

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

AND

IN THE MATTER of the Proposed Auckland Unitary Plan ("PAUP") and procedures established under the relevant legislation to address the submissions and further submissions processes in relation to the PAUP following notification of it by the Auckland Council

**MEMORANDUM OF COUNSEL ON BEHALF OF AUCKLAND COUNCIL
IN RELATION TO CONFERENCE ON 3 OCTOBER 2014**

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 The Auckland Council's (**Council**) position on the various points raised in the Douglas Allan dated 19 September 2014 (**Allan memorandum**), Procedural Minute Number 10, Fact Sheet 8 and the Paul Cavanagh QC memorandum (**Cavanagh memorandum**) dated 30 September 2014 is set out under relevant headings below.

1.2 At the outset, the Council acknowledges the tight timeframes that all parties will be working to over the next 20 months to enable the Panel to meet its legislative deadline for providing its recommendation report to the Council on 22 July 2016 (section 146 of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**)).

2. IDENTIFICATION OF SUBMISSIONS THAT FURTHER SUBMITTERS HAVE SUBMITTED ON IN THE PANEL'S SUBMISSION POINT PATHWAY REPORT

2.1 The Council website has the further submissions requested (**FSR**) report available for the public to view. The FSR report on the website enables users to search for the names of further submitters

and from there identify the original submission points that the further submitter has supported/opposed.

2.2 As a result, the request in the Allan memorandum appears unnecessary.

3. THAT THE PANEL PROVIDES A SIGNIFICANTLY GREATER PERIOD OF TIME BETWEEN THE COMPLETION OF THE MEDIATION PHASE AND THE EVIDENCE EXCHANGE

3.1 While the Council considers that there would be benefit to the parties in providing a greater period of time between the conclusion of mediation and the need to prepare evidence, the Council disagrees that such a period should be significant. As already indicated, all parties, including the Council, are working to very tight timeframes within this process.

3.2 The Council considers that 10 working days following a Panel-directed mediation should be sufficient time for the Council to provide its evidence to the Hearings Panel.

4. THE PROPOSED OBLIGATION ON THE COUNCIL TO CIRCULATE ITS REVISED POSITION ON THE RELEVANT PROVISIONS FOLLOWING MEDIATION

4.1 The Council, along with all other parties attending mediation, will be required to attend mediation with delegation to reach agreement. This is required by Clause 50 of the Panel's Procedures document, which states: "Parties attending a mediation must be authorised to be able to agree or otherwise settle the matters and issues that are the subject of the mediation".

4.2 As a result, all participants in mediation will be party to any agreed amendments to the Proposed Auckland Unitary Plan (PAUP) provisions and the identification of the outstanding issues that are still in dispute. In these circumstances, the Council considers that it is entirely appropriate for all parties to be required to file their evidence with the Panel on the same date. As outlined above, the Council considers that 10 working days following mediation should be sufficient time for the parties to provide their evidence to the Panel.

5. THAT THE PANEL ADOPT AS A GENERAL PRACTICE STAGGERED EVIDENCE EXCHANGES WITH AT LEAST THREE WEEKS BETWEEN THE EXCHANGE DATES FOR THE COUNCIL AND SUBMITTERS

5.1 The Council agrees that its evidence should be provided first in relation to topics that proceed straight to a hearing.

5.2 However, as set out in the Council's memorandum (dated 15 September 2014) in relation to paragraph 15 of Procedural Minute No. 9 (copy **attached**), the Council has sought a departure from the evidence exchange timetable directions for topics that proceed straight to hearing on or before 28 February 2015 for the reasons set out in that memorandum.

5.3 The Council refers to the memorandum of Russell McVeagh, dated 1 September 2014 (copy **attached**), which sought standard directions in respect of the timing and form of evidence. This request was addressed by the Panel in Procedural Minute No. 9. However the Russell McVeagh memorandum also acknowledged, at paragraph 5(a), that there may be particular instances where tighter or amended timeframes may be required (eg to accommodate hearings which have already

been scheduled). The Council's request for a departure from the evidence exchange requirements in Procedural Minute No. 9, where required, only applies to hearings which have already been scheduled.

- 5.4 The Council will endeavour to provide its evidence 20 working days in advance of a hearing, where the topic proceeds straight to hearing, in accordance with the directions in paragraph 15 of Procedural Minute No. 9. However, it is anticipated that some evidence is unlikely to be available for filing on the due date.
- 5.5 Every effort will be made to provide evidence to the Panel as soon as practicable, taking into account the governance arrangements of the Council and the timing of Council Committee meetings to confirm the Council's position on aspects of its case, and the discretion outlined in Panel Fact Sheet 8 - Communicating with the Panel.
- 5.6 The Council is currently revising its work schedule from 1 March 2015 onwards, and will ensure that provision is made for evidence to be provided to the Panel in accordance with the directions in Procedural Minute No. 9.

6. PROPOSAL TO REMOVE THE REQUIREMENT TO FILE EVIDENCE BY MIDDAY

- 6.1 The Council acknowledges that evidence is usually required to be filed with the Environment Court by 5pm on a specified date.
- 6.2 However, given the tight timeframes involved in this Independent Hearings Panel process, the Council considers that the requirement to provide evidence by midday is appropriate, and will better enable all parties to consider the evidence of other parties.

7. THE 10 MINUTE PRESENTATION TIME LIMIT FOR SUBMITTERS

- 7.1 The Panel has issued Procedural Minute No. 10, which in the Council's view addresses the issue of the 10 minute presentation time limit. Submitters are now able to apply for additional time to present their case at a hearing, by filling out and submitting the application form available on the Panel's website.
- 7.2 Procedural Minute No. 9 has also confirmed that there is no obligation on counsel to put their case to opposing witnesses through cross-examination.

8. MODERATION OF THE SPEED AND COMPLEXITY OF THE PAUP HEARING PROCESS

- 8.1 The Hearings Panel has, in the Council's view, worked hard to schedule mediation, expert conferencing, and hearing time in relation to the various Regional Policy Statement (RPS) topics. The Council is required to attend all of these sessions, and is required to be in attendance at every hearing (unless excused by the Panel). While the timeframes are tight and, as indicated above, may result in the Council providing its evidence late in some situations, the Council considers that the proposed approach of the Panel will result in the hearing processes being efficient and effective.

9. WHETHER SPECIAL ASSISTANCE COULD BE PROVIDED TO RESIDENT AND SPECIAL INTEREST GROUPS – SIMILAR TO THE ‘FRIEND OF SUBMITTER’ FOR BOARDS OF INQUIRY

9.1 This issue has been raised previously by Mr Cavanagh QC in his memorandum of 9 July 2014, and with respect, was covered by the Panel in Procedural Minute No. 5, at paragraph 20(d), which states:

The Panel has engaged 15 experienced and respected practitioners in a range of disciplines to be facilitators of expert conferences and mediators [sic]. We have considered the possibility of also engaging process advisors to assist the public in understanding the process, as has been done in recent consent application processes, but do not consider that to be appropriate in the context of a plan review process or necessary in light of the availability of the facilitators and mediators who may, as part of their roles assisting the Panel in the identification and resolution of issues, provide incidental assistance to submitters who lack experience in these processes.

9.2 The Council agrees with the comments of the Chairperson in Procedural Minute No. 5, that is not appropriate in this plan review process, nor necessary, for a friend of submitter (or similar) to be appointed.

10. SEEKING AN EXTENSION OF TIME FOR RECOMMENDATIONS

10.1 The Council is aware that it and/or the Panel can make a request to the Minister for the Environment to extend the original deadline referred to in Section 146. However, the extended deadline can only be for a period no later than 1 year after the original deadline (that is, no later than 22 July 2017) as provided for in section 147 of the LGATPA.

10.2 At this stage of the process, the Council does not support the suggestion in paragraph 10 of the Cavanagh memorandum that the IHP seek an extension to the hearing period for a minimum of at least one year.

11. FACT SHEET 8 - COMMUNICATING WITH THE IHP

11.1 The Council requests that the Panel clarify and amend its directions in relation to the following 2 statements in Fact Sheet 8:

- (a) “Evidence must be pre-circulated”
- (b) “publication of this communication on the website is not a substitute for service of documents on other parties. Parties are responsible for ensuring they send any communication to the persons directly affected by that communication”

11.2 Fact Sheet 8 refers to evidence being pre-circulated. The Council understands that evidence must be provided to the Panel in advance of the hearing on the date specified in the notice of hearing, or as otherwise directed by the Panel, and that there is no requirement for the Council (or submitters) to circulate its evidence to other parties.

11.3 The Council relies on clause 27 of the Panel's Procedures document on the www.aupihp.govt.nz website states “Formal service of documents will be by way of the www.aupihp.govt.nz website unless submitters have been advised directly by the Hearings Panel that another form of service is

required" and requests that the Panel confirm that the Council is correct to do so.

- 11.4 In relation to service, the Council respectfully requests that the Panel provide amended directions to the Council under section 164(d) of the LGATPA excusing it from serving affected submitters. Such a direction would also be consistent with clause 27 of the Panel's Procedures document.
- 11.5 Many of the letters or memoranda of the Council to the Panel will be procedural in nature, or will be in response to a direction from the Panel, and will, in some cases, arguably affect all 9,429 original submitters. A requirement for the Council to serve all affected submitters would be onerous, administratively burdensome, and costly for the Council.

12. CONCLUSION

- 12.1 The Council's positions on various matters are set out above. In relation to the request for directions, the Council respectfully requests the following:
- (a) The Council is excused from serving documents directly on affected parties and may rely on publication of documents on its or the IHP website as suitable service.

Dated 3 October 2014



K Anderson / C Faesenkloet

On behalf of Auckland Council

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

AND

IN THE MATTER of the Proposed Auckland Unitary Plan ("PAUP") and procedures established under the relevant legislation to address the submissions and further submissions processes in relation to the PAUP following notification of it by the Auckland Council

**MEMORANDUM OF COUNSEL ON BEHALF OF AUCKLAND COUNCIL
IN RELATION TO PROCEDURAL MINUTE NO. 9**

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1 The Auckland Council supports generally the content of Procedural Minute No. 9 (**Minute No. 9**), which sets out evidence exchange timetables for hearings before the Independent Hearings Panel, and will use its best endeavours to comply with those timetables.
- 1.2 However, the Council requests a departure from the evidence exchange timetable directions for the topics that proceed straight to hearing on or before 28 February 2015 for the reasons set out below.
- 1.3 The Council is currently developing its work programme for topics that will be scheduled for hearings from March 2015 onwards and will ensure that it will be able to meet the evidence exchange directions set out in Minute No. 9.

2. EVIDENCE EXCHANGE DIRECTIONS

2.1 Clause 56 of the Auckland Unitary Plan Independent Hearings Panel Procedures document, Version 1.0, dated 28 May 2014 provided:

Hearings Panel will direct the pre-circulation of all submitter evidence, expert evidence, and Council evidence no later than five working days prior to a hearing session or as otherwise directed for any particular hearing session by the Hearings Panel. These directions may include directions whether such pre-circulation shall be contemporaneous (i.e. all at the same time) or sequential (i.e. according to a timetable) and if sequential in what order and at what time any evidence from any submitter or expert or the Council must be provided.

- 2.2 The Council has developed its work programme for the remainder of the year, and up until February 2015 on the basis of the order of topics indicated by the Panel and the requirements in clause 56, to ensure that the Council would be in a position to provide the Panel with evidence 5-10 days prior to the relevant hearing.
- 2.3 Minute No. 9 sets out evidence exchange timetables for topics that are subject to expert conferencing and/or mediation, and for topics that proceed straight to hearing.
- 2.4 For topics that are subject to expert conferencing and/or mediation the Council (and all submitters) will be required to provide their primary evidence (both expert and non-expert) to the Hearings Panel for uploading to the Panel's website at least 15 working days prior to the hearing to which such evidence relates. The Council may have difficulty providing their evidence 15 working days prior to a hearing until 28 February 2015, and in circumstances where the Council is not able to provide their evidence, they would indicate this early to the Panel and the parties.
- 2.5 For topics that proceed straight to a hearing, Minute No. 9 requires the Council to provide its primary evidence to the Hearings Panel for uploading to the Panel's website at least 20 working days prior to the hearing to which such evidence relates. The Council considers that it is appropriate for the Council to provide its evidence first in relation to topics that proceed straight to hearing, so that submitters are on notice of the Council's position on submissions. However, the Council's programme until 28 February 2015 does not provide for the Council to provide its evidence 20 working days prior to the hearing.
- 2.6 The Council is also concerned that it would be required to provide evidence in some cases prior to a pre-hearing meeting taking place. With Topic 005 RPS Issues for example, the Council is required to provide its evidence on 30 September 2014, prior to the pre-hearing meeting on the topic where submitters may seek to amend the issues and/or the proposed pathways for those issues, as set out in the Panel's Parties and Issues Report. The Council considers that it would be more efficient for any evidence exchange timetable to begin at least 4-5 working days following a pre-hearing meeting, to ensure that the evidence addresses all relevant and live issues.
- 2.7 The Council respectfully requests alternate directions until February 2015, for topics that

proceed straight to hearing, as follows:

- (a) Auckland Council to provide its primary evidence to the Hearings Panel for uploading to the Panel's website at least **10 working days** prior to the hearing to which such evidence relates.
- (b) All submitters shall provide their primary evidence to the Hearings Panel for uploading to the Panel's website at least **5 working days** prior to the hearing to which such evidence relates. The evidence of other submitters is to address the Council's evidence, including any rebuttal of it, in their primary statements of evidence.
- (c) Any rebuttal evidence shall be provided to the Hearings Panel for uploading to the Panel's website at least **3 working days** prior to the hearing to which such evidence relates.
- (d) Any notice to cross-examine a witness shall be lodged with the Hearings Panel at least **2 working days** prior to the hearing at which the witness who is sought to be cross-examined will appear.

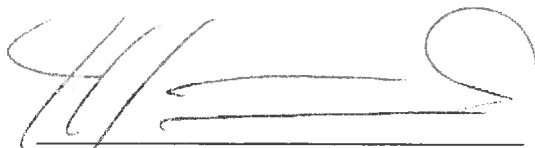
2.8 This alternate timetable will still provide sufficient time for rebuttal evidence, and for the parties to advise the Panel and other parties of an intention to cross-examine 2 working days prior to the hearing.

3. CONCLUSION

3.1 The Council requests that the evidence exchange timetable for topics that proceed straight to a hearing be amended in accordance with paragraph 2.7 above until 28 February 2015 for the reasons set out above.

3.2 The Council will ensure that it structures its work programme for 2015 in a way that will enable the Council to meet the evidence exchange directions set out in Minute No. 9.

Dated ¹⁴ 15 September 2014



J P Hassall / C L L Faesenkloet
On behalf of Auckland Council

**BEFORE THE AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL
AUCKLAND**

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

**JOINT MEMORANDUM OF COUNSEL SEEKING DIRECTIONS AS TO
EXCHANGE AND PRESENTATION OF EVIDENCE**

1 SEPTEMBER 2014

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MAY IT PLEASE THE PANEL:

1. This memorandum of counsel is filed on behalf of the clients listed below in response to requests from the Panel for suggestions as to how the proposed hearing process can be made more efficient and certain for participants, while ensuring that all parties receive a fair hearing and that the principles of natural justice are observed.
2. Many of the suggestions made below are as a result of counsels' experiences with Boards of Inquiry which, like the Hearing Panel, are required to operate under very tight timeframes.
3. In summary, counsel seek the following directions:
 - (a) That all *reports* prepared by facilitators of expert conferences as required by paragraphs 44 and 45 of the Auckland Unitary Plan Hearing Procedures, as at 28 May 2014 ("**Hearing Procedures**"), and all *reports* prepared by mediators as required by paragraph 49 of the Hearing Procedures, be uploaded to the website at least 25 working days prior to any hearing, and that the parties are encouraged to cross refer to and adopt the contents of those documents where appropriate (without needing to repeat that material in their primary evidence).
 - (b) That all *primary evidence* be provided to the Hearing Panel and uploaded to the Hearing Panel website at least 20 working days prior to any hearing.¹
 - (c) That all *rebuttal evidence* be provided to the Hearing Panel and uploaded to the Hearing Panel website at least 5 working days prior to any hearing. Any rebuttal evidence should be accompanied by a consolidated set of changes to the Unitary Plan provisions sought by that party.
 - (d) That all *notices to cross examine* be provided to the Hearing Panel 2 working days prior to the hearing.²

¹ The requirement that evidence be uploaded to the Hearing Panel website is consistent with the Auckland Unitary Plan Hearing Panel Procedures, Version 1.0, 28 May 2014, at paragraphs 27 and 58.

² While paragraph 72 of the Auckland Unitary Plan Hearing Panel Procedures, Version 1.0, 28 May 2014 states that "The Notice of Hearing for a hearing session will request that parties give notice to the Panel no later than 5 working days prior to the hearing session of any requests to

- (e) That all evidence (primary and rebuttal) should contain an executive summary of no more than 3 pages.
 - (f) That all evidence will be pre-read, but that, in accordance with paragraphs 67 and 70 of the Hearing Procedures, parties shall be entitled (if they wish) to present their executive summary and, with leave of the Panel, to take the Panel through any key visual material, maps or diagrams that might assist the Panel understand their evidence.
 - (g) That no party shall be entitled to produce additional evidence to the Panel that is not in either their primary or rebuttal evidence, other than as a result of a request from the Hearing Panel for further information (in accordance with paragraph 66(d) of the Hearing Procedures), and in particular, no party should take the opportunity, while presenting their executive summary, to seek to introduce additional material.
 - (h) That the Panel direct that the rule in *Browne v Dunn*³ shall not apply (ie there is no obligation to put your case to opposing witnesses through cross examination, and, if that does not occur, there will be no assumption made that any party agrees with the position put forward by any opposing party).
 - (i) That all substantial changes requested to the Unitary Plan provisions should be clearly described in original submissions or evidence and should not be produced for the first time in legal submissions or at the outset of the hearing.
4. Counsel appreciate that, for those hearings that have already been scheduled, the above suggested timeframes may need to be truncated. Further, Counsel acknowledge that throughout the process there may be situations where different timeframes may be required, and parties will of course be able to seek alternative timeframes from the Hearing Panel as the circumstances require.

cross-examine witness(es)", this memorandum seeks 2 working days based on the directions sought for rebuttal evidence to be exchanged 5 days in advance at paragraph 3(c). Alternatively, as has happened with other Boards of Inquiry, an initial notice to cross examination could be given after receipt of primary evidence, with it being updated following receipt and review of rebuttal evidence.

³ (1893) 6 R. 67, codified in section 92 of the Evidence Act 2006.

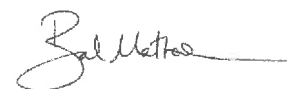
5. Those directions are sought because:
- (a) Witnesses and counsel for all parties, along with the Hearing Panel, are and will continue to be under considerable pressure to meet the commitments detailed in the provisional schedule that has been released. In order to be able to prioritise work appropriately, it is desirable for there to be standard directions in respect of the timing and form of evidence. Counsel have acknowledged that there may be particular instances where tighter or amended timeframes may be required (eg to accommodate hearings which have already been scheduled).
 - (b) In order for the primary evidence to be as focussed as possible, any caucusing statements or agreed mediation outcomes need to be provided (at least) one week in advance of filing that evidence. It would be desirable for the Panel to emphasise that witnesses can rely on that material without needing to repeat it in each of their statements.
 - (c) Although the Hearing Procedures indicate at paragraph 64 that supplementary or rebuttal evidence will only be accepted at a hearing session with leave of the Panel, where circumstances make it necessary for such evidence to be provided, there must, with respect, be an opportunity to provide rebuttal evidence. This was an issue with the most recent Board of Inquiry for the Tukituki plan change and Ruataniwha storage proposal, where there was no provision made for submitters to provide rebuttal evidence against other submitters (in that situation the submitters sought a wide range of relief, which will certainly be the case for these hearings). Upon request by counsel for Fonterra and DairyNZ, the Panel in that case acknowledged the need for that step and made provision for it accordingly. Unless that opportunity is provided as part of this process, the cross examination required will be lengthy and complex, as the opposing case would need to be put through cross examination rather than clearly set out in rebuttal evidence.
 - (d) Counsel agree with the proposition that notices of cross examination should be provided in advance, however, these cannot be provided until all evidence is received (including all

rebuttal evidence). We have allowed for this in the timetable sought above. All rebuttal evidence also needs to be provided sufficiently in advance of the hearing for it to be reviewed for the purposes of cross examination notices, and where notices are issued, to allow time for that cross examination to be prepared. Allowing sufficient preparation time will again assist with focussed cross examination. (As noted in footnote 2, an alternative is for cross examination notices to be given after exchange of primary evidence, but updated after receipt of rebuttal evidence.)

- (e) The form of evidence, and in particular the proposed executive summary and the opportunity to read this out, is of crucial importance to ensuring that the key points are emphasised and that witnesses (particularly inexperienced witnesses) are comfortable prior to any cross examination occurring. In addition, even expert witnesses find it difficult to summarise evidence "on the fly". For those reasons, we are proposing that all statements of evidence are directed to contain an executive summary, and that if parties wish to read out part of their evidence, then they are limited to their executive summary. Leave can be granted by the Panel for a witness to take the Panel to visuals, maps, diagrams etc, and certainly in the case of landscape/visual or urban design evidence that may be essential. From the perspective of natural justice however, it is imperative that, if parties have elected not to issue a cross examination notice (and potentially not attend the hearing) on the basis that they were comfortable with the nature of the evidence lodged by a party, then a party giving evidence cannot bolster their evidence or attempt to introduce substantive new evidence at the hearing itself. This occurred in the case of the Tukituki Board of Inquiry referred to earlier, where some witnesses took advantage of an opportunity to speak for 10 minutes and effectively introduced substantive new evidence. Unless the Panel is particularly vigilant on this point, counsel will have no choice but to attend most hearings and/or to issue cross examination notices to most witnesses "just in case" the witnesses endeavour to introduce new evidence at the hearing.

- (f) While the position with respect to the rule in *Browne v Dunn* is usually that taken in the Environment Court and in Boards of Inquiry, counsel nonetheless seek the comfort of a formal direction to that effect. This will ensure that cross examination can be very focussed. Again, this was a direction made in the Tukituki and Ruakura Boards of Inquiry.
- (g) The request that all substantive changes to the provisions of the Unitary Plan be clearly set out in original submissions or in the exchanged evidence may appear self evident. However, again, in some Boards of Inquiries, submitters have prepared complete "rewrites" of provisions at the time of presenting their case - well after all parties have exchanged evidence, and presented their cases. Parties need the comfort of knowing, when electing whether or not to appear or cross examine, that the provisions proposed will be substantially as set out in the earlier submissions or evidence. Counsel accept of course that minor refinements will (and ought to) be proposed during the hearing itself.
6. Counsel are available to attend a pre-hearing meeting or conference at short notice to elaborate upon any of the above matters raised.
7. A copy of this memorandum has been served on Auckland Council in accordance with the directions in Procedural Minute No. 5 (18 July 2014). As the directions sought in this memorandum will have implications for every submitter who elects to prepare and present evidence to the Panel, this memorandum has not otherwise been individually served on submitters. Instead, counsel respectfully request that formal service of this memorandum occur through the Hearing Panel website, in accordance with paragraph 27 of the Hearing Procedures.

Dated 1 September 2014



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