

IN THE MATTER of the Resource
Management Act 1991
and the Local
Government (Auckland
Transitional Provisions)
Act 2010

AND

IN THE MATTER of the Proposed
Auckland Unitary Plan
("PAUP")

**LEGAL SUBMISSIONS ON BEHALF OF AUCKLAND COUNCIL REGARDING THE
USE OF NON-STATUTORY LAYERS IN THE PAUP**

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These submissions are filed in response to the memorandum from Phill Reid (on behalf of the Independent Hearings Panel) dated 4 December 2014, requesting that the Council provide the Panel with a response to concerns raised by submitters about the legality of the non-statutory layers in the PAUP and whether they link to rules in the PAUP, and affect requirements for resource consent. In particular, the Panel has asked the Council to provide:

- (a) its justification for the legality or otherwise of the use of non-statutory information layers provided in the GIS maps which link directly to rule and consent requirements in the plan text; and
- (b) a detailed outline of the methodology, research, studies, analysis and mapping work undertaken, to establish the need for and accuracy of all of the non-statutory layers in the GIS maps.

1.2 Mr Reid's memorandum identifies the following non-statutory layers and related plan rules:

- (a) Flood Hazards Layer (Definition of 'floodplain', definition of 'flood-sensitive areas', definition of 'land which may be subject to natural hazards' , Rule 4.11 Natural hazards, Rule H.4.12 flooding, Rule H.5.2.3.1 Subdivision development controls in Residential zones, Rule H.5.3.2 Subdivision development controls in Business zones);
- (b) Māori Land Layer (Rules G.2.7.4 Cultural Impact Assessment, H.2.1 Māori Land; H.4.17 Taking, using damming and diversion of water and drilling, K.5.20 Kawau Island, K.5.36 Riverhead 2, K.5.38 Riverhead 4, K.5.49 Te Arai North, and K.5.50 Te Arai South precincts);
- (c) Treaty Settlements Layer (G.2.7.4 Cultural Impact Assessment, and H.22 Treaty Settlement Land); and
- (d) Cultural Redress Layer (G.2.7.4 Cultural Impact Assessment).

1.3 In addition, in his memorandum, Mr Duguid has identified the following further non-statutory layers and related rules:

- (a) Hauraki Gulf Marine Park Layer (Rule H.4.14.1.3.2(2)(f)(ii) – an assessment criteria);
- (b) Indicative Coastline Layer (only referred to in D.5 Introduction to Coastal Zones);
- (c) Macroinvertebrate Community Index layer (K.5.23.5.5(1)(j) Realignment of Steam Long Bay Precinct – assessment criteria); and
- (d) Soil Types Layer (H4.10.2.1.1(3) Rural Production Discharges).

1.4 The Council's position with respect to the use of each of these non-statutory layers is set out under the headings below. For completeness, while not directly raised by Mr Reid's memorandum,

we have also addressed a potentially related issue in terms of the definition of activities on land that may be subject to natural hazards (H4.11 Natural Hazards)

2. RELEVANT LEGAL PRINCIPLES RELATING TO LAWFULNESS OF PLAN RULES

2.1 Counsel understands that the essence of the Panel's concern is that:

- (a) The information included in the non-statutory layers of the PAUP, and shown in the GIS System, is updated by the Council from time to time, without public rights of participation and appeal; and
- (b) Depending on the drafting of the rules in the PAUP which relate to the non-statutory layers, this could change resource consent requirements that apply to particular properties. If this was the case, this would effectively be a change to the PAUP without using the plan change process under Schedule 1 of the RMA.

2.2 The Council's detailed response to each of the non-statutory layers and PAUP Rules identified by the Panel is set out under the headings below.

2.3 However, by way of an overview of the approach the Council has taken to the non-statutory layers:

- (a) In the Council's submission, identification of a property or resource within one of the non-statutory layers of the PAUP does not, in and of itself, trigger a requirement for resource consent, or additional information or assessment under the PAUP;
- (b) The purpose of the non-statutory layers in the PAUP is to assist the public by sharing with them information held by the Council, relevant to the consenting process;

- (c) The requirement for consent is only triggered where a proposed activity relates to a property or resource that falls within a technical definition (e.g. the definition of floodplain), or a legal definition (e.g. is Māori Land under the Te Ture Whenua Māori Land Act 1993);
- (d) Whether or not a property or resource falls within this technical or legal definition is a matter which can be resolved (if necessary) by expert evidence and assessment. This assessment can be assisted by the information held in the non-statutory layer.

2.4 Accordingly, in the Council's submission, no issue of unlawfulness arises by virtue of the relationship between the Rules and the non-statutory layers. The non-statutory layers are for information purposes only, and changes to them will not trigger any change in the requirements for consent, or information or assessment. Whether the relevant technical definitions used by the rules are lawful is a separate question that may be considered in the context of the submissions on the rules. However, the Council notes that the definitions are not necessarily unlawful simply because some level of objective assessment may be required to interpret or apply them.¹

2.5 The alternative would be for the Council to remove the references in the PAUP to the non-statutory layers, and include a more generic notation that that the Council may hold "relevant information" on these issues. This would not change any requirement to obtain resource consent under the PAUP. However, in our submission, it may serve to make the identification and assessment of relevant resource management issues more difficult for the Council and parties, and make it more difficult for the Council to undertake its statutory functions, and achieve the purpose of the Act.

3. FLOOD HAZARD LAYERS

3.1 As the panel may recall, the relationship between the flood hazard information shown on the non-statutory layer and the flooding related

¹ *Twisted World Limited v Wellington city Council* W024/2002, paragraph 67.

rules was addressed in Council's opening legal submissions for Topic 006 Natural Resources.

3.2 The PAUP rules apply depending upon whether a property is in a floodplain or flood prone area. However, in our submission, identification of a property as being in a floodplain or flood prone area in the non-statutory layer does not in itself mean that it is in a flood plain or flood prone area for the purposes of the PAUP rules.

3.3 Floodplain is defined in the Unitary Plan as:

Floodplain

The area of land that is inundated by water during a specific flood event.

Determination of whether a site is within a specific floodplain should be based on either:

- the relevant site being shown in the Auckland Council's GIS viewer as being within the flood plain of the specific ARI flood event; or*
- through the preparation of a site specific report prepared by a suitably qualified and experienced person applying accepted methodology to determine the extent of a floodplain.*

Flood Prone Areas was (due to an oversight) not defined in the PAUP as notified. In his evidence on Topic 006 Mr Mead proposed the following definition:

"Flood Prone Areas

The extent of land within a topographical depression that water will pond on in a 1 percent flood event, assuming any outlet to the depression is blocked. Topographical depressions occur either naturally or as a result of man-made features which act as dams when stormwater outlets are blocked."

3.4 As a matter of plan interpretation the "floodplain" definition is simply an "area of land that is inundated by water during a specific flood event". The text that follows the definition is intended to be an explanation – to assist plan users. This explains that the identification

on the non-statutory layer of a property as being in a floodplain is not necessarily conclusive. In the Council's closing submissions on Topic 006, we indicated that the Council would agree to wording changes to make this intention clearer.

3.5 As outlined in the evidence that Mr Brown provided to the Panel in the hearing on Topic 006, the purpose of identifying these areas in the non-statutory layer is to provide information to property owners, and to "flag" for property owners and the Council a potential issue that requires further assessment.

3.6 However, a property is not regarded as being within a floodplain or flood prone area (and therefore requiring a resource consent) simply because it is identified in the non-statutory layer in the PAUP. The definitions are "stand alone". Whether a property is within a floodplain or a flood prone area will be a question of fact to be determined on the basis of expert advice. It is open for any person to rely on the Council's information or obtain their own expert assessment. In such cases the Council will, if necessary, modify and update what is shown in the non-statutory layer. In our submission, it is of benefit to plan users to have easy access to the information in the non-statutory layer.

3.7 For completeness we note that similar issues arise with overland flow paths, which are shown in the Council's GIS system (but not in the non-statutory layer of the PAUP). Overland flow paths are defined as:

"Low point in terrain, excluding a permanent watercourse, where surface runoff will flow, with an upstream contributing catchment of 4,000m2."

3.8 Like floodplains and flood prone areas, development within an overland flow path can trigger the need for resource consent under the rules. However, again, although overland flow paths are identified in the GIS, the definition in the PAUP is a "stand alone" definition, and the location of overland flow paths shown in the GIS is revised, from time to time, following expert assessment.

3.9 In our submission, including the flood risk information on a non-statutory layer in the PAUP will assist the Council to carry out its functions relating to the avoidance and mitigation of flood hazard risk; and is appropriate in terms of achieving the objectives and policies of the PAUP.

3.10 In our submission, given the dynamic nature of floodplains, flood prone areas and overland flow paths, it is reasonable (and necessary) for the identification of these features to rely on definitions as opposed to being identified on the planning maps. Such an approach is valid, provided the definitions are sufficiently certain as to whether any particular property is within a floodplain, flood prone area of overland flow path (which may trigger a requirement for a resource consent). In our submission, the above definitions are sufficiently certain because, while they may require a level of objective assessment, any dispute regarding whether particular properties fall within those definitions could be determined by the Environment Court.²

4. ACTIVITIES ON LAND THAT MAY BE SUBJECT TO NATURAL HAZARDS

4.1 Rule H4.11.1 of the PAUP requires "*New buildings, structures and infrastructure on land which may be subject to natural hazards*" to obtain resource consent, as a restricted discretionary activity.

4.2 Land which may be subject to natural hazards is defined in Part 4 Definitions of the PAUP as:

Any land:

- within a horizontal distance of 20m landward from the top of any coastal cliff with a slope angle steeper than 21 in 3 (18-degrees)
- on any slope with an angle greater than or equal to 1 in 2 (26-degrees)
- at an elevation less than 3m above MHWS if the activity is within 20m of MHWS
- any natural hazard area identified in a council natural hazard register/database or GIS viewer.

2 *Twisted World Limited v Wellington City Council* W024/2002, paragraph 67.

- 4.3** The rule does not link with the non-statutory layers of the PAUP, and is not part of Topic 026.
- 4.4** However, for completeness, the fourth bullet point may give rise to similar issues in that the rule refers to non-statutory information held by the Council (in either the natural hazard register/database or the GIS viewer), that triggers a requirement under the PAUP for resource consent.
- 4.5** The Council will give the drafting of the definition of Land which may be subject to natural hazards and the related objectives, policies and rules, further consideration, ahead of the hearing for Topic 022 Flooding and Natural Hazards (to be held in April next year) – as those provisions all refer to that definition. As part of this consideration, the Council will need to consider the submissions received, and determine if amendment to the rule or definition would remove control over natural hazards not covered elsewhere in the PAUP.

5. NON-STATUTORY INFORMATION – MĀORI LAND

- 5.1** The Panel has identified various Rules in the PAUP (H2.1 Māori Land, K5.20 Kawau Island, K5.36 Riverhead 2, K5.38 Riverhead 4, K5.49 Te Arai North and K5.50 Te Arai South) relating to the use and development of Māori Land.
- 5.2** The term "Māori Land" is defined in Part 4 Definitions of the PAUP as follows³:
- Māori land**
- Land subject to Te Ture Whenua Māori Act 1993, including: Māori customary land, Māori freehold land, and land administered by an entity constituted under sections 12 or 13 of Te Ture Whenua Māori Act 1993, or under subsequent amendments to the Act.
- 5.3** However, H2.1 Māori Land states, at the start of that chapter – above the activity table, that:

³ Council in its closing statement to Topic 009 Mana Whenua has submitted to change the definition of Māori land as it incorrectly refers to Sections 12 or 13. Instead, this should refer to Parts 12 or 13

"The following rules apply to Māori land subject to Te Ture Whenua Māori Act 1993. Not all land subject to this Act is shown in the Māori Land non-statutory layer. Applicants should provide documentation from the Māori Land Court as evidence that the land is subject to the Act."

5.4 In our submission, it is clear from the above that:

- (a) The Rules in H2.1 apply to land by virtue of the fact that it is Māori Land under the Te Ture Whenua Māori Land Act 1993 (not because it is identified in the Māori Land non-statutory layer of the PAUP);
- (b) Inclusion of land in the Māori Land non-statutory layer is not determinative of whether the Rules in H2.1 apply as:
 - (i) The PAUP records that applicants need to provide documentation from the Māori Land Court as evidence their land is subject to the Act in any case; and
 - (ii) The PAUP notes that the Non-statutory layer is not entirely accurate – as not all Māori Land is included.

5.5 In summary, what determines whether the PAUP Rules apply is whether or not the land is subject to the Te Ture Whenua Māori Act, as a matter of law – not whether or not the land is identified in the non-statutory layer.

6. G.2.7.4 CULTURAL IMPACT ASSESSMENT – MANA WHENUA OVERLAYS

6.1 Mr Reid's memorandum refers to rule G.2.7.4 Cultural impact assessment (**CIA**).

6.2 This rule requires a CIA to be provided with applications requiring resource consent in relation to a range of matters, including:

- (a) Under the Sites and Places of Significance to Mana Whenua Overlay, or Sites and Places of Value to Mana Whenua Overlay;
- (b) Within the following areas:
 - (i) Areas subject to customary marine title and protected customary rights under the Marine and Coastal Area (Takutau Moana Act 2011);
 - (ii) Areas subject to customary uses or cultural activities identified within a resource management plan or cultural activities management plan;
 - (iii) Sites, places areas or resources of significance identified in the final Deeds of Settlement and Treaty Settlement legislation; and
 - (iv) Māori Land.

6.3 With the exception of Māori Land (which we have already addressed above) and Deeds of Settlement (discussed below), none of the above information is included in the non-statutory layers of the PAUP.

6.4 "Sites and Places of Significance to Mana Whenua", and "Sites and Places of Value to Mana Whenua" are described in Rule 2.7.4 as "overlays". However, these overlays are *statutory* in nature.

6.5 The Sites and Places of Significance to Mana Whenua and Sites and Places of Value to Mana Whenua consist of sites listed in Appendices included within the PAUP. These sites are then shown on the planning maps of the PAUP (and are described in the PAUP as an "overlay" because they are an additional feature planning feature, overlaying the base zoning). The inclusion of any further sites in the schedule and overlay in the future would require a plan change, under Schedule 1 to the RMA.

7. NON-STATUTORY INFORMATION – TREATY SETTLEMENT ALERT LAYERS

7.1 Rule H2.2 of the PAUP relates to the use and development of "Treaty settlement land".

7.2 Treaty Settlement Land is defined in Part 4 Definitions of the PAUP as:

Properties vested with claimant groups by the Crown as a result of Treaty settlement legislation and final deeds of settlement.

Includes:

- cultural redress properties
- commercial redress properties.

Excludes:

- properties over which claimant groups have been awarded Right of First Refusal
- land covered by Statutory Acknowledgement or Deed of Recognition but not owned by claimant groups.

7.3 In our submission, this definition makes it clear that whether land is Treaty Settlement Land is a factual matter, involving whether particular properties have been vested in iwi as a result of the Treaty Settlement process. Although this land is identified in the PAUP non-statutory layer, that identification is for the purpose of assisting the public, and is not determinative of whether those rules apply. To put that another way, if land was mistakenly identified in the non-statutory layer as Treaty Settlement Land, that alone would not be sufficient for the rules in H2.2 to apply to that property.

8. HAURAKI GULF MARINE PARK LAYER

8.1 Mr Reid's memorandum did not refer to the Hauraki Gulf Marine Park Layer. However, this layer has been identified by Mr Duguid as one of the non-statutory layers of the PAUP.

8.2 The Hauraki Gulf Marine Park Layer shows the boundaries of the Hauraki Gulf Marine Park (as defined by Hauraki Gulf Marine Park Act 2000 (HGMPA)).

- 8.3** Rule H.4.14.1.3.2(2)(f)(ii) includes an assessment criteria applying to applications for stormwater consent, that refers to *"the sensitivity of natural and freshwater systems and coastal waters, including the Hauraki Gulf Marine Park, to the adverse effects of stormwater contaminants and flows"*.
- 8.4** The assessment criterion refers to the Hauraki Gulf Marine Park, rather than the Hauraki Gulf Marine Park non-statutory layer, identified in the PAUP. Accordingly, in our submission, the ambit of the assessment criterion is determined by the actual boundaries of the Park, established under the HGMPA, rather than the non-statutory layer. This analysis, and the limited nature of references to the Hauraki Gulf Marine Park in the PAUP mean that, in our submission, the non-statutory layer does not give rise to any concerns of the kind raised by the Panel.
- 8.5** The General Coastal Marine zone includes objectives and policies (but not rules) that refer to the Hauraki Gulf Marine Park⁴. As with the assessment criterion referred to above, these references to the Hauraki Gulf Marine Park included within the objectives and policies of the General Coastal Marine zone relate to consideration of the values of the Marine Park itself, and are unaffected by the location of the Hauraki Gulf Marine Park as indicated by the non-statutory layer.

9. INDICATIVE COASTLINE LAYER

- 9.1** Mr Reid's memorandum did not refer to the Indicative Coastline Layer. However, this layer has been identified by Mr Duguid as one of the non-statutory layers of the PAUP.
- 9.2** The Indicative Coastline Layer identifies Council's faithful reproduction of the location of Mean High Water Springs (**MHWS**). As explained by Mr Duguid the precise location of the MHWS on any particular site may require detailed survey and assessment.

⁴ For example D5.1.2 Depositing and Disposal Objective 4 and Policy 3, D5.1.10 Discharges Objective 3, D5.1.11 Sewage discharges Objective 2 and D5.1.12 Harmful Aquatic Organisms Objective 2 and Policy 3.

- 9.3 MHWS is also defined in Part 4 Definitions of the PAUP.
- 9.4 Various Rules in the PAUP refer to MHWS, and setbacks from MHWS. However, none of these rules refer to the Indicative Coastline Layer, included in the non-statutory layer to the PAUP.
- 9.5 Accordingly, in our submission, again, there is no issue in terms of non-statutory information affecting requirements for consent under Rules in the PAUP – as there is no direct linkage between the non-statutory layer and the rules.

10. MACROINVERTIBRATE COMMUNITY INDEX

- 10.1 The Macroinvertebrate Community Index (**MCI**) has been identified by Mr Duguid as one of the non-statutory layers of the PAUP.
- 10.2 There are no rules or consent requirements in the PAUP which link directly to the MCI non-statutory layer. Accordingly, in our submission, again, there is no issue in terms of non-statutory information affecting requirements for consent under Rules in the PAUP – as there is no linkage between the non-statutory layer and the rules.

11. SOIL TYPES

- 11.1 The non-statutory layers of the PAUP include a layer identifying the different types of soil found in the region (includes various types of volcanic soil, limestone, grewacke, Waitemata residual and alluvial).
- 11.2 Rule H4.10.2.1.1, Rural Production Discharges refers to "sandy and volcanic soils" and then beneath that "soils other than those listed above" in its permitted activity performance standards. Beneath the permitted activity performance standards for discharges is then the following note "Note Refer to the *"Soil Types" layer under "Non Statutory Information" in the Unitary Plan GIS viewer*".
- 11.3 In our submission, the reference to information regarding soil types in the GIS viewer is for assistance only (like an advice note), and the

soil types shown on the non-statutory maps does not affect any requirements for consent under the Rules. This is because the rules do not refer to soil types "as shown on maps in the GIS viewer", and has instead referred to this information in a separate "Note". Whether requirements for consent will be triggered under the rules depends upon the type of soil actually present on a property (rather than what is shown in the maps in the non-statutory layer).

12. CONCLUSION

- 12.1** In our submission, the use of the non-statutory layers in the PAUP is lawful.
- 12.2** The purpose of the layers is to assist the public by sharing relevant information known to the Council. However, due to the way the rules have been drafted, inclusion of a property or resource in a non-statutory layer does not of itself trigger requirements for consent or to provide further information. Modifications to the non-statutory information does not, therefore, result in modifications to the PAUP that would otherwise require a plan change under Schedule 1 of the RMA.

DATED at Auckland this 19th day of December 2014



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