

AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Judicial Conference on Interim Recommendations

27 January 2015

Conference minute

Directions

1. Interim Guidance

The Panel will issue interim guidance on the principal issues arising from submissions on the proposed Regional Policy Statement, once the Panel has completed the RPS hearings, deliberated and drafted our interim guidance. This is likely to be mid-March. The details are as set out below.

2. Consideration of operative and proposed RPS

The Panel will hear submissions and make recommendations on the PAUP as a combined document so that the proposed plans would give effect to the proposed RPS rather than the presently operative RPS.

Introduction

The Local Government (Auckland Transitional Provisions) Act 2010 (“**LGATPA**”) requires this Panel to make recommendations to the Auckland Council by 22 July 2016 on submissions on the Proposed Auckland Unitary Plan (“**PAUP**”). The PAUP is a combined plan comprising a regional policy statement (“**proposed RPS**”), a regional plan, including a regional coastal plan, and a district plan.¹

Such recommendations must be formulated so as to ensure that, were the Auckland Council to accept them, the numerous relevant plan-making provisions of the Resource Management Act 1991 (“**RMA**”) would be complied with.² Of particular concern for our present purposes, these provisions include sections 67(3)(c) and 75(3)(c) RMA which respectively require a regional plan and a district plan to give effect to any regional policy statement.

In our process for considering and making recommendations on the PAUP in light of those requirements at least two difficulties arise:

1. A substantive issue affecting the ability of submitters to address proposed regional and district plan provisions without knowing with certainty what the provisions of the proposed RPS may be; and

¹ Section 122 LGATPA. See also s80 RMA.

² Section 145(1)(f) LGATPA.

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2. A legal issue affecting the status of the current Auckland Regional Policy Statement (made operative in 1999) (“ARPS”) and the jurisdiction of the IHP to be able to take into account any aspect of the proposed RPS in making its recommendations on the proposed regional and district plans.

To assist us in contemplating how we might resolve these issues we convened a conference of interested parties on 27 January 2015. **Attached** to this minute is an appendix listing those who addressed us at the conference. Available on our website, on the page dealing with Our Process, are copies of the correspondence and memoranda lodged with us in relation to this conference.

While we have reasonably extensive powers and discretions under both the LGATPA and the RMA to deal with issues such as these without conducting a conference, we also consider that we should raise these issues with participants in the process and get their views and ideas as to do so is in the interests of:

- (i) the participatory scheme of the RMA;
- (ii) the objective of better plan making under the LGATPA; and
- (iii) the fundamental imperative of natural justice.

The Substantive Issue

A specific purpose of the conference was to discuss whether the Panel might issue interim recommendations on the regional policy statement provisions of the Proposed Auckland Unitary Plan before we embark on hearing and deliberating on submissions on the proposed regional and district plan provisions.

Detailed comments on this were submitted by the partners of Russell McVeagh, solicitors, in their letter dated 16 December 2014 and their memorandum dated 23 January 2015. Their material examined how the procedures outlined in the LGATPA could be applied so that we formulated and made our recommendations to the Council on the proposed RPS before we turned to consider the regional and district plans.

While very grateful for the careful thought that went into those submissions, we have concluded that we ought not to pursue the options identified in relation to interim recommendations for several reasons:

1. Most importantly, the making of recommendations now in relation to the proposed RPS might prevent us from revisiting the subject matter of our recommendations in light of evidence or submissions we hear concerning the plans. That would be deleterious to one of our over-arching objectives which is to make recommendations for the PAUP as an integrated planning document.

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2. The time required to prepare recommendations in accordance with sections 144 and 145 LGATPA, coupled with the time that would then be required for the Council to consider those and notify its decisions under section 148 and any appeals that may then follow under sections 155 – 158 LGATPA could seriously delay the process for considering submissions on the plans. This would put at risk the meeting of the deadlines for our recommendations and that of the Council for making its decisions.
3. The Council in its detailed memorandum dated 22 January 2015 clearly expressed a preference that we not provide it with recommendations in tranches. While the Council's preferences in this process are not determinative of the matters which are within our control, including our control of our process, we acknowledge that we are a recommendatory rather than a decision-making body and accordingly have appropriate regard for the preferences of the Council as the decision-maker.
4. The clear consensus of most of the participants at the conference was that they sought guidance to assist them rather than formal recommendations by us and decisions by the Council on the proposed RPS. Some noted that while it might have been better, had our process been different, that the RPS could have been settled before the process for the plans commenced, that was not how the process for the PAUP had proceeded and it would be better to have something as guidance now rather than nothing.

We record, as announced at the conference, that we sought our own advice from Royden Somerville QC, instructed by Anderson Lloyd, solicitors, and had received it in draft just before the conference. Mr Somerville's advice addresses the issues fully and concludes that the LGATPA does not provide for interim recommendations at this stage. A copy of it, dated 5 February 2015, is available on our website. We accept his advice on the law and will follow it, noting that it does not alter our substantive reasons for deciding not to issue interim recommendations. His advice also contains a suggested approach by us in relation to interim guidance which is consistent with the consensus of the participants at the conference and with our decision as to how we will proceed.

The alternative approach which we have decided to adopt, which was the consensus view at the conference and is supported by Mr Somerville's advice, is that we publish interim guidance on the principal issues arising from our consideration of submissions on the RPS.

It is important that we be clear about the nature of any interim guidance:

1. Such guidance would be interim in the sense that it would not amount to a recommendation in terms of section 144 LGATPA and therefore would not require any decision from the Council in terms of section 148 LGATPA.
2. It would also be interim in the important sense that we would not be bound by it when we come to make our recommendations to the Council: we would retain within our recommendatory power the right to make our recommendations based on all of the evidence and submissions heard by the time we do make formal recommendations.

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3. Such guidance would not be open to correspondence: we would not want to turn this into a debate outside our usual hearing process.
4. Within our usual hearing process, while such guidance would not normally be the subject of its own separate hearing, it could certainly be referred to or discussed by submitters or witnesses in the course of presenting submissions or evidence on a relevant regional or district plan topic, either as a ground on which to focus those submissions or that evidence (whether in support of or in opposition to the interim guidance) or to show whether and how the relevant plan provisions gave effect (or not) to the interim guidance. It could be used during mediation in the same way.

The form of the interim guidance would depend on the subject matter:

1. In most cases it would be an indication of the Panel's interim view about a particular matter or policy approach, without being so detailed as to include a marked-up text of the relevant provisions. For example, the Panel expects it would help submitters if we were to indicate whether we presently consider that the Rural Urban Boundary is appropriate or not and we would do that in a descriptive way, together with any necessary associated matters that follow on immediately from such a policy but without issuing marked up text of Section B of the proposed RPS or amended maps.
2. The guidance may also be in the form of questions, the answers to which the Panel believes will assist in narrowing the relevant issues and clarifying any competing submissions on them.
3. There may be some cases where the Panel's interim view could include marked-up text, especially where the policy issue is focussed on a particular word or form of words, such as an important definition or matter of interpretation, or where it would be desirable for guidance to show by example how the word or phrase ought to be used or, if omitted, what alternative wording might be more appropriate.
4. We expect any interim guidance will include:
 - a. A statement of the relevant issue or issues;
 - b. Interim guidance on those issues, with summary reasons for that guidance;
 - c. Any questions that may arise from the issues, with summary reasons for those questions.

The likely timing for issuing such interim guidance is expected to be by mid-March, after the Panel has concluded the hearings on the RPs, had time to deliberate on all the material presented at the RPS hearings and draw together its interim views.

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The Legal Issue

The legal issue about the status of the ARPS and the jurisdiction of the IHP to be able to take into account any aspect of the proposed RPS in making its recommendations on the proposed regional and district plans is set out and discussed in detail in the memorandum of Richard Brabant dated 19 December 2014. As noted there, a “regional policy statement” is defined in s 43AA RMA as an “operative regional policy statement.” It is then submitted that this means that it must be the ARPS, rather than the proposed RPS, which must be given effect by the proposed PAUP provisions which form the proposed regional and district plans in order to comply with sections 67(3)(c) and 75(3)(c) RMA and s 145(1)(f)(i) LGATPA. Mr Brabant submits that these statutory requirements must be amended so that the requirement to give effect to the ARPS is removed and the proposed plans can be considered in terms of the proposed RPS. He says that this could be done by regulations made under s 5 or s 119 LGATPA.

This position was opposed by others, including the Council in its memorandum dated 22 January 2015 and the partners of Ellis Gould, solicitors, in their memorandum dated 22 January 2015. These documents set out an interpretive approach to the relevant provisions of the RMA and the LGATPA which sought to demonstrate why the context of our present circumstances required a meaning of “regional policy statement” other than the operative ARPS.

We note in particular that the power given to us by s 124(5) LGATPA to direct the Council to vary the PAUP may be used where we are satisfied that the variation is required:

to give effect, in the provisions of the proposed plan comprising the regional plan or district plan, to the provisions of the proposed plan comprising the regional policy statement; (s 124(5)(a)(ii) LGATPA).

This provision clearly treats the proposed RPS as the relevant document. It makes no sense at all for this approach to be used only in relation to a variation to the PAUP and not to the PAUP itself.

We also received helpful submissions from the Deputy Secretary (Natural Resources Policy) of the Ministry for the Environment, Mr Guy Beatson, who drew our attention to s 80 RMA, which provides for combined regional and district documents under that Act and noted that the PAUP is, pursuant to s 122 LGATPA and the definition of “Auckland combined plan” in s 116 LGATPA, such a combined document. He submitted, quoting from a relevant Cabinet Paper, that the policy intent of these provisions is to enable local authorities to prepare single resource management documents for a region “*that fully integrates regional and district council functions, obligations and powers.*” This reference is obviously closely linked to the statutory functions of regional councils for:

The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region (s 30(1)(a) RMA);

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and of territorial authorities for:

The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district (s 31(1)(a) RMA).

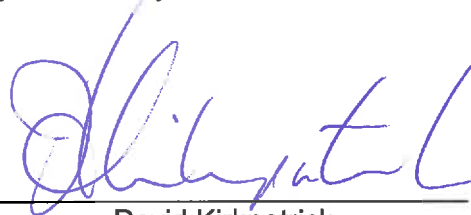
We note that after the conference we received from the Minister for the Environment, the Hon Dr Nick Smith, a letter confirming his understanding of the legislative intention being to develop a single resource management plan for Auckland that integrates both the RPS and regional and district plan provisions. While it is well established in law that the view of a Minister of the Crown cannot determine the meaning and effect of legislation because that is a matter for the Courts, nonetheless the Minister's clear statement reassures us, at a time when various reform measures are underway or being discussed, that there is no present government policy that would undermine the policy position outlined by Mr Beatson.

Mr Somerville's advice to us dated 5 February 2015 also addresses this issue and concludes that there are strong reasons to interpret s 145(1)(f) LGATPA as requiring that our recommendations on the proposed plan provisions would give effect to the proposed RPS provisions, and not those of the ARPS. We accept that advice and will follow it.

In general terms, we note that considering the proposed plan provisions in terms of the proposed RPS rather than the operative ARPS is likely to be more efficient for all participants than requiring them to address the operative ARPS. It will also assist in ensuring that submitters are better able to address their concerns in the context of the PAUP as a whole.

Having carefully considered the memoranda filed and the submissions presented, we conclude that we should proceed on the basis that we are to hear submissions and make recommendations on the PAUP as a combined document within the meaning of s 80 RMA and s 122 LGATPA. This means that in formulating our recommendations under s 145 LGATPA, we should ensure that, were the Council to accept our recommendations in respect of the combined document, the proposed plans would give effect to the proposed RPS.

Dated at Auckland this 9th day of February 2015



David Kirkpatrick
Chairperson, Hearings Panel for
Proposed Auckland Unitary Plan

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PARTIES WHO PRESENTED AT CONFERENCE:	
Auckland Council	Katherine Anderson, Corina Faesenkloet and James Hassall
Ministry for the Environment	Guy Beatson
Russell McVeagh	Bal Matheson
Ports of Auckland	Derek Nolan
Richard Brabant	Jeremy Brabant
Housing New Zealand Corporation, Minister of Education, Minister of Courts, Minister of Police, New Zealand Defence Force	Douglas Allan
Tram Lease Limited, Viaduct Harbour Holdings Limited, Viaduct Harbour Management Limited	Trevor Daya-Winterbottom
Man O War Farm Limited and Clime Asset Management Limited	Martin Williams
Federated Farmers	Richard Gardner
Todd Property Group	Sue Simons
John Maplesden	
Auckland 2040	Richard Burton
Transpower New Zealand Limited	Luke Hinchey
Russell Bartlett QC	
Contact Energy	Rosemary Dixon

PARTIES WHO TABLED MATERIAL:
Ngati Whatua Orakei Whai Maia Ltd
Bell Gully