IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2016-404-2322
[2017] NZHC 2487

BETWEEN	STEPHEN HOLLANDER Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing:	4 September 2017
Counsel:	M E Casey QC and A J Davidson for Appellant N M H Whittington and M G Wakefield for Respondent C E Kirman and A K Devine for Housing New Zealand Corporation
Judgment:	11 October 2017

JUDGMENT OF HEATH J

This judgment was delivered by me on 11 October 2017 at 2.15pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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Berry & Co, Queenstown
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Counsel:
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The appeal

[1] Mr Stephen Hollander appeals against a zoning decision made by Auckland Council (the Council). Mr Hollander and two others (the Landowners) challenge the zoning of an area of land at Dairy Flat, a north-Auckland suburb, comprising 97.5 hectares (the Land), as Mixed Rural, rather than Countryside Living.[1] The decision was made under special legislation enacted to accelerate the preparation of a combined plan for the Auckland region, following the amalgamation of several territorial authorities in 2010.[2]

[2] The Council's zoning decision on the notified version of the Proposed Auckland Unitary Plan (the Proposed Unitary Plan) was made under s 148(1)(a) of the Local Government (Auckland Transitional Provisions) Act 2010 (the Transitional Act)[3] and was based on recommendations made by an Independent Hearings Panel (the Panel)[4] established by that legislation.

[3] The Land was subject to a Mixed Rural zoning in the Proposed Unitary Plan. Before the Panel, the Landowners sought to change the zone to Countryside Living. Evidence filed on behalf of the Council supported that submission. No contrary submissions were made. Nevertheless, the Panel recommended, and Council confirmed, the Mixed Rural zoning.

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1 The nature and purpose of the Mixed Rural and Countryside Living zones are set out at para [16] below.
2 Local Government (Auckland Transitional Provisions) Act 2010. See para [7] below.
3 Section 148(1) is set out at para [61] below.
4 See para [7] below.

[4] Section 158(4) of the Transitional Act[5] limits appeals to the High Court to questions of law.[6] Mr Casey QC, for the Landowners, identified three categories of error:

(a) *Errors relating to the evidence*:

(i) *Issue one* — Was the Panel's finding on the zoning of the Land reached without evidence, or was it a conclusion to which the Panel could not reasonably have come on the evidence before it?

(ii) *Issue two* — Should the Panel have taken into account, as a mandatory relevant factor, the agreed position of the Landowners and Council, and the relevant supporting evidence? If so, did it fail to do so, and did the failure materially affect the outcome of the zoning decisions?[7]

(b) *Errors relating to the provision of reasons*:

(i) *Issue one* — Was the Panel required to give reasons for its finding as to the zoning of the Land in circumstances where the finding effectively rejected an agreed position of the parties and all supporting evidence?

(ii) *Issue two* — Were the reasons given by the Panel sufficient to support its finding on the zoning of the Land?

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5 Section 158(4) is set out at para [42] below.

6 This Court's approach to appellate review of this type is discussed at paras [42]–[46] below.

7 As to materiality, see para [46] below.

(c) *Errors relating to application of the statutory test*:

In considering the zoning for the Land on a "grouped" basis,[8] did the Panel fail to apply the correct legal test in terms of the appropriate zoning for the Land?

[5] The appeal provisions of the Transitional Act incorporate many of those found in the Resource Management Act 1991. Section 301 of the latter Act confers rights of audience to any person who appeared before the Panel when it heard submissions on the Proposed Unitary Plan.[9] Housing New Zealand Corporation (the Corporation) gave notice under s 301.

[6] I heard from counsel for the Corporation on the appeal. Its submissions were addressed to wider public interest issues, as opposed to the merits of the dispute between the Landowners and the Council. I thank Ms Kirman for her helpful submissions, to which I refer later.

Background

[7] The Council was established on 1 November 2010.[10] Part 4 of the Transitional Act sets out the process by which the "First Auckland Combined Plan" was to be prepared. The first stage involved the preparation and issue of the Proposed Unitary Plan. After notification of that plan, the Panel was to consider submissions and make recommendations to the Council on the content of the final plan (the Unitary Plan).[11] The Panel was required to make recommendations "no later than 50 working days before the expiry of three years from the date" on which the Proposed Unitary Plan was notified.[12] The Council was to make decisions on those recommendations within a further 20 working days.[13]

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8 See s 144(8)(c) of the Local Government (Auckland Transitional Provisions) Act 2010, set out at para [59] below.

9 Section 158(5) of the Local Government (Auckland Transitional Provisions) Act 2010 applies s 301 of the Resource Management Act 1991 to appeals under the Transitional Act.

10 Local Government (Auckland Council) Act 2009, ss 2 and 6.

11 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1).

12 Ibid, s 115(1)(j).

13 Ibid, s 115(1)(k).

[8] Section 115(1)(g) of the Transitional Act characterises the Panel as "specialist" in nature. That characterisation is evident from s 161 of the Transitional Act. The Minister for the Environment and the Minister of Conservation were to appoint a chairperson and 3 to 10 other members to comprise the Panel.[14] In doing so, they were to consult with both the Council and the Independent Māori Statutory Board.[15] The chosen Panel members were required, collectively, to "have knowledge of, and expertise in relation to" the Resource Management Act 1991, district and regional plans and policy statements prepared under that Act, tikanga Māori (as applied in Tāmaki Makaurau), the Auckland region, the people and mana whenua groups of Auckland, and the management of legal proceedings.[16] While a quorum of two was required for any particular hearing,[17] all Panel members signed the reports to Council.

[9] The Panel's functions were set out in s 164 of the Transitional Act:

> **164 Functions of Hearings Panel**
>
> The Hearings Panel has the following functions and powers for the purposes of holding a Hearing into the submissions on the proposed plan and any variation permitted by section 124(4):
>
> (a) to hold hearing sessions; and
>
> (b) for the purposes of paragraph (a),—
>
> (i) to hold or authorise the holding of pre-hearing session meetings, conferences of experts, and alternative dispute resolution processes; and
>
> (ii) to commission reports; and
>
> (iii) to hear any objections made in accordance with section 154; and
>
> (c) to make recommendations to the Auckland Council on the proposed plan and any variation; and
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> (d) except as expressly provided by this Part, to regulate its own proceedings in the manner it thinks fit; and
>
> (e) to carry out or exercise any other functions or powers conferred by this Part or that are incidental and related to, or

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14 Ibid, s 161(1) and (2).
15 Ibid, s 161(3).
16 Ibid, s 161(4).
17 Ibid, s 136(1).

> consequential upon, any of its functions and powers under this Part.

[10] The Panel remains in existence "until it has completed the performance or exercise of its functions and powers". That includes completion of "any appeals in relation to the Hearing that are filed in any Court".[18]

The zoning options

[11] The issue on appeal is whether the Council was right to zone the Land as Mixed Rural, rather than Countryside Living. The Proposed Unitary Plan included five rural zones: Rural Production, Mixed Rural, Countryside Living, Rural Coastal and Rural Conservation.

[12] Mr Duguid, who holds the position of "General Manager Plans and Places" at the Council, gave evidence before the Panel. In a written statement of evidence dated 3 December 2015, he described the "foundation of the policy framework which directs the management of rural Auckland". Mr Duguid said it was "based on the protection of elite and prime land and the provision for rural production activities as a priority over other activities". The policies were intended to minimise "reverse sensitivity effects on rural production activities, channelling rural lifestyle living into identified areas, and managing rural subdivision so it supports rural production activities".

[13] There are four aspects of the Proposed Unitary Plan that assume significance in the context of the particular zoning decision in issue. They are:

(a) The Future Urban Zone;

(b) The Rural Urban Boundary;

(c) Mixed Rural Zone; and

(d) Countryside Living Zone.

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[18] Ibid, s 166. Depending on the nature of the issue, provision is made for appeals to either the Environment Court (ss 156 and 157) or the High Court (s 158).

[14] Explaining the nature of the Future Urban Zone, Mr Duguid said:

> 18.101 The Future Urban zone … is applied to land located within the [Rural Urban Boundary], on the periphery of existing urban areas. The Council has determined that this land is suitable for future urban development. The purpose of the [Future Urban Zone] is to facilitate the future development of the land for urban purposes by providing for the continuation of a broad range of rural activities and imposing restrictions on activities that might compromise the future development of the [Future Urban Zone] for urban purposes. …

[15] At the time that submitters were heard on the zoning of the Land, the Proposed Unitary Plan included about 10,100 hectares of land zoned as Future Urban, almost all of which was within the Rural Urban Boundary. In making its recommendations, the Panel decided to expand the Rural Urban Boundary, so as to increase the available land within it. In its *Re-zoning Report*,[19] the Panel recorded that this area be increased from 10,100 hectares to about 13,000 hectares; of which 11,100 hectares was to be zoned Future Urban.

[16] Mr Duguid also explained the nature of the Mixed Rural and Countryside Living zones:

> *Mixed rural zone*
>
> 18.59 The Mixed Rural zone has been applied to areas with a history of activities such as horticulture, viticulture and more intensive farming activities. The purpose of this zone is to provide for mixed rural production. The policy framework directing management of the Mixed Rural zone provides greater flexibility to accommodate a range of rural production activities and associated activities, while still ensuring good amenity levels for residents who use the land for rural lifestyle purposes.
>
> 18.60 Through evidence, the Council proposed refinements to the policy intent of this zone to anticipate and enable a wider range of activities.
>
> …
>
> *Countryside Living zone*
>
> 18.65 The Countryside Living zone principally provides for rural lifestyle living. The zone is generally applied closer to urban Auckland or to rural and coastal towns. The zone is applied to areas that have diverse topographical, land quality and landscape characteristics. As

[19] Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council – Changes to the Rural Urban Boundary, rezoning and precincts* (22 July 2016) [*Re-zoning Report*] at 9–10.

a consequence, there is a diversity of site sizes within this zone. This zone is the main receiver area for Transferable Rural Site Subdivision (**TRSS**) from other zones, and is also the zone in which the majority of rural lifestyle living is anticipated.

18.66 Through evidence, the Council proposed a revised rural subdivision strategy providing a targeted approach using a number of methods including TRSS. TRSS encourages and provides for the amalgamation of rural titles and the transfer of their residential development potential out of areas of elite or prime land into identified transferable site receiver areas. TRSS also enables the protection and restoration of identified areas of significant ecological value or outstanding natural character, and the creation of development opportunities in identified transferable site receiver areas. As outlined above, these identified receiver areas are predominantly in the Countryside Living zone.

(Footnote omitted)

[17] In a separate table, annexed to his statement of evidence, Mr Duguid described the zones as follows:

Mixed Rural Zone:

Applies in areas with a history of horticulture and viticulture, including greenhouse production of flowers, fruit and vegetables, wine production, intensive poultry farming, and equine-related activities and services.

...

Countryside Living Zone:

Applies in locations which avoid sensitive areas such as natural landscapes, elite and prime land and quarries.

Areas with smaller site sizes around rural townships.

The Panel's reports

[18] Two of the Panel's reports to the Council are relevant for the purposes of the appeal. Both were provided on 22 July 2016. They are the *Overview Report*[20] and the *Re-zoning Report*. The two reports must be read together. They provide the foundation on which the Council's decision was based.

[19] In the *Overview Report*, the Panel stated:[21]

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[20] Auckland Unitary Plan Independent Hearings Panel, *Report to Auckland Council: Overview of recommendations on the proposed Auckland Unitary Plan* (22 July 2016) [*Overview Report*].

[21] Ibid, at 29.

> While the submission process is a very important part of this planning process, it is not the only part. The purpose of the Unitary Plan is to achieve the purpose of promoting the sustainable management of natural and physical resources for the whole of Auckland. The whole includes not only all people and communities, but also future generations and all other living things that are part of the environment as broadly defined in the Resource Management Act 1991. Also important in that broad context is the identification of significant resource management issues and appropriate methods to address them in ways that achieve the purpose of the Resource Management Act 1991. As the Environment Court has noted on many occasions, addressing such issues is not simply a numbers game to be done by adding up the submissions for and against a proposed plan provision. Further, the Panel [by s 144(8) of the Transitional Act] is not required to make recommendations that address each submission individually.
>
> (Footnote omitted)

[20] In the *Re-zoning Report*, the Panel stated:[22]

> **2.3 Criteria for determining Rural Urban Boundary location**
>
> …
>
> … The Panel considers the planning tool to best achieve that form of development is the appropriate zoning to enable intensification in and around centres and transport corridors … It appears to the Panel the only meaningful way in which the Rural Urban Boundary could be used to support compact urban development is to signal a tight and firm restriction on the supply of future urban land, with a view to forcing more intensive use of the existing metropolitan areas than would otherwise be the case. [Two witnesses] provided evidence that such an approach would drive urban land prices higher than would otherwise be the case and would be contrary to the objective of promoting more affordable access to appropriately-zoned land for housing, commercial and industrial use. The Panel agrees.
>
> The Panel was also not convinced by the related proposition that the Rural Urban Boundary should be located so as to attempt to match the supply of future urban land with estimated demand (and no more) over the next thirty years. The Panel simply does not have available to it the necessary information or a recognised method to attempt to match with any confidence the supply of urban land with its estimated demand across the Auckland region over the next ten years (let alone for thirty years). …

[21] The Panel concluded its view on the location of the Rural Urban Boundary by stating:[23]

> The estimates [prepared by Council staff and other experts] on supply and demand for urban land uses for the next thirty years indicate that the Panel's recommended location of the Rural Urban Boundary should provide for

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22 *Re-zoning Report* at 10–11.

23 Ibid, at 11.

> sufficient supply, but not with a large margin. This outcome reinforces the Panel's view that proposals to change the location of the Rural Urban Boundary in the future should be open to private plan changes (as well as Council's) should the quantum of supply prove inadequate or if more efficient land supply is identified. This would be achieved if the Rural Urban Boundary is defined (i.e. mapped) in the district plan, with the objectives and policies related to it in the regional policy statement.

[22] The Panel made recommendations for changes to the Rural Urban Boundary in a manner consistent with the regional policy statement criteria. While acknowledging a need for greater flexibility to meet any changes in circumstances that might require reconsideration of the amount of land needed for that purpose, the Panel recognised the need for a greater pool of land from which future urban development could be undertaken.

[23] The Panel heard submissions on the objectives, policies and rules in the proposed plan over a period of 18 months. Submissions on rezoning issues took place over a further period of two months. The Panel was satisfied that it had been made "aware of the range of resource management issues that any such rezoning … would raise and that must be addressed by its recommendations".[24] In concluding an explanation of the scope of its work, the Panel said:[25]

> *These issues are complex and any consideration of them involves a range of competing considerations. In many cases the resolution of an issue is not a binary choice between the position of the Council and that of a particular submitter*. In a wide-ranging planning process, the choice is much more likely to be a synthesis of a number of submissions, together with an evaluation of the relevant provision in accordance with sections 32 and 32AA of the Resource Management Act 1991. This evaluation must include the application of the judgment of the Panel to review (and in a number of cases establish) and recommend objectives, policies and methods to achieve integrated management of the natural and physical resources of Auckland and of the effects of the use, development, or protection of land and associated natural and physical resources of Auckland.
>
> (Emphasis added)

[24] Sections 32 and 32AA of the Resource Management Act 1991, to which the Panel referred, state:

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[24] *Overview Report* at 29.
[25] Ibid.

32 Requirements for preparing and publishing evaluation reports

(1) An evaluation report required under this Act must—

(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and

(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

(iii) summarising the reasons for deciding on the provisions; and

(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.

(2) An assessment under subsection (1)(b)(ii) must—

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

(3) If the proposal (an amending proposal) will amend a standard, statement, national planning standard, regulation, plan, or change that is already proposed or that already exists (an existing proposal), the examination under subsection (1)(b) must relate to—

(a) the provisions and objectives of the amending proposal; and

(b) the objectives of the existing proposal to the extent that those objectives—

(i) are relevant to the objectives of the amending proposal; and

(ii) would remain if the amending proposal were to take effect.

(4) If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.

(4A) If the proposal is a proposed policy statement, plan, or change prepared in accordance with any of the processes provided for in Schedule 1, the evaluation report must—

(a) summarise all advice concerning the proposal received from iwi authorities under the relevant provisions of Schedule 1; and

(b) summarise the response to the advice, including any provisions of the proposal that are intended to give effect to the advice.

(5) The person who must have particular regard to the evaluation report must make the report available for public inspection—

(a) as soon as practicable after the proposal is made (in the case of a standard or regulation); or

(b) at the same time as the proposal is notified.

(6) In this section,—

objectives means,—

(a) for a proposal that contains or states objectives, those objectives:

(b) for all other proposals, the purpose of the proposal

proposal means a proposed standard, statement, national planning standard, regulation, plan, or change for which an evaluation report must be prepared under this Act

provisions means,—

(a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change:

(b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

32AA Requirements for undertaking and publishing further evaluations

(1) A further evaluation required under this Act—

(a) is required only for any changes that have been made to, or are proposed for, the proposal since the evaluation report for the proposal was completed (the changes); and

(b) must be undertaken in accordance with section 32(1) to (4); and

(c) must, despite paragraph (b) and section 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes; and

(d) must—

(i) be published in an evaluation report that is made available for public inspection at the same time as the approved proposal (in the case of a national policy statement or a New Zealand coastal policy statement or a national planning standard), or the decision on the proposal, is notified; or

(ii) be referred to in the decision-making record in sufficient detail to demonstrate that the further evaluation was undertaken in accordance with this section.

(2) To avoid doubt, an evaluation report does not have to be prepared if a further evaluation is undertaken in accordance with subsection (1)(d)(ii).

(3) In this section, proposal means a proposed statement, national planning standard, plan, or change for which a further evaluation must be undertaken under this Act.

[25] In addressing the likely population growth of Auckland, the Panel said:[26]

6. Enabling growth

6.1. Summary

The [Unitary] Plan envisages the need for approximately 400,000 additional dwellings in the Auckland region by 2041 to accommodate an increase of somewhere between 700,000 to 1 million residents over that period. Considerable demand is also expected for commercial and industrial capacity. The rate and scale of this expected growth is unprecedented for a New Zealand city.

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[26] Ibid, at 47.

> The Plan also envisages a more quality compact urban form than is currently the case with intensification focused on centres and transport nodes, and along transport corridors (which the Panel has pursued as a centres and corridor strategy), and a wider choice of housing types and more affordable housing.
>
> The Panel convened two expert groups to develop methods to estimate the feasible enabled capacity of the proposed Unitary Plan and of possible alternatives put to the panel. *The results identified a severe shortfall in the proposed Unitary Plan relative to expected residential demand*. Shortages of commercial and industrial capacity appear less acute, except possibly for the availability of industrial-zoned land in some areas. *Thus a central theme in the Panel's work has been to enable greater residential capacity, and to a lesser extent greater commercial and industrial capacity, while promoting the centres and corridors strategy, greater housing choice and more affordable housing*.
>
> The Panel considers the Unitary Plan should err toward over-enabling, as there is a high level of uncertainty in the estimates of demand and supply over the long term, and the costs to individuals and the community of under-enabling capacity are much more severe than those arising from over-enabling capacity. *To provide for sufficient residential capacity the Plan needs to both enable a large step-change in capacity in the short to medium term and to provide a credible pathway to ongoing supply over the long term*.
>
> (Emphasis added; footnote omitted)

[26] Following those objectives, the Panel considered a number of approaches "to increase residential, commercial and industrial capacity". In relation to rural zoning, the Panel recommended:[27]

> vii. Expand the Rural Urban Boundary to include 30 per cent more land area targeted for future urbanisation, and not impose a Rural Urban Boundary around smaller towns and villages so they are able to grow organically.
>
> viii. Locate the Rural Urban Boundary line at the district plan level, with criteria for any change set out in the regional policy statement, so that there is a firm framework for any change but that such change can be initiated by parties in addition to Council.
>
> ix. Increase lifestyle choices by expanding the extent of land zoned Rural – Countryside Living Zone.

[27] The Panel expressly considered the amount and location of land to be designated as Countryside Living. It did so in the context of its recommendation that

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[27] Ibid, at 48.

"lifestyle choices" should be increased "by expanding the extent of land zoned" as Countryside Living.[28] In its *Re-zoning Report*, the Panel said:[29]

> **3.3.6. Countryside living**
>
> The Panel has further increased the amount and locations of land recommended to be rezoned Residential – Countryside Living Zone seeing this both as a reasonable lifestyle choice option in a maturing city context as well as strategically serving to buffer the edges of future urban expansion. *Rezoning has not been recommended where the integrity of the Rural Urban Boundary would be undermined or the expansion of urban areas, including Future Urban zoned land, would be compromised.* An example of this is between the western extent of land zones [sic] as Future Urban Zone at Brigham Creek and the emerging urban areas of Riverhead and Kumeu-Huapai. The Panel recommends that the Council undertake further strategic work in this locality to determine if in the longer term a buffer is to be retained between urban Auckland and the emerging urban areas to the west, or alternatively that eventually the emerging urban areas would be joined to the western expansion of urban Auckland.
>
> In addition the Panel had particular regard to the matter of land containing elite soils and the clear preference of Council (and others) to prefer rural productive activities. The Panel's approach is consistent with the regional policy statement provisions at B9 – Rural environment with respect to the provision of new rural lifestyle subdivision. In broad terms the recommended countryside living zones have been concentrated in close proximity to existing urban areas and around some smaller rural and coastal settlements where land zoned as countryside living already exists. An exception to this general approach is that requests to rezone land zoned Rural – Rural Coastal Zone to Rural – Countryside Living Zone have not been recommended, consistent with the regional policy provisions.
>
> Requests for new countryside living zoning not adjacent to existing urban areas, settlements or existing land zoned countryside living have not been recommended. In being persuaded that Rural – Countryside Living Zone was an appropriate zone, the Panel has taken into consideration the substantial volume of evidence indicating that many of these areas are already in comparatively small lot sizes (i.e. less than five hectares) and are not generally used for commercial production purposes. In other words, they already have the functional characteristics of countryside living.

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28 Ibid, recommendation ix, set out at para [26] above.

29 *Re-zoning Report*, at 21–22.

> The Panel notes that extending the Rural – Countryside Living Zones will also increase the receiver areas for Transferable Rural Site Subdivision as the Rural – Countryside Living Zones are the only areas that may receive transferred titles. There was some criticism from submitters that there were insufficient receiver areas. Extending the areas zoned Rural – Countryside Living Zone will, to some extent, address this concern. In addition the two hectare average lot size and associated pattern of subdivision and development contemplated for the Rural – Countryside Living Zone, is less likely to be compromised by the transfer in of additional titles by having more extensive receiving areas.
>
> (Emphasis added)

[28] The Council considered the Panel's recommendations during a series of "Governing Body" meetings held between 10 and 15 August 2016.[30] Decisions were made on the basis of the Panel's reports alongside "several reports which set out the proposed staff response to the Panel's recommendations".[31] The staff reports to which the Council referred in its decision of 19 August 2016 (the *Decisions Report*) were not in evidence before me. I do not know whether the Council had additional information available to it which may have supported some of the Panel's recommendations on different grounds. I proceed on the basis that all relevant information is before me.

[29] The *Decisions Report* makes it clear that the Council did discriminate among various recommendations of the Panel in relation to the Rural Urban Boundary, and consequential zoning decisions. Although not in the same area as the Land, the Kumeu Showgrounds represents an illustration of a Council decision to reject a Panel recommendation in relation to the Mixed Rural/Countryside Living dichotomy.[32]

Evidence in relation to the Land

[30] Mr Casey submitted that the planning evidence put to the Panel by Mr Ewan Paul and Mr Ryan Bradley, on behalf of the Council, was based on the framework

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30 Auckland Council *Decisions of the Auckland Council on recommendations by the Auckland Unitary Plan Independent Hearings Panel on submissions and further submissions to the Proposed Auckland Unitary Plan* (19 August 2016) [*Decisions Report*], at para 1.3.

31 Ibid.

32 Ibid, at 64 and 65.

identified by Mr Duguid in his statement.[33] Their evidence relied on "Interim Guidance" provided by the Panel in documents issued in 2015.[34]

[31] The joint statement of Messrs Paul and Bradley set out their views in relation to particular submissions in a schedule annexed to their statement of evidence. One dealt with the Land. It was described as "specific properties bounded by Dairy Flat Highway, Kahikatea Flat Road, Selman Road and Wilks Road West". After referring to the Landowners' submission that the Land should be rezoned Countryside Living, Messrs Paul and Bradley said:

> Support request for re-zoning to [Countryside Living] zone. *The site meets the criteria for areas identified for Countryside Living in RPS B8.3 Rural Subdivision Policy 6*. It is also generally close to urban Auckland.
>
> *The site is suitable as a receiver site location for Transferable Rural Site Subdivision*. As discussed in the evidence of Ruth Andrews for this topic, re-zoning some additional sites to [Countryside Living] zone will assist to provide further opportunities for receiver sites for Transferable Rural Site Subdivision.
>
> Re-zoning of the site … to [Countryside Living] is the most appropriate way to achieve the objectives of the [Countryside Living] zone and gives effect to the RPS.

[32] Evidence was also presented by Mr Stephen Brown. He gave evidence for the Council on landscaping issues. Mr Brown referred to submissions (including those from the Landowners) in which changes in zoning from Mixed Rural to Countryside Living had been sought "for a large valley area both sides of Pine Valley [Road]". The Land is located to the south of that road. In describing the area next to Kahikatea Flat Road and Wilks Road West, Mr Brown said:

> … Between these residual natural features/landscapes [being stands of kahikatea and kauri], much of the gently rolling landscape subject to the current submissions is already subdivided into largish rural-residential lots, with the presence of some very large houses, extensive amenity (as opposed to production) planting and the clearly subdivided nature of much of this landscape appearing to 'pre-condition' it for further development. Although this development is intermixed with residual areas of open pasture … the

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33 See para [12] above.

34 Messrs Paul and Bradley state that Interim Guidance documents were issued by the Panel (among other things) in order to identify "best practice approaches to re-zoning and precincts … [and] to changing zoning and precincts". It is unnecessary to refer to guidance on "precincts" as the parties accept that does not apply.

> presence of both proposed Future Urban Zones simply amplifies the feeling of a peri-urban landscape in transition.
>
> Consequently, I consider the current proposals to be largely acceptable. …

[33] On behalf of the Landowners, Ms Deborah Tilley, a Senior Resource Planner with Cato Bolam Consultants Ltd, observed that Messrs Paul and Bradley supported the change to Countryside Living "in full". She added that Mr Brown's assessment was to similar effect, noting that, while he had concluded that any extension of the Countryside Living zone should be limited to the area south of a named stream course, the Land was included within that area.

[34] In a summary of evidence that she presented at a hearing before the Panel, Ms Tilley expressed the opinion that the Land was appropriate for Countryside Living zoning because it was:

- Located in close proximity to existing urban areas, services and transport links (including good access to State Highway 1 and Dairy Flat Highway);
- Generally flat to undulating topography and relatively flood free;
- Provides future housing opportunities in close proximity to established services and urban centres;
- Not identified as having any landscape significance;
- The land has been fragmented such that it already has a rural-residential character, amenity planting and no real prospect of productive farming use;
- Located between two proposed Future Urban zones rendering the land suitable as a peri-urban landscape, Countryside Living zoning and a suitable location for transferable rural site subdivision;
- The site meets the criteria for areas identified for Countryside Living in RPS B8.3 Rural Subdivision Policy 6 of the [Proposed Unitary Plan]; and
- The proposed change is consistent with the objectives and policies of the Countryside Living zone in the [Proposed Unitary Plan].

Competing contentions

[35] Mr Casey contended that the Panel's zoning recommendation was inconsistent with the undisputed evidence and the agreed position of the Council and

the Landowners. His starting point is that there was "no evidence that the Mixed Rural zone was appropriate, and the recommendation to retain that zoning lacked any evidential foundation". Rather, there was "unequivocal and undisputed evidence that the appropriate zoning for the Land was Countryside Living." At the least, he submitted, the "agreed position" was something the Panel "was required" to take into account. Mr Casey submits there is nothing to indicate that factor was taken into account.

[36] In dealing with the appeal points identified in his submissions,[35] Mr Casey submitted:

(a) There was no evidence on which a reasonable decision to zone the Land as Mixed Rural could be made.

(b) The Council, by failing to take the "agreed position" into account, made a decision that did not take into account a mandatory relevant factor.[36]

(c) The Panel was under a duty to provide reasons for its decision. The Council's decision was vitiated by the Panel's failure to provide sufficient reasons to support its recommendation. Either the reasons advanced were inconsistent in nature or they did not explain at all why the decision to retain the notified Mixed Rural zoning had been made. While it may have been open to the Panel to form a view contrary to the agreed position, had it done so, it was obliged to give transparent reasons to explain why.

(d) By dealing with submissions involving Countryside Living zoning on a grouped basis, the Panel failed to turn its mind to the optimal planning solution required. In that regard, the Panel's task was no different to that required by a decision maker acting solely under the provisions of the Resource Management Act.[37]

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35 See para [4] above.
36 Reference was made to *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.
37 Reference was made to *Advance Properties Group Ltd v Taupo District Council* [2014] NZEnvC

[37] Mr Whittington, for the Council, responded by submitting that the special procedure mandated by the Transitional Act necessarily required the decision making process to be considered on a different basis to zoning decisions made under the Resource Management Act. In particular, he referred to observations made by Whata J in *Albany North Landowners v Auckland Council*, with reference to s 144 of the Transitional Act, in which his Honour said that it would be "unrealistic to expect the [Panel] to specify and then state the reasons for accepting and rejecting each submission point."[38] The Judge added that it "would have been a Herculean task to list and respond to each submission with reasons, especially given the limited statutory timeframe to produce the reports (3 years)".[39]

[38] Mr Whittington did not accept that the Landowners and the Council had reached an "agreed position" as to zoning of the Land. Rather, he characterised what had happened as an "alignment" of submissions. While that submission suggests a distinction without any difference, it is consistent with the Panel's ability to make recommendations that were in conflict with aligned positions taken by the Council and a submitter in respect of a particular issue.

[39] The Council's position is that the Panel did not act on the submissions made by the Landowners and Council because the Panel had formed the view that it needed to make changes to the Rural Urban Boundary to accommodate future growth in Auckland. As Mr Whittington submitted:

> One problem with the [Landowners'] argument is that it treats the evidence of the Council and the [Landowners] on the zoning of the Land as the only evidence that was relevant to the Panel's assessment. It was not. The evidence and submissions about a substantial array of other issues, including the location and nature of the [Rural Urban Boundary], and the need to accommodate future growth, were also relevant, and indeed the Panel put decisive weight on that evidence in ensuring that the [Unitary] Plan was vertically and horizontally integrated.
>
> (Footnote omitted)

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126 at para [12](b).

38 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at para [143].

39 Ibid.

[40] Mr Whittington contended that it was open to the Council to deal with the zoning issue on a "grouped" basis[40] and that the reasons given for reaching the ultimate decision were sufficient in those circumstances. Although acknowledging that the Panel's obligation was to seek "the optimum planning solution", he submitted that it was "important to recognise that the Panel was necessarily not concerned only with the submissions and evidence relating" to the Land.

[41] Ms Kirman supported the broader view of the Panel's tasks articulated by Mr Whittington. She outlined in some detail the scheme of the Transitional Act, by way of background to the specific questions raised on appeal. The Corporation's primary concern was with the obligation to give reasons, given the "potential implications" a finding that insufficient reasons had been given might have on consideration of "residential intensification" recommendations at issue in at least one other proceeding.

Appellate review principles

[42] The appeal is brought under s 158 of the Transitional Act. Relevantly, it provides:

> **158 Right of appeal to High Court on question of law**
>
> (1) A person who made a submission on the proposed plan may appeal to the High Court in respect of a provision or matter relating to the proposed plan—
>
> (a) that the person addressed in the submission; and
>
> (b) in relation to which the Council accepted a recommendation of the Hearings Panel, which resulted in—
>
> (i) a provision being included in the proposed plan; or
>
> (ii) a matter being excluded from the proposed plan.
>
> …
>
> (4) However, an appeal under this section may only be on a question of law.

[40] See s 144(8)(c) of the Local Government (Auckland Transitional Provisions) Act 2010, set out at para [59] below.

(5) Except as otherwise provided in this section, sections 299(2) and 300 to 307 of the [Resource Management Act] apply, with all necessary modifications, to an appeal under this section.

(6) Notice of the appeal must be filed with the High Court, and served on the Auckland Council, no later than 20 working days after the Council notifies the matters under—

(a) section 148(4)(a), in the case of an appeal under subsection (1) or (3); or

(b) section 151(5), in the case of an appeal under subsection (2).

(7) If the subject matter of the notice of appeal relates to the coastal marine area, the person must also serve a copy of the notice on the Minister of Conservation no later than 5 working days after the notice is filed with the High Court.

[43] The Court's powers on appeal are set out in r 20.19(1) of the High Court Rules:[41]

20.19 Powers of court on appeal

(1) After hearing an appeal, the court may do any 1 or more of the following:

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

…

[44] Counsel agreed that I should take a similar approach to appeals brought under the Transitional Act to those from the Environment Court on questions of law, under s 299(1) of the Resource Management Act 1991. Counsel relied on *Countdown Properties (Northland) Ltd v Dunedin City Council.*[42] That approach was adopted by

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41 Resource Management Act 1991, s 292, adopted by Local Government (Auckland Transitional Provisions) Act 2010, s 158(5).

42 *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at

Wylie J, in the context of the Transitional Act, in *Transpower New Zealand v Auckland Council*.[43]

[45] In *Countdown Properties*, a Full Court of this Court[44] observed that the High Court would only interfere with decisions of (what is now) the Environment Court if it considered that:[45]

(a) It applied a wrong legal test; or

(b) It came to a conclusion without evidence, or one to which, on evidence, it could not reasonably have come; or

(c) It took into account matters which it should not have taken into account; or

(d) It failed to take into account matters which it should have taken into account.

[46] *Countdown* also made it clear that an appeal could not succeed unless the error materially affected the decision under appeal.[46]

[47] In *Transpower*, Wylie J said:[47]

> [53] [The *Countdown*] analysis has been applied by the courts, generally without comment, for many years. Recently it was adopted by Whata J in *Albany North Landowners v Auckland Council* in dealing with a number of appeals (and applications for review) arising out of the Council's decisions on the proposed Unitary Plan. The Council and the s 301 parties before me did not seek to criticise or distinguish the Countdown decision. In my view it is a correct statement of the applicable law.
>
> (Footnote omitted)

153–154.

43 *Transpower New Zealand v Auckland Council* [2017] NZHC 281 at para [53], set out at para [47] below. Wylie J adopted the approach taken by Whata J in *Albany North Landowners v Auckland Council* [2017] NZHC 138.

44 Barker, Williamson and Fraser JJ.

45 *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

46 Ibid, applying *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 at 81–82.

47 *Transpower New Zealand v Auckland Council* [2017] NZHC 281.

Reasons and sufficiency of evidence

(a) Reasons

[48] In *R v Taito*, the Privy Council considered a procedure adopted in criminal proceedings in the Court of Appeal to deal with criminal legal aid applications.[48] In giving the advice of the Board, Lord Steyn echoed observations made by the Court of Appeal in *Lewis v Wilson & Horton Ltd*,[49] in saying that "dismissal of an application [without reasons] meant [an] appeal could not be effectively pursued"; thus, "a reasoned decision was required".[50]

[49] I treat *Lewis* as the leading New Zealand decision on this topic. In giving the judgment of the Court of Appeal, Elias CJ discussed "three main reasons why the provision of reasons by Judges is desirable".[51] In broad summary:

(a) Provision of reasons is an important part of openness in the administration of justice.[52] The principle of open justice should be seen as "critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way."[53] Put another way, transparency in the operation of the judicial process is enhanced through provision of adequate reasons for decision making.

(b) Failure to give reasons "means that the lawfulness of what has been done cannot be assessed by a Court exercising supervisory jurisdiction."[54] Those who exercise judicial power must address the right questions and correctly apply the law. The "assurance that they will do so is provided by the supervisory and appellate Courts".[55] Their role is fundamental to the rule of law.[56]

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48 *R v Taito* [2003] 3 NZLR 577 (PC).
49 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at paras [74]–[82].
50 *R v Taito* [2003] 3 NZLR 577 (PC) at para [17].
51 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at para [76].
52 Ibid, at paras [76]–[78].
53 Ibid, at para [79].
54 Ibid, at para [80].
55 Ibid.
56 Ibid.

(c) Provision of reasons imposes a discipline on a Judge to explain his or her decision, "which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice".[57]

[50] No New Zealand court has yet gone so far as to decide that there is "an inflexible rule of universal application" requiring Judges to provide a reasoned decision.[58] In *Lewis*, the Court of Appeal left that question open. In the absence of full argument, it declined to consider whether to revisit what had been said in an earlier decision of that Court, *R v Awatere*.[59] In that case, Woodhouse P, delivering the judgment of the Court of Appeal, had expressed the need to provide reasoned decisions as "good judicial practice".[60]

[51] Importantly, in *Lewis*, the Court of Appeal acknowledged that "reasons may be abbreviated" and, in some cases "will be evident without express reference".[61] The Chief Justice said:

> [81] … What is necessary, and why it is necessary was described in relation to the Civil Service Appeal Board (a body which carried out a judicial function) by Lord Donaldson MR in R *v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 at p 319:
>
> > ". . . the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree."

[52] The obligation to give reasons has been adopted in the context of appeals from decisions of the Environment Court under the Resource Management Act 1991. In *Murphy v Rodney District Council*, Baragwanath J, having referred to both *Taito* and *Lewis*, said:[62]

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57 Ibid, at para [82].

58 For example, see *Potter v New Zealand Milk Board* [1983] NZLR 620 (HC); *R v Awatere* [1982] 1 NZLR 644 (CA) at 648–649; *R v MacPherson* [1982] 1 NZLR 650 (CA); and *R v Jefferies* [1999] 3 NZLR 211 (CA).

59 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at para [85]; see *R v Awatere* [1982] 1 NZLR 644 (CA).

60 *R v Awatere* [1982] 1 NZLR 644 (CA) at 648–649.

61 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at para [81].

62 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC).

> [25] The Privy Council in *R v Taito* [2003] 3 NZLR 577 at para [17] endorsed the observations of the Chief Justice in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at paras [74] – [82] as to the duty of a decision maker to give reasons. Of present relevance are the points that failure to give reasons means that the lawfulness of what is done cannot be assessed by an appellate Court; and that the duty to give reasons requires the decision maker to outline the intellectual route taken, which provides some protection against error. The reasons may be succinct; in some cases they will be evident without express reference.
>
> [26] The question is in the end whether the reasons are intelligible and demonstrably correct. At least in cases of the present type where reference back is readily achieved, if there is real doubt it must be resolved in that way. Unsuccessful parties to litigation before professional Judges will have particular reason to feel aggrieved if they do not know why they have lost.
>
> [27] I am satisfied that the reasons for the Court's decision are sufficiently clear to be intelligible and that they conform with the law.
>
> [28] To give reasons for its decision the Court was required to deal concisely with the two issues, as to visual effects and of number of lots, each requiring analysis against the requirements of the RMA, numerous planning documents, and the evidence and submissions. It is unnecessary to outline the discussion of the first issue on which Mr Murphy succeeded.

[53] Context is important in determining the extent to which it is necessary for reasons to be given. If the purpose for which reasons are required were to enable a party to determine whether to pursue a right of general appeal, the reasons must identify each material issue (legal and factual) relevant to that decision.[63] To decide whether to challenge the exercise of a discretion, a lesser standard may be required. In that situation, it is necessary for the reasoning to identify the factors that have been taken into account, so that a Court exercising appellate or supervisory jurisdiction may determine whether all relevant facts have been considered and no irrelevant facts have been taken into account.[64]

[54] The extent of the obligation to give reasons will also be dependent on the functions cast on the particular tribunal responsible for making the relevant decision. In common with the approach taken to application of the principles of natural justice,

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63 Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at para [9.04]. As to the nature of a general appeal see *Austin, Nicholls & Co Inc v Stitchting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

64 Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at para [9.04].

where Parliament has established a special procedure, the extent of reasoning required to support a decision will be moulded to fit the purpose of the process.[65]

[55] In *Albany North Landowners v Auckland Council*, Whata J explained the role and functions of the Panel:[66]

> [31] The [Panel] is a specialist panel appointed by the Minister for the Environment and the Minister of Conservation.[67] During the first reading of the Resource Management Reform Bill, Hon Amy Adams described the composition of the [Panel], and its general role, as follows:[68]
>
> > The Unitary Plan developed by the council after enhanced consultation will be referred to a hearings panel appointed by me and the Minister of Conservation in consultation with the council and the independent Māori Statutory Board, to ensure that the consideration is properly independent. There will be the usual guidelines applied for making appointments, including a high degree of local knowledge, competency, and understanding of tikanga Māori. The process will involve all the dispute resolution options available in the Environment Court, and provide the board with wide discretion to control its processes to ensure that it is easily accessed and understood by all.
>
> [32] It was envisaged that a one-off hearing process carried out by the [Panel] would "streamline and improve" the development of the [Unitary Plan], and ensure Aucklanders would have comprehensive input and a "high-quality independent review of the council plan".[69]
>
> [33] Its functions are set out in full in s 164 of the Act. Those functions include holding and authorising pre-hearing meetings, conferences of experts and alternative dispute resolution processes, commission reports, holding hearing sessions, making recommendations to the Council and to regulate its processes as it thinks fit. The procedure adopted must, however, be "appropriate and fair in the circumstances".[70] The submission and hearing process was also subject to a strict statutory timetable, with limited powers for extension.[71]
>
> (Footnotes retained)

[56] The Panel's functions are set out in s 164 of the Transitional Act:

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65 Ibid, at para [13.35]. See also *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC).
66 *Albany North Landowners v Auckland Council* [2017] NZHC 138.
67 Local Government (Auckland Transitional Provisions) Act 2010, s 115(1)(g).
68 (11 December 2012) 686 NZPD 7331.
69 (11 December 2012) 686 NZPD 7331.
70 Section 136.
71 Sections 123(7)–(9).

164 Functions of Hearings Panel

The Hearings Panel has the following functions and powers for the purposes of holding a Hearing into the submissions on the proposed plan and any variation permitted by section 124(4):

(a) to hold hearing sessions; and

(b) for the purposes of paragraph (a),—

(i) to hold or authorise the holding of pre-hearing session meetings, conferences of experts, and alternative dispute resolution processes; and

(ii) to commission reports; and

(iii) to hear any objections made in accordance with section 154; and

(c) to make recommendations to the Auckland Council on the proposed plan and any variation; and

(d) except as expressly provided by this Part, to regulate its own proceedings in the manner it thinks fit; and

(e) to carry out or exercise any other functions or powers conferred by this Part or that are incidental and related to, or consequential upon, any of its functions and powers under this Part.

[57] The Panel was chaired by Judge Kirkpatrick, an Environment Court Judge. It was multi-disciplinary in character, including a lawyer, a number of planners, an economist and an iwi representative.[72] Plainly, it was intended that those persons pool their broad experience in making recommendations to the Council.

[58] The Panel is not a decision-making body. While its task was limited to making recommendations, I consider that the nature of its functions were such as to engage the legal obligations to provide reasons that are cast upon judicial and quasi-judicial bodies. I hold that, within the constraints of the Transitional Act, it was obliged to comply with the principles of natural justice[73] and to give reasons. Indeed, the need for the Panel to give reasons[74] for accepting or rejecting

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72 See para [8] above.

73 New Zealand Bill of Rights Act 1990, s 27(1). Although that section refers to a "determination" in respect of a person's "rights, obligations or interests protected or recognised by law" as a fact-finding body exercising a public function, I consider the Panel came within the ambit of that provision. See also, s 3(b) of the New Zealand Bill of Rights Act 1990.

74 Local Government (Auckland Transitional Provisions) Act 2010, s 144(8)(c) and (10), set out at

submissions persuades me that the authorities I have examined[75] apply to the Panel's recommendations.

[59] The extraordinary breadth of the Panel's task was recognised by s 144 of the Transitional Act. In particular, I refer to those provisions which authorised the Panel to hear submissions on particular topics "by grouping" rather than on an individual basis. Relevantly, s 144(8) and (10) of the Transitional Act state:

> **144 Hearings Panel must make recommendations to Council on proposed plan**
>
> …
>
> (8) Each report must include—
>
> (a) the Panel's recommendations on the topic or topics covered by the report, and identify any recommendations that are beyond the scope of the submissions made in respect of that topic or those topics; and
>
> (b) the Panel's decisions on the provisions and matters raised in submissions made in respect of the topic or topics covered by the report; and
>
> (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.
>
> …
>
> (10) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

[60] Mr Whittington advised me that, over the period of almost three years during which the Panel undertook its work, some 13,000 submissions and 93,600 submission points were put to it for consideration. Ms Kirman went further. She referred to the *Overview Report*, in which the Panel referred to "nearly 100,000 primary submission points and over one million further submission points".[76] After

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para [59] below.

75 Discussed at paras [48]–[52] above.

76 *Overview Report* at 16–17.

making that observation, the Panel indicated that it had decided to group all of the submissions according to the provisions of the Proposed Unitary Plan to which they related and the matters to which they related. The Panel continued:[77]

> While individual submissions and points may not be expressly referred to in the reports and recommendations, all points have nevertheless been taken into account by the Panel when making its recommendations.

As a result of taking that approach, the Panel's reasoning is necessarily directed to the generic approach taken to zoning of the "grouped" land.[78] In my view, there is no basis on which the Panel's decision to "group" the zoning issues can be gainsaid.

[61] Although Mr Casey focussed on the lack of reasons for the Panel's decision to depart from (what he termed) the "agreed" position on zoning for the Land put forward by the Landowners and the Council, the justifiable approach taken by the Panel as to "grouping" means that its reasoning must be assessed by reference to the collective, rather than the individual.

[62] To the extent that the challenge is strictly to the decision of the Council to accept the Panel's recommendation to zone the Land Mixed Rural, the Transitional Act differentiates between recommendations of the Panel that are accepted or rejected by the Council. Section 148(1)–(3) of the Transitional Act states:

> **148 Auckland Council to consider recommendations and notify decisions on them**
>
> (1) *The Auckland Council must—*
>
> (a) *decide whether to accept or reject each recommendation of the Hearings Panel; and*
>
> (b) *for each rejected recommendation, decide an alternative solution,* which—
>
> (i) may or may not include elements of both the proposed plan as notified and the Hearings Panel's recommendation in respect of that part of the proposed plan; but
>
> (ii) must be within the scope of the submissions.

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77 Ibid.

78 At paras [82]–[84] below, I discuss and reject the Landowners' contention that the Panel erred in considering the zoning for the Land on a grouped basis.

(2) *When making decisions under subsection (1),—*

(a) *the Council is not required to consult any person or consider submissions or other evidence from any person*; and

(b) the Council must not consider any submission or other evidence unless it was made available to the Hearings Panel before the Panel made the recommendation that is the subject of the Council's decision.

(3) To avoid doubt, the Council may accept recommendations of the Hearings Panel that are beyond the scope of the submissions made on the proposed plan.

…

(Emphasis added)

[63] The Council was alive to the need to provide discrete reasons for decisions that departed from the Panel's recommendation. In its *Decisions Report*, the Council said:[79]

Decision-making by the Council

…

2.8 For the Panel's Recommendations that it decides to ***accept***, the Council will be able to fulfil its decision-making obligations by considering the Panel's Recommendations and reasons only. This is because the Panel, in making its recommendations, was required to comply with all the requirements of section 145 of the [Transitional Act], including obligations on the Panel to:

a) ensure that if the council accepts each/any/all of the Panel's Recommendations, all relevant requirements (and legal tests) of the [Resource Management Act], and other enactments which apply to the Council's preparation of the [Proposed Unitary Plan], are complied with; and

b) prepare, and include with its recommendations, a further evaluation in accordance with section 32AA of the [Resource Management Act].

2.9 Where however, the Council decides to ***reject*** any of the Panel's Recommendations, there are additional requirements that must be satisfied before that decision can be publicly notified. If the Council decides to ***reject*** a recommendation, it must provide reasons supporting that rejection and also prepare an ***alternative solution*** for that rejected Panel recommendation (which, given the way in which the Panel's Recommendations have been formulated, could be any matter or provision recommended by the Panel), together with a

[79] *Decisions Report*, at paras 2.8 and 2.9 at 3–4.

> ***section 32AA assessment*** supporting the rejection, where necessary. No new section 32AA assessment has been undertaken by the council, where section 32/32AA assessment relating to all alternative solution has already been prepared as part of development of the [Proposed Unitary Plan] and/or the Council's case team evidence for the hearings before the Panel.
>
> (Emphasis in original)

[64] In my view, there are three factors that assume significance in determining whether the Council erred in failing to give adequate reasons for its zoning decision:

(a) The Council did not act as a "rubber stamp" for the Panel's recommendations. Section 148(1)(a) of the Transitional Act expressly required the Council to "decide whether to accept or reject each recommendation of" the Panel.[80]

(b) Acceptance of a Panel recommendation does not necessarily mean that the Council adopted its reasoning. It was open to the Council to accept a recommendation on a different basis to that recommended by the Panel.

(c) In deciding whether to accept or reject a recommendation, the Council was not "required" to consult with others or consider further submissions or evidence.[81] However, s 148(2)(b) of the Transitional Act prevented the Council from considering submissions or other evidence not before the Panel when it made its recommendation.

[65] In its *Decisions Report*, the Council adopted the Panel's "grouped" recommendation for zoning in relation to the Land. While the Panel departed from the submissions put on behalf of the Council and the Landowners, it did so because it formed a different view of the purpose and location of the Rural Urban Boundary.

[66] The Panel was conscious that its jurisdiction was not limited to addressing each submission on an individual basis. The purpose of its recommendations was to

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[80] Section 148(1)(a) is set out at para [61] above. The Council's approach is articulated in its *Decisions Report*, the relevant extracts from which are set out at para [63] above.

[81] Local Government (Auckland Transitional Provisions) Act 2010, s 148(2)(a).

promote sustainable management of natural and physical resources for the *whole* of Auckland. The Panel expressly defined the term "whole" as including "not only all people and communities, but also future generations".[82]

[67] The Panel did not regard resolution of competing contentions as "a binary choice between the position of the Council and that of a particular submitter".[83] Rather, its approach was based on the need to synthesise submissions and to complete an evaluation in terms complying with ss 32 and 32AA of the Resource Management Act 1991.[84] There is no reason why, when exercising public functions, the Panel ought to be constrained by the positions taken by the parties. I hold that the Panel was not obliged to adopt aligned positions taken by the Council and a particular submitter.

[68] The Panel concluded that the Proposed Unitary Plan did not accurately estimate the extent of future residential demand. Because "a central theme in the Panel's work" was to "enable greater residential capacity … greater housing choice and more affordable housing", it considered that a different approach was required, to provide for greater residential capacity in the future.[85]

[69] In order to achieve that goal, the Panel considered that the Rural Urban Boundary should be expanded to include 30 per cent of all land targeted for future urbanisation, and should be located at the District Plan level so that there was a greater flexibility to meet changing circumstances. Likewise, it considered that the Countryside Living zone should be expanded.[86]

[70] In its *Re-zoning Report*, while recommending an increase in the amount and location of land to be rezoned as Countryside Living, the Panel made a deliberate decision not to recommend rezoning "where the integrity of the Rural Urban Boundary would be undermined or the expansion of urban areas, including Future Urban Zoned land, would be compromised".[87]

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82 *Overview Report* at 29, set out at para [19] above.
83 Ibid.
84 Ibid. Sections 32 and 32AA are set out at para [24] above.
85 Ibid, at 47, set out at para [24] above.
86 Ibid, at 48, set out at para [26] above.
87 *Re-zoning Report*, at 21–22, set out at para [27] above.

[71] The Panel provided an example of a situation in which it considered that either "the integrity of the Rural Urban Boundary would be undermined" or "the expansion of urban areas, including future urban zoned land, would be compromised." The illustration is not in the vicinity of the Land.[88] Nevertheless, I consider that the Panel intended that its recommendation that the "Council undertake future strategic work in this locality to determine if in the longer term a buffer is to be retained between urban Auckland and the emerging urban areas to the west", applied that rationale equally to all areas affected by its primary conclusion.

[72] In addition, the Panel explained that in "broad terms" its recommended Countryside Living zones were "concentrated in close proximity to existing urban areas and around some smaller rural and coastal settlements where Land zoned as countryside living already exists."[89] In not acceding to requests for new Countryside Living zoning for land *not* adjacent to existing urban areas, settlements or existing land zoned Countryside Living, the Panel took into account "the substantial volume of evidence indicating that many of these areas are already in comparatively small lot sizes (i.e. less than five hectares) and are not generally used for commercial production purposes."[90]

[73] I am satisfied that the Panel gave adequate reasons to support its recommendation that the land be zoned Mixed Rural. In the context of a topic that the Panel addressed by reference to a "grouping" of land interests, and the familiarity of those responsible for determining whether the Council would accept or reject the Panel's recommendation with the issues, I am satisfied that the reasoning is sufficient to justify the approach taken. There is nothing in the Council's *Decisions Report* to suggest that it considered there were any internal inconsistencies in the Panel's approach. Further, in order to give reasons why particular land was not zoned as submitted, it would have been necessary for the Panel to revert to individualised reasoning, even though its recommendations were made on a "grouped" basis. In those circumstances, I conclude that the reasons given to support the zoning recommendation were adequate for purpose.

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88 Ibid.
89 Ibid, at 21. set out at para [27] above.
90 Ibid.

[74] In the context of the Transitional Act, this Court's decision in *Murphy v Rodney District Council* is distinguishable.[91] When the High Court considers an appeal against a decision of the Environment Court, it is dealing with a legal question[92] arising out of a specific application affecting a particular party. In such circumstances, the Environment Court is bound to give sufficient reasons for its decision both to enable parties to decide whether there are grounds to appeal and for the High Court to deal adequately with the appeal.[93] By contrast, when the Environment Court considers an appeal from a zoning decision, it makes a decision by way of rehearing.[94]

[75] The Panel was considering zoning questions by reference to a collective group of land, and against the background of the need to recommend an integrated approach to Auckland's development. Necessarily, reasons given to support a group recommendation will be expressed at a higher level of abstraction than is required to deal with a specific issue.

(b) Sufficiency of evidence

[76] In dealing with this question, I consider together two of the issues raised by Mr Casey, namely:[95]

(a) Whether the Panel's recommendation on zoning of the Land was one it was entitled to reach on the evidence; and

(b) Whether the Panel ought to have taken into account the agreed position of the parties and supporting evidence as to Countryside Living zoning as a mandatory relevant factor; and

[77] Mr Casey contended that the Panel had no evidence before it to suggest that the Land should be zoned Mixed Rural. He relied on *Guthrie v Dunedin City Council*.[96] In that case, the Environment Court said:[97]

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91 *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC). See para [52] above.
92 Resource Management Act 1991, s 299(1) which limits appeals to questions of law.
93 Generally, see para [49] above.
94 Resource Management Act 1991, s 277A. As to its ability to consider fresh evidence, see s 276.
95 See para [4](a)(i), (ii) and (c) above.

Issues for decision

> [13] The issues before the Court as refined during the hearing process are:
>
> (a) What is the appropriate zone for this land?
>
> (b) It is acknowledged that the amenity of the site is relevant to its categorisation within the zone and the identification and relevance of those amenity features is a key issue.
>
> (c) Whether land stability issues are a key issue to determining zoning, and if so, what impact this has upon appropriate zoning.
>
> [14] On studying these issues it can be seen that none of the policies, objectives and rules of the plan themselves were under scrutiny before this Court. *It was accepted that the issue was which of the available zones most properly accommodate the site. It was accepted by both parties that the Court in considering such a reference commences with a "clean sheet of paper". There is no presumption in favour of any one zoning. In particular its inclusion in the Rural zone at this stage does not amount to a presumption that Rural zoning should continue unless good cause for an alternative is discovered.*
>
> (Except for underlined words, emphasis added)

[78] Mr Casey accepted that any appellant faced "a high hurdle" in contending that a decision had been reached without sufficient evidence.[98] He referred to *Bryson v Three Foot Six Ltd*, in which the Supreme Court was asked to determine whether the Employment Relations Authority had reached a decision without evidence, so as to have reached a conclusion that was so clearly untenable as to amount to an error of law.[99] Delivering the judgment of the Supreme Court, Blanchard J said:[100]

> [25] … Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
>
> [26] *An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known*

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96 *Guthrie v Dunedin City Council* (Environment Court C174/2001), 5 October 2001 (Judge J A Smith, Commissioner I G C Kerr and Commissioner R S Tasker).

97 Ibid, paras [13] and [14].

98 Generally, see *Edwards v Bairstow* [1956] AC 14 (HL) and *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

99 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

100 Ibid.

> *words of Lord Radcliffe in* Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination"*. Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. In *Lee Ting Sang* itself the Privy Council concluded that reliance upon dicta of Denning LJ in two cases "of a wholly dissimilar character" may have misled the Courts in Hong Kong in the assessment of the facts and amounted in the circumstances to an error of law justifying setting aside concurrent findings of fact. Their Lordships were of the opinion that the facts pointed so clearly to the existence of a contract of service that the finding that the applicant was working as an independent contractor was, quoting the words of Viscount Simonds in *Edwards v Bairstow*, "a view of the facts which could not reasonably be entertained", which was to be regarded as an error of law. In *Lee Ting Sang* the facts demonstrated so clearly that the applicant was an employee that it was the true and only reasonable conclusion.
>
> (Emphasis added; footnotes omitted)

[79] I am not satisfied that the Panel's recommendation was insupportable by the available evidence. While I accept that the notified plan created no presumption as to appropriate zoning, it did form part of the information before the Panel on which it could place weight. That being so, the approach taken in respect of the Mixed Rural zoning in the Proposed Unitary Plan, coupled with the Panel's recommendation for expansion of the Rural Urban Boundary, was sufficient for the notified zoning to be accepted, notwithstanding the aligned position taken by the Landowners and the Council in submissions.

[80] Nor am I satisfied that the Council failed to take account of the "agreed" position. In making this submission, Mr Casey relied on *Ancona Properties Ltd v Auckland Council*.[101] In that case, Whata J was asked to allow an appeal in relation to (what was known as) the Southern Gateway, in circumstances where the Council and submitters had reached an agreed position but the Panel did not explain why it departed from that agreement in its recommendation to the Council. It is clear that Whata J was concerned about whether it was appropriate to allow the appeal by consent; certainly, he made it clear that the "Council's concession" was an important factor in his decision to do so.[102] As no concession has been made in this case, I consider that *Ancona Properties* is distinguishable.

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[101] *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594 at para [54].
[102] Ibid, at paras [62] and [63].

[81] The Panel was well aware of the Council's and the Landowners' submissions. I am not prepared to infer that it was overlooked. The failure to address this issue specifically is explained by the "grouped" approach taken in respect of relevant zoning decisions.

Did the Panel apply the statutory test correctly?

[82] Finally, Mr Casey contended that the Panel had approached the zoning decision incorrectly; by failing to seek "the optimum planning solution … based upon an evaluation of all of the evidence heard".[103] That submission was directed to the question of zoning for the Land, rather than the area grouped together for the Panel's consideration.

[83] I do not consider that the *Guthrie*[104] principle can be applied unvarnished in the context of the Panel's statutory obligations. For the reasons advanced by Mr Whittington, I consider that the Panel did apply the correct test. In short, the Panel was seeking to make optimum planning recommendations on an integrated basis for the whole of the amalgamated city, rather than the particular land. I have already explained the broader considerations resulting from the Panel's decision to change the proposed Rural Urban Boundary and the consequences of that decision on zoning for the Land.

[84] In my view, in light of the tasks entrusted to the Panel by Parliament, it was open to the Panel to consider submissions on a "grouped" basis. I see no reason to question the Panel's decision to consider zoning issues in relation to the Land on that basis. I consider that it approached its recommendatory role in accordance with its statutory functions, and did not apply a wrong legal test.

Result

[85] For those reasons, the appeal is dismissed.

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[103] Applying *Advance Properties Group Ltd v Taupo District Council* [2014] NZEnvC 126 at para [12](b).

[104] *Guthrie v Dunedin City Council* (Environment Court C174/2001), 5 October 2001 (Judge J A Smith, Commissioner I G C Kerr and Commissioner R S Tasker). The relevant passage is set out at para [77] above.

[86] I did not hear from counsel on costs. Counsel shall confer on this issue and file a joint memorandum within 20 working days of the date of this judgment, setting out their respective positions. If no memorandum were filed within that time, I shall assume that the question of costs has been resolved by agreement.

[87] If directions were required for the exchange of formal memoranda, counsel shall advise the Registrar, who will then allocate a telephone conference before me to hear from counsel on that issue.

[88] I thank counsel for their assistance.

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P R Heath J

Delivered on 11 October 2017 at 2.15pm