Dr R J Somerville QC
Barristers Chambers
106 George Street, Dunedin 9058

PO Box 5117 DX YP80539
Telephone (03) 477 3488
Facsimile (03) 474 0012
Mobile 0274 323 109
Email rjs@barristerschambers.co.nz

His Honour Judge David Kirkpatrick
Auckland Unitary Plan Hearings Panel
Private Bag 92300
Victoria Street West
Auckland 1142

Re: Proposed Auckland Unitary Plan – Plan provision guidance within hearing process

Introduction

1. I have been asked to provide independent advice to the Hearings Panel in relation to the hearing procedure concerning higher order to lower level processes in the Proposed Auckland Unitary Plan (PAUP). Specifically, the purpose of the advice is:

> . . . to determine the best method to provide Plan provision guidance or setting from higher order to lower level hearing processes (mediation, expert conferencing and hearings). This is derived from the desire to guide or set the strategic aspects of the PAUP and reduce the instances of submitters' participation being 'off target' relative to the Panel's position as deliberated on strategic aspects of the PAUP.
>
> The release of Plan provision guidance on the Regional Policy Statement parts of the PAUP is to be used as the moot for this advice.

Executive Summary

2. For the reasons set out in this opinion I consider that:

(a) The Local Government (Auckland Transitional Provisions) Act 2010 (the ATPA) does not provide for the Panel to make interim recommendations to the Auckland Council (the Council)[1] at this stage of the hearing sessions.[2]
(b) The regulatory-making powers in the ATPA cannot be utilised to give legal effect to interim recommendations at this stage of the hearing sessions.[3]
(c) A purposive, contextual and ambulatory interpretation of the ATPA provides for plan provisions in the combined plan to give effect to the Regional Policy Statement (RPS) provisions in the combined plan and not to the operative RPS.[4]
(d) It would be a fair procedure for the Panel to indicate to submitters and the Council the changes that the Panel is minded to make to the RPS provisions in the PAUP before the hearing sessions on the planning provisions in the PAUP.[5]
(e) Any indications of changes either in general terms or by way of a marked-up version of the RPS provisions should be provided by the Panel on the basis that they do not purport to be interim recommendations and are for guidance only.

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1 Section 116(1) of the ATPA.
2 Sections 144 and 145 of the ATPA.
3 Sections 5 and 119 of the ATPA.
4 Section 43AA of the Resource Management Act 1991 and sections 116(3) and 145(1)(f) of the ATPA.
5 Section 164 of the ATPA.

Summary of Options Sought

3. The following points have been raised by submitters and the Council:

   (a) There needs to be a fair procedure, and the Panel should indicate to submitters and the Council its preliminary views on the amendments to the RPS provisions in the PAUP, including any amendments not sought by submitters.
   (b) Some submitters would like to see a marked-up version of the RPS sections.
   (c) Some submitters consider that an interim recommendation should be made under section 144 of the ATPA so that it can be addressed as an operative RPS, for the purposes of section 145(1)(f) of the ATPA.
   (d) In order to perfect the provisions as an operative RPS, the Minister for the Environment should be asked to promulgate transitional regulations under sections 5 or 119 of the ATPA.

Background

4. The PAUP was notified on 30 September 2013 and was prepared in accordance with Part 4 of the ATPA, particularly under sections 121 to 126.

5. Part 4 was inserted on 4 September 2013 as a result of the Environment Minister's announcement in October 2012 of a "one-off process to improve the development of Auckland Council's first Unitary Plan". The one-off process was considered necessary because under the current process, outlined in the First Schedule to the Resource Management Act 1991 (the RMA), it was estimated that the first Unitary Plan would take between six to ten years to become operative.

6. The overview of Part 4 of the ATPA, at section 115(1)(a), envisages a combined resource management plan:

> **115 Overview of this Part**
> (1) This Part sets out the following process for the preparation of the first Auckland combined plan:
> (a) The Auckland Council prepares a proposed plan for Auckland that meets the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and a district plan:
> ...

7. Section 121(1) of the ATPA requires the preparation of the "first Auckland combined plan" in compliance with Part 4 of the ATPA and the RMA, except the provisions of the RMA that are excluded from applying or that correspond to a provision of Part 4.

8. Section 122(1) and (2) of the ATPA provides:

> **122 Auckland combined plan to combine regional and district documents**
> (1) The Auckland Council must prepare, implement, and administer a document (the **Auckland combined plan**) that meets the requirements of all of the following:
> a) a regional policy statement for Auckland:
> b) a regional plan, including a regional coastal plan for Auckland:
> c) a district plan for Auckland.
>
> (2) The Auckland combined plan must clearly identify –
> a) the provisions of the document that are the regional policy statement, the regional plan, the regional coastal plan, or the district plan, as the case may be; and
> b) the objectives, policies, and methods set out or described in the document that have the effect of being provisions of the regional policy statement.
>
> (3) Once the Auckland combined plan is approved by the Auckland Council, it is deemed, for the purposes of the RMA, to be a plan or regional policy statement separately prepared and approved by the Council for its region or district, as the case may be.

9. The intention of the ATPA is that the new Auckland Unitary Plan will replace the existing RPS and the regional and district plans for Auckland.

10. Section 123 of the ATPA requires the initial preparation of the Auckland combined plan in compliance with clauses 1 to 8A of Schedule 1 of the RMA, as modified by the ATPA.

11. The key changes introduced by the ATPA for the PAUP include the following:

(a) Although the PAUP requires public notification, it does not require notification to individual landowners: section 123(4) ATPA.
(b) An Independent Hearings Panel (rather than Council-appointed Commissioners) has been introduced.
(c) The Panel is required to establish its own hearing procedure which is appropriate, fair and avoids unnecessary formality: section 136(4) of the ATPA.
(d) Pre-hearing meetings, expert conferences and mediation will be utilised to try and resolve issues before the hearing.
(e) The Panel may decline to consider a submitter's submissions if that person fails to attend a pre-hearing meeting without reasonable excuse. If this occurs, the person will have no rights of appeal and may not become a section 274 party: section 132 of the ATPA. [6]
(f) The Panel must make recommendations on the PAUP to the Council, and those recommendations can include matters that are outside the scope of the

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6 A right of objection to the Panel is available: section 154(1) of the ATPA.

submissions, provided they are identified by the Panel in its report to the Council: section 144 of the ATPA.

(g) Where the Council accepts the Panel's recommendations, parties will only be able to appeal the decision on a point of law to the High Court: section 158 of the ATPA.

(h) Only those recommendations not accepted by the Council can be appealed to the Environment Court on merit: section 156 of the ATPA.

(i) There remains the right of judicial review, [7] but a person must not both apply for judicial review and appeal to the High Court under section 158, unless the applications are lodged together: section 159 of the ATPA.

12. Section 146 of the ATPA introduces a three year time frame for implementation of the Unitary Plan. The Panel must provide its report to the Council no later than the date that is 50 working days before the expiry of three years from the date of notification. The time frame can be extended to four years from the date of notification, but only with the approval of the Minister for the Environment.

13. There is, therefore, an expectation under the new process that the first Auckland Unitary Plan will be operative within three years from the date of notification. [8]

14. In my opinion these provisions show that the intention of the legislature for the Part 4 procedure was to introduce a new streamlined plan development process specifically designed to reduce the delay and other impacts that could have occurred if the current process outlined in the RMA's Schedule 1 had been followed.

Does the ATPA provide for an interim report and recommendation by the Panel?

15. One of the options put forward to provide Plan provision guidance for submitters and expert witnesses is for the Hearings Panel to issue an interim recommendation on the RPS section of the PAUP.

16. The ATPA was passed in June 2010 with Part 4 being inserted in September 2013. Its purpose is set out in section 3 which provides, relevantly, as follows:

> **3 Purpose of this Act**
> (1) The purpose of this Act is to resolve further matters relating to the reorganisation of local government in Auckland begun under the Local Government (Tamaki Makaurau Reorganisation) Act 2009 and continued under the Local Government (Auckland Council) Act 2009.
>
> (2) To this end, this Act –
> …

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7 Section 296 of the RMA applies.

8 The PAUP was notified on 30 September 2013.

(d) provides a process for the development of the first combined planning document for Auckland Council under the Resource Management Act 1991.

17. As noted, one of the key aims behind Part 4 was to introduce a one-off streamlined plan procedure to fast track the Unitary Plan process. Part 4 applies only to the preparation of the first Auckland combined plan. Once the combined plan is operative, the standard RMA processes will apply. [9]

18. Sections 144 and 145 are the key provisions. They provide:

> **144 Hearings Panel must make recommendations to Council on proposed plan**
>
> (1) The Hearings Panel must make recommendations on the proposed plan after it has finished hearing submissions, including any recommended changes to the proposed plan.
>
> (2) The recommendations must include recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA, as applied by section 123 of this Part (which relate to designations and heritage orders).
>
> (3) However, the Hearings Panel –
>
> (a) is not limited to making recommendations only within the scope of the submissions made on the proposed plan; and
>
> (b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.
>
> (4) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.
>
> (5) The Hearings Panel must provide the recommendations, in a report, to the Council.
>
> (6) The report must include –
>
> (a) the Panel's recommendations, and identify any recommendations that are beyond the scope of the submissions made on the proposed plan; and
>
> (b) the Panel's decisions on the provisions and matters raised in submissions; and
>
> (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to –
>
> (i) the provisions of the proposed plan to which they relate; or
>
> (ii) the matters to which they relate.
>
> (7) The report may also include –
>
> (a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and
>
> (b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.
>
> (8) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.

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9 Section 117 of the ATPA.

145 Matters that affect recommendations

(1) The Hearings Panel, in formulating its recommendations, must –
   (a) have regard to any reports prepared under sections 131(4) and 133(3) and;
   (b) take account of any outcomes reported under section 134(4); and
   (c) have regard to the evaluation report and the report required by s 165H of the RMA in relation to the proposed plan and any variation and to the audit report referred to in section 126; and
   (d) include in the recommendations a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA; and
   (e) if a rule to which section 165H(1) of the RMA applies is to be recommended, include in the recommendations a report prepared under section 165H(1A) of the RMA by the Hearings Panel as if it were a regional council; and
   (f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:
      (i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2),165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:
      (ii) any other provisions of the RMA, or another enactment, that applies to the Council's preparation of the plan.

(2) To avoid doubt, when complying with subsection(1)(f) in respect of section 66 of the RMA, the Hearings Panel must ensure that regard has been had to the spatial plan for Auckland prepared and adopted under section 79 of the Local Government (Auckland Council) Act 2009.

19. In my opinion the scheme of the Part 4 provisions means that an interim recommendation approach is not available to the Panel. The relevant Part 4 provisions are:
   (a) Section 144(1) provides that the Hearings Panel "must make recommendations on the proposed plan after it has finished hearing submissions."
   (b) The Hearings Panel "must provide the recommendations, in a report, to the Council": section 144(5).
   (c) The report must include the Panel's recommendations and the Panel's decisions on the provisions and matters raised in the submissions. The Panel must, in its report, give reasons for accepting or rejecting submissions and "for this purpose, may address the submissions by grouping them according to the provisions of the proposed plan to which they relate": section 144(6).
   (d) In formulating its recommendations, the Panel must include a further evaluation of the proposed plan undertaken in accordance with section 32AA of the RMA: section 145(1)(d).

20. In my opinion the drafting of sections 144 and 145 of the ATPA contemplates one set of recommendations, to be submitted to the Council in one report, after the Panel has heard the submissions.

21. Under section 144 of the ATPA, the Panel must provide the recommendations in a report to the Council. Amongst other things the report must include the Panel's reasons for accepting or rejecting submissions.

22. When formulating the recommendations, the Panel must also have regard to the matters set out in section 145(1). It would be difficult to see how the Panel could satisfy the section 145(1) matters if it were issuing a recommendation on an interim basis. Under section 145(1)(d), for example, the Panel is required to include in the report a further evaluation undertaken in accordance with section 32AA. A section 32AA report would have to address all components of the Combined Plan, not just the higher order provisions. It would also be a public document for the purposes of the Local Government Official Information and Meetings Act 1987.

23. A further difficulty with recommendations issued on an interim basis is the question of the right to appeal. The Council would need to make a decision to accept or reject the interim recommendations. I do not consider that the Council could simply indicate whether or not it generally agreed with them, as has been suggested. If the Council decides to accept the recommendations, even for an interim period, that would give rise to a right of appeal to the High Court. [10]

24. It is to be noted that under section 149Q of the RMA, a board of inquiry "must" prepare a draft decision and a draft written report. The Environmental Protection Authority (EPA) must provide a copy of the draft report to certain persons and invite comment on minor or technical aspects of the report to the EPA.

25. While the procedure outlined under Part 4 of the ATPA has some similarities to that of a board of inquiry, there are key differences. [11]A significant difference is that there is no specific provision in the ATPA enabling the Hearings Panel to issue a draft decision or report. As a matter of statutory interpretation, it is my view that if such a power was intended by the legislature it would have been specifically mentioned, as it is for a board of inquiry in section 149Q.

26. The Panel has a wide power to regulate its own proceedings. Section 164 provides:

> **164 Functions of Hearing Panel**
> The Hearings Panel has the following functions and powers for the purposes of holding a Hearing into the submissions on the proposed plan and any variation permitted by section 124(4):
> a) to hold hearing sessions; and
> b) for the purposes of paragraph (a) –
> (i) to hold or authorise the holding of pre-hearing session meetings, conferences of experts, and alternative dispute resolution processes; and
> (ii) to commission reports; and
> (iii) to hear any objections made in accordance with section 154; and

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10 Section 158 of the ATPA gives a right of appeal to the High Court on a question of law in respect of a provision or matter relating to the proposed plan which the Council accepted as a "recommendation" of the Panel.

11 The only mention in the ATPA to a board of inquiry is in section 169 which provides that the Local Government Official Information and Meetings Act 1987 applies to the Panel as if it were a board of inquiry given authority to conduct a hearing under section 149J of the RMA.

c) to make recommendations to the Auckland Council on the proposed plan and any variation; and
d) **except as expressly provided by this Part, to regulate its own proceedings in the manner it thinks fit**; and
e) to carry out or exercise any other functions or powers conferred by this Part or that are incidental and related to, or consequential upon, any of its functions and powers under this Part.
[emphasis added]

27. The phrase "except as expressly provided for" is an exception to the power of the Panel to regulate its own proceedings.

28. The ATPA does not expressly provide that the Panel cannot issue interim recommendations. It could therefore be argued that section 164(d) is available to the Panel for this purpose.

29. The power given to the Panel by section 164(d) to regulate its own proceedings is similar to the power conferred on the Environment Court by section 269(1) of the RMA. Case law on section 269(1) of the RMA confirms that a power to regulate procedure confers a wide discretion. [12]

30. However the power under section 164(d) is not an unlimited power and must be limited to making provisions that promote the purpose of the ATPA.

31. The Supreme Court in **Unison Networks Ltd v Commerce Commission**[13] has confirmed that a statutory power is subject to limits even if stated in unqualified terms. Delivering the judgment of the Court, McGrath J said: [14]

> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.
> [footnotes omitted]

32. The purpose of the ATPA is to replace the existing planning documents with a new combined plan, and to this end the Act has been amended to include a process for the development of the *first* combined planning document for Auckland Council. [15] As noted, the key driver for the Auckland Unitary Plan process was to replace the old

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12 **Waikato Environmental Protection Soc Inc v Waikato Regional Council** (2009) 15 ELRNZ 229 (HC) at 241.
13 **Unison Networks Ltd v Commerce Commission** [2007] NZSC 74, [2008] 1 NZLR 42.
14 At [53].
15 Section 3(2)(d) of the ATPA.

planning documents and introduce a new streamlined process to fast track the preparation of the first combined plan for Auckland, post-amalgamation.

33. Under section 104 of the RMA, when considering an application for resource consent, the Council is required to have regard to the operative RPS for policy content and put lesser weight on the RPS component of the PAUP.

34. If, on the other hand, an interim recommendation resulted in the RPS component of the PAUP being deemed to be an operative RPS, then that would result in the Council not having any regard to the current operative RPS, which the operative district and regional plans currently give effect to.

35. Logically, because the legislative intention is to replace the current operative planning documents with a new combined plan, the alignment of higher order and lower order matters within the Combined Plan should take place at the end of the process. Dealing with matters on an interim basis would mean treating the legal effect of the different components of the Combined Plan in a different way, and would in my opinion, lead to confusion and uncertainty.

Can regulation-making powers be used to promulgate an interim recommendation?

36. It has been suggested that the Panel could ask the Minister for the Environment to recommend the making of a regulation to enable the Panel to issue an interim recommendation. The regulation would deem the interim recommendation to be an operative RPS for the purposes of the PAUP process.

37. An alternative suggestion is that the regulation-making powers be used to amend section 144 so that a recommendation can be made in respect of the RPS provisions.

38. The regulation-making powers are contained in sections 5 and 119 of the ATPA.

39. Section 5 of the ATPA provides:

> **5 Transitional regulations**
> ...
> (4) 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 Resource Management Act 1991, 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.

(5) The Minister for the Environment must not recommend the making of regulations under subsection (4) unless he or she is 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.

40. Section 119 of the ATPA provides:

119 Regulations relating to preparation of Auckland combined plan

(1) This section provides for regulations to be made that specifically relate to the preparation of the Auckland combined plan.

(2) Regulations may be made under section 360(1) of the RMA for the purposes of the preparation of that plan and as if references to the RMA in that subsection include references to this Part.

41. Section 119 was introduced into the new Part 4. It provides for the promulgation of regulations that "specifically relate to the preparation of the Auckland combined plan." The regulations may be made under section 360(1) of the RMA. Section 360(1)(g) provides that regulations may provide that specified provisions of the Act shall not apply. Section 360(1)(i) enables regulations to be made for the purpose of providing for "any other such matters as are contemplated by, or necessary for giving full effect to, this Act and for its due administration."

42. Section 360(1)(g) and (i) essentially allow for the amendment of primary legislation by subordinate legislation, and for that reason alone they should be used cautiously. In my view their application in the way suggested is not appropriate in the present situation.

43. A regulation which allows primary legislation to be amended by secondary legislation may be appropriate in some situations, for example to deal with unforeseen contingencies that cannot be dealt with in some other way.

44. However, it cannot be said here that this situation is unforeseen. It was not unforeseen that the Panel would consider the higher order provisions at the outset as this is a combined plan.

45. Further, to introduce a regulation or "Henry V111" clause which would deem certain parts of the PAUP to have legal effect, would be contrary to Parliament's intention to

give only certain rules immediate legal effect. [16] It can be inferred that had Parliament wished to give certain parts of the Combined Plan immediate legal effect, it would have done so.

46. Section 119 is a more general provision, whereas section 5(4) expressly provides for regulations that amend the ATPA or the RMA.

47. In my opinion it is not possible to use section 5 to promulgate a regulation which would amend the hearing process in the ways suggested. First, as already indicated, it cannot be said that this is an unforeseen situation as required by section 5(5)(b).

48. Second, a regulation, whether made under section 5 or through the RMA, that "deems" an interim recommendation to have legal effect, may run the risk of a Court finding it ultra vires. The only deeming provisions in Part 4 of the ATPA are sections 122(3) and 152. [17] There are no other relevant deeming sections in Part 4.

49. In a recent decision the High Court cautioned against the use of deeming provisions, noting the Parliamentary Counsel's Office view is that deeming "should only be used to create a legal fiction, and even then it should be avoided if there is a sensible alternative way to achieving the same result." [18]

What is the meaning of the RPS for the purposes of section 145(1)(f) of the ATPA?

50. An issue has arisen as to whether, in the absence of an interim recommendation and the proposed RPS being deemed to have an operative effect, the Panel will be able to satisfy the requirements of section 145(1)(f).

51. Section 145 sets out matters that affect the Panel's recommendations. Section 145(1)(f) provides:

> **145 Matters that affect recommendations**
> (1) The Hearings Panel, in formulating its recommendations, must –
> ...
> (f) ensure that, were the Auckland Council to accept the recommendations, the following would be complied with:
> (i) sections 43B(3), 61, 62, 66 to 70B, 74 to 77D, 85A, 85B(2),165F, 165G, 168A(3), 171, 189A(10), and 191 of the RMA:

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16 Section 153 of the ATPA gives certain rules immediate legal effect upon notification.

17 Section 122(3) provides that once the Auckland combined plan is approved, it is deemed to be a plan or regional policy statement separately prepared and approved by the Council for its region or district, as the case may be. Section 152 provides that once the proposed plan is amended in accordance with the Council's decisions on the recommendations, each part of the proposed plan is deemed, subject to appeal rights, to be approved or adopted, as the case may be, by the Council.

18 **Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council** [2014] NZHC 3191 at [191].

(ii) any other provisions of the RMA, or another enactment, that applies to the Council's preparation of the plan.

52. Part 5 of the RMA sets out an elaborate "hierarchy" of planning documents with each document in the hierarchy giving effect to the document above it. Section 67(3)(c) of the RMA provides that a regional plan must "give effect to" any RPS, and section 75(3)(c) provides that a district plan must "give effect to" any RPS.

53. The phrase "give effect to" means "to implement". As the Supreme Court has recently confirmed, it is a strong directive, creating a firm obligation on the part of those subject to it. [19]

54. The perceived difficulty is, do the regional and district plan sections of the PAUP need to give effect to the existing operative Auckland RPS, or can the term "regional policy statement" in sections 67(3)(c) and 75(3)(c) of the RMA be given a different meaning in the context of section 145(1)(f) of the ATPA?

55. A RPS is defined in section 43AA of the RMA as meaning an operative RPS approved by a regional council under Schedule 1. A proposed regional statement is separately defined. It means a RPS that has been notified but is not yet operative.

56. It is to be noted that section 43AA contains the qualification that the expressions defined will have their meaning "unless the context otherwise requires".

57. The same qualification also appears in section 116(3) of the ATPA, which provides that a term or expression used and not defined in Part 4 of the ATPA, but defined in the RMA, has the same meaning as in the RMA.

58. The question is whether the qualifying words "unless the context otherwise requires" enable a wider context to modify the definition of "regional policy statement" as meaning an operative RPS.

59. The Court of Appeal in **Police v Thompson** has held that the "context" of an Act, for the purposes of an interpretation section, can include the policy of the Act, the history of the legislation, the consequences of a given interpretation, and the surrounding text. [20]

60. The authors of **Statute Law in New Zealand** include a discussion of the **Thompson** case. The authors state: [21]

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19 **Environmental Defence Society Inc. v New Zealand King Salmon Company** [2014] NZSC 38, [2014] NZRMA 195 at [77].

20 **Police v Thompson** [1966] NZLR 813 (CA) at 820-821.

21 Burrows & Carter **Statute Law in New Zealand** (4th ed, LexisNexis, Wellington, 2009) at 422-423.

> A statutory definition is only displaced were there are strong indications to the contrary in the context. That is particularly so where the definition is of the stipulative kind that extends the meaning of the word.
>
> ...
>
> ... it is clear that "context" is given a wide meaning. It includes not only the text of the provision in question, but also the purpose and policy of the legislation, its history, and the consequences of a suggested interpretation.

61. The Supreme Court has confirmed that the meaning of a statutory provision must be considered in light of the Act as a whole. [22]

62. In my view, there are strong contextual indications that section 145(1)(f) is not referring to the operative RPS. These are:

(a) The Auckland situation is unique. The Panel is tasked with preparing the combined Auckland Unitary Plan, which for the first time includes the Auckland Council's RPS, regional plans (including the regional coastal plan) and a district plan.
(b) Some of the provisions in the RPS component of the PAUP represent significant changes to those in the current operative RPS. It would be impossible to achieve integration within the Combined Plan if the lower order planning documents had to give effect to the current operative RPS.
(c) Section 145(2) requires the Panel to ensure that regard has been had to the spatial plan. The legislature could also have required lower order documents to give effect to the current Auckland RPS, but did not. The spatial plan is quite different from the operative RPS.
(d) The Panel is concerned with a combined plan where it is just as important to have bottom up development as it is to have top down development.

63. In my opinion, the requirement to ensure compliance with sections 67(3)(c) and 75(3)(c) of the RMA means, in the context of section 145(1)(f), to ensure that the district and regional plans give effect to, or implement, the proposed RPS in the Combined Plan.

64. A Court is likely to give an interpretation of section 145(1)(f) that is purposive. Section 5(1) of the Interpretation Act 1999 provides:

> **5 Ascertaining meaning of legislation**
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

65. As Tipping J observed in **Commerce Commission v Fonterra Co-operative Group Ltd,** [23] even a plain meaning must be "cross-checked" against purpose:

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22 **Unison Networks Ltd v Commerce Commission** [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance to may be the social, commercial or other objective of the enactment.

66. It is my opinion that the term "regional policy statement" should also be given an ambulatory interpretation, as a RPS has a different meaning in light of the context of the more recent ATPA. As to changes in legal context, the authors of **Statute Law in New Zealand** state: [24]

> Sometimes it is argued that a word in an old Act needs to be reinterpreted to align it with other, more recent, legislation. The assertion, in other words, is that Acts must be interpreted in the current legal landscape, and that landscape (or "wider context") may require a shift in meaning in the words of an older Act.

67. Section 6 of the Interpretation Act 1999 supports an ambulatory approach. It provides:

> **6 Enactments apply to circumstances as they arise**
> An enactment applies to circumstances as they arise.

68. Applying an ambulatory interpretation supports the view that it was Parliament's intention that the Combined Plan's RPS is to be the operative RPS for the purposes of section 145(1)(f) of the ATPA.

69. In my opinion the clear purpose of section 145(1)(f) is to achieve integration of all planning documents within the Auckland Unitary Plan when it becomes operative. That purpose is best achieved by interpreting "regional policy statement" as the proposed RPS in the Combined Plan. The purpose of Part 4 would be denied if the Hearings Panel is required to give effect to an operative RPS in the context of the ATPA.

70. Therefore, on a purposive interpretation, the requirement in section 145(1)(f) means that the Panel must ensure that the Council, if it accepts the Panel's recommendations, complies with sections 67(3) and 75(3) of the RMA. That means that when the Combined Plan becomes operative those sections will be complied with.

71. On this interpretation there is no "gap" in the legislation, but if it were necessary, reliance can be placed on **Northland Milk Vendors Association Inc v Northern**

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23 **Commerce Commission v Fonterra Co-operative Group Ltd** [2007] 3 NZLR 767 (SC) at [22].

24 Burrows & Carter **Statute Law in New Zealand** (4th ed, LexisNexis, Wellington, 2009) at 396.

Milk Ltd[25] to give a practical interpretation to section 145(1)(f) in order to make the legislation work as Parliament intended.

72. In **Northland Milk Vendors** Parliament had enacted legislation establishing an Authority to set standards for the delivery of milk to homes but had left undetermined the proper course to take in the interim before any standards were prescribed. Delivering the judgment of the Court, Cooke P stated:

> This is one of a growing number of recent cases partly in a category of its own. They are cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act – that is to say, the spirit of the Act.

Plan guidance

73. The Panel is seeking a best way forward to provide Plan guidance from higher order to lower order hearings.

74. If the Panel does not have the jurisdiction to issue interim recommendations, the issue is what process the Panel should follow if it were minded to change policies in the RPS component of the PAUP, particularly if the proposed change concerns a matter that is not encompassed by the submissions.

75. Section 144(3) of the ATPA expressly states that the Panel has jurisdiction to make recommendations beyond the scope of submissions.

76. I have considered whether the ability of the Panel to direct variations under section 124(5) of the ATPA is of assistance. In my opinion it is not. Section 124(5)(ii) permits the Panel to direct the Council to vary the PAUP 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."

77. Section 124(5) does not permit the Panel to make a direction to vary policies in the proposed RPS. Rather, it is a provision enabling the Panel to ensure that the regional and district plan provisions in the PAUP give effect to the RPS provisions.

78. An evaluation report prepared under section 32 of the RMA is required for any section 124(5) direction.

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25 **Northland Milk Vendors Association Inc v Northern Milk Ltd** [1988] 1 NZLR 530 (CA) at 537-538.

79. There are other provisions in the ATPA however that are available to the Panel to assist it when it is considering changes where the matter or issue has not been raised in submissions.

80. Under section 164(b) of the ATPA the Panel is given the power to hold pre-hearing session meetings, conferences of experts, and alternative dispute resolution processes. The Panel also has the power to commission reports. These powers are specifically set out in sections 131, 133, 134 and 142.

81. Section 131, which deals with pre-hearing session meetings, states that the Panel may invite parties to attend such a meeting for the purpose of clarifying a matter or issue relating to the PAUP or for facilitating resolution of a matter or issue relating to the PAUP.

82. Section 133 states that the Panel may, at any time, direct that a conference of experts be held for the same purpose of clarifying and facilitating resolution.

83. These provisions would allow the Panel, if it were minded to make changes to policies, to flag the matter to parties in order to give them the opportunity to provide comment and influence the Panel's final thinking on the issue. If the matter or issue remained unresolved, the Panel could then refer the parties to mediation for the purpose of resolution: see section 134.

84. While the Panel has the jurisdiction to make recommendations that are beyond the scope of submissions,[26] section 136(4) requires that the procedure established by the Panel must be "appropriate and fair in the circumstances." Natural justice considerations will be an important aspect of that fair procedure as confirmed in the recent judgment of Collins J in **Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council.** [27] One of the issues in that case was whether the Board of Inquiry breached its duty to re-consult when it departed significantly from its draft report issued under section 149Q of the RMA. In concluding that the Board did so err, Collins J said:

> [117] **Although s 149Q of the RMA envisages limited opportunity to comment on a Board's draft report, s 149Q does not purport to override a Board's duty to adhere to the principles of natural justice**.
>
> [118] Fairness is at the heart of the issue. Those who have a right to be consulted must be given an adequate opportunity to express their views and to influence the decision-maker. An assessment of whether or not a decision-maker has acted fairly is a quintessential judicial task that is highly influenced by context.

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26 Section 144(3) of the ATPA.

27 **Hawke's Bay and Eastern Fish and Game Councils v Hawke's Bay Regional Council** [2014] NZHC 3191.

> [119] There have been various formulations of the duty to re-consult when circumstances have changed between the initial consultation and the basis upon which a decision is made. In *Smith, R (on the application of) v East Kent Hospital NHS Trust* the Court suggested that the need for re-consultation occurred "if there was a fundamental difference" between a proposal consulted upon and the basis upon which the decision-maker made his or her decision.
>
> [120] In some New Zealand decisions the scope of a decision-maker's duty to re-consult echoes the United Kingdom position to some extent. There can be no doubt a decision-maker must re-consult if the final decision differs in a fundamental way from the decision which was indicated at the time of the consultation. However, some New Zealand decisions suggest the duty is engaged at a lower threshold. For example, in *Air New Zealand Ltd v Nelson Airport Ltd* Millar J found that **further consultation might have been required if advice contained in a report already in the decision-maker's possession differed in a "material[ly] adverse way".**
>
> [121] I have previously concluded that the approach taken by Millar J best addresses the need to ensure fairness to those who are consulted and affected by an administrative decision. The RMA acknowledges that during the decision-making process, entities such as the Board must act fairly. **Section 149Q is not isolated from the principles of natural justice. The principles of natural justice required the Board to provide the affected parties with an opportunity to comment on material changes to the Board's decision.**
> [Footnotes omitted. Emphasis added]

85. In the same way, section 144(3) of the ATPA, which gives the Panel jurisdiction to make changes not encompassed by submissions, is not isolated from natural justice considerations. If the Panel makes, or intends to make, material changes to the policies in the PAUP as publicly notified, natural justice requires the Panel to give an indication of its preliminary views to provide guidance to submitters and the Council so they can consider whether or not the Panel's approach can be implemented by the lower order planning provisions.

86. A failure to give an indication of its likely views on a material change to the proposed RPS provisions in the PAUP before the hearing sessions on the planning provisions commence may put the Panel at risk of judicial review action.

Conclusion

87. The Panel should not purport to make a recommendation to the Council on the proposed RPS provisions of the PAUP pursuant to section 144 of the ATPA. If it did, that would amount to an endeavour to exercise a statutory power of decision and could be subject to judicial review proceedings.

88. However, it would be a fair procedure for the Panel to direct submitters to consider the issue of the implications for the planning provisions in the PAUP, if the Panel were to make a recommendation at the conclusion of the hearings which involved

amending the proposed regional policy provisions in a way the Panel indicated with a marked-up version or in more general terms.

89. This approach would meet the principles of natural justice because it would mean that the submitters and the Council have notice of what the Panel is minded to recommend subject to the pre-hearing processes and the hearing sessions involving the planning provisions of the PAUP. Also, it would allow for the Panel to have the submitters' and Council's views on the consequences for the PAUP planning provisions.

90. The Panel needs to confirm that it is not making an interim recommendation which would raise issues involving the legal consequences of recommendations in terms of the Council's duties and rights of appeal.

Dr Royden Somerville QC

5 February 2015