

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

REGARDING Topic 004

MEMORANDUM ON BEHALF OF
KIWI INCOME PROPERTY TRUST AND KIWI PROPERTY HOLDINGS LIMITED
AND
THE NATIONAL TRADING COMPANY OF
NEW ZEALAND LIMITED
AND
THE WAITAKERE RANGES PROTECTION SOCIETY INCORPORATED

DATED: 19 SEPTEMBER 2014

ELLIS GOULD
SOLICITORS
AUCKLAND

REF: DA Allan

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MAY IT PLEASE THE COURT

1. This memorandum is lodged on behalf of:
 - (a) Kiwi Income Property Trust and Kiwi Property Holdings Limited (“**Kiwi**”);
 - (b) The National Trading Company of New Zealand Limited (“**NTC**”); and
 - (c) The Waitakere Ranges Protection Society Incorporated (“**WRPS**”).

(collectively “**the Submitters**”)

with regard to the Notice of Prehearing Meeting on Proposed Auckland Unitary Plan Topic 004 – Chapter G General Provisions.

2. The Submitters are all represented by Ellis Gould with respect to PAUP matters and are all primary and/or further submitters on Topic 004. While the Submitters will present separate cases to the Topic 004 hearing, they share concerns regarding the proposed process and in the interest of efficiency have elected to file a single memorandum recording those concerns.
3. The following section of the memorandum addresses presentations to the Topic 004 hearing. The subsequent sections relate to the Panel’s proposed process for Topic 004. The Submitters’ suggested changes to the process are underlined. The Submitters propose to raise these matters during the prehearing meeting on Topic 004.

Involvement at Topic 004 Hearing

4. Kiwi anticipates calling evidence from Gerard Thompson, consultant planner. Kiwi reserves the right to call evidence from its urban designer and engineers with regard to information requirements. The extent and scope of Kiwi’s evidence will be determined on completion of the proposed mediation on Topic 004
5. NTC anticipates calling evidence from Vaughan Smith, consultant planner. NTC reserves the right to call evidence from its urban designers and civil engineers with regard to information requirements. The extent and scope of NTC’s evidence will be determined on completion of the proposed mediation on Topic 004.
6. WRPS anticipates calling evidence from James Hook, consultant planner.

Lack of Cross References to Further Submissions

7. The Submitters ask that the Panel explore and implement a mechanism by which further submitters will be able to identify from the Submission Point Pathway Report (“SPP”) the submissions on which they have lodged further submissions.
8. The Submitters are concerned that none of the material made available by the Council and/or Panel provides any cross reference between primary and further submissions. Submitters can locate primary submissions on a topic by searching the submitter name in the SPP. There is, however, no ability to search further submitter names and hence to identify with ease which primary submissions have been the subject of a further submission.
9. The Notice of Prehearing advises further submitters to, *“recollect which prime submissions you submitted on, and you can find that prime submission point in the SPP by searching on their name”*. That will be a time consuming task for any submitters who lodged more than a token number of further submissions. In practice, the absence of any cross references to further submissions is likely to result in parties omitting to present evidence on further submissions simply because they are unaware that those matters have been listed for hearing.
10. The Council has presumably logged every further submission against the relevant primary submission and the fact that the Notice of Prehearing Meeting currently identifies parties as prime or further submitters on a topic implies that the information is available in some form. If so, it would be helpful if that information could be incorporated into the SPP in the manner that typically occurs at the Council hearing stage on proposed planning instruments.
11. It is acknowledged that including further submissions in the SPP would make an already complex document more so but, in practice, the recommended course of action means that all submitters will need to undertake a cross referencing exercise on multiple hearing notices. Any assistance on that task would be valuable.

Effect of Evidence Exchange Timetable on Prospect of Successful Mediation

12. The Submitters request that the Panel provides a significantly greater period of time between the completion of the mediation phase and the evidence exchange.
13. The Submitters consider it appropriate that Topic 004 be directed to mediation but are concerned that the evidence exchange timetable proposed provides insufficient time for parties to react following mediation and hence may compromise the efficacy of the mediation process itself.
14. By way of explanation:
 - (a) The Panel has set aside six days for mediation. Ideally, that process will allow Council and submitters to resolve or narrow the scope of submission points. The fact that the Panel has set aside only one hearing day for Topic 004 presumably reflects its expectation that the issues will largely be resolved by consent.
 - (b) The mediation will finish on 22 October. Contemporaneous evidence exchange is scheduled for noon on 31 October – six and a half working days later. That is a very short period for parties to revise their positions and prepare evidence.
 - (c) The Submitters each consider that, given that time frame, they would be unwise to assume that their concerns will be resolved through mediation. Their expectation is, therefore, that parties and their witnesses will allocate resources to evidence preparation before or during the mediation. That is likely to divert attention from the mediation and to reduce the prospects of it succeeding.
15. Parties are under time pressure during mediation and often benefit from an opportunity to review matters subsequently. The tight time frame proposed will effectively drive these matters to hearing in the absence of a clear resolution during mediation when a breathing space thereafter might allow more considered and nuanced responses from all sides.

Desirability of Council circulating Revised Position prior to Evidence Exchange

16. The Submitters ask that:
- (a) The Panel either:
- (i) Impose an obligation on Council to circulate its revised position on the relevant provisions following mediation and before exchange of evidence; or
- (ii) Provide for a staggered evidence exchange with the Council exchanging prior to submitters; and
- (b) In any event, there be sufficient time between the receipt by submitters of the Council's revised provisions and the date on which they are to exchange evidence to enable a considered response to be made.
17. The Submitters are concerned that there is no requirement for the Council to circulate a revised position prior to the contemporaneous exchange of evidence.
18. The Submitters' hope and expectation is that the Council will review the draft PAUP provisions in light of the submissions and mediation and that it will present a considered redraft of the provisions to the hearing. That redraft may overcome all or some of the Submitters' concerns (or those of other parties) and, if so, could avoid or reduce the need to prepare detailed evidence.
19. Whilst it is possible that the Council's amended position will be available at the end of the mediation, that is not necessarily the case. Council may need additional time to refine its position.
20. The timetable provides for contemporaneous exchange of evidence without any requirement on Council to advise parties of any revised position following mediation. The Submitters' expectation is that, in practice, the Council's revised position will form the agenda for the hearing. Under the current timetable, submitters will be exchanging evidence based on the PAUP as notified while the Council is likely to be exchanging evidence in support of a revised position that submitters will only be able to comment on in rebuttal. That will render the submitters' evidence in chief partly irrelevant and will result in a waste of resources (in particular where the Council accepts relief sought by submitters).

21. The Submitters consider that a staggered evidence exchange is preferable to contemporaneous exchange. Staggered exchange enables submitters' witnesses to adopt uncontentious aspects of the Council's presentation and thus minimise preparation costs and time for submitters and reading time for the Panel. The Submitters ask that the Panel adopt as a general practice staggered evidence exchanges with a period of at least three weeks between the exchange dates for the Council and submitters.

Requirement for Midday Filing of Evidence

22. The Submitters suggest that the reference to evidence being received by the Panel by midday on the filing date be deleted and that the Panel simply specify the date on which material should be filed.
23. The evidence exchange timetable specifies that evidence should be exchanged by midday. That is problematic for professionals who will often have obligations during the working day and for lay people who may well have to work on evidence outside office hours. The time frame will in practice require many parties to file evidence on the previous evening.
24. The Submitters consider that it would be clearer and more practical for all submitters if the midday filing deadline were omitted. If the Panel considers that its administrative time frames are so tight as to warrant imposing a midday cut off on the selected days then it could require evidence to be filed by the previous day.

10 Minute Presentation Time Limit for Submitters

25. The Submitters are concerned by the suggestion that each submitter "*will be given approximately 10 minutes to present your case to the Panel ... there will not be time to read submissions or other material to the Panel*".
26. Ellis Gould wrote by email to the Panel on 15 September 2014 ("**the Email**") in support of Russell McVeagh's memorandum of 12 September 2014 on this issue ("**the Memorandum**"). Copies of the Memorandum and Email are attached as **Annexures 1** and **2** respectively. The Submitters support and reiterate the views expressed in that material.
27. The Submitters ask the Panel to revisit this matter urgently and to issue revised advice in accordance with the proposal in paragraph 7 of the Russell McVeagh memorandum. Alternatively, if the Panel is minded to retain the 10

minute maximum presentation per submitter we suggest that the Panel convenes a conference involving Council and members of the planning bar to canvass this issue in more depth.

General Observations re Provisional Schedule

28. The Submitters consider that it would be beneficial if the Panel moderated the speed and complexity of the PAUP hearings process, particularly with respect to the critical RPS phases. Ideally that would involve:
- (a) Extending the time periods between the various procedural steps for each topic so that parties have a better chance to explore options for settlement, to prepare evidence and submissions and to test the evidence from other parties in the hearing; and
 - (b) Extending the time periods between steps on different topics (eg: by increasing the separation of hearings on different topics) so that parties and witnesses are able to treat each matter with the time and attention they deserve.
29. Leaving aside the issues relating specifically to Topic 004, the Submitters are concerned that the intensity and complexity of the overall PAUP hearing process will compromise the ability of the legal, planning and related professions to provide quality advice and representation to Auckland's property interests and residents.
30. The Provisional Schedule identifies a complex matrix of prehearing meetings, expert conferencing, mediation and hearings. Overlaying that timetable will be dates for responding to the Notices of Prehearing and evidence exchange requirements. It is rapidly becoming apparent that the administrative aspects of the hearing process, let alone the substantive mediation and evidence preparation, will place extensive demands on submitters and advisors. The Submitters are concerned that the parties will soon be immersed in a work load that will be extremely demanding if not incapable of performance.
31. If parties are unable to present full cases because of the compressed timetables that raises additional concerns regarding the reasonableness, fairness and efficacy of the hearings process. It will also compromise the ability of the Panel to make fully informed recommendations.

32. The Submitters accept that the overall statutory timeframes governing the PAUP process are extremely tight but consider that the hearing process is likely to speed up over time as:
- (a) High level issues are clarified (assuming recommendations or interim views are issued progressively by the Panel in respect of matters on which hearings have been completed);
 - (b) The topics become more focussed in scope;
 - (c) Parties are able to refer back to evidence put before the Panel in the early stages; and
 - (d) All participants become accustomed to the process.

The hearings process will also benefit from maximising the opportunities for expert conferencing and for mediation as that will minimise the scope and scale of contested matters which require extensive hearing time.

33. The RPS provisions will set the strategic framework for the balance of the PAUP. Many counsel and witnesses will be involved in multiple RPS hearings for a number of clients. These are matters that would benefit from a relatively slow start to the hearing process to ensure that the overall PAUP strategy is carefully considered and fully informed. That will also enable any procedural teething issues to be worked through.

DATED 19 September 2014



DA Allan - Counsel for the Submitters

ANNEXURE 1

IN THE MATTER

of the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991

AND

IN THE MATTER

of the Proposed Auckland Unitary Plan and procedures established under the relevant legislation to address the submissions and further submissions processes in relation to the Proposed Auckland Unitary Plan following notification of it by Auckland Council

**MEMORANDUM OF COUNSEL FOR PORTS OF AUCKLAND LIMITED AND
SCENTRE (NEW ZEALAND) LIMITED REGARDING TIME LIMIT ON
PRESENTATIONS TO HEARINGS PANEL**

12 SEPTEMBER 2014

RUSSELL McVEAGH

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Auckland

MAY IT PLEASE THE HEARINGS PANEL:

1. This memorandum relates to Procedural Minute 9 dated 8 September 2014 and the Notices of Pre-Hearing Meetings and Hearings that are now being sent out to submitters. In particular, this memorandum relates to the indication that submitters will be given only approximately 10 minutes to present their case to the Hearings Panel on a particular topic.
2. Procedural Minute 9 was very clear as to the procedures for the production and presentation of evidence. In particular:
 - (a) All evidence is to be pre-exchanged.
 - (b) All evidence must include a summary of no more than three pages and witnesses will be permitted to read that summary. With leave of the Hearings Panel, a witness may also take the Hearings Panel to key diagrams, maps or other visual material. (The earlier Auckland Unitary Plan Hearing Procedures Version 1.0 dated 28 May 2014 ("**Hearing Procedures**") specifically require that all witnesses must attend the hearing to confirm that the contents of their statements of evidence are true and correct,¹ and that all witnesses will need to be prepared to present a 10 minute concise summary of their evidence.²)
 - (c) Appropriately, there is no limit on the number of witnesses that any submitter may call. Procedural Minute 9 also clearly contemplates legal representation and the presentation of legal submissions.³ That appropriately recognises that, for a particular topic, submitters could potentially have multiple witnesses presenting evidence, as well as legal submissions to present.
 - (d) While the earlier Hearing Procedures encourage opening representations to be circulated in advance, that is not mandatory, nor has it been required in Procedural Minute 9. In many cases, this cannot occur as those legal submissions will need to also address matters arising from a review of the primary and rebuttal evidence and from cross-examination.

¹ Paragraph 68.

² Paragraph 70.

³ See, for example, paragraphs 5 and 11.

Therefore, the Hearings Panel will not be able to pre-read opening legal submissions in most cases, and it is imperative that the hearing schedule provides sufficient and adequate opportunity for legal submissions to be presented to the Hearings Panel, including an opportunity for any questions to be asked by the Hearings Panel.

3. The Notices of Pre-Hearing Meetings and Hearings that are now being sent out to submitters contain information at the bottom of the notice that explains what is involved in relation to evidence production and hearing attendances. The requirements for evidence production are consistent with Procedural Minute 9. However, under the "What happens at the hearing?" heading, the Notices state:

The hearing will be run in sessions and you will be advised of which session you have been allocated to attend. Each session will last for approximately 1.5 to 2 hours and during that session, **you will be given approximately 10 minutes to present your case to the panel.** The Panel will have read the submissions and any evidence provided before the hearing. There will not be time to read submissions or other material to the Panel. You may like to summarise your main points in your evidence to bring them to the panel's attention. Where there are many submitters making the same point the Panel may further restrict speaking time to avoid repetition.

[emphasis added]

4. The statement that submitters will only be given approximately 10 minutes to present their case is of significant concern:
- (a) That indication is contrary to the earlier directions of the Hearings Panel. In particular, it is inconsistent with the Hearing Procedures, which state that the Hearings Panel will:
- ...provide submitters with an adequate opportunity to be heard, while, where necessary, limiting the length of oral presentation, avoiding repetition of information and the presentation of irrelevant material.
- (b) Providing an adequate opportunity for submitters to be heard is a fundamental right and is entrenched within both the Resource Management Act 1991 and the specific legislation for the Unitary Plan hearings process.
- (c) While for a number of submitters a 10 minute limit will provide sufficient opportunity for them to speak to their concerns (for example, a submission relating to an individual property with

perhaps one or two witnesses who would read their executive summaries and no legal representation), it is, with respect, unreasonable and inadequate for submitters with a broader or more complex range of concerns. For example:

- (i) A number of infrastructure providers have sought an entirely new issue be added to the Regional Policy Statement and there are a wide range of matters that would need to be addressed before the Hearings Panel could be expected to make a decision whether to include an additional issue.
 - (ii) Some submitters, such as the Airport and Port, have specific zones or precincts dedicated to their operations, and have provided detailed submissions addressing a wide range of concerns with those provisions and have sought significant amendments to those provisions.
 - (iii) Some of the issues raised by particular sectors or industry groups seek fundamental changes to the approach taken in certain parts of the Unitary Plan. For example, the application of Special Purpose zones or precincts, the removal of the controversial stormwater and flooding controls, etc.
 - (d) Submitters can have significant assets that are affected by the provisions of the Unitary Plan. Some large corporate submitters are entirely reliant on the suitability and workability of the Unitary Plan provisions that affect them in order to carry on their businesses. For businesses to be able to continue to invest in Auckland, it is imperative that the Unitary Plan provides sufficient certainty and workability. That demands that they be provided an adequate opportunity to present to the Hearings Panel as to specific concerns they have with the current form of the Unitary Plan.
5. The introduction of a 10 minute limit may also have unintended consequences. For example, a number of parties are currently seeking to co-ordinate their cases to assist the Hearings Panel and to aid in the

efficiency of the hearing process. However, a co-ordinated approach is disincentivised by the current direction.

6. Preliminary discussions with other counsel for major parties confirm that these are fundamental concerns. There appears to be strong support for what was intended to be the process as set out in Procedural Minute 9, but that seems to be overridden by the notice being sent out to submitters referred to in paragraph 3 above.
7. We understand and appreciate the significant time pressures that the Hearings Panel is under. However, on the basis of the concerns set out above, we respectfully seek directions to confirm that:
 - (a) Submitters be given 10 minutes per witness to read their executive summaries of their statements of evidence, except where leave has been granted to refer to visuals, plans, etc, along with sufficient time for opening legal submissions to be presented (where there are legal counsel). Procedural Minute 9 already directs that legal submissions be focussed and succinct.
 - (b) Parties be given the opportunity to have a longer period to present their case, with leave of the Hearings Panel. (This is specifically intended to provide an opportunity for submitters with complex cases to present a comprehensive case to the Hearings Panel.)
8. Directions of that nature would ensure that the Hearings Panel clearly retains discretion to ensure that all submitters have adequate opportunity to be heard, reflecting the scale and complexity of the issues raised in the submission, to reflect the assurance given in the Hearings Panel's earlier Hearing Procedures.

DATED: 12 September 2014



Derek Nolan
Counsel for Ports of Auckland Limited and
Scentre (New Zealand) Limited

TO Auckland Unitary Plan Independent Hearings Panel
AND Auckland Council

ANNEXURE 2

Douglas Allan

From: Douglas Allan
Sent: Monday, 15 September 2014 7:41 a.m.
To: info@aupihp.govt.nz; Phill.Reid@aupihp.govt.nz; 'Julie McKee - aupihp'
Cc: Derek Nolan; Bal Matheson; James Gardner-Hopkins; Bronwyn Carruthers; Russell Bartlett (Shortland Chambers); Paul Cavanagh (Shortland Chambers); Claire Kirman; 'Daniel Minhinnick'; Paula Brosnahan (Chapman Tripp); Catherine Somerville (Chapman Tripp); Corina Faesenkloet; james.hassall@aucklandcouncil.govt.nz; 'Bianca Tree'
Subject: RE: Memorandum of counsel - time limit on submitter presentations to the Hearings Panel
Attachments: Memorandum of counsel dated 12 September 2014.pdf

Dear Julie and Phil,

We write on behalf of Kiwi Income Property Trust and related parties, MediaWorks Holdings Limited, The National Trading Company of New Zealand Limited, Sanford Limited and Housing New Zealand Corporation which are all submitters on the Proposed Auckland Unitary Plan. Our clients support the attached memorandum dated 12 September 2014 from Russell McVeagh to the Hearings Panel ("the Memorandum").

Our clients share and reiterate the concerns expressed in the Memorandum and consider that imposition of a 10 minute limit on the presentation of cases on PAUP topics will deprive parties of the right to a fair hearing. We note the following in that regard:

1. The PAUP represents the most significant recasting of planning provisions in Auckland's history. Not only is the format of the region's planning framework changing but the content of the PAUP differs markedly from that of the operative planning instruments. Those changes have significant implications for our clients who consider it essential that they have sufficient input into the hearings process to explain their position and to test the Council's proposals and other submitters' relief fully.
2. The PAUP hearings process was introduced by Parliament as a means of replacing the two stage (council first instance hearing and Environment Court appeal) process that would otherwise have applied under the Resource Management Act. It was an explicit aspect of the debate that, in return for the loss of merits appeal rights, submitters would receive a fair hearing with elevated protections (eg; cross examination) in comparison with a first instance council hearing under RMA.
3. The suggestion that the Panel will ration submitter presentations to 10 minutes will result in a PAUP process that is more constrained than any proposed district plan first instance hearings process this firm has been involved in to date. The ability to seek cross examination rights is not a substitute for sufficient time to present one's case. Thus, not only will submitters be deprived of a merits appeal, they will also be subject to a severely reduced right of appearance during which to express their position. That is contrary to the intention of the legislation and the basis upon which the single stage process was presented to the public.

Our clients ask the Panel to revisit this matter urgently and to issue revised advice in accordance with the proposal in paragraph 7 of the Memorandum. Alternatively, if the Panel is minded to retain the 10 minute maximum presentation per submitter we suggest that the Panel convenes a conference involving Council and members of the planning bar to canvass this issue in more depth.

We understand that the Panel will be considering this matter on Monday and ask that this email be placed before them along with the Memorandum.

Regards,
Douglas Allan

Douglas Allan PARTNER

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From: Daniel Minhinnick [<mailto:daniel.minhinnick@russellmcveagh.com>]
Sent: Friday, 12 September 2014 3:37 p.m.
To: info@aupihp.govt.nz; Phill.Reid@aupihp.govt.nz
Cc: Derek Nolan; Bal Matheson; James Gardner-Hopkins; Bronwyn Carruthers; Russell Bartlett (Shortland Chambers); Paul Cavanagh (Shortland Chambers); Douglas Allan; Claire Kirman; Paula Brosnahan (Chapman Tripp); Catherine Somerville (Chapman Tripp); Corina Faesenkloet; james.hassall@aucklandcouncil.govt.nz
Subject: Memorandum of counsel - time limit on submitter presentations to the Hearings Panel

Good afternoon

Please find **attached** a memorandum of counsel on behalf of Ports of Auckland Limited and Scentre (New Zealand) Limited in relation to the time limit on submitter presentations to the Hearings Panel.

Please contact us if you have any queries.

Kind regards

Daniel Minhinnick
SENIOR ASSOCIATE

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Russell McVeagh

ALB New Zealand Dealmaker of the Year, New Zealand Deal of the Year, Australasian Equity Deal of the Year 2013, Gold Employer of Choice 2013
IFLR New Zealand Law Firm of the Year 2013
ILO Client Choice New Zealand Law Firm 2013

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