

BEFORE THE INDEPENDANT 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

**MEMORANDUM OF COUNSEL FOR THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED
AND ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND**

SUBMISSION NUMBERS 4735 AND 4848

2 OCTOBER 2014

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MAY IT PLEASE THE PANEL

Introduction

1. This memorandum relates to Procedural Minute No. 6 by Chairperson of Independent Hearings Panel (5 August 2014) and Council Response to Further Memorandum on Procedural Minute No. 6 (23 September 2014).
2. Procedural Minute No. 6 and the Council Response address site-specific requests to modify or add or delete items to or from the schedules of the Proposed Auckland Unitary Plan. The submissions lodged by Environmental Defence Society Inc (EDS) and Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird) include such requests.

New scheduled items proposed without landowner consent and/or information

3. Minute No. 6 states:¹

...where the submission seeks to add an item not identified in the proposed Plan as notified ... then a fundamental issue of procedural fairness is the extent to which the submission may directly affect a third party. Where a submission seeks to schedule land or buildings which are privately owned by someone other than the submitter, then the effects on that owner are likely to be such that we will need to be sure that the affected owner has an effective opportunity to participate before proceeding to a merits assessment. The submission and further submission process in Schedule 1 is not likely to be sufficient on its own to ensure adequate notice.

...Where the addition of the item is opposed by the owner... and/or the submission lacks any sufficient information to demonstrate that it meets or is likely to meet the relevant criteria, then we do not consider that the submission should proceed to be considered on its merits as it does not meet the second Clearwater test. In these cases a better approach may be for the Council to consider these subsequent to our processes.

4. The Council Response states:²

The Council respectfully suggests that the Panel reject these submissions (or the relevant submission points) in its recommendation report, and recommend that the Council includes this category of submissions as nominations for scheduled items in subsequent plan changes.

¹ At [10] and [16]

² At [4]

5. This raises a number of concerns: submissions to add items to schedules would be disregarded if (1) the submission is opposed by the landowner or (2) the submission does not contain the evidence needed to warrant scheduling.

(1) Landowner Opposition

6. This would give a landowner a veto over the consideration of a lawful submission. This is contrary to the scheme of the Resource Management Act 1991 which allows any person to make a submission on a proposed plan and requires the local authority to hold a hearing into submissions and give a decision on the matters raised in submissions.³

7. The Clearwater decision addressed whether a submission was 'on' a variation to a plan. The High Court stated:⁴

...if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that is a powerful consideration against any argument that the submission is truly "on the variation".

... It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

8. The submission and further submission process may be sufficient to ensure affected or interested persons have an opportunity to participate. EDS and Forest and Bird submit that submissions seeking additions to schedules do not "come out of left field". The schedules are open to submissions. Additions to the schedules, along with changes and deletions, are an expected part of the submissions process.

³ Clauses 6, 8B, and 10, Schedule 1, Resource Management Act 1991

⁴ At [66] at [69]

9. The purpose of the further submission process is to allow affected or interested persons to comment on provisions/changes not mentioned in the proposed plan.
10. However, EDS and Forest and Bird recognise that the scope of the Auckland Unitary Plan summary of submissions created difficulties for further submitters. EDS and Forest and Bird submit that any issue of procedural fairness could be rectified by notifying landowners and allowing them to lodge late submissions.⁵ The submission points should then proceed in the usual way through the hearings process.

(2) Evidence not included in submission

11. A submission must include grounds for the relief sought, however the grounds can be general in nature. The Resource Management Act 1991 does not require a submitter to include evidence in their written submission.⁶ Submitters were not notified of this requirement and as such had no opportunity to meet it. EDS and Forest and Bird submit that it would be procedurally unfair to decline to consider submissions on this basis.
12. Furthermore, the hearings process is the appropriate place to provide fulsome evidence on a submission, in that this process allows opposing parties to test that evidence, and for the Hearings Panel to come to a decision on the basis of complete information.

Submission points seeking to add (with landowner consent), amend/correct or delete scheduled items and the Council agrees

13. The Council Response states:⁷

Where the Council agrees with the submission AND where there are no contrary further submissions, the Council proposed to: submit a joint memorandum of the submitter and the Council (and any relevant further submitters) to the Panel setting out a proposed recommendation to amend the PAUP.

14. EDS and Forest and Bird submit that prime submissions must also be considered in this context. Procedural Minute No. 5 confirmed that:⁸

⁵ Sections 135 and 165(c) of the Local Government (Auckland Transitional Provisions) Act 2010

⁶ Form 5, Resource Management (Forms, Fees, and Procedure) Regulations 2003. As noted in the Council Response at [4], "it is not unusual for a submitter to provide limited information with their submission, and that many submitters provide relevant information/evidence at council hearings".

⁷ At [8]

A primary submitter is entitled to be heard on any submission that challenges the relief sought in the primary submission, whether that primary submitter has lodged a further submission on that other submission or not.

15. By way of example, the EDS and Forest and Bird submissions support a number of the notified overlays, although in some cases additions are sought. Submissions seeking deletions are contrary to this prime submission and EDS and Forest and Bird have an interest in them.
16. EDS and Forest and Bird submit that, in such circumstances, the primary submitter should be notified of the Council position and if the primary submitter does not agree with the submission the primary submitter should retain the ability to address the matter at the hearing.

Conclusion

17. EDS and Forest and Bird submit that the approaches proposed in Minute 6 and the Council Response to ensure landowners have a fair opportunity to be heard would consequentially affect the right of submitters to a fair opportunity to be heard. EDS and Forest and Bird have suggested possible approaches to address the issues raised.



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⁸ At [21]