IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY
I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2019-

UNDER THE	Resource Management Act 1991
IN THE MATTER	of an appeal from a decision of the Environment Court pursuant to section 299 of the Resource Management Act 1991
BETWEEN	**GOLF (2012) LIMITED** a duly incorporated company with its registered office at Unit 9, 22a Kalmia Street, Ellerslie, Auckland, 1051, New Zealand **Appellant**
AND	**THAMES-COROMANDEL DISTRICT COUNCIL** a territorial authority constituted by the Local Government (Waikato Region) Reorganisation Order 1989 **Respondent**

NOTICE OF APPEAL

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To: The Registrar of the High Court at Hamilton

TAKE NOTICE that at on or as soon as counsel may be heard, counsel for the appellant will move the High Court at Hamilton on appeal from the decision of the Environment Court dated 24 June 2019 with reference [2019] NZEnvC 112 (**Decision**) **UPON THE GROUNDS** that the Decision is erroneous in law and upon the further grounds as set out below.

Errors of Law

1. In concluding that the provisions of the decisions version of the proposed Thames-Coromandel District Council District Plan (the **Proposed Plan**) which were the subject of the appeal:

(a) did not satisfy the test in section 85(3) of the Resource Management Act 1991 (the **Act**); and

(b) (by implication) did not render the golf course land (the **Land**) owned by Golf (2012) Limited (the **Appellant**) incapable of reasonable use, and did not place an unfair and unreasonable burden the Appellant in terms of section 85(3); and

(c) were appropriate,

the Environment Court made the following errors of law.

2. The Environment Court erred in failing to make the determinations required under section 85(3), specifically:

(a) whether the open space zoning rendered the Land incapable of reasonable use, and if it did not, identifying what the reasonable use was and why it was reasonable; and

(b) whether the open space zoning placed an unfair and unreasonable burden on the Appellant, including identifying the nature and extent of the burden on the Appellant and why it was not unfair and unreasonable.

3. The Environment Court erred in its interpretation and application of section 85(3), by holding, inter alia:

(a) that the test in section 85(3) focuses on the public interest rather than on the reasonable use of the land by an owner of the land and the unfairness or unreasonableness of the burden on that owner;

(b) that in determining whether the challenged plan provisions satisfied section 85(3) the Court could look beyond the matters referred to in that subsection (namely Part 3 and section 85(1)), and in particular could consider the matters in Part 4 including section 32, and could compare the reasonableness of the challenged zoning and rules with alternative zonings or rules;

(c) to the extent the Court did so, that matters of national importance in section 6 of the Act, and in particular the preservation of the natural character of the coastal environment and its protection from unnecessary subdivision and development, were relevant either at all or in this case;

(d) that the most appropriate zoning of the Land determined whether section 85(3) was satisfied;

(e) that the planning history of the Land, including past plan provisions affecting the Land, was relevant;

(f) that the actions of previous owners of the Land were relevant;

(g) that the Appellant's personal circumstances, including the planning provisions which were in force at the time of its acquisition of the Land, and the Appellant's knowledge of them, were relevant.

4. The Environment Court took into account irrelevant considerations, namely the matters in paragraph 3(a) to (g) above.

5. The Environment Court erred in determining that the tests of section 85 were not met because it reached that conclusion without evidence or which on evidence before the Court it could not reasonably have come.

6. Having concluded in paragraph [124] of the Decision that the treatment of the Land compared to the disparate treatment of otherwise similar land was *prima facie* a restriction of reasonable use and might amount to an unfair and unreasonable burden on the Appellant, the Environment Court then erred in relying on irrelevant considerations to hold that the prima facie conclusion was overridden.

7. Alternatively, and if the matters in paragraphs (3)(e), (f) and/or (g) were relevant, the Environment Court erred in reaching the following conclusions without evidence or which on the evidence before the Court it could not reasonably have come:

   (a) the controls at the time the Appellant acquired the Land were reasonably comparable to the controls imposed by the Proposed Plan;

   (b) *Capital Coast Health Ltd v Wellington City Council* (W101/98 and W4/2000) was distinguishable;

   (c) that the arrangements whereby the Land came to be open space were voluntarily entered into by the owner at the time.

8. The Court erred in concluding that the test for expropriation identified by the Supreme Court in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112 was not satisfied, based on the restrictions in the plan at the time of the Appellant's acquisition of the Land, because those restrictions were materially different to those in the Proposed Plan under challenge.

9. Even if the Proposed Plan is not contrary to section 85(3), the Environment Court erred in holding that the proposed plan provisions were more appropriate than those proposed by the Appellant by failing to undertake the appropriate assessment required under section 32.

Questions of Law to be Resolved

The questions of law to be resolved are:

10. Whether the Environment Court erred in law in failing to make the determinations required by section 85(3), and specifically the matters in paragraph 2(a) and (b) above?

11. Whether the Environment Court applied the wrong legal test, and/or took into account irrelevant matters to the test in section 85(3), in considering the matters in paragraph 3(a) to (g) above?

12. Whether the Environment Court reached a conclusion without evidence or which on evidence before the Court it could not reasonably have come in determining that the tests of section 85 were not met?

13. Having concluded in paragraph [124] of the Decision that the disparate treatment of the Land compared to otherwise similar land was *prima facie* a restriction of reasonable use and might amount to an unfair and unreasonable burden on the Appellant, whether the Environment Court erred in law and/or took into account irrelevant considerations in holding that its prima facie conclusion was overridden?

14. If the matters in paragraphs 3(e), (f) or (g) were relevant, whether the Environment Court reached a conclusion without evidence or on which the evidence before the Court it could not reasonably have come in relation to the matters in paragraph 6(a) to (c) above?

15. Whether the Environment Court was correct in concluding that the test for expropriation identified by the Supreme Court in *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112 was not satisfied based on the restrictions in the plan at the time of the Appellant's acquisition of the Land), either:

(a) without any or sufficient evidence; or

(b) contrary to the evidence (because those restrictions were materially different to those in the Proposed Plan under challenge)?

16. Even if the proposed plan is not contrary to section 85(3), whether the Environment Court erred in law by failing to undertake the appropriate assessment required under section 32 in determining that the Proposed Plan provisions were more appropriate than those proposed by the Appellant?

Grounds of Appeal

The grounds of appeal are:

17. The Environment Court proceedings related to an appeal against the Council's decision on the Proposed Plan which focused on the appropriateness of the zoning of the Land. The Appellant challenged the provisions under section 85 on the basis that the Proposed Plan provisions would render the land incapable of reasonable use, and place an unfair and unreasonable burden on the Appellant.

18. The Environment Court decision was made on the basis of the errors of law described in paragraphs 1 to 9 above. These errors were material to the Environment Court's decision and its conclusions that the Proposed Plan provisions did not satisfy the test in section 85(3), and were more appropriate than the Appellant's provisions, when it dismissed the appeal.

Relief Sought

19. The Appellant seeks the following relief:

(a) That the appeal be allowed together with a declaration that the Environment Court erred in law in its decision;

(b) Such further or other relief as may be appropriate; and

(c) Costs of and incidental to this proceeding including disbursements.

A copy of the Decision is attached to this notice of appeal.

This notice is filed in reliance on sections 299 and 300 of the Resource Management Act 1991 and Part 20 of the High Court Rules.

DATED at Auckland this 12th day of July 2019

W S Loutit
Solicitor for the Appellant

This document is filed by WILLIAM STUART LOUTIT solicitor for the Appellant of the firm Simpson Grierson.

The address for service of the Appellant is at the offices of Simpson Grierson, Level 27, and 88 Shortland Street, Auckland.

Documents for service on the Appellant may be left at that address for service or may be posted to the solicitor at Private Bag 92518, Auckland, or left for the solicitor at a document exchange for direction to DX CX10092 or emailed to the solicitor at bill.loutit@simpsongrierson.com.

TO: The Registrar of the Environment Court at Auckland

AND TO: The Respondent

AND TO: Other parties to the Environment Court proceedings:

- Holes 1 and 2 Group
- Matarangi Ratepayers Association Incorporated
- New Zealand Transport Agency
- Burfoot Limited