

**BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY**

ENV-2016-AKL-

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(1) of the Local Government (Auckland Transitional Provisions) Act 2010
AND IN THE MATTER	of Proposed Plan Hearing Topic 080 - Zoning
BETWEEN	NORTH EASTERN INVESTMENTS LIMITED and HERITAGE LAND LIMITED (NEIL) Appellant Submitter No. 857 Further Submitter No. FS2837
AND	AUCKLAND COUNCIL Respondent

NOTICE OF APPEAL

Dated: 16 September 2016



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NOTICE OF APPEAL

To The Registrar
Environment Court
Auckland

Introduction

1. North Eastern Investments Limited and Heritage Land Limited (jointly referred to as NEIL) appeal against parts of the decision of the Auckland Council on the Proposed Auckland Unitary Plan (PAUP).
2. NEIL has the right to appeal Auckland Council's decision to the Environment Court under s 156 of the LGATPA.
3. NEIL is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991.
4. The decision was made by the Auckland Council.
5. NEIL received notice of the decision on 19 August 2016.

Background

Rezoning to THAB

6. NEIL is the owner of land in Albany known as 56 Fairview Avenue and 129 Oteha Valley Road that was largely zoned Mixed Housing Urban in the Proposal Unitary Auckland Plan (PAUP).
7. NEIL sought re-zoning of that land (as well as 131 Oteha Valley Road owned by Auckland Council and 135 Oteha Valley Road owned by Auckland Transport) to Terraced Housing and Apartment Buildings (THAB) and Mixed Use in its submission. NEIL also proposed a precinct for its land (as well as 135 Oteha Valley Road owned by Auckland Transport) known as Albany 5 which would provide additional guidance in relation to the development of the land. This was dealt with under Topic 80-Precinct.

8. The Independent Hearings Panel in its Precincts decision (Annexure 4: Precincts North) dated July 2016 at pp 158 – 160 decided that the land should be zoned THAB. In section 3 in the penultimate paragraph of that section, the Independent Hearings Panel said:

The Panel has instead agreed with the submitter that a more intensive zoning is appropriate and has recommended that the entire 8ha site be zoned Residential-Terrace Housing and Apartment Building Zone. Proposed Building Mixed Use Zone for a portion of the land is not supported in this location which is relatively close to but physically separated from the nearby metropolitan centre at Albany. If any future specific proposal seeks to exceed the height provisions of that zoning the Panel considers that such a proposal would need to be contested by resource consent application.

9. The Auckland Council Decision dated 19 August 2016 states the following in respect of the recommendation in Topics 80 and 81 at clause 50.1:

50.1 The Council has accepted all the recommendations of the Panel contained in the Panel reports for Hearing Topic 080 Rezoning and precincts (General), and 081 Rezoning and precincts (Geographic areas) and 016 and 017 – Rural urban boundary and Annexures 1 – 6, July 2016 – (recommendations in RODNEY), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps except as listed below at paragraph 50.2.

10. Auckland Council listed no rejections to recommendations of the IHP relevant to the land.
11. Despite the above, the planning maps issued by the Council in accordance with its decision showed the land zoned Mixed Housing Urban, not THAB.
12. When queried on this matter, the Auckland Council advised by email to NEIL on 31 August 2016 the following:

I've had some discussions with colleagues this morning regarding your concern as to where you might find the information where Council rejected the recommendations of the IHP. What I have discovered is that, **there were some rejections Council made that did not follow with a report as to why they were made.** There may also be issues where Council supported the IHP recommendations and that may not have been picked up. Council is working through a process to identify and resolve these issues.

In the meantime, there is a plan change underway in March 2017, where some of these issues may be addressed. Further, you might consider lodging an appeal, this gives you an opportunity to be heard again.

Apologies for not being able to assist you further. If there is anything more we can do, please do not hesitate to contact the Unitary Plan helpdesk. (Emphasis added)

13. A subsequent email from the Auckland Council on 7 September 2016 said the following:

After reviewing the Panel's recommendations and the zoning shown in the Decisions Version of the GIS Viewer, the Council has decided to correct the errors pursuant to clause 16(2) of the First Schedule to the Resource Management Act 1991. For clarity, the zoning to the above properties will be changed to reflect the "Residential –Terrace Housing and Apartment Buildings" zoning recommended by the Panel within its report addressing those properties.

The Council will be publishing a list of all the clause 16 corrections made to the Decisions Version of the Proposed Auckland Unitary Plan during the week of 12 September 2016. That list will be available on the Unitary Plan modifications webpage at...

14. Auckland Council has accepted the IHP's recommendations and therefore it is unclear why Auckland Council considers it necessary to rely on clause 16(2) of the First Schedule of the RMA to amend the planning maps.
15. As at 15 September 2016, the modifications webpage referred to by Auckland Council has not been amended to reflect the IHP's recommendations, although on 16 September 2016 all the land, except 135 Oteha Valley Road, was shown on amended maps as THAB. The webpage link is:

www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/plansstrategies/unitaryplan/Pages/modifications.aspx

Macroinvertebrate Community Index Layer

16. The notified PAUP contained non statutory layers including a Macroinvertebrate Community Index Layer (MCIL) which was described by the Auckland Council as "a geospatial representation of appendix 5.6 of the PAUP text, Map 1: Macroinvertebrate Community Index Layer for Land Use Types".¹ The Council in its evidence and legal submissions referred to the layer as a non-statutory layer to be used for information purposes only.
17. The IHP made the following recommendations:

¹ AC 19 December 2014 response to AUPIHP memo, section 5F, Page 4, paras [2]-[3].

“The Panel recommends deleting all but one of the ‘Non Statutory Information’ layers from the planning maps for the Unitary Plan provisions because it is inappropriate to use a mapping technique to define the spatial extent of a rule where that mapping is not open to submission and change in the same way as the rule. The one exception is the indicative coastal boundary as this assists in showing the indicative boundary between the district of Auckland and the coastal marine area in the Auckland region.

The Panel recommends the relocation of the Macroinvertebrate Community Index layer from the non-statutory information layer to a statutory ‘Controls’ layer and the deletion of the 2m sea level rise information, but the retention of the 1m sea level rise information in the Coastal Inundation Control layer.”²

“The Panel recommends relocating the Macroinvertebrate Community Index layer to a Control layer in the planning maps. The Panel also agrees with Dr Martin Neale that the information in the layer should be made more useable by being separated into its component elements: urban, rural, exotic and native. The Panel recommends that this layer also be linked to the property summary, so that the type of control is clearly identified for a user.”³

18. The MCIL layer is identified on the planning maps applying to the land.
19. There was no submission in respect of the elevation of the MCIL to a statutory layer and the proposal is beyond scope. The inclusion of the MCIL prejudices the appellant that has several streams within the land.
20. The decision of the Council accepted the recommendations of the IHP in its decision dated 19 August 2016 on Topic 026.

The appeals

Re-zoning to THAB

21. The decision appealed is any decision by Auckland Council to reject any part of the IHP’s recommendation to rezone the land (including 135 Oteha Valley Road) to Terrace Housing and Apartment Building. If the Auckland Council has decided to accept the IHP’s recommendation, then the Auckland Council should amend the decisions version of the planning maps accordingly – and this part of the appeal is then not relevant. The planning maps are deemed to be amended in accordance with s 152 LGATPA.

Re-zoning of part of the land to Mixed Use

² AUIHP July 2016 Decisions report Topics 022 and 026 – p4, Section 1.2 paragraphs 2-3.

³ Ibid, p17, Section 12.2, paragraph 7.

22. The decision appealed against is the decision to re-zone that part of the land which NEIL sought to be re-zoned Mixed Use to THAB instead of Mixed Use because it was out of scope and s 156(3) LGATPA applies.

Macroinvertebrate Community Index Layer

23. The decision appealed against is the decision by the Auckland Council to accept IHP's out of scope recommendation to elevate the MCIL from a non-statutory layer to a statutory control layer and any associated identification of that layer in the planning maps and any consequential changes to rules and policies referring to that layer.

Grounds for appeal

Re-zoning to THAB

24. Any decision not to approve the IHP recommendations (and subject to the appeal on Mixed Use) is inappropriate because:
- (a) Re-zoning for intensification was only opposed by Auckland Council on the grounds of transportation infrastructure and the Medallion Drive Link which was resolved by the Environment Court Decision [2016] NZEnvC 73; and
 - (b) Re-zoning is appropriate in light of the Environment Court Decision in [2016] NZEnvC 73 and the change in the receiving environment as a result of that Decision.

Re-zoning of part of the land to Mixed Use

25. Mixed Use zoning where requested by NEIL is appropriate and:
- (a) NEIL's evidence on this matter in support of Mixed Use was uncontested and there was no contrary evidence; and
 - (b) The Mixed Use zone best reflects the approved development in [2016] NZEnvC 73.

Macroinvertebrate Community Index Layer

26. Elevating a non-statutory layer to a statutory layer was inappropriate and undermines the Schedule 1 process and the MCIL is otherwise not justified as a statutory control layer in order to achieve the objectives and policies of the PAUP, to give effect to the Regional Policy Statement, and to the purpose of RMA.

Relief sought

Re-zoning to THAB

27. That the decision of the IHP be reinstated that the land be rezoned THAB, or THAB and Mixed Use as requested in NEIL's submission.

Re-zoning of part of the land to Mixed Use

28. That the land requested to be re-zoned Mixed Use by NEIL be re-zoned Mixed Use and all consequential changes.

Macroinvertebrate Community Index Layer

29. That the MCIL be removed as a statutory control layer and reinstated as a non-statutory control layer with all consequential changes to the PAUP to give effect to this alteration.

Source documents

30. The following documents are relevant and hosted on Auckland Council's website:
- (a) NEIL's submissions;
 - (b) IHP's Recommendations;
 - (c) Auckland Council's decision, dated 19 August 2016.
31. NEIL seeks a waiver from supplying these documents until the Court's case management conference.

DATED at Palmerston North this 16th day of September 2016



John W Maassen
Counsel for NEIL

This document is filed by JOHN WILLIAM MAASSEN, Solicitor for the abovenamed Appellant of the firm CR LAW. The address for service of the abovenamed Appellant is 227 Broadway Avenue, Palmerston North.

Documents for service on the abovenamed Appellant may be left at that address for service or may be:

- (a) Posted to the Solicitor at PO Box 1945, Palmerston North 4440, or
- (b) Left for the Solicitor at a document exchange for direction to DX PP80001, Palmerston North, or
- (c) Transmitted to the Solicitor by email to jmaassen@crlaw.co.nz.

