In the High Court of New Zealand
Auckland Registry

I Te Kōti Matua O Aotearoa
Tāmaki Makaurau Rohe **CIV-2019-404-2810**

BETWEEN	**FRANCO BELGIORNO-NETTIS** Plaintiff
AND	**AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL** First Defendant
AND	**AUCKLAND COUNCIL** Second Defendant

Memorandum of Counsel for the Plaintiff in Support Application for Interim Orders

Dated: 7 February 2020

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May it Please the Court:

Application

1. The plaintiff seeks interim orders pursuant to section 15 of the Judicial Review Procedure Act 2016, following the filing of judicial review proceedings by statement of claim, and notice of proceeding dated 20 December 2019.

2. The documentation filed with this memorandum includes:

    a. a notice of application for interim orders pursuant to section 15 of the Judicial Review Procedure Act 2016; and

    b. a chronology attached as schedule 1 to this memorandum; and relies on the affidavit of the plaintiff dated 11 December 2019.

3. The proceedings have their first call before Palmer J in the judicial review list for Thursday, 13 February 2020, at 9 a.m.

Orders sought

4. Orders are sought:

    1. *Prohibiting the second defendant from notifying as operative the height and zoning provisions in the Auckland Unitary Plan (operative in part) which relate to the Promenade Block and Lake Road Blocks ("**the Sites"**) under clause 20 of Schedule 1 of the Resource Management Act 1991 (RMA);*

    2. *Prohibiting the second defendant from treating as operative the height and zoning provisions for the Sites in the Auckland Unitary Plan (operative in part) when performing its functions under the RMA, including when processing and assessing applications for resource consent or certificate of compliance applications,*

    3. *Upon terms and conditions that the orders continue to have effect until.*

i. *determination of the Plaintiff's application for judicial review in this Court, or*

ii. *unless otherwise varied on application to the Court*.

5. The Council, by its solicitors, have indicated it agrees not to make the plan operative in accordance with order (1); but it opposes order (2). The applicant seeks to proceed to hearing of the application for interim orders on an expedited basis.

Notice of the interim proceedings

6. Contemporaneous with filing of the interim application, notice of this application has been given to:

   a. the second respondent, Council by its solicitors,

   b. The First Respondent, the Panel, via Crown Law,

   c. solicitors representing intervener parties in the earlier proceedings before the Court of Appeal, being:

      i. Housing New Zealand Corporation, and

      ii. the Emerald Group Limited, a landowner in the Promenade Block.

7. Directions as to the service of the proceedings are to be sought at the case management conference. Subject to directions from the Court, this is proposed to involve the giving of public notice of the proceedings by uploading copies to the Council's website, and by giving appropriate notice to landowners and other persons who may potentially affected by the proceedings.

Background to the Claim

8. The background to these proceedings is traversed in the statement of claim, and in the decision of the Court of Appeal in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] 3 NZLR 345.

9. The first combined planning document for the Auckland area known as the Auckland Unitary Plan (**AUP**) was first notified as the proposed Auckland Unitary Plan (**PAUP**) in September 2013. The plaintiff was one of many thousands of submitters and further submitters to the PAUP.

10. Submissions were heard before the Auckland Unitary Plan Independent Hearings Panel (the **Panel**, or the **IHP**). The Panel was established to hear submissions and make recommendations in relation to the first unitary plan of the Auckland Council in accordance with the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**).

11. Submissions to the PAUP were heard in 2015 and 2016, with the Panel making recommendatory decisions on 22 July 2016, for decision-making by the Auckland Council on 19 August 2016.

12. The LGATPA essentially established a "one-shot" hearing process before the Panel in variance to the familiar 'standard track' process for plan appeals under schedule 1 of the Resource Management Act (**RMA**), which provides for a right of appeal to the Environment Court. Under the LGATPA unless the Council rejected the recommendations of the Panel, there was no right of appeal to the Environment Court. Instead, rights of appeal on a question of law (only) to the High Court were preserved under section 158 LGATPA. The LGATPA also preserved recognition of judicial review under section 159 LGATPA.

13. In making recommendations, the Panel had a duty pursuant to s 144(8)(c) of the LGATPA to provide reasons for accepting or rejecting submissions in its recommendations on the PAUP.

14. Following the Council decisions on the panel recommendations, Mr Belgiorno-Nettis appealed to the High Court on a point of law. The plaintiff alleged that the Panel failed to provide adequate reasons in accordance with its duty, and that the subsequent decisions by Council were invalid. This appeal was heard with a conjoint application for judicial review before Davison J in June 2017.

15. Following that hearing, Davison J dismissed both the application for review and the appeal,[1] and a subsequent application for leave in relation to the appeal proceedings.[2]

16. On appeal to the Court of Appeal, Mr Belgiorno-Nettis was successful in part. The Court of Appeal's decision in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] 3 NZLR 345 upheld the plaintiff's claim that the Panel had not complied with its statutory duty, to provide reasons for accepting or rejecting submissions in its recommendations on the PAUP,[3] . The Panel's recommendations and reasons preceded the subsequent decisions of Auckland Council (**Council**) to accept those recommendations.[4]

17. From the (now reported) headnote of the Court of Appeal's decision, the decision is summarised as finding:

> 2. Even though the Panel was not a decision-making body and was limited to making recommendations, it was acting in a quasi-judicial role. Providing reasons for the Panel's recommendations and the Council's decision could be seen as an aspect of the principle of open justice. A reasoned decision enabled the parties to see why they won or lost. Reasons showed whether the decision-maker had made an error or mistake and whether they had misunderstood or overlooked a submission. Reasons were also important because they provided a discipline requiring a judge to formally marshal reasons thus ensuring considered decision-making. Reasons could be abbreviated and they could be evident without express reference. Requiring reasons was also a way of forcing the observation of natural justice (see [46], [47], [48], [50], [51], [52], [53], [54], [55], [58], [60]).
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> 3. No reasons were given for the Panel's recommendations for the Promenade and Lake Road Blocks. Mr Belgiorno-Nettis' submissions were not specifically mentioned. The process of considering submissions carried out by the Panel was on its face proper and thorough. However, a statement that submissions had been taken into account could not be seen as providing reasons. It certainly could not satisfy the underlying policy requirement of transparent and challengeable reasoning. The Panel set out a general approach to zoning and height controls which would enable

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[1] *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1.
[2] *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2018] NZHC 459, (2018) 20; ELRNZ 335.
[3] *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175.
[4] Under s 148(1) of the LGATPA.

intensification of development in and around town centres and transport corridors, but the general statements did not provide any sort of a reason for the acceptance and rejection of a specific submission or group of submissions. The competing evidential positions on the Promenade and Lake Road Blocks were not mentioned at all. It was not possible to say why the Panel made its recommendations concerning those Blocks. Reasons were given for other recommendations but there were no reasons either grouped or otherwise, that could explain the Promenade Block and Lake Road Block decisions. All that could be taken from the Panel's report was that the very broad principles that were outlined in some general way had been preferred to Mr Belgiorno-Nettis' specific submissions. Mr Belgiorno-Nettis' submissions were not entirely rejected, and none of the Council recommendations were entirely accepted. The Panel ultimately recommended densities and heights in between the extremes in the submissions, but how the submissions and evidence worked to achieve that result was not stated. A reader was left to speculate about a compromise. Similarly, there would have been a reasoning process carried out by the Council for it to have reached its decision but, again, a reader was left to infer that there had been some reasoning process that involved the application of the principles set out in the Panel's report (see [68], [69], [76], [77], [78], [80], [87], [88],
[89], [90]).

4. The Panel's failure to give reasons in its recommendations in respect of the proposed Unitary Plan was a breach of s 144(8) of the Act, and an error of law, given s 144(8)'s express requirement for reasons. Even if a task required by Parliament was extremely difficult, an unambiguous legislative direction could not be ignored by a purposive interpretation. It was not possible to read s 144(8) as requiring anything other than the giving of reasons. Any practical difficulties surrounding the giving of reasons did not entitle the Panel to ignore that legislative requirement (see [92], [97], [98], [99], [100], [101]).

4. The Appropriate remedy was to require the Panel to give reasons. The Panel was still in existence, and the fact that it was chaired by an Environment Court judge, and had adopted a quasi-judicial process meant there was no danger that reasons would not be composed to fit the decision (see [106], [109]).

18. Mr Belgoirno-Nettis succeeded in part in his appeal in relation to adequacy of reasons, when other litigants, raising the same or similar point failed in their proceedings before the High Court.[5] Mr Belgiorno-

[5] See *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [143]; *Hollander v Auckland Council* NZHC 2487 at [73]; *Viaduct Harbour Holdings Ltd v Auckland Council* [2018] NZHC 154 at [64].

Nettis was successful only in part. The Court rejected the relief sought that the recommendations and decisions of the Council be set aside.

19. The Court of Appeal formally allowed the application for judicial review by Mr Belgiorno-Nettis, finding an error of law by the Panel's failure to provide adequate reasons, and directed the Panel to provide retrospective "*new reasons*" in relation to the Promenade Block and the Lake Road Block (at [110], [117]).

20. The Court of Appeal formally dismissed the application for leave to appeal from the High Court (in respect of the appeal proceedings, see [113] and [116]) but noted that such dismissal was not on the merits, in that apart from the unresolved question of jurisdiction for leave to appeal, it would have allowed the appeal on the same grounds as the application for review.

21. At [109] of the Judgment, the Court Of Appeal considered that the directions to the Panel to provide new reasons (without quashing the decisions) could be the foundation for new proceedings by the plaintiff, such that "***the position can be reassessed by the parties [and] if it is considered that there is a basis for a claim, new proceedings can be filed***"

    (emphasis **supplied**).

22. The plaintiff subsequently made application for leave to appeal to the Supreme Court in relation to the relief granted by the Court of Appeal. In addition, Mr Belgiorno-Nettis applied for a stay and interim orders from the Court of Appeal pursuant to rule 30 of the Supreme Court Rules 2004 in Order to preserve the plaintiff's position pending decision of the Supreme Court on the application for leave to appeal by application dated 20 June 2019. Orders were sought to:

    1.1 Stay the execution of that part of the Court's judgment (CA 184/2018, [2019] NZCA 175 at [116]) declining leave to appeal the decision of the High Court under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010;

    1.2 Interim orders preventing the second respondent (Auckland Council) from taking action to make or treat the proposed Auckland Unitary Plan rules relating to height control and

zoning for the Promenade and Lake Road Blocks in Takapuna, as operative under s 86F of the Resource Management Act 1991;

1.3 Stay the execution of that part of the Court's judgment (at [117]) directing the first respondent (the Auckland Unitary Plan Independent Hearings Panel) to provide reasons for its recommendations relating to the zoning and height requirements for the Promenade and Lake Road Blocks in Takapuna; and

23. This application sought the equivalent of a stay or interim order interim injunction holding or protecting a position pending the application for leave to appeal to the Supreme Court.

24. The Council, responsibly, consented to or did not oppose the making of these interim orders, pending the Supreme Court's decision on the application for leave.[6] The Court of Appeal did not deal with the application for stay and interim orders ahead of the decision by the Supreme Court declining leave.

25. On 10 October 2019 the Supreme Court declined the application for leave to appeal in [2019] NZSC 112. The Supreme Court did not consider that the applicant had made out the grounds for leave. The Court considered at [10] that *"[t]here may also be questions about the effect of [the] failure to provide reasons on the decision in issue. But this case is not an appropriate one to address these questions"*.

26. The Panel, having been directed by the Court of Appeal to provide reasons, then provided new reasons on 14 October 2019, and again (in relation to part of the Lake Road block) on 21 October 2019.

27. In these proceedings, the plaintiff makes a fresh application for review, as contemplated by the Court of Appeal. The plaintiff, having considered the new reasons, contends that the new reasons provided by the Panel contain new errors of law, which in combination with the prior errors, affect the decision-making by Council. As the Court of

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Appeal recognised (at [1]), the lawfulness of the Council's decisions rest on the validity and lawfulness of the Panel's recommendations.

28. The fresh application for review was filed with the Auckland Registry on 20 December 2019. It relates to the zoning and height provisions in the AUP to the extent that they apply to the Sites (both the Lake Road Block and Promenade Block), in particular to the:

    a. The rezoning of the Promenade Block to Residential - Terrace Housing and Apartment Buildings Zone;

    b. The inclusion of an Additional Zone Height Control (**AZHC**) of 22.5m over the Promenade Block;

    c. The rezoning of the areas to the east and the west of Lake Road, in the Lake Road Block, to Business - Mixed Use Zone;

    d. The rezoning of the area to the east of Lake Road to Residential - Mixed Housing Urban Zone;

    e. The inclusion of an AZHC of 21m over the area to the west of Lake Road; and

    f. The inclusion of an AZHC of 18m over the area to the east of Lake Road.

29. The Sites are shown in the map appended to the statement of claim and attached to the notice of application for interim orders.

Principles Applicable to Interim Relief

30. Under s 15(1) of the Judicial Review Procedure Act, the Court may make an interim order in the form specified in s 15(2) *if, in its opinion, it is necessary to do so to preserve the position of the applicant*.

31. As is well established, the leading case on applications for interim relief in the context of public and administrative law is *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA), in which Cooke J observed at 430:

> Section 8 of the Judicature Amendment Act 1972 gives a valuable power to make interim orders, a power which should not, it seems to me, be restricted by any such formulation as is to be found in the well-known English case about interim injunctions, *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
>
> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief- which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief. The Chief Justice's judgment was in accord with that general approach.

32. Once the plaintiff has demonstrated that the relief sought is reasonably necessary to preserve its position, the Court exercises a broad discretion to consider the circumstances of the case as to whether such relief should be ordered, typically taking into account:[7]

    a. The strengths of the application for judicial review.

    b. Public and private repercussions of granting relief; and

    c. The overall balance of convenience and justice of the case.

33. Interim relief can encompass orders placing the applicant in the position it would have been but for the illegality alleged – it is not limited to preserving the status quo: *Greer v Chief Executive Department of Corrections* [2018] NZHC 1240.

Relief necessary to preserve the plaintiff's position

34. The plaintiff submits that interim orders are necessary and appropriate to protect the position of the plaintiff pending the determination of his application for judicial review.

35. In the course of preparing this application, the Council has agreed in correspondence from its solicitor on 7 February 2020 [8] that it will agree not to take steps to make the provisions operative under clause 20 of

[7] *ENZA Ltd v Apple & Pear Export Permits Committee* HC Wellington CP266/00, 18 December 2000.
[8] email from Council's solicitor, Mr Allan, 7 February 2020

the first schedule of the RMA (order (1)) until decision of this Court; but is opposed to the order (2) sought by the applicant.

36. Order (1) seeks to prohibit the Council from formally notifying the relevant rules as operative under cl 20 Sch 1 RMA is necessary to preserve the position of the plaintiff for the following reasons:

    a. Under s 160 of the LGATPA, Auckland Council is required to notify the date on which the AUP, or parts of the AUP, become operative in accordance with cl 20 Sch 1 RMA. Clause 20 provides that a policy statement or plan shall become an operative policy statement or plan on a date which is to be publicly notified.

    b. While most of the AUP is operative, Auckland Council has not yet publicly notified the parts of the plan in relation to the Sites as operative.

    c. Council had earlier agreed, while the matter was before the Supreme Court not to treat the plan as operative. In correspondence between counsel, on 20 December 2019, Auckland Council agreed to undertake not to publicly notify the relevant parts of the AUP in terms of cl 20 Sch 1 RMA up until 4 February 2020.

    d. If the provisions become operative, then a privative clause in s 83 RMA may limit the ability to challenge the provisions by way of judicial review. The effectiveness of the privative clause may be open to question but section 83 RMA on its face purports to limit further challenges. It states:

        > A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with Schedule 1 and shall not be challenged except by an application for an enforcement order under section 316(3).

e. The challenged parts of the AUP relating to the Sites have not yet been "held out as operative" by Auckland Council. The relevant maps, which can be accessed online by members of the public using the GIS viewer on Auckland Council's online portal, currently show the Promenade and Lake Road Block as being "*subject to appeal*".

f. If Auckland Council were to now take steps to hold out the relevant parts of the AUP as operative by notification under cl 20 Sch 1 RMA, the plaintiff may be precluded by the privative clause in s 83 RMA from arguing that the Panel has failed to observe procedural requirements under the RMA, or from alleging any grounds which could construed as an argument under Sch 1 RMA - despite the Court Of Appeal contemplating that fresh proceedings were available.

37. Order (2), prohibiting the Council from treating as operative the height and zoning provisions for the Sites, is necessary to preserve the position of the plaintiff for the following reasons:

a. Absent interim orders, the Council has advised via its solicitors that it treats the relevant *rules* in the AUP as being operative by reason of s 86F RMA as incorporated by s 152 LGATPA[9] , consequential on the dismissal of the appeal by the Court of Appeal.

b. Section 86F(1) RMA provides:

> (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

[9] Section 153(1) LGATPA applies ss 86A-86G to the Auckland Unitary Plan with all necessary modifications.

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

c. The effect of dismissing the appeal under the LGATPA, meant that the appeal rights on the Lake Road and Promenade Blocks were exhausted and the appeal was in effect "determined" for the purposes of s 86F RMA.[10]

d. The implications are that Council will, absent interim orders, process applications for resource consent and assess such applications under section 104 RMA on the basis the zoning and height provisions of the sites as operative, and beyond effective challenge; despite the Court of Appeal's contemplation that fresh proceedings might be brought by the plaintiff following new reasons being provided by the IHP.

e. On Council's position, landowners or others within the Lake Road and Promenade Blocks may now make applications for resource consent or other applications such as making applications for certificates of compliance which would risk rendering futile or nugatory the relief sought by the plaintiff, which is to set aside the Council decisions in relation to the sites. Once the rules are to be treated as operative, land can be bought and sold, and applications for resource consent lodged by third parties.

f. The substantive relief sought by the plaintiff in the statement of claim is the setting aside of the Panel's recommendations, and directions to the respondents to make fresh decisions on the height and zoning requirements for the Lake Road and Promenade Blocks for the AUP.

g. Absent any interim relief prohibiting the Council from treating the new provisions as operative, this would effectively nullify the ability for the Applicant to successfully obtain relief in these future proceedings after the "new reasons" have been

[10] See *Sutcliffe v Tarr* [2018] 2 NZLR 92 at [21], in which the Court of Appeal held that a proceeding was determined when all appeal rights were exhausted and all enforcement procedures had come to an end.

provided, contrary to the Court of Appeal's contemplation (at [109]) that further rights of challenge existed to the plaintiff.

h. There is no apparent consideration of this factor by the Court of Appeal despite the Court's contemplation (at [109]) that further rights of challenge would be available to the plaintiff, nor is there is any pronouncement as regards this issue by the Supreme Court in declining the application for leave to appeal.

i. Under s 16 of the Judicial Review Procedure Act, this Court has a discretion as to which relief it grants. A Court is likely to be reluctant to grant relief where to do so may cause substantial prejudice to third parties.[11] At present, any member of the public enquiring online as to the status of the relevant rules is shown that the land is currently subject to appeal. However If the orders are not granted, and Auckland Council approves resource consents or certificates of compliance which seek to rely on the proposed height and zoning requirements challenged in these proceedings, this would likely present a substantial barrier to the granting of any future substantive relief open to the plaintiff.[12]

Serious question to be tried

38. It is contended for the plaintiff in his statement of claim that the reasons given by the Panel on 14 and 21 October 2019 as directed by the Court of Appeal,[13] bring to light material errors of law in the exercise of the Panel's statutory powers conferred to it by the LGATPA (the grounds are set out in the statement of claim), affecting the validity of the recommendations and Auckland Council's decisions based on those recommendations.

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[11] *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 51.
[12] Preservation of a position can include the preservation of an opportunity: *Westhaven Shellfish Ltd v Chief executive of Ministry of Fisheries* CA52/03, 28 March 2003 at [4].
[13] In *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, [2019] NZRMA 535 at [117].

39. The Panel's new reasons in relation to the Sites are attached to the affidavit in support of Mr Belgoirno-Nettis. The grounds to be advanced by the plaintiff include the following:

Error of Law-As regards both the Promenade Block and the Lake Road Block

40. The new reasons were provided by the Panel under headings 'strategic reasons', 'consequences of strategic reasons', and 'local reasons'. In relation to the strategic reasons, the IHP stated *inter alia*:

> As set out in sections 1 and 6 of the Panel's overview of recommendations and elsewhere in the Panel's particular recommendations, projected growth requires substantial increases in the provision of residential capacity. Key higher-order objectives and policies of the AUP to be given effect to (as set out in the Auckland Regional Policy Statement in Section 82, and in particular the objectives and policies for urban growth and form in 82.2 and for a quality built environment in 82.3) are to provide for increased capacity and intensification around centres and along corridors to try and achieve a more compact urban form that would have a reduced urban footprint and transport demand.
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> Takapuna was therefore recommended by the Panel to be confirmed as one of many appropriate locations for intensification for those reasons. **Mr Belgiorno-Nettis' 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.**
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> (emphasis **supplied**)

a. In relation to the consequences of strategic reasons the IHP stated *inter alia*:

> **Following the hierarchy of the statutory planning documents[1] and the prior strategic recommendations for the Regional Policy Statement necessarily resulted in the recommendation of rejection of individual submissions which ran counter to that strategy.**
>
> One of the consequences of the strategic recommendations to increase capacity by providing for more intensive development around centres was to make spatial changes to zonings, as described in section 4.4.4 of the Panel's overview of recommendations. Achieving additional residential

> capacity required making provision for taller buildings in and around metropolitan centres where, among other things, employment opportunities and commercial services are currently available and expected to increase.
>
> [FN][1]: *Environmental Defence Society Inc v New Zealand King Salmon Ltd* [2014) NZSC 38 at [10] - [15].
>
> (emphasis **supplied**)

41. It is to be contended that the Panel had made an error in its interpretation of the statutory framework of the LGATPA, by stating in its reasons that prior decision-making at the regional policy statement (**RPS**) level or submissions which raised general concerns about intensification and building height in Takapuna would *necessitate* the rejection of individual submissions of the plaintiff (or others) in relation to the Lake Road and Promenade Blocks.

42. The Panel did not previously (in its recommendations in July 2016) indicate that submissions perceived as running counter to the general thrust of intensification warranted automatic rejection.

43. It is to be submitted this is a material error of law, because it "neutralises" other material relevant considerations. The Panel is required to have regard to not only the RPS, but also site-specific considerations, and other policy considerations. The plaintiff will rely on the case of *Enterprise Miramar Peninsula Incorporated v Wellington City Council* [2019] 2 NZLR 501 in which the Court of Appeal held that the mandatory considerations that the Council had to have regard to (in that case, in the context of the special housing legislation) could not be 'neutralised' by referring to the purpose of the legislation, even where the Council was expressly required to give the most weight to the purpose of the Act. Similarly, in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty RC* [2019] NZRMA 1*,* the High Court held that neither the obligation to implement a proposed plan's objectives, nor the requirement for an evaluation report, removed the necessity for a proposed plan to give effect to both the New Zealand Coastal Policy Statement and any regional policy statement.

44. In addition, the plaintiff contends that there is a material mistake of fact, in that properly considered, and in context, his submissions and evidence were not directed in general against intensification, but it intensification at The Sites and that he identified opportunities for greater intensification elsewhere (refer affidavit of F Belgiorno-Nettis dated 11 December 2019,para [10] –[19]).

Error of Law-Absence of Consideration of Evidence

45. In relation to both the Lake Road Block, and the Promenade Block, the Panel held hearings, and received competing expert evidence. For the Promenade Block, the plaintiff and others called an expert urban designer who produced a 70-page brief of evidence with shading diagrams. In relation to the Lake Road Block the plaintiff relied on the evidence of others, including the expert evidence (planning, architecture) of Auckland 2040 Inc. The Panel's new reasons makes no attempt to engage with the competing evidential positions, or to identify the evidence of any particular witness relied on. Adequate reasons will vary in context, but must engage with the parties' competing cases and the evidence sufficiently to justify the result: *Ngāti Hurungaterangi and others v Ngāti Wahiao* [2017] 3 NZLR 770 at [63] (CA). It is to be contended that the Panel's new reasons are inadequate, in that they fail to state why the particular decision was reached on the zoning and height levels for the Lake Road and Promenade Blocks.

    a. The reasons fail to state:

        i. The evidence relied on by the Panel or any other evidence.

        ii. Reasons for preferring one expert witness over another; and

        iii. The competing evidential positions as relates to the Sites.[14]

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b. The failure to resolve or even address the important points of contention in the recommendation or reasons, such as the competing evidential positions, raises substantial doubt as to whether the Panel had properly understood the key issues or reached a rational conclusion on the evidence.[15]

46. It will be contended that the new reasons illustrate a breach of natural justice. The members of the Panel who heard the evidence presented by the plaintiff (and other submitters) during the Unitary Plan hearings (and in particular, the Panel members who heard the evidence in relation to the RPS Topics) were not the same members who heard the evidence regarding the height and zoning requirements for the Lake Road and Promenade Blocks:[16] Applying *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551, the reasons do not indicate any process by which the appropriate members of the Panel who heard and listened to the evidence in relation to the Lake Road and Promenade Blocks actually conferred and provided the new reasons as directed by the Court of Appeal. It is not apparent from the new reasons (given, what the plaintiff contends is an inaccurate characterisation of his submissions) and the absence of any express consideration of the competing evidential positions that the members of the Panel who actually heard the evidence and expert evidence of the plaintiff in relation to the Sites accurately reported the position of the plaintiff to the members of the Panel who made the recommendations.

As regards the Promenade Block

47. It is to be contended that Panel came to a conclusion on the AZHC without evidence or one on which it could not reasonably have reached on the evidence:

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[15] See *Regina (CPRE Kent) v Dover District Council* [2018] 1 WLR at [35]-[42] which contains a discussion by the United Kingdom Supreme Court on the standard of reasons.

[16] A table of the Panel members who heard the evidence of the plaintiff and various other submitters, including Auckland Council, on the Lake Road Block and the Promenade Block is appended to the statement of claim.

a. the Auckland Council in closing on Topic 081 supported the removal of the AZHC for the Promenade Block entirely (resiling from its position earlier on in the hearings process), such that at the conclusion of the AUP hearing sessions there was no expert evidence relied on by any party appearing before the Panel in relation to the AZHC of 22.5m for the Promenade Block;

b. By failing to refer to the evidence it relied on in its new reasons, the Panel has not provided any sound basis for its recommendations as regards the AZHC. As such, a logical conclusion is that the Panel overlooked Auckland Council's change of position in respect of the AZHC for the Promenade Block.

48. It is contended that Panel failed to have regard to relevant site-specific considerations and therefore failed to consider the built environment as it exists, a material relevant consideration under section 76(3) RMA, and the Panel's guidance for rezoning. This includes that:

a. There is no realistic opportunity for intensification within a material part of the Promenade Block (known as the Promenade Terraces); such that the proposed THAB zoning is artificial or illusory; and

b. The proposed zoning and height provisions will not realistically achieve a transition between the adjacent Business - Metropolitan Centre Zone to the south and west of the Promenade Block and the Residential – Mixed Housing Urban Zone on Earnoch Avenue, to the north and east of the Promenade Block.

As regards the Lake Road Block

49. in relation to the Lake Road Block it is contended the Panel failed to have regard to relevant site-specific considerations and therefore failed to consider the built environment as it exists. This includes that:

a. The actual and potential adverse shading effects that buildings in the Mixed-Use Zone subject to an AZHC would have on the existing built environment to the east of the Lake Road Block.

Public and private repercussions of granting interim relief

50. It is in the public interest to grant the orders so as to enable the plaintiff to pursue an action in judicial review:

a. Environmental law sits within the context of administrative justice and is governed by principles associated with the protection of individual rights, and democratic participation in decision-making which affects entire communities;[17]

b. The statutory scheme of the LGATPA incorporates key aspects of the public and participatory process of decision-making under the RMA, but with limited rights of appeal. The typical right of a merits appeal under the RMA Sch 1 process was not available in respect of the AUP process. This meant that it was all the more important for the Panel to provide reasons adequate to properly facilitate the limited rights of appeal under the LGATPA. This was acknowledged by the Court of Appeal at [58]:

> In practical terms, these limited appeal rights mean that the merits of a submission will be considered only once. It might be thought that this in some way indicates that reasons are less important, as factual determinations cannot be challenged save in limited circumstances so the reasons for the factual determinations do not need to be stated. It is true that this aspect of the need for reasons may apply with less force, but it is more than counteracted by the even greater need for justice to be seen to be done by the public, with the reasons for the unchallengeable decisions being apparent. Otherwise the reasons could be entirely arbitrary and no-one would know or be able to challenge recommendations or the decision by judicial review, a remedy expressly recognised as still applicable under the Transitional Provisions Act. In our view, the very limited rights of

[17] Robin Cooke "Forward" in Kenneth Palmer Planning and Development Law in New Zealand (Sweet & Maxwell, Wellington, 1984) at V, cited in Sian Elias "Righting environmental justice", 112th Annual Salmon Lecture, Auckland, 25 July 2013 at 3; *Discount Brands Ltd v Westfield* (New Zealand) Ltd [2005] NZSC 17; 2 NZLR 597 at [45].

> appeal weigh in favour of the giving of discernible reasons, rather than against it. An unsuccessful submitter should be able to understand why the submission has failed. A submitter who cannot understand why a submission has been rejected, and who has no right of appeal against the decision is more likely to be left nursing a sense of uncertainty and unfairness.

c. By the Panel failing to provide adequate reasons for its recommendations on the Sites, it is to be submitted that the plaintiff's limited rights of appeal under the LGATPA were not rendered effective. [18]

d. As outlined above, the plaintiff alleges serious errors of law in the process undertaken by the Panel in making its recommendations, which have implications for not only the plaintiff but also for other submitters to the Unitary Plan. It is both in the public interest and in the interests of justice that the plaintiff be given a real opportunity to bring these questions before the Court. If the orders are not granted and proceedings are rendered nugatory for the reasons noted above, then these questions will not be answered.

51. While it is in the public interest for matters to be resolved in an expeditious manner, any delay in bringing the errors pleaded to the attention of the Court has not been through any fault or omission by the plaintiff. It was only since the release of the Panel's reasons on 14 and 21 October 2019 that the plaintiff has been able to point to material errors of law in the Panel's decision-making process, which go beyond the mere failure to provide reasons. These proceedings have been bought promptly after the issue of the new reasons.

52. Since December 2016, land owners within the Promenade Block and the Lake Road Block have had public notice of the existence of the challenge by the plaintiff to the Council's decision-making, as apparent from the Councils website. Only one landowner, the Emerald Group Limited has to-date expressed any interest in the proceedings.

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[18] *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 at 170.

53. It is submitted that the public interest in preserving the opportunity to bring judicial review proceedings and granting the relief in the substantive proceedings would outweigh any public inconvenience which may be caused by the granting of interim orders.

Overall Justice

54. It is submitted that the overall justice of the situation requires the making of interim orders pending determination of the substantive application for review. It is an established principle in law that there has been a wrong there should be a remedy.[19]

55. It is submitted that the Panel has made material errors of law in the making of its recommendations, which have resulted in the height and zoning requirements for the Lake Road and Promenade Blocks being erroneously made. The overall justice of the case requires a temporary halt on the implementation of invalidly made rules, in order to preserve the position of the plaintiff.

Dated 7 February 2020

R B Stewart QC/ S J Ryan

Counsel for the appellant

[19] *Te Whakakitenga O Waikato Inc v Martin* [2017] NZAR 173 (CA) at [38].

Chronology

Date	Event	
March-May 2013	Informal consultation period for the Draft Auckland Unitary Plan.	
4 September 2013	Part 4 of the Local Government (Auckland Transitional Provisions) Act 2013 enacted	
30 September 2013 – 28 February 2014	Proposed Auckland Unitary Plan publicly notified for submissions	
11 June 2014 – 22 July 2014	Period for further submissions on the Proposed Auckland Unitary Plan	
7-11 September 2015	Business Zone Topics hearing	
14-28 October 2015	Residential Zone Topics hearing	
29-30 October 2015	Topic 078 Hearings	
3 March-29 April 2016	Topic 081 Hearings	
22 July 2016	IHP recommendations to Council on PAUP	
10-18 August 2016	Auckland Council makes its decisions on the Auckland Unitary Plan.	
19 August 2016	Auckland Council notifies its decisions on the Auckland Unitary Plan	
19 August-16 September 2016	Appeals period. Mr Belgiorno-Nettis files judicial review and appeal proceedings	
19-20 June 2017	Hearing in the High Court before Davison J	
29 September 2017	Judgment of Davison J	
11-12 February 2019	Court of Appeal - Hearing	
22 May 2019	Court of Appeal - Decision	
20 June 2019	Application for Stay or Interim Orders Filed in Court of Appeal	
20 June 2019	Application for Leave to Appeal to the Supreme Court	
10 October 2019	Decision of the Supreme Court on application for leave to appeal	
14 October 2019	Reasons by the IHP	
21 October 2019	Additional reasons by the IHP in relation to Lake Road	
20 December 2019	Statement of claim filed in High Court Auckland for judicial review	