

In the High Court of New Zealand  
Auckland Registry  
**CIV-2016-404-**

under the Local Government (Auckland Transitional Provisions) Act 2010, the Resource Management Act 1991 and Part 20 of the High Court Rules

in the matter of an appeal on questions of law under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010

between

**AUCKLAND MEMORIAL PARK LIMITED**

a duly incorporated company having its registered address at 8 Melrose Street, Auckland  
Appellant

and

**AUCKLAND COUNCIL**

a local authority established under the Local Government (Auckland Council) Act 2009  
Respondent

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**NOTICE OF APPEAL**

15 September 2016

**LeeSalmonLong**

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109

EMAIL: tim.mullins@lsl.co.nz SOLICITOR ON RECORD: TIM MULLINS

EMAIL: robert.schultz@lsl.co.nz SOLICITOR ACTING: ROBERT SCHULTZ

COUNSEL:

ALAN WEBB

QUAY CHAMBERS, LEVEL 7,  
2 COMMERCE STREET, AUCKLAND

TELEPHONE 09-377 5070

EMAIL: webb@quaychambers

and

**BAA LAND HOLDINGS LIMITED (FORMERLY  
SILVERDALE ESTATES LIMITED)**

a duly incorporated company having its registered  
address at 15 Newman Road,  
Auckland  
Second Respondent

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## NOTICE OF APPEAL

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**TO:** The Registrar of the High Court at Auckland

**AND TO:** The Respondents

### **This document notifies you that –**

The Appellant **AUCKLAND MEMORIAL PARK LIMITED**, will move the High Court at Auckland by way of appeal to reject provisions being included, and matters being excluded in the new Auckland Plan (**Plan**) by the **AUCKLAND COUNCIL** accepting a recommendation by the hearings Panel (**Panel**) appointed and constituted under the provisions of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGA**) **UPON THE GROUNDS** that accepting the recommendation was erroneous at law for the reasons set out below, and on other grounds to be referred to in written submissions which will be filed and served in advance of the hearing of this appeal.

### **Right of Appeal**

1. Auckland Memorial Park Limited (**AMP**) made a submission on the Plan, and addressed in that submission, provisions and matters that the Panel made a recommendation on, which was accepted by the Council and which resulted in:
  - (a) provisions being included in the Plan namely: the inclusion in the Plan of a light industrial zone (**LIZ**) and residential large lot zone (**RLLZ**) over land at 15 Newman Road, Silverdale (**Site**) owned by BAA Land Holdings Limited (formerly Silverdale Estates Limited) and shifting the Rural Urban Boundary (**RUB**) to a ridgeline on the Site (the **Provisions**); and
  - (b) matters being excluded from the Plan namely: the exclusion of the countryside living zone over the Site and/or appropriate controls over the Site to avoid, remedy or mitigate serious adverse effects on AMP's land from development of the Site under the LIZ and RLLZ (the **Matters**).
2. This appeal relates to a subtopic (Silverdale 1 Precinct) within Topics 016/017 Changes to the Rural Urban Boundary, and Topics 080/081 Rezoning and Precincts (Geographic), and submissions 7022 and 2556 and further submissions 611 and 1125.
3. The recommendation of the Panel is included in its Report to the Council Hearings Topics 016/017 Changes to Rural Urban Boundary and Topics 080/081 Rezoning and Precincts ref Silverdale 1 Precinct at page 186.

### **The Errors of Law**

#### *First error*

4. The Council had a statutory duty under s32 of the Resource Management Act 1991 (**RMA**) to prepare an evaluation report of the Plan (**Report**).

5. The Council prepared a general Report for the Plan, but failed to include in that Report a proper (or any) evaluation of whether including the Provisions or excluding the Matters was the most appropriate way of achieving the objectives under s32 of the RMA in relation to the Site or the surrounding environment, and in particular:
- (a) The zoning proposed for the Site under the Operative Auckland District Plan - Rodney Section (**Legacy Plan**) was countryside living;
  - (b) Pursuant to s32 of the RMA the Council was statutorily bound to complete an evaluation report to address the requirements of s32 of the RMA and in particular whether including the Provisions or excluding the Matters, was the most appropriate way to achieve the objectives of the Plan;
  - (c) Any report completed in accordance with s32 of the RMA had to be relevant to the Site and the surrounding environment;
  - (d) The Council failed to properly complete the evaluation required under s32 of the RMA and the Council could not therefore know whether including the Provisions or excluding the Matters would achieve the sustainable purpose of the RMA and whether it would be contrary to Part 2 of the RMA; and
  - (e) Any deficiencies in the Report were not remedied through the process undertaken by the Panel leading up to its recommendation, or by any subsequent enquiries, or evaluations undertaken by the Council before it accepted that recommendation.
6. Any recommendation by the Panel on the notified version of the Plan and/or any subsequent decision by the Council to include Provisions and exclude Matters in respect of the Site in reliance of the Report and/or any subsequent evaluation under s32AA of the RMA are unlawful.

*Second error*

7. The Panel and/or the Council failed to take into account relevant considerations when recommending and/or deciding to include the Provisions and/or exclude the Matters in the Plan, in particular:
- (a) There was no assessment of the effects on AMP's land from development of the Site under the controls in the LIZ and/or RLLZ particularly from:
    - (i) Bulk and dominance effects; and
    - (ii) The absence of effective mitigation measures, including landscape screen plantings and height restrictions.
  - (b) The Panel and/or the Council failed to give consideration, and/or proper weight to the very recent full decision of the Environment Court in *Auckland Memorial Park Ltd v Auckland Council* [2014]

NZEnvC 009 which specifically rejected a change in zoning for the Site.

- (c) The Panel and/or the Council failed to give consideration and/or proper weight to AMP's planning evidence and in particular to issues about:
  - (i) The capacity of mitigation measures to control the effects on AMP's land from development of the Site using only the controls in the LIZ or RLLZ;
  - (ii) Defensible boundaries particularly in relation to the location of the RUB on the Site;
  - (iii) Stopped only at considering whether the Silverdale 1 Precinct was necessary to control development on the Site, and did not consider the effects of development of the Site on the AMP land under the controls in the LIZ and/or RLLZ; and
  - (iv) The statutory framework and the objectives and policies of the legacy plans and the objectives and policies of the Plan.
  
- (d) The Panel and/or the Council failed to give consideration and/or proper weight to AMP's landscape evidence and in particular to issues about:
  - (i) The existing environment and setting of AMP's site;
  - (ii) The surrounding landscape context;
  - (iii) The effects on AMP's land from development of the Site under the controls in the LIZ and/or RLLZ on the elevated slopes of the Site overlooking, or adjacent to AMP's land; and
  - (iv) The impact on the visual character and landscape qualities of the environment from development of the Site under the controls in the LIZA and/or RLLZ.

*Third error*

- 8. The Panel and/or the Council took account of irrelevant considerations, not supported by evidence, when recommending and/or deciding to include the Provisions and/or exclude the Matters from the Plan, in particular:
  - (a) The Panel and/or the Council relied on an underlying assumption of "over enabling" development in including the Provisions and excluding the Matters, instead of justifying its recommendations and/or decisions based on evidence; and
  - (b) The Panel and/or Council relied on a "high level of uncertainty" as to the future development needs of the environment as a reason why business zones (like the LIZ) would more likely to be

approved, rather than undertaking a coherent assessment of the objectives and policies of the Plan in relation to the Site and the AMP land, and an assessment of the relevant controls in the LIZ and the RLLZ to control the effects from development of the Site on the AMP land.

*Fourth error*

9. The Panel and/or the Council failed to give proper reasons for including the Provisions or excluding the Matters in the Plan preventing a clear understanding of why the Provisions were included or the Matters were excluded.

*Fifth error*

10. The inclusion of the Provisions, and the exclusion of the Matters in the Plan was so unreasonable that no reasonable panel or consent authority could have reached that conclusion.

**Questions of Law**

11. Did the Panel and/or the Council err in law in any of the respects noted above and in particular:

- (a) Did the Council err in law by failing to comply with its statutory duties under s32 of the RMA?

Answer: Yes.

- (b) If the answer to 11 (a) is yes, was the failure to comply with that duty remedied throughout the process conducted by the Panel in respect of the Site?

Answer: No.

- (c) Did the Panel and/or the Council err in law by failing to take into account relevant considerations;

Answer: Yes.

- (d) Did the Panel and/or the Council err in law by taking into account irrelevant considerations?

Answer: Yes.

- (e) Did the Panel and/or the Council err in law by failing to give proper reasons for its recommendation and subsequent decision to accept that recommendation?

Answer: Yes.

- (f) Did the Panel and/or the Council err in law by reaching conclusions which, on the evidence, they could not have reasonably reached, or otherwise had no rational basis?

Answer: Yes.

**Grounds of Appeal**

12. The grounds of appeal are set out in paragraphs 4 – 10 of this notice of appeal.

**Wherefore the appellant seeks:**

1. That this appeal be allowed.
2. That the questions of law be answered as set out in paragraph 11 in this notice of appeal.
3. An order that the inclusion of the Provisions, and exclusion of the Matters in the Plan was unlawful.
4. An order setting aside the Panel's recommendations and the Council's decision to accept those recommendations, and remitting those matters for reconsideration.
5. Any other relief the Court sees fit.
6. That the respondents pay the costs of and incidental to this appeal to the AMP.

Dated 15 September 2016



Alan G W Webb/Robert Schultz  
Counsel for the Appellant

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This document is filed by Tim Mullins solicitor for the Appellant of the firm LeeSalmonLong.

Documents for the Appellant may be served at the offices of LeeSalmonLong situated on Level 16, Vero Centre, 48 Shortland Street, and Quay Chambers, Level 7, 2 Commerce Street, Auckland or may be posted to P O Box 2026 and PO Box 106215 Auckland or emailed to [webb@quaychambers.co.nz](mailto:webb@quaychambers.co.nz) and [robert.schultz@lsl.co.nz](mailto:robert.schultz@lsl.co.nz).