

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA287/2018  
[2018] NZCA 629

BETWEEN NORTH EASTERN INVESTMENTS  
LIMITED AND HERITAGE LAND  
LIMITED  
Appellants

AND AUCKLAND COUNCIL  
First Respondent

HOUSING NEW ZEALAND  
CORPORATION  
Second Respondent

Hearing: 13 November 2018 (further submissions received  
19 November 2018)

Court: Asher, Lang and Moore JJ

Counsel: J W Maassen for Appellants  
H J Ash and W M Bangma for First Respondent  
C E Kirman and A K Devine for Second Respondent

Judgment: 21 December 2018 at 10 am

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JUDGMENT OF THE COURT

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**A The appeal is allowed.**

**B The Panel’s recommendations dated 22 July 2016 (provided in its Report to Auckland Council July 2016, Changes to Rural Urban Boundary, Rezoning and Precincts, Annexure 4 Precincts North, at page 158), and subsequent Council decision dated 19 August 2016 to accept those recommendations, are both set aside, insofar as they relate to:**

**(a) the Council’s decision not to adopt the Albany 5 Precinct; and**

- (b) the Council's decision not to zone the land within the proposed Albany 5 Sub-Precinct B Business — Mixed Use.
- C** The Panel is directed to make new recommendations pursuant to s 144 of the Local Government (Auckland Transitional Provisions) Act 2010 in respect of the matters set out in orders B(a) and (b), following a process that addresses the error identified in this judgment.
- D** Following receipt of the Panel's recommendations on the matters set out in orders B(a) and (b), the Council is directed to make a new decision under s 148 of the Local Government (Auckland Transitional Provisions) Act.
- E** The costs orders made in the High Court as between the appellants and the first respondent are set aside. Costs are to be determined by the High Court as between those parties in accordance with the outcome of this appeal.
- F** The costs order made in the High Court as between the appellants and the second respondent is not disturbed.
- G** The appellants must pay the second respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.
- H** The first respondent must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

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## REASONS OF THE COURT

(Given by Lang J)

[1] This appeal raises issues regarding the procedure adopted in relation to a hearing conducted by a sub-committee of the Auckland Unitary Plan Independent Hearings Panel (the Panel) on 20 April 2016.

[2] Following the hearing the Panel made a recommendation to the Auckland Council (the Council) relating to the zoning of two blocks of land situated

near Albany on Auckland's North Shore. The land in question is owned and being developed by the appellants in this proceeding (together referred to as North Eastern).<sup>1</sup> The Panel also recommended that the Council reject North Eastern's proposal that the land be designated a precinct for planning purposes. The Council subsequently adopted both recommendations.

[3] North Eastern contends the Panel breached important principles of natural justice in making its recommendations because it took into account material provided by a Council planner, Ms Terry Conner. North Eastern says it was entitled to conclude as a result of events that occurred prior to and at the hearing that neither the Council nor the Panel would be relying on the material from Ms Conner. As a result, North Eastern contends it did not have an opportunity to challenge the material or to make submissions in relation to it.

[4] North Eastern applied to the High Court for judicial review of the Panel's recommendations and the Council's decision. Woolford J dismissed North Eastern's application in a judgment delivered on 2 May 2018.<sup>2</sup> North Eastern appeals against the Judge's decision.

## **Overview**

[5] The hearing before the Panel took place using the procedure adopted to hear submissions from parties affected by a combined planning instrument known as the Proposed Auckland Unitary Plan (the proposed plan). The Council prepared this document following the amalgamation of the Auckland City Council with several other local councils in the Auckland region. It did so pursuant to its obligations under the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA). The Council publicly notified the proposed plan on 30 September 2013, and provided affected parties with the opportunity to make submissions on the plan until July 2014.

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<sup>1</sup> Heritage Land Ltd owns the land and North Eastern Investments Ltd is developing it.

<sup>2</sup> *North Eastern Investments Ltd v Auckland Council* [2018] NZHC 916.

[6] North Eastern proposes to develop approximately 7.8 hectares of land situated at 56 Fairview Avenue and 129 Oteha Valley Road near Albany. The proposed plan provided for North Eastern's land to be zoned Residential — Mixed Housing Urban (MHU) and Residential — Mixed Housing Suburban (MHS).

[7] North Eastern lodged a submission challenging the proposed zoning of its land in February 2014. It sought a rezoning of most of its land to Residential — Terrace Housing and Apartment Buildings (THAB). This type of zoning permits a significantly more intensive form of residential development than MHU and MHS. North Eastern sought a Business — Mixed Use zoning in relation to the balance of its land. This comprised a strip of land approximately 350 metres in length fronting onto Oteha Valley Road. Oteha Valley Road is a main arterial route leading from the Northern Motorway towards the Albany Town Centre.

[8] North Eastern also sought the overlay of a precinct for the land (the Albany 5 Precinct). It said this would provide a supplementary planning method that would enable the Council to provide objectives and policies specific to the special features of North Eastern's land. These would recognise the potential of the land for residential development to a higher intensity than that set as a general benchmark for residential development within a THAB zone. This could occur, for example, through building height controls permitting residential buildings considerably higher than would ordinarily be permitted on land with a THAB zoning. North Eastern viewed the precinct method as providing a mechanism that would ensure an integrated development of its land.

### **The procedure adopted by the Panel**

[9] The Council received 9,400 primary submissions relating to the proposed plan. From these it identified 93,600 primary submission points. These were summarised in a report entitled "Summary of Decisions Requested Report". After this report had been circulated, submitters were given an opportunity to make further submissions. The Council then received 3,800 further submissions containing 1.4 million submission points. In relation to zoning alone, the Council received more than 20,000 rezoning requests that related to more than 80,000 properties.

[10] The procedures adopted in relation to the hearing and determination of issues raised in the submissions were prescribed primarily by the LGATPA. Section 115 of that Act provides a convenient overview of the procedures to be adopted:

**115 Overview of this Part**

- (1) This Part sets out the following process for the preparation of the first Auckland combined plan:
  - (a) the Auckland Council prepares a proposed plan for Auckland that meets the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and a district plan:
  - (b) the plan is prepared in accordance with this Part and, to the extent provided for by this Part, the RMA:
  - (c) the plan is not required to include district plan provisions in relation to the Hauraki Gulf Islands (the district plan provisions of the former Auckland City Council in relation to those islands will become operative as part of an existing separate process):
  - (d) the Council prepares its reports on the proposed plan under sections 32 and 165H(1A) of the RMA and makes them available for public inspection, and provides the reports to the Ministry for the Environment for audit:
  - (e) the Council notifies the proposed plan and calls for submissions:
  - (f) the Council notifies a summary of submissions and calls for further submissions:
  - (g) the Council then forwards all relevant information obtained up to this point to a specialist Hearings Panel appointed by the Minister for the Environment and the Minister of Conservation:
  - (h) the Hearings Panel holds a Hearing into submissions on the proposed plan by means of hearing sessions conducted in accordance with the procedural and other requirements of this Part:
  - (i) the Council must attend the hearing sessions and otherwise assist the Hearings Panel with the task of the Hearing:
  - (j) no later than 50 working days before the expiry of 3 years from the date the Council notifies the proposed plan, the Hearings Panel must make recommendations to the Council on the proposed plan (unless that period is extended by the Minister for the Environment by up to 1 year):

- (ja) the Hearings Panel may make recommendations to the Council in respect of a particular topic once it has finished hearing submissions on that topic:
  - (k) after it has received all of the Hearings Panel's recommendations, the Council must make decisions on the recommendations within 20 working days (unless that period is extended by the Minister for the Environment by up to a further 20 working days) and publicly notify the recommendations of the Hearings Panel and the Council's decisions on the recommendations:
  - (l) the proposed plan is amended in accordance with the Council's decisions on the recommendations and is deemed, subject to the appeal rights of submitters, to be approved or adopted, as the case may be:
  - (m) submitters on the proposed plan may appeal to the Environment Court on those recommendations of the Hearings Panel that the Council rejects:
  - (n) submitters on the proposed plan may appeal to the High Court, on a point of law only, on those recommendations of the Hearings Panel that the Council accepts:
  - (o) once all appeals are determined, the Council must then publicly notify the operative date of the proposed plan.
- (2) This section is only a guide to the general scheme and effect of this Part. It does not affect the interpretation or application of the other provisions of the Part.

[11] Section 136 prescribes the procedure to be adopted at each hearing conducted before a Panel. It provides as follows:

**136 Hearing procedure**

- (1) At each hearing session, no fewer than 2 members of the Hearings Panel must be present.
- (2) If the chairperson is not present, he or she must appoint another member as chairperson for the purposes of the hearing session.
- (3) At the hearing session, the Hearings Panel—
  - (a) may permit a party to question any other party or witness; and
  - (b) may permit cross-examination; and
  - (c) must receive evidence written or spoken in Māori, in which case the Te Ture mō Te Reo Māori 2016/the Māori Language Act 2016 applies as if the hearing session were legal proceedings before a tribunal named in Schedule 2 of that Act.

- (4) Otherwise, the Hearings Panel must establish a procedure for hearing sessions that—
  - (a) is appropriate and fair in the circumstances (including in respect of the granting to a person of any waiver of the requirements of the Hearings Panel); and
  - (b) avoids unnecessary formality; and
  - (c) recognises tikanga Māori where appropriate.
- (5) The Hearings Panel must keep a full record of the hearing sessions and any other proceedings.

[12] In addition to these procedural directions, s 138(1) of the LGATPA provides that several provisions in the Commissions of Inquiry Act 1908 are to apply to each hearing session as if the Panel were a Commission of Inquiry and the hearing were an inquiry under the Commissions of Inquiry Act. These include the power under s 4B to receive such evidence as the Panel thinks fit whether or not it would be admissible in a court of law. The Panel was also given the power under s 4D to summon witnesses.

[13] Sections 139 and 140 give the Panel the power to make directions relating to the provision of briefs of evidence within specified time limits and the power to direct the manner in which hearing sessions are to be conducted.

[14] Section 146 requires the Panel to provide its reports to the Council no later than 50 working days prior to the expiry of three years from the date on which the Council notified the proposed plan. Section 148(1) then requires the Council to consider the recommendations made by the Panel and decide whether to accept or reject each recommendation. It is required to publicly notify its decisions no later than 20 working days after it was provided with the last of the reports from the Panel.<sup>3</sup>

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<sup>3</sup> Local Government (Auckland Transitional Provisions) Act 2010, s 148(4).

[15] Section 164 provides the Panel with functions and powers as follows:

**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.

[16] The Panel also published its own Procedures Manual setting out the procedures the Panel would follow. This incorporated both matters contained in the Act as well as those that the Panel had itself determined as being appropriate using the discretion vested in it to establish its own procedures.

[17] The LGATPA did not specify how documents and other information relevant to hearing sessions were to be provided to and by the Panel and other parties. The Procedures Manual dealt with these issues, including the service of documents and delivery of communications to and from the Panel. The Panel used its website as a primary mechanism for communications between the Panel and individual submitters as well as for submitters wishing to communicate with each other. This meant the Panel did not communicate directly with most submitters. Instead, the procedure placed the onus on parties affected by the submissions to keep abreast of procedural developments that may affect or be of interest to them.



[18] North Eastern does not take issue with the general procedures adopted by the Panel in relation to the hearing and determination of submissions. This reflects our own view that the procedures adopted by the Panel were entirely consistent with those prescribed by the Act. The use of the website as the primary means of communication was also essential given the vast number of parties with whom the Panel was required to communicate throughout the submissions process.

[19] The issues that have arisen in the present case are not generic to all cases heard by the Panel. They stem from a series of events that occurred before North Eastern's submissions were heard by the Panel on 20 April 2016. They continued because of the manner in which the hearing on that date proceeded, and culminated in the matters the Panel relied on in its decision. We emphasise that the issues raised by the present case do not call into question in any way the procedures generally used by the Panel to carry out its statutory functions.

### **Ms Conner's evidence**

[20] Ms Conner provided a statement dated 26 January 2016 regarding submissions received by the Council in relation to proposed zoning in the Albany and Greenhithe areas. Ms Conner did not support the rezoning of North Eastern's land to THAB as sought by North Eastern because of concerns she held regarding access to this area. Instead, Ms Conner proposed that the existing Residential — MHU zone be retained because she considered it was the most appropriate way to give effect to the Regional Policy Statement.

[21] Ms Conner was also a co-author of a report to the Panel (dated 26 January 2016) on submissions received by the Council in relation to requests for new precincts. These included the precinct that North Eastern proposed for its land. The report concluded that the proposed precinct provisions would conflict with the intent of the underlying zones by permitting a greater intensity of residential activities in circumstances where the effects of those activities were not governed by appropriate provisions of the proposed plan to manage effects.

[22] Ms Conner's statement was uploaded to the Panel's website on 28 January 2016. From that point it could be accessed by all parties who visited the

website. At that point it formed part of the evidence the Council was likely to call at hearings of the Panel involving zoning issues in the Albany and Greenhithe areas.

### **A major issue arises**

[23] A major issue arose in late January and early February 2016 after the Council posted the evidence it proposed to adduce in relation to the submissions it had received. At this point it became clear that the Council had proposed zoning changes that had not been raised in submissions on the proposed plan. This issue, and the consequences that flowed from it, undoubtedly played a significant role in the events that have led to the present proceedings.

[24] The Council's approach attracted widespread comment and considerable criticism. This resulted from the fact that parties who had filed submissions in relation to the proposed plan considered they had been denied the opportunity to make submissions on the new zoning proposals.

[25] The Council endeavoured to deal with the issue by resolving at an Extraordinary Meeting held on 24 February 2016 to withdraw certain evidence it had provided to the Panel in relation to the new zoning proposals. These became known as "out of scope" residential zoning changes. Zoning changes that were contained in the proposed plan were referred to as "in scope" residential zoning changes.

[26] On 29 February 2016, the Council filed a memorandum with the Panel seeking leave to withdraw its evidence to the extent that it related to out of scope residential zoning changes. The report provided by Ms Conner in relation to the underlying zoning for North Eastern's land did not fall within this category. Her report did, however, make out of scope recommendations in relation to other land on Auckland's North Shore.

[27] The Panel responded to the Council's memorandum on 1 March 2016. It directed that parties could present their cases as they wished, and noted that expert witnesses would be giving evidence on an independent basis and unaffected by the position of the parties by whom they had been called. This led some submitters to

seek to rely for their own purposes on recommendations made by Council employees and experts in relation to out of scope proposals.

[28] This development raised a further issue for the Council. It was not comfortable with the concept of its own employees or experts giving evidence that was effectively on behalf of other parties. In addition, such evidence was likely to conflict with the Council's stated policy position in relation to zoning issues.

[29] The Panel began hearing submissions on the topic of rezoning and precincts (designated as Topic 081) on 8 March 2016. The Council dealt with the issue that had arisen in relation to out of scope zoning in its opening submissions as follows:

2.3 At this point, it is appropriate to record that a number of statements of evidence were filed on the Council's behalf on or after 26 January 2016. The Council's decision to withdraw those parts of the evidence as they relate to the out of scope residential zoning changes, except evidence addressing minor changes covering technical errors and anomalies (Out of Scope Residential Changes) has meant that the authors of those evidence reports have had to carefully consider whether they can appear in support of the Remaining Evidence. They have determined that they cannot. They will accordingly not be called to confirm that evidence.

2.4 We acknowledge therefore that the weight the Panel can give to that evidence is a matter for it to determine. We do however note that the Local Government (Auckland Transitional Provisions) Act 2010 enables the Panel, inter alia, to receive any information and advice that is relevant and reasonably necessary to make its recommendations under s 144. As such, it would be open to the Panel to consider the Remaining Evidence as such information or advice for several reasons:

(a) First, it is submitted that the Remaining Evidence provides a thorough summary of the themes raised in submissions and an analysis of those themes and submission points against the rezoning principles developed by the Council and addressed in Mr Duguid's rezoning evidence. To the extent that that analysis is not challenged in the evidence of submitters, we submit that it is information on which the Panel may decide to place some reliance. We acknowledge that this is a matter for the Panel.

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- (c) Thirdly, the evidence may be seen by the Panel procedurally as an important reference point, keeping in mind that many submitters may have referred to aspects of it in their subsequent evidence filed in response.

(Footnote omitted.)

[30] North Eastern was not represented at the hearing on 8 March 2016. In common with other parties, however, it could access the Council's submissions on the Panel's website. It is noteworthy, however, that the submissions dealt with the issue of whether the Panel could have regard to out of scope zoning evidence. North Eastern did not need to confront that issue because Ms Conner's statement, insofar as it concerned North Eastern's land, related to in scope zoning issues.

[31] On 9 March 2016 the Council filed a further memorandum with the Panel. This recorded that the Panel had requested a list of witnesses whom the Council would not be calling as part of its rezoning evidence for Topic 081. The memorandum listed the names of the witnesses the Council no longer proposed to call. Ms Conner's name was on that list.

[32] Parties who wished to rely on evidence given by Council witnesses who would not be called to give evidence were now required to decide how to protect their interests. The second respondent, Housing New Zealand Corporation (HNZC), wished to rely on statements made by Ms Conner in relation to out of scope zoning issues. It therefore applied to the Panel for a witness summons to be issued compelling Ms Conner to produce her statement containing her recommendations on those issues in relation to HNZC's submission. This issue was ultimately resolved by agreement between HNZC, the Council and the Panel. It resulted in Ms Conner filing her statement with the Panel on 18 March 2016. The Panel then posted the statement on its website under the file dealing with HNZC's submission.

[33] In the High Court, North Eastern challenged the validity of the witness summons obtained by HNZC. Woolford J held the summons to be valid.<sup>4</sup> That issue is of significant practical importance to HNZC and it is anxious to obtain this Court's opinion regarding the validity of the summons. During the hearing before us, however,

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<sup>4</sup> *North Eastern Investments Ltd v Auckland Council*, above n 2, at [33].

Mr Maassen effectively abandoned this ground of appeal so it is no longer before us. As a result, the finding of the High Court on this point remains intact.

### **Further events leading up to the hearing on 20 April 2016**

[34] Prior to the hearing on 20 April 2016 several other noteworthy events also occurred.

[35] On 29 February 2016 North Eastern filed a request with the Panel seeking leave to cross-examine four of the Council's witnesses, including Ms Conner. On 7 March 2016, North Eastern received an email from the Panel seeking confirmation that it still required time to cross-examine the Council's witnesses at the hearing on 20 April 2016.

[36] The Council filed separate legal submissions relating to rezoning and precincts on or about 3 March 2016. The rezoning submissions did not rely on Ms Conner's statement and made no direct reference to the appellants or their land.

[37] The Council's legal submissions in relation to the proposed Albany 5 Precinct relied, however, on Ms Conner's report on rezoning. It also relied on a report prepared by another Council planner, Mr Ewen Patience. Mr Patience's report relied in part on findings contained in Ms Conner's statement on rezoning.

[38] On 9 March 2016 Judge Kirkpatrick granted North Eastern's application to cross-examine Council witnesses subject to express time limits. This was the same day that the Council filed its memorandum with the Panel advising that Ms Conner would not be called at hearings to confirm her statement.

[39] On 18 March 2016 Ms Erin Woolley, who was acting as counsel for the Council in relation to the precinct issue, filed a memorandum with the Panel seeking a direction that Ms Conner would not be required for cross-examination as she was not a co-author of the joint statement relating to the proposed Albany 5 Precinct. Mr Maassen filed a memorandum in response pointing out that the Panel had already granted North Eastern's request to cross-examine Ms Conner. He also pointed out Ms Conner was the author of a report on the THAB zone submission point.

Ms Julie McKee, the Unitary Plan Hearings Team Leader, advised Ms Woolley and Mr Maassen by email on 20 March 2016 that Judge Kirkpatrick had determined that North Eastern could cross-examine Council witnesses at the hearing but would need to observe the time limits imposed on 9 March 2016.

[40] Mr John Farquhar, a consultant for North Eastern, contacted Ms McKee on 5 April 2016 to discuss the proposed cross-examination of Council witnesses. Ms McKee told Mr Farquhar that Ms Conner would not be attending the hearing on 20 April. Based on this advice Mr Farquhar told Ms McKee that North Eastern would not be cross-examining Ms Conner at the hearing.

[41] Following this discussion Mr Farquhar sent an email containing the following advice to the team responsible for making North Eastern's submission to the Panel:

I attach a memorandum of AC [Auckland Council] containing a list of AC Planners that HAVE NOT BEEN CALLED in relation to rezoning 081.

This list includes:

Joseph Jefferies

Terry Conner

Ewen Patience.

NOTE: Ewen Patience evidence for Albany 5 PRECINCT has been presented.

What this means (following a conversation with Julie McKee) is:

1. We may not cross examine Terry Conner for Rezoning
2. The Panel will rely on the Planning Evidence filed by the submitter (the AC evidence remains on the AUP [Auckland Unitary Plan] website, it has been read but that is the extent of it).
3. As far as she is aware, AC did not put forward any experts for rezoning;
4. AC have structured their Planning response to be fed through legal submissions and legal counsel.

[42] It is apparent that from this point, North Eastern's team proceeded on the basis that the Council was no longer relying on Ms Conner's report on the issue of zoning their land. It took that approach based on Ms McKee's advice that Ms Conner would not be attending the hearing on 20 April 2016.

[43] Ms McKee was cross-examined before Woolford J at the hearing in the High Court. The Judge accepted Ms McKee's evidence that she did not tell Mr Farquhar that the Panel would only be relying on the evidence provided by North Eastern at the hearing on 20 April.<sup>5</sup> Ms McKee also acknowledged, however, that she told Mr Farquhar North Eastern would not be able to cross-examine Ms Conner because she was not attending the hearing. She said she told Mr Farquhar this as a statement of fact.

### **The hearing on 20 April 2016**

[44] The sub-committee of the Panel that heard North Eastern's submission on 20 April 2016 comprised Messrs Des Morrison, Les Simmons and Alan Watson. North Eastern was represented by Mr Maassen and Ms Woolley appeared as counsel representing the Council.

[45] In his introductory remarks the Panel Chairperson, Mr Morrison, advised Mr Maassen that the Panel considered its role was to focus on the precinct issue. Mr Maassen confirmed this was consistent with his view of matters.

[46] On two occasions during his opening submissions Mr Maassen drew the attention of the Panel to the fact that Ms Conner's evidence had been withdrawn. Those submissions obviously reflected Mr Maassen's belief at that time based on the events that had occurred prior to the hearing.

[47] Mr Maassen then advised the Panel that he proposed to cross-examine Mr Patience regarding the precinct proposal. He pointed out that Mr Patience was not put forward by the Council to deal with the issue of zoning although resolution of the zoning issue in North Eastern's favour underpinned its argument for a precinct. At the beginning of his cross-examination Mr Maassen asked Mr Patience to answer questions about the proposed precinct based on the assumption that the Panel would agree THAB and Mixed Use zonings were appropriate. Later in the cross-examination Mr Patience said he disagreed with the assumption that Mixed Use zoning was appropriate for the strip of land fronting Oteha Valley Road. Neither Mr Maassen nor

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<sup>5</sup> At [44]–[45].

Mr Patience referred at any stage during the cross-examination to Ms Conner's statement.

[48] At no stage during the hearing did Ms Woolley advise the Panel that the Council still relied on Ms Conner's statement regarding the zoning issue. Furthermore, the Panel did not raise with Mr Maassen the possibility that the Panel might take Ms Conner's statement into account in making its recommendation to the Council regarding the issue of either zoning or the precinct.

### **The Panel's recommendation**

[49] Despite this background, the material contained in Ms Conner's report featured in the Panel's recommendation in the following passage:

#### 3. Key issues

The key issue between the Council and North Eastern Investments Limited related to the zoning of the land and the height and intensity of future development.

The Council's position was summarised in the joint planning evidence on precincts (Albany 1, 3, 4, 5 etc) dated 26 January 2016 in the table at paragraph 7.9, as set out below:

The underlying zone of the proposed new precinct under the notified PAUP is MHS and MHU. The MHS and MHU zones provide for a maximum building height of 8m and 11m respectively, and yard controls ranging from 1.3m to 2.5m.

The proposed new precinct would more than double the maximum building height limits from those proposed in the underlying zones. The zone controls for building height and yards are set at levels that are appropriate for the zone.

A proposal to exceed the height limits can be pursued through a resource consent application. The resource consent process would involve assessment of any dominance, privacy and shading effects on the surrounding neighbourhood.

*The evidence of Terry Conner (Topic 081) explains why the change of zoning sought by the submitter from MHS and MHU to THAB is not supported. In summary, it is inappropriate to encourage more intensive residential development in this area without appropriate assessment of the effects.*



*Ms Conner's evidence also dated 26 January 2016 on Rezoning — North Shore — Albany and Greenhithe on page 32, as set out below.*

*Do not support change to THAB of either site, due to access concerns but support an alternative change for 39 Fairview Ave from SH/MHS to solely MHS to avoid split zoning. MHS is an appropriate zone for properties not close to centres and the RFN to recognise the planned suburban built character of the area. MHU is proposed to be retained on 56 Fairview. Access to much of this area is constrained by a 1 lane bridge and is not conducive to a safe pedestrian walk to public transport. Retention of the respective zones and the proposed change to MHS are the most appropriate ways to achieve the objectives of the MHS and MHU zones and gives effect to the RPS.*

The outcome of the Environment Court hearing of the proposed AT requirement for improvements at the Medallion Road, currently underway, may have a material impact on this issue.

...

(Emphasis added.)

[50] The Panel did not accept Ms Conner's views regarding the issue of zoning for the bulk of North Eastern's land. It accepted North Eastern's submissions in relation to that issue. The Panel did not, however, accept North Eastern's submissions regarding the Business — Mixed Use zone for the strip of land fronting Oteha Valley Road or the proposed precinct. The Panel observed:

The Panel agrees with the submitter that this site has considerable potential for residential development but was not convinced by the evidence that a precinct as proposed is necessary or appropriate. The Panel supports the evidence on behalf of the Council in opposing the precinct provisions.

The Panel has instead agreed with the submitter that a more intensive zoning is appropriate and has recommended that the entire eight hectare site be rezoned Residential — Terrace Housing and Apartment Buildings Zone. The proposed Business — Mixed Use Zone for a portion of the land is not supported in this location which is relatively close to but physically separated from the nearby metropolitan centre at Albany. If any future specific proposal seeks to exceed the height provisions of that zoning the Panel considers that such a proposal would need to be tested by way of a resource consent application.

The Panel is confident that the Auckland-wide provisions, together with the provisions of the Residential — Terrace Housing and Apartment Buildings Zone, will appropriately enable the future development of this site, give effect to the regional policy statement and achieve the purpose of the Resource Management Act 1991.

[51] This led the Panel to make the following recommendation:

The Panel having regard to the submissions the evidence and sections 32 and 32AA of the Resource Management Act 1991, recommends that the Albany 5 Precinct not be adopted. The rezoning of the land within the proposed precinct to Residential — Terrace Housing and Apartment Buildings Zone is considered the most appropriate way to enable the development of the proposed precinct site and to give effect to the regional policy statement and achieve the purpose of the Resource Management Act 1991.

### **The appeal**

[52] Mr Maassen's overall submission was that the Panel breached the principles of natural justice by relying upon material from Ms Conner's report in circumstances where North Eastern was entitled to believe the material was not being relied upon by the Council and would not be relied upon by the Panel.

[53] Mr Maassen also developed a more technical submission to the effect that Ms Conner's statement was never available to the Panel as evidence because Ms Conner had not appeared before the Panel to confirm it. We do not consider that submission to be tenable because the Panel had a wide power under s 4B(1) of the Commissions of Inquiry Act to receive as evidence:

... any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

We have already recorded that Ms Conner's report had been posted on the Panel's website on 28 January 2016 as part of the Council's response to issues raised by submitters. It therefore constituted a statement, document, information or matter the Panel was entitled to receive under s 4B regardless of whether it would have been admissible in a court.

[54] Mr Maassen also advanced a submission that it was unfair for the Panel to take Ms Conner's report into account after it had been posted on the Panel's website as a result of the summons obtained by HNZC. He pointed out that North Eastern was not involved in the submission made by HNZC and could not reasonably expect to have known the Panel would also use the report to assist it in determining North Eastern's submission. This submission overlooks the fact that the report was already on

the Panel's website before it was re-posted after HNZC obtained its summons. We consider the fact that the report was subsequently posted on the website on a second occasion is immaterial to the issues raised by the present appeal.

[55] We take the view that the appeal should instead be determined on the wider ground advanced by North Eastern. The key issue under that ground is whether the Panel was obliged to put North Eastern on notice that it might rely on material contained in Ms Conner's statement even though she did not appear at the hearing.

### **The Judge's decision**

[56] The argument relating to procedural unfairness was one of four grounds advanced by North Eastern at the trial in the High Court. It is not necessary to refer to the remaining grounds because they have not been pursued on appeal. The Judge expressed his conclusion in relation to the argument based on procedural unfairness as follows:<sup>6</sup>

[47] Mr Farquhar seems to have assumed that because Ms Conner's report was no longer being relied upon by the Council as part of its case, then it could not be evidence before the Panel or have any relevance to the hearing. I am of the view that assumption was mistaken, but that mistake was not the result of anything said by Ms McKee or other Panel staff, but because of a misapprehension on Mr Farquhar's part about the nature of the hearing process. This misapprehension continues when NEIL [North Eastern] submits that it was significant that the Panel never advised NEIL that it intended to rely on Ms Conner's evidence. I am of the view that as a matter of principle it is not the responsibility of a decisionmaker to advise a submitter or a party of the evidence to which it must respond. Rather, it is for the submitter or party to inform itself as to the issues which it may wish to address in terms of its own evidence or submissions.

[48] I am therefore of the view that any reliance by the Panel on Ms Conner's report was, in all the circumstances, not unfair. I am also not persuaded that if Ms Conner was cross-examined the Panel may have made a different recommendation to Council. The Panel did not in fact agree with Ms Conner on the underlying zone, preferring the evidence of the NEIL experts who sought a Terrace Housing and Apartment Buildings zone for most of the land. It stated:

The Panel has instead agreed with the submitter that a more intensive zoning is appropriate.

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<sup>6</sup> *North Eastern Investments Ltd v Auckland Council*, above n 2.

[49] The Panel did not support NEIL's position only in respect of part of the land — the rezoning of a strip of the land fronting Oteha Valley Road as Mixed Use. The Panel gave reasons which had nothing to do with Ms Conner's evidence. She favoured retention of the Residential — Mixed Housing Urban zoning.

### **The Council's argument**

[57] Ms Ash for the Council supports the Judge's reasoning. She also submits that the email sent by Mr Farquhar to other members of the North Eastern team on 5 April 2016<sup>7</sup> demonstrates that North Eastern knew the Panel had read the material, including Ms Conner's statement, on the Panel's website. She submits North Eastern should also have known the Panel might take the material into account in making its recommendation.

[58] Ms Ash points out that Ms Conner's statement did not contain out of scope recommendations in relation to North Eastern's submission. She says North Eastern should therefore have known the Council had never withdrawn the material to the extent that it related to North Eastern's submission. In addition, North Eastern ought to have known the Panel had the power to receive material that would not be admissible as evidence in a court. These facts should have alerted North Eastern to the prospect that the Panel might receive and take into account the material in Ms Conner's statement.

[59] Ms Ash is also critical of the steps, or lack of steps, taken by North Eastern to keep abreast of events that occurred prior to the hearing on 20 April 2016. She points out that North Eastern had an obligation to check the Panel's website regularly to ensure it knew what evidence the Council proposed to rely on at the hearing. Had it done so, it would have realised the material remained on the website and was therefore available for the Panel to take into account. Ms Ash contends that North Eastern only has itself to blame for not anticipating the Panel might take that step.

[60] HNZA supports the stance taken by the Council although its focus is on the issues relating to the witness summons it obtained to enable it to use Ms Conner's statement in support of its own submission.

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<sup>7</sup> Set out above at [41].

## **Our assessment**

[61] We begin by observing that the only reasonable conclusion to be drawn from the whole of the evidence is that by the time of the hearing on 20 April 2016 the Council was no longer relying on Ms Conner's statement in relation to the issue of zoning. Were that not the case, the Council would have referred to her statement in its legal submissions regarding that issue, and it would also have complied with the Judge's direction that she be available for cross-examination at the hearing.

[62] More importantly, Ms Woolley would have corrected Mr Maassen when he referred twice during his opening submissions to the fact that the Council had withdrawn Ms Conner's evidence. Ms Woolley was prepared to object on one occasion during Mr Maassen's cross-examination of Mr Patience when she considered he was asking questions that were not relevant to the issues before the Panel. We have no doubt she would similarly have corrected Mr Maassen if she considered he was providing the Panel with an incorrect statement of the Council's position regarding Ms Conner's statement.

[63] The events that occurred between 9 March and 5 April 2016 persuade us that the Council decided at some stage during this period not to rely on Ms Conner's statement in relation to the issue of zoning. It signalled that fact, albeit not overtly, by advising Ms McKee that Ms Conner would not be attending the hearing even though Judge Kirkpatrick had already given North Eastern leave to cross-examine her. We therefore take a different view to the Judge on the issue of whether Mr Farquhar was mistaken in his assumption that the Council was no longer relying on Ms Conner's statement by the time of the hearing. We consider Mr Farquhar was correct to reach that conclusion.

[64] We accept that the Panel had the power under s 4B of the Commissions of Inquiry Act to receive Ms Conner's statement even though she did not appear as a witness to confirm it. We also accept, in general terms, the correctness of Woolford J's observation that it is not for a decisionmaker such as the Panel to advise a submitter of the issues to which it should respond.<sup>8</sup> It will ordinarily be the responsibility of

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<sup>8</sup> *North Eastern Investments Ltd v Auckland Council*, above n 2, at [47].

the submitter to make its own decision regarding those issues. We consider the position changes, however, where a party such as the Council decides not to rely on the evidence of its own witness. If the Panel considered it might rely on the evidence even though the Council did not, it had an obligation to advise North Eastern of that possibility. This would have enabled North Eastern to take such steps as it considered appropriate to protect its position.

[65] Had he appreciated what might occur, Mr Maassen could have asked additional questions of his own witnesses and he could have addressed Ms Conner's statement in his submissions. He may also have insisted on exercising the right to cross-examine Ms Conner in accordance with the permission given by Judge Kirkpatrick on 9 March 2016. Woolford J was clearly of the view that cross-examination of Ms Conner would probably not have caused the Panel to alter the recommendation it ultimately made to the Council. That may well be the case but the focus in judicial review proceedings is on process rather than substantive outcome. The real point for present purposes is that North Eastern was denied the opportunity to take appropriate steps because it did not know the Panel might take into account Ms Conner's statement.

[66] We consider this amounts to reviewable procedural unfairness.

### **Should relief be granted?**

[67] The issue of whether relief should be granted is more problematic. On one view, the Panel may not have placed weight on Ms Conner's statement. The Panel clearly rejected her view regarding the THAB issue and favoured in large part the outcome advanced by North Eastern. Furthermore, it did not accept either party's argument in relation to the precinct issue and chose a middle ground instead. Its decision regarding the precinct issue also appears to have been grounded largely, if not exclusively, on the proximity of North Eastern's land to the Albany Town Centre rather than the factors relied upon by North Eastern and the Council. We therefore accept it is arguable that the procedural error may not have had any appreciable effect on the ultimate outcome.

[68] The problem, however, is that it is now not possible to say with any degree of certainty that the error did not affect the ultimate outcome. The Panel clearly took Ms Conner's views into consideration because it cited them in its recommendation. The zoning and precinct issues are also clearly intertwined. This is demonstrated by Mr Maassen's cross-examination of Mr Patience and the fact that Mr Patience relied on Ms Conner's zoning conclusions in preparing his report on the precinct issue. These factors persuade us there is a real risk the Panel's decision regarding the precinct issue was influenced by information contained in Ms Conner's statement regarding zoning issues. We therefore consider North Eastern should be granted relief.

### **Form of relief**

[69] Counsel advised us during the hearing that the Panel remains in existence and could re-hear North Eastern's submission if the appeal was to succeed. At the end of the hearing we asked counsel to endeavour to reach agreement regarding the orders we should make should that be the case. Regrettably counsel have not been able to agree. The issue in dispute relates to the terms on which the Panel is to re-hear North Eastern's submission.

[70] Mr Maassen submits we should direct the Panel to re-hear the submission in the following terms:

1. The Panel's recommendations dated 22 July 2016 (provided in its Report to Auckland Council July 2016, Changes to Rural Urban Boundary, Rezoning and Precincts, Annexure 4 Precincts North, at page 158), and subsequent Council decision dated 19 August 2016 to accept those recommendations, are both set aside, insofar as they relate to:
  - (a) The Council's decision not to adopt the Albany 5 Precinct; and
  - (b) The Council's decision not to zone the land within the proposed Albany 5 Sub-Precinct B Business — Mixed Use.
2. The matters in 1 are to be reheard by the Panel and procedural matters, and the parameters of that hearing are matters to be determined by the Panel in the light of this decision.

[71] Ms Ash submits the Court should make the following direction:

2. The Panel is directed to make new recommendations pursuant to section 144 of the LGATPA in respect of the matters set out in paragraphs 1(a) and (b), following a process that addresses the errors identified by the Court of Appeal.

[72] We prefer the approach suggested by the Council because we consider it is more certain in its terms but still provides the Panel with a significant degree of flexibility regarding the procedure it will use to re-hear North Eastern's submission.

### **Result**

[73] The appeal is allowed.

[74] The Panel's recommendations dated 22 July 2016 (provided in its Report to Auckland Council July 2016, Changes to Rural Urban Boundary, Rezoning and Precincts, Annexure 4 Precincts North, at page 158), and the subsequent Council decision dated 19 August 2016 to accept those recommendations, are both set aside, insofar as they relate to:

- (a) the Council's decision not to adopt the Albany 5 Precinct; and
- (b) the Council's decision not to zone the land within the proposed Albany 5 Sub-Precinct B as Business — Mixed Use.

[75] The Panel is directed to make new recommendations under s 144 of the LGATPA in respect of the matters set out in paragraphs [74(a)–(b)], following a process that addresses the errors identified by this judgment.

[76] Following receipt of the Panel's recommendations on the matters set out in paragraphs [74(a)–(b)], the Council is directed to make a new decision under s 148 of the LGATPA.



## Costs

[77] The costs orders made in the High Court as between North Eastern and the Council are set aside. Costs are to be determined by the High Court as between those parties in accordance with the outcome of this appeal.

[79] HNZC was required to prepare submissions and participate in the present appeal because it validly assumed North Eastern maintained its ground of appeal relating to the validity of the summons issued by HNZC for the purpose of ensuring Ms Conner's statement was before the Panel when it heard a submission by HNZC. As recorded earlier,<sup>9</sup> Mr Maassen's abandonment of that ground effectively evolved during the hearing. For that reason the costs order in the High Court as between North Eastern and HNZC is not disturbed. HNZC is entitled to an award of costs in this Court against North Eastern. North Eastern must pay HNZC costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[78] The Council must pay North Eastern one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
Wadham Partners, Palmerston North for Appellants  
Simpson Grierson, Auckland for First Respondent  
Ellis Gould, Auckland for Second Respondent

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<sup>9</sup> At [33].