

## **Proposed Auckland Unitary Plan**

### **Closing Date for Submissions**

#### **Procedural Minute by Chairperson of Hearings Panel**

##### **Summary**

The Chairperson of the Hearings Panel on the proposed Auckland Unitary Plan will make a decision whether to waive the time limit for making submissions on the Plan in respect of all submissions lodged by 28 February 2014 as soon as possible after that date. This waiver process appears to be necessary because of statutory provisions in relation to the deadline for making submissions. In light of the relevant factors to consider in respect of such waivers and on the basis that there may be no evidence of any direct adverse effect on the interests of any other person (which cannot be and is not pre-determined by this procedural minute), the Chairperson indicates that he will be likely to grant such waivers.

##### **Background**

The Auckland Council publicly notified the proposed Auckland Unitary Plan for submissions on 30 September 2013. The period for submissions was stated in that notice to close on 28 February 2014.

Clause 5(3)(a) of Schedule 1 to the Resource Management Act 1991 (“the RMA”) provides that the closing date for submissions to a proposed plan shall be “at least 40 working days after public notification”. For the purposes of the proposed Auckland Unitary Plan, section 123(7) of the Local Government (Auckland Transitional Provisions) Act 2010 (“the LGTAPA”) provides that clause 5(3)(a) is “modified so that its closing date for submissions is 60 working days after notification”.

The obvious question is whether the modification simply replaces the 40 working days by 60, leaving the words “at least” in place, or whether the intention was to fix the submission period at 60 working days and remove the Council’s discretion to set a longer period. If the statutory setting of the time limit includes the words “at least”, then the Council’s setting of the closing date on 28 February 2014 is lawful; if not, then the closing date is set by statute on 14 January 2014.

The manner in which the time period has been amended is not clear and raises doubt. When considered with other provisions in both the LGTAPA and the RMA, there is room for argument about the legal position. The clearest solution would be clarify the amendment by some form of remedial legislation, but I am advised by officials of the Council and the Ministry for the Environment that this is not presently an available option. It would also be possible to seek a declaration from a court of competent jurisdiction (which might be the Environment Court or the High Court) as to the meaning and effect of section 5(3)(a) LGTAPA, but that might be difficult to

complete in sufficient time to be of value to participants in the submission process. In any event a court might confirm that the more limited period applies and leave everyone in the position they are in now.

An alternative option is to consider whether the issue of the time limit can be resolved procedurally. While section 123(9) of the LGTAPA states that the Council cannot extend the closing date for submissions, other provisions of the LGTAPA establish the Hearings Panel and confer on it (and on me as its chairperson) specific procedural powers. In particular, I have the power pursuant to section 165(c) of the LGTAPA to decide whether to accept any late submissions. Pursuant to section 135 and in respect of submissions received after the closing date for those submissions, I must decide whether to waive the requirement to provide the submissions before that closing date in respect of each submission. In making my decision, I “*must take into account:*

- (a) *the interests of any person who or that, in the chairperson’s opinion, may be directly affected by the waiver; and*
- (b) *the need to ensure there is an adequate assessment of the effects of the proposed plan; and*
- (c) *the stage of the Hearing at which the Hearings Panel is provided with the submissions.”*

My decision under section 135 would be final and there is no right of objection or appeal against it.

It is pertinent to note that as well as those specific factors as listed in section 135 of the LGTAPA, I would also have to act in a manner that was appropriate in light of the purposes of both the LGTAPA and the RMA.

It does not appear that I have any power to grant a general waiver in advance of the closing date for submissions (whatever date that may in fact be). While it does not appear to be necessary for any person to have to make an application for a waiver, it is clear, both in terms of the legislation and generally as a matter of law, that I cannot pre-determine how I might deal with any particular submission that may be “late”, given the requirement to consider each submission received in terms of the factors set out in section 135.

### **Issue**

On a cautious literal approach submitters could decide to lodge their submissions by 14 January 2014, even if those are in draft form, and then they may lodge a follow-up submission in more detail by 28 February 2014.

This is unsatisfactory for all concerned. It is well-known from experience in a wide range of submission processes that mid-January is a difficult time for such processes to close given that it is soon after the main holiday period when many people (including professional advisers) may not be able to give full attention to preparing and lodging formal documents. That is obviously why the Council stated that the period should not conclude until the end of February. A two-step submission process would create additional unproductive work for submitters, the Council and the Hearings Panel and so would be inefficient, confusing, and of no value to anyone. Such a process would be inconsistent with the participatory character of the planning

process under Schedule 1 to the RMA. Given those considerations such a process appears in a general sense and in absence of any particular countervailing circumstances to be one which would not promote the purpose of the RMA, which I summarise as being to enable people and communities to provide for their well-being in its various dimensions while addressing the effects of people's activities now and for the future.

I also note that even after the submission period closes, the statutory process still requires the Council to summarise the submissions received, advertise that summary for further submissions and then undertake a process of marshalling all the submissions into a sensible and efficient hearing order and prepare pre-hearing reports for the benefit of all participants (including the Hearings Panel) before any hearing takes place. Given all those requirements, it is unlikely that any hearings of submissions could commence prior to the fourth quarter of 2014. While there is a general duty under section 21 of the RMA on every person who does anything under the RMA for which no time limits are prescribed (which includes my power to accept late submissions) to do so as promptly as is reasonable in the circumstances, in the present context a delay in the closing date of submissions from 14 January to 28 February 2014 could not be seen as a significant or otherwise unreasonable factor.

In saying that, I am well aware that substantive issues will arise in submissions, both between submitters and the Council and between submitters themselves. I am anxious to ensure that this procedural issue does not exacerbate any of those substantive issues, but they cannot be predicted before the contents of all submissions are known and those submissions have been marshalled for hearing and each submitter has been given the opportunity to be heard in relation to them. At this stage I cannot see how a delay from 14 January to 28 February 2014 could affect any substantive issue.

### **Position of Auckland Council**

I am told by the Council that it wishes to maintain the date of 28 February 2014 as the closing date for submissions. In response to my query, the Council has given the Hearings Panel its unreserved and irrevocable undertaking that it will not oppose on the basis of time any submission that is lodged by 28 February 2014.

I have also been told that if, contrary to my understanding of section 135, it is necessary for an application for waiver to be made in respect of any or all submissions lodged after 14 January but by 28 February 2014, then the Council will make such an application to me in respect of all such submissions.

### **Procedural Indication**

In all these circumstances, it is appropriate for me to indicate that to assist in enabling the Auckland Unitary Plan submission process to proceed effectively and efficiently, and to enable people to make properly considered and prepared submissions in light of the purpose of the RMA, I will make a prompt decision on the status of submissions lodged after 14 January 2014 but by 28 February 2014. If at that stage there is no clear evidence before me of direct adverse effects on the interests of any

person resulting from the time when any submission was lodged, then, I can indicate now that I am likely to grant waivers to all submissions lodged by 28 February 2014.

### **Publicity**

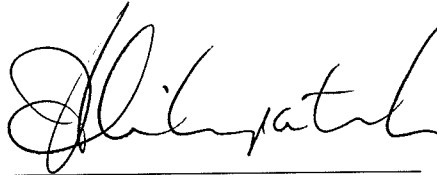
I understand that this procedural minute is to be publicised by the Council on its website and on the particular web-site in relation to the Auckland Unitary Plan, and disseminated to the news media.

Any person who considers that she or he may be adversely affected by the indication I have given should make their concerns known to me as Chairperson of the Hearings Panel as soon as possible. The appropriate contact details for the time being are:

The Chairperson  
Auckland Unitary Plan Hearings Panel  
c/- Ministry for the Environment  
PO Box 106 483  
Auckland 1150

e-mail: [info@mfe.govt.nz](mailto:info@mfe.govt.nz)

Dated at Auckland this 17<sup>th</sup> day of December 2013.



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David Kirkpatrick  
Chairperson, Hearings Panel for  
proposed Auckland Unitary Plan