

BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

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, Framework Plans (Topic 004 Chapter G and Topic 003 Chapter A)

**MEMORANDUM ON BEHALF OF AUCKLAND COUNCIL IN RESPONSE TO DR ROYDEN
SOMERVILLE QC ADVICE ON FRAMEWORK PLANS
9 APRIL 2015**

MAY IT PLEASE THE PANEL

Introduction

1. The Independent Hearings Panel (**Panel**) received advice dated 13 March 2015 from Dr Royden Somerville QC on the *vires* of the Proposed Auckland Unitary Plan (**PAUP**) provisions for Framework Plans (**FP**). The Panel subsequently invited parties to provide written correspondence in relation to his advice by 27 March 2015.
2. On 27 March 2015 the Auckland Council (**Council**) requested further time to consider Dr Somerville's opinion. The Panel granted the Council's request to provide a memorandum in response 2 working days before the scheduled 13 April 2015 conference.
3. The Council thanks the Panel for the further time to consider the issues raised in Dr Somerville QC's advice and the responses provided by other parties. Council understands the Panel has received responses from the following parties:
 - a. City Works Depot Site Limited
 - b. The National Trading Company of New Zealand Limited
 - c. Fletcher Construction Development
 - d. Tamaki Redevelopment Company
 - e. Kauri Tamaki Limited
 - f. Karl Schweder
 - g. Ngati Whatua Orakei Whai Rawa Limited
 - h. Auckland Volcanic Cones Society Incorporated

Council's Response

4. As addressed in the evidence of Rachel Dimery for Topic 004 (Chapter G), the Council considers that FP are a valuable planning tool that enable the coordinated planning of large sites within precincts in particular:
 - a. They allow coordinated and integrated planning across those large sites which is not available for smaller individual sites;
 - b. They require applicants to demonstrate the way in which development of the site will integrate with neighbouring sites and adjacent infrastructure networks;
 - c. they provide flexibility to the development community; and

- d. they enable land to be developed before structure plans are in place or in circumstances where a structure plan is not feasible or provided for (such as in urban areas involving non-contiguous lots).
5. The Council therefore supports retention of the FP mechanism within the PAUP, provided the provisions are workable and legally robust. The Council acknowledges there are arguments for and against use of the mechanism and a range of views on the FP provisions as currently drafted, although it notes that the provisions were the subject of a constructive mediation involving a range of parties and that the provisions as placed before the Panel at the Topic 004 hearing were accorded a high level of support.
6. The Council respectfully disagrees with Dr Somerville QC's advice in respect of the first question considered in his opinion; whether it is *ultra vires* the Resource Management Act 1991 (RMA) for the status of an activity to be determined by reference to the presence of an approved FP.
7. In particular, we submit that Dr Somerville QC's advice does not acknowledge the critical distinction between the PAUP provisions as notified and the provisions as amended through the Topic 004 mediation and hearing process. In our submission, the determination of activity status by reference to the existence of a FP is very different from, and not analogous to, the determination of activity status by reference to whether the proposal complies with an approved FP.
8. As a result, we submit that the requirement that a FP consent exists, as a pre-qualifier to activity status, does come within the meaning of *requirement, condition or permission* provided for by sections 87A(3) and (5) of the RMA, and that the PAUP provisions as amended are therefore *intra vires* the RMA.
9. The Council agrees with the following aspects of Dr Somerville QC's advice:
 - a. The PAUP provisions as notified are likely to be *ultra vires* the RMA;
 - b. It is not *ultra vires* the RMA that a matter of discretion for assessing an activity in an area subject to a FP is whether the activity is "consistent with an approved FP"; and
 - c. It is not *ultra vires* the RMA that an applicant for one FP can be required to demonstrate how their FP integrates with neighbouring sites and other FP.

10. In light of the uncertainty regarding the *vires* of the PAUP FP provisions as amended, the Council considers it would be desirable to obtain clarity on the issue. To that end, it agrees with second course of action proposed by Mr Allan on behalf of the National Trading Company of New Zealand Limited that it would be helpful to seek a declaration on the *vires* of the proposed rules which define the activity status of land use, development and subdivision by reference to the existence of a FP. The Council proposes to initiate declaration proceedings at the earliest opportunity after considering a number of matters including the appropriate forum, the need for an amicus, appropriate parties, who should be notified, and the need for a sample precinct activity table.
11. The Council expects that a declaration would be available before the end of the year.
12. For completeness, we record that at this time the Council does not consider it necessary to seek a declaration on the matter of “incentives” accompanying the use of FPs because the appropriateness of such provisions is a matter for substantive consideration in the context of specific precincts. Further, as to the remaining questions put to Dr Somerville QC, they need not be tested because they are either determined by the *vires* question for which the declaration will be sought, or they concern other matters not central to the FP provisions in the PAUP.
13. Until such time as a declaration is made in relation to this issue, the Council proposes to continue to support the use of the FP provisions, including in respect of the relevant City Centre precincts.

DATED the 9th day of April 2015



J Hassall / M Gribben / J Caldwell / M Dickey
For Auckland Council