IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	Of the Auckland Unitary Plan (Operative in Part) ("AUP")
AND	
IN THE MATTER	Of an application for resource consents by Drive Holdings Limited to demolish and construct buildings on land bounded by the southern side of Tamaki Drive, the eastern side of Patteson Avenue and the northern side of Marau Crescent being 75-97 Tamaki Drive, 6-14 Patteson Avenue and 26-30 Marau Crescent Mission Bay ("the Proposed Development").
AND	
IN THE MATTER	Of submissions by the Mission Bay Kohimarama Residents Association Inc

LEGAL SUBMISSIONS ON BEHALF OF
THE MISSION BAY KOHIMARAMA RESIDENTS ASSOCIATION INC

DATE 6 AUGUST 2019

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vbc VULCAN BUILDING CHAMBERS

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 These legal submissions are presented on behalf of the Mission Bay and Kohimarama Residents Association Inc.

1.2 Evidence is presented on behalf of the Association by:

(a) Mr Don Stock, chairperson

(b) Mr David Wren (planner).

1.3 The Association also relies on and adopts the evidence of Mr Stephen Brown (landscape architect) and Mr Putt (planner) on behalf of Support Mission Bay Incorporated.

2. KEY ISSUE FOR DETERMINATION

2.1 For the Association there one key issue: should consent for a proposal that grossly exceeds the height standards of the Business - Local Centre Zone of the AUP be granted? The Association says that the Application should be declined.

3. THE INTERESTS OF THE ASSOCIATION

3.1 Mission Bay is a relatively small suburb in Auckland that stretches from Tamaki Drive on the coast to the ridge of Kepa Road. It is variously described as an amphitheatre.[1] Because of this graduating topography many properties in the suburb have a vista or outlook directed towards the waterfront. In this sense the waterfront is like a stage.

3.2 The Mission Bay Kohimarama Residents Association Inc ("the Association") has more than 650 members and is involved in a wide range of projects.[2] It was an active participant in the development of the Unitary Plan.[3] The Association held public meetings about the proposal demonstrating very strong community interest and opposition to the proposal.[4] You will have heard from the many residents who consider themselves fortunate to live in this coastal community with proximity to the city, the coast, the reserve, as well as the many eateries and cinema that make up the current commercial activities in the Bay. They

[1] EIC S Brown at 24
[2] EIC D Stock at 2.3
[3] Ibid at 2.7(e)
[4] Ibid at 2.5

acknowledge that they share these facilities with large numbers of visitors to the Bay. Generally speaking, most residents would agree that some new life needs to be breathed into the commercial sites located on Tamaki Drive.

3.3 That said, height has long been perceived by the Community as integral to the way in which the coastal waterfront is developed. In some areas, for example, along the cliff face, high rise makes sense in principal where it is located at or below the cliff height.[5] However, buildings on the waterfront that sit at the forefront of the coastal interface, with residential development to the rear are altogether different. In this location the concern is that tall buildings will create a visual wall separating the rear of the Mission Bay community from the waterfront.[6] The many visitors to the Bay may seldom traverse the 'backseats' of the amphitheatre but the residents experience this relationship with the Bay on a daily basis as they live within and travel through the suburb.[7]

3.4 The evidence of Mr Stock outlines the Association's submissions to the IHP on the Applicant's site, noting that the Association specifically sought a height control of 10m. It is acknowledged that the height controls arising from the AUP zoning provisions were not what the Association had advocated for its coastal community as part of the AUP process. Nevertheless, it understands that the newly minted plan is the blueprint for the future development of Auckland, including Mission Bay and that the AUP has enabled further residential intensification through changes to the zoning controls.

3.5 As part of the AUP process, the Applicant supported the proposed notified provisions, being a height control of 16m occupiable height with a 2m roof space height, which was subsequently accepted.[8] The legal submissions of the Applicant are attached to Mr Stock's evidence.[9] The key points are:

(a) the height provisions of the Application site, including whether to apply a Height Variation Control, were the subject of specific submissions and consideration by the IHP as part of the AUP process; and

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[5] There is an area on Tamaki Drive between Mission Bay and Kohimarama that sits in front of the cliff face that is zoned Terrace Housing and Apartment Buildings.
[6] Orakei Local Board submission page 12 / EIC D Wren at 8.3
[7] EIC S Brown at 70
[8] EIC D Stock at section 3
[9] EIC D Stock Appendix One

(b) the Applicant supported these. There was no suggestion by the Applicant that these would not fit its development aspirations, which it had put on hold during the AUP process.[10]

3.6 In light of the Applicant's acceptance of the AUP height controls, the Association is surprised and disappointed that the Applicant has elected to submit an application that:

(a) significantly exceeds the height controls of the AUP that it so recently accepted (by between 55 and 73%);[11] and

(b) imposes the costs of defending these provisions (again) on the wider community.

3.7 In the Association's view this is a resource grab – a transfer of amenity values from existing to new (future) residents.[12]

3.8 The community appears to be almost unanimously opposed to the Application to the extent that it breaches the activity standards - as evidenced by consistent submissions from the Orakei Local Board.[13]

4. INITIAL CONSIDERATIONS - CHAPTER C PROVISIONS OF THE UP

Bundling

4.1 The Applicant argues that the consents should not be bundled. This approach is intended to narrow the ambit of the Panel's discretion in relation to height and is opposed.

4.2 Chapter C1.5 of the AUP provides that where a proposal consists of more than one activity, involves more than one type of resource consent and where the effects of the activities overlap, the activities may be considered together. The overall activity status of a proposal is determined by the most restrictive rule that applies to the proposal (Rule C1.6).

4.3 The IHP inserted the word "overlap" into these provisions to reflect case law on this point.[14] Case law has identified that a consent authority should not artificially split off components of the proposal on the basis of different activity classifications but that bundling may not be necessary where some of the proposal is for a restricted discretionary activity,

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[10] EIC D Stock Appendix One
[11] EIC B Putt at 4.1
[12] EIC D Stock at 2.7(k), EIC S Brown at 161
[13] The Board supports redevelopment of such a significant site as a transformational change only if all aspects of the proposals comply with the AUP.
[14] IHP Recommendation report

provided that the scope of the consent authority's discretion is relatively restricted and the effects of exercising the two consents would not overlap or have consequential or flow-on effects on matters to be considered on the other application.[15]

4.4 Mr Wren's evidence outlines the reasons why there is an overlay and why the applications should be bundled.[16]

Restricted discretionary activities – matters for consideration

4.5 Regardless of any approach to bundling (i.e whether the activity is discretionary or restricted discretionary), it is appropriate to make a full assessment of the objectives and policies of the UP and, even if the matters to be considered are restricted, in the context of height, that discretion is broad.[17]

4.6 Rule C1.8(1) "Assessment of restricted discretionary, discretionary and non-complying activities" states that when considering "a restricted discretionary, discretionary or non-complying activity, the Council will consider all relevant overlay, zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site where that activity will occur".[18] Specifically, where an activity is a restricted discretionary activity by virtue of infringing standards (i.e. the height rule), Rule C1.9 "Infringement of standards" provides that the Council will restrict its discretion to the following:

> a. Any objective or policy which is relevant to the standard;
>
> b. The purpose (if stated) of the standard and whether that purpose will still be achieved if consent is granted;
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> c. Any specific matter identified in the relevant rule or any relevant matter of discretion or assessment criterion associated with that rule;
>
> d. Any special or unusual characteristic of the site which is relevant to the standard;
>
> e. The effects of the infringement of the standard; and
>
> f. Where more than one standard will be infringed, the effects of all the infringements together.

4.7 It is submitted that the evidence of the Applicant, which undertakes a forensic analysis of the provisions of the Local Centre Zone in a bid to

[15] *South Park Corp Ltd v Auckland CC* [2001] NZRMA 350 (EnvC), where the Locke approach was held to be generally applicable.
[16] EIC D Wren at 4.4
[17] Ibid at 7.1
[18] Emphasis added

constrain matters for consideration, is misconceived. The correct analysis of the matters listed in Rule C1.9 is outlined in the evidence of Mr Wren, Mr Putt and Mr Brown.

5. HIERARCHY OF PLAN PROVISIONS

5.1 In undertaking its "novel approach" to the plan provisions, the planning evidence for the Applicant avoids providing context to the Local Centre Zone provisions in the AUP hierarchy. This job has therefore fallen to the submitters' experts.[19]

5.2 The objectives and policies, which are informed by the description (including reference to typically enabling buildings up to four storeys high in the zone),[20] are described as reflecting "a well evolved, and distinctly hierarchical, approach to town centre and local centre development, in which Local centres sit below the City Centre, Metropolitan Centre, and Town Centre Zones. This is reinforced by a cascading of height limits for future development within each zone".[21] Together the various provisions provide a gradation of development expectation.[22]

5.3 This is reinforced by Chapter A1.3 of the UP which refers to the hierarchical policy framework of the plan.

6. HEIGHT

Consideration of the future built environment

6.1 Assessments of the future environment must not be fanciful and must take a real world approach.[23]

6.2 In the absence of judicial decisions on the provisions of the AUP and guidance in respect of the provisions relating to height it is appropriate to draw on previous decisions of the hearings panels. The recent Council decision on the Panuku (Dominion Road) case about the future built environment are apt in this context and supported by the Association's planning evidence:[24]

> 202. In this regard, we make two observations, firstly that development within any adjacent Local Centre-zoned property (i.e. 109-111 Valley Road

[19] EIC B Putt at 2.4
[20] EIC D Wren at 9.11
[21] EIC S Brown at 14
[22] EIC B Putt at 2.6
[23] *Royal Forest & Bird Protection Soc of New Zealand Inc v Buller DC [2013] NZHC 1324, [2013] NZRMA 275 and Royal Forest & Bird Protection Soc of New Zealand Inc v Buller DC [2013] NZHC 1346, [2013] NZRMA 293*
[24] There is no permitted baseline as all new buildings require a resource consent. EIC D Wren at 9.5

> and 184-196 Dominion Road), or THAB-zoned property (i.e. 9-15 Carrick Place) or within the Special Character Overlay (i.e. 184-196 Dominion Road) requires consent as a restricted discretionary activity. In other words, the AUP does not "permit" the construction of new buildings on these sites, and so no buildings can be constructed as of right. While the "permissible" development standards for the zones or overlay do not appear likely to be fettered to a significant degree by the matters of discretion applicable to new buildings, there is some degree of conjecture as to the eventual building envelopes that would be able to be achieved in each case when the matters of discretion are taken into account. Secondly, there is a discretion as to whether a consent authority will disregard the effects of a permitted activity.
>
> 203. We have therefore adopted a precautionary approach in our consideration of the evidence in this regard, and apply our discretion not to adopt possible future building forms as a primary mitigation feature for the mitigation of adverse effects.

6.3 The photomontages, although subsequently partly modified in the Applicant's evidence.[25] envisage development that is uncertain and 'subject to a degree of conjecture' It is submitted that little weight should be given to these. For example, the existing residential developments such as the Bay Terraces Apartment Complex on Tamaki Drive are unlikely to change in the medium to long term, given their age and unit title ownership structure. The pohutukawa trees that buffer views from the reserve and coast may (unfortunately) suffer from disease such as myrtle rust.[26] Similarly, if the height limits are as flexible as the Applicant suggests then we have no idea what that environment might look like in terms of future height.

6.4 Even if the planned future environment is seen as reasonably certain it is nevertheless an environment that would be dominated by an 8 storey (28m) building in circumstances where the plan contemplates "a relatively low level of development (with maximum heights of 18m or four to five storeys) in a manner that provides a uniformity of development"[27] for the business zones, and a lesser (11m) limit for the higher density residential zones.

What is the starting point for the consideration of height – 16m or 18m?

6.5 Mr Wren addresses this point with reference to the purpose of the 2m roof form and considers that the Applicant's approach to the roof form, which utilises a flat roof, ignores the purpose of the height rule and the

[25] EIC Munro Appendix 2
[26] Oral evidence of Mr R Greenwood.
[27] EIC D Wren at 6.10

rule itself which is clear that the additional 2m is not to be used for occupiable space.[28]

6.6 In the Dominion Road case, where the maximum height limit was 13 m, the Panel commented:

> 231. As a further preliminary comment or observation, we discerned a general approach in the evidence for the applicant, and by reference to the drawings, that a simple maximum height of 13m had been adopted, without any particular appreciation for the nuance in the height standard that seeks to reserve the additional 2m above the 11m occupiable height for roof forms and those other matters noted in H11.6.1(3) above. The AUDP similarly observed that this additional 2m height allowance has been used for primary building form. We further note that it appears to have been adopted in fairly simple terms as the basis of "baseline" height comparisons and the analysis of shadowing effects….
>
> In this regard, the applicant has persisted, despite numerous questions on this point throughout the hearing, with adopting the 13m standard as a proxy for total elevation height. We consider this approach is to mis-interpret the clear approach and purpose of this standard. (emphasis added)

6.7 The Applicant has adopted a similar approach in this case. The Panel is urged to conclude that this case also involves a mis-interpretation of the clear approach and purpose of the standard.

Height controls – to what extent are they a limit or a starting point?

6.8 The Applicant seeks to argue that the height controls "invite" much taller buildings than currently exist in Mission Bay.[29] It is correct that the height limit in the Local Centre Zone is higher than the previous plan allowed for, but beyond that, the centres hierarchy and the resulting height controls in this zone indicate a limit, not a guideline or starting point. The ability to identify specific sites to which a height variation control may be applied through the plan process and the directive language in H11.6.1(1) gives credence to this approach.

6.9 Mr Wren also observes that:

> I consider that the relevant objectives and policies do not 'invite' buildings to be higher than height rules as building height is an important component of the policy framework distinguishing one business zone from another.

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[28] EIC D Wren at 9.7-9.8
[29] EIC M Absolum at 8.11

6.10 The onus on establishing that the height controls should be breached must fall to the Applicant having regard to the matters in s104 of the Act.

Case law - views

6.11 Although the statement that there is "no right to a view" is oft cited, that statement is not a complete statement of the law. Case law addresses height controls (and corresponding effects on views) in two distinct situations:

(a) Determinations as to controls developed as part of the district plan process;

(b) Determinations as to breaches of height controls as part of a resource consent application.

> 120 "While there is no doubt that the Act requires an effects based approach, the Act also provides for two distinct levels of assessment, at the planning and the resource consent stage. Site specific considerations are appropriate at the time a resource consent application is assessed, but not at the district plan stage"[30]

6.12 The plan development cases have established the proposition "long entitled in planning law that property owners are not entitled to have district scheme provisions made for the protection of views" [31]

6.13 However, for resource consent applications, the Courts have consistently held that to simply assert that there is "no right to a view", is not the 'whole story'. Impacts on amenity values from particular places must still be assessed.[32] The High Court has said:

> [40] Impairment of views are usually a relevant consideration when assessing the effects of the bulk of a proposed development on neighbours. "Views", among other things, inform amenity values. Furthermore, it is reasonable for neighbours to assume that effects on their views will be considered if the proposed development infringes bulk and location standards.[33]

6.14 Amenity Values are defined in s2 the Act as follows:

> **amenity values** means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its

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[30] *Foot v Wellington City Council* W73/98
[31] *AMP Society v Waitemata Harbour maritime Planners Authority (1982) 2NZLR 448; Ports of Auckland v The Americas Cup Planning Authority A100/91*
[32] *SKP Inc v Auckand Council* [2018] NZEnvC at 206
[33] *Ennor v Auckland Council* [2018] NZHC 2598 at 119

> pleasantness, aesthetic coherence, and cultural and recreational attributes.

6.15 The requirement to consider amenity values, and therefore effects on views, is reflected in the purpose and the objectives and policies in Chapter H11 that directly address height and the effects of height on amenity. [34]

6.16 However, as noted by Mr Brown, it should be borne in mind that amenity is also about more than views.[35]

Case law - Plan integrity / precedent effect

6.17 Cases relating to breaches of standards, particularly height, have also recognised considerations of justifiable expectation or plan integrity:[36]

> Owners are entitled to rely on a general anticipation that bulk, height and location requirements will be complied with, and persons will probably plan their own houses accordingly with justifiable expectation that benefits (such as view) will not be encroached upon. This was Mr salmon's principal argument but it overlooks the fact , as the Tribunal says, that there is no absolute certainty that the restrictions will be enforced, because of the powers of granting conditional use applications…, specified departures… and dispensations and waiver …. Views, of course, will be taken into account in such determinations.

6.18 In a similar case in Howick the Environment Court considered the implications of consenting a development that substantially breached the height controls of the former Auckland District Plan:

> [28] Fourthly, para (i) — any other matters relevant and reasonably necessary to determine the application. Mr Moffat raised the issue of plan integrity, and this head is the appropriate place to discuss that. Our view, put simply, is that if this proposal is given consent as a matter of discretion, it would be all but impossible to later credibly point to the height controls in the Plan as an effective means of avoiding, remedying or mitigating the adverse effects they were put in place to deal with. We accept that it is not necessary for the applicant to be able to say that this site is unique to avoid the precedent argument: - see eg Cooper J in Rodney DC v Gould and Gillain (High Court Auckland, CIV 2003-485-2182). <u>But this exceedance would be by such a margin, and on a piece of land materially indistinguishable from what surrounds it, that as a</u>

[34] H11.6.1 Purpose, Objective H11.2(7) and Policy H11.3(8) "Require development adjacent to residential zones ….to maintain the amenity values of those areas, having specific regard to dominance, overlooking and shadowing."
[35] EIC S Brown at 22
[36] The issue of what was argued as plan integrity, sometimes rather unhelpfully described as precedent effect, can also be considered under this head. *Blueskin Bay Forest Heights Limited v Dunedin City Council* [2010] NZEnvC 177 at [44] to [46].

> matter of administrative law consistency and reasonableness a later, different, decision about a similarly zoned site would be almost indefensible.

6.19 The High Court has held that it is not mandatory to consider the effects of a particular development on plan integrity but that concerns about precedent, coherence and like cases being treated alike are all legitimate matters to be able to be taken into account.[37] However, if a case was truly exceptional, and could properly be said to be not contrary to the objectives and policies of the district plan, such concerns might be mitigated or might not exist.

6.20 In Blueskin Bay, the Environment Court confirmed that:[38]

> "[48] Only in clear cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined. In such a case it is unlikely in the extreme that the resource consent would be granted in any event."

6.21 In this case there is an irreconcilable clash with the height limits and ample opportunity for development of a similar height on the Tamaki Drive frontage in the Business Mixed Use Zone, for example to support the opposite pillar of the Applicant's "gateway"

6.22 In a situation where a proposal is a direct challenge to an important policy approach, the fact that the planning document is "newly minted" means that plan integrity considerations can carry greater weight:[39] More recently the Environment Court again followed this approach where a district plan had recently been developed:[40][41]

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37 *Rodney DC v Gould* [2006] NZRMA 217 per Cooper J At [102]
38 *Blueskin Bay Forest Heights Limited v Dunedin City Council* [2010] NZEnvC 177 at [44] to [46].
39 *Ahuareka Trustees (No 2) Ltd v Auckland Council* [2017] NZEnvC 205.
40 *Stone v Hastings District Council* [2019] NZEnvC 101; *Blampied v Whangarei District Council* [2012] NZEnvC 54 at [67] is another good example of where the issue of precedent was determined to be relevant.
41 See *Murphy v Rodney District Council* [2004] 3 NZLR 421, (2004) 10 ELRNZ 353 at 39 (and followed in *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712). The High Court has observed that: [H]uman experience is that not to treat similar cases alike will give rise to suspicion and a deep sense of injustice which it is the duty of the Courts, as well as others who make decisions on behalf of the public, to avoid.

Previous case law relating to the Site

6.23 Ms Absolum gives evidence as a landscape architect (for the Applicant) and seeks to downplay the earlier Drive Holdings decision of the Environment Court[42].[43]

6.24 Nevertheless, in that decision the Court found that increased height would result in a loss of amenity, including view, to the occupiers of the unit affected. It specifically recognised that the proposed residential development aspect of the proposal would usurp "the front seats in the bus".

> No witness has told us why it is necessary to have residential development at all on the Tamaki Drive frontage area. We may infer that it is desirable; we may infer that it is profitable; but we certainly can see no necessity for it if it upsets the sustainability of the lifestyle of those who have invested in residential properties to the rear and to the side of the proposed development. Whilst there may not be many residential units lying below 12m and above 10m to the side or the rear which will suffer a loss of amenity if development is permitted to 12m, the loss of view will be significant to the occupiers of units affected and that loss will be caused, not by the necessity for commercial development, but by residential development effectively usurping "the front seats in the bus" should the development plan shown to us proceed.[44]
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> …
>
> [38] In our opinion the retention of building bulk at 10m maximum as proposed by the council and supported by the residents is the best way of achieving harmony and a balance in this area. It does not affect the aspirations of any persons behind or to the side of the proposed development, those persons at all times being aware that a 10m structure might arise. We had no evidence to suggest that the aspirations of commercial developers and restauranteurs would be inhibited, there being no evidence indicating that any such activity would be likely to make use of third floor space.

6.25 The Applicant seeks to interpret the AUP as representing such a significant change in direction from earlier plans that residential intensification is the ultimate driver for determining whether a breach is acceptable and that views are no longer important. That submission is neither consistent with the case law nor the clear focus on height expectations and its effects as contained in the Local Centre Zone chapter, when read as a whole.

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[42] *Drive Holdings (1991) Ltd v Auckland City Council* A009/00
43 EIC J Absolum at 5.3 referring to *Drive Holdings (1991) Ltd v Auckland City Council* A009/00
[44] *Drive Holdings (1991) Ltd v Auckland City Council* A009/00 at [35]

Evidence

6.26 The Applicant's own evidence considers that "for more proximate viewpoints, the visibility of the Project would vary between moderate to high".[45] For reasons that are not explained clearly, Mr Neeve then concludes that "the building design, hierarchy of built form, and appearance will reduce and therefore remedy and mitigate the potential adverse effects to an acceptable level".[46] It is not apparent how a project that "will be highly visible from some of the properties in Marau Crescent and Ronaki Road" because of its height can have its height ameliorated by design, form and appearance. It is highly visible because of its height.

6.27 The conclusions as to effect are backed up by Mr Kensington who considers that adverse effects on sites to the south of the subject site will be very high or significant. Mr Pryor for the applicant refers to the same adverse effects as "high or more than minor".

6.28 Mr Brown concludes that the proposal "would have a significant, and adverse impact on the wider character and values of Mission Bay, without any real potential for amelioration or mitigation of effects".[47] He describes the proposal as highly prominent to the point of being visually dominant when viewed from part of Maru Crescent, Patteson Avenue and properties on Ronaki Road. Although relatively less conspicuous from other locations it would "loom large in the local community's perceptions of Mission Bay.[48] He concludes that the landscape effects would be significant from a number of public vantage points.[49]

6.29 In a scenario where various witnesses reach similar conclusions the question is the extent to which these effects can be mitigated. The Association says the effects can't be mitigated. This point is addressed more fully in response to the Applicant's arguments below.

Analysis

6.30 Where views are affected these must be taken into account[50] By corollary, the extent of the encroachment must be relevant because the degree of the breach has a direct bearing on the ability of the community to rely on compliance with the rules. The more significant the encroachment the greater the infringement of the "justifiable expectation".

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[45] EIC Neeve at 4.63
[46] Ibid
[47] EIC S Brown at 10
[48] Ibid at 8
[49] Ibid at 114-115
[50] Ibid at 40

6.31 Thus, as in the Anderson case,[51] where the height increase was only a "few feet" in circumstances where the house was largely built before the challenge arose, the High Court found this qualified as a situation where an "occasional dispensation" could be applied.

6.32 As height creates the adverse "visibility" effect the question is whether that height is part of the future planned environment. Put simply, a 28m building that is 55% greater in height than the maximum height standard of the zone is on any logical assessment, not part of the future planned environment.

6.33 The weight to be given to any effect on integrity of the plan must be a matter of judgment for the consent authority.[52] In taking into account the integrity of the AUP the following points are noted:

(a) The height control breach is significant – approximately 10 m or 55% above the 18m height control and 11.66m or 73% above the 16m occupiable height control. By any standard this is a significant increase and goes well beyond the justifiable expectations of the community about what might be built.

(b) The breach of the height control will be a very transparent and enduring example of how the AUPs standards have not been observed.

(c) How the plan's controls are interpreted paves the way for further applications to seek increased height controls and a 'free for all' approach that is expensive for the community to defend.

(d) The height controls for this site were recently subject to a determination of the IHP who considered the site and concluded that there should be no height variation (either higher or lower). Granting consent to a significantly over height development flies in the face of and undermines that decision.

(e) In the context of a newly minted plan, the controls provide some degree of certainty to the community about what will or will not be built. It is important that confidence in the application of the plan controls is not undermined.

(f) In Mission Bay, where there are other opportunities for waterfront development within the same or similar zoning,[53] a significant

[51] *Anderson v East Coast Bays City Council* (1981) 8 NZTPA 35 (HC)
[52] *Batchelor v Tauranga City Council* 2 NZRMA137 at [141].
[53] Both the Mixed Used Zone and Local Centre Zone have the same height controls in the block stretching to the west of the subject site.

increase of the height limits on this site would signal that the limits for the rest of Mission Bay have less relevance. At best they are an indicative guide.

6.34 It is acknowledged that the height limits for the site have increased to achieve the AUP's objectives, but this has not changed the findings in relation to the effects on nearby residents, or the justification for additional residential development above those height limits. As in the previous Court cases involving this site, there is still no evidence from the developer (Mr Staples) as to why the additional height is required and as a corollary why the Council should exercise its discretion to allow that height.[54]

7. APPLICANT'S ARGUMENTS FOR ADDITIONAL HEIGHT

Does the restricted discretionary status indicate greater height flexibility?

7.1 This argument suggests that because the former district plan provided for breaches of controls as either a discretionary or non-complying activity, this signals a more relaxed approach to height. There is no caselaw or statutory support for this proposition. Mr Wren's expert view, consistent with Mr Putt, is that the assessment in terms of the objectives and policies and effects is the same, subject to the proviso that with a restricted discretionary activity the issues that need to be looked at are more defined.[55]

Is it appropriate to adopt an unders and overs / redistribution approach to mitigation?

7.2 A common theme of the Applicant's planning evidence and the Planning Report is that effects can be offset through a reallocation or redistribution of building mass around the site.[56] This amounts to an "unders and overs" approach to the use of height in the development.[57] It is tantamount to saying that because your effect is not as significant as it could have been in one part of the development, you have the right to create a greater effect in another part of the development.

7.3 Mr Lovett effectively argues that because there is a reduction in building height beyond the height limit on the Marau Cresent (presumably as a

[54] The Applicant's legal submissions assert that Mr Staples states that the "10m and 12m maximum height limits on the Site were insufficient to enable economic development to be undertaken". In fact, his evidence refers only to the 10m maximum height limit. There is no statement that 16-18m is insufficient.
[55] EIC D Wren at 9.3, EIC B Putt at 4.5
[56] Eg, see the Applicant's legal submissions at 2.12(i)
[57] Eg see EIC Neeve at 1.44 there is "an enhanced level of amenity for those adjacent properties at Marau Crescent, providing for an outcome that is more residential in character than might otherwise be the case".

result of building 5), this is a benefit that accrues to the larger number of houses on that road. This "overall improved outcome" is used to justify the adverse effects on the Ronaki Road Residents.

7.4 This argument is flawed:

(a) it conflates not creating an effect with having a positive effect;

(b) although it has been established that there is no permitted baseline, the applicant's evidence adopts the worst possible "permitted baseline" to apply a net effects approach;

(c) it ignores the hierarchy of the plan (as outlined by Mr Wren and Mr Putt);

(d) it overlooks that Building 5 is only 2m below the maximum 16m occupiable height limits, so the "reduction" is not significant in any event.[58]

(e) it could be broadly applied to many developments.[59] It would result in an undermining of the hierarchy of the plan's centres approach, of which height is an integral issue.[60]

(f) It has "no rational foundation in town planning".[61] It is inconsistent with case law which establishes that any package of positive measures must be viewed separately from the mitigation measures proposed.[62]

Meaning of adjacent

7.5 Mr Lovett for the applicant, argues that policy H11.3 does not apply to any part of the development with the exception of the eastern side boundary area and the Marau Road frontage areas of the development because in his view "adjacent" generally applies to properties either adjoining or directly opposite the subject site. He notes that planners have become more familiar with the meaning of the word "adjacent" since it became part of the test for notification of resource consents.

7.6 This argument contrasts with the broad purpose of the height control – to manage the effects of height. Taking this broad purpose into account (as required by Rule C1.9), the effects of height must be considered in the

[58] EIC Lovett, where the differences between the standard and the actual building heights are outlined at para 4.13.
[59] EIC D Wren at 7.4
[60] Ibid
[61] EIC B Putt at 4.6
[62] *Stretch v Queenstown Lakes DC* EnvC C009/04, applying *Stokes v Christchurch CC* [1999] NZRMA 409 (EnvC).

context of more than the immediate neighbours, particularly in Auckland's hilly topography and an amphitheatre setting. Limiting those effects to adjacent site is an overly narrow interpretation.

7.7 Case law, including cases on notification, establish that "adjacent land is not confined to land which is adjoining. It includes places which are nearby"[63] The meaning of "adjacent" was held by the Privy Council not to be a word to which a "precise and uniform meaning is attached by ordinary usage".[64] The degree of proximity required was held to be entirely a matter of circumstance.[65]

7.8 Mr Wren observes that "Objective 7 clearly provides the additional context" and that the attempts to constrain objective 7 by recourse to policy 8 are incorrect.[66] Amenity values including dominance are clearly relevant to the wider residential area, particularly for those properties on Ronaki Road which are elevated above the site.

Does the Application give effect to the AUP by increasing residential intensification?

7.9 The Applicant seeks to stress the Proposal will give effect to the UP by enabling additional residential intensification and thus create a quality compact city. Those arguments are generic to any site, and ignore the way in which the new provisions of the UP were structured to enable increased residential intensification through the zoning hierarchy and the changes to the previous plan's bulk and location controls.

7.10 Surprisingly, the Applicant attempts to argue that not allowing the additional height would compromise the consistent administration of the UP because it would represent a direct challenge to the planning outcomes the UP explicitly seeks to promote. This argument seeks to override the specificity of the district plan's height limit standards by drawing on overarching regional policy statement objectives and polices. It is inferred that the underlying assumption for the Applicant's argument is that the higher order planning objectives and policies have not appropriately cascaded into the district plan rules. That is a long bow to draw in the context of a unitary plan that was holistically developed.[67]

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[63] *Murray v Whakatane District Council* - [1999] 3 NZLR 276, citing *Wellington v Lower Hutt [1904] AC 773*. This was a notification decision.
[64] *Ports of Auckland Ltd v Auckland City Council* - High Court, Auckland, 31/8/1999, Williams J M2020/97 Citing with approval *Mayor Councillors and Citizens of the City of Wellington v Mayor Councillors and Burgesses of the Borough of Lower Hutt* [1904] AC 773, 775
[65] Ibid citing *Claney v Bland* [1958] NZLR 760, 763
[66] EIC D Wren at 9.13
[67] Refer Chapter A1.3 – Structure of the Auckland Unitary Plan

Is additional height required to create a focal point?

7.11 The Applicant's central justification for additional height is the desire to create a focal point. This refences objective H11.2 (2). It is submitted that this is not a mandatory requirement as the verb "require" is not used (*cf* its translation through to the policies, none of which "require" a focal point whereas other matters such as "quality and design" are required). As Mr Wren observes: creating a focal point does not necessitate height.[68]

Is the reference to four storeys in the description accurate?

7.12 The Applicant attempts to argue that the "reference to four storeys in the description is a remnant of the different zone height standard rule structure"[69], but its own legal submissions to the IHP refute this point.[70]

8. OTHER EFFECTS

Effects on the coastal environment

8.1 Mr Wren's analysis of the plan provisions includes an assessment of the AUP objectives and policies as they relate to the coastal environment which he assesses as including the reserve and beach area. He concludes that the impact of the buildings will detract from the natural area of the reserve area and the beach through the dominance of the built form in this location

8.2 Consistently, Mr Brown's analysis of the effects on the reserve describes the proposal as having "a significant, and adverse, impact on the wider character and values of Mission Bay.[71] It would rebuff any sense of connection with Selwyn Reserve and the adjoining beachfront.[72] It would disrupt the 'garden seaside' aesthetic and heritage undertones of Mission Bay.[73]

Effects on public open space

8.3 As future regular users of the commercial parts of the development including the cinema (which is supported) it is noted that the residents of the area have an interest in the public open spaces offered. Mr Wren considers that these areas, which are poorly located, difficult to access,

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[68] EIC D Wren at 9.14(e)
[69] Applicant's legal submissions at para 5.10(c)
[70] EIC D Stock Appendix One – refer to para 14 and the Applicant's proposed amendments which include retaining reference to 'four storeys' in the context of the proposed heights of 16m +2m..
[71] EIC S Brown at 10
[72] Ibid at 9
[73] Ibid at 11

potentially dangerous and quite small, are likely to be inconsistent with the Auckland Urban Space design manual.

The cinema

8.4 The Association has supported the incorporation of a cinema into the proposal. It is however concerned that the application is ambivalent about whether this will be constructed. If the Proposal is granted the Association seeks a condition confirming that the cinema forms part of the development.

9. SUMMARY

9.1 The following points summarise the Association's key arguments:

(a) The Chapter C rules govern bundling and the matters for consideration for discretionary and restricted discretionary activities which include the purpose, the objectives and policies and the specific characteristics of the site.

(b) The consents should be bundled (as a discretionary activity) because the effects of the cinema and other buildings overlap.

(c) Even if the applications are not bundled, the Council has a broad discretion in relation to height as derived from the consideration of the purpose, the objectives and policies and the specific characteristics of the site.

(d) In considering the effects of height, views are relevant and must be assessed. However, amenity values encompass more than views and include the values of local residents with the subject environment.[74]

(e) The starting point for an assessment of height in the absence of use of the 2m height for roof form, is 16m.

(f) The future environment has to reflect a real world approach.

(g) The evidence consistently establishes that there are moderate to high effects from the more proximate view points. These cannot be offset by not applying the maximum height, bulk and form controls on other parts of the site. Height is height and where there is an adverse effect "there is no remedy or mitigation possible"[75].

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[74] EIC S Brown at 121
[75] EIC B Putt at 4.12 and S Brown at 161

(h) The planning evidence for the Incorpporated Societies concludes that the proposal will cause adverse effects on neighbours' amenity and is contrary to the objectives and policies of the Buisness – Local Centre Zone.[76] The effects on the coastal area are not consistent with and potentially contary to the obejctives and policies of the Coastal Environment.[77]

(i) The community has a legitimate expectation that the height controls of the newly minted AUP will be observed. Failure to do so undermines community certainty, faith in the fair and consistent administration of the AUP and the ability for the community to plan their own developments.

9.2 The AUP envisages a transformation of Auckland, including Mission Bay, but it seeks to achieve this with a carefully integrated approach to the Business centre and residential zones that creates a gradation in the height limits to achieve outcomes that are clear and able to be anticipated and planned for by the community. A grant of consent for this development would signal that significant additional height is a "free for all". While the Association would generally welcome a new development for Mission Bay that is compliant within the substantially increased bulk height and form standards, this Application is so egregiously non-compliant that this Application must be declined.

Dated this 6th day of August 2019

Gill Chappell
Counsel for Mission Bay Kohimarama Residents Association Inc

[76] EIC D Wren at 10.3 and 11.2
[77] EIC D Wren at 7.7