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Dear Sir

REQUEST FOR INTERIM RECOMMENDATION ON REGIONAL POLICY STATEMENT SECTION OF PROPOSED AUCKLAND UNITARY PLAN

Executive Summary

1. It will be virtually impossible, let alone cumbersome and time consuming, to proceed with the hearings on the regional plan and district plan sections of the Proposed Auckland Unitary Plan ("**PAUP**") in the absence of (at least) an interim recommendation on the proposed regional policy statement ("**RPS**").
2. We therefore respectfully request that the Auckland Unitary Plan Independent Hearings Panel ("**Panel**") issue an interim recommendation on the RPS section of the PAUP.
3. While legislative amendment would enable a cleaner and more straightforward two-step process to occur, the time needed for that legislative change would cause a material delay. We recognise the urgency required in order to meet the Panel's statutory deadline under the Local Government (Auckland Transitional Provisions) Act 2010 ("**ATP Act**"). Accordingly, we recommend a process whereby:
 - (a) The Panel issues, in April 2015, its proposed draft wording for the RPS section of the PAUP.
 - (b) The Auckland Council is invited to indicate its support (or otherwise) on an interim basis to that proposed RPS wording.
 - (c) Having regard to the Council's response, the Panel issues a full mark up of the RPS ("**Interim Recommendation**").
 - (d) A regulation is promulgated under section 119 of the ATP Act, deeming the Interim Recommendation to be an operative RPS for the purposes of sections 67(3)(c) and 75(3)(c) of the RMA and in respect of the hearing process for the PAUP, until such time as the final decision is made by the Council on the PAUP pursuant to section 148 of the ATP Act.
 - (e) At the conclusion of the hearing of submissions on all sections of the PAUP, the Panel considers whether further changes need to be made to RPS so as to ensure consistency with other parts of the PAUP.

(f) The proposed process for the hearing of submissions on the PAUP as set out in the ATP Act is otherwise retained in its current form.

4. The details of this process and the reasons for it are described in more detail below.

The difficulties with the current process prescribed by the ATP Act

5. None of the unitary plans that have been promulgated to date have included a regional policy statement component. We are unsure whether that fact was understood by those who drafted the ATP Act. What is apparent is that the current process required by the ATP Act is going to give rise to very serious practical and procedural problems, once the hearings move into the district and regional plan sections of the PAUP.
6. Sections 67(3)(c) and 75(3)(c) of the RMA require regional and district plans (respectively) to *give effect to* the operative regional policy statement; a regional council or territorial authority is only required to *have regard to* any proposed regional policy statement under sections 66(2)(a) and 74(2)(a)(i) of the RMA. Accordingly, as a matter of law, the regional and district plan sections of the PAUP need to give effect to the existing operative Auckland Regional Policy Statement (which became operative on 31 August 1999). There is no requirement for those regional and district plan sections to give effect to the proposed RPS component of the PAUP.
7. While the PAUP's RPS section could be made operative just prior to making the regional and district plan sections operative, so that this requirement was technically complied with at the time the decisions are released, that approach will not assist with those attending mediations, those preparing for or presenting submissions and evidence throughout the hearing process, and nor will it assist the Panel's deliberations.
8. The essence of the problem is this: how can a submitter or expert witness confirm that a regional or district plan provision *gives effect to* the PAUP's RPS, without knowing what that RPS says?
9. In the absence of the Interim Recommendation, in subsequent hearings, every submitter and witness will need to assess the proposed regional and district plan provisions against a virtually unlimited combination of the relief within the following parameters:
- (a) The RPS as notified.
 - (b) The RPS as supported by Auckland Council in evidence.
 - (c) The RPS as modified by the various amendments sought by other parties through the first round of hearings.
 - (d) A combination of (b) and (c) above.
10. The uncertainty over the content of the RPS section will inevitably lead to the preparation of lengthy evidence (and legal submissions) to address all possible scenarios set out above. This in turn will lead to longer mediations and hearings, placing the overall timeframe for resolution of the PAUP process in jeopardy. Developed in this manner, the form of the provisions of the regional and district plans will be sub-optimal.

Proposed process

Interim recommendation

11. Our proposed process is set out below, with the reasons following:
- (a) A regulation is promulgated under section 119 of the ATP Act, deeming the Interim Recommendation to be an operative RPS for the purposes of sections 67(3)(c) and 75(3)(c) of the RMA, until such time as the final decision is made by the Council on the PAUP pursuant to section 148 of the ATP Act.¹ This regulation would need to be in effect by March 2015. (Refer paragraphs 12-15 below.)
 - (b) In April 2015, the Panel issues proposed amended wording for the RPS, in the nature of an interim decision by the Environment Court, comprising:
 - (i) the Panel's track-change version of the RPS section of the PAUP;
 - (ii) a short statement of reasons explaining the basis (at a high level) for any key recommended changes to the RPS.²
 - (c) The Council is invited to issue a public statement confirming whether or not it is in general agreement with the Interim Recommendation or, if it disagrees with any aspect of the Interim Recommendation, which part(s) it disagrees with ("**Council response**"). Strictly speaking this will be without prejudice to the Council's legal right, conferred by section 148 of the ATP Act, to accept or reject the Panel's final report containing all recommendations at the conclusion of the process.
 - (d) The Panel issues a Minute attaching a final draft of the RPS (ie the Interim Recommendation). This final draft would record any issues raised in the Council response. In accordance with the regulation described in sub-paragraph (a) above, the Minute would confirm that, for the purposes of the subsequent hearings on the PAUP, the Interim Recommendation represents an operative RPS for the purposes of sections 67(3)(c) and 75(3)(c) of the RMA.
 - (e) The Panel proceeds to hear the remainder of submissions on the PAUP, both the regional plan and district plan, and all ancillary matters. The parties are able to rely on the Interim Recommendation for the purpose of giving effect to the RPS through the regional and district plan objectives, policies and rules.
 - (f) To assist with those hearings, the Panel directs the Council to circulate, in advance of each Pre-Hearing Meeting for subsequent hearing topics, a marked up version of the relevant provisions identifying what changes,

¹ We did consider whether the proposed regulation should deem the proposed RPS section to be operative for all resource management purposes, rather than just the PAUP process, however we decided that was unnecessary. Primarily this is because section 104(1)(b)(v) of the RMA requires a consent authority to have regard to both operative and proposed regional policy statements, and accordingly the RPS section of the PAUP can be considered without it needing to be deemed operative.

² The giving of reasons would be optional. It would potentially allow the Council and submitters to better apply the changes to the RPS recommended by the Panel, however if it would delay the issue of the draft RPS or overly complicate the process then this aspect could be omitted.

if any, are required to give effect to the amendments made to the RPS recorded in the Interim Recommendation. These can be identified separately to any proposed amendments in response to submissions, so that all parties and the Panel understand how the RPS is being given effect to.

- (g) In the first quarter of 2016 (on the current timetable), the Panel revisits the Interim Recommendation and decides whether the draft RPS contained within that Interim Recommendation needs amendment:
 - (i) If amendments are not required, the Interim Recommendation is simply folded within the broader recommendations which are presented to the Council in the report required by sections 144 and 146 of the ATP Act. (Section 144 anticipates a single report to the Council, containing all of the Panel's recommendations. Our proposed approach is consistent with that requirement and does not require legislative amendment to Part 4 of the ATP Act.)
 - (ii) If amendments are required, the Panel issues a further Minute attaching the redrafted RPS section and invites submissions from interested parties *only on the recent amendments* and confirming that any attempt to "re-litigate" earlier material will be disregarded by the Panel. The Panel could, if it wished, convene a short hearing in order to hear from any parties who had lodged submissions.³ At the conclusion of this hearing process, the process set out above in paragraph 11(g)(i) is adopted.
- (h) Other than as set out above, the proposed process set out in the ATP Act remains unaffected.

Proposed regulation to enable the proposed process

12. While we considered whether or not the Panel could simply "deem" the draft RPS as set out in the Interim Recommendation to be an operative RPS for the purpose of sections 67(3) and 75(3) of the RMA, ultimately we concluded that approach gave rise to an unacceptable risk that a submitter could seek to judicially review the process.
13. When the ATP Act was enacted, there was specific provision in section 119 to promulgate regulations to amend the hearing process. This no doubt reflected the urgency with which that legislation was developed and the uniqueness of the process, which would almost certainly result in the need for refinement to the process. The proposed amendment to the process that we are proposing fits squarely within the purpose of section 119 of the ATP Act and section 360 of the RMA:

119 Regulations relating to preparation of Auckland combined plan

(1) This section provides for regulations to be made that specifically relate to the preparation of the Auckland combined plan.

(2) Regulations may be made under [section 360\(1\)](#) of the RMA for the purposes of the preparation of that plan and as if

³ This step would avoid the type of concerns raised by the High Court in *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* [2014] NZHC 3191 at [131]-[133].

references to the [RMA](#) in that subsection include references to this Part.

360 Regulations

(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
...

(i) providing for any other such matters as are contemplated by, or necessary for giving full effect to, this Act and for its due administration.

14. The operative wording of any regulation would be straightforward. The wording could be as simple as:

Solely for the purposes of section 67(3)(c) and section 75(3)(c) of the Resource Management Act 1991, the Interim Recommendation of the Panel is deemed to be the operative regional policy statement instead of the existing operative Auckland Regional Policy Statement. This regulation will cease to have effect upon the issuing of the Auckland Council's decision under section 148 of Local Government (Auckland Transitional Provisions) Act 2010 on the report from the Panel.

"**Interim Recommendation**" means for the purposes of the Local Government (Auckland Transitional Provisions) Act 2010, a draft regional policy statement issued by the Panel in advance of the final report required from the Panel by section 144 of the Local Government (Auckland Transitional Provisions) Act 2010.

15. Any such regulation could be prepared and promulgated within a very short timeframe.

Reasons for the proposed process

16. In our opinion, the proposed process is not only desirable but is necessary:
- (a) The RMA envisages a clear hierarchical framework of planning instruments. The importance of higher order instruments, including regional policy statements, was confirmed by the Supreme Court in the *New Zealand King Salmon* decision.
 - (b) The process provides as much certainty as possible as to the content of the RPS section of the PAUP. Without that certainty, it will not be possible for any submitter or the Council to put forward provisions that "give effect to" the PAUP's RPS, as required by sections 67(3)(c) and 75(3)(c), because no one will know what those provisions are. This difficulty is exacerbated by the significant changes being proposed in response to submissions by the Council itself, as well as those arising from mediation, and so it is not realistic to expect that the notified version of the PAUP's RPS will remain largely intact.
 - (c) As the right of appeal under sections 156 and 158 of the ATP Act is only against the Council's decision, we do not consider that issuing an Interim Recommendation will give rise to an appeal, nor would the Council's response to that Interim Recommendation. The Panel's Minute could expressly record that neither its Interim Recommendation nor the Council

response is a final decision in this regard, but that it has been released in order to assist the participants in the process.⁴

17. We accept that the Panel seeking (effectively) an interim decision from the Council in respect of the Interim Recommendation is novel.
18. There is a risk that the Council might not agree with the Interim Recommendation, and if the Council were to indicate it was opposed to fundamental aspects of the proposed RPS wording then that would be problematic in terms of being able to "give effect to" the Interim Recommendation in subsequent hearings.
19. However, if the Council is uncomfortable with the wording of the RPS then this will become apparent at some point in the process - if that disagreement is only expressed at the conclusion of the process (ie once all other parts of the PAUP are heard), then in many respects that would be more disruptive. This is because, if the Council amends the RPS in its decision on the Panel's recommendation, then the Council or Court will need to decide whether any consequential changes need to be made to any part of the regional plan or district plan sections of the PAUP.
20. Having the Council provide such an indication in response to the proposed Interim Recommendation will not only assist submitters, but it will also no doubt assist Council staff and others advising the Council because it would effectively (and transparently) "update" the Council's policy position. That should facilitate the faster translation of those agreed RPS provisions into the regional and district plan provisions.

Alternative approach

21. Another alternative that we have considered is to amend the current process so as to allow a formal two stage recommendation and decision process (this would effectively be the "normal" RPS promulgation process). While this would enhance the certainty of the RPS provisions, the primary disadvantages would be:
 - (a) The delay that would be necessary to allow this to occur, in particular if there were appeals on points of law to the decision on the RPS section. Depending upon the scope of the appeals, those appeals might need to be resolved prior to the regional and district plan sections of the PAUP being heard. (Even if the appeals were heard under urgency, this could still result in a 6 months hiatus - which would be most undesirable.)
 - (b) The added difficulty that there would be in revisiting the RPS at the conclusion of the PAUP hearings, so as to make any consequential changes to ensure consistency with the remainder of the PAUP. While this could be overcome by adopting a truncated plan change process for the RPS section (because the RPS would be legally operative), it would be more complex than the approach we have suggested.
 - (c) The need for legislative amendment to address the requirement in section 144 of the ATP Act for the Panel to provide a single report to the Council containing the Panel's recommendations.

⁴ In light of there being a right of appeal to the Council's decision and because it is difficult to see how the release of the Interim Recommendation as proposed would disadvantage any person, any application for judicial review is most unlikely to succeed, even if an application were made by a disgruntled submitter.

Conclusion

- 22. We understand that the Panel is currently considering a number of options in respect of potential interim directions. We would welcome the opportunity to appear before the Panel and speak to this request, and could make ourselves available at short notice to attend a conference if that would assist.
- 23. We look forward to hearing from you.

Yours faithfully
RUSSELL McVEAGH



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