

**In the High Court of New Zealand  
Auckland Registry**

**CIV-2016-404-**

Under the Local Government (Auckland Transitional Provisions) Act 2010 ('the Act')

In the matter of an appeal pursuant to s 158 of the Act

Between **Auckland University of Technology**, a tertiary institution under the Education Act 1989, at Auckland

**Appellant**

And **Auckland Council** a unitary authority established under the Local Government (Auckland Council) Act 2009

**Respondent**

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**Notice of appeal**

Dated 16 September 2016

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Solicitor Acting: **Andrea Vujnovich**

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Counsel Acting: **Matthew Casey QC / Asher Davidson**

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**To** The Registrar, High Court, Auckland

And

**To** Auckland Council

**This document notifies you that –**

1. Auckland University of Technology ('the **appellant**') appeals to the High Court at Auckland against the decision of the Auckland Council ('the **respondent**') in respect of a provision and/or matter relating to the Proposed Auckland Unitary Plan ('**PAUP**'), namely that part of the decision to zone the appellant's land General Business Zone.

**Standing**

2. The appellant made a submission on the PAUP in relation to the appropriate zoning of its land at 41 Centorian Drive, Windsor Park ('the **Site**'), seeking that the land be zoned Mixed Use Zone, rather than the Light Industrial zoning proposed in the PAUP as notified.
3. The respondent accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel ('the **Panel**') which resulted in:
  - (a) A provision being included in the PAUP, namely that the Land was zoned General Business rather than the zoning sought by the appellant; and/or
  - (b) A matter being excluded from the PAUP, namely the Land was not zoned Mixed Use Zone as sought in the submission or Mixed Housing Suburban as sought by the appellant at the hearing.
4. The appellant therefore has standing to appeal to the High Court under s 158 of the Act on questions of law.

**Decision Appealed**

5. The decision appealed is that part of the respondent's decision on the PAUP to zone the Site General Business, rather than the most appropriate zone, being either Mixed Use or Mixed Housing Suburban.

6. By accepting the recommendation by the Panel without more, the respondent accepted and was bound by the reasoning (if any) of the Panel. Therefore, the respondent's decision suffers from the same errors as the Panel's recommendations.

### **The errors of law**

7. In making its recommendation that the Land be zoned General Business, the Panel, and therefore the respondent, made the following errors:
  - (a) Failed to provide reasons sufficient to allow the appellant to ascertain whether the decision/recommendation was correct in law.
  - (b) Failed to apply the correct legal test. In particular:
    - (i) In taking an area-wide approach, the Panel failed to consider whether the General Business Zone was the optimal planning outcome for the Site having regard to the particular characteristics of the Site;
    - (ii) Failed to undertake the assessment required under s 32AA Resource Management Act 1991, as required by s 145(1)(d) of the Act;
    - (iii) Failed to assess the benefits and costs of the respective zones sought for the Site.
  - (c) Failed to have regard to mandatory relevant considerations, namely:
    - (i) The unique characteristics of the Site, which differentiate the Site from other land in the Rosedale area, particularly that:
      - the only road access to the Site is from a residential cul de sac; and
      - the Site is bounded on two sides by land zoned Mixed Housing Suburban, and one side by the Special Purpose Zone – Major Recreation Facility;

- (ii) The implications of a General Business Zoning for the Site and the appellant, particularly that:
- Tertiary education (the appellant's primary business) will require discretionary activity consent under the General Business Zone, rather than being permitted in the Mixed Use Zone or permitted in some cases in the Light Industrial Zone;
  - Residential activity, being the activity for which the Site is best suited, will require non-complying activity consent under the General Business Zone, rather than being permitted or restricted discretionary under the Mixed Use Zone and Mixed Housing Suburban Zones.
- (d) Made findings contrary to the true and only reasonable conclusion available on the evidence. In particular:
- (i) While evidence was given to the Panel in support of the Mixed Housing Suburban Zone for the Site, the Panel had no evidence supporting the General Business zone as applying to the Site;
- (ii) To the extent that there was a finding that zoning the Site General Business was the optimal planning outcome, that finding was contrary to the only relevant evidence that the optimal planning outcome was Mixed Housing Suburban.

### **Questions of law**

8. The following questions of law arise:
- (a) Where the Panel's recommendation is relied upon for the respondent's decision, does the respondent's decision suffer from the same errors of law as the Panel's recommendation?
- (b) Was the Panel required to give reasons sufficient to determine whether its recommendation suffered from errors of law?
- (c) Did the Panel provide sufficient reasons for its recommendation to zone the Site General Business?

- (d) Did the Panel apply the correct legal test to determining the zoning of the Site?
- (e) Did the Panel fail to have regard to all relevant considerations in recommending that the Land be zoned General Business?
- (f) Did the Panel make factual findings which contradicted the true and only reasonable conclusions available on the evidence?

**Grounds of appeal**

- 9. The grounds of the appeal are as set out in paragraphs 7 and 8 above. The Panel's recommendations, insofar as they related to the zoning of the Site, suffered from a number of errors of law, which were carried over to the respondent's decision which adopted the recommendation without more.

**Relief sought**

- 10. That this appeal be allowed.
- 11. That the issue of the appropriate zoning of the Site be referred back to the respondent and/or Panel to reconsider the relevant part of its decision/recommendation in relation to the zoning of the Site.
- 12. That the respondent/Panel provide the appellant with the opportunity to provide further relevant evidence and submissions in relation to the zoning of the Site.
- 13. Such further or other relief as is appropriate to the circumstances.
- 14. The costs of and incidental to this appeal.

**Dated** at Auckland this 16<sup>th</sup> day of September 2016.



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Matthew Casey QC / Asher Davidson

Counsel for appellant

**This notice of appeal** is filed by **Andrea Vujonivich**, solicitor for the appellant. The address for service of the appellant is at the offices of Auckland University of Technology, Level 7, WA Building, 55 Wellesley Street East, Auckland Central.

Documents for service on the appellant may be left at that address for service or posted to Private Bag 92006, Auckland 1142.

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**Appellant**

And **Auckland Council** a unitary authority established under the Local Government (Auckland Council) Act 2009

**Respondent**

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**Without notice application by appellant for directions under Rule 20.6 and 20.7, with memorandum of counsel**

Dated 16 September 2016

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**To** The Registrar  
High Court  
Auckland

**This document notifies you that –**

1. The appellant, Auckland University of Technology, will apply to the Court for orders:
  - (a) pursuant to rule 20.6(1)(c), confirming that service of the appeal is required on the respondent only; or in the alternative
  - (b) pursuant to rule 20.7, dispensing with service of the notice of appeal other than on the respondent.
2. The grounds on which the orders are sought are as follows:
  - (a) The appeal relates to land at 41 Centorian Drive, Windsor Park, Auckland (**'Site'**), which is owned by the appellant.
  - (b) The appeal relates to a decision by the respondent as to the zoning of the Site in the Proposed Auckland Unitary Plan (**'PAUP'**).
  - (c) The right of appeal arises from a submission lodged by the appellant on the PAUP. While there was an opportunity for persons who considered themselves affected by the submission to make further submissions, no such further submissions were lodged.
  - (d) The appellant is not otherwise aware of any person who is directly affected by the appeal.
  - (e) The appellant takes the view that, other than the respondent, there are no parties directly affected by the appeal that are required to be served under rule 20.6(1)(c).
  - (f) An order dispensing with service is sought out of an abundance of caution.
3. The application is made in reliance on rules 20.6(1)(c) and 20.7 High Court Rules.



4. The attention of the Court is respectfully drawn to the memorandum of counsel set out below.

Date: 16 September 2016



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Matthew Casey QC / Asher Davidson  
Counsel for Appellant

### **Memorandum of Counsel in relation to directions**

1. These directions are sought because, while the appellant takes the view that the respondent is the only party who needs to be served under rule 20.6(1)(c), it acknowledges that there is some uncertainty about who should be served.
2. This appeal is made under s 158(1) Local Government (Auckland Transitional Provisions) Act 2010 (**Act**), and that the respondent's decision to zone the Site as General Business Zone suffered from errors of law.
3. The relief sought is that the matter be referred back to the respondent, or the Independent Hearings Panel who made recommendations on which the respondent relied, for reconsideration of the appropriate zone to apply to the Site.
4. Under rule 20.6(1)(c), a copy of the notice of appeal is required to be served on every party directly affected by the appeal.
5. There is a question as to who may be considered to be directly affected, and the appellant seeks directions from the Court to ensure it complies with its service obligations.
6. The appellant's position is that the only party required to be served under rule 20.6(1)(c) is the respondent. The reasons for its position are that:

- (a) The Site is solely owned by the appellant and there are no other persons involved with the Site that may be affected by the outcome of the appeal;
  - (b) No person made a further submission on the appellant's submission seeking to change the zoning of the Site from Light Industrial zone to Mixed Use zone. Had any person been directly affected by a change in zone for the Site, they can be reasonably expected to have made a further submission;
  - (c) Under s 129 of the Act, only those persons who made a submission and stated in their submission that they wished to be heard were entitled to speak at a hearing session. The Act also limits the right of appeal to those who made a submission (other than where a decision was out of scope).
  - (d) Given the statutory scheme of limiting the right of participation to those who have involved themselves in the submission process, it is reasonable to interpret "directly affected" in rule 20.6(1)(c) to mean those persons who made a further submission on the appellant's submission on the zoning of the Site.
7. In the event that the Court does not accept that there are no other parties directly affected, the appellant seeks an order under rule 20.7 dispensing with service on any party other than the respondent. If the respondent considers that there are other persons who are or might be affected by the appeal, it can be expected to advise the appellant who can then serve those persons.
8. Although this application is made without notice, the appellant will serve it (and this memorandum) on the respondent so that it is aware of the position regarding service.