinforced the appropriateness of the Plaintiff's position.

31. In an email addressed to representatives of the parties dated 22 April 2016, Mr Reinen-Hamill concluded that:

> My findings are that the proposed development at Karepiro Bay results in a net decrease in the total quantity of suspended solids compared to the pre-development catchments of Weiti, Okura and Karepiro.
>
> ...
>
> Due to the higher energy environment and wave and tide reworking, no significant quantities of contaminants are likely to be retained in the intertidal area.

32. As a result of the expert conferencing, the Defendant's technical experts amended their position ("**Updated Council Evidence**"). In a statement of supplementary evidence, filed on 26 April 2016, the Defendant's stormwater experts stated that:[4]

> With respect to the Weiti Precinct, when considering the increase of contaminants from the operative district plan of 550 dwellings to 1200 dwellings, as proposed in the notified PAUP, we are now of the opinion that there is no reasonable technical justification to oppose development up to 1200 dwellings on stormwater grounds. This is on the basis that the additional load of metals is relatively insignificant (in the context of the existing catchment loads) and is not likely to cause significant impacts, beyond any that currently exist.

33. The Defendant's experts also concluded that there was no issue in relation to the cumulative effects of 1200 dwellings in the Weiti Precinct:[5]

> We suggest that this could be a means of ensuring that the additional load from a proposed level of development of 1200 dwellings in the Weiti precinct does not have a cumulative impact on the subtidal depositional zone of Karepiro Bay, should the Panel recommend the 1200 dwelling scenario for the Weiti development, but feel the need to be mindful of cumulative effects.

34. The Defendant provided closing remarks on 19 May 2016, which reconfirmed the Updated Council Evidence:[6]

> During the hearing, the Council's stormwater experts reconsidered their position in their rebuttal evidence and informed the Panel that there is no technical stormwater reason to oppose development up to 1,200 dwellings.

35. The Defendant's closing comments expressed concern with development up to 1750 dwellings. However, the statement did not expressly contest development at the 1200 dwelling level, other than to state that the Council's "official" position remained at 550 dwellings.

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4 Supplementary evidence of Dr Hellberg, Dr Carbines and Mr Vigar on behalf of Auckland Council in relation to the Weiti Precinct, dated 26 April 2016, at [12].

5 Supplementary evidence of Dr Hellberg, Dr Carbines and Mr Vigar on behalf of Auckland Council in relation to the Weiti Precinct, dated 26 April 2016, at [11].

6 Closing remarks on behalf of Auckland Council in relation to specific precincts, Attachment B (Topic 081b - Rezoning and Precincts - Rodney), dated 19 May 2016, page 74.

36. The Defendant's final proposed precinct provisions included an alternative version to address stormwater contaminant concerns should the Panel recommend providing for a level of development over 550 dwellings.

37. This was because the matter had not been taken back to Council committee.

38. Under section 144 of the LGATPA, the Panel was required to make recommendations to the Defendant on the Unitary Plan at the conclusion of the hearing process.

39. The Panel publicly released its recommendations regarding the Unitary Plan provisions, including the Weiti Precinct provisions, on 27 July 2016 ("**Recommendations**"). The Recommendations proposed the development of only 550 dwellings within the Weiti Precinct, instead of the 1200 that had been included within the notified version of the Unitary Plan.

40. In the Recommendations, the Panel stated that:[7]

> The Panel accepts the position of the **Council presented in evidence** that the precinct be retained with some amendments to the provisions to clarify the extent of and number of dwellings, that being 550 dwellings, provided for in the precinct. The Panel accepts the **evidence of submitters and Council** regarding the need to carry out further investigations regarding contaminant loads and the cumulative impact from all developments that are planned in the locality and until satisfactory results are reported to adopt a precautionary approach and limit development to that currently approved.
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> [emphasis added]

41. In so doing, the Panel purported to accept the Updated Council Evidence.

42. Under section 148 of the LGATPA, the Defendant was required to consider the Recommendations and notify decisions on them.

43. The Defendant released its decision whether to accept or reject the Recommendations on 19 August 2016 ("**Decision**"). In the Decision, the Defendant accepted the Recommendations regarding the level of

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7 Panel's report in relation to Topics 016 / 017, 080 and 081, Annexure 4 Precincts - North, page 152.

development that should be enabled in the Weiti Precinct, being 550 dwellings.

FIRST CAUSE OF ACTION: BREACH OF NATURAL JUSTICE

The Plaintiff repeats paragraphs 1 to 43 above and says:

44. The Defendant's conduct resulted in a breach of the Plaintiff's right to natural justice.

Particulars

(a) The Defendant's role in the Unitary Plan process was as architect, de facto respondent and ultimate decision-maker regarding the appropriate provisions for the Unitary Plan.

(b) In exercising its powers in its various roles the Defendant was obliged to act fairly, reasonably, and in a manner that did not have the effect of depriving a submitter of its rights to natural justice.

(c) As set out at paragraphs 24 to 27 above, the evidence presented by the Defendant raised new matters that had not previously been raised, contrary to the Panel's own directions regarding the acceptance of rebuttal evidence, which emphasised that:[8]

> Rebuttal evidence will only be accepted as evidence before the Hearings Panel if it is strictly in rebuttal to matters already raised in evidence and contains no material relating to new issues not previously raised in evidence.

(d) There was no new material available to the Defendant between the filing of primary evidence on 26 January 2016 and rebuttal evidence on 11 March 2016 which justified the introduction of new issues at that stage in the hearing process.

(e) The Defendant was aware of the effects regarding the Okura Estuary and the Long Bay - Okura Marine Reserve through the hearing process for Topic 016 / 017.

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8 Auckland Unitary Plan Hearing Procedures, dated 24 November 2015, at [93].

(f) If it had concerns as a consequence, these should have been raised in primary evidence.

(g) The new issues were raised at such a stage in the Topic 081 hearing process that the Plaintiff was not able to respond adequately to the concerns in the time available to it.

(h) The Defendant's timing denied the Plaintiff any opportunity to address the placement of its development proposals within the approximately 860 hectare Weiti Precinct.

(i) As a result of the confusion caused by the admission of the "rebuttal" evidence, the Panel was under the misapprehension that those new technical matters were still at issue, with the consequence that the Recommendations were based on an erroneous understanding of the evidence and were defective and invalid.

(j) In accepting the invalid Recommendations, the Defendant's Decision was itself invalid.

The Plaintiff seeks:

(a) a declaration that the Defendant erred in making the Decision to accept the Recommendations;

(b) a declaration that the Decision to accept the Recommendations was unlawfully made and invalid;

(c) an order pursuant to section 4(2) of the Judicature Amendment Act 1972 setting aside the decision;

(d) such other orders as the Court thinks appropriate; and

(e) costs.

SECOND CAUSE OF ACTION: BREACH OF LEGITIMATE EXPECTATIONS

The Plaintiff repeats paragraphs 1 to 43 above and says:

45. In making the Decision to accept the Recommendations, the Defendant breached the Plaintiff's legitimate expectations that:

(a) the Defendant would support the enablement of at least 1200 dwellings in the Weiti Precinct; and

(b) any issues the Defendant had with the Plaintiff's submission would have been communicated to the Plaintiff in advance of the Defendant filing its evidence.

Particulars

(a) The Defendant represented to the Plaintiff that it would support at least 1200 dwellings within the Weiti Precinct in evidence and at the hearing.

(b) Consistent with those representations, the Defendant's primary evidence supported 1200 dwellings within the Weiti Precinct.

(c) The Plaintiff had a legitimate expectation that, to the extent that the Defendant was aware of the effects regarding the Okura Estuary and the Long Bay - Okura Marine Reserve through the hearing process for Topic 016 / 017, these would have been raised in primary evidence.

(d) There was no new material available to the Defendant between the filing of primary evidence on 26 January 2016 and rebuttal evidence on 11 March 2016 which justified the introduction of new issues at that stage in the hearing process.

(e) The Plaintiff therefore had a legitimate expectation that the Defendant would not propose a significant reduction to the level of development enabled at Weiti in rebuttal.

46. As a consequence of the breach of the Plaintiff's legitimate expectations:

(a) The Plaintiff relied on the representations made by the Defendant to its detriment, in that it did not prepare additional data or evidence supporting the enablement of 1200 dwellings to be necessary, and it no longer pursued the enablement of

development within the part of the Weiti Precinct within the Okura catchment.

(b) By the time the Defendant notified the Plaintiff of its change in position by way of the filing of rebuttal evidence, it:

(i) left the Plaintiff with insufficient time to adequately respond to the concerns that had been raised;

(ii) denied the Plaintiff any opportunity to restructure its proposals for the broader Weiti Precinct; and

(iii) ran the risk - which eventuated - that the Panel hearing process would miscarry.

The Plaintiff seeks the same relief as for the First Cause of Action.

THIRD CAUSE OF ACTION: IRRATIONALITY

The Plaintiff repeats paragraphs 1 to 43 above and says:

47. In making the Decision, the Defendant made an irrational decision in accepting the Recommendations of the Panel in the knowledge that the Panel had based that recommendation on an erroneous understanding of the position of the Defendant's witnesses as represented at the hearing.

Particulars

(a) The Panel made a mistake of fact, being that the position of the Defendant's expert witnesses was such that they only supported the enablement of 550 dwellings within the Weiti Precinct. The Panel's recommendation stated that:[9]

> The Panel agrees with the evidence for the Council and the submitters seeking to limit development to the currently approved 550 dwellings.
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> [...]
>
> The Panel accepts the position of the Council presented in evidence that the precinct be retained with some amendments to the provisions to clarify the extent of and number of dwellings, that being 550 dwellings, provided for in the precinct.

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9 Panel's report in relation to Topics 016 / 017, 080 and 081, Annexure 4 Precincts - North, page 152.

(b) The Panel's recommendation did not recognise that the Defendant's expert witnesses had amended their position such that they did not continue to oppose the enablement of 1200 dwellings (refer to paragraphs 32 to 34 above).

(c) The Panel's recommendation regarding the proposed level of development was purportedly based on the Updated Council Evidence.

(d) It was irrational for the Defendant to accept the Panel's recommendation in the knowledge that the recommendation was based on a mistake as to the position of those expert witnesses.

The Plaintiff seeks the same relief as for the First Cause of Action.

This document is filed by **BRONWYN SHIRLEY CARRUTHERS**, solicitor for the Plaintiff, of Russell McVeagh. The address for service of the Plaintiff is Level 30, Vero Centre, 48 Shortland Street, Auckland 1010.

Documents for service may be left at that address 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.