

**AUCKLAND UNITARY PLAN  
INDEPENDENT HEARINGS PANEL**

*Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau*

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**Procedural Minute No.11 by Chairperson of  
Independent Hearings Panel**

**Minute in relation to procedural issues  
raised at conference held on 3 October 2014**

**28 October 2014**

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## Summary

1. In response to concerns raised by several lawyers in relation to the directions in our Procedural Minute #10 and other procedural matters relating to submissions and hearings, the Hearings Panel convened a conference at 2pm on Friday 3 October 2014. Lawyers and planning consultants on the Panel's list of those known to be acting for submitters on the PAUP were invited. Approximately 50 people attended.
2. Written submissions and oral presentations were received from the persons listed in the **attached** schedule. Issues raised included:
  - (a) Difficulties in cross-referencing further submission points with their relative primary submission points;
  - (b) The effect of the Panel's standard evidence exchange timetable on mediation;
  - (c) The Council's presentation of its position prior to other parties preparing evidence;
  - (d) The Panel's requirement that documents be lodged with it by midday on the due date;
  - (e) The fairness and appropriateness of the standard period of 10 minutes for oral presentations before the Panel;
  - (f) The use (or not) of mediation and expert conferencing as a standard approach;
  - (g) The pace of the hearing schedule for RPS matters; and
  - (h) The overall burden on professional advisers in dealing with the submission and hearing process.
3. In summary, the Panel has decided to address these matters in the following ways:
  - (a) The Panel understands that the Council will soon provide an on-line searchable database that will allow anyone to track further submission points back to the relevant primary submission;
  - (b) The Panel has revised its timetable directions to provide a little more time between mediation and the provision of statements of evidence;
  - (c) The Council has indicated that it will try to provide a marked-up version of the relevant PAUP provisions in advance of mediation or hearing sessions on every topic;
  - (d) The Panel no longer will require documents to be lodged with it by midday on the due date for such documents;
  - (e) The standard period of 10 minutes for oral presentations will be retained, but the process for seeking extensions of time will be simplified;

- (f) Given the support which has been shown for the processes of expert conferencing and mediation, the Panel will make increased use of those processes and simplify the procedures in relation to them;
  - (g) The hearings in relation to the site-specific locations of the RUB (Topics 016 & 017) will be deferred to late-2015, to approximately the same time as the hearings on precincts and zones, in order to reduce the burden on those submitters involved in those topics and free up some time for dealing with other RPS topics;
  - (h) The Panel acknowledges that the overall burden on all participants in the process remains high and will continue to monitor the areas of concern with a view to seeking ongoing improvements to the process and amelioration of the burdens where possible.
4. The detail of these matters is addressed later in this Minute and in the **revised Hearing Procedures (version 1.1)** which are issued together with this Minute. We would emphasise the need to meet deadlines and the potential ramifications of exclusion of material or attendance if they are not met.

#### **Presentation Overview**

5. Ms Bronwyn Carruthers (who addressed the Panel on behalf of Mr Derek Nolan, who lodged the memorandum which led to the conference) presented a helpful summary of points in relation to the issues. She stated as over-riding objectives for the conference and beyond:
- (a) Less time spent on process issues, more on substance; and
  - (b) Working together to achieve the goal of a good quality plan.

All of those who presented to us appeared to support those objectives and the Panel concurs with them.

6. A number of attendees spoke to the issues identified above. Having heard the presentations (including some discussion between the Chairperson and the presenters), the Panel adjourned at 4.30pm to consider the material presented and the concerns raised.
7. The key issue in all of this is the limited time available for undertaking the process required by the Local Government (Auckland Transitional Provisions) Act 2010. A further important issue is the burden of process resulting from the procedures instituted by the Panel.

#### **Dealing with limited time**

8. A deadline has been set for us. The Panel is unable to control that and considers it would be at best premature to apply now under s146 LGATPA for an extension of the deadline, as we do not have adequate information to support a case for the exercise of the Minister's discretion.
9. The Panel has set the schedule based on the following principles:

- i. To provide for every submitter who wishes to be heard an opportunity to be heard;
  - ii. To deal with PAUP matters on a “by issue” basis rather than a “by submitter” basis (that is, we have ordered the schedule according to issue-based topics rather than by dealing with individual submissions);
  - iii. To move through the issues logically from the general to the specific – from higher (RPS) policies to lower (Plan) objectives and policies and then to rules and other methods; and
  - iv. To meet all statutory requirements, including providing a fair and appropriate process and meeting the current statutory deadline.
10. The consequences of applying these principles are presently:
- i. Time limits for presenting must be imposed, with allowance for moderate amounts of extra time where appropriate;
  - ii. The schedule does not prioritise any particular part of the PAUP but tries to ensure that there will be sufficient time for all topics to be heard and considered; and
  - iii. Submissions which address several topics are likely to be heard at different hearing sessions.
11. Options for alleviating the burden of the deadline include:
- (a) Obtaining an extension of the deadline;
  - (b) Extending time for hearing RPS topics; or
  - (c) More efficient processes.
12. As noted above, the Panel has considered obtaining an extension of the deadline and does not think it could make an application for extension now. It may be able to do so once the pattern of hearings is apparent and the actual timing of hearings, as compared to its schedule, is known.
13. But there is nothing preventing submitters from making their own presentations to the Minister. Several attendees put to us the question whether the statutory deadline will in fact promote the policy of the LGATPA. That is not something we can properly determine as we are bound to apply the law as it stands, but submitters may consider that their arguments ought to persuade the Minister and Parliament. They are of course entitled to raise these matters with their representatives at any time.
14. The option of extending the scheduled time for hearing RPS topics has been advanced before us on the basis that later topics can be dealt with more quickly

once the higher level policy is known. There are several potential problems with this.

15. We are uncertain when the outcomes for higher level policy will be known. While the Panel is contemplating whether it would be appropriate to make its recommendations to the Council on a staged basis, as matters presently stand it is not clear whether the Council would make its decisions on our recommendations about the RPS before it received our recommendations on plan provisions.
16. While some experienced submitters (many of whom appear to be comparatively better resourced than the majority of submitters) are involved in all stages of the PAUP, thousands of submissions are site specific or concerned with particular rules rather than with any policy issue. We are concerned that the sheer volume of these submissions will require substantial hearing time and so we are very reluctant simply to shift the time problem back into next year if that is at all likely to foreclose on our ability to properly consider submissions in the later part of the schedule.
17. Several procedural suggestions have been made to improve the efficiency of the Panel's processes. We think a number of them have merit and can be instituted in a satisfactory way. We address these in the next section.
18. On a general basis, however, and while recognising the efforts that submitters and their professional advisors are making while under significant work burdens, we must stress that we cannot implement a procedure that is the same as people have been used to in previous plan review processes. We have a single-stage process and a deadline, both imposed by statute. We do not see any way in which we can grant, in a general way, extensions of time so as to accommodate other hearing commitments. While we will try to resolve particular problems as hearings occur, we doubt we will be able to postpone or adjourn hearing sessions for the sake of individual submitters or the schedules of their advisers or witnesses.
19. We should stress, as the Chairperson did in relation to the raising of the issue by Mr Trevor Daya-Winterbottom, that we will read and consider the submissions on the PAUP and other relevant material that is placed before us, so that reading documents out loud before us will not be necessary or useful. We have made provision for presentations of material at hearing sessions so that submitters can identify and emphasise the key points they wish to make and be available to answer questions from us and, where leave is granted, to make their evidence subject to cross-examination.
20. Scheduling pressures on counsel or other advisers and on the availability of expert witnesses to attend conferencing or hearing sessions, points, we think, to the desirability of submitters collaborating with like-minded submitters so that their resources can be used most efficiently. It is, we think, unlikely that there will be as many different positions as there are submitters on any given issue. While we fully understand that submitters may wish to have their own counsel

appear for them and have first call on the time of expert witnesses, if such resources are scarce then there may need to be sharing of them.

21. In relation to the request for more time between mediation on a topic and the hearing session to allow positions to be considered by parties, we are uncertain that we can offer anything on a general basis given the time constraints we are under. We note that the whole process is based on written submissions. While we accept that Council may be able to assist everyone (including the Panel) by making its position (where that has changed since it notified the PAUP) known as soon as possible, the statutory deadline and its consequences require all parties to assess situations quickly and address them promptly. We simply do not have the luxury to wait for parties (including the Council) to give instructions or briefs on an “as we go along” basis.
22. We appreciate the force of Mr Richard Brabant’s submission that a highly accelerated process threatens the principles of fairness and natural justice and that we should not elevate our time budget over those principles. We observe that the LGATPA requires both an appropriate and fair procedure for hearing sessions (s136(4)) and the provision of our recommendations to the Council by 22 July 2016 (s146). As things stand and in the absence of any apparent priority between those two provisions, we consider we must proceed on the basis that Parliament intends that they are not inconsistent and expects us to achieve both of them through the exercise of an overall judgment.

### **Burden of Process**

23. Many submitters are concerned by the burden of the process presently being followed. The Panel acknowledges this problem. The dilemma arises between:
  - (a) ensuring (for both administrative and natural justice reasons) that every submission is properly dealt with, with adequate notice of processes and events and proper consideration of matters that the submitters themselves may wish to raise as part of the process; and
  - (b) achieving reasonable efficiency from the several points of view that need to be taken into account, including the submitters (particularly those who have no professional assistance), professional advisers (many of whom will have several clients) and the Panel (who must substantively assess every submission and piece of evidence) and its staff (who are required to keep full records of every procedural step).
24. Having said that, the Panel notes with gratitude that almost all submitters and their advisers have responded in a positive way to dealing with the issues that have arisen so far. As matters presently stand it seems reasonable and appropriate that a number of procedural requirements be amended in response to the suggestions that have been made. These (together with matters addressed in previous procedural directions) are now incorporated in the revision of our Hearing Procedures (version 1.1) which is issued together with this minute. We summarise the procedural changes we have made below.

## Procedural Changes

25. **Lists of witnesses** (names, areas of evidence to be addressed and (if being called as an expert) relevant qualifications and contact details) may be provided by e-mail prior to the pre-hearing meeting (5pm the previous working day) or else must be provided at the pre-hearing meeting.
26. **Indications of anticipated requests for additional hearing time** must be made by e-mail prior to the pre-hearing meeting (5pm the previous working day) or else must be provided at the pre-hearing meeting. **Requests for additional hearing time** must be made by a submitter by e-mail by the deadline for that submitter lodging statements of evidence to be presented at a hearing session. The Panel will consider such applications on their merits and in light of any other requests relating to the same hearing session.
27. Note that hearing time as allocated **does not include** any time that may be required for answering questions from the Panel or for cross-examination, but the Panel will take those matters into account when considering whether to grant applications for additional hearing time.
28. **Requests for recoding or reallocation of submission points** in the form specified by the Panel may be made by e-mail prior to the pre-hearing meeting (5pm the previous working day) or else must be provided at the pre-hearing meeting. **Note** that where a further submitter seeks the recoding or reallocation of a primary submission point, such a request must be accompanied by either:
  - (a) the support of the primary submitter or
  - (b) clear reasons why the primary submission has been incorrectly coded or allocated using a test of substance for correctness rather than the preference of the submitter.
29. **Attendance at pre-hearing meetings** is excused for all submitters who provide, on time, all the information sought in the invitation to the pre-hearing meeting.
30. **Filing and availability of documents** is expected to be better facilitated by the establishment of a Hearing Portal on the AUPIHP website which will allow submitters to lodge documents on the website directly.
31. Parties may use the Hearing Portal as a **means of service** of evidence, legal submissions and other relevant hearing documents on other parties. Where a party applies for or otherwise initiates any process in relation to another specific party or group of parties (that is, a number of parties which is fewer than all the parties on a specific hearing topic), or is responding to any such application or separate process, then the Panel requires that party to serve any documents directly on the affected party or parties as well as filing it with the Panel.
32. The **deadline of midday** on the day that documents are required is removed. Deadlines will be on the day specified. Submitters are urged to lodge material

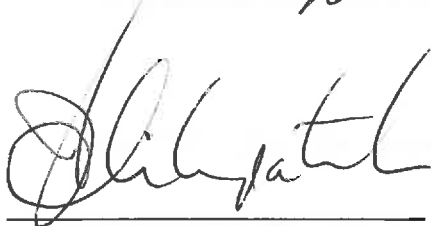
as early as possible. Failure to meet deadlines without good reason may result in late material not being considered by the Hearings Panel.

33. **The Auckland Council's position** is to be stated as early as reasonably possible in relation to each topic or (where appropriate) sub-topic, including wherever possible an amended version of the relevant part or parts of the PAUP in .doc (or compatible) format with additions underlined and ~~deletions struck through~~ (and **not** using a tracked change function given the problems the Panel has experienced with such tools for numbering and formatting of documents). The timing for this will be determined at the relevant pre-hearing meeting.
34. **Mediation and expert conferencing** will be considered as the default process rather than direct to hearing except where it appears to the Panel that the positions of most submitters are entrenched and so mediation or expert conferencing would be unlikely to be useful. Time allocated for mediation and expert conferencing will usually be treated as available for either process, with specific timing to be determined by the mediator(s)/facilitator(s) in consultation with participating submitters and/or experts.
35. **Evidence exchange** will be the subject of specific directions for each topic, but as a general guide:
  - (a) we expect submitters (including the Council) to be considering their positions now in light of other submissions lodged and be preparing their evidence and briefing any expert witnesses they intend to call on the basis of the submissions they have lodged; and
  - (b) we expect the Council to make every effort to prepare and circulate a marked-up version of its position on the relevant PAUP provisions as soon as possible ahead of expert conferencing and mediation , even if that version is still a "draft" in advance of the Council formally resolving its position; and
  - (c) we agree that sequential exchange (with the Council going first) is appropriate where there has been no prior process of expert conferencing or mediation; but
  - (d) we anticipate that the process of expert conferencing and mediation should enable parties to understand each others' positions so that contemporaneous exchange would be reasonable where one or both of those processes has occurred; and
  - (e) we strongly encourage those parties who intend to make legal submissions to prepare those in advance and circulate those together with their evidence.
36. On that basis (and as the default position unless and until specific directions are made for any topic) the following standard directions will apply:



1. For Hearings that are **not** preceded by either expert conferences or mediation:
    - a. The Council's evidence shall be provided to the Hearings Panel for uploading to the Panel's website no later than 20 clear working days prior to a hearing session; and
    - b. Other submitters' evidence shall be provided to the Hearings Panel for uploading to the Panel's website no later than 15 clear working days prior to a hearing session.
  2. For Hearings that **are** preceded by either expert conferences or mediation (not including off-line mediation), **all** evidence shall be provided to the Hearings Panel for uploading to the Panel's website no later than 15 clear working days prior to a hearing session unless otherwise directed by the Panel.
  3. Any rebuttal evidence shall be provided to the Hearings Panel for uploading to the Panel's website no later than 5 clear working days prior to the hearing to which such evidence relates.
  4. The Hearings Panel encourages all parties to pre-circulate their opening legal submissions in advance of the hearing session. Any legal submissions by the Auckland Council shall identify the relevant proposed plan provisions and shall state clearly the Council's position in relation to those provisions and the reasons for that position.
37. As stated in clause 8 of our Hearing Procedures, these timeframes may be adjusted to meet particular circumstances on application or by our own direction.

Dated at Auckland this 28<sup>th</sup> day of October 2014



Judge David Kirkpatrick  
Chairperson, Hearings Panel for  
proposed Auckland Unitary Plan

## **Schedule**

### **Written submissions and oral presentations received at the conference**

- (a) Derek Nolan as counsel for Ports of Auckland Ltd (#5137) and Scentre (NZ) Ltd (#2968) – memorandum dated 12/9/14;
- (b) Bronwyn Carruthers as counsel for Progressive Enterprises Ltd (#5723) – notes for conference dated 3/10/14;
- (c) Douglas Allan as counsel for Kiwi Income Property Trust and related parties (#5253), Mediaworks Holdings Ltd (#6558), The National Trading Co of NZ Ltd (#2632), Sanford Ltd (#3416) and Housing NZ Corp (#839) – email dated 15/9/14, memorandum dated 19/9/14 and further memorandum dated 3/10/14;
- (d) Catherine Somerville as counsel for NZ Steel Ltd (#868), Transpacific Industries Group (NZ) Ltd (#877), The Warehouse Ltd (#2748) and Ryman Healthcare Ltd (#6106) – email dated 15/9/14;
- (e) Paul Cavanagh QC as counsel for various submitters including Herne Bay Residents Association Inc (#3635) – memorandum dated 30/9/14;
- (f) Bianca Tree as counsel for DNZ Property Fund Ltd (#3863 & FS#868), AMP Capital Property Portfolio Ltd (#4376 & FS#831), DB Breweries Ltd (#4868 & FS#884) and 273 Neilson St Ltd (#4378 & FS#888) – memorandum dated 1/10/14;
- (g) John Maplesden on behalf of Land Solutions Ltd (#2936) and Auckland Developers Group (#5145) and unspecified others – letter dated 17/9/14 and memorandum dated 30/9/14;
- (h) Trevor Daya-Winterbottom as counsel for Tram Lease Ltd, Viaduct Harbour Holdings Ltd and Viaduct Harbour Management Ltd (#5566) – memorandum dated 3/10/14.
- (i) Richard Brabant as counsel for unspecified parties;
- (j) Richard Burton on behalf of Auckland 2040 (#1473) – oral presentation followed by memorandum dated 4/10/14;
- (k) Sue Simons as counsel for unspecified parties;
- (l) James Gardner-Hopkins as counsel for Transpower NZ Ltd (#3766) and KiwiRail Holdings Ltd (#4336);
- (m) Fiona McLaughlin on behalf of Long Bay - Okura Great Park Soc. (#4462);
- (n) Richard Gardner as counsel for Federated Farmers of NZ (#6253);
- (o) James Hook on behalf of unspecified parties; and
- (p) Katherine Anderson and Corina Faesenkloet as counsel for the Auckland Council (#5716) – memorandum dated 3/10/14.