

**From:** [daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz) [mailto:[daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz)]

**Sent:** Wednesday, 5 November 2014 5:03 p.m.

**To:** Vanessa Wilkinson

**Subject:** Re: Mediation Record and Documents - 004 Chapter G - General Provisions - SESSION 1 and Session 9 - FRAMEWORK PLANS

Vanessa

Further to your email, please find **attached** the memorandum requested by Judge Kirkpatrick.

Kind regards,

**Trevor Daya-Winterbottom**

Barrister *Lincoln's Inn & New Zealand*

Totara Chambers™

PO Box 75-945

Manurewa

Auckland 2243

New Zealand

*Email:* [daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz)

*Skype:* TrevorD-W

*Mobile:* 0275 182 196

On Monday, 3 November 2014 3:37 PM, Vanessa Wilkinson <[vanessa.wilkinson@aupihp.govt.nz](mailto:vanessa.wilkinson@aupihp.govt.nz)> wrote:

Dear Trevor

Further to your email below and as discussed over the phone on Friday afternoon, I have reviewed your client's (Tram Lease, Viaduct Harbour Holdings Ltd and Viaduct Harbour Management Ltd), standing in Chapter G (i.e. a review of whether you are listed as a primary of further submitter in the topic 004 – Chapter G – General Provisions). It would appear that Council has not coded any of your client's submission points to Topic 004 – Chapter G.

I've also reviewed the Memorandum you filed for the pre-hearing meeting on Topic 004 – Chapter G, and the response provided by the Panel as outlined in the Pre-Hearing Meeting Record dated 6 October 2014. I understand that you are of the view that the general decision sought by your client enables them to attend any hearing they consider is relevant to the more specific submission points / decisions they have sought and that you consider the Panel had agreed to this at the Pre-Hearing meeting for Chapter G. Unfortunately, this is not the case and the Panel does not recall agreeing to this.

This matter has been further reviewed by the Judge and he is of the opinion that the general decision your client has sought is an 'endless loop'. As outlined in *Leith v ACC (1995) A037/95* a submitter **must** state the actual decision sought. Furthermore, as outlined in *Westmark v ACC (1995) HC 72/95* it is not open to a submitter to keep the whole of a plan up in the air on the basis of general wording in a submission.

Therefore, you are requested to respond to this matter in light of the two cases mentioned above and either provide legal justifications for why you consider your client can have standing at any hearing or advise what specific matters your 'general decision' relates to and what decision it seeks. The Panel will consider your response.

In order to finalise the mediation document, could you please come back to me on this matter by the COB on **Wednesday, 5 November 2014**.

Best Regards  
Vanessa.

**Vanessa Wilkinson**  
**Principal Planner**  
Auckland Unitary Plan Independent Hearings Panel  
Level 15, 205 Queen Street, Auckland  
Mobile: 027 239 2277

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**From:** [daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz) [mailto:[daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz)]  
**Sent:** Thursday, 30 October 2014 4:06 p.m.  
**To:** Vanessa Wilkinson; [bianca@halaw.co.nz](mailto:bianca@halaw.co.nz); [vijay.lala@tattico.co.nz](mailto:vijay.lala@tattico.co.nz); [brendon.liggett@hnzc.co.nz](mailto:brendon.liggett@hnzc.co.nz); [vaughan@vsplanning.co.nz](mailto:vaughan@vsplanning.co.nz); [bronwyn.carruthers@russellmcveagh.com](mailto:bronwyn.carruthers@russellmcveagh.com); [david@osbornehay.co.nz](mailto:david@osbornehay.co.nz); [mark.vinall@tattico.co.nz](mailto:mark.vinall@tattico.co.nz); [karen.joubert@hainesplanning.co.nz](mailto:karen.joubert@hainesplanning.co.nz); [laura.swan@hainesplanning.co.nz](mailto:laura.swan@hainesplanning.co.nz); [natalie.amos@kensingtonswan.com](mailto:natalie.amos@kensingtonswan.com); [kellie.roland@aucklandairport.co.nz](mailto:kellie.roland@aucklandairport.co.nz); [john.duthie@tattico.co.nz](mailto:john.duthie@tattico.co.nz); [graeme.mccarrison@chorus.co.nz](mailto:graeme.mccarrison@chorus.co.nz); Scott Macarthur (AT); Michele Perwick; Mathew Gribben <[Mathew.Gribben@buddlefindlay.com](mailto:Mathew.Gribben@buddlefindlay.com)> ([Mathew.Gribben@buddlefindlay.com](mailto:Mathew.Gribben@buddlefindlay.com)); Jennifer Caldwell ([Jennifer.Caldwell@buddlefindlay.com](mailto:Jennifer.Caldwell@buddlefindlay.com))  
**Cc:** Harry Bhana <[HarryBhana@hfb.net.nz](mailto:HarryBhana@hfb.net.nz)> ([HarryBhana@hfb.net.nz](mailto:HarryBhana@hfb.net.nz)); 'murray.kivell@emslimited.co.nz'  
**Subject:** Re: Mediation Record and Documents - 004 Chapter G - General Provisions - SESSION 1 and Session 9 - FRAMEWORK PLANS

Vanessa

Many thanks for your email, I have now reviewed the documents for Tram Lease et al, and my my comments are:

#### **Mediation record**

Section 3.1 now accurately records the position regarding the declaration/law change as being something raised by one party and not agreed by others. In particular, Tram Lease et al do not share the concern over these points and they do not see the need for clarification outside the AUP hearings process.

There has been no further action by Council to complete drafting of the matters for discretion or assessment criteria.

**Attachment 1**

This should be amended to record Tram Lease et al as primary submitters as they have a comprehensive whole AUP submission. See correspondence filed with the Panel and the pre-hearing meeting record.

#### **Attachment 2**

Tram Lease et al consider that this is now largely historic, records what occurred in that session, and has now been superseded.

#### **Attachment 3**

Tram Lease et al consider that this is now largely historic, records what Council circulated after the session, and has now been superseded.

#### **Attachment 4**

Tram Lease et al consider that this reflects the position of the parties on the various amendments discussed at the 2nd mediation session on Framework Plans. Comment VW25 reflects that the matters for discretion and assessment criteria may still be a work in progress depending on the position of the parties on these outstanding matters. As a result, it is difficult (as other parties have recorded) to say that overall the parties are close to settlement on the Chapter G Framework Plan provisions - the remaining discussion needs to be had on these provisions either off-line or in the hearing.

#### **General comments**

Tram Lease et al consider that the concurrent application option is preferable to the information option. In particular, they consider that there is no legal issue arising from recent Court decisions that would provide any obstacle to these general provisions being agreed or decided by the Panel after hearing.

Tram Lease et al however note that the primary issue arising from the recent Court decisions has not been addressed at all by any of the amendments made to Chapter G. This matter has been left to 32 sets of precinct provisions to remedy.

As recorded in the drafting note the precinct provisions to be lawful will each need to provide for a level of development or land use activity that can be carried out absent a Framework Plan being approved, the precinct rules will need to define what bundle of land use activities Framework Plans will apply to, and the precinct provisions will need to provide a default activity status for applications which exceed basic entitlements but where no Framework Plan is applied for. On the latter point there will need to be careful thought as to whether the fallback should be discretionary or non-complying. Drafting such a cascade for each precinct should not be problematic - but there may be a legal issue for certain precincts if Council does not provide some reasonable basic entitlement that land owners can get on with absent Framework Plans. Other precincts (e.g. Wynyard Quarter) will pass the legal test easily as there is already a cascade in place under the operative and proposed plans. Council will need to invest some time in this issue rather than wait for the topics to arise later next year.

Please feel free to contact me by email or mobile if you have any queries or would like to discuss this matter.

Kind regards,

#### **Trevor Daya-Winterbottom**

Barrister *Lincoln's Inn & New Zealand*

Totara Chambers™  
PO Box 75-945  
Manurewa  
Auckland 2243  
New Zealand

Email: [daya.winterbottom@xtra.co.nz](mailto:daya.winterbottom@xtra.co.nz)

Skype: TrevorD-W

Mobile: 0275 182 196

On Wednesday, 29 October 2014 9:21 AM, Vanessa Wilkinson <[vanessa.wilkinson@aupihp.govt.nz](mailto:vanessa.wilkinson@aupihp.govt.nz)> wrote:

Dear all

Please find attached the combined documents that formed the basis for **SESSION 1 AND SESSION 9** of mediation for Topic 004 Chapter G General Provisions – **FRAMEWORK PLANS** on Wednesday, 15 October 2014 from 9.30am - 1.00pm and on Wednesday, 22 October 2014 from 9.30am – 1:10pm..

The documents attached include:

004 – Session 1 & Session 9 – Framework Plans – Mediation Record 2014-10-28

Attachment 1	Mediation Attendance Record 004 – Session 1 & Session 9 2014-10-15 & 22
Attachment 2	004 –Chpt G Framework Plans Concurrent Application Option Mediation Track Changes 2014-10-15
Attachment 3	Chpt G framework plans concurrent application option mediation 211014
Attachment 4	Session 9 – 004 – Chpt G Framework Plans Concurrent Application Option with Mediation Changes 2014-10-22.

All parties in attendance at this mediation should remember that these documents remain Draft, Confidential and Without Prejudice documents until such time as all parties have responded and confirmed the documents are an accurate and correct record of agreements / disagreements / discussions. Once all parties at the **Session 9** mediation have confirmed this, the document will become an 'open' document and will be referenced in the final version of the Parties and Issues Report.

**All parties are required to provide confirmation or otherwise of these documents being accurate and correct by 5:00pm Wednesday, 29 October 2014.** Please note, no response will be considered to indicate agreement/acceptance of the documents accuracy. Please also note this is not an opportunity to restate your position on matters mediated.

**Please email your responses to everybody on this email and please also include:**

Harry Bhana – [HarryBhana@hfb.net.nz](mailto:HarryBhana@hfb.net.nz)  
Murray Kivell - [murray.kivell@emslimited.co.nz](mailto:murray.kivell@emslimited.co.nz)  
Vanessa Wilkinson – [vanessa.wilkinson@aupihp.govt.nz](mailto:vanessa.wilkinson@aupihp.govt.nz)

Best regards  
Vanessa.

**Vanessa Wilkinson**  
**Principal Planner**  
Auckland Unitary Plan Independent Hearings Panel  
Level 15, 205 Queen Street, Auckland  
Mobile: 027 239 2277

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**Before the Auckland Unitary Plan Independent Hearing Panel**

**Submission 5566 & Further Submission 3168**

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*In the matter of:* Submissions on proposed plan under s 123 of the Local Government Act (Auckland Transitional Provisions) Act 2010 and under cl 6 of Schedule 1 of the Resource Management Act 1991 – Proposed Auckland Unitary Plan – 30 September 2013

*And:* **Auckland Council**

Local Authority

*And:* **Tram Lease Ltd, Viaduct Harbour Holdings Ltd & Viaduct Harbour Management Ltd**

Submitters

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**Memorandum for Tram Lease Ltd, Viaduct Harbour Holdings Ltd & Viaduct Harbour Management Ltd**

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*Dated:* 5 November 2014



**MEMORANDUM FOR TRAM LEASE LTD, VIADUCT HARBOUR HOLDINGS LTD & VIADUCT HARBOUR MANAGEMENT LTD**

- 1 This memorandum is filed for Tram Lease Ltd, Viaduct Harbour Holdings Ltd & Viaduct Harbour Management Ltd (**submitters**). It addresses the following request from Judge Kirkpatrick of 3 November 2014:

As outlined in *Leith v ACC* (1995) A037/95 a submitter **must** state the actual decision sought. Furthermore, as outlined in *Westmark v ACC* (1995) HC 72/95 it is not open to a submitter to keep the whole of a plan up in the air on the basis of general wording in a submission.

- 2 The request is addressed in relation to the following matters:

**Chapter G General Provisions**

- 3 In relation to Chapter G General Provisions, the submitters appeared at the pre-hearing meeting on 29 September 2014 and sought:

3.1 To be heard in general support of the Framework Plan provisions in Chapter G based on paragraph 6.4 of their primary submission.

3.2 For two specific submission points pertaining to Framework Plans in paragraphs 109.1(b) and 109.1(i)(i) of their primary submission (points 5566/119 and 5566/131) to be addressed in the mediation and hearing sessions regarding Framework Plans (Topic 004).

- 4 At the pre-hearing meeting Judge Kirkpatrick referred to the *Leith* decision,<sup>1</sup> and stated that any relief sought in relation to Chapter G needed to be specific. The submitters confirmed the specific provisions as being the Framework Plan provisions, which they supported as notified and sought to be retained. In response, Judge Kirkpatrick indicated that he had "got it".

- 5 Judge Kirkpatrick also drew attention to the recent *Queenstown* decisions,<sup>2</sup> and stated that Council may wish to propose some amendments to the Framework Plan provisions based on those decisions. Beyond that, Judge Kirkpatrick also indicated that the Panel may wish the submitters to address their general point in

<sup>1</sup> *Leith v Auckland City Council* A37/95.

<sup>2</sup> *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2014] NZEnvC 93.

paragraph 6.4 of their submission in the context of the *Leith* decision at some future point.

- 6 The submitters left the pre-hearing meeting under the impression that their two requests (see paragraph 3 above) had been accepted.
- 7 After the pre-hearing meeting the submitters sought clarification from Council as to which of the three *Queenstown* decisions it relied on for amendments to the Framework Plan provisions, and in particular which parts of the relevant decision were relied on. Council clarified these matters before the mediation, but questioned the submitters jurisdiction to participate in the Framework Plans mediation and stated that the other specific submission points would not be addressed in the mediation as they would be addressed later in relation to other topics. The submitters drew Council's attention to the material filed by them for the pre-hearing meeting, the pre-hearing meeting report, and their impression that their requests had been accepted.
- 8 Council did not raise the jurisdictional point at the mediation, and the submitters other two specific submission points (see paragraph 3.2 above) were not addressed at the mediation. As a result, the other two specific submission points remain to be addressed later in the context of subsequent hearing topics. After the mediation, the jurisdictional point was raised again and (by agreement) was referred to Judge Kirkpatrick for clarification.
- 9 By that time, the submitters had participated in the mediation in good faith, and agreed to the tracked changes version of the Chapter G Framework Plan provisions.

#### **What is the scope of the relief sought in paragraph 6.4**

- 10 Paragraph 6.4 should be read in the context of the primary submission (see pages 2-4).
- 11 The submitters seek a number of decisions in paragraph 6 of the primary submission, namely:
  - 11.1 Specific amendments pertaining to 28 sites listed in Appendix A (paragraph 6.1).
  - 11.2 Other specific amendments, set out in Appendix B, pertaining generally to the 28 sites listed in Appendix A (paragraph 6.2).
  - 11.3 Site zoning or rezoning, shown on the maps in Appendix D, pertaining to the sites listed in Appendix A (paragraph 6.3).

- 12 Overall, paragraphs 6.1-6.3 confine the submission to the listed sites. This provides definition around the provisions that will apply to these sites – as all plan provisions will not apply to them. Primarily, the sites are located in Mt Albert, Newmarket, Viaduct Harbour Precinct, and Wynyard Quarter. Generally, the submission supports urban intensification in established centres that are well served by the road and rail networks.
- 13 In particular, paragraph 6.4 seeks:
- 13.1 The retention of all other plan provisions included in the notified version of the plan (30 September 2013) ...
- 13.2 ... that are not listed or referred to in Appendices A, B and D,
- 13.3 ... but only in so far as retention of such provisions is not inconsistent with the decisions sought by this submission.
- 14 Based on the assumptions in paragraphs 10 and 12 above, the decision sought by paragraph 6.4 of the primary submission relates only to plan provisions pertaining in some way to the 28 sites.
- 15 Paragraph 6.4 seeks a specific decision, namely, that plan provisions pertaining in some way to the 28 sites should be retained as notified.
- 16 The submission in paragraph 6.4 is qualified in two ways. First, it does not duplicate matters covered in Appendixes A, B, and D. Second, it only seeks to retain other plans provisions not covered in these Appendixes that are not inconsistent with these matters.
- 17 Generally, the other plan provisions to which paragraph 6.4 relates will be higher level objectives and policies that apply to the rules affecting these sites. For clarity, these provisions are listed in the Schedule **attached** to this memorandum. With the exception of one matter mentioned in paragraph 18 below, the submitters generally support these provisions as they consider that these objectives and policies support the other decisions sought in the Appendixes.
- 18 The only objectives and policies opposed by the submitters, because they are not consistent with the decisions sought regarding the Mt Albert and Newmarket sites, are those found in 4.3.2 Landscape and natural features.<sup>3</sup>

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<sup>3</sup> Objective 4, and Policies 7, 13, and 15 as notified. The submitters seek that these provisions be deleted, except for Policy 15 which should be amended so that it relates only significant adverse effects on significant features.



- 19 Additionally, the decision sought in relation to Wynyard Quarter (site 28) also pertains to Parts 6 and 7 of the plan as it seeks the roll over of certain non-statutory documents from the operative legacy plan, and opposes certain designations in the Quarter that Council or Auckland Transport have responsibility for. The relevant documents and designations are referenced in Appendix A of the submission.
- 20 Therefore to advance matters pertaining to the sites listed in Appendix A of the primary submission, the submitters do not need to expand the scope of the point in paragraph 6.4 of the primary submission beyond the provisions listed in the Schedule to this memorandum.

### **Relevant law**

- 21 In terms of the relevant law, cl 6 of Schedule 1 of the Resource Management Act 1991 (RMA) requires that the submission should be made in the prescribed form. The relevant form is Form 5 of the Resource Management (Forms, Fees and Procedure) Regulations 2003. The submission complies with these requirements.
- 22 The decision in *Leith* provides that the submission should set out the nature of the decision sought. Paragraph 6.4 meets this requirement by seeking, generally, that notified provisions not referred to in the Appendixes should be retained.
- 23 Beyond that, *Leith* can be distinguished from the present case. For example, Mr Leith sought amendments to Gulf Islands section of the operative Auckland District Plan in circumstances where the Court was concerned about the fairness of that for other parties. In this case, the submitters support the provisions listed in the Schedule and seek that they be retained, except for the matters regarding 4.3.2 Landscape and natural features. Thus no amendments are sought regarding the majority of the provisions listed in the Schedule, and in relation to 4.3.2 Landscape and natural features there are a number of other submitters taking issue with the particular objectives and policies of concern to the submitters and seeking similar amendments to them (as recorded in the expert conferencing report).
- 24 In terms of the *Westmark* decision,<sup>4</sup> the submitters do not need to “keep the whole plan up in the air”, as illustrated by the limited range of provisions identified in the Schedule to this submission, in order to make the points which they seek to advance. Notwithstanding that, Barker J found that reasonably

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<sup>4</sup> *Westmark Investment Ltd v Auckland City Council* [1995] 570.

general decisions sought in submissions would satisfy RMA requirements.<sup>5</sup>

- 25 In conclusion, the decision sought in paragraph 6.4 of the primary submission is limited in scope by reference to the sites listed in Appendix A. It complies generally with the relevant law. As indicated in the Schedule, the submitters do not need to "keep the whole plan up in the air". Finally, they have advised (as requested) via this memorandum what specific matters their general decision relates to and what decision it seeks – for completeness they seek retention of the provisions identified in the Schedule as notified in the plan, except for 4.3.2 Landscape and natural features which they seek should be deleted or amended.<sup>6</sup> Their additional involvement in hearings will therefore be limited.
- 26 The submitters seek to be heard in support of this matter.

*Trevor Daya Winterbottom*

**Trevor Daya-Winterbottom**

*Counsel for Tram Lease Ltd, Viaduct Harbour Holdings Ltd & Viaduct Harbour Management Ltd*

5 November 2014

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<sup>5</sup> *ibid* at 575.

<sup>6</sup> See: n3 above; and will say statement of Mr Michael Foster FNZPI (17 October 2014) filed in relation to Topic 010.

**SCHEDULE****Chapter B Regional Policy Statement**

2 Enabling quality urban growth

3 Enabling economic well-being

4.3.2 Landscape and natural features

7 Sustainably managing our coastal environment

**Chapter D Zone objectives and policies**

3.1 Mixed use zones

3.2 City Centre zone

3.3 Metropolitan Centre zone

5.1 General Coastal Marine zone

5.3 Mooring zone

**Chapter F Precinct objectives and policies**

2.11 Newmarket 1

3.12 Viaduct Harbour

3.15 Wynyard

**Chapter G General provisions**

2.6 Framework Plans

