

**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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**Joint Memorandum on behalf of Housing New Zealand Corporation, the Minister of Education, the Minister for Courts, the Minister of Police and the New Zealand Defence Force concerning the issue by the Hearing Panel of a recommendation on the RPS section of the Proposed Auckland Unitary Plan**

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**22 January 2014**

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## MAY IT PLEASE THE PANEL

### *Introduction*

1. This memorandum is filed on behalf of:
  - (a) Housing New Zealand Corporation (submitter 839);
  - (b) The Minister of Education (submitter 884);
  - (c) The Minister for Courts (submitter 4279);
  - (d) The Minister of Police (submitter 4274);
  - (e) New Zealand Defence Force (submitter 838)(collectively, "**the Submitters**").
  
2. The Submitters have discussed this memorandum with the following parties who have asked that we record their agreement with its content:
  - (a) Heritage New Zealand (submitter 371);
  - (b) The Minister of Conservation (submitter 6360);
  - (c) The New Zealand Transport Agency (submitter 1725);
  - (d) The Ministry for Primary Industries (submitter 6203);
  - (e) The Ministry of Business Innovation and Employment (submitter 6319).
  
3. This memorandum responds to the memoranda lodged by Russell McVeagh (dated 16 December 2014) and Richard Brabant (dated 19 December 2014) concerning how the Regional Policy Statement ("**RPS**") provisions of the Proposed Auckland Unitary Plan ("**PAUP**") should be managed.
  
4. The Submitters have endeavoured to reach a consensus on the issues raised by the memoranda and in the interests of efficiency have elected to file a single memorandum recording their position. The Submitters have had the opportunity to discuss the issues with

officers of the Ministry for the Environment. In summary, the Submitters support the request that the Panel issue an interim or indicative recommendation regarding the RPS provisions but do not consider that any regulatory change is required in order for that to occur.

*Issues raised by Russell McVeagh and Mr Brabant*

5. The memorandum filed by Russell McVeagh addresses two related but separate issues:

- (a) A request that the Panel release interim conclusions with respect to the RPS provisions in the PAUP so that submitters will be able to provide targeted and relevant evidence and submissions at the hearings on lower order provisions.

The Submitters support the request for an interim or indicative recommendation to be issued by the Panel and consider that guidance from the Panel regarding the form and content of the RPS will enable the Regional and District Plan hearing to be progressed efficiently and would avoid the need for lengthy statements of evidence addressing the various approaches that might be taken in RPS provisions.

- (b) A suggestion that regulations be promulgated to deem the interim recommendation an operative regional policy statement for the purposes of sections 67(3)(c) and 75(3)(c) of the Resource Management Act ("RMA").

It is understood that this request stems from a concern that the Panel will be required by law, when making its recommendation on the lower order provisions in the PAUP, to give effect to the Operative Auckland Regional Policy Statement and will only be able to have regard to the RPS provisions in the PAUP. The Submitters do not consider it necessary to develop such regulations and consider that the existing legislative framework will enable

the Panel to give effect to the proposed RPS provisions when assessing the lower order provisions in the PAUP.

6. Mr Brabant's memorandum asks that a final recommendation be issued now on the RPS provisions and that Council then issue a decision on those matters so that the RPS can be resolved before parties turn to the lower order matters. Mr Brabant's memorandum seeks further changes to the legislation to enable the RPS issues to be resolved separately from and prior to resolution of the balance of the PAUP. The Submitters acknowledge the benefits that would flow from finalising the RPS before proceeding to the lower order provisions but understand that the legislation promotes consideration of a single planning instrument. That approach gives the Panel flexibility to deal with PAUP provisions collectively and to review RPS provisions in the context of evidence presented on lower order matters. Accordingly, the Submitters do not consider that the regulatory changes sought by Mr Brabant are necessary.

#### *Legal Issues*

7. Russell McVeagh and Mr Brabant have referred to sections 67 and 75 of the RMA. The following is noted in that regard:
  - (a) The sections refer respectively to a "*regional plan*" and a "*district plan*". They do not refer to "*proposed*" plans. Such regional and district plans are required under the sections to give effect to the regional policy statement.
  - (b) "*Regional plan*", "*district plan*" and "*regional policy statement*" are defined in section 43AA of RMA and in each case the definitions refer exclusively to "*operative*" documents.
  - (c) Accordingly, sections 67 and 75 of RMA govern the contents of operative regional and district plans. These are not sections which need to be complied with whilst a proposed planning instrument is being considered in terms of submissions but they will come into force once the planning instrument is made operative. In practice, of course, regard is rightly had through the submission (and

appeal) process to the regional policy statement provisions that will need to be given effect to (ie: will be operative) once the instrument itself becomes operative.

- (d) In this case, the RPS provisions in the PAUP will be made operative at the same time as the regional and district plan provisions in the PAUP are made operative. At that stage the currently operative Auckland Regional Policy Statement will lapse and have no effect. Therefore, it will be the newly operative version of the PAUP RPS provisions that the lower order provisions will need to give effect to (and not the currently operative Auckland Regional Policy Statement).
8. Sections 66 and 74 of RMA govern the matters that need to be addressed by regional councils and territorial authorities in preparing and changing their regional and district plans. In that regard:
- (a) These sections also refer to a "*regional plan*" and a "*district plan*". They do not refer to "*proposed*" plans.
  - (b) Section 66(2)(a) provides that, "*in addition to the requirements of section 67(3) and (4), when preparing or changing any regional plan, the regional council shall have regard to any proposed regional policy statement with respect to the region*".
  - (c) Section 74(2)(a) provides that, "*in addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to any proposed regional policy statement*".
  - (d) The Panel is addressing the preparation of the PAUP including the district and regional plan components of that document. These sections therefore have direct relevance to the process currently being undertaken by the Panel. They require regard to be had to the proposed RPS provisions in the PAUP when developing the lower order provisions. [For the reasons noted above, once the PAUP

has been made operative, those lower order provisions will need to give effect to the then operative RPS provisions.]

9. That approach is consistent with the provisions in Part 4 of the Local Government (Auckland Transitional Provisions) Act (“**LGATPA**”) which governs the Council’s PAUP process:
- (a) Section 115(1)(a) of the LGATPA summarises the process in Part 4. It introduces a procedure for a single “*combined*” plan for Auckland which “*meets the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and a district plan*”.
  - (b) Section 122 of the LGATPA imposes a duty to prepare the combined plan and for it to meet the requirements for a regional policy statement for Auckland; a regional plan, including a regional coastal plan, for Auckland; and a district plan for Auckland.
  - (c) Subsequent sections govern the process for notifying and hearing submissions on the combined plan. Sections 144 to 147 address the Panel’s recommendations. In that regard:
    - (i) The sections all envisage recommendations in respect of the combined plan.
    - (ii) Section 145(1)(f) of the LGATPA provides that the Panel, in forming its recommendations must ensure that, were the Council to accept them, specified sections of RMA (including sections 66 to 70B and 74 to 77D) would be complied with.
  - (d) In the circumstances:
    - (i) The sections are focused on the introduction of a single plan to replace multiple documents. The fact that the combined plan must meet the requirements for specified planning instruments (ie: address the

matters that those documents must address) does not avoid the fact that it is to be a single document.

- (ii) It is inherent in that concept that the new document will be internally consistent. Thus the lower order provisions in the combined plan must logically give effect to the RPS provisions in the combined plan and not those in some other document.
  - (iii) Section 145(1)(f) is concerned with the position if the Council accepted the Panel's recommendations (ie: the PAUP became operative in the recommended form). Thus it is the internal consistency of the document that is relevant, not its relationship to the currently operative Regional Policy Statement.
- (e) The constituent parts of the PAUP will need to respect the hierarchy in the RMA – that is, the district and regional rules in the operative Unitary Plan will need to give effect to the RPS provisions. The fact that the legislation envisages a single decision in respect of a single document does, however, enable the Panel to refine the RPS provisions whilst hearing evidence on the lower order matters. Thus the Panel could use an iterative process to develop the PAUP RPS text through the course of the balance of the hearings. In that case, it may appropriately seek further input from submitters on higher order provisions that it is revisiting (eg: by identifying issues of interest, inviting further legal submissions or evidence from affected parties and resuming hearings on earlier topics).

*Preferred Course of Action*

10. Accordingly, the Submitters consider that additional regulations are unnecessary and ask that the Panel simply issues an informal and interim recommendation regarding the content of the RPS.
11. One way to accomplish that task would be to issue a redlined version of the RPS chapters in the PAUP. That would give parties

a clear indication of the Panel's thinking and would therefore help focus evidence for the subsequent hearings. The Panel could record that it may revisit and refine the wording in the redlined RPS provisions and submitters would be on notice that the redlined version does not constitute a formal recommendation and may be subject to change. It is not considered necessary that the redlined version be accompanied by reasons for the Panel's approach although you may wish (and would be entitled) to give an indication of the rationale for your approach on particular matters.

12. In the event that the Panel chose not to provide a redlined version of the full RPS, it could provide differing levels of detail for various parts of the RPS. It may be sufficient in some cases to record the Panel's high level conclusions. In other cases it will be desirable for the Panel to issue an annotated version of the relevant RPS provisions which identifies the wording proposed by the Panel. Circumstances in which more detail will be desirable include the following:

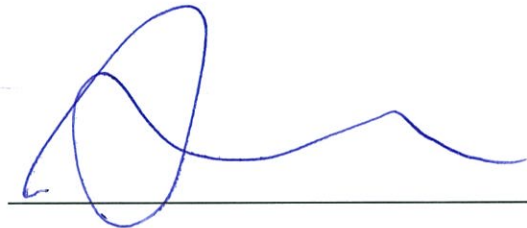
- (a) Areas where the Panel is considering making substantive changes to the direction set out in the RPS as notified, particularly if that involves going beyond the scope of submissions. For example, the Panel has been asked by Council to add to the PAUP references to heritage character areas in place of the notified provisions regarding special character areas. That substitution raises jurisdictional issues and involves a substantive and unforeseen change to the RPS. It is desirable that the Panel identify in detail the approach it is adopting in this regard and the basis on which it is doing so.
- (b) Where there is debate regarding the use of directive language (eg: words such as require and avoid). The presence of such wording will influence the range of options available under the lower order provisions and hence the scope of evidence. In that regard the Submitters note that at the time of making submissions the Supreme Court decision was not available and it may only become apparent as the hearings progress what the practical



implications of some of the language that is currently proposed.

13. The Submitters' expectation is that, in order to make coherent and internally consistent findings on the lower order provisions, the Panel will need to form views on the principles that will apply through the RPS. The request for an informal recommendation in effect asks for those principles to be shared with submitters. The Submitters consider that, as an interim and informal recommendation would not involve the exercise of a statutory power of decision (or recommendation), the process should not give rise to a risk of judicial review.

**Dated** at Auckland this 22<sup>nd</sup> day of January 2015



**D A Allan / C E Kirman**

Counsel for Housing New Zealand Corporation, the Minister of Education, the Minister for Courts, the Minister of Police and the New Zealand Defence Force