

**BEFORE THE AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL
AUCKLAND**

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

JOINT MEMORANDUM OF COUNSEL SEEKING INTERIM RECOMMENDATION

23 JANUARY 2015

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MAY IT PLEASE THE PANEL:

1. The purpose of this memorandum is to respond to the Council's memorandum dated 22 January 2015 and to update the Panel on our proposal since writing to the Panel on 16 December 2014.

Our position

2. Our position can be summarised as follows:
 - (a) A "redline" or tracked changes version of the RPS section of the PAUP would be desirable and in our respectful submission essential if the remainder of the hearing process is to be undertaken effectively and efficiently.
 - (b) The Hearing Panel is not constrained from issuing a tracked changes version of its current position on the RPS section. However, at present such a tracked changes version would have no statutory weight (it is neither the operative RPS, a proposed RPS, or even a decisions' version of an RPS).
 - (c) It is essential that the tracked changes version, if issued, has some statutory weight. There are a range of options for giving that document statutory weight. These include promulgating a regulation specifying that the tracked changes version is a document to which the Hearing Panel should: "give effect to"; "have particular regard to"; "have regard to"; or "take into account". There are a range of views amongst counsel we have canvassed as to which status is most appropriate. The preferred view is between "give effect to" or "have particular regard to". We understand counsel will address the Hearing Panel separately on this.
 - (d) In terms of decoupling the Operative RPS from the current process, there is merit in the Council's suggestion that the "context" provides an opportunity to disregard the Operative RPS.
 - (e) The intention is to enable the creation of a robust and internally consistent PAUP. Whatever approach is adopted, we respectfully submit that the tracked changes version must be capable of being amended throughout the process. For

example, its wording may have unintended implications on the form of the lower order provisions, or it may need to be amended in response to legislative reform. In other words, the Hearing Panel should be given unfettered discretion to revisit the RPS provisions as the hearings unfold and in particular as legislative or other amendments might take effect.

- (f) Counsel no longer seek any form of informal feedback from the Council (in its decision making role) on the tracked changes version. While what was proposed was only an informal indication, the complications inherent in that process outweigh any potential benefit to the hearing process moving forward.

Council's issues paper

3. The Council has filed a lengthy memorandum on the appropriateness or desirability of issuing:
 - (a) High level indications;
 - (b) Interim recommendations; or
 - (c) Final recommendations.
4. The options discussed in detail are the high level indications and staged final recommendations. Very little is said of the interim recommendations option, which remains our preferred approach.
5. In terms of the approach put forward in our letter of 16 December 2014, the Council says:¹
 - (a) It is likely to make it impossible for the Panel to deliver the recommendations on the complete PAUP by July 2016;²
 - (b) It is unlikely to achieve the "simplicity" benefits suggested;³
 - (c) It is expressly contrary to Parliament's intention that the Council is at all times the decision maker in relation to planning

¹ Paragraph 2.7.

² Paragraph 2.7.

³ Paragraph 2.7.

instruments for Auckland,⁴ as it "transforms" a body mandated to make recommendations into a decision maker.⁵

- (d) It does not specify a procedural step to protect any natural justice rights arising from any significant change between the Interim Recommendation and the Final Recommendation.⁶

6. We disagree:

- (a) Issuing a tracked changes version of the RPS that can be used to more efficiently hear the lower order provisions will assist the Panel to meet its statutory deadline, rather than hinder it;
- (b) An interim recommendation on the RPS provisions will not involve a "decision", any more than the final recommendation to the Council involves a decision. There is no change to the Panel's role.

7. Council submits there is a high degree of risk to the vertical integration of the PAUP and the ability to complete hearings and deliver recommendations to the Council within the statutory timeframes if the Panel delivers interim recommendations in early 2015.⁷ Its reasons include:

- (a) The Panel has not yet heard all economic evidence on the RPS provisions as Council intends to present this as part of its case on the Regional Plan provisions.⁸
- (b) There is insufficient time for the Panel to undertake the required section 32AA analysis.⁹

8. The first of these suggests that the Council has not presented evidence relevant to the RPS provisions during the RPS hearings, and has instead elected to delay that evidence to a later date. We would be very surprised if that was indeed the case, but even if it were so it is not a reason to delay the issuing of a tracked changes version. The second reason is a matter for the Panel to decide.

⁴ Paragraph 2.7.

⁵ Paragraph 3.2.

⁶ Paragraph 4.1(b)(vi).

⁷ Paragraph 2.5.

⁸ Paragraph 2.5(a)(i).

⁹ Paragraph 2.5(c).

9. We entirely agree with the Council that:
- (a) Evidence in relation to the lower order provisions will be highly relevant to confirming the appropriateness of, and any required fine tuning of, the RPS provisions;¹⁰
 - (b) It is necessary and desirable for the Panel to hear the remainder of the evidence before confirming or finalising the contents of the RPS;¹¹
 - (c) It will be more difficult to prepare evidence for the later hearings in the absence of any certainty regarding the content of the RPS that needs to be given effect to, with evidence needing to cover a range of possibilities making it more detailed and resulting in longer hearings.¹²
10. Council has usefully referred to the process followed for the preparation of the Horizons Manawatu One Plan.¹³ Council appears to support the manner in which that Panel:
- (a) Regulated its own proceedings as it saw fit;
 - (b) Issued provisional determinations;
 - (c) Disregarded the operative RPS; and
 - (d) Treated the RPS chapters of the One Plan as the RPS to be given effect to by the remainder of the plan.¹⁴
11. In that situation, the Panel issued a tracked changes version of the RPS in its provisional determination which the remainder of the plan was to give effect to. That is what we are seeking here. However, the Council (despite its apparent support of that process):
- (a) Opposes the release of a tracked changes version.¹⁵
 - (b) Suggests that the **notified** RPS section of the PAUP should be the relevant document.¹⁶

¹⁰ Paragraph 2.5(a)(ii).

¹¹ Paragraph 2.5(a)(ii).

¹² Paragraphs 7.13(a) and 7.19(a) and (b).

¹³ Paragraphs 6.3 - 6.7.

¹⁴ Paragraph 8.9.

¹⁵ Paragraphs 6.7 & 6.8.

12. It is difficult to see this opposition to the release of recommendation tracked changes version as anything other than the Council refusing to relinquish control over the document or the process. The Council is at pains to emphasise it remains the decision maker, and that the Panel is only able to provide it with recommendations. The Council has misunderstood a number of aspects of the proposal we put forward on 16 December 2014:
- (a) The Panel would not be making a decision (as suggested in paragraph 7.7(a)), but merely releasing in advance its interim recommendations on the RPS and a tracked changes version for all parties to use during the remainder of the hearings;
 - (b) No issues will arise if the Panel seeks to make changes to the RPS at the end of the process (as suggested in paragraph 7.7(b)). This is specifically contemplated in our proposal, and must be provided for.
 - (c) Similarly, there is no risk of judicial review if the Panel changes its approach in the final version (as suggested in paragraph 7.7(d)). There is no exercise of a statutory power of decision, and future changes are specifically contemplated in our approach.
 - (d) There is no issue for private plan changes to legacy plans (as suggested in paragraph 7.7(f)) as the deemed operative status will solely apply for the PAUP process and the determination of the lower level provisions.
13. The revised approach set out above addresses those concerns.

Ellis Gould memo

14. As noted in the Ellis Gould memorandum dated 22 January, no regulation is required for the Panel to issue a tracked changes version. While we agree that no regulation is required for the Panel to simply issue the document, we are particularly concerned that it would have no legal statutory weight (particularly in light of the Council's position that the relevant RPS for lower order provisions is the notified version).¹⁷ It would

¹⁶ Paragraph 2.9.

¹⁷ Paragraph 2.9.

not be particularly onerous for a regulation to be passed in short order and it need not hold up the development and release of the tracked changes version.

15. We understand the legal argument presented in respect of our other concern about the effect of the operative RPS (ie needing to give effect to the 1999 RPS). While we do not consider such an interpretation were intended by Parliament, the argument does have some merit and it may avoid the need for a regulation to address that aspect. In that regard we also agree that in these particular circumstances it would be open to the Panel to decide that the context requires that the operative RPS for the purpose of s 67(3)(c) and 75(3)(c) is not the legally operative provision. However even if the Panel were to accept those arguments, we remain concerned that the Council (and others) may argue that it is the notified version of the RPS if the tracked changes version lacks formal statutory weight.

Dated 23 January 2015



B J Matheson



J K Gardner-Hopkins



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