Memo

13 June 2018

TO: Councillor Darby, Chairperson Planning Committee; Richard Hills, Deputy Chairperson Planning Committee

CC: John Duguid, General Manager - Plans and Places; Warren Maclennan – Manager Planning Northwest and Islands

FROM: Corina Faesenkloet, Legal - Principal Solicitor

SUBJECT: Environment Court decision - Rural subdivision appeals

1.0 IHP RECOMMENDATION, COUNCIL DECISION AND APPEALS

1.1 The Auckland Council decision on the Independent Hearings Panel (**IHP**) recommendations on the Rural Subdivision provisions in the Auckland Unitary Plan:

(a) rejected the IHP recommendations; and

(b) decided an alternative solution.

1.2 As a result, section 156(1) of the Local Government (Auckland Transitional Provisions) Act 2010 provided a right of appeal to the Environment Court for relevant submitters on the Proposed Auckland Unitary Plan.

1.3 Ten appeals were originally filed. Three were withdrawn and seven (7) Environment Court appeals[1] were heard by the Environment Court in relation to the Council's decision on the Rural Subdivision provisions.

1.4 The appeals generally sought to reinstate the Independent Hearing Panel recommendations and/or to introduce other Rural Subdivision provisions, to provide more opportunities for landowners to subdivide in the rural areas.

2.0 THE ENVIRONMENT COURT HEARING

2.1 The appeals on the Council's decision on the Rural Subdivision provisions were the subject of an Environment Court hearing on 19-23 and 26-29 March 2018.

[1] Cabra Rural Developments Limited & Ors ENV-2016-AKL-189; Cato Bolam Consultants Limited ENV-2016-AKL-206; Radiata Properties Limited ENV-2016-AKL-234; Terra Nova Planning Limited ENV-2016-AKL-248; Zakara Investments Limited ENV-2016-AKL-216; Mason and Others ENV-2016-AKL-207; Smithies Family Trust ENV-2016-AKL-212.

3.0 ENVIRONMENT COURT DECISION

3.1 The Environment Court issued their decision on 12 June 2018 – *Cabra Rural Developments Limited & Ors v Auckland Council* [2018]NZEnvC90 (**the decision**). The decision is available at the following link: https://nzftp.dlapiper.com/?u=ZmQA&p=zvK9

3.2 The outcomes in the decision are summarised in A-H on pages 2-4 of the decision. For ease of reference these are set out in Annexure A to this memorandum.

3.3 In brief, the Council was not successful in these proceedings. The Environment Court has, having considered all the evidence before it, preferred the Rural Subdivision provisions that were set out in the IHP recommendations (subject to some refinements).

3.4 The Court has preferred the Rural Subdivision provisions that were set out in the IHP recommendations over: (a) the provisions set out in the Council's decision; and (b) the alternative provisions put forward by some of the appellant parties.

3.5 A key feature of the IHP's provisions that have been preferred by the Court is that they enable subdivision rights in exchange for the protection of indigenous vegetation or wetlands that meet the factors for identification of Significant Ecological Areas (**SEAs**) in Schedule 3 of the AUP as well as those listed in the SEA Schedule. By contrast, the Council provisions only enabled subdivision opportunities for indigenous vegetation and wetlands in the SEA Schedule in the Auckland Unitary Plan.

3.6 Another key feature is that the IHP's provisions supported by the Court enable revegetation planting to occur on sites where the planting is not contiguous to existing SEA indigenous vegetation on a site. The Council's provisions enabled revegetation planting only to occur contiguous to an existing SEA. In some cases the Court's decision also supports different thresholds for the size of feature eligible for protection and the number of sites that can be created 'in-situ' on the site where the feature is located.

3.7 Overall, the Court's decision promotes a more generous incentive subdivision regime compared to that in the Council decisions version of the plan.

4.0 APPEAL

4.1 The Council will need to decide whether (or not) to appeal the decision to the High Court.

4.2 The Council delegations provide that the decision whether or not to appeal the Environment Court decision to the High Court sits with John Duguid, General Manager – Plans and Places, in consultation with James Hassall, General Counsel.

4.3 The only ability to appeal to the High Court is on a question of law. Any appeal (if there is one) would need to be filed with the High Court within 15 working days after the date on which the Council was notified of the Environment Court decision (by 3 July 2018).

Annexure A

A. The appeals are allowed to the extent that the Independent Hearing Panel (IHP) recommendation is to be substituted for the decisions of the Council subject to the following:

(a) the changes to the Plan made by the Council that were not appealed;
(b) changes to the Plan made by agreement of the parties.

B. The Court annexes as "J" a general guide to amendments appropriate to the Plan. The Council is to circulate its proposed amended provisions, including:

(a) provisions similar to "J";
(b) agreed changes as appropriate;
(c) proposed wording for staging (based on Ms Pegrume's evidence), within 20 working days. Parties are to provide their comment within a further 15 working days. Council are to file and serve its preferred wording with the Court in a further 10 working days. Where there remains a difference, the Council memorandum shall set out the various wordings proposed, and its reasons for their preference.

C. Other parties are to provide their comments in five working days. The Court shall then consider whether to issue a final decision or hold a hearing on the wording.

D. The Court recognises that there should be improvements to the transferable rights subdivision system (**the TRSS**) to make this simpler to be utilised by both subdividers and donors. It makes recommendations for the type of changes that might be introduced through a plan change process. We conclude that such extensive changes are not justified in the current appeals, as:

(a) they would not have been signalled to the public sufficiently in submissions;
(b) the implications of such changes in terms of the balance of the plan have not been able to be understood or appreciated for the reasons set out in this decision.

E. The Court also considers that there is some merit to the concept of in-situ developments of four or more lots being required to undertake a Master Plan process. We have concluded that a status change goes beyond the scope of the current appeals, and may have consequences which we have not been able to fully ascertain given our limited evidence in relation to the comparison of plan provisions.

F. By way of guidance for any Change considered by the Council, we conclude:

(a) that there should be a clear preference for the use of the TRSS in the Countryside Living zone where possible;
(b) that SEA incentive subdivision provisions could relate to either a small number of sites in-situ or for larger developments a Master Plan approach to ensure that the issues identified in this decision are addressed, including particularly:
(i) long term protection, enhancement and improvement of significant indigenous vegetation;
(ii) long term enhancement and improvement of other indigenous

vegetation;
(iii) avoidance of the consequences of residential dwellings on indigenous vegetation (whether significant or otherwise);
(iv) avoidance of adverse effects on significant vegetation and significant effects on indigenous vegetation as a result of any developments;
(v) achieving appropriate access to the building site and separation to ensure that multiple objectives and policies of the Auckland Unitary Plan can be met.

H. This does not appear to be an appropriate case for costs. In the event that any party seeks to make an application, they are to file the same within twenty working days of the date of this decision; any response is to be filed within ten working days.