

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-2289
[2017] NZHC 1340**

BETWEEN KIWI PROPERTY GROUP LIMITED
 AND KIWI PROPERTY HOLDINGS
 LIMITED
 Appellants

AND AUCKLAND COUNCIL
 Respondent

Hearing: 16 June 2017

Counsel: D A Allan for Appellants
 M G Wakefield and C J Brown for Respondent

Judgment: 19 June 2017

RECALLED JUDGMENT OF WHATA J

*This judgment was delivered by me on 19 June 2017 at 11.00,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Ellis Gould, Auckland
 Auckland Council, Auckland

[1] Kiwi Property Group Limited (KPG) appeals against the Auckland Council's decision to accept a recommendation of the Interim Hearings Panel (IHP) that the permitted activity threshold for offices in certain business zones should be 500m² per tenancy. KPG contends that the permitted threshold ought to be 500m² per site.

[2] KPG alleges, among other things, that the IHP failed to give effect to the regional policy statement, as it is required to do, by s 75(3)(c) of the RMA. The Council agrees. They seek, by consent, an amendment to the PAUP changing the threshold test to a per site, rather than a per tenancy, threshold.

Background

[3] The following background is based on a joint memorandum of the parties.

[4] The PAUP used a per site threshold for offices in Business zones, providing up to 500m² gross floor area per site as a permitted activity in both General Business and Mixed Use zones. Offices with greater than 500m² were a discretionary activity in both the General Business and Mixed Use zones.

[5] KPG's original submission dated 27 February 2014 supported the PAUP provisions, subject to amendments to certain specific provisions. No changes were sought however to the use of the per site threshold. The further submissions opposed submissions by third parties seeking to amend the office size thresholds to a per activity or per tenancy basis, including the submissions of Hugh Green Ltd on this point.

[6] In evidence and legal submissions presented to the IHP at the hearings for Topics 050 and 051-054, KPG, the Council, and some but not all other parties supported retention of a per site threshold for offices in business zones.

[7] In its recommendations, the Panel replaced the per site threshold for offices in the Local Centre, Neighbourhood Centre, General Business and Mixed Use zones

with a “per tenancy” threshold. However, it did not provide reasons for this change aside from the following observation:¹

In the business zones, and further to amendments agreed between the Council and submitters, the Panel recommends as follows.

...

- iii. Amend the gross floor area limits for offices to be on a per tenancy basis rather than on a per site basis.

[8] In overview it also made some general observations:²

The provisions for business zones were the subject of productive mediation, resulting in numerous issues being resolved in ways that the Panel considers were appropriate in the context of the objectives and policies and the approach in the Unitary Plan as a whole.

A number of rules imposing restrictions on the design and use of buildings in business zones are recommended to be deleted where they are overly restrictive...

Overall, the Plan’s policy framework for the city centre and business zones continues a long-settled approach which the Panel supports. The zoning of centres and corridors and issues relating to the extent of light and heavy industry zones give effect to the business strategy...

The resource management issues

[9] The parties submit that the use of a per tenancy, rather than a per site, threshold will have a number of practical implications:

- (a) Large scale offices could be established as a permitted activity outside the main centres, simply by arranging them as a collection of 500m² tenancies, rather than a single large tenancy. For example, an office space of 5,000m² of gross floor area could be permitted as ten separate tenancies.
- (b) Because resource consent would not be required (except for other reasons such as the built form), potentially large scale offices would not be subject to an assessment of effects on the function, role, and

¹ At 6.

² At 7.

amenity of centres having regard to their position in the hierarchy or network of centres.

- (c) A permitted baseline could be established which would make it less likely that consent applications for offices exceeding 500m² per tenancy threshold would be refused, ie the effects could be disregarded because they would be no worse than the effects of a large office permitted as a collection of tenancies.

[10] Against this backdrop, the regional policy statement at B2.2 states:

B2.2. Urban growth and form

B2.2.1. Objectives

- (1) A quality compact urban form that enables all of the following:
 - (a) a higher-quality urban environment;
 - (b) greater productivity and economic growth;
 - (c) better use of existing infrastructure and efficient provision of new infrastructure;
 - (d) improved and more effective public transport;
 - (e) greater social and cultural vitality;
 - (f) better maintenance of rural character and rural productivity; and
 - (g) reduced adverse environmental effects.

...

B2.2.2. Policies

...

- (2) Ensure the location or any relocation of the Rural Urban Boundary achieves a quality compact urban form and identifies land suitable for urbanisation in locations that:

[11] Furthermore, a strategy for commercial/industrial growth is set out at B2.5 to help achieve this outcome. B2.5 embodies a “centres plus” strategy, such that commercial growth is to be located within the hierarchy of centres, as well as

identified growth corridors (IGCs) in other locations where appropriate. This entails a preference for commercial growth in centres as illustrated by objective B2.5.1, which states:

B2.5.1. Objectives

- (1) Employment and commercial and industrial opportunities meet current and future demands.
- (2) Commercial growth and activities are focussed within a hierarchy of centres and identified growth corridors that support a compact urban form.
- (3) Industrial growth and activities are enabled in a manner that does all of the following:
 - (a) promotes economic development;
 - (b) promotes the efficient use of buildings, land and infrastructure in industrial zones;
 - (c) manages conflicts between incompatible activities;
 - (d) recognises the particular locational requirements of some industries; and
 - (e) enables the development and use of Mana Whenua's resources for their economic well-being.

B2.5.2 Policies

- (1) Encourage commercial growth and development in the city centre, metropolitan and town centres, and enable retail activities on identified growth corridors, to provide the primary focus for Auckland's commercial growth.
- (2) Support the function, role and amenity of centres by encouraging commercial and residential activities, and ensuring development locates within centres in a manner that contributes to all of the following:

...

Assessment

[12] I am prepared to accept that a per tenancy threshold does not give effect to the RPS and, in particular, B2.2, B2.5 and B3.3. On its face, a per tenancy rule would enable intensive development of large scale offices in out of centre locations, contrary to the policies expressed in those parts of the RPS. Given that all parties to

the appeal agree about this, and given the total absence of reasons in the IHP report for adopting a per tenancy basis rather than a per site basis, I am satisfied that a basis for an error of law requiring correction has been made out.

[13] Ordinarily, on a matter of potentially wide application, I would simply set aside the IHP decision for inconsistency and refer the matter back to the Council for full consideration or grant the relief but refer the matter back to the Council to trigger the right of appeal to the Environment Court. Helpfully, however, Mr Loutit provided a breakdown of the submitters on this part of the PAUP. Only three submitters sought a per tenancy threshold, and only one provided evidence on it at the hearing. That submitter was served with KPG's appeal to this Court and took no part in this proceeding. Given, as Mr Allan noted, the decision to be made was binary – either per site or per tenancy – that submitter could have been under no illusion as to the possible outcome of this appeal.

[14] Accordingly, I am satisfied that referring the matter back would serve no useful purpose and no unfairness arises from granting the relief sought. The appeal is allowed and the relief sought is granted accordingly. This decision is final.

[15] For completeness my observations about the effect of B2.5.1 and B2.5.2 and B3.3 are based on the issues specifically before me, information supplied to me, a plain reading of those provisions and the agreement reached between the parties. It should not be taken as a statement of position with more general application.