

BEFORE THE INDEPENDENT HEARINGS PANEL

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

**MEMORANDUM OF COUNSEL FOR THE ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED AND THE ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**

SUBMISSION NUMBERS 4735 AND 4848

FINAL RECOMMENDATIONS ON THE RPS

21 JANUARY 2015

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MAY IT PLEASE THE PANEL

Introduction

1. This memorandum is filed on behalf of the Royal Forest and Bird Protection Society Inc (**Forest and Bird**) and the Environmental Defence Society Inc (**EDS**) in response to the Hearing Panel's letter dated 22 December 2014, the memorandum of counsel of Auckland Council (**Council**) and the letter to the Hearing Panel from Russell McVeagh both dated 16 December, and the memorandum of counsel of Richard Brabant dated 19 December 2014.
2. The above-mentioned correspondence relates to the question of how the proposed Regional Policy Statement (**RPS**) component of the Proposed Auckland Unitary Plan (**PAUP**) should be dealt with on completion of the PAUP hearings on the RPS provisions; specifically, whether a recommendation and decision on the RPS provisions can be left until the Hearing Panel makes its recommendation after hearing all submissions (on all parts of the PAUP) or whether interim or final recommendations on the RPS provisions should be made before hearings on the Regional and District Plan components of the PAUP continue.
3. Forest and Bird's and EDS's position on this issue is set out below.

Hearing Panel Recommendations on the Regional Policy Statement provisions

Forest and Bird and EDS Position and Reasons

4. Forest and Bird and EDS strongly agree with the general proposition that clarity and certainty are needed on the RPS component of the PAUP before mediation and hearings on the Regional Plan and District Plan components continue.
5. We support Richard Brabant's submission that the Hearing Panel should issue final recommendations in a two stage process, with the Hearing Panel issuing final recommendations on the RPS provisions prior to the hearings on the other components of the PAUP, as opposed to issuing interim recommendations. The reasons for this position are:
 - (a) New Zealand's planning instruments are required to adhere to a strict hierarchy. Regional and District Plans are required to give effect to higher-ranking documents, relevantly regional policy statements¹. The importance of maintaining this

¹ Sections 67(3)(c), 75(3)(c) Resource Management Act 1991.

hierarchical approach was recently reiterated by the Supreme Court². The role of a regional policy statement in this hierarchy is to provide a strategic overview of regional issues. Without this strategic overview in place an important part of the foundation for the regional and district plans will be missing.

- (b) Forest and Bird and EDS agree with the reasons set out in paragraph 7 of Mr Brabant's memorandum that an "interim" version of the RPS cannot be considered to be "operative" for the purposes of the RMA and the Local Government (Auckland Transitional Provisions) Act 2010 (**ATP Act**). Interim recommendations would not avoid the situation whereby the PAUP's Regional and District Plan provisions are required to give effect to the current operative Regional Policy Statement³ and only have regard to the RPS provisions in the PAUP alongside which they are being developed.
- (c) Interim recommendations as opposed to a fully operative RPS would effectively limit appeal rights. The remainder of the PAUP would be drafted and argued on the basis of giving effect to the interim recommendations. The PAUP process only allows for appeal once the Hearing Panel makes its final recommendations and the Council makes its decisions⁴. If only interim recommendations are made, appeals on RPS, Regional and District Plan provisions will be made contemporaneously, at the completion of the entire process. Where a party remained concerned about an RPS provision at that late stage, they would be faced with the reality that the remainder of the Plan had been drafted in reliance on that interim RPS provision. An appeal against an interim RPS provision may therefore also necessitate appeals against the further district and regional provisions (if the party is even able to identify all the provisions made in reliance on the RPS interim provision). This will in turn likely give rise to very complex issues around standing of parties. This may deter an appeal in the first place, particularly where a party is not extremely well-resourced. If an appeal was lodged, the chances of success would in our submission be much diminished, again given the downstream reliance on that interim provision. It would be a very complex and time-consuming task to identify all the District and Regional Plan provisions that had been made in reliance on an interim RPS provision, and then amend them somehow through the appeals process.

² *Environmental Defence Society Inc v King Salmon Company Ltd* [2014] NZSC 38, [2014] NZRMA 195 at [10]-[11].

³ Operative on 31 August 1999.

⁴ Sections 156 and 158 Local Government (Auckland Transitional Provisions) Act 2010.

- (d) With respect, it is not certain that all submitters would respect interim recommendations. It is possible that some submitters would continue to pursue proposed provisions contrary to interim recommendations on the basis that the RPS provisions could possibly still be amended as part of the PAUP appeals process (notwithstanding our previous submissions on the difficulties involved with such an appeal).
6. Making recommendations and decisions on the RPS now, and allowing any appeals to be made in the short term rather than at the completion of the entire AUP process, will clarify the RPS content in a way that will allow the Regional and District Plan provisions to be developed within a lawful policy framework.
7. Forest and Bird and EDS acknowledge that there is likely to be a delay as a result of a two stage process. However it is our submission that it is necessary to have an up to date operative RPS for Auckland to provide certainty to submitters, the Council and the Hearing Panel. Further, having the PAUP RPS provisions operative will ultimately save time by ensuring that parties only advocate district and regional provisions that accord with the RPS. If the PAUP's RPS is not final and operative, parties would have to put forward multiple arguments in the alternative responding to the different versions of the relevant RPS provisions. The hearing process would become unreasonably complicated.

Legal Basis for issuing final recommendations on the RPS provisions in the short term

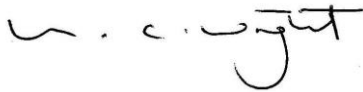
8. Section 144 of the ATP Act requires the Hearing Panel to make its recommendation to Council after it has finished hearing submissions on the PAUP. It does not require the Hearing Panel to have finished hearing "all" submissions before recommendations are made. Shortly the Hearing Panel will have finished hearing submissions on the RPS component of the PAUP. It is submitted that section 144 leaves the door open for the Hearing Panel to issue final recommendations on the RPS component of the PAUP as the first chapter of a single report when it has finished hearing submissions on the RPS provisions.
9. As only one report is being released by the Hearing Panel the overall deadline for the provision of the Hearing Panel's report would remain⁵.

⁵ Section 146 and 147 Local Government (Auckland Transitional Provisions) Act 2010

10. It is arguable that under section 148 of the ATP Act the Council would not have to provide its decision on the RPS chapter of the Hearing Panel's report until 20 working days after receipt of the full report. The Council would therefore have to agree to issue its decision on the RPS chapter within 20 working days of receiving the Panel's recommendations.
11. This alternative would avoid the need to make recommendations to amend the ATP Act.

Conclusion

12. Forest and Bird and EDS submit that the Hearing Panel should issue final recommendations on the RPS component of the PAUP as the first chapter of a single report.



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