Before the Auckland Unitary Plan

Independent Hearings Panel

In the Matter	of the Resource Management Act 1991 as amended by the Local Government (Auckland Transitional Provisions) Amendment Act 2010
And	
In the Matter	of submissions lodged on the Proposed Auckland Unitary Plan

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Additional Memorandum concerning the issue by the Hearing Panel of its final recommendation on the RPS

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May it please the Hearing Panel:

1. I refer to the memorandum of counsel on behalf of the Auckland Council dated 22 January 2015, and the memorandum of Mr Allan dated 23 January 2015.

2. The purpose of this memorandum is not to revisit matters already covered in my earlier memorandum but to respond on what I respectfully submit are some key considerations.

3. My understanding is that no party involved in the hearings on the PAUP would wish to present evidence or make submissions in respect of the proposed Regional and District Plan provisions of the PAUP on the basis that the provisions of the operative Auckland RPS must be given effect to – reference s67(3)(c) and s75(3)(c) RMA.

4. There is now a proposed RPS (part of the Unitary Plan, but nonetheless a distinct and separate policy statement), and in accordance with s66(2)(a) and s74(2)(a)(i) the Hearing Panel (and all parties presenting submissions or evidence) must *have regard to* that proposed RPS.

5. It is suggested in the council memorandum (para 8.3) that the "context of the PAUP requires a different meaning to be given to 'regional policy statement' and 'regional plan'". In my submission the emphasis placed on the words "unless the context requires another meaning" is flawed. The words "In this Act" which precede those words do not enable the procedural arrangements provided for in the Local Government (Auckland Transitional) Act to provide a basis for setting aside the obligation to give effect to the operative RPS.

6. If there is no merit in making reference to, let alone giving effect to, the operative Regional Policy Statement at mediations, in evidence or at hearings a sound, defensible process should be followed to ensure that the ongoing hearing process is not "derailed" (to use an expression found in the Auckland Council memorandum) by a failure to comply with s67(3) and s75(3), as recommended by the Russell McVeagh memorandum. I support the promulgation of a regulation under s5 of the LG(AT)A.

7. In relation to how the Panel should proceed in relation to the proposed RPS provisions, I do not propose to revisit the options available, and acknowledge that they have been fully canvassed in the Auckland Council memorandum and by other parties. In my submission in order to give appropriate guidance and direction to witnesses and counsel it is necessary (at the least) for the Hearing Panel to provide what has being described by others as a “red-line version" of the proposed RPS provisions.

8. My remaining concern is that something less than an operative (new) RPS creates potential uncertainty, the prospect of challenge in another forum, and potentially lengthens (not shortens) the time required for mediations, hearings, the Panel’s deliberations, the issue of recommendations by the Panel and the decision-making process required of the Auckland Council, because parties will rely on different versions of the proposed RPS provisions in dealing with the regional and district plan topics. This will make evidence more complex, and extend the time taken for hearings and deliberations, compared to there being a definitive version of the RPS provisions.

9. If the Hearing Panel were to undertake deliberations now on the RPS provisions and issue its formal recommendation (I note the memorandum for the Auckland Council acknowledges this is legally possible) I do not accept this results in the overall process being longer. It simply transfers the Panel's time in undertaking that work (and the time that will be needed for the Auckland Council to make a decision on that recommendation) forward within the allocated timeframe. Similarly, if there are to be an appeals to the Environment Court or a review challenge in the High Court in relation to the RPS provisions, the time it takes for that process to play out need be no different. In fact there may be advantages in having a decision or decisions from the Environment Court on key policy provisions to guide future hearings and deliberations. The risk of judicial review is arguably less if an operative RPS is established at this point as opposed to the hearing continuing on the basis that interim recommended provisions are relied upon from this point onwards, or nothing is decided until later in the process or everything is held over for a determination after all matters have been heard.

10. A primary concern that I endeavoured to raise in my earlier memorandum and an issue not really addressed in the memorandum for the Auckland Council, is what proposed RPS provisions a witness preparing evidence in relation to Regional and District plan matters is to refer to. If the suggested “red-line" version is provided by the Hearing Panel (and is legally defensible) then that is an option, I agree.

11. An example of a major policy shift in Council evidence and submissions on the proposed RPS is Topic 10 where Council abandoned the concept of “special character” (and so the decisions of the Environment Court on PC163) and in reliance of submissions, argued for the quite different concept of “historic character”. Mediation is soon on the proposed District Plan provisions, followed shortly after by evidence exchange and hearings (unless these are adjourned). Without a ruling on this by the Panel, the breadth of evidence necessary to cover both possibilities, and the consequences for the rules and assessment criteria will greatly extend the process - and make any concensus at mediation much less likely.

12. Where there are unresolved differences (and no decision or even a “red-line” version issued by the Hearing Panel) different experts (or submitters) and lawyers making submissions would be entitled to favour their own preference as to what the RPS wording should be and shape their plan evidence on that policy wording. For an expert giving evidence in accordance with the Environment Court Code of Conduct, I submit there would be an obligation to address the regional or district plan provisions by reference to other parties (including the Council) wording preferences. It has been suggested a mediated version could be relied upon and referred to only – but not all RPS topics were subject to mediation, and of course the Hearing Panel has not “signed off” any of the mediated provisions.

13. I appreciate a workable solution is possible, and I certainly submit that some directions from the Hearing Panel would be essential to prevent what I might describe as a “blow-out" in the production of evidence and legal submissions for the next stage.

14. I acknowledge that other hearings have considered proposed RPS and “lower order" plan provisions at the same time. The Auckland Council

memorandum refers to the process followed by the General Hearings Panel for the One Plan, and I understand that another Hearing Panel proceeded similarly in the Waikato. However, that is not to say the method followed was appropriate – by which I mean either lawful, or the best procedure in relation to the Auckland Unitary Plan.

15. There are frequent references in memoranda on this matter to “vertical integration" of the combined document. If this means consistency and coherence of the document from top to bottom I have no difficulty in agreeing. However I submit that the notion of an on-going review of the regional policy statement provisions following completion of hearings and working recommendations on lower order plans is at odds with the structure of the RMA in relation to the preparation of planning instruments. In my respectful submission the Act expects (the words are “must give effect to", or “must have regard to”) a hierarchical process. No one so far has argued with the imperative in respect of what the Unitary Plan contains in respect of coastal-related provisions, referencing the NZCPS. The Supreme Court judgement in *EDS v King Salmon* has been frequently referred to.

16. No one seems to consider it is appropriate or useful to refer to the operative RPS, and the Council itself has argued for some significant departures from the Notified proposed RPS. But there is resistance to the Hearing Panel and the Auckland Council producing a new operative RPS, and it appears the Council doesn’t even support a “red-line” version from the Panel. Either of these replacements of the notified version must be better than proceeding without any definitive revision of the notified RPS, or relying on “high-level indications" of the Hearing Panels position on what changes might be appropriate.

Richard Brabant