

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2021] NZEnvC 159

IN THE MATTER OF

an appeal under s 120 of the Resource
Management Act 1991 (**the Act**)

BETWEEN

DRIVE HOLDINGS LIMITED

(ENV-2019-AKL-283)

Appellant

AND

AUCKLAND COUNCIL

Respondent

Court: Judge J A Smith
Commissioner Mabin
Deputy Commissioner D Kernohan

Hearing: 24 – 28 May 2021
28 June – 2 July 2021

Appearances: D Allan, J Goodyer and R Bartlett QC for Drive Holdings
Limited
D Hartley and A Buchanan for Auckland Council
J Gardner-Hopkins for Anna Nathan
G Chappell for the Stephen W Owen Family Trust, Support
Mission Bay Incorporated and The Mission Bay Kohimarama
Residents Association Incorporated

Date of Decision: 14 October 2021

Date of Issue: 14 October 2021

DECISION OF THE ENVIRONMENT COURT

A: The appeal is declined, and the Council decision confirmed.

Costs are reserved. Applications for costs are to be filed and served within 20

Drive Holdings Limited v Auckland Council



working days, replies within a further 15 working days and any final response from the applicants within a further 5 working days.

REASONS

Introduction

[1] This is an appeal against a refusal of an application for retail/residential development over multiple sites zoned in the town centre at Mission Bay, Auckland. The key issue on appeal is the overall height of the project and the consequences of the bulk and scale of the building over the multiple sites.

Issues

[2] Numerous experts espoused views as to the appropriateness of this development as a restricted discretionary activity. We also received opinion evidence from a number of expert witnesses as to the appropriate height, scale and bulk for this development. This evidence did little to assist us in determining the appropriate height, scale and bulk beyond that implied by the Auckland Unitary Plan (**AUP**).

[3] Section 290A of the Act leads us to consider the Auckland Council's Commissioners' decision, the appropriateness of their decision and whether the appeal evidence has appropriately addressed the concerns raised in that decision.

[4] As it will become clear through the course of this decision, we have concluded that the Commissioners adopted a well-balanced approach to the application and that the concerns identified by them remained for this Court. The major distinction is that the application has been modified both prior to and during this hearing.

[5] Early in the hearing, the Court indicated that given the complexity of the development, it needed to consider the appellant's current proposal (the **Revised Proposal**) rather than some putative alternatives. As a result, the appellants then sought three days into the hearing to introduce an alternative proposal. This development was lower and made modifications to the height, bulk and scale. The alternative (the **June Proposal**) was allowed to be submitted, but time extensions

were granted to allow other parties to provide evidence in response.

[6] Even then we were advised by Mr Allan, lead counsel for the appellant, that in the event the Court did not consider either of the alternatives was appropriate, the Court should indicate the level of development on this site that was appropriate and the type of controls that should be in place. With such a complex development, the range of parameters would need to be relatively narrow as is not for the Court to design the proposal.

[7] Nevertheless, for the reasons we are going to discuss in some detail in this decision, we do believe matters have reached a point where key parameters are settled, particularly in light of the more detailed evidence now provided on the alternatives by all of the parties. To some extent these signal the essential attributes of any proposal that would be appropriate and acceptable.

[8] We are in a quandary as to the outcome in this case, particularly whether there may be a clearly consentable proposal. We decide these issues in our conclusion later in the decision.

The Area

[9] The appellant, particularly through its director, has acquired a number of sites in and around the Mission Bay Centre over the past few decades. The Mission Bay retail areas consist of sites bounding Tamaki Drive and pivoting on its intersection with Patteson Avenue.

[10] There is a small amount of retail development radiating from the intersection up Patteson Avenue, which does not continue past the intersection with Marau Crescent. Nevertheless, there are a number of professional and service activities situated in and around the Mission Bay centre such as medical centres, physiotherapy and legal.

[11] On the seaward side of Tamaki Drive is the site of the original Auckland Melanesian Mission station with one original stone building dating from the 1860s. Over the years, the foreshore areas in Mission Bay have been developed as a reserve

with a full-length promenade, a fountain, toilets facilities and parking areas.

[12] The reserve area is fringed by mature trees, with an expansive grass area in the centre of the reserve which is well used for leisure activities. This area and the beach are popular throughout the year for both local and outside visitors. The fringe of trees along Tamaki Drive to the reserve includes several substantial trees, including Pohutukawa, many of which are at around 20 m or more and constitute a major feature of this bay.

[13] We accept that Mission Bay is a popular seaside area with a visitor focus, both local and overseas, for leisure activities. Food retailers are the predominant activity along the Tamaki Drive frontage with many premises offering takeaway, casual or full meals. Alcohol is also served at a number of restaurants. Several ice cream parlours, a movie theatre and street dining give a clear relationship to the seaside and a relaxed, informal nature of the Mission Bay local centre.

[14] The local centre buildings are mostly of eclectic construction with key features, being the Berkeley movie theatre and the nearby De Fontein restaurant and pub on the corner of Tamaki Drive and Patteson Avenue. Both appear as art deco buildings although this is imitation only. Nevertheless, with the combination of night-time fluorescent lighting, it makes for an attractive seaside view both during the day and night.

[15] Opposite De Fontein, on the corner of Tamaki Drive and Patteson Avenue, the buildings have less street presence with the second storey set back. Retail businesses are on both sides of Patteson Avenue for a short distance towards Marau Crescent but terminate before that intersection.

[16] We conclude that the retail area of Mission Bay Centre is focused on the older strip development on Tamaki Drive, with limited and more recent development on Patteson Avenue.

AUP zoning

[17] The entire site subject to this application is zoned as Business-Local Centre. There is also a similarly zoned adjacent site on Tamaki Drive to the east of the application site, and a number of sites on Tamaki Drive to the west of Patteson Avenue.

[18] The other properties within Tamaki Drive, Patteson Avenue, Marau Crescent and Atkin Avenue are zoned Business-Mixed Use Zone. The other properties to the east of the subject site between Marau Crescent and Tamaki Drive are zoned as Single House Zone. Nevertheless, the opposite side of Marau Crescent between Atkin Avenue and Tamaki Drive is all zoned Residential - Mixed House Urban Zone, with a number of properties identified as Single House Zone on and around Ronaki Road.

[19] The Annexure hereto marked “A” is a zone plan shown as a site in the context of the wider area between Kepa Road and Tamaki Drive. It can be seen that there are Local Centre Zones in St Heliers on Tamaki Drive between Maheke Street and Turua Street and on Kepa Road, near the northern end of Patteson Avenue (known as the New World site).

[20] We note for completeness that adjacent to the eastern edge of the application site, the Gordon Spratt Flats have a heritage overlay and represent an important character component of Mission Bay.

[21] More generally, the site is situated within a sandy coastal embayment with steeper hills to the south, east and west. The ridge to the west is particularly important, constituting the marae and ancestral lands for Ngāti Whātua, and having significant historical value as the site of the kāinga of Ngāti Whātua as well as events of Bastion Point and the Michael Savage Memorial Point. The relationship between Ngāti Whātua and the missionaries is one of some importance in understanding the context of this area. The ridges to the rear (south) create platforms upon which the residences are perched, overlooking expansive northern views from the west to the east city and north to Rangitoto and beyond.

[22] The orientation of the embayment towards the north east creates particular advantages for views, which makes the area popular for both residents and visitors. The relationship of headlands and the slopes to the south with the lower lying area on the foreshore is one of some importance in this case.

The NPS-UD

[23] The role of the Local Centre, in terms of the NPS-UD, was raised. For clarity, we accept the position of *Eden-Epsom Residential Protection Society Incorporated v Auckland Council*¹ in relation to Objectives and Policy 3 of the NPS-UD. In short, we conclude the NPS-UD does not apply to this application for the following reasons:

- (a) It deals with the city centre zones, metropolitan centre zones and areas on the edge of each of those zones. We acknowledge Auckland is within tier 1 and therefore these obligations will apply to future planning processes for Auckland but not within Local Centres.
- (b) The NPS-UD requires a planning response by the Council but not in relation to each individual consent application in the meantime.
- (c) The general thrust of the NPS-UD towards intensification is already captured in the AUP provisions for the town centre zones.
- (d) For the city centre, metropolitan centres, town centres and local centres, the NPS-UD sees a hierarchy between these with intensification levels descending through the hierarchy reflecting the importance of each zone.

[24] In particular, we conclude that the NPS-UD envisages intensification for the Local Centre. There is no argument in this case that the upper building levels may be utilised for residential activity. The NPS-UD statements as to the number of floors (we assume above ground level) also show progressive reduction in number from city centres to metropolitan, town, and local centres. The intensification provisions under the AUP already adopts this approach.

¹ *Eden-Epsom Residential Protection Society Incorporated v Auckland Council* [2021] NZEnvC 082.

Controls under the AUP

[25] At the Council hearing the application was for a discretionary activity because a new replacement movie theatre was proposed. The appellant reluctantly removed the theatre from its proposal for this appeal hearing, thus making the overall application a restricted discretionary activity. However, all parties agreed at this hearing that the theatre would be of particular benefit to the Local Centre.

[26] No party raised any issues in respect of any additional criteria being raised should the theatre be re-instated in the project.

[27] We accept this and agree with the common evidence of all parties that the theatre is currently and would be a focal point for the Local Centre development. Given the positive features of the theatre and its minimal, if any, additional impacts, the parties acknowledged that such an opportunity might be included within any development consented by the Court.

[28] The restricted discretionary 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 are contained in different parts of the plan – sometimes reflected with minor wording differences. Overall, we conclude the following factors arise:

(a) General Factors:

- (i) quality and amenity;
- (ii) permanence – materials, solidity, mass; and
- (iii) transparency – articulation, permeability, bulk, articulation, wind flow.

(b) Local Centre Factors:

- (i) relationship to surrounding areas;
- (ii) public/private position of site;
- (iii) buildings within central position;

- (iv) cohesion;
- (v) accessibility, legibility, efficiency;
- (vi) vitality and vibrancy;
- (vii) integration with public transport;
- (viii) avoiding effects on pedestrian activities – Parking Policy 11.3(7);
- (ix) functional operation Policy 11.3 (312) – loading bays, parking etc;
- (x) Lift shafts Policy 11;
- (xi) height control – hierarchy, City centre, Metro, Town centre and Local centre Policy 11.3 (14);
- (xii) economic and residential – Special Controls 11.2(6);
- (xiii) any significant adverse effects on special character, landscape features, amenity Policy 11.2 (8) Attractive places; and
- (xiv) building height, shadowing, visual character Rule 11.6.1. In keeping with the surrounding environment plan area.

(c) Public Area Factors:

- (i) public areas bar viewing positions to Local Centre;
- (ii) backgrounds, hills and other buildings (Bastion Point);
- (iii) natural character of the coast;
- (iv) focal point for public areas safe and convenient for all age groups;
- (v) sense of place;
- (vi) relationship to public area; and
- (vii) does it reinforce the role on function and centre in relation to public areas?

(d) Residential Area Factors:

- (i) relationship to Local Centre – visual and amenity;
- (ii) significant adverse effect 11.6.1;

- (iii) sense of place; and
- (iv) integration in terms of size, shape, form (possibly transparency (element of visual)).

[29] We see the factors and issues raised in the preceding paragraph as generally encompassing the parties' and the Court's concerns. There is a great overlap and the provisions need to be examined both specifically and generally.

[30] There are many other general issues relating to parking, traffic and flooding to be considered. They require consents, but the evidence for these applications was not contested on those issues. We agree the grant of consent does not turn on those issues but rather those we have identified.

[31] We now go on to describe the proposal. This leads to an analysis of the proposal and a discussion of the decision appealed from.

The Proposal

[32] The designers' evidence stated that they had sought to redistribute the available bulk and scale to achieve a similar overall outcome to that anticipated under the plan. However, during the case it became clear to us that there were aspects of this approach which were inconsistent with the AUP:

- (a) the designers' calculated the floor area based on an envelope 18 m high over the whole of this site;
- (b) they allowed the residential unit floor heights of Level 2 up at 2.5 m floor to floor or 2.2 m to ceiling, but in the actual building design allowed 2.7 m floor to ceiling, i.e. 3 m per floor to floor;
- (c) they assumed a volume calculated at 18 m to the boundary edges was consentable, even though the activity is a restricted discretionary activity at this level;
- (d) the exceedance over the 18 m height limit was based on the redistribution

of bulk from places where there were restricted discretionary activities. This would mean areas where there was bulk was less likely to be consented, such as Marau Crescent; and

- (e) the 18 m height limit still allowed roof and plant above that height based on the designers' interpretation of the plan.

[33] The result is 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 Avenue, except where it approaches the other zones to the east on Tamaki Drive and facing Marau Crescent.

[34] On Marau Crescent there is a setback and slight reduction in height, but the bulk is still close to the 16 m occupiable floor height limit. The interface on the eastern side of the building near the residences is more nuanced, and there was no direct criticism of this interface.

[35] In opening evidence, the Revised Proposal included three extra floors in the northwest corner of the building (Tamaki Drive-Patteson Avenue intersection) up to 30.7 m RL or 28 m above ground level. The relevant ground levels would have been 2.7 RL plus the AUP maximum 18 m building, including roofing to a 20.7 RL height above ground. The building height stepped down along Tamaki Drive and Patteson Avenue to an overall height for the fifth floor of around 20.30 RL, and plants and lift overruns reaching around 21.5 RL.

[36] The Revised Proposal provided to the Court in the evidence at the commencement of the hearing was very similar to that given to the Commissioners, with the exception there had been some redesign of the building as a whole, and the glazing of the penthouse roof to create a floating roof concept and "lighten the design".

Modification and the June Proposal

[37] After three days of presentation by the appellant, including opening and cross examination of witnesses, the appellant sought to amend their Revised Proposal. This was an alternative which reduced the overall height and scale of the building (the **June Proposal**). The appellant did not abandon their Revised Proposal but sought to include the June Proposal as an alternative for the Court if it concluded that the Revised Proposal was not acceptable.

[38] All other parties sought an adjournment to have an opportunity for their experts to consider the changes and file further evidence. The adjournment was allowed with evidence exchange directions and the matter recommenced again some weeks later.

The June Proposal

[39] To assist in understanding the nature of the June Proposal, we annex and mark as “**B**” two versions of a view from a property behind this site overlooking the area in question. Although this is a view from a private property, they are indicative only. We consider them of only limited usefulness given the assumptions underlying them. Nevertheless, they do help understand the distinction between the two proposals given the reference points visible in the photo montages.

[40] In “**B**”, the Revised Proposal shows an eight-storey building, with stepping along Tamaki Drive and Patteson Avenue. The fifth floor remains at the same height. Various other elements of plant are situated on Building 4, with lift overruns and the like protruding. Building 1 is reduced from up to eight floors to seven with some extra floor space still on Building 6.

[41] Key features of the June Proposal which are shown in “**B**” are:

- (a) most of the buildings are five floors and over 18 m high but not by a significant margin (less than 1 m);
- (b) the significant over-height floors are carried in the north western corner with Patteson Avenue and Tamaki Drive to around 27RL 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

- (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.

The Core Issue

[42] We have concluded that the real issue in this case is the appellant's continued pursuit of over-height residential apartments on the site. This is notwithstanding clear opposition by residents, the Council and relevant experts. As noted for the residents, there are persistent over-height and bulk elements in the proposal, which are an over-intensification of these sites beyond that anticipated in the AUP.

[43] We are of the view that the AUP provisions are not the result of chance or inattention on the part of the Council, or the Independent Hearings Panel (**IHP**) which considered them. These height limits were the subject of submissions to the IHP who gave some consideration to the height for the Local Centre of Mission Bay. Being at the base of the embayment, there is no surprise that there was particular argument and thought given to the planned outcome for the Mission Bay Local Centre and surrounding zones.

[44] For the reasons we discuss shortly, we conclude the AUP submission process and decision by the IHP was correct, both as to principle and as to the balancing of the various issues in the area at a fine grain. In short, particular consideration has been given to the height relationships between the headlands, the residential areas, behind the reserve areas on the foreshore and the height of the Local Centre.

[45] We conclude the AUP approach has been correctly applied by the decision of Council under appeal. The same issues arise for this Court and we adopt the same approach.

The Council decision

[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.

[47] They concluded that it was the height and bulk issues which were of potential concern. They considered that there could be a consentable proposal, but the application before them went too far in terms of height and bulk. We agree that the same issues arise in the case. Further, we conclude that, faced with the same application at first instance, we too would refuse consent. We agree with the principal issues identified by the Commissioners.

[48] The question for us is whether the appellant has now gone far enough to address the issues identified by the Commissioners. Clearly, this is a matter of discretion, but we conclude our concerns are the same as the Hearing Commissioners'.

Key focal point

[49] We conclude, after considering all the evidence, the AUP provisions, the Commissioners' decision and our own inspections, that:

- (a) the corner of Tamaki Drive and Patteson Avenue is a clear focal and pivot point for Mission Bay;
- (b) it is a natural viewpoint when approaching Tamaki Drive from the west as one enters the bay;
- (c) the sense of arrival is dominated by sea views to the east and north, the

view progressively developing to the Local Centre of the bay; and

- (d) travelling either way on Patteson Avenue there is a clear sense of arrival or departure from the Local Centre, marked by intersection at Patteson Avenue and Tamaki Drive.

[50] The following supports our conclusions:

- (a) the Tamaki-Patteson intersection is the midpoint of the bay;
- (b) it is an entry and an access point to the promenade;
- (c) the relationship with the reserve and the particular facilities including the bus, the toilets, the police kiosk and the clock;
- (d) large pohutukawa trees frame the arrival to the south along Patteson Avenue;
- (e) the Patteson-Tamaki corner has a prominent building and the De Fontein sign; and
- (f) there is a clear connection to leisure activities with prominent ice cream and outdoor dining.

[51] In short, we conclude that the Patteson-Tamaki connection is the focus of the Local Centre of Mission Bay, with the recreation elements on the southern side of the corner and the visitor retail elements on the northern side of that corner. It is therefore necessary that any future development maintains that pivot point for the Local Centre. Put another way, the Local Centre is already there, therefore it is important not to lose it and it may be unnecessary to emphasise it further than its present configuration.

Prominence

[52] It follows that the prominence of any new building could either reinforce the focus of the Local Centre or derogate from it. We have strongly concluded that the Mission Bay Local Centre, and particularly this corner of Patteson Avenue and Tamaki

Drive, should continue with at least the same levels of activation and preferably be reinforced to intensify its role as a “people place”.

[53] Currently, this focal function is served by:

- (a) the Patteson-Tamaki corner appearing mid-view when travelling from the west;
- (b) the De Fontein building having outdoor dining and drinking including on the first floor, giving a relaxed signal to all visitors;
- (c) the Mövenpick ice cream parlour, presenting on the corner in plain view to travellers;
- (d) the visible outdoor dining to the east and west of the corner on Tamaki Drive, signalling leisure activity; and
- (e) the reinforcement from the reserve around the clock refers to the Patteson-Tamaki corner, including a line of trees and the deepening reserve in the centre.

[54] We heard a great deal of evidence from the different experts about the need for a distinctive building at the corner to mark out the Local Centre. Yet, most of the proposed floors are residential with balconies, which are private. As originally proposed, the first floor would also contain private apartments.

[55] One of the key changes made to the proposal and presented on recommencement of the hearing was to utilise a portion of the corner of the first floor for retail, such as for a restaurant and bar. The intention was for that to be accessed internally from the building on the corner itself.

[56] We agree that activating the first floor would represent a significant improvement over the Revised Proposal. This would significantly improve the activation of this area. We note that currently there are several buildings on Tamaki Drive which utilise or have utilised the second level for restaurant or bars. Currently, both the Berkeley movie theatre and several restaurants have upper levels on the

subject sites facing Tamaki Drive.

[57] Overall, we conclude that the height of the Revised or June proposal serve little function in marking out the Local Centre purpose. An activation on the first level may justify an over-height building if it does not abrogate from the Local Centre role.

Public Area Outcomes

[58] This leads us to the outcomes anticipated by the plan given there is no permitted baseline for height in the Local Centre. We accept that we cannot adopt a de facto building envelope. The attempt by the appellant's witnesses to do so by showing building envelopes over most of Mission Bay's business areas and photo montages does not represent any permitted activity. Using a "likely consentable" approach adds nothing to that evaluation. That said, it is clear the AUP envisages significant intensification in this Local Centre and in Auckland generally.

[59] We conclude that we cannot require new applicants in the Local Centre zone to be the same height and bulk as existing buildings. In fact, no one suggested this. The issue is what level of intensification is envisaged, and how that enhances the public space and Local Centre.

[60] The primary purpose of Local Centre intensification is to provide retail activity at a level commensurate with other development. We would therefore anticipate a significant increase in the retail offering. This relationship to public space, public accessibility and services is core to the Local Centre provisions in the AUP. Yet, the June Proposal at best offers around the same total in floor space, and the Revised Proposal even less. Given the intensification anticipated we would expect more public and retail space to be provided.

Height Controls

[61] We also conclude that the combination of the AUP Local Centre's description of buildings being generally four to five storeys in height, and the height limit of 16 m with building form fluctuations, i.e. roof and plant to 18 m, gives a clear expectation

as to outcome.

[62] Primarily, the AUP anticipates these four or five storeys could be a mixture of retail and residential, with the retail levels requiring 4-4.5m and the residential levels requiring less height (~3 m). Thus, two levels of retail (9 m) and two levels of residential (6 m) would result in a four-storey building about 15 m high and within the 16 m height restriction. Alternatively, one level of retail (4 m) and four levels of residential (12 m) would result in a five-storey building within the 16 m height restriction. A more generous retail level height of 4.5 m and residential of 3.5 m would reduce the storeys to four in this example.

[63] The control on height relates to 16 m of occupiable floor space, which we conclude can only mean to the ceiling of the upper floor area. Seen in this way, the 16 m height and 2 m variation restrictions have distinct purposes; one is for occupiable area (16 m), and the other the whole building form, including roof plant and lift overruns.

[64] We conclude that the purpose of the 2 m of roof fluctuations above the 16m restriction is to provide some flexibility in articulation of the building to avoid the constant use of flat roofs. However, where the 16 m occupiable height is breached (to the ceiling of the occupied floor), it is clear to us that the plan makes all activity above that height restricted discretionary activity, and the 18 m provision does not apply. In short, the 18 m height provision is not a de facto height for the overall building. It merely allows articulation of the total building from where the building meets the control of 16 m of occupiable area. We agree with the witnesses that the occupiable area is to the ceiling height within the building, not the top of the roof.

[65] Accordingly, if the occupiable area is under 16 m, the 2 m articulation provision can apply. Where the building itself has occupiable area of over 16 m, then that 2 m fluctuation provision is subsumed within the restricted discretionary criteria.

[66] For our part, we do not consider that the exemptions relating to plant/lift overruns apply where the height of occupiable area is over 16 m. In this case, for example, a ground floor height of four metres and the level 2 height of 3.3 m would

then allow levels 3 and 4 of 3 m. Thus, level 5 height to the ceiling height of 2.7 m gives a total height of 16 m. Accordingly, a five-storey building could be constructed here and would be fully in accordance with what is envisaged in the AUP.

[67] Although five storey buildings could be constructed under 16 m, the difficulty is that this would involve a low ceiling height for level 2 and above. This would suggest height from the ground floor around 4.5 m, three floors of three metres and the top floor to the ceiling height 2.5 m. Thus, five stories would involve some compromises in terms of outcomes under the plan.

[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.

Relevant cases

[69] Two significant relevant cases were drawn to our attention during the hearing.

[70] One is *Summerset Villages (St Johns) Limited v Auckland Council*, which involved the construction of a residential retirement village (integrated housing development) in terms of the plan in a Mixed Housing Urban (MHU) zone.² To that extent, this case is less comparable with the current one but it is within relative proximity to Mission Bay, although on top of the ridge and one ridge back. It involved construction on a major road which is fully serviced by buses as in Mission Bay and involved a step height over a site to six storeys.

[71] The other relevant case involves a Local Centre Zone, albeit in a different area of Auckland, being *Panuku Development Auckland Limited v Auckland Council*.³ This case contains a detailed evaluation in similar circumstances. The Panuku Development involved development over the site at three storeys and another area with higher

² *Summerset Villages (St Johns) Limited v Auckland Council* [2019] NZEnvC 173.

³ *Panuku Development Auckland Limited v Auckland Council* [2020] NZEnvC 24.

heights up to five storeys (20.5 m). There were topographical effects (20.5 m portion was in a dip), and there were setbacks of 12 m on part of the building and 18 m on the top floor from the road.

[72] In *Panuku*, most of the site was zoned as Local Centre, but some land was zoned as Mixed Housing. In the *St Johns* case, the site adjoined St Johns College which had special precinct overlays and had provided a written consent for extra height against the boundaries. In *St Johns*, the height up to six storeys was focussed on the boundary adjacent to the college and the nearby reserve. There was significant setback and stepping down, both towards the road frontage and towards the single housing area boundaries.

[73] However, we have concluded that these cases are useful in setting out some of general principles that were clearly applicable in this case.

Panuku Development Auckland Limited

[74] This case involved a Council entity, Panuku Development Auckland Limited (**Panuku**), applying for consent for an over-height building. The Court noted in [24]:

The Commissioners determined that, although many of the adverse effects arising from the development could be appropriately mitigated, the intensity of the proposed development overall would not be compatible with the amenity values for the properties in the immediate vicinity, particularly in relation to the adjoining residential amenity and character to the east.

[75] and [25]:

The Commissioners acknowledged that the proposal was not without merit and the positive benefits that residential intensification would offer this part of the inner city. However, the Commissioners identified scale, bulk and intensity of the proposed development within this part of the Local Centre Zone was not in keeping with the planning outcomes identified in the AUP for the surrounding environment. That was particularly in relation to the special character values of the Eden Valley area and the height limit imposed by the Height Variation Control.

[76] To this extent, it can be seen overall concerns of the Commissioners in that case were not dissimilar to those expressed in this case by the Commissioners for the Council.

[77] At [31] to [33], the Court summarises changes that have been made by the applicant to reduce the scale of the development and its amenity impact. In paragraph [33], the Court summarises the features of the buildings. It should be noted that in addition to the concerns about height and bulk, many s 274 parties were concerned with the demolition of the Universal Building and the unacceptable and adverse effects that would occur.⁴ It would be fair to say that issue does not directly arise in this case although s 274 parties have, as in that case, raised various other more general issues.

[78] At [47], the Court relates the concerns for the owners of one property, indicating Building C was 7.5 m over-height, Building A 1.5 m over-height and Building D 400 mm over-height. For comparison to this case, the eighth floor on Building 1 in the Revised Proposal would be around 30 m RL, and the June Proposal at some 27 m RL, or over 9 m over-height for the Revised Proposal and over 6 m for the June proposal if the 18 m height limit is used. Even Buildings 2, 3, and 6 would be up to 1.2 m over the 18 m height or 3 m over occupiable height and this varies depending on whether the plant is placed on Building 4 or Building 5.

[79] Other issues were raised in *Panuku* which did not arise in this case such as parking and traffic congestion. Importantly, however, the owners of 104 Valley Road identified that. For instance, in [51] of the decision, the Court noted Ms Modrow's closing submission:

Assessed that, currently on the site there was a combined area of about 4,100 m² of retail, community-focussed businesses, and "community socialising opportunities". By comparison, she highlighted that new development provided about 915 m² of retail space.

[80] It is fair to say that this issue arises in this case, although to a lesser extent. However, the issues about noise, vibration and dust were not raised directly by any party.

[81] In *Panuku*, the Court goes on to consider a wide range of issues raised. The approach we have adopted in this case is entirely consistent with that decision. We

⁴ At [46].

particularly reiterate the concern expressed by the Court at [65]:

The approach taken by the expert witnesses to their evaluation of the restricted matters of discretion and assessment criteria also requires some comment, because overall the approach taken has required us to take undertake a more fulsome analysis of the evidence than might otherwise have been required.

[82] Given the fulsome analysis contained in that case, we did not consider it necessary to repeat much of the analysis of rules and other provisions in that case for two reasons:

- (a) We are anxious to issue this decision within a reasonable time. The Court has been affected by the COVID-19 lockdown throughout August and September. This has compromised the ability of this Court to issue a more fulsome decision within the next year; and
- (b) We do not consider there would be any significant gain for the parties by our repetition of the analysis and discussion contained in the earlier decision to the extent the provisions are generally applicable to this case. We acknowledge that not every provision is directly applicable but consider our approach entirely consistent with that of *Panuku* and *Summerset (St Johns) Limited*. Not all the issues that are discussed in those cases were raised directly in this case.

[83] In *Panuku* at paragraphs [69] to [72] The Court was led to have made comment about this concept of obtaining outcomes within some form of permitted baseline. We repeat the Court's comment which we adopt entirely:

Some of the evidence appeared to rely on general and speculative statements about the planning and design outcomes envisaged in the Local Centre and THAB zones and made comparisons with compliant developments. What informed these statements and comparisons was often unclear. The evidence was unhelpful given the large number of different restricted discretionary activities involved in this proposal and in most instances, it was not relevant to the issues we need to determine. Furthermore, it did not align with the submissions made by counsel for Panuku that a permitted baseline argument was not being advanced on appeal.

[84] In this case, the appellant did not advance an argument on permitted baseline. Nevertheless, it still had its expert present documents showing a shadowing of

probable development within the area. In most, if not all cases, this would require some form of restricted discretionary consent at the least and so cannot be considered a permitted baseline. We reject any suggestion of a “likely consentable” comparator.

[85] Although we have discussed that intensification changes are anticipated in the AUP, we do not consider this to constitute a permitted baseline nor in any way to derogate from the comments of the Court in *Panuku*. That Court made it clear at the outset of that decision that intensification was anticipated within the zones.

[86] Furthermore, in discussing the question of retail space and Local Centre Zone, the Court concluded that the AUP provisions do not require a predominant focus on retail over residential.⁵ In terms of shared floor space, that was not an argument raised in this case. The question is whether areas that have front public open streets should have dwellings on them as that is not proposed in this case except on Marau Crescent.

The Question at Large

[87] The issue, however, of Local Centre providing for commensurate local demand is not derogated from by the Court in the *Panuku* decision. We note the comments of the Court in *Panuku* from paragraphs [74] to [86] and essentially have made our own assessment of these matters as part of this decision, although we do not understand our position to derogate from that decision. Again, our view is already expressed in [97] in *Panuku* in relation to the restricted discretionary activity consents:

We have also determined that, from a legal perspective, the contraventions of these provisions do not provide a legal impediment to the proposal on the facts of this case, but our factual analysis of the effects arising from the contraventions may.

[88] At paragraph [100] the Court in *Panuku* discussed visual simulations. This Court wants to be very clear that it sees simulations of being of some assistance in evaluating the issues before the Court, but they are not determinative. In particular, we note that issues such as the time of day, the weather (including shadowing and then instantaneous position and perspective of the view) and a range of other matters to

⁵ At [74]-[77].

affect the relationship between the viewer and the subject in an area as visually culturally complex and multi-layered.

[89] We conclude that a visual simulation must be subject to a clear understanding of these limitations. We rely on our site inspection and the evidence of parties with some assistance from the relevant visual simulation perspectives.

[90] We repeat the same criticisms of the Court in *Panuku* in relation to this case, namely that the use of multiple scales for landscape assessment by the parties did not assist us. We are still unclear as to what gain is achieved by some experts utilising different scales. If the scales are truly noncomparable we conclude that such evidence is of limited usefulness.

[91] The Court in *Panuku* then moves on to a more particular analysis but we believe that the common discussion of [157] is of direct relevance to this case:

The purpose of the height standard in the Local Centre Zone is to:

- (i.) Manage the effects of building height;
- (ii.) Allow reasonable sunlight and daylight access to public open space excluding streets and nearby sites;
- (iii.) Manage visual dominance effects;
- (iv.) Allow an occupiable height component to the height limit, and an additional height for roof forms that enables design flexibility, to provide variation and interest in building form when viewed from the street;
- (v.) Enable greater height in areas identified for intensification; and
- (vi.) Provide for variations to the standard zone height through the Height Variation Control, to recognise the character and amenity of particular areas and provide a transition in building scale to lower density zones.

[92] We see *Panuku* as supporting the general principles that we outlined earlier in our decision. Overall, in *Panuku* the approach of focussing excess height in the lower part of the site gave an ability to achieve greater intensity while minimising the effects of height and bulk.

The Summerset (St Johns) Decision

[93] In the St Johns decision, the AUP zoning provisions are slightly different and apply the integrated residential development matters of discretion under H.5.8.1, as discussed in [27] of the decision, which include:

- a) the effects on neighbourhood character, residential amenities, safety in the surrounding resident areas from all of the following:
 - i) Building, intensity, scale, location, form and appearance;
 - ii) Traffic;
 - iii) Design of parking and access;
 - iv) Noise, lighting and hours of operation.

[94] The Court also highlighted at [28] additional criteria under H5.8.2.1(b)(i) for building intensity scale location form and appearance:

- i) Whether the intensity and scale of the activity, the building location form and appearance is compatible with the character and residential amenity provided for within the zone and compatible with the surrounding residential area;
- ii) Traffic – whether the activity avoids or mitigates high levels of additional non-residential traffic on local roads and a series of other criteria which were in the end not argued or addressed by appropriate conditions.

[95] It can be seen therefore that similar criteria arise in respect of the MHU Zone, in respect to building intensity, location and formal appearance. However, the relationship with the surrounding Single House Zone becomes of more importance because of the compatibility requirement under H5.8.2.1(b)(i). The different wordings between these two zones is helpful in showing the distinction between the two zones.

[96] We conclude there is less focus within the Local Centre on the compatibility directly with the surrounding residential area. But there is still an expectation that amenity outcomes will be achieved. We conclude that is achieved in the Local Centre Zone by meeting the other purposes, which we have already discussed in relation to buildings within the Local Centre Zone. Again, we do not think there is anything that is said within the *St Johns* decision that militates towards a particular outcome in this case.

[97] As the Court noted in *St Johns* at [58], the zone description for the Mixed Housing Urban states over time the appearance of neighbourhoods within the zone will change with development, typically up to three storeys and a variety of sizes and forms. In short, we see the words typically and predominantly indicating a general intent with variation provided.

[98] To that extent, the statement in relation to the Local Centre Zones at four storeys is again showing a typical or predominant outcome anticipated, not the outcome in a particular case.

[99] In short, some sites may warrant lesser development and some sites greater where height variation control is being used, such as in the Local Centre Zones of 16 m and on the St Johns adjacent to Summerset at 16 m. This is more indicative of the outcomes anticipated. Although the Court discussed the question of whether or not the intensification was permissible on the Summerset site, this issue did not arise in this case and is accepted by all the parties that some level of intensification - at least to the build height variation controls provided - is anticipated on this site. That case turned, upon compatibility with adjacent residential zones and the Court's conclusion that the layering of the buildings and the setback from the adjacent residential zones, achieved the overall purpose of the plan.

Conclusion as to the Revised and June Proposals

[100] As noted earlier, most other relevant concerns of the AUP have been addressed and there are well advanced provisions provided to the Court, which are acceptable with minor modifications including matters such as parking, flooding, hazards and manoeuvring.

[101] The core issue in this case is what extra occupiable height (to the ceiling of the highest occupiable part of the building) over 16 m and total height of building can this Local Centre zoning carry to achieve the outcomes envisaged under the AUP and the Act.

[102] It is clear that the AUP consideration by the IHP adopted a fine-grained

approach to this site given the historical contention relating to its buildings and its position immediately adjacent to a public reserve and major thoroughfare with significant residential housing on the upper layers of the hills behind. They adopted a height variation control for this zone of 16 m and allowed 2 m variation for roof form variation.

[103] In terms of the current design with the ground floor 4.5 m for retail and the upper floors (excluding the top floor) being 3.2 m, a four-storey building would have an occupiable height of around 13.6 m above ground, depending on the ceiling height of the top floor. A five-storey building would intrude some 0.8 m above occupiable 16 m limit, for instance at under 17 m above ground. Roof form would intrude a further metre plus lift overruns above that, to around 18.8 m or 21.5 RL. A four-storey building clearly at 14 m would still have the allowance of 2 m for roof and lift overrun which would take it to approximately 16 m or 18.7 m RL.

[104] Putting aside the over-height storeys on Building 1, the balance of the buildings themselves use a flat roof to minimise height. The impact upon properties on the ridge behind is affected by the front edge on Tamaki Drive at key positions at which views towards the sea will be impacted if the entire building height is the same to Marau Crescent. If the June Proposal was amended for extra height for the second retail floor to 4 m this would exacerbate this issue by around 700 mm.

[105] Although the June Proposal plans produced at the recommenced hearing show a smaller intrusion on Building 1, the design still provides for two extra storeys above the overall intrusion with a height for the parapet at 27 m RL or 24.3 m above ground. In other words, this is over 8 m above the 16 m occupiable limit and over 6 m above the 18 m height limit. The outcome of that is not inconsequential or mitigated by any of the other redistribution of bulk around the site.

[106] We conclude the appellant is still seeking to maximise the height along the balance of the frontage on Tamaki Drive, which increases impact on the residents behind. We acknowledge that there have been steps taken to move the bulk of the buildings back from the Marau Crescent frontage. However, this has minimal impact

upon those residences higher on the ridge and is probably no more than we would have expected for any development facing this road in any event.

[107] We note that the shadowing effects from the buildings built right on Marau Crescent and facing south could have some impact upon the public space and amenity of the road itself. Again, these matters are not conclusive, but they demonstrate to us that there has been a clear decision to maximise the envelope and benefit to the appellant over the public and residential amenity.

[108] We have concluded that there is no doubt that there is going to be reduction in views to the residences behind because of the building intruding over the anticipated height limit.

[109] We have spent a great deal of time deciding whether the extra height on the corner is warranted. We conclude that some extra height on that corner would have been warranted on the second floor if retail activity were to occur there. However, we have concluded clearly that as a maximum this could involve only a single extra storey on the corner of Tamaki Drive and Patteson Avenue and only to the extent of the current penthouse area shown on the diagram annexed hereto “C”.

[110] We now move to the more problematic issue for this Court as to the height intrusion over the occupiable height. We certainly consider that there would be some justification for carrying extra height on this site if the second floor was retail. However, there is no commensurate benefit to the public for floors 3 to 5, which clearly are private residential development. In terms of the finely grained approach of the IHP, we consider that the intrusion of a further 746 mm, while not critical, is a further increase above the occupiable height limit of 16 m.

[111] While these problems are not insurmountable, neither Proposal is currently consentable as we have no design to justify such an intrusion. Increasing the floor height for the second retail floor by 800 mm would increase the overall intrusion, we consider, to around 1.5 m. More retail on Level 2 should justify some extra height but the question then arises as to whether it justifies that level of intrusion.

Residents' concerns

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

[113] In the case before the Council Commissioners they noted:

We consider that key features of this area are as follows:

- (a) That there is a highly developed residential area surrounding the site including multi-layered buildings, similar to the type of outcomes anticipated under this plan; and
- (b) That there has been a finely grained expectation on development and the Local Centre and surrounding areas based on a series of decisions.

Outcome

[114] In our view, there is no doubt there would be a transference of the outlook that is currently enjoyed by those properties of Ronaki Road and other streets to those on the Tamaki Drive frontage. The AUP gives residents in Marau Crescent and on Ronaki Road no guarantee that the buildings in front of them will not obscure their views. However, they have a reasonable expectation that the plan provisions represent a reasonable understanding of what may occur on that site.

[115] We do not consider it appropriate to provide a design approach in terms of the issues to be addressed under the plan. For our part, the lack of articulation of the roof has both advantages and disadvantages for residents. The main advantage is it gives a more open and uniform view across the whole view.

[116] Neither the Revised Proposal put to us in opening (which was not abandoned by the appellant) nor the June Proposal (which required a resumed hearing) are acceptable to the Court.

[117] Mr Allan invited us to look at some alternative proposal that may be suited to us if neither of these are acceptable. I anticipate he was considering us allowing a sixth floor on the corner of Patteson Avenue. The Court has, over the years, sought to accommodate parties by seeking to avoid a repeated litigation in circumstances where a sensible outcome appears to be available.

[118] This is not one of those cases for the following reasons:

- (a) Drive Holdings' position has been argued multiple times, and the IHP outcome is an appropriate approach to height on this site;
- (b) It is clear that even minor deviations from the AUP requirements can have impacts on the surrounding properties and landowners;
- (c) While some intrusion might be justified, for example by a second level of retail development, the level of intrusion that would occur in this case still may still be unacceptable in our view. A single extra storey penthouse on corner and five floors with second floor retail may be justifiable depending on the overall height and design. However, that detail is not before us;
- (d) We are unpersuaded by the arguments about redistribution of bulk; and
- (e) In particular, we consider that the expert witnesses have not been helpful to us in evaluating the issues at large under the AUP. The repeated opinion evidence, which was often in conflict, left us no proper basis for an evaluation based upon expert opinion.

[119] It is for this Court to be satisfied that the consent should be granted. We are to consider not only the evidence before us and the AUP, but the decision of the Commissioners. We consider their decision was well founded.

[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.

[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.

[122] **Accordingly:**

- (a) **the appeal is refused, and the Commissioners decision confirmed; and**
- (b) **the Court allows the parties 20 working days to file any application for costs if these cannot be agreed. Any replies that we filed a further 15 days thereafter. And final reply, if any, five working days after that. The Court encourages the parties to resolve cost without reference.**

For the Court:



Judge J A Smith
Environment Judge



Annexure A

Annexure B



PROPOSED MISSION BAY DEVELOPMENT PHOTOMONTAGE VPT 11 VIEWED FROM 6 RONAKI ROAD

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VPT 11 | Image 2 of 3
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Photomontage information:

Photography Date/Time: 09/07/2020 10:15 a.m
Camera type: Canon EOS 5D Mark III / 50mm prime lens, focal length of 50mm
Field of view (FoV): 66 degrees horizontal FoV / 27 degrees vertical FoV
Camera location: (Coordinates are in terms of Mt. Eden 2000 Circuit, Levels in terms of Auckland Vertical Datum 1946) 803326.13mN, 406092.23mE, Viewfinder 24.11mRL
Photograph location and control point items have been accurately surveyed by Fluker Surveyors Ltd

Optimum viewing distance of this image is 312mm when printed at scale 1:1 (100%) on SRA3 paper then trimmed to A3 size.

This image should be assessed in the field from the same location from where the photograph was taken.

In reality photographs and photomontages can not convey a view exactly as it would be seen by the human eye.

This photomontage has been prepared by U6 Photomontages Ltd in accordance with the NZILA Best Practice Guide for Visual Simulations BPG 10.2 document.



PHOTO VIEWPOINT 11 A

PROPOSED DEVELOPMENT

BUILDING 1 PENTHOUSE GLAZING



PROPOSED MISSION BAY DEVELOPMENT

PHOTOMONTAGE VPT 11 ILLUSTRATING THE 18m TOTAL BUILDING HEIGHT STANDARD & 16m OCCUPIABLE BUILDING HEIGHT STANDARD

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Legend:

— 18m Total building height standard

— 16m Occupiable building height standard

Annexure C

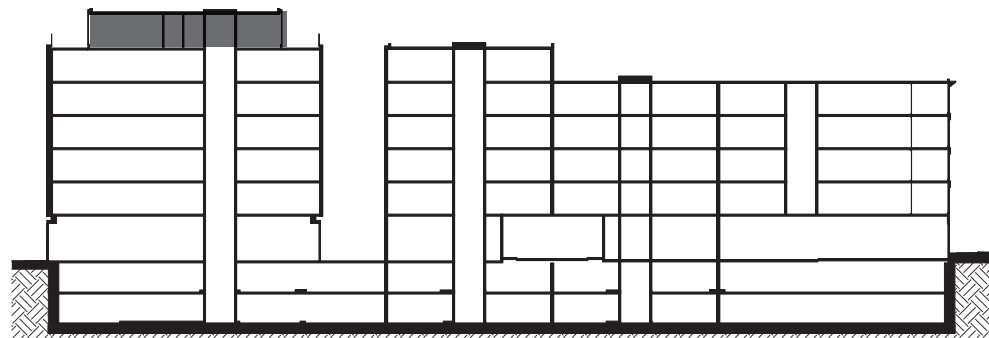
June Proposal

Mission Bay
Environment Court

Buchan
917032 / 01 June, 2021

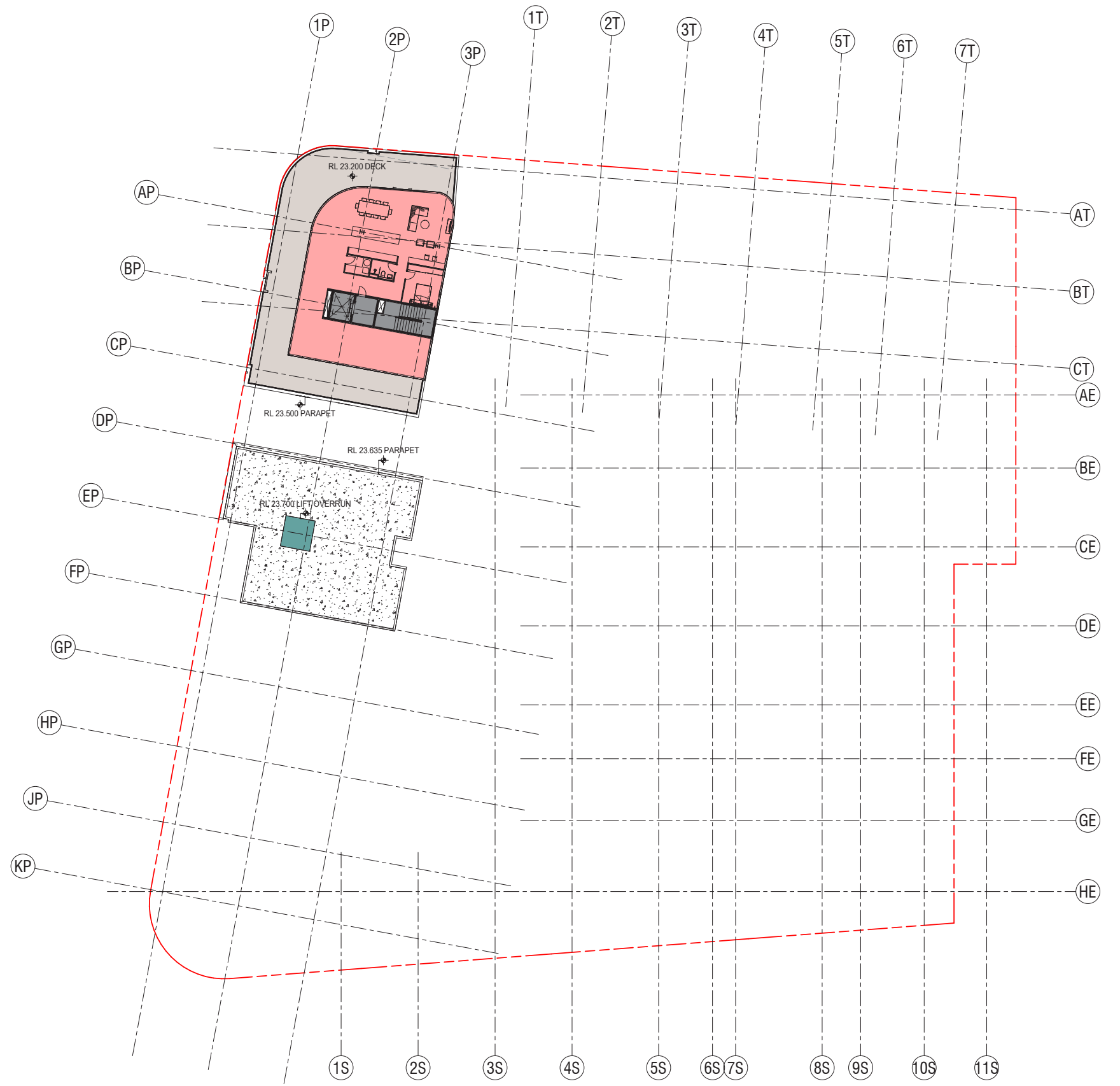
Level 7 Floor Plan / 1:500@A3

KEY SECTION



STANDARD KEY

- PARKING/LOADING/VEHICLE ACCESS
- RETAIL
- RESIDENTIAL
231m²
- CIRCULATION
36m²
- DECK / MIXED LANDSCAPE AREA
199m²
- STORAGE
- PLANT SERVICES
9m²
- ACCESSORY RECREATIONAL FACILITY
- ROOF
- INACCESSIBLE LANDSCAPED ROOF GARDEN
- GROUND LEVEL LANDSCAPING



Level 7
Scale 1:500@A3

