

**IN THE HUMAN RIGHTS REVIEW TRIBUNAL**

HRRT No.

BETWEEN **NGAI TAI WAIPAREIRA HOUSING LIMITED** an  
incorporated company having its registered office at  
Te Whānau O Waipareira Trust, Corner Edmonton &  
Great North Roads, Henderson, Auckland

Plaintiff

AND **AUCKLAND COUNCIL** constituted under section 6  
of the Local Government (Auckland Council) Act  
2009

First Defendant

AND **PANUKU DEVELOPMENT AUCKLAND LIMITED**  
an incorporated company having its registered office  
at 82 Wyndham Street, Auckland Central, Auckland

Second Defendant

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**POINTS OF CLAIM**

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GROVE DARLOW & PARTNERS  
SOLICITORS  
AUCKLAND

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## POINTS OF CLAIM

### The plaintiff says:

#### Plaintiff

1. The plaintiff is an incorporated company having its registered office at Corner Edmonton and Great North Roads, Henderson, Auckland being the offices of Te Whānau O Waipareira Trust (“Waipareira Trust”).
2. The shareholders of the plaintiff are:-
  - (a) Waipareira Trust;
  - (b) Ngai Tai Ki Tamaki Whenua Limited which is in turn owned by Ngāi Tai ki Tāmaki.
3. The plaintiff was incorporated as a special purpose vehicle with which to conduct the development of, inter alia, land known as Old Tavern Lane, at 3 St George Street, Papatoetoe, Auckland which is the subject matter of the proceeding.
4. Waipareira Trust:-
  - (a) Is an urban Maori authority and a charitable trust governed by an amended deed of trust dated 16 December 2008;
  - (b) Was incorporated under the Charitable Trusts Act 1957 on 24 August 1984;
  - (c) Is recognized as an entity that is representative of urban Maori by, for example, having the designation of “representative Maori organization” under the Maori Fisheries Act 2004;

- (d) Is the largest integrated non-government social service organization in New Zealand providing health, welfare, education, justice and enterprise services to the people of West Auckland; and
- (e) Has more than 200 full time staff, in excess of 150 accredited volunteers and during the last annual financial year had in excess 18,000 client contacts.

5. Ngāi Tai Ki Tamaki Whenua Limited (“NTKTWL”):-

- (a) Is a company incorporated by Ngāi Tai ki Tāmaki and having its registered office at 102 Maraetai Drive, Maraetai, Auckland.
- (b) Ngāi Tai ki Tāmaki are known as ‘nga manu tangata’ or the bird people. Ngāi Tai ki Tāmaki are also known as the ancient sea faring people who have no sense of boundaries. Ngāi Tai ki Tāmaki are the original inhabitants of Auckland. This is acknowledged by all other iwi, hapu and waka who arrived at Auckland as it is Ngāi Tai ki Tāmaki who welcomed, hosted and accommodated these historic Maori arrivals.
- (c) Ngāi Tai ki Tāmaki ancestor, Taikehu, first discovered and named Papatoetoe when he followed the Karoro or seagulls he discovered in the Manukau Harbor which he also named, te Manukanuka o Hoturoa.

**First Defendant**

- 6. The first defendant is Auckland Council. Auckland Council was established as a territorial authority for Auckland by section 6 of the Local Government (Auckland Council) Act 2009 (“LGACA”).
- 7. By virtue of sections 10 and 11 of the Local Government Act 2002 (“LGA”), Auckland Council is required to give effect, in relation to the Auckland region, to the purpose of local government, which includes meeting the current and future needs of communities.

## Second Defendant

8. The second defendant, Panuku Development Auckland Limited (“Panuku”), is an incorporated company having its registered office at 82 Wyndham Street, Auckland Central. Its sole shareholder is Auckland Council.
  
9. Panuku:-
  - (a) Is a council controlled-organisation (“CCO”) under Part 5 of the LGA and Part 8 of the LGACA.
  
  - (b) Is a substantive council-controlled organisation, as defined by section 4 of the LGACA, with an obligation to give effect to the Auckland Council’s Long Term Plan and written strategies of the Auckland Council pursuant to section 92 of the LGACA;
  
  - (c) Is required to make all decisions in accordance with its Statement of Intent and Constitution, pursuant to section 60 of the LGA;
  
  - (d) Is the sole entity within the Auckland Council group responsible for leading urban redevelopment leveraging off council owned property;
  
  - (e) By its Statement of Intent for the 2017 – 2020 period (“SOI 2017/2020”) and its Statement of Intent for the 1 July 2018 – 30 June 2021 period (“SOI 2018/2021”), identified the second defendant’s strategic objectives as including to facilitate iwi investment and collaboration into the sustainable redevelopment of brownfield urban locations;
  
  - (f) By its SOI 2017/2020 and SOI 2018/2021, identified key projects and initiatives for delivering on Maori outcomes which include:-
    - (i) Achieving better outcomes for and with Maori;
    - (ii) Enabling Maori commercial development opportunities;
    - (iii) Working in partnership with Maori to enable investment in commercial and housing opportunities;

- (iv) Making a contribution to Maori outcomes which include significantly lifting Maori social and economic wellbeing.
- (g) By its SOI 2017/2020 identified key projects and initiatives for delivering housing for older people, including delivering a multi-year re-development programme for the Housing for Older People network (“HfOP”) through partnerships. This key project was repeated in its SOI 2018/2021, with HfOP being re-named Haumaruru Housing.
- (h) By its SOI 2018/2021:
- (i) Acknowledges that the new government has signalled that increase in housing supply, including affordable housing, is a priority;
  - (ii) Recognises its role in contributing to Maori Identity and Wellbeing by (inter alia) providing commercial development and capacity building opportunities and enabling Maori to express kaitiaki role through place making;
  - (iii) Recognises its role in leading urban transformation in a number of areas, including Papatōetoe, and also facilitating and accelerating quality housing at scale and housing choices to meet challenging needs.
- (i) Has elaborated on its commitment to Tamaki Makaurau Maori in its policy document entitled “*Decision Paper: Maori Engagement*” dated 28 October 2015 in which Panuku (inter alia):-
- (i) Recognises that through a collaborative partnership approach, Maori can contribute to the successful exercise of the Panuku mandate in four key areas, one being “*enabling commercial investment, including partnership in commercial and housing opportunities*”;
  - (ii) Recognises the Auckland Plan objective to achieve “*Transformational shift; significantly lift Maori social and economic wellbeing*”;

- (iii) States that Maori can contribute to the successful exercise of the Panuku mandate, including by *“working towards joint strategic outcomes”* and *“enabling commercial initiatives and development partnerships”*;
- (iv) Sets “Commercial investment/partnership” goals that include that *“Maori are informed and encouraged to participate in partnerships”* and *“Contribution [to] Maori wellbeing and effective Maori capacity (Independent Maori Statutory Board Maori Plan Objectives)”*;
- (v) Identifies “Actions” to be undertaken, which include (inter alia) *“Facilitating iwi partnerships in significant initiatives, for example, Housing for Older People”* and *“Te Toa Takatini – Whai Painga programme, Whare for Life”*.

### **Old Tavern Lane, Old Papatoetoe**

10. Auckland Council is the registered proprietor of 3 St George Street, Papatoetoe, being legally described as Lot 1 Deposited Plan 156759 (NA94A/944), Lot 3 Deposited Plan 15556 (NA121C/916), Lot 1 Deposited Plan 64602 (NA89C/919), Lot 1 Deposited Plan 46102 (NA1625/85) and Part Lot 2 Deposited Plan 7551 (NA1060/166), measuring approximately 10,094 square metres (more or less) as shown for identification purposes only as Lot 1 and Lot 2 on the survey plan attached as **Schedule 1** (“Old Tavern Lane”).

### **Background**

11. On or before 16 August 2017 Auckland Council, by Panuku, agreed to sell Old Tavern Lane to Ngāi Tai ki Tāmaki for the purpose of Ngāi Tai ki Tāmaki undertaking the development of that property for affordable residential and retirement lifestyle housing units in conjunction with easily accessible connection to transport systems, shopping precinct and medical facilities.
12. On a date that is presently unknown but which will be provided following discovery Auckland Council either by itself or by Panuku:-

- (a) Adopted a policy whereby it would impose a restriction as to the maximum percentage or amount of 'social housing' which could be included as a component of housing units in residential developments upon any third party acquiring land from Auckland Council for housing and/or commercial development; and
- (b) Specifying the restriction referred to in (a) as a term of any contract by which land was acquired from Auckland Council for residential and/or commercial development.

("the Policy")

- 13. By letter dated 16 August 2017 from the second defendant ("Panuku") addressed to Mr James Brown, Chairman, Ngāi Tai ki Tāmaki, Auckland Council appointed the plaintiff as the preferred developer of Old Tavern Lane.
- 14. The Policy was stated and given effect to by Auckland Council on and from 16 August 2017 when Panuku, on behalf of Auckland Council, specified the purpose of the letter in paragraph 13 was to record the main commercial terms that would be included in a development agreement to be entered into between Auckland Council and Ngāi Tai ki Tāmaki.
- 15. The terms specified in the 16 August 2017 letter included:-
  - (a) Vendor is Auckland Council;
  - (b) Purchaser is Ngāi Tai ki Tāmaki or approved nominee;
  - (c) Number of units – 71 household units featuring 29 three bedroom houses and 42 one bedroom apartments;
  - (d) Design – will be substantially in line with the formal proposal submitted subject to Panuku confirming the design as it is developed during the master planning process;

- (e) The purchaser agrees to work with Panuku's internal designers to ensure the apartment building interface to Old Tavern Lane frontage meets Panuku's vision and outcome;
  - (f) Social housing – Not more than 30% of the proposed units may be used for social housing, which term includes sales to persons aged over 55 years (“the Social Housing Cap”);
  - (g) Iwi liaison - The purchaser will be responsible for iwi liaison, which will include engagement with all local iwi and incorporation of Te Aranga design where appropriate;
  - (h) Restrictive covenant – A restrictive covenant will be registered over the land which provides that the land cannot be used for a supermarket or food outlet store while Foodstuffs (or a related entity) is the proprietor of the neighbouring supermarket lot.
16. Between 16 August 2017 and around July 2018 Auckland Council, by Panuku, and the plaintiff negotiated the terms of an agreement to develop the Old Tavern Lane (“the Development Agreement”).
17. On 8 September 2017 the defendants sent a draft of the Development Agreement to the plaintiff which:-
- (a) Defined Social Housing as follows:-

**“Social Housing”** means houses owned, managed and rented out at lower than market rent for social purposes by organisations such as Housing New Zealand, Community Housing Providers and other similar organisations, and sales to people over the age of 55 years.
  - (b) Included in Annexure D, Essential Outcomes, the statement:-

“Not more than 30% of the townhouses and units may be used for social housing.”
18. By its draft Development Agreement dated 28 September 2017 the defendants adopted a revised definition of Social Housing, which provided:-

**“Social Housing”**: means dwellings or units leased to tenants (including those over the age of 55) by organisations such as Housing New Zealand or Community Housing Providers the rents for which are subsidised by grants or rental subsidies by the Ministry of Social Development or any other central or local authority or the private sector including without limitation charitable trusts and religious entities.

19. By its draft Development Agreement dated 18 December 2017 the defendants:

(a) Added the following definition of Social Housing Covenant to the Agreement:-

**“Social Housing Covenant”** means the restrictive covenant to be registered against the titles to 70% of the Development providing that those dwellings cannot be used for the provision of Social Housing including any form of tenancy or lease to provide for Social Housing;

(b) Added clause 11.2 to the Agreement, which provided:-

**“Interests on titles to dwellings”**: The Developer must register the Social Housing Covenant on the relevant Lots when separate fee simple titles issue for the relevant Lots.

20. The final draft of the Development Agreement discussed between the parties around 10 April 2018 incorporated the following provisions required by the defendants:-

(a) Clause 1 included the following definitions:-

**“Social Housing”** means dwellings or units leased to tenants (including those over the age of 55) by organisations such as Housing New Zealand or Community Housing Providers, the rents for which are subsidised by grants or rental subsidies by the Ministry of Social Development or any other central or local authority or the private sector including without limitation charitable trusts and religious entities”.

**“Social Housing Covenant”** means the restrictive covenant to be registered against the titles to 69.1% of the Development providing that those dwellings cannot be used for the provision of Social Housing including any form of tenancy or lease to provide for Social Housing.

**“Essential Outcomes”** means the outcomes which the Developer must achieve and which are set out in Schedule D;

(b) Clause 11.2 provided:-

**“Interests on titles to dwellings:** The Developer must register the Social Housing Covenant on the relevant Lots when separate fee simple titles issue for the relevant Lots.

(c) Schedule D, Essential Outcomes provided (inter alia):

Not more than 30.9% of the townhouses and units may be used for Social Housing ...

Incorporate Panuku's social and community objectives while being complimentary and flexible with urban design outcomes in the relevant high level project plan.

21. On or about 23 October 2017 Auckland Council, by Panuku, in the knowledge that Waipareira Trust and NTKTWL intended to incorporate the plaintiff as the vehicle with which to undertake the development contemplated by the Development Agreement, sought assurances from Waipareira Trust as follows:-

*“Please note that although Housing for Social Benefits Limited may be a social housing provider, that the limit of 30% social houses will remain in place over the entire development. Please advise how will we ensure the remaining apartments terraces will be sold in the open market and not retained by HFSB?”*

22. At the Design Meeting dated 14 February 2018, the parties discussed the request made by the plaintiff’s consultant on behalf of Housing New Zealand to reconfigure two bedroom terraced apartments as one and three bedroom apartments which, in conjunction with the four terraced apartments in Lot 1, would be included within a Social Housing mix of 30.9%. In response, Panuku stated at paragraph 3.1 of the Design Meeting Minutes that the option to include the Lot 1 four terrace houses within the Housing New Zealand mix was not accepted by Panuku as it exceeds the 30% Social Housing Cap.

**First challenge to Policy**

23. By email dated 16 February 2018, the plaintiff by its solicitor stated:-

*“For my own part where does the 30% come from? Is it Panuku policy on this particular site or is it part of the contractual obligations Panuku has to Foodstuffs?”*

24. By email dated 6 April 2018, the defendants sent to the plaintiff an amended draft of the Development Agreement which revised the Social Housing Cap

from 30% to 30.9%. The defendants failed to respond to the plaintiff's question contained in the 16 February 2018 email.

### **Second challenge to Policy**

25. At a meeting held on 17 May 2018 between John Tamihere of the plaintiff and Allan Young and Roger MacDonald of Panuku, John Tamihere requested Panuku to:-

- (a) Articulate the legal justification for having established a Social Housing Cap; and/or
- (b) Increase the Social Housing Cap from inter alia 31% to 67%.

26. By email dated 22 May 2018, Panuku replied in writing:-

*“Outstanding is the maximum social housing component. It was mutually agreed at the outset of negotiations that the maximum level of social housing was 30%. This has been a consistent requirement of Panuku. A request to alter the percentage to allow for four townhouses to be incorporated into the social housing percentage was subsequently agreed bringing the maximum to 31%.*

*It has now been requested that Panuku agree to alter the maximum social housing percentage to approximately 67%. As discussed this is unacceptable and will not be agreed to.*

*Subsequently we have received from your consultants a plan indicating a total development of 77 units with 28 units being social which is 36% social housing and would be acceptable to Panuku.*

*Having considered the request to alter the maximum social housing percentage it is apparent that the percentage can swing quite widely dependent on unit configurations. I suggest that we continue with the principle of capping social housing but limit it to the number of units in the block Apartments marked Block A and the four terraces marked Block B on the attached plan.*

*This is a pragmatic basis on which to move forward... “*

### **Third challenge to Policy**

27. By email dated 24 May 2018 the plaintiff by Mr Tamihere sought to challenge the legitimacy of the Social Housing Cap saying:-

*“The final issue of contention and the only issue not well recorded in your email was that concerning the Social Housing quota/percentage determined by Panuku.*

*Firstly, I agree and accept that from the time of Waipareira involvement Panuku had made known its 30% quota on Social Housing in this Development.*

*I made the following points:*

- *An Election had changed the landscape in regard to Housing provision particularly Social.*
- *The true volume of Homelessness and a massive increase in Social Housing waiting lists had occurred whilst we awaited closure on matters addressed above in terms of the DA.*
- *The market had softened and was in a cautious phase.*

*I can confirm that HNZ has shown significant interest in this development particularly in regard to Social Housing for the Elderly.*

*I informed you of this and requested you revise your percentage of Social Housing on this site to 50%...”*

28. By email dated 2 July 2018, Panuku responded to the plaintiff, stating:

*“...the Panuku Board has now considered your request for a higher percentage of social housing on The Tavern Lane site*

*...The Board discussed the process to date and how our requirement for a cap on the amount of social housing in the overall development has been a consistent ‘bottom line’. Despite Panuku taking a pragmatically flexible approach to the level of the cap during the negotiations, the Board agreed that pushing the percentage over 37% which is what was our final position, would not generate the community outcomes the Board envisages for this town centre. On that basis, the Board did not approve increasing the cap as requested by your Board.*

*Given that there is no agreement on the level of social housing at this stage, I would appreciate a discussion with you to clarify how you would like to proceed. Panuku would like to continue to finalise The Tavern Lane development agreement with you if you see a way forward to amend your plans to stay within the cap of social housing percentage. If you do not see a way to achieve this, Panuku will begin the process to take the site to the open market again. Please note that this is not our preferred outcome...”*

#### **Fourth challenge to Policy**

29. By email dated 3 July 2018 the plaintiff by Mr Tamihere again questioned the legitimacy of the Social Housing Cap stating:

*“I refer to your email of 2 July 2018.*

*I alerted you to two matters that you have obviously taken advice on. Your adherence to your own Maori Engagement Policy and Human Rights issues that may make your Social Housing Policy cap illegal. We accept your Board’s view and consider that we can proceed to a full DA now that all headline matters are agreed.*

*Given my Board has taken legal advice which is at odds with your Board’s position I wondered whether we could exchange briefs. Your legal opinion may explore matters that our Counsel may not of taken into account. My Board is on notice that this Social Housing cap is in breach of the law and requires that we look to protect our position.”*

#### **Fifth challenge to Policy**

30. The plaintiff's solicitors, Grove Darlow, sent a letter dated 6 July 2018 to the defendants' solicitors, Buddle Findlay, which:
- (a) enclosed a copy of a letter from Mr Mathew Smith, barrister, dated 14 May 2018 setting out the reasons as to why (inter alia) the Social Housing Cap infringes the prohibition on discrimination in section 53 of the Human Rights Act 1993 ("HRA");
  - (b) confirmed that the plaintiff would proceed with the Development Agreement, subject to reservation of rights in respect of the Social Housing Cap and the issues raised in the letter of Mr Smith; and
  - (c) gave notice to Panuku that it would seek a declaratory judgment as to the enforceability of the Social Housing covenant, and requested amendment to clause 29.5 of the Development Agreement to take into account the said reservation of rights.
31. By email dated 6 July 2018, the plaintiff by Mr Tamihere confirmed agreement to pursue the Development Agreement, but again challenged the legitimacy of the Social Housing Cap:

*"I note I have yet to receive a response to my email confirming agreement to pursue the Development Agreement. Notwithstanding, I have instructed our Lawyers and design team to close off and have the Agreement executed. This is all incumbent on Panuku.*

*In that regard, we consider our legitimate expectations will proceed.*

*You will note I have copied you in on our legal opinion as a matter of good faith, because we are sure you would not want to apply a Policy that may be discriminatory to Poor, Elderly on fixed incomes and Maori.*

32. The plaintiff's solicitors sent a further email dated 8 July 2018 to the defendants' solicitors setting out reasons for objection to the Social Housing cap, and concluding:

*"10. The vires of the social engineering covenant can be determined by the Courts. Ngai Tai Waipareira accepts that if the Court determines the social engineering covenant is intra vires then it will be bound by the same. The vires of the social engineering covenant is not a matter which should delay execution of the Development Agreement, all other terms being accepted and agreed upon. This is*

*especially so when Ngai Tai Waipareira has spent hundreds of thousands of dollars on design collaboration with Auckland Council / Panuku.*

*11. Put simply, the social engineering covenant is either legal (as Auckland Council have informed Ngai Tai Waipareira) or it is not (as Ngai Tai Waipareira has informed Auckland Council / Panuku). It would be disingenuous of Ngai Tai Waipareira to sign the Development Agreement and then give notice it is seeking a judicial determination of the vires of that social engineering covenant. The correct legal and moral approach was to invite dialogue and if that failed to resolve the issue (or as in this case there was no response to that invitation) then to give written notice.*

*12. We look forward to hearing from you after you have received instruction but we would expect that Auckland Council / Panuku will proceed with the Development Agreement subject to the reservation set out in my letter of 6 July 2018. The reservation of the vires issue allows for further discussion between our respective clients (and failing resolution, determination) without economically impacting on the viability of the Development Agreement.”*

33. The defendants’ solicitors responded to the plaintiff’s solicitors by email dated 9 July 2018, stating (inter alia):

*From our point of view, the main issue for some months has been how much of the development should be social housing. I understand that the parties have been discussing this with opposing views as well as considering how the changes brought about by Kiwibuild affect a project like this.*

*If the parties agree on the percentage of social housing the DA can control how that is achieved in a way that satisfies both parties.*

### **Sixth challenge to Policy**

34. The plaintiff’s solicitors sent a further email dated 16 July 2018 to the defendants’ solicitors stating (inter alia):

- 1. Ngai Tai Waipareira (NTW) has always pushed for no cap on the social housing covenant. It has been AC/Panuku which is restricting the social housing component to circa 30%;*
- 2. NTW has accepted the social housing covenant in terms of the DA subject to the vires of such a covenant being tested in Court. If the Court holds the covenant is vires, NTW accepts that social housing will be restricted to 30.1%. ...*

*We do not see why the issue of vires needs to hold up execution of the DA and the implementation of the project. ...*

### **Defendants’ Position**

35. By email dated 8 August 2018, the second defendant by Allan Young gave notice to the plaintiff that the defendants intended to cease discussions with the plaintiff regarding the development of the Old Tavern Lane site, on the grounds that the defendants did not wish to increase the Social Housing Cap. The second defendant stated (inter alia):

*We have re-considered the increased level of social housing within the development that you have proposed. Although Panuku is willing to take a pragmatic, flexible approach to the level of social housing, increasing that level up to 67 per cent as you have requested falls well outside our amended cap of around 37 per cent. Our Board considers agreement on the level of social housing a fundamental issue, and is essential to the signing of the DA. Without agreement on the level of social housing, the Board does not wish to proceed any further.*

*We have sought legal advice regarding the requirements for a cap on the level of social housing in this development and Panuku does not accept that it is outside its legal obligations with regard to any of the points you raise....*

*Given that we still have not reached agreement on the level of social housing we will not continue any further negotiations...”*

### **Panuku’s Housing Mix Policy**

36. From at the latest 6 November 2018 Panuka and Auckland Council promoted the Policy.

## Particulars

A. The Agenda of the Auckland Council Planning Committee dated 27 November 2018 (“the Agenda”) included Panuku’s draft “Policy for Determining Desired Housing Mix” (“the Housing Mix Policy”). The Agenda stated that the draft Housing Mix Policy was provided by Panuku to a workshop of the Planning Committee on 6 November 2018. The Agenda also contained an Executive Summary of the Housing Mix Policy which referred to the following components:

- (i) The broad aim of achieving a mix of 30% social, 30% affordable and 40% market housing in key locations, but with flexibility to reflect local conditions;
- (ii) The proposed 30% social, 30% affordable and 40% market housing mix was to be a “starting assumption”, but with flexibility to consider context and work with partners;
- (iii) An upper limit of 30% social housing was to be “a working assumption and acknowledged rule of thumb”.

B. Panuku’s draft Housing Mix Policy stated (inter alia):

5.14 *A maximum of 20 – 30% social housing is often applied as a rule of thumb, based on observation and experience, and has come to represent international and local best practice...*

5.15 *The Auckland Community Housing Provider Network ... members work on the basis that no one tenure should be dominant using the rule of thumb that a new housing development should roughly have a housing tenure mix that provides social rental housing (between 20% to 30%), affordable housing options (30% to 40%) and competitively priced market housing (20% to 40%). The final split of tenures is determined by the household cohort needs and the project context...*

7.4 *For **Priority Development Locations where more than 500 housing units are forecast** (i.e. Manukau, Panmure, Northcote, Onehunga), we will establish an overall target mix for those locations taking a 30/30/40 (social/affordable/market) mixed tenure approach as the starting assumption...*

7.9 *To avoid large concentrations of social housing, Panuku will work with our social housing partners to support them to incrementally improve the social housing stock and add affordable and market housing to the mix.*

7.10 *In the Transform and Unlock locations, the optimal share of social housing of up to 30% is the working assumption for Panuku Projects, where social housing is part of the development scheme. Panuku has the flexibility to place further restrictions on concentrations in large developments.*

- C. The second defendant's Housing Mix Policy was endorsed by the Auckland Council's Planning Committee at a meeting held on 27 November 2018.

### **Discriminatory effect of the policy**

37. The conduct of the first and second defendants in setting a Social Housing Cap (at any percentage), both in its negotiations with the plaintiff in relation to the development of the Old Tavern Lane properties, and as part of its Housing Mix Policy, has the effect of discriminating against the following groups, who typically have the greatest need in the Auckland community for Social Housing and are therefore disproportionately affected by the Social Housing Cap:

- (a) Maori and Pacific peoples;
- (b) Single Parents;
- (c) Persons over the age of 55 (who are specifically identified in the defendants' definition of Social Housing in the draft Development Agreement); and
- (d) Persons who are unemployed or the recipients of benefits as defined in Schedule 2 of the Social Security Act 2018.

### **Particulars**

A. The report of the Auckland Council Planning Committee prepared for the purpose of the meeting of that committee held on 27 November 2018 records that:

- (1) *"The divide in income and wealth between renters and homeowners is growing. Increasing numbers of older people cannot afford to support themselves in a home in retirement."* (p18);

- (2) *“Maori and Pacific peoples and single parents are increasingly pushed into .....social housing and homelessness because of the intense competition for affordable homes”* (p 18);
- (3) *“Maori are disproportionately affected by the current unaffordability of housing in Tamaki Makaurau”* (p20);
- (4) *“Maori and Pacifica home ownership has declined more rapidly than overall home ownership from an already low base”,* with home ownership rates in 2013 being 24% for Maori and 17% for Pacific peoples, compared with 54% for people of European ethnicity (p36).
- (5) *“Retirement income was not designed to support housing for the increasing share of older workers who do not own a home”* (p 38).

B. The Ministry of Social Development has published statistics regarding the number of applicants on the Social Housing Register (“the SH Register”), which records the number of applicants not currently in public housing, who have been assessed as eligible for public housing. These statistics regarding applicants on the SH Register as at 31 December 2018 include:

- (1) There were 10,712 applications on the SH Register, an increase of 73.3% compared to 12 months previously;
- (2) 3,794 applicants were single with children, being 35%;
- (3) 4,954 were Maori, being 46.2%;
- (4) 1,523 were Pacific people, being 14.2%.

C. The report of the Ministry of Social Development entitled *“Housing Quarterly Report, June 2018”* records:

- (1) 81% of applicants on the Social Housing Register as at 30 June 2018 received a main benefit, with the most common benefits being the Job Seeker Benefit (31% of applicants), Sole Parent

Support (25% of applicants) and the Supported Living Payment (22%);

- (2) 38% of applicants were single with children;
- (3) 44% of applicants were Maori;
- (4) 16% of applicants were Pacific people.

D. The report of the Ministry of Social Development entitled "*Public Housing Plan 2018 -2020*" records:

- (1) Between 30 June 2016 and 30 June 2018, the number of applicants on the SH Register increased by 111%, or 5,577 applicants;
- (2) The three main reasons people applied to be on the SH Register were that they were homeless, in inadequate or unsuitable housing or their current tenancy was ending;
- (3) Of the applicants on the SH Register:
  - 72% were assessed as being "Priority A" (ie "at risk");
  - 80% were existing beneficiaries;
  - 38% were single adult households with children;
  - 44% were Maori.

E. The Taylor Fry, Ministry of Social Development Report entitled "*Baseline valuation of the social housing system as at 30 June 2015*" records that Maori and Pacific peoples are heavily overrepresented in the social housing system. Maori are five times more likely to be in social housing and Pacific peoples seven times, compared to the average rate for those with European or Other backgrounds.

F. The report of A Johnson entitled "*Taking Stock – Demand for Social Housing in New Zealand*" dated August 2017 records that two core groups who have an ongoing need for social housing are:

- (1) Working aged persons receiving a welfare benefit, who have poor health and/or disabilities. This group numbers approximately 150,000 people;

- (2) Older people who do not own their own home and who rely almost entirely on Superannuation for their income. This group numbers around 190,000 people, and may grow to 270,000 by 2030.
- G. It is acknowledged by Panuku in its Housing Mix Policy that social housing is, by its nature, allocated to households with the highest need.
- H. Consequently, the groups identified in paragraph 37 above will be disproportionality affected by the defendants' Social Housing Cap.

## **BREACH OF SECTION 19 OF BORA AND SECTION 20L IN PART 1A OF THE HRA**

38. The first and second defendants were at all material times acting in the performance of a public function, power or duty conferred or imposed on the first and second defendants by or pursuant to law in terms of section 3 of the Bill of Rights Act 1990 ("BORA").

### **Particulars**

- (a) At all material times the first defendant was performing a public function, power or duty, and exercising the same pursuant to (inter alia) the LGACA and sections 12(2), 12(4) and 14 of the LGA;
  - (b) At all material times the second defendant was performing a public function, power or duty, and exercising the same pursuant to its constitution and statement of intent and (inter alia) sections 59 and 60 of the LGA.
39. The conduct of the first and second defendants in:
- (a) Setting the Social Housing Cap and including that cap in its Housing Mix Policy;
  - (b) Imposing the Social Housing Cap on the plaintiff in relation to the Old Tavern Lane properties;

- (c) Declining to proceed with the Development Agreement on the grounds that the plaintiff wished to make at least 67% of the Old Tavern Lane development available for Social Housing;

has the direct or indirect effect of discriminating against the persons referred to in paragraph 37 above by depriving them of access to Social Housing.

40. The actions of the first and second defendants referred to in paragraph 39 above constitute direct or indirect discrimination on the following prohibited grounds of discrimination set out in section 21 of the HRA:

- (a) Colour, race or ethnic or national origins;
- (b) Marital status, and in particular the status of being single or separated;
- (c) Age;
- (d) Employment Status, and in particular the status of being unemployed or the recipient of a benefit as defined in Schedule 2 of the Social Security Act 2018 (“Beneficiaries”);
- (e) Family status, and in particular having responsibility for the full time or part time care of children.

### **Particulars**

The said actions of the first and second defendants disproportionately affect, disadvantage and discriminate against persons in the following groups who fall within the categories listed above:

- (i) Maori and Pacific peoples;
- (ii) Single parents;
- (iii) Persons over the age of 55;
- (iv) Persons who are unemployed or Beneficiaries.

41. The actions of the first and second defendants referred to in paragraph 39 above are inconsistent with section 19 of the BORA, and constitute a breach of section 20L in Part 1A of the HRA.
42. The actions of the first and second defendants were not, under section 5 of the BORA, a justified limitation on the right to freedom from discrimination.
43. The plaintiff incurred significant costs in the legitimate expectation that the first and second defendants would proceed with the Development Agreement, which costs have been wasted as a result of the unlawful decision of the defendants to impose the Social Housing Cap and refuse to proceed with the Development Agreement without permitting the plaintiff to challenge the legality of that Cap in an appropriate Court or Tribunal. These costs are in the process of being collated by the plaintiff, and included:
  - (a) Costs incurred in developing the Development Plan for Old Tavern Lane;
  - (b) Legal costs.

### **Particulars**

Particulars of the costs incurred by the plaintiff are in the process of being collated and will be provided to the defendants once this process is complete.

### **WHEREFORE THE PLAINTIFF CLAIMS:**

- A. A declaration under s92I(3)(a) of the HRA that the defendants have breached Part 1A of the HRA through their conduct described in paragraphs 39 - 41 above;
- B. A declaration under s92I(3)(a) of the HRA that:

- (i) The requirement that the Social Housing Cap be included in the Development Agreement was unlawful and constituted a breach of Part 1A of the HRA;
  - (ii) The inclusion of a Social Housing Cap in the Housing Mix Policy of Panuku and/or the Auckland Council is unlawful and constitutes a breach of Part 1A of the HRA; and
  - (iii) The policy of Panuku and/or the Auckland Council of imposing a Social Housing Cap on persons or entities who wish to develop land for housing in Auckland is unlawful and constitutes a breach of Part 1A of the HRA.
- C. An order under s92I(3)(b) of the HRA restraining the defendants from:
- (i) Imposing a Social Housing Cap on persons who wish to develop the Old Tavern Lane;
  - (ii) Imposing a Social Housing Cap on persons or entities who purchase land and/or property from the first and/or second defendants for the purpose of developing that land and/or property and creating housing in the Auckland region;
  - (iii) Engaging in, or causing or permitting others to engage in, conduct of the nature described in paragraphs 39 – 41 above.
- D. Damages under s92I(3)(c) and s92M of the HRA in an amount to be advised to the defendants before the hearing.
- E. An order that the defendants pay the plaintiff's costs of and incidental to this proceeding.

## MEMORANDUM

This statement of claim is filed by TIMOTHY JOHN GEOFFREY ALLAN, solicitor for the plaintiff, of the firm Grove Darlow & Partners. The address for service of the plaintiff is Level 9, Rabobank Tower, 2 Commerce Street, Auckland.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to the solicitor at PO Box 2882, Auckland; or
- (b) left for the solicitor at a document exchange for direction to DX CP 24049; or
- (c) transmitted to the solicitor by fax to 09 309 9877; or
- (d) emailed to the solicitor at [tima@grovedarlow.co.nz](mailto:tima@grovedarlow.co.nz)

Schedule 1

