IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2810
[2020] NZHC 1017

BETWEEN	FRANCO BELGIORNO-NETTIS Plaintiff/Applicant
AND	AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	12 May 2020
Counsel:	R B Stewart QC and S Ryan for Plaintiff/Applicant M C Allan for Second Defendant/Respondent C Kirman for Kainga Ora-Homes and Communities - Intervener A Witten-Hannah for Body Corporate
Judgment:	15 May 2020

JUDGMENT OF WHATA J

This judgment was delivered by me on 15 May 2020 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Daniel Overton Goulding, Onehunga
Brookfields Lawyers, Auckland

[1] Mr Belgiorno-Nettis was a submitter on the Proposed Auckland Unitary Plan (PAUP). He sought, among other things, to prevent intensive developments at specified locations in Takapuna, including the Promenade Block and the Lake Road Block (the Blocks). His submissions were not accepted by the Independent Hearings Panel (IHP). He appealed and judicially reviewed the IHP's decision. He lost in this Court but was partially successful in the Court of Appeal. That Court found the IHP had not complied with its duty to give reasons. The IHP was then directed to give its reasons. It did so in two decisions, respectively dated 14 and 19 October 2019. Mr Belgiorno-Nettis remained dissatisfied. He now claims that the IHP has erred in several ways,[1] and seeks to judicially review the IHP's decisions relating to his submissions. He also sought interim relief as follows:

[a] An order preventing the Auckland Council (Council) from notifying as operative the height and zoning provisions in the Auckland Unitary Plan (AUP) in respect of the Blocks; and

[b] an order preventing the Council from treating the affected AUP rules as operative, pending the hearing of his claims in June 2020.

[2] The Council consented to the first order. However, it says it could not treat the affected rules as inoperative because of the effect of s 86F of the Resource Management Act (RMA), which states:

86F When rules in proposed plans must be treated as operative

(1) A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—

(a) no submissions in opposition have been made or appeals have been lodged; or

(b) all submissions in opposition and appeals have been determined; or

[1] See Schedule A at the foot of this judgment.

(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.

(2) However, until the decisions have been given under clause 10(4) of Schedule 1 on all submissions, subsection (1) does not apply to the rules in a proposed plan that was given limited notification.

[3] "Interim interim" orders were granted by Palmer J preserving Mr Belgiorno-Nettis' position, pending the determination of his application for interim orders. That application then came before me.

[4] While hearing argument on this issue, the parties mooted a potential alternative approach which did not involve derogation from s 86F. I then adjourned the matter and afforded the parties the opportunity to discuss this potential alternative further. After the adjournment, Mr Allan provided an outline of what that alternative proposal might look like. In short, it envisaged the Council processing applications affected by the impugned rules in the normal way, except that the Council would not determine the applications (including any notification decision) until after the trial of the substantive application. At that point, the need for interim relief would then be revisited. It would also require that the RMA processing timeframes be imposed by an order of the Court. Specified exceptions to the interim orders were also noted. Those exceptions were, in summary, to enable decisions to be made in relation to applications for activities that would not or did not exceed the limits sought by Mr Belgiorno-Nettis in his submissions on the relevant parts of the PAUP.

[5] Mr Stewart indicated an agreement ought to be reached and that he would be taking further instructions that afternoon. One potential area of disagreement related to the period of any interim order. The applicant preferred the orders remain until a decision is made. I indicated my preference that it be approached on the basis that both parties be granted leave to seek a revisiting of the orders when the matter is heard substantively. On that basis, I adjourned the hearing to enable Mr Stewart to take instructions. He then did so, indicating that agreement was likely.

[6] The parties reached an agreement and then filed consent orders for my approval. The orders broadly accord with Mr Ward's outline as noted above. I am content to make those orders for the following reasons:

[a] Mr Belgiorno-Nettis' claims raise serious issues to be tried.

[b] However, it is not necessary to make orders directly affecting the operation of s 86F in order to preserve, in substance, Mr Belgiorno-Nettis' position pending the hearing of his claims.

[c] The orders as sought enable the ordinary operation of s 86F, and the AUP rules, up until the making of a substantive decision that might bear on the utility of any relief that could be granted in these proceedings.

[d] The proposed orders are tailored to allow the processing of applications for consent, the granting of which would not be inconsistent with the relief Mr Belgiorno-Nettis sought in relation to the AUP.

[e] Taken together, the orders represent a proper balance between the policy of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) to enable the efficient promulgation of the AUP, the right of the public to be able to rely on the operative provisions of the AUP, and Mr Belgiorno-Nettis' right to his day in Court and any vindication that might flow from that.

[7] Accordingly, I make the following orders:

[a] The Council is to provide Mr Belgiorno-Nettis (through his legal representatives) a copy of any resource consent applications received relating to land within the Blocks, as defined in the proceedings, within 3 working days of lodgement.

[b] Subject always to the exceptions stated below in [c], the Council may process any new resource consent application, or existing application

at the date of these orders, by reference to the provisions of the AUP (Operative in Part) only, and without reference to the provisions of the former North Shore District Plan (NSDP). However, the Council may only process any such application up to the point of preparing draft notification and substantive decisions, and it may not make a notification decision or substantive decision in respect of the application while these orders remain in force. The processing timeframes under the RMA shall be paused from the point at which the Council ceases processing in terms of this order [b].

[c] The Council may process and determine any application for resource consent specified below under the RMA in the usual way by reference to the provisions of the AUP only, and without reference to the provisions of the NSDP. The order at [b] shall not apply to any of the following applications (however the order at [a] will apply):

[i] Applications for resource consent involving a change in use and involving no development; and/or

[ii] Applications for resource consent involving any development at or below the following heights:

- The Terrace Housing and Apartment Building-zoned land within the Promenade Block -– 12 metres;
- Within the Lake Road Block:
  - "The Mixed Use zoned land" west of Lake Road – 16.5 metres;
  - "The Mixed Use zoned land" east of Lake Road – 12 metres;
  - "The Mixed Housing Urban zoned land" east of Lake Road – 9 metres.

[d] Leave is reserved to any party to apply to the Court at any time to vary or cancel these orders. It is expressly recorded that the Council may apply for the orders to be varied or cancelled at the substantive hearing set down on 29 and 30 June 2020. If no party applies to vary or cancel the orders, they shall expire on the determination of the proceedings by this Court.

[e] Costs shall lie where they fall.

[8] Counsel for the Plaintiff record that the proposed interim orders are without prejudice to position of the Plaintiff to be advanced at the substantive hearing.

Schedule A

Mr Belgiorno-Nettis' claims (to be tried) are as follows:

(a) The IHP erred by stating that prior decision making at the regional policy statement level or submissions which raised general concerns about intensification and building height in Takapuna would necessitate the rejection of individual submissions by Mr Belgiorno-Nettis (and others) in relation to the Blocks, which also negated materially relevant considerations.

(b) The IHP made a material mistake of fact by mischaracterising Mr Belgiorno-Nettis' position, namely, in holding that his "general submissions raising concerns about intensification and building height in Takapuna at a general strategic or growth management level were accordingly not recommended to be accepted" and that "prior strategic recommendations for the regional policy statement necessarily resulted in the recommendation of rejection of individual submissions [of Mr Belgiorno-Nettis and others] which ran counter to that strategy".

(c) The IHP gave inadequate reasons, which breached s 144 of the LGATPA and/or the common law, including in so far as the IHP:

(i) Failed to state the evidence or expert evidence relied upon;

(ii) did not make them with reference to any particular evidence;

(iii) omitted to state reasons for preferring one witness or expert over another; and

(iv) failed completely to mention the competing evidential positions.

(d) The promulgation of the new reasons breached the principle of natural justice because the persons deciding the new reasons had not listened

to or heard all of the evidence Mr Belgiorno-Nettis provided or relied upon.

(e) The IHP failed or omitted to have regard to relevant considerations in relation to what was actually built or the environment as it existed.

(f) The IHP came to a conclusion without evidence, or one it could not reasonably have come to on the evidence.

(g) For the reasons just mentioned, the Council's decision to accept the IHP's recommendation was flawed.