

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 ("PAUP") and procedures established under the relevant legislation to address the submissions and further submissions processes in relation to the PAUP following notification of it by the Auckland Council

MEMORANDUM OF COUNSEL ON BEHALF OF AUCKLAND COUNCIL
in advance of the conference on Tuesday 27 January 2015
DATED 22nd January 2015

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1 This memorandum on behalf of Auckland Council is provided in advance of the conference scheduled for 2pm on Tuesday 27 January 2015.
- 1.2 The purpose of the conference is to assess the appropriateness and/or the desirability of the Independent Hearings Panel (**Panel**) issuing high level indications and/or interim or final recommendations on the Regional Policy Statement (**RPS**) section of the Proposed Auckland Unitary Plan (**PAUP**).
- 1.3 The Panel is convening the conference in circumstances where it has informally indicated it is considering this issue. In addition, Russell McVeagh has written to the Panel suggesting there are process issues with the procedures set out in the Local Government (Auckland Transitional Provisions) Act 2010 (**the Act**) under which the hearing is

conducted by the Panel and final recommendations on the entire PAUP, including the RPS section, are to be delivered to the Council in a single report by July 2016. It proposes certain changes that Council considers are more closely aligned with traditional Resource Management Act processes, and which would require central government intervention.

2. EXECUTIVE SUMMARY

- 2.1 In advance of determining whether to issue 'indications' or 'interim recommendations' or 'final recommendations' on the RPS, the Panel needs to satisfy itself that its statutory powers under Part 4 of the **Act** enable it to do so.
- 2.2 For the reasons set out in section 5 below, Council submits that in the context of the statutory scheme of Part 4 of the Act there are legitimate arguments both in favour and opposing the proposition that the Panel's statutory powers enable it to issue staged final recommendations in advance of the July 2016 statutory deadline (including recommendations to Council on the RPS). On balance, Council considers that the statutory scheme of Part 4 of the Act enables the Panel to provide staged final recommendations, but does not require it to do so. Legal certainty on this point could be achieved by the Minister for the Environment promulgating a regulation to that effect (under section 5 of the Act), should the Minister wish to do so.
- 2.3 For the reasons set out in section 6 below, Council submits that in the context of the statutory scheme of Part 4 of the Act, the Panel's statutory powers enable it to issue high level 'indications', but does not require it to do so.
- 2.4 Council has approached the issues under consideration at the 27 January 2015 conference on the basis that the key objective is to be able to deliver the best possible first combined plan for Auckland within the statutory timeframe Parliament has determined (with recommendations to be provided by the Panel to the Council by July 2016).
- 2.5 Council submits that 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 timeframe if the Panel delivers recommendations on the RPS in early 2015 (whether interim as per the Russell McVeagh option or final as per the Brabant proposal). The reasons, set out in more detail in section 7 below, include:
 - a) The Panel does not yet have all relevant evidence available to it:
 - i. The Panel has not yet heard all economic evidence relating to the RPS provisions, as certain economic evidence is to be presented as part of Council's and submitter's cases in the upcoming Regional Plan hearing sessions. In the absence of that important evidence the Panel does not have all relevant

considerations available to it for the purpose of formulating recommendations.

- ii. Evidence in relation to the lower order provisions (Regional Plan and District Plan), yet to be heard, will be highly relevant to assessing the appropriateness of and any required fine tuning of the RPS provisions of the PAUP. In order to achieve vertical integration of the PAUP, it is necessary and desirable that that evidence be heard by the Panel before views on the RPS are crystallised.
 - b) In relation to final recommendations, there is a high degree of risk that the process would be derailed by appeals to the Environment Court or the High Court in relation to Council decisions on the Panel's recommendations on the RPS, leading to an extended process for establishing the first combined plan for Auckland (exactly the mischief the Unitary Plan provisions in the Act are designed to avoid).
 - c) In practical terms, the Panel's timetable does not appear to provide sufficient time to undertake the required section 32AA analysis and draft final recommendations on the RPS by early 2015. Therefore changes to the timetable would likely be required, with consequential risk to the Panel's delivery date.
- 2.6 Council's preferred option is for the Panel to deliver final recommendations on the RPS to Council in late 2015/early 2016 (after the conclusion of hearings on the Regional Plan and the District Plan provisions of the proposed PAUP). This would best enable the vertical integration of the operative Unitary Plan and minimise the risk of not being able to meet the statutory timeline due to legal challenges.
- 2.7 Council opposes the Russell McVeagh option, which proposes a process that would allow for the Panel to give an interim (rather than final) recommendation following the hearing of submissions on the RPS section of the PAUP, that the Council could provide comment on, which (following the making of a regulation under section 119 of the Act) could be deemed to be an operative RPS (**Russell McVeagh's Interim Recommendation**), and final recommendations on the RPS are then made by the Panel as part of a full recommendation report by July 2016. This approach is likely to make it impossible for the Panel to deliver the recommendations on the complete PAUP by July 2016 and is unlikely to achieve the "simplicity" benefits suggested. In addition, the suggestion that the Panel determines an operative RPS for an interim period is expressly contrary to the Parliamentary intention, expressed in Part 4 of the Act, that the Council is at all times the decision maker in relation to planning instruments for Auckland.
- 2.8 Council opposes the Brabant proposal that the Panel provides final recommendations on the RPS to Council in early 2015, with Council then making decisions on the RPS recommendations within the statutory timeframe. This option would be highly likely to lead

to a delayed PAUP process, due to likely appeals on the RPS, such that the statutory timeframe cannot be achieved.

- 2.9 Finally, a further legal issue has been raised by Russell McVeagh that, in the absence of the Russell McVeagh proposal being accepted, the evidence on the regional and district plan provisions of the PAUP would need to reference the currently operative Auckland Council Regional Policy Statement (**ACRPS**),¹ and how the provisions give effect to that document². In addition, the Brabant memorandum states "...the sections of the PAUP containing the proposed new regional and district plans must give effect to the current operative RPS unless it is replaced by a new operative document."³ This is not accepted. For the reasons set out in section 8 below, for the purposes of the PAUP the RPS will be the notified RPS section of the PAUP.

3. BACKGROUND

- 3.1 Hearings on the proposed RPS provisions are to conclude on 5 February 2015, with the final day of hearing on Topic 013 – RPS Urban Growth. As outlined above, it has been suggested that all evidence on the proposed regional and district plan provisions would need to reference the current operative ACRPS and how the ACRPS has been given effect to.
- 3.2 To overcome that perceived outcome, the Russell McVeagh letter to the Panel⁴ proposes Russell McVeagh's Interim Recommendation process, as set out in paragraph 2.7 above. The Council considers that this process would fundamentally change the scheme of the Act because it transforms a statutory body mandated to make recommendations into a decision maker. This is at odds with the principle of the legislation.
- 3.3 The Council notes that the Brabant memorandum did not support Russell McVeagh's Interim Recommendation approach. Mr Brabant has instead submitted that it is necessary to use sections 5 or 119 of the Act to amend sections 143⁵[sic] and 148 so that a final recommendation can be provided by the Panel in respect of the RPS provisions, so that the Council can then issue a decision on that recommendation.⁶ The Brabant memorandum acknowledges that there is potential for delays in proceeding further with the hearings before the Hearings Panel, depending on whether the recommendations are accepted in full or some are not, giving rise to potential appeals. However, Mr Brabant's memorandum concludes that "*using some form of interim RPS when hearing submissions*

¹ The ACRPS became operative on 31 August 1999.

² Paragraphs 6 and 7, letter to Phill Reid, dated 16 December 2014.

³ Paragraph 7, Brabant memorandum, dated 19 December 2014.

⁴ Letter to Phill Reid, dated 16 December 2014.

⁵ Section 144, Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA).

⁶ Paragraph 9, Brabant memorandum, dated 19 December 2014.

*on and determining the wording of the District and Regional sections of the PAUP cannot be an appropriate way forward*⁷.

- 3.4 The Council does not consider that there is a need for a regulation to be promulgated under section 119 (or section 5) of the Act in relation to this concern, for the reasons set out in paras 5.15-5.20 below.

4. THE OPTIONS AVAILABLE TO THE PANEL IN RELATION TO THE ISSUING OF INTERIM INDICATIONS, INTERIM RECOMMENDATIONS, OR STAGED FINAL RECOMMENDATIONS

- 4.1 The Council considers that there are potentially six options available to the Panel to consider in relation to the issuing of high level indications or staged interim or final recommendations. Each has its respective risks and benefits, which the Panel will need to weigh carefully:

- (a) **Option One: High level indications:** The Panel issues high level indications on the RPS section of the PAUP in early 2015. These would provide the Panel's current high level thinking on the RPS (rather than providing a track-changed version of the RPS section of the PAUP). These indications could be made available on the Panel website, with clear directions to the parties that they are not to comment on the high level indications.
- (b) **Option Two: Russell McVeagh's Interim Recommendation process:** This process would involve:
 - i. the Panel issuing draft wording for the RPS section of the PAUP in April 2015;
 - ii. the Council being invited to indicate its support or otherwise for the Panel's draft wording;
 - iii. having regard to the Council's response, the Panel issues a full marked up copy of the RPS (which assumes Council takes up the invitation);
 - iv. a regulation is promulgated under section 119 of the 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 in respect of the hearing process for the PAUP, until such time as a final decision is made by the Council on the PAUP under section 148 of the Act; and
 - v. 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 the RPS to ensure consistency with other parts of the PAUP⁸ (**Russell McVeagh's Interim Recommendation**).

⁷ Paragraph 10, Brabant memorandum, dated 19 December 2014.

⁸ Paragraph 3, Russell McVeagh letter to Phill Reid, dated 16 December 2014.

- vi. The Council notes that Russell McVeagh's approach does not specify a procedural step to protect any natural justice rights arising from any significant change from the Interim Recommendation to the Panel's Final Recommendation on the RPS.
- (c) **Option Three: RPS final recommendations early 2015:** The Panel provides the Council with recommendations on the RPS section of the PAUP in early 2015, which is proposed in the Brabant memorandum,⁹ as part of staged recommendations, and the Council makes a decision on those recommendations.
- (d) **Option Four: RPS final recommendations late 2015/early 2016:** The Panel provides the Council with final recommendations on the RPS at the end of 2015 or early 2016, following the hearings on the Regional Plan and District Plan sections of the PAUP and the Council makes a decision on those recommendations. The recommendations on the Regional Plan and District Plan sections, etc would follow in subsequent recommendation reports.
- (e) **Option Five: RPS, Regional Plan and District Plan final recommendations late 2015/early 2016:** The Panel provides the Council with final recommendations on the RPS, Regional Plan and District Plan (excluding zoning) sections of the PAUP at the end of 2015 or early 2016 and the Council makes a decision on those recommendations.
- (f) **Option Six: Final recommendations on the Plan in one report by July 2016:** The Panel provides no early indications or recommendations to the Council on the RPS section of the PAUP, and all recommendations on the PAUP are provided to the Council in one report in July 2016 (or a later date if an extension of time is sought and obtained) and the Council makes a decision on all recommendations.

4.2 Before the Panel considers the benefits and risks of the respective options, it will need to have concluded it has the requisite legal power to be able to implement the respective options.

5. DOES THE PANEL HAVE A LEGAL POWER ENABLING IT TO ISSUE STAGED FINAL RECOMMENDATIONS ON THE RPS SECTION OF THE PAUP

5.1 Council submits that in the context of the statutory scheme of Part 4 of the Act there are legitimate arguments both in favour and opposing the proposition that the Panel's statutory powers enable it to issue staged final recommendations in advance of the July 2016 statutory deadline (including recommendations to Council on the RPS).

⁹ The Brabant memorandum submits at paragraph 9 that it is necessary to use sections 5 or 119 of the LGATPA to amend sections 143[sic] and 148 of the LGATPA so that a recommendation can be made in respect of the RPS provisions and the Council can issue a decision on that recommendation.

- 5.2 This is an issue of statutory interpretation. Section 5(1) of the Interpretation Act 1999 provides “*The meaning of an enactment must be ascertained from its text and in the light of its purpose.*”
- 5.3 This requires proper attention to the context (including the purpose) of the statutory provision while respecting the language used in the legislation.
- 5.4 In assessing the intention underpinning Part 4 of the Act, it is helpful to reflect on what Parliament was setting out to achieve when it enacted this Part, providing for the unique process for the preparation of Auckland’s first combined plan. The Minister for the Environment noted at the second and third readings of the Local Government (Auckland Transitional Provisions) Amendment Bill (No 2):

“As I have mentioned, the other area of reform in the bill is a proposal to develop a one-off hearings process for Auckland’s first unitary plan. The streamlined process for developing and making operational the first plan is essential for developing a set of consistent planning policies and rules within a workable time frame. Long-term costs and uncertainty around the delivery of the plan will be lowered, while ensuring the delivery of a high-quality document that has comprehensive input from the public and key stakeholders.”¹⁰

“The legislation also contains provisions to develop a one-off hearings process for Auckland’s first unitary plan. This streamlined process is essential for developing and implementing a consistent planning framework for New Zealand’s largest city. Thanks to this process, it is estimated that the Auckland Unitary Plan will be in place within 3 years from notification, rather than the 10 years it would take without these improvements. Auckland’s economy is simply too important to wait 10 years for the plan to become operational. Ensuring that a high-quality plan is delivered swiftly will allow work on pressing Auckland issues, such as housing affordability, to take place sooner rather than later. These significant time savings will provide certainty and have real benefits for both Aucklanders and the country as a whole.”¹¹

- 5.5 The purpose includes enabling a streamlined process to arrive at a set of consistent planning policies and rules within a workable timeframe. There is clearly an intention to reduce uncertainty around the delivery of the plan, so that a high quality plan is swiftly delivered.

Arguments in favour of Panel’s powers limiting it to providing all recommendations in one report at the end of the hearing

- 5.6 There are a range of factors in favour of the proposition that the Panel is empowered to deliver one recommendations report only, on the plan in its entirety, at the conclusion of the hearing.
- 5.7 In relation to the hearing process, the Panel must hold “***a hearing into submissions on the proposed plan***” (section 128(1) (emphasis added)). This ‘Hearing’ (defined in the

¹⁰ Hansard, 5 June 2013. Volume:690; Page:10791.

¹¹ Hansard, 27 August 2013. Volume:693; Page:12851.

singular) is defined as “*the overall process undertaken by the Hearings Panel under this Part*” (section 116(1)). A hearing session is defined as “a particular session at which submissions are heard by the Hearings Panel as part of the Hearing.”

- 5.8 The proposed plan is defined as “***the proposed Auckland combined plan prepared by the Auckland Council in accordance with sections 121 to 126***” (emphasis added).
- 5.9 Therefore there is one hearing. That hearing is about one plan. There is not a series of hearings into parts of the proposed plan.
- 5.10 In this context, section 144 mandates that “*the Hearings Panel must make recommendations on the proposed plan after it has finished hearing submissions, including any recommended changes to **the proposed plan***” and the Panel “must provide the recommendations in a report” (emphasis added). This suggests there is one final report at the end of the Hearing.
- 5.11 Supporting that view is the fact that that when making its recommendations, the Panel “*must include in the recommendations a further evaluation of **the proposed plan undertaken in accordance with section 32AA of the RMA***” (emphasis added) (section 145(1)(d)). It appears that the section 32AA report is to be in relation to the combined plan, not parts of the Plan.
- 5.12 Section 146 provides that the Hearings Panel must provide **its report** under section 144(5) to the Council no later than 50 working days prior to the expiry of 3 years from the date of notification unless an extension is granted in accordance with section 147. Section 150 provides at the same time as the Auckland Council publicly notifies its decisions under section 148(4)(a), the Council must make **the report** of the Hearings Panel required under section 144(5) available.
- 5.13 The July 2016 deadline set by section 146 for the Panel to provide its recommendations to the Council does not allow time for the resolution of any appeals on the RPS, prior to the Panel holding hearings and providing recommendations on the Regional and District Plan components of the PAUP.
- 5.14 It would be consistent with the intention of achieving a streamlined process to arrive at a set of consistent planning policies and rules within a workable timeframe if one report was delivered after the hearing was concluded.

Arguments in favour of Panel's powers enabling it to provide staged final recommendations

5.15 Alternatively, Part 4 of the Act could be read as enabling the Panel to provide staged final recommendations to the Council, including final recommendations on the RPS after the conclusion of the hearing sessions concerning the RPS. Relevant factors supporting this approach include:

- (a) While the language within the Act refers to "a report", "the report" and "its report"¹² suggesting one final report, the Interpretation Act 1999 provides that "*words in the singular include the plural and words in the plural include the singular*".¹³
- (b) While the Act provisions do not expressly provide for staged or interim/draft recommendations, they do not expressly prohibit that approach.
- (c) Section 144 is entitled "*Hearings Panel must make recommendations to Council on proposed plan*". The thrust of this section is that the Panel itself is not the decision maker, and it sets up the 'deliverables' required of the Panel. The section expressly empowers the Panel to make recommendations beyond the scope of submissions and prescribes the form and content of a recommendation report to be provided to the Council.
- (d) The only provision addressing the timing of the deliverables identified in section 144 is section 146, which gives only a "deadline" by which the recommendations report must be provided. The Panel could have the option of providing all of its recommendations in advance of the deadline; provided the deadline is met in respect of all recommendations, it should make no difference whether some are provided the week before and others are provided six months before the deadline.¹⁴
- (e) Except as expressly provided by Part 4, the Panel has the power to regulate its own proceedings in the manner it thinks fit under the Act.¹⁵

5.16 The power given by section 164(d) of the Act to the Panel to regulate its own proceedings is almost identical to the power conferred on the Environment Court by section 269(1) of the RMA, although the RMA provision contains further subsections that elaborate on the principal power.¹⁶ Some of these additional matters in section 269 of the RMA are also addressed in the Hearings Panel provisions. Section 136 of the Act sets out a series of specific procedural requirements for hearing sessions (eg the quorum of the panel, discretion to allow cross examination) and then provides:

(4) Otherwise, the Hearings Panel must establish a procedure for hearing sessions that –

¹² Sections 144(5), 144(6), 144(7), 146, 148(4) and 150, LGATPA.

¹³ Section 33, Interpretation Act 1999.

¹⁴ Section 146 of the LGATPA provides that the Hearings Panel must provide its report under section 144(5) to the Auckland Council no later than the date that is 50 working days before the expiry of 3 years from the date on which the Council has notified the proposed plan in accordance with section 123, unless section 147 applies.

¹⁵ Section 164(d), LGATPA.

¹⁶ Sections 269(1A), (2), (3) and (4), RMA.

- (a) Is appropriate and fair in the circumstances ...; and
- (b) Avoids unnecessary formality; and
- (c) Recognises tikanga Maori where appropriate.

5.17 Case law on section 269(1) of the RMA confirms that a power to regulate procedure confers a wide discretion:

*Section 269(1) confers the necessary power for the Court to regulate its own proceedings in such manner as it thinks fit, except to the extent that the Act expressly makes provision to the contrary. This power has been deliberately framed in wide terms to reflect the particular role of the Environment Court and the need for flexibility. It would be contrary to the statutory purpose for the Court to read the provision down.*¹⁷

5.18 Therefore the power given to the Panel to regulate its own procedure could arguably be used to develop a recommendation process that includes the staging of final recommendation reports, provided that any such procedure complies with the requirements of both section 136(4) of the Act¹⁸ and section 269 of the RMA.

5.19 If the Panel were to issue a final recommendation on the RPS (as the first recommendations of staged final recommendations) then the Council considers that the final recommendations would need to comply with sections 145 and 146 of the Act. Upon receipt of these recommendations, the Council considers that it would be required to comply with sections 148(4)(a) and 150 of the Act regarding the making of, and public notification of, the decisions on the recommendations and making the recommendations available within 20 working days. As the Brabant memorandum acknowledged, appeals could be lodged (to the extent allowed by the Act) which would likely result in delays to the PAUP hearing process.

5.20 Council considers that it is open to the Panel to make staged final recommendations on the RPS, without the need to amend sections 144 and 148 of the Act.

5.21 The Brabant memorandum suggested that sections 5 or 119 of the Act would need to be used to amend sections 143[sic] and 148 of the Act to enable the Panel to provide a recommendation report on the RPS and for the Council to make a decision. Russell McVeagh also suggested using section 119 to promulgate a recommendation for Russell

¹⁷ *Waikato Environmental Protection Society Inc v Waikato Regional Council* (HC) (2009) 15 ELRNZ 229 at 241. The Waikato EPS case involved an appeal against an Environment Court decision on a number of grounds, including misconstruction and misapplication of section 269, in circumstances where the Court had issued an interim decision in order to obtain further information on odour effects and subsequently, at the request of the consent applicant, delayed issuing a final decision for several years to enable the applicant to relocate operations to another site. In considering whether or not to delay the issue of a final decision using its section 269(1) discretion, the Environment Court considered the purpose of the RMA, and whether the promotion of sustainable management would be best achieved by doing so, and gave substantial weight to its findings about the effects on affected persons of not exercising its discretion. Against those factors it also took into account the obligation under the RMA to avoid remedy or mitigate adverse effects on the environment. The High Court accepted the respondents' arguments that none of the RMA sections governing Environment Court proceedings (particularly sections 272 and 290) expressly provided that it could not issue interim decisions or delay issuing final decisions, and under those circumstances the Environment Court had correctly interpreted and utilised section 269(1) (at 241).

¹⁸ Section 136(4), LGATPA provides: Otherwise, the Hearings Panel must establish a procedure for hearing sessions that: (a) is appropriate and fair in the circumstances (including in respect of the granting to a person of any waiver of the requirements of the Hearings Panel); and (b) avoids unnecessary formality; and (c) recognises tikanga Maori where appropriate.

McVeagh's Interim Recommendation process. In any event, the making of regulations is a matter for the Minister for the Environment, and there would likely be issues of timing in any event.

5.22 However, if we are wrong and amendments are needed to sections 144 or 148 (or any other sections) of the Act, the Council considers that it would be appropriate to use section 5 of the Act (rather than section 119 as referred to by Russell McVeagh). Under section 5(4) of the Act the Governor-General may, by Order in Council made on the recommendation of the Minister for the Environment, make regulations to:

- (a) prescribe matters in respect of the preparation of the first Auckland combined plan that may be in addition to or in place of the provisions of Part 4:
- (b) provide that, subject to any conditions specified in the regulations, during a specified period or in specified circumstances, specified provisions of Part 4, or of the RMA, do not apply, or apply with modifications, to the preparation of the first Auckland combined plan:
- (c) make provision for a situation in respect of the preparation of the first Auckland combined plan for which no or insufficient provision is made by Part 4 (section 5(4) of the Act).

5.23 In recommending the making of recommendations under section 5(4) of the Act, the Minister must be satisfied that the regulations

- (a) are necessary or desirable for the efficient and orderly development of the first Auckland combined plan; and
- (b) address unforeseen situations or unforeseen issues arising in the preparation of that plan; and
- (c) are consistent with the purposes of this Act (section 5(5) of the Act).

5.24 In addition, section 5(6) of the Act provides that the Minister for the Environment must not recommend the making of regulations under section 5(4) of the Act unless he or she has first consulted the Auckland Council and the Hearings Panel on the proposed regulations.

5.25 These important safeguards apply because the regulation making power enables primary legislation to be amended by secondary legislation (regulations).

5.26 In conclusion in relation to this issue, Council submits that there are reasonable arguments both for and against the proposition that the Panel has the power to issue staged final recommendations in advance of the July 2016 statutory deadline. On balance, Council favours the view that the Panel's power to regulate its own proceedings (and procedure) enables it to phase its final recommendations, so that it is not limited to the option of delivering a single report containing all recommendations at the conclusion of the hearing.

6. PANEL HAS A LEGAL POWER ENABLING IT TO ISSUE HIGH LEVEL INDICATIONS ON THE RPS SECTION OF THE PAUP

- 6.1 Council submits that in the context of the statutory scheme of Part 4 of the Act, the Panel's statutory powers enable it to be able to issue high level 'indications' (but does not require it to do so).
- 6.2 The legal power to do so would again be based on the Panel's power to regulate its own proceedings in the manner it thinks fit under the Act.¹⁹ In practical terms, the Council considers that the Panel could issue high level indications on the RPS section of the PAUP in early 2015, once it has finished hearing submissions on the PAUP.
- 6.3 The Council considers that the issuing of high level indications would be similar to the approach taken by the General Hearings Panel in relation to the Horizons MW Plan (2010) (**One Plan**), where provisional determinations were issued on the Regional Policy Statement and Regional Plan provisions (including track-changed provisions), and the General Hearings Panel sought limited comment from specific parties. The first paragraph of the provisional determination, dated 20 November 2009, stated:

The Resource Management Act (RMA) provides for composite planning instruments. A composite instrument presents special challenges for the Hearing Panels, officers, and submitters. In particular, it is important to achieve coherence and consistency throughout the entire document. To ensure that other Hearing Panels, officers and submitters understand the relevant Hearing Panel's thinking on each chapter, it has been decided to use the technique of issuing provisional determinations.

- 6.4 Paragraph 4 then states:

This provisional determination is not a decision within the meaning of the RMA and, in particular, is not a decision under clause 10 of Schedule 1 to the RMA. Except where input has been expressly sought herein, the provisional determination is not intended to invite further response from submitters or encourage new debate.

- 6.5 In the case of the One Plan there was no express provision in the RMA for the General Hearings Panel to issue provisional determinations. However, there was no express prohibition on the General Hearings Panel making its provisional determinations on the One Plan either. The One Plan General Hearings Panel regulated its own proceedings as it saw fit.
- 6.6 Under the various appeals lodged on the One Plan decisions, it appears that the General Hearings Panel's approach of issuing provisional determinations was not challenged. This means that the point has not been determined.
- 6.7 The Council does not consider that the high level indications should contain track-changed

¹⁹ Section 164(d), LGATPA.

provisions on the RPS section of the PAUP. While this was the approach taken by the General Hearings Panel in relation to the One Plan, they were the decision maker in that case. That scenario is materially distinct from the current circumstance where it is the role of the Hearings Panel to provide recommendations to the Council, with Council then making decisions on those recommendations.

- 6.8 The Council considers that the provision of track-changed provisions on the RPS section of the PAUP would have the appearance of Panel final recommendations, which the Council would then need to make a decision on, given the wording in section 148 of the Act. It would not, in the Council's view, be open to the Council to issue a provisional determination on the Panel's track-changed version of the RPS.

7. THE RISKS AND BENEFITS OF THE OPTIONS

- 7.1 The risks and benefits of the options identified in section four above are noted below.

Option One: High level indications

- 7.2 Under this option the Panel would issue high level indications on the RPS section of the PAUP in early 2015. These would provide the Panel's current high level thinking on aspects of the RPS, such as the Growth Strategy (rather than providing a track-changed version of the RPS section of the PAUP). These indications could be made available on the Panel website, with clear directions to all parties that they are not to comment on the high level indications.

- 7.3 The benefits of this option include:

- (a) Provides some level of guidance on the Panel's thinking on key aspects of the RPS.
- (b) Participants could base/focus their evidence for the lower order provisions on the Panel's high level indications.
- (c) Issuing high level indications would be consistent with the legislative intention to reduce/avoid delays in the PAUP process.
- (d) The Panel would have the opportunity to amend their high level indications (if required) based on the evidence that it hears in relation to the regional and/or district plan provisions at later hearings, but would need to ensure the process did not trigger significant natural justice considerations that may cause delay at a later point.
- (e) Delaying recommendations would likely result in better vertical integration of the Unitary Plan.

- (f) Receiving any high level indications from the Panel as to their thinking at the RPS level could be more helpful to the parties than no indication at all.

7.4 Risks arising from this option include:

- (a) Evidence produced at hearings on lower order provisions may need to cover a range of possibilities, which could result in more detailed evidence being required and, potentially, longer hearings.
- (b) Indications would be given after hearing only part of a parties' case. For example, the economic/cost benefit and technical evidence is to be provided at the Regional Plan hearings in relation to the Air and Coastal topics (among others). The Panel may be in a better position to provide indications once it has heard sufficient evidence at the next level.
- (c) High level indications may be of limited assistance due to lack of certainty and lack of clarity of legal status.
- (d) There may be a question of whether the high level indications are de facto 'final recommendations' clothed as 'indications', potentially giving rise to judicial review challenges.
- (e) The practical effect of the high level indications could be to set a course for the hearing of submissions on the lower order provisions (with some regarding the high level indications as pre-judging certain provisions). Those aggrieved by or concerned about the high level indications may well decide that an early challenge is desirable and institute judicial review proceedings.
- (f) The Panel may seek to amend its high level indications. If the high level indications were at a detailed level, further hearings could potentially be needed so as to hear from submitters who had relied on the earlier indications in their evidence. The Panel would need to consider whether submitters would have a legitimate expectation that they should have an opportunity to comment on high level indications prior to their being finalised (in much the same way that submitters are able to comment on draft Board of Inquiry decisions under the RMA), or on any changes the Panel might make to the high level indications. This could have timeline implications.

Option Two: Russell McVeagh's Interim Recommendation process

7.5 Under this option:

- (a) The Panel issues draft wording for the RPS section of the PAUP in April 2015;
- (b) The Council is invited to indicate its support or otherwise for the Panel's draft wording;
- (c) Having regard to the Council's response, the Panel issues a full marked up copy of the RPS (Interim Recommendation);

- (d) A regulation is promulgated under section 119 of the Local Government (Auckland Transitional Provisions) Act 2010 deeming the Interim Recommendation to be an operative RPS for the purposes of sections 67(3)(c) and 75(3)(c) of the RMA in respect of the hearing process for the PAUP, until such time as a final decision is made by the Council on the PAUP under section 148 of the LGATPA; and
- (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 the RPS to ensure consistency with other parts of the PAUP.²⁰

7.6 The benefit of this option is:

- (a) Provides a degree of clarity for the parties going forward, although this needs to be weighed against the potential for the Panel to have to make changes to the RPS in its final recommendation report.

7.7 Risks arising from this option include:

- (a) The approach is inconsistent with the Act/fundamentally changes the scheme of the Act in that it requires the Panel to make a decision (albeit interim), whereas the scheme of the Act reserves that role for the Council.
- (b) This option would result in an 'operative' RPS and evidence would need to be prepared on the lower order provisions to give effect to that 'operative' RPS. Issues will then arise if the Panel seeks to make changes to the RPS in its recommendations. Overall, the option would not deliver certainty for any party until after the final recommendations are provided by the Panel.
- (c) There is no certainty that any regulation would be promulgated and the timing of a regulation is uncertain.
- (d) A risk of judicial review arises if the Panel changes its approach to the RPS in its final recommendation report.
- (e) The approach suggests that the Panel should undertake all deliberations and prepare a track-changed version of the RPS section of the PAUP in April 2015. This would likely result in the hearings scheduled for February 2015, and potentially March and April, being pushed out.
- (f) This option gives rise to issues with sections 67(3)(c) and 75(3)(c) of the RMA for any private plan changes to legacy plans.

Option Three: RPS final recommendations early 2015

7.8 Under this option, the Panel provides the Council with recommendations on the RPS section of the PAUP in early 2015 (which is proposed in the Richard Brabant

²⁰ Paragraph 3, Russell McVeagh letter to Phill Reid, dated 16 December 2014.

memorandum²¹) as part of staged recommendations, and the Council makes a decision on those recommendations.

7.9 The benefits of this option include:

- (a) Provides guidance that would set the course for hearings that follow on the lower order provisions.
- (b) Evidence produced at hearings on the lower order provisions could be based/focused on these recommendations.

7.10 Risks arising from this option include:

- (a) The Panel would be making final recommendations on the RPS in advance of having heard all relevant evidence (including the evidence in relation to the regional and district plan provisions and relevant economic evidence).
- (b) The Panel would not have the opportunity to amend the RPS based on the evidence it hears in relation to lower order provisions, increasing the risk that the plan lacks the right level of vertical integration.
- (c) It is not clear that the Panel's current schedule provides sufficient time for the Panel to complete formal recommendations, including satisfying all the requirements of section 145 of the Act, which includes the requirement to prepare a further evaluation of the Plan undertaken in accordance with section 32AA of the RMA. If not, taking time to finalise written recommendations, and prepare a section 32AA evaluation of the Plan, will likely require delays to the hearing schedule. Further delays may be required to accommodate the statutory time for the Council to receive the Panel's recommendations and make decisions and/or wait out the appeal period. This will likely mean that the July 2016 deadline in section 146 of the Act cannot be met by the Panel.
- (d) This option creates a risk of appeals or judicial review proceedings being lodged in the Environment Court or High Court following the Council's decisions on the Panel's recommendations on the RPS. This would likely lead to delays in the Panel's hearings processes and create resourcing issues for Council and other parties.

Option Four: RPS final recommendations late 2015/early 2016

7.11 Under this option, the Panel provides the Council with final recommendations on the RPS at the end of 2015 or early 2016, following the hearings on the Regional Plan and District Plan sections of the PAUP and the Council makes a decision on those recommendations. The recommendations on the Regional Plan and District Plan sections, etc would follow in

²¹ The Brabant memorandum submits at paragraph 9 that it is necessary to use s5 or 119 of the LGATPA to amend sections 143 and 148 of the LGATPA so that a recommendation can be made in respect of the RPS provisions and the Council can issue a decision on that recommendation.

subsequent recommendation reports.

7.12 The benefits of this option include:

- (a) The Panel would be making final recommendations on the RPS after having had the opportunity to consider all relevant evidence (including the evidence in relation to the regional and district plan provisions and relevant economic evidence), which would likely result in better vertical integration of the Unitary Plan.
- (b) There would be a reduced risk of delays to the process, this being generally consistent with the purpose and intent of the Act to reduce/avoid delays in the process for preparing the first Unitary Plan for Auckland.
- (c) It would provide the Council with recommendations in stages, allowing sufficient time for the Council to make decisions during the final phase.
- (d) It would avoid the risk of the Council (and submitters) dealing with concurrent appeals or judicial review challenges, as well as Panel hearings on lower order provisions during 2015.

7.13 Risks arising from this option include:

- (a) Evidence would need to be prepared for many of the lower order provisions to cover a range of possibilities, which could result in more detailed evidence and/or longer hearings for many of the lower order provisions.
- (b) It may require a pause in the hearings timetable so that the Council can receive the Panel's recommendations and make decisions on them and/or wait out the appeal period.
- (c) There is the potential for appeals or judicial review challenges in the Environment Court and High Court before the Panel has completed hearings on lower order provisions, zones, precincts and/or designations.

Option Five: RPS, Regional Plan and District Plan final recommendations late 2015/early 2016

7.14 Under this option, the Panel provides the Council with final recommendations on the RPS, Regional Plan and District Plan (excluding zoning) sections of the PAUP at the end of 2015 or early 2016 and the Council makes a decision on those recommendations.

7.15 The benefits of this option include:

- (a) The Panel would be making final recommendations on the RPS, Regional Plan and District Plan (excluding zoning) sections of the PAUP after having had the opportunity to consider all relevant evidence (including the evidence in relation

to the regional and district plan provisions and relevant economic evidence), which would likely result in better vertical integration of the Unitary Plan.

- (b) It provides the Council with the recommendations in stages to facilitate staged decision-making during the later phase of the Panel's process.
- (c) There would be a reduced risk of delays to the process, this being generally consistent with the purpose and intent of the Act to reduce/avoid delays in the process for preparing the first Unitary Plan for Auckland.
- (d) It would avoid the risk of the Council (and submitters) dealing with concurrent appeals or judicial review challenges, as well as Panel hearings on lower order provisions during 2015.

7.16 Risks arising from this option include:

- (a) Evidence would need to be prepared for many of the lower order provisions to cover a range of possibilities, which could result in more detailed evidence and/or longer hearings for many of the lower order provisions.
- (b) It may require a pause in the hearings timetable so that the Council can receive the Panel's recommendations and make decisions on them and/or wait out the appeal period.
- (c) There is the potential for appeals or judicial review challenges in the Environment Court and High Court before the Panel has completed hearings on zones, precincts and/or designations.

Option Six: Final recommendations on the Plan in one report by July 2016

7.17 Under this option, the Panel provides no early indications or recommendations to the Council on the RPS section of the PAUP, and all recommendations on the PAUP are provided to the Council in one report in July 2016 (or a later date if an extension of time is sought and obtained) and the Council makes a decision on all recommendations.

7.18 The benefits of this option include:

- (a) It best aligns with the legislation, on its face.
- (b) Delaying recommendations until after the Panel has heard all relevant evidence (including economic evidence to be presented to lower level hearings) would likely result in better vertical integration of the Unitary Plan.
- (c) It avoids the risk of the Council and submitters dealing with concurrent appeals or judicial review challenges, as well as Panel hearings on lower order PAUP provisions.

7.19 Risks arising from this option include:

- (a) It could be more difficult to prepare evidence for the later hearings on the lower order provisions in the absence of any certainty regarding the content of the RPS that needs to be given effect to.
- (b) Evidence may need to cover a range of possibilities, and so will be more detailed which could result in longer hearings.
- (c) Issues of timing arise for the Council and submitters. If one recommendations report is provided in July 2016, the Council must consider all recommendations and make decisions within 20 working days²² (extendable by a further 20 working days).²³ Submitters will then have only 20 working days to consider all the Council's decisions and the recommendations report on the entire PAUP before deciding whether to lodge any appeals.

Summary relating to Council's preferred option

7.20 The key benefits of the Council's preference of the Panel issuing final recommendations on the RPS in late 2015 or early 2016 after the hearing sessions on the Regional Plan and the District Plan are concluded includes:

- (a) Reduces the risk that the panel's hearing process relating to the regional plan and district plan will be derailed by appeals on the RPS (if recommendations on the RPS were made by the Panel in early 2015) and that as a consequence the Panel cannot provide recommendations on the combined plan within the statutory timeframe.
- (b) Increases the likelihood of achieving the desired level of vertical integration in the plan as a whole (including enabling all relevant evidence to be before the Panel prior to it forming concluded views on the RPS).
- (c) The Panel would have the flexibility to alter its view of the RPS provisions at a later time, if necessary, after hearing the evidence on the Regional and District Plan provisions.

8. WILL THE REGIONAL AND DISTRICT PLAN PROVISIONS OF THE PAUP BE REQUIRED TO GIVE EFFECT TO THE OPERATIVE ACRPS

8.1 Russell McVeagh's letter²⁴ and the Brabant memorandum²⁵ state that the regional plan and the district plan provisions of the PAUP will be required to give effect to the ACRPS (rather than the RPS provisions in the PAUP), given the wording of sections 67(3)(c) and 75(3)(c) of the RMA, and the definition of regional policy statement in section 43AA

²² Section 148(4), LGATPA.

²³ Section 149, LGATPA.

²⁴ Paragraph 6, Russell McVeagh letter, dated 16 December 2014.

²⁵ Paragraphs 6 and 7, Richard Brabant Memorandum, 19 December 2014.

definition of the RMA.²⁶

8.2 Section 43AA of the RMA provides:

In this Act, unless the context requires another meaning, - **regional policy statement** (a) means an operative regional policy statement approved by a regional council under Schedule 1; and (b) includes all operative changes to the policy statement (whether arising from a review or otherwise).

8.3 The Council does not accept that the regional plan and the district plan provisions of the PAUP will be required to give effect to the ACRPS (rather than the RPS section of the PAUP) for the following reasons:

- (a) Bespoke provisions provide for promulgation of the first combined plan for Auckland. These provisions are set out in Part 4 of the Act. A unique feature of this combined plan is that it meets "*the requirements of a regional policy statement, a regional plan, including a regional coastal plan and a district plan.*"²⁷
- (b) The context of the PAUP requires a different meaning to be given to 'regional policy statement' and 'regional plan' for the purposes of the PAUP hearing process, as is provided for in the first line of the section 43AA Interpretation section of the RMA.
- (c) As acknowledged in the Russell McVeagh letter²⁸, the PAUP's RPS section could be made operative just prior to making the regional and district plan sections operative, so that those provisions can then give effect to the operative RPS as required by sections 67(3)(c) and 75(3)(c) of the RMA.
- (d) The General Hearings Panel for the One Plan (which was a composite plan comprising RPS, regional plan and regional coastal plan components) took the approach that the provisions of the Proposed One Plan (**POP**) that will form the Regional Plan and the Regional Coastal Plan must give effect to the RPS chapters of the POP. This approach was not challenged.

8.4 Section 145(1)(f) of the Act requires the Panel to "ensure that, were the Auckland Council *to accept the recommendations, the following would be complied with:*" There follows in (i) a list of RMA sections, including sections 66, 67, 74 and 75.

8.5 Section 66(2)(a) requires a regional council, when preparing or changing a regional plan, to have regard to "*any proposed regional policy statement in respect of the region ...*". Section 67 deals with contents of regional plans and directs (at section 67(3)(c)) that a regional plan "*must give effect to – any regional policy statement*".

8.6 Section 74(2)(a)(i) and (ii) require a territorial authority, when preparing or changing a

²⁶ Section 43AA of the RMA provides: "In this Act, unless the context requires another meaning, - **regional policy statement** (a) means an operative regional policy statement approved by a regional council under Schedule 1; and (b) includes all operative changes to the policy statement (whether arising from a review or otherwise)".

²⁷ Section 122(1), LGATPA.

²⁸ Paragraph 7, Russell McVeagh letter, dated 16 December 2014.

district plan, to have regard to "any proposed regional policy statement; or proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4". Section 75 deals with contents of district plans and directs (at section 75(3)(c)) that a district plan "must give effect to – any regional policy statement" and (at section 75(4)(b)) that a district plan "must not be inconsistent with a regional plan for any matter specified in section 30(1)". Both "regional plan" and "regional policy statement" are defined in RMA section 43AA as operative documents, **unless the context requires another meaning.**

- 8.7 Council submits that the context of the PAUP requires a different meaning for a regional policy statement and regional plan. It cannot have been intended that the Panel formulate recommendations on submissions on the PAUP that ensure that Council decisions will include regional and district plan provisions that give effect to the currently operative ACRPS when the PAUP itself includes an RPS for Auckland²⁹ which sets a new strategic direction for Auckland.
- 8.8 This requirement can only make sense if, in accordance with the opening words of section 43AA of the RMA, the terms "regional plan" and "regional policy statement" in sections 67(3) and 75(3) and (4) of the RMA are given different meanings in the context of section 145(1)(f) of the Act, which encompass individual components of a proposed combined plan prepared under the latter Act. The Council considers that this interpretation/approach is supported by the wording in section 124(5)(a)(ii) of the Act, which gives the Panel the ability to direct the Auckland Council to vary the proposed plan if the Panel is satisfied that the variation is required to give effect, in the provisions of the proposed plan comprising the regional plan or district plan, to the provisions of the **proposed plan comprising the regional policy statement.**
- 8.9 The Council notes that the General Hearing Panel's decision report on the One Plan acknowledged the issue of a combined plan that included an RPS section in the following terms:

Under s67(3)(c) of the RMA, a regional plan must give effect to any regional policy statement. While that provision is referring to an operative regional policy statement and the POP process is dealing with proposed documents, the intent of the provision is apparent. In addition, once the POP is operative, the provisions will be applicable. Hearing Panels have approached the decision-making task on the basis that the provisions of the POP that will form the Regional Plan and the Regional Coastal Plan must give effect to the RPS chapters of the POP. (Vol 1, Part 1, section 1.6 Legal Matters)

- 8.10 For the above reasons, Council submits that as a matter of law, the proposed regional and

²⁹ Section 122(1)(a), LGATPA.

district plan provisions of the PAUP can, and should, give effect to the proposed RPS provisions of the PAUP, and that the ACRPS can be disregarded for the purposes of attending mediation, and preparing submissions and evidence throughout the hearing process.

9. CONCLUSION

- 9.1 In determining whether it is appropriate and/or desirable to issue indications, preliminary recommendations or final recommendations on the RPS, the Panel needs to assess the scope of its legal powers and be satisfied it can take such steps. It must also be satisfied that the course of action it chooses is consistent with achieving the purpose of the statutory scheme set out in Part 4 of the Act (delivery of a set of consistent planning policies and rules within a workable timeframe, reducing uncertainty around delivery of the plan, swiftly delivering a high quality plan).
- 9.2 Risks identified in section 7 of this memorandum properly outline the significant risk to the delivery of a high quality plan within the statutory timeframe arising in relation to relevant options. The Panel should take a cautious approach to ensure it can fulfil its statutory functions within the timeframes set out in the Act.

Dated 22nd January 2015

A handwritten signature in blue ink, consisting of several stylized, overlapping loops and lines, positioned above a horizontal line.

K Anderson / J Hassall / C Faesenkloet

On behalf of Auckland Council