IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2062
[2022] NZHC 3620

UNDER	the Resource Management Act 1991 ("RMA")
IN THE MATTER	of an appeal under s 299 RMA against a decision of the Environment Court on an appeal under s 120 RMA
BETWEEN	DRIVE HOLDINGS LIMITED Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing: 15, 16 June 2022

Appearances: D Allan for the Appellant
D Hartley and A Buchanan for the Respondent
G K Chappell for the s 301 Party

Judgment: 23 December 2022

JUDGMENT OF HARVEY J

This judgment is delivered by me on 23 December 2022 at 10am pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors:
Ellis Gould, Auckland
DLA Piper, Auckland

Counsel:
Lara Burkhardt, Barrister, Tauranga
G K Chappell, Barrister, Auckland

Introduction

[1] Drive Holdings Ltd (DHL) sought resource consents on 16 August 2018 from Auckland Council for a multilevel apartment and retail development on its land on the corner of Tāmaki Drive, Patteson Avenue and Marau Crescent in Mission Bay. The application was declined 3 October 2019.[1] DHL then appealed that decision to the Environment Court. Following mediation, on 1 September 2020, DHL reduced the scope of its original proposal. Further changes were made in May and June 2021 while the appeal was in progress.

[2] In its judgment, the Environment Court considered that, in the context of DHL's application for restricted discretionary activity resource consents, the core issue was DHL's ongoing pursuit of over-height residential apartments "contrary to the opposition from residents, the Council and relevant experts". While considering that a re-design was required and that there could be a "consentable proposal," the Court was not satisfied that, as currently framed, the proposals were capable of approval. The appeal was dismissed on 14 October 2021.[2]

[3] DHL now appeals that judgment to this Court. It seeks orders that the decision be set aside, and that the application be remitted back to the Environment Court for a rehearing by a differently constituted Court. In reply, the Council's position is that that there was no error in law, and that DHL was simply dissatisfied with the decision and is seeking to re-examine the merits of the Environment Court's judgment.

[4] Ms Nathan, a resident who owns an affected property, has filed submissions as a s 301 party opposing the appeal. I have taken those submissions into account in my decision.

Grounds of appeal: alleged errors of law

[5] DHL alleges six errors of law, that the Environment Court:

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1 The development concerns a proposed mixed-use, multi-level development at 75-79, 81-87 and 89-97 Tamaki Drive, 6, 8-10, 12 and 14 Patteson Avenue, 26, 28, and 30 Marau Crescent, Mission Bay. The site is zoned Business-Local Centre in the Auckland Unitary Plan.

2 *Drive Holdings Limited v Auckland Council* [2021] NZEnvC 159.

(a) failed to provide any or adequate reasons;

(b) failed to make findings required of it under ss 104 and 104C of the Resource Management Act 1991 (RMA);

(c) applied an incorrect legal test, or had regard to an irrelevant consideration in the decision by requiring DHL to justify that the additional height sought was "warranted" or "justified";

(d) erred in its interpretation of the Auckland Unitary Plan (AUP);

(e) took into account irrelevant and incorrect considerations; and

(f) misapplied s 290A of the RMA by placing undue reliance on the outcome of the Council's first instance decision.

[6] DHL claimed that these errors are material as omissions because by failing to provide reasons or findings regarding key issues, the Environment Court deprived it of an understanding of the rationale for the decision and consequently how it might amend its proposal to secure approval. Further, DHL claimed that, regarding the errors stated at (c) to (f), they erode any sense that the decision is reliable and collectively suggest a flawed understanding of the AUP and the historic change it marked for allowing intensification.

[7] DHL sought that the decision be set aside and the matter remitted to the Environment Court for rehearing or reconsideration.

Background

[8] On 16 August 2018, DHL applied to the Council for resource consents. This process included public notification on 12 September 2018. Over the following year, the Council requested further information on 13 September and 4 October. A hearing before commissioners on the notified proposal was held between 30 July 2019 and 6 August 2019. Then on 3 October 2019, the Council issued its 83-page decision refusing the resource consents.

[9] The Council noted that the proposal involved the demolition of all existing buildings and the construction of two levels of basement and seven detached and semi-detached buildings above, ranging in height from four to eight storeys, arranged around an internal, raised plaza space. The proposed buildings were to provide for commercial units, some 100 individual residential dwellings, carparks and a cinema. The decision recorded that following public notification, a total of 699 submissions had been received: 626 in opposition to the application, 3 neutral and 70 supporting the application. In making its decision the Council considered specialist reports, the evidence of the applicant, the evidence of the submitters and specialist peer reviews.

[10] Ultimately, the Council considered that the application should be declined and resource consents refused but noted that it was "not an easy decision to make" and that "we hasten to add that there may well be scope for some additional height on the site". It recorded that "the effects generated by the development sit close to the point of balance between being appropriate and inappropriate". In giving a summary of reasons for their decision, the Council stated:

> Reasons for the decision
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> a. In terms of section 104(1)(a) of the RMA and having regard to any actual and potential effects on the environment of allowing the activity it has been determined that overall, the adverse effects of the proposal to construct a new multi-level mixed use development would be unacceptable. The excess height of the proposal will result in adverse visual and dominance effects on the amenity of the surrounding environment, including the local centre environment itself, nearby residential areas that overlook the site, and the wider landscape.
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> b. In terms of section 104(1)(b) of the RMA, the proposal is considered inconsistent with some of the key objectives and policies of the AUP(OP), particularly those related to:
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> i. the scale and intensity of development within the local centres being in keeping with planned outcomes identified in the AUP(OP) for the surrounding environment;
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> ii. managing the height and bulk of development to minimise adverse effects on adjoining residential sites and developments.
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> c. In terms of section 104(1)(c) of the RMA, there are no other matters considered relevant and reasonably necessary to determine the application.

[11] On 21 October 2019, DHL filed a notice of appeal of the Council's decision with the Environment Court. This was on the basis that the Council's decision would

not promote the sustainable management of resources and was otherwise inconsistent with the purpose and principles of the RMA and sound resource management principles and practice. Unsuccessful mediation between the parties was then held on 5 February and 16 March 2020. Following that, DHL filed and served a revised proposal on 3 September 2020 which reduced the overall scope of the development (the Revised Proposal).

[12] The Environment Court hearing initially commenced on 24 and 28 May 2021. Additional revisions were made by the applicant in a further proposal which was filed and served on 1 June 2021 (the June Proposal). The hearing resumed on 28 June and 2 July 2021. As foreshadowed, the Environment Court issued its decision refusing the appeal on 14 October 2021. The present appeal was filed on 3 November 2021.

The Environment Court decision

[13] The Environment Court began by noting at the outset of its decision that the large amounts of expert evidence adduced during the hearing did little to assist in determining the appropriate height, scale and bulk for the development beyond that implied by the AUP. Moreover, the Court highlighted its conclusion that the Commissioners had adopted a well-balanced approach to the application. Despite the change in proposal, the concerns the Commissioners identified remained the issues for the Environment Court.

[14] In addition, the Environment Court noted the major difference was the modification of the application both prior to and during the hearing, of which the most recent was the June Proposal which had been introduced three days into the hearing. It was suggested to the Court that if neither alternative were appropriate it should indicate the level of development and controls that should be in place. The Court recorded, "We are in a quandary as to the outcome in this case, particularly whether there may be a clearly consentable proposal".[3] It was not willing to consider such a wide range of design parameters that the Court would in effect "design the proposal".[4]

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3 At [8].
4 At [6].

However the Court was satisfied that on the evidence it had received the "key parameters" and "essential attributes" of the development.[5]

[15] The Court began by recording the features/character of Mission Bay and the applicable AUP zoning. The site subject to the application is zoned Business-Local Centre. The Court recorded that at the Council hearing the application was for a discretionary activity because a new movie theatre was proposed. The theatre had since been removed for the appeal hearing, meaning the application was for a restricted discretionary activity. While it was not formally reinstated into the proposal, all parties agreed that the theatre would be of particular benefit to the Local Centre. There were no issues identified with any additional criteria were the theatre re-instated so the appeal progressed on the basis of the proposal being restricted discretionary (with the possibility the theatre would be within the consented development).

[16] At [28], the Court gave a list of factors derived from the restricted discretionary criteria under the AUP. It considered these factors generally encompassed the parties' and the Court's concerns and that the grant of consent would turn on them. In selecting the factors, the Court referred to the amount of evidence it had considered:

> [28] The restricted discretionary activity criteria were the focus of a great deal of evidence, both as to meaning and achievement in this case. These were extracted from the AUP but contained in different parts of the plan – sometimes reflected with minor wording differences…

[17] The list contained a series of factors set out under the headings "General Factors", "Local Centre Factors", "Public Area Factors" and "Residential Area Factors", some of which (but not all) directly referenced an AUP policy.

[18] The Court then proceeded to describe the proposal, noting that there were several aspects of the designer's approach which were inconsistent with the AUP, particularly in relation to height, of which they said the result was:[6]

> an extremely large building, occupying the footprint to the outer boundaries of this site except on Marau Crescent and on the eastern side of the site facing the housing area. The resulting building is well over 18 m high on Tamaki Drive and Patteson

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5 At [7].
6 At [33].

Avenue, except where it approaches the other zones to the east on Tamaki Drive and facing Marau Crescent.

[19] The Court considered that the Revised Proposal was very similar to that given to the Commissioners, with the exception of some redesign to the building as a whole and the glazing of the penthouse roof to create a floating roof concept and "lighten the design". Following that, and commenting on the June Proposal, which was presented three days into the hearing as an alternative where the overall height and scale had been reduced, the Court noted that the key features were:[7]

> (a) most of the buildings are five floors and over 18 m high but not by a significant margin (less than 1 m);
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> (b) the significant over-height floors are carried in the north western corner with Patteson Avenue and Tāmaki Drive to around 27RL[8] for the penthouse. There is a sixth-floor part way along Patteson Avenue from the corner to Marau Crescent. The other intrusions are relatively minor, such as the lift overruns. They are, nevertheless, all over 16 m occupiable floor area and the total height over 18 m above ground level; and
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> (c) there has been relocation of the plant from Building 4 to Building 5 on Marau Crescent. This is now within the 18 m height limit and on balance there was an acceptance that this was a better outcome than that originally proposed. Nevertheless, nearby residents on Marau Crescent opposite the site noted that this outcome may have lost many of the professed advantages to them of relocating bulk elsewhere on the site.

[20] Under a heading titled "The Core Issue", the Environment Court recorded its conclusion that the real issue in this case was the appellant's continued pursuit of over-height residential apartments on the site, notwithstanding clear opposition by residents, the Council and relevant experts. The Court noted there were persistent over-height and bulk elements in the proposal which were an over-intensification of these sites beyond that anticipated in the AUP. The Court agreed that the Council had correctly applied the AUP approach, which balanced the various issues in the area and with particular consideration given to the height relationships between the headlands, the residential areas, the reserve areas on the foreshore and the Local Centre.[9]

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7 At [41].

8 RL stands for reduced level, and is usually measured from ground level: see Auckland Unitary Plan, Chapter J.

9 At [44].

[21] The Court considered that the same issues of height and bulk arose in this case, and that faced with the same proposal the Council was at first instance, they too would have refused consent. The question for the Court was whether the new proposals went far enough to addressing those issues.[10]

[22] The Environment Court then recorded its findings on key issues. First, it considered whether the development reinforced the centre as a focal point. It found that it would not, as it would disrupt the existing focal point of the Local Centre. Secondly, it considered the proposal's prominence, making a neutral finding that the height of the proposal served little purpose for marking out the Local Centre purpose but if retail such as a restaurant or bar were placed on the first floor, this could justify an over-height building if it did not detract from the Local Centre role. Thirdly, it considered public area outcomes and found that the public and retail space provided was low compared to the significant intensification of the area because of the proposal.

[23] Fourthly, and importantly, the Court considered height standards. The Local Centre description in the AUP sets a "clear expectation as to outcome" with buildings being generally four to five storeys with a height limit of 16 m (allowing up to 18 m for building form fluctuations).[11] The 16 m limit is for occupiable space, to the ceiling of the occupied floor. If five storeys were desired, level two and above would have low ceiling heights. The 18 m provision is "not a de facto height for the overall building". Once the 16 m occupiable space height provision is breached, the plan makes all activity above that area restricted discretionary activity. The 18 m "total building height" provides for discrete articulated areas, primarily to avoid the constant use of flat roofs. The Court concluded:

> [68] We conclude this demonstrates the overall intent of the AUP was to allow a generous four-storey development in general, while acknowledging there may be occasions where a five-storey development might be appropriate. That generality does not mean, of course, that in some circumstances lower buildings may not be appropriate or that higher buildings are appropriate.

[24] After recording findings on key issues, and considering case law provided by counsel, the Environment Court determined, that the core issue, as foreshadowed, was:

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10 At [48].
11 At [61].

what extra occupiable height over 16 m and total height of building can this Local Centre zoning carry to achieve the outcomes envisaged under the AUP and the RMA? The Court noted that the AUP provisions that apply to this zone in Mission Bay, in particular the height provisions, were carefully constructed by the Independent Hearing Panel (IHP) after a fine-grained analysis of the specific features of the area, such as historical connections to buildings, its position as a major thoroughfare, near to a public reserve and significant residential housing on the upper layers of the hills behind. It found that DHL was still seeking to maximise the height along the balance of the frontage on Tāmaki Drive, which increased impact on these residents. "Building 1" was a significant two storeys, or eight metres, over the occupiable limit. There would be shadowing effects on the public space and amenity of the road. There was no justification for extra height for the private residential development on floors three to five as there was no commensurate public benefit.

[25] After noting the issues, the Court concluded that while issues of height were not insurmountable, neither proposal was currently consentable as there was no design to justify the height intrusion. The Court also noted that there was a palpable frustration by various residents who gave evidence including resident groups who considered that the proposal was clearly a significant increase in impact over that envisaged after a hearing before the IHP Commissioners.[12]

[26] In concluding, the Court found that neither the Revised Proposal nor the June Proposal was acceptable. In summary, refusing the appeal, the Court recorded:

> [120] Although there are two variations to this proposal, we conclude neither achieve nor implement the AUP or meet the wider purpose of the Act. We note context of the issues that were clearly identified from the very first meetings between the developer and the Council, reflected both in the decisions of the IHP and AUP and the decision of the Commissioners on this application.
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> [121] It must follow that it is not for this Court to redesign a consentable proposal and we refuse to do so. We conclude that a redesign is required but there are many issues that are affected by such a redesign. On the basis of the applications put to this Court, we refuse consent and at this stage are not satisfied there is currently a consentable proposal before us.

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12 At [112].

Legal principles

[27] Section 299 of the RMA provides:

> **Appeal to High Court on question of law**
> A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

[28] Regarding s 299, Ms Hartley and Ms Buchanan for the Council pointed to the recent summary of the principles in *Speargrass Holdings Ltd v van Brandenburg (as trustees of the Flax Trust)*.[13] DHL referred to the summary of principles in *Ayrburn Farm Estates Ltd (as trustees of the Millhouse Trust) v Queenstown Lakes District Council*.[14] The Court's approach on appeal from a decision of the Environment Court is well settled.

[29] In *Countdown Properties (Northlands) Ltd v Dunedin City Council*, it was confirmed that the Court will only interfere with decisions of the Environment Court if it considers that latter has:[15]

(a) applied a wrong legal test;

(b) concluded without evidence or one to which on the evidence it could not reasonably have come; or

(c) considered matters which it should not have taken account of; or

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

[30] Allowing for the specialist nature of the Environment Court, this Court will give it "some latitude in reaching findings of fact within its areas of expertise".[16] The question of weight to be given to the relevant considerations is for the Environment Court alone. Any identified error of law must be material – in the sense that it has materially affected the result of the Environment Court's decision. In this context,

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13 *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009. See also *Speargrass Holdings Ltd v Van Brandenburg* [2019] NZCA 18.

14 *Ayrburn Farm Estates Ltd (as trustees of the Millhouse Trust) v Queenstown Lakes District Council* [2012] NZHC 735.

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

16 At 153.

Wylie J's comments in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, cited in *Speargrass Holdings Ltd*, are also apposite:[17]

> [31] Relief ought not to be granted unless an identified error of law has materially affected the Environment Court's decision. The Environment Court is the sole decision maker responsible for the balancing process required under the Act, and that process is an integral part of the consideration of resource management consents under s 104. The weight to be given to the assessment of relevant considerations is for the Environment Court and is not for reconsideration by this Court as a point of law.
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> [32] It was also common ground that the Court must be vigilant in resisting attempts by litigants disappointed by Environment Court decisions to use appeals to the High Court in an endeavour to re-litigate factual findings made by the Environment Court. This Court can only intervene in such situations where the Environment Court has come to a decision to which, on the evidence, it could not reasonably have come. This can be described as a situation in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination. It is trite law however that the sufficiency of evidence, rather than the want of it, cannot amount to a point of law.

[31] In *Waterfall Park Developments Limited v Queenstown Lakes District Council* this Court underscored that Environment Court decisions may depend on planning, logic and experience "and not necessarily evidence."[18] That Court may also express a view on a matter of opinion within its expertise from which no question of law will arise.[19] Moreover, the weight to be attached to a planning policy will generally be for that Court to determine.[20]

Did the Environment Court fail to provide any or adequate reasons or fail to make findings under ss 104 and 104C RMA?

DHL's submissions

[32] Mr Allan submitted that the Environment Court failed to provide any or adequate reasons that identified the basis on which it distilled the AUP restricted discretionary activity provisions into the list of factors set out in [28] of the decision. Counsel contended that, in addition to the implied criticism of the appellant for "persisting" with the proposal, the Environment Court rejected the expert evidence as

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17 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271.

18 *Waterfall Park Developments Limited v Queenstown Lakes District Council* [2022] NZHC 376, citing *Guardians of Paku Bay Association Inc v Waikato Regional Council,* above n 17, at [33].

19 *Guardians of Paku Bay Association Inc v Waikato Regional Council,* above n 17, at [33].

20 At [33].

"providing little assistance" without explaining in detail how it engaged with that evidence and how it was of limited assistance. Mr Allan argued that the Environment Court also failed to record its assessment regarding the nature, location, scope and significance of the relevant potential adverse environmental effects and evaluate the proposal in terms of relevant matters over which the AUP restricted its discretion.

[33] Turning to the "factors" mentioned in [28] of the decision, Mr Allan contended that the Environment Court's list of factors deriving from the AUP restricted discretionary activity assessment criteria was not explained. According to counsel, the list used "loose and generic" wording which can be contrasted with the applicable AUP provisions that specify the extent to which a matter is relevant. Mr Allan argued that the decision does not explain how and to what degree the list reflects those provisions. Further, counsel submitted that there is no explanation as to whether, and if it did, the Court assessed the proposal in terms of the list.

[34] Moreover, Mr Allan contended that while some of the matters in the list are cross-referenced to specific provisions, they were the exception. There is no explanation from the Court as to how it derived the list from matters set out in the flowcharts provided to the Court of applicable instruments and provisions. In a restricted discretionary activity context, the scope of the Court's enquiry is limited by the legislation to those matters identified in the AUP provisions. The Environment Court, according to counsel, by replacing precise wording of the AUP provisions with a broadly expressed list of factors departed from the form of analysis necessary under ss 104 and 104C of the RMA and the AUP.

[35] Mr Allan underscored that at [29] of its decision, the Environment Court did not return to the factors identified in that paragraph or evaluate the application against them. Accordingly, he argued that DHL is prevented from understanding the degree to which the list influenced the outcome and therefore whether the Court took an irrelevant consideration into account and/or failed to confine itself to the matters required by the legislation in the AUP. The Court, having identified those matters that needed to be examined both specifically and generally was then required to do so and explain reasons for its findings. Unfortunately, Mr Allan contended that the decision

does not do so with the result that the appellant cannot understand the link between the AUP provisions and the list, and the list in the refusal of consent.

[36] On the issue of rejecting expert evidence, Mr Allan submitted that 10 witnesses gave evidence – three urban designers, four landscape architects and three planners. They were highly qualified, experienced and respected, appearing before the Environment Court on a number of occasions. Counsel contended that, despite this, the Environment Court's decision does not engage with the expert evidence regarding matters in contention while dismissing its usefulness at [2], [7], and [118(e)]. More importantly, according to Mr Allan, the decision does not contain any substantive analysis or evaluation of any of the evidence. There is also a lack of engagement with evidence of any particular witness. There is no reference to the Environment Court's reliance upon expert evidence concerning relevant potential adverse effects including visual effects.

[37] Overall, counsel contended that the decision contains no reasons for the Environment Court's rejection of the relevant technical evidence on the key issues for determination. In any event, Mr Allan argued that the fact that the expert witnesses held different opinions should come as no surprise, given varying approaches as a result of the AUP. Equally concerning, according to Mr Allan, the Judge and one of the Commissioners even questioned the relevance of urban designer and landscape architects' evidence generally. While those views did not find their way into the decision, the appellant's impression is that they did influence the Court's judgment regarding that evidence.

[38] Mr Allan submitted that the Environment Court failed to make findings, refer to the evidence and provide reasons as it was obliged to do under ss 104 and 104C of the RMA regarding three matters. First, the nature, scope and significance of relevant potential adverse environmental effects of the proposal. Secondly, evaluating the proposal in terms of the relevant matters over which the AUP restricted its discretion. Thirdly, the Court's evaluation of the effects of the proposal on the environment regarding the assessment criteria in the AUP concerning restricted matters of discretion.

[39] Moreover, according to counsel, the decision failed to address the matters of discretion in any detail and instead sought to rely on the conclusions in the *Panuku* case.[21] Mr Allan submitted that the Court also failed to clarify the relationship between the AUP provisions and the factors set out at [28]. Counsel then referred to [101], [103]–[108] and [114]–[121] of the decision as "arguably" instances of the Court discussing the effects of the proposal before levelling criticisms at each example cited.

[40] For instance, regarding whether an alternative proposal might be granted the Court stated that "even minor deviations from the AUP requirements can have impacts on the surrounding properties and landowners". According to Mr Allan this was at best a "generic statement" which failed to identify whether the Court considered that such impacts arise and if so, to what extent and regarding which properties. Counsel contended that the Court also failed to evaluate the location, scale and severity of such impacts. It did not make findings on the extent to which those impacts amount to determinative adverse effects on the environment. It also failed to evaluate the impacts against the applicable AUP restricted discretionary activity criteria.

The Council's submissions

[41] Ms Hartley submitted that, while a general principle exists that it is expected a court or tribunal will give reasons for its decisions, citing *Murphy v Rodney District Council*,[22] it does not necessarily follow that a court must give a reason for every point that may have been argued. In *Auckland Council v Cable Bay Wine Ltd* this Court determined that, while the Environment Court gave reasons on one point that could be described as "overly abbreviated", nonetheless the reasons given could not be described as being "so inadequate to constitute an error of law."[23] In any event, counsel contended that the appellant's proposals needed to be considered as restricted discretionary activities.

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21 *Panuku Development Auckland Ltd v Auckland Council* [2020] NZEnvC 24.

22 *Murphy v Rodney District Council* [2004] 3 NZLR 421 at [26]. See also *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC) at [65].

23 *Auckland Council v Cable Bay Wine Ltd* [2021] NZHC 3290 at [67].

[42] Counsel submitted that from the commencement of the hearing the Environment Court circulated a draft list of factors which no party including the appellant objected to at the time. In this context, at [28] the Environment Court grouped those factors into four categories: general, local centre, public area and residential area. Ms Hartley argued that while the appellant claimed that it had three core concerns with this list, the Environment Court had identified from the start of the hearing that the key issue on appeal was the "bulk and scale" of the proposed buildings over multiple sites. She further submitted that "all parties who took part in the hearing had agreed…with that proposition". Ms Hartley thus underscored that this first ground of appeal must be considered against the background that the bulk and scale across the site was the principal issue for consideration.

[43] Moreover, counsel contended that the list was derived from the restricted discretionary activity criteria in different parts of the AUP. The Environment Court comments at [28] and [29] confirmed that the Court decided that the factors in the list encompassed those concerns raised by the parties. In addition, Ms Hartley argued that the Court noted that the AUP restricted discretionary criteria were the focus of much evidence both as to meaning and achievement. Counsel then submitted that at [30] of the decision, while there were other relevant issues concerning the Revised and June Proposals, they were not contested in evidence. Equally importantly, counsel contended that there are sufficient reasons at [28] to [30] of the judgment that identify the basis on which the Court distilled the AUP restricted discretionary activity provisions into the list of factors contained in [28].

[44] As to the appellant's criticism over the claimed use of "loose and generic wording" Ms Hartley argued that the Environment Court decided to adopt a thematic approach regarding the AUP provisions relevant to the Court's assessment and this approach was both reasonable and acceptable. Counsel emphasised that the Environment Court was not obliged to engage with every claim allegedly relevant to the planning documents as asserted by the appellant. As to the distillation of the list of factors, Ms Hartley submitted that there are more than sufficient reasons at [28] to [30] identifying the basis for the Court having distilled the AUP restricted discretionary activity provisions into the list of factors referred to at [28].

[45] Regarding the claim that the decision is devoid of an explanation as to whether the Court assessed the proposal in terms of the list, this too is unsustainable according to Ms Hartley. Counsel highlighted that the decision engages with the central and determinative issues arising from the general, local centre, public area and residential area factors set out at [28].

[46] Turning to the assertion that the Environment Court did not provide any or adequate reasons for rejecting the evidence as providing "little assistance" when referring to [2] and [118] of the decision, Ms Hartley submitted that this claim is also not sustainable. The Council contended that the appellant overstated the Environment Court approach to the expert evidence because the comments in those two paragraphs do not suggest all the evidence was rejected.

[47] Instead, Ms Hartley argued, some of the expert evidence was considered by the Environment Court to be of limited assistance to help in the assessment of the relevant issues. In addition, other parts of the decision make it plain that the Court did take into account the evidence. For example, counsel cited the reference to whether the corner of Tāmaki Drive and Pattison Ave was a key focal point. Ms Hartley referred to [49] where the Environment Court prefaced its conclusion with the statement "after considering all of the evidence, the AUP provisions, the Commissioners' decision and our own inspections...".[24]

[48] Counsel also cited [89] and [90] of the decision as further examples of the Environment Court referring expressly to the evidence of the parties and then explaining why it considered some of the evidence of limited benefit to its assessment. Moreover, counsel contended that the Environment Court at [90] underscored its earlier criticism in the *Panuku* case that where experts use different points of reference in their evidence, that approach will not assist the Court in its assessments.[25] Accordingly, Ms Hartley argued that it cannot be said that the Court rejected "all of the expert evidence" as asserted by the appellant. The Court was also entitled to decide the weight it would give to any of the evidence and the extent it would rely on its own expert knowledge as a specialist court.

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24 *Drive Holdings Ltd v Auckland Council*, above n 2, at [49].
25 *Panuku Development Auckland Ltd v Auckland Council*, above n 21.

[49] Ms Hartley submitted that the appellant has mischaracterised the Environment Court's obligations under ss 104(1) and 104C since the legislation is devoid of any requirement that the Court is obliged to specify in its judgments the nature, location, scope and significance of a proposal's potential adverse effects. Instead, the Council contended that all the Court was required to do was to consider the merits of the proposals and have regard to their effects and the relevant parts of the AUP insofar as they concerned the issues over which the Court's discretion was confined. Counsel underscored that there is nothing in the Environment Court's decision that suggests its consideration of the relevant effects and matters of discretion departed from that approach.

[50] As to the appellant's criticism of a lack of clarity in the decision on the link between the assessment criteria at [55] and the factors at [28], Ms Hartley contended that this was also unjustified. As mentioned, the factors at [28] were derived from the Court's thematic approach when considering the points raised by the AUP matters of discretion and assessment criteria. Put another way, counsel argued that contrary to the appellant's view, the Court was not required to engage with all of the relevant AUP provisions. Further, Ms Hartley submitted that there was nothing unreasonable in the Court citing one of its own decision for a comparable analysis of the particular provisions of the AUP relevant to the appeal.

[51] Moreover, counsel contended that the alleged errors cited by the appellant must be viewed in context, notwithstanding that some of the appellant's comments appear to simply revisit the merits. At [42] and [101] of its decision the Environment Court underscored that the core issue were the over-height and over-bulk elements of the proposal. This then confirmed, according to Ms Hartley, that the decision does have regard to and provide conclusions on the adverse effects of the proposals concerning the central issues while recording reasons for those conclusions. As examples, counsel referred to [106]–[108] and [114] of the decision, highlighting that the Court did reach conclusions about both proposals, the Revised and the June versions.

[52] In addition, Ms Hartley refuted the appellant's contention that private views are not protected under the legislation, citing the decision of Whata J, *Ennor v*

Auckland Council, in support.[26] According to counsel, the impairment of views can be a relevant consideration when assessing the effects of the "bulk of a proposed development" where it infringes development standards, unless the relevant plan expressly excludes consideration of private views. Ms Hartley pointed out that no such exclusion exists here and so the Environment Court was correct to consider the impairment of private views issue in its decision when assessing the appellant's proposals.

Anna Nathan's submissions

[53] Ms Chappell submitted that her client supported the position of the Council on the point of law appeal question, citing *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*[27] and *Bryson v Three Foot Six Ltd* in support.[28] Counsel underscored that for an appeal of this kind to succeed, an express misdirection of law was required. Alternatively, the decision under appeal must be one that no Environment Court properly directing itself could have reached. Therefore, according to Ms Chappell, if the Environment Court has stated the law correctly or if the error was not material, this Court cannot intervene. If, however, the error was material then this Court could do so. Similarly, intervention is permitted where, regardless of how the Court appeared to direct itself on the law, no Court that had properly directed itself could have arrived at that decision.

[54] In this case, according to counsel, the alleged error of law goes to style and manner or "thoroughness" as to expression of the Environment Court's understanding of the law that do not amount to an error of law. Accordingly, there are no grounds for this Court to intervene, Mr Chappell argued.

Discussion

[55] In summary, I do not accept the appellant's argument that the Environment Court failed to give reasons or that if it did, those reasons were inadequate. In *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings*

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[26] *Ennor v Auckland Council* [2018] NZHC 2598 at [40].
[27] *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2012] 3 NZLR 153.
[28] *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 (SC).

Panel the Court of Appeal affirmed the principle that, while there is no invariable obligation, a court or tribunal should give reasons for its decisions.[29] The Supreme Court in *Shirley v Wairarapa District Health Board* also confirmed that, even where a discretion is being exercised by a court, it must be on a principled basis, or the decision will be unacceptably arbitrary.[30]

[56] However, I also agree with Ms Hartley's submission that, despite the confusion that can arise from time to time between the authorities, it is not essential for the Environment Court to provide a detailed discussion on every element of an appellant's case and every aspect of its evidence to a level of minutiae and granularity that would be both impractical and unreasonable.[31] While it could be suggested that at times the Environment Court's decisions were brief, nonetheless, I consider that it is not accurate that on the relevant issues that were before that Court it failed to give reasons in arriving at its principal conclusions.

[57] In relation to the list of factors set out at [28] of the decision, there is no suggestion that those factors were irrelevant and therefore wrongly taken into account. All that is alleged by DHL is that the Court did not give reasons for selecting those factors. However, the factors are quite clearly derived from the applicable AUP policies and objectives, as stated by the Court. In particular, they have an obvious connection to Chapter H11 of the AUP, focussing as a whole on the relationship of the proposal to the Local Centre and its features. To the extent the factors are further articulated and/or simplified beyond the AUP, that is part of the specialist role of the Environment Court to interpret and apply the plethora of planning instruments. Additionally, the origin of some factors is expressly identified.

[58] I also accept the argument that the core issue before the Environment Court, and the Council prior, concerned the scale, height, and bulk of the proposed development as a whole across the appellant's land. Both parties agreed with this, and the list of factors was accordingly designed to encompass the parties' and the Courts'

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29 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2019] NZCA 175, at [46] citing *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [75].

30 *Shirley v Wairarapa District Health Board* [2006] 3 NZLR 523 at [16]. See also *Ngāti Hurungaterangi, Ngāti Taeotu me Ngāti Te Kahu o Ngāti Whakaue v Ngāti Wahiao* [2017] 3 NZLR 770 (CA) at [97] to [107].

31 See *Contact Energy Ltd v Waikato Regional Council*, above n 22, at [65].

concerns. This was clearly stated by the Court at [29] of its decision. Accordingly, the claim that the Environment Court did not justify the factors set out at [28] of its decision is rejected.

[59] Moving to the claim that the Environment Court erred by failing to give reasons for rejecting expert evidence, I do not accept that this was the case. First, the Environment Court stated that some of the evidence was not helpful or of limited assistance because it either did not go beyond the guidelines implied in the AUP or was irreconcilably in conflict. In particular the Court found that the use of multiple scales for landscape assessment meant the evidence was of limited usefulness.[32] Second, the Environment Court is not required to expressly refer to all of the evidence and make a finding in relation to every aspect of it.[33] Such an approach would be cumbersome in the context of appeals which often have lengthy bundles of evidence. As was stated in *Contact Energy v Waikato Regional Council*:[34]

> There is no error of law by failing to articulate all of the reasoning provided it is clear that the Court turned its mind to the relevant statutory provisions and had evidence to justify a conclusion: *Takamore Trustees v Kapiti Coast District Council*. The depth of reasoning that must be expressed will vary depending on the subject matter, but here it is clear that the Court, faced with conflicting expert opinions, made its decision based on the evidence it heard and its own expertise.

[60] Accordingly, the claim that the Environment Court erred by failing to give reasons for rejecting expert evidence is rejected.

[61] Finally, under this heading is the claim that the Environment Court failed to make findings or give reasons under ss 104 and 104C of the RMA. This claim was repeated under both the first and second grounds of appeal so I deal with it once here. Again, there is no basis for this claim. First, I have already found above that at [28] the Environment Court highlighted the relevant factors derived from the AUP that were most pertinent to the appeal. Because they are derived from the AUP, they engage s 104(b) and s 104C(1)(b), and findings on those factors are findings under

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32 At [90].
33 *Contact Energy Ltd v Waikato Regional Council*, above n 22.
34 At [92] (citations omitted).

those sections. As I have summarised above at [21]–[22], the Environment Court set out its finding in relation to key issues with reference to these factors.

[62] In general, these grounds of appeal fail to appreciate the context of the Court's decision. The Environment Court had before it the granular decision of the Council. That decision was adopted (so far as it was relevant to the Revised and June Proposals):

> [46] Section 290A of the Act requires us to have regard to the decision at the Council level. We do not consider a full recitation or analysis of the Council Commissioners' decision on this application is either helpful or necessary. There was little, if any, criticism of the methodology or legal approach of the Commissioners, and *we endorse their analysis and summary of the issues*.

[63] The task for the Court, having agreed with and referred to the Council's analysis, was to assess whether either of the new proposals changed that analysis. The clear issue was the over-height nature of the proposal which was a common feature of every iteration of the proposal. In my assessment, the rationale was clear and so these grounds of appeal must fail.

Did the Environment Court apply an incorrect legal test and require DHL to justify the additional height sought?

DHL's submissions

[64] Mr Allan submitted that the Environment Court had applied an incorrect legal test or had regard to an irrelevant consideration by requiring the appellant to justify the additional height sought above the zone height standard. According to counsel, at [57], [109]–[111] and [118], it appeared that the Court had assessed the proposals on the basis that it was the appellant who was required to justify how, in a trade-off between height infringement and additional benefits, the change was warranted.

[65] In addition, Mr Allan contended that that approach by the Environment Court was inconsistent with the scheme of the legislation because there is no "justification" threshold in ss 104 and 104C. Further, counsel argued that the AUP provisions do not have a justification requirement. More importantly, s 104 requires regard to be had to the effects on the environment of the proposal. Mr Allan submitted that any height

infringement must be assessed only in the context of matters where the Court's discretion is restricted and the relevant AUP provisions.

The Council's submissions

[66] Ms Hartley submitted that there was no error of law because the appellant has simply referred selectively to parts of the decision which are not read in context. According to counsel, the Court was not requiring the appellant to meet an additional statutory test. Instead, Ms Hartley contended, the references made by the appellant to parts of the decision demonstrate that the Court was considering whether the proposed height of buildings in the proposals was appropriate in the overall context of the site, the zoning and relevant AUP provisions.

[67] Equally relevant according to counsel, was the point that the Court was well aware of the central appeal issue, as set out at [1], [7] and [42] of its decision, being the acceptability of the scale, height and bulk of the proposed development as assessed against the relevant considerations including the AUP. Moreover, Ms Hartley emphasised that the critical issue was the proposed *level* of intensification. This is also discussed at [61], [62] and [68]. Counsel then pointed out that the Court assessed many of the appellant's revised proposals as acceptable while noting that the height issue remained central.

[68] The Court confirmed that, even with certain changes proposed by the appellant, the effects of the height infringement were not mitigated. There was also a risk of potential shadowing effects from the Marau Crescent buildings which might affect public spaces. The Court confirmed such an approach was to benefit "the appellant over the public and residential amenity" which counsel contended were relevant matters for consideration. In the end the Court concluded that the proposals could not be consented with the result that the appeal was dismissed.

Discussion

[69] I consider that the Court did not impose an incorrect legal test. It was entitled to consider how the proposal gave effect to the objectives and policies of the Local Centre Zone under the AUP. Although the over-height aspect of the proposal did not

give effect to the objectives and policies of the zoning, other features may have. In undertaking its analysis, it would have been open for the Court to find that on the whole, other features of the proposal meant that, overall, it achieved policies and objectives for the Local Centre Zone, notwithstanding the over-height. That is all that my reading of the paragraphs cited by Mr Allan provides. I conclude that no error of law arises so this part of the appeal must fail.

Did the Environment Court err in its interpretation of the AUP or take account of irrelevant and incorrect considerations when considering height?

DHL's submissions

[70] Mr Allan submitted that the Environment Court wrongly took a height "limit" or "control" approach to the application. He contended that Rule 11.6.1 is not a height "limit" but rather a standard that, where breached by a proposal, triggers an additional resource consenting process under the restricted discretionary activity approach. As a result, he submitted that the Environment Court erred in law by referring to the height standard as a "limit", "control" or "restriction" and not a "standard".

[71] Secondly, Mr Allan argued that the Environment Court wrongly included exceptions, for example for plant rooms, within the 16 m occupiable height standard, rather than within the overall 18 m building height standard.

[72] Thirdly, Mr Allan submitted that the Environment Court took into account irrelevant and incorrect considerations in its decision. The Court incorrectly considered, in Mr Allan's submission, that the Independent Hearings Panel (IHP) that heard the submissions on the proposed AUP: (a) adopted a fine grain approach to the height standards applying to the site at Mission Bay and (b) adopted a height variation control for the site at Mission Bay.

[73] Mr Allan submitted that "height variation control" is a site-specific height standard that deviates from the general standard. It does not apply in Mission Bay, so the default height controls apply as set out in Standard H11.6.1. The publicly notified version of the AUP applied the (then) default Local Centre Zone height standard to Mission Bay. There is no reference, in Mr Allan's submission, in the IHP

recommendation reports or subsequent Council decisions to the detailed analysis for Mission Bay height standards as referred to by the Environment Court.

[74] Accordingly, Mr Allan argued that the Environment Court erred by referring to the IHP's fine grained approach and "height variation controls" in Mission Bay.

The Council's submissions

[75] Ms Hartley submitted that the appellant's criticism of the use of the terms height "limit", "control" or "restriction" rather than "height standards" as set out in Chapter H11 of the AUP is also misplaced. The Court's references to these alternatives does not amount to an error of law, according to Ms Hartley. This is because, she argued, the plain and ordinary meaning of Standard 11.6.1 confirms that it imposes a height "limit" which the Environment Court applied correctly in its decision. Further, when read as a whole, counsel reiterated that the Court was clearly aware that a restricted discretionary activity resource consent and assessment were needed if the height standard was infringed, which it was in this case.

[76] In addition, counsel contended the parties and the Court were aware that Mission Bay is not subject to a height variation control in the AUP with the result that the standard default Business-Local Centre Zone occupiable height standard of 16 m and total building height of 18 m applied. The Court was aware of the default Business-Local Centre Zone occupiable height standard of 16 m and total height of 18 m applicable to the site. The Court was also aware that a restricted discretionary activity resource consent and assessment were required where the height standard was to be infringed. All of which was evident from the parties' evidence and from the decision when read as a whole, according to Ms Hartley, citing paragraphs [61] to [68] of the decision. Any error would be of a technical nature only.

[77] Ms Hartley submitted that there was evidence before the Environment Court indicating that the appropriate height limits for the Mission Bay local centre had been the subject of consideration by the IHP. Counsel contended that the Court's finding at [44] that the Mission Bay height limits were the subject of objective submissions to the IHP, who gave consideration to the height of the local centre of Mission Bay, was a finding available to the Court on the evidence. Moreover, Ms Hartley submitted the

Court was simply observing it had agreed with the height limits in question as being appropriate when viewed at a fine grain.

Discussion

[78] I do not accept the appellant's arguments that the Environment Court misinterpreted the AUP. The wording of Standard H11.6.1(1) is that buildings "*must not exceed* the height in metres specified in Table H11.6.1.1". Under the purpose section the standard refers to "allow[ing] an occupiable height component to the height *limit*". The Environment Court's use of "limit" terminology is entirely consistent with the standard. As I have explained above at [69], it anticipated that an over-height building could be consented but exercised its discretion against that given the overall effect of the proposal(s).

[79] In addition, I consider that the Environment Court correctly interpreted Standard H11.6.1. The two metre "buffer" above total occupiable height allows for *only* "roof form, roof terraces, plant and other mechanical and electrical equipment". This list envisages discrete elements that sit atop the roof of the building. Nothing in [60], [66] or [103] of the Environment Court's decision is inconsistent with that approach. The point it was making is that occupiable space exceeding a height of 16 m is noncomplying, notwithstanding it is under the total 18 m building height. The additional two metres cannot be used for occupiable space if the building is to comply with Standard H11.6.1. Accordingly, this does not give rise to an error of law.

[80] Speculation as to the process undertaken by the IHP when updating the AUP is not relevant nor an appropriate challenge to the Environment Court's decision. The point was subject to some discussion during the Environment Court hearing. The Court put to counsel that the IHP received submissions that the height standard ought to be lower but nonetheless it retained both the "default" height standard and the zoning which included that standard. The subsequent finding it made in the decision that the height standard was purposefully applied for Mission Bay was available to it on the evidence.

[81] I am not satisfied that there is any substance to DHL's contention that the Court erroneously referred to "height variation control". As Ms Hartley submitted, the

parties and the Court were clear as to what height standard applied. If the language was slightly imprecise this was not material to the decision in any way. This element of the appeal must therefore fail.

Did the Environment Court err in its interpretation of the Local Centre Zone purpose?

DHL's submissions

[82] Mr Allan submitted that the matter raised in the fourth alleged error of law is that the Environment Court erred in its interpretation of the AUP in concluding at [60] that, "the primary purpose of the Local Centre intensification is to provide retail activity at a level commensurate with other development". DHL considers that the assertion is not reflective of the AUP provisions. Residential dwellings are a permitted activity in the Local Centre Zone, and the zone provisions make no direction as to the mixture of uses, beyond constraining residential development at ground level.

[83] Mr Allan contended that at [60] of the decision the Court focussed on the physical extent of retail activity in a centre. In doing so, he says it ignored the evidence for DHL that the retail space proposed will be of high quality. While the June Proposal includes some retail at Level 2 on the Tāmaki Dr/Patteson Ave corner, Mr Allan submitted DHL cannot economically increase the Level 2 retail in a new purpose-built structure.

The Council's submissions

[84] In light of Chapter H.11.1 regarding the local centre intensification, Ms Hartley argued that it was reasonable for the Court to anticipate there would be an increase in retail or other services congruent with the scale of the expansion of residential activities in the appellant's proposals. Paragraph [60] of the decision addresses this point, according to counsel. Moreover, Ms Hartley submitted that the reference to "expansion" in Chapter H11.1 refers to expansion in a general sense and not one that is limited to geographical expansion in a manner argued by the appellant. The Business-Local Centre Zone general and specific objectives and policies also make reference to centres being reinforced as community focal points which provide for the community's social and economic needs.

[85] As to DHL's contention that the Court ignored quality of retail space evidence and focused instead to the physical extent of the retail activity, counsel pointed out that the Court also had evidence from the parties' experts expressing the view that further changes were needed to the appellants' June proposal to, for example, enhance the character and social and economic function of Mission Bay, which would ensure consistency with the policy framework. In any event, Ms Hartley contended that the conclusions reached by the Environment Court on this matter were available to it based on all the material before the Court.

Discussion

[86] As a preliminary observation, this ground goes to the heart of the Environment Court's specialist jurisdiction to interpret and apply planning policy and give what it determines to be appropriate weight to policies and objectives. Mr Allan's challenge to the Court's emphasis on retail and public space over dwellings is a challenge to its specialist interpretation of the applicable Local Centre Zone AUP provisions and accordingly is not a point on which it is appropriate for this Court to intervene.[35]

[87] Having carefully considered counsels' submissions, I am not persuaded that there is any error. I agree with the Council that Chapter H11 emphasises the community's social and economic needs (while recognising that areas above and away from the street can be used residentially). Moreover, my conclusion is that its finding that the proposal did not contribute to these needs sufficiently to meet the purpose of the zone is an evidential finding available to it.

Did the Environment Court take account of an irrelevant consideration by referring to previous litigation?

DHL's submissions

[88] Mr Allan took issue with the Court's statements that:[36]

> There was a palpable frustration by various residents who gave evidence including resident groups. *The series of cases and disputes relating to the appropriate building heights within Mission Bay has still not led to any resolution of this issue.* In their view, this proposal is clearly a significant

[35] *Guardians of Paku Bay Association Inc v Waikato Regional Council,* above n 17, at [31] and [33].
[36] *Drive Holdings Ltd v Auckland Council,* above n 2, at [112] (emphasis added).

> increase in impact over that envisaged after a significant hearing before the IHP Plan Commissioners.

And:[37]

> Drive Holdings' position has been argued multiple times, and the IHP outcome is an appropriate approach to the height on this site.

[89] In addition, Mr Allan submitted that it is DHL's understanding that the issues raised by the Revised and June Proposal and addressed in the decision have not previously been considered, let alone argued on multiple occasions. He underscored that the proposal is the first publicly notified resource consent application by DHL on the site and the first on the site which seeks to exceed the zone height standard. Counsel contended that DHL cannot be criticised for exercising its right to appeal. The Environment Court hearing was the first and only occasion on which consent was sought for a proposal with the characteristics of the Revised and June Proposals.

The Council's submissions

[90] As to the claim that the Environment Court took account of an irrelevant consideration that the appellant's position had been argued multiple times, Ms Hartley submitted that the appellant had mischaracterised the Court's remarks at [112] of the decision. In short, she argued that the Court was simply making an observation regarding the evidence given by residents in the appeal. Ms Davies' evidence referred specifically to the residents' association's submission on the proposed AUP.

[91] In summary, Ms Hartley contended that the Environment Court was again entitled to make the findings that it did, while noting that the height limits in Mission Bay were the subject of a previous planning change hearing that involved the appellant. Further, the criticism of the Environment Court's decision at [118] is misplaced since what the appellant was proposing was for the Court to redesign the appellant's proposal. Ms Hartley contended that nothing turned on those points since the key issue was the height, bulk and scale of the proposals.

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[37] At [118(a)].

Discussion

[92] I agree with the Council's submissions. The statements of the Court refer to members of the community's opposition to increased height standards which has persisted through the IHP process. DHL's opposing view that buildings of 16 m (or more) are appropriate in Mission Bay is the "position" referred to at [118(e)] of the decision. It was open to the Court to find that in this case the "default" height standards resulting from the IHP process should not be breached.

[93] This ground of appeal must fail.

Did the Environment Court misapply s 290A by placing undue reliance on the outcome of the Council's decision?

DHL's submissions

[94] Mr Allan submitted that the Environment Court misapplied s 290A of the RMA by placing undue reliance on the outcome of the Council's first instance decision (which declined the publicly notified version of the proposal) and failing to evaluate the consequences of the changes made to the proposal to address the finely balanced conclusions in the Council decision.

[95] In addition, counsel contended that the Environment Court placed undue reliance on the negative outcome of the Council decision giving no consideration to the analysis which led to the finely balanced conclusions nor the specific matters of concern to the Commissioners.

The Council's submissions

[96] Ms Hartley submitted that the phrase "must have regard to" in s 290A was considered in the context of s 104 of the legislation in *Unison Networks Ltd v Hastings District Council*.[38] Counsel contended that the weight a first instance court gives to evidence or other relevant considerations is a matter for that court and cannot be impeached as an error of law citing *Guthrie v Queenstown Lakes District Council*[39] in

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38 *Unison Networks Ltd v Hastings District Council* CIV-2007-485-896, 11 December 2007 at [70].
39 *Guthrie v Queenstown Lakes District Council* [2022] NZHC 532 at [43].

support. Ms Hartley argued that it is evident the Environment Court gave attention and thought to the Council's decision while acknowledging that it did not need to reach the same conclusion about the threshold at which a modified proposal might be acceptable.

[97] It is also clear, Ms Hartley submitted, that the Court knew it was dealing with two different proposals compared with what had been considered by the Commissioners. Moreover, counsel contended that it is for the Court to decide what weight to give to the Council's decision. Even if the appellant's submission that the Court gave the Council decision too much weight was correct, which is not accepted, that in itself is not an error of law.

Discussion

[98] First, it is clear that the Court did consider the Council's decision. It in fact endorsed its analysis as set out at [46] of its decision. Accordingly, I conclude that there is no basis for the claim that the Court merely considered the outcome of the decision.

[99] Secondly, the Court also recognised that it needed to specifically assess the new proposals and keep in mind their impact on the detailed analysis undertaken by the Council.

[100] This ground of appeal seeks to challenge the outcome of the Environment Court decision because DHL's view is that the new proposals should have tipped the "finely balanced" conclusions of the Council. However, the Environment Court found neither proposal did so. That is a factual finding this Court will not interfere with. This ground of appeal also fails.

Conclusion

[101] As I have found there were no errors of law in the Environment Court's decision, I do not need to consider DHL's submissions as to the materiality of the alleged errors.

Decision

[102] The appeal by Drive Holdings Limited against the judgment of the Environment Court dated 14 October 2021 is dismissed.

[103] Costs memoranda can be filed and exchanged by the end of February 2023, taking account of the holiday period.

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Harvey J