

**BEFORE THE AUCKLAND UNITARY PLAN 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 Topic 009: RPS Issues

**MEMO OF PAMELA ELAINE MCMILLAN FOR LEE W AND SUSAN C SHORT
(FURTHER SUBMISSION NO. 2736) IN RELATION TO TOPIC 009**

Dated: 25 November 2014



Commercial & Public Law Ltd
Level 5, Wakefield House
90 The Terrace
PO Box 10388
Wellington 6140

Tel +64 4 815 8050
Fax +64 4 815 8039

Solicitor: Pam McMillan

(pam.mcmillan@franksogilvie.co.nz)

Memo for Topic 009

1. We attended the Hearing on 20 November, for Topic 009. The Panel asked for electronic copies of the two hand-outs we had. These are provided.
2. A question from a member of the panel was “what can the panel do on a mistake?” This was in reference to the Auckland Council’s mistake in making the purple circles on the Overlay map for sites and places of value to Mana Whenua 200m wide rather than 100m wide (in paragraphs 32 to 37 of our legal opinion). The purpose of this memo is to provide further information in answer to this question.
3. At paragraph 37 of our opinion we say the mistake could be corrected by the Council on application to the Environment Court under s 292 of the RMA.
4. Dr Palmer who was heard with us recommended the Panel take interim measures to ensure the policies and rules in the proposed plan regarding the 3600 sites and places of value to Mana Whenua are not given effect by the Council until the Hearings process is complete. He cited sections 124, 139, 142 and 144 of the Local Government (Auckland Transitional Provisions) Act 2010. These sections are at the end of this memorandum for your convenience.
5. Under s 124 the Panel can direct the Council to amend or vary the proposed plan before the Council publicly notifies its decisions on the recommendations of the Panel. The Panel can do this if satisfied the variation is required:
 - a. To give effect to a provision in a national policy statement, or New Zealand coastal policy statement; or
 - b. To correct a substantial error in the plan.
6. The Panel is also able to direct the Commission to provide evidence (s 139), or prepare reports (s 142). The recommendations made by the Panel do not need to be limited to the scope of the submissions (s 144(3)).

7. In and with submissions provided by and on behalf of Susan and Lee Short, Democracy Action, Kent Baigent, Heather Metcalfe and Audrey Ellis is evidence of:
 - a. The Council admitting the extent of the purple circles on the overlay map for the sites and places of value to Mana Whenua was a mistake;
 - b. The Council admitting that the value to Mana Whenua of each of the 3600 sites was not ascertained or even estimated prior to notification;
 - c. The meaning of the 'precautionary approach' from the NZ Coastal Policy Statement and how it should not be used for the sites and places of value to Mana Whenua.
8. Our submissions drew attention to the protections (procedural and substantive) for property rights found in the heritage designation provisions of the RMA, and the Heritage New Zealand Pouhere Taonga Act 2014, to contrast with the proposed plan's casual application of contentious new requirements to an unknown number of properties.
9. The errors revealed are substantial for the purposes of s 124(5)(a)(iii) in their financial impact, in the uncertainty they create, in the loss of confidence by submitters and those who have not submitted on the fairness and integrity of the proposed plan and those promoting it.
10. The Council could apply to the Environment Court under s 292 of the RMA to remedy the mistakes and uncertainties in the proposed plan. For our clients we have asked the Council to do that, without any indication that it is inclined to do so.
11. The Panel could take the following interim steps prior to making its final recommendations:
 - a. Direct the Council to provide evidence about the mistake regarding the purple circles;

- b. Direct the Council to provide a report on heritage value and cultural values of each of the 3600 sites;
 - c. Recommend the Council remove the Overlay map for all sites and places alleged to be of value to Mana Whenua from the proposed plan which have not been already;
 - d. Recommend the Council remove any policies substantially or rules in the proposed plan which derive from taking a precautionary approach to sites and places claimed to be of value to Mana Whenua which claims have not been properly established, let alone tested.
12. The Council's indifference to the costs imposed on property owners by its casual indifference to accuracy, and the absence of any intention to assist with an urgent remedy is illustrated by advice given by Dr Roger Blakeley at a public meeting on 18 October when he said:

"What we're doing, as I've said, we're working through those 3600 sites. I think we said we've gone through 2,000 of them. We will be in a position when this issue comes before the Independent Hearings Panel to indicate to them and those, which we believe we have identified that there is no need for them to be subject to that layer. What the Independent Hearings Panel chooses to do with that information at that time, we will have to wait and see. They do have the ability to make recommendations before July 2016. If they do make a recommendation, then the council has to respond to that within 20 working days...."

Through the hearings process, if either the Council has identified or mana whenua, because there are also mana whenua looking at these various sites to give feedback on whether or not they think they should be included, or whether you as a land owner or affected party at the hearings process, the Independent Hearings Panel will hear all of those views and they could quite easily direct the Council to remove schedule of sites of value, as they equally can direct Council to take sites of the schedule of historic heritage buildings or archaeological sites. That is the role of the

Independent Hearings Panel once they have heard the various views of a particular issue.”

Pamela Elaine McMillan

25 November 2014

Appendix: Local Government (Auckland Transitional Provisions) Act 2010

1. The relevant sections of the Local Government (Auckland Transitional Provisions) Act 2010 follow: [our emphasis]

[124 Restriction on amendments or variations to Auckland combined plan

(1) This section and section 125 specify the only ways in which the Auckland combined plan may be amended or varied **before the Auckland Council publicly notifies its decisions on the recommendations of the Hearings Panel** under section 148(4)(a).

(2) The Auckland Council may amend the proposed plan—

(a) under any provision of the RMA or another enactment that provides for amendments to be made to a proposed regional policy statement or proposed plan without using the process in Schedule 1 of the RMA; or

(b) as a result of the Council's decisions on the recommendations of the Hearings Panel.

(3) If the Auckland Council amends the proposed plan under a provision described in subsection (2)(a), the Council must—

(a) give notice of the amendments to the Hearings Panel; and

(b) make the amendments available for inspection on its Internet site and at its offices; and

(c) if the provision requires public notice of the amendment, give public notice in accordance with the provision.

(4) The Auckland Council may vary the proposed plan in accordance with a direction of the Hearings Panel.

(5) The Hearings Panel may direct the Auckland Council to vary the proposed plan if the Panel is satisfied that—

(a) the variation is required—

(i) to give effect to **a provision in a national policy statement, or New Zealand coastal policy statement**, that affects the proposed plan; or

(ii) to give effect, in the provisions of the proposed plan comprising the regional plan or district plan, to the provisions of the proposed plan comprising the regional policy statement; or

(iii) to correct a substantial error in the proposed plan; and

(b) the Panel is able to deal with the variation as provided in subsection (7) before the deadline for providing its report under section 146 or 147.

(6) The Auckland Council must deal with the variation under section 125.

(7) The Hearings Panel must deal with the variation under sections 128 to 145 as if the variation were the proposed plan, except that in section 145(1)(d) the proposed plan includes the variation.

(8) Clause 16B(1) and (2) of Schedule 1 of the RMA apply to the variation, and the variation must be merged in and become part of the proposed plan in time for the Hearings Panel's report under section 144(5) to provide recommendations on the proposed plan as varied.

(9) In sections 148 to 159, references to the proposed plan include references to the variation.]

[139 Directions to provide evidence within time limits

(1) The Hearings Panel **may direct a submitter or the Auckland Council to provide briefs of evidence** in writing or electronically to the Panel before a hearing session.

(2) The Hearings Panel may direct a submitter or the Auckland Council, if the submitter or the Council is intending to call expert evidence, to provide briefs of the evidence in writing or electronically to the Hearings Panel before a hearing session.

(3) The submitter or the Auckland Council must provide briefs of evidence under this section in the time frame specified by the Hearings Panel.

(4) The Hearings Panel must give electronic notice to any relevant submitters of briefs of evidence that are made available under section 143.]

[142 Hearings Panel may commission reports

(1) The Hearings Panel may, at any time during the Hearing, **require the Auckland Council**, or commission a consultant or any other person, to **prepare a report on—**

(a) 1 or more submissions; or

(b) **any matter** arising from a hearing session; or

(c) **any other matter** that the Panel considers necessary for the purposes of the Panel making its recommendations.

(2) The report does not need to repeat information included in any submission.

(3) Instead, the report may—

(a) adopt all of the information; or

(b) adopt any part of the information by referring to the part adopted.

(4) The Hearings Panel—

(a) may consider a report prepared under subsection (1) at the hearing session or when making its recommendations, or both; and

(b) must require the Auckland Council to make the report available for inspection on its Internet site and at its offices.

(5) The Hearings Panel may request and receive, from a person who makes a report under this section, any information and advice that is relevant and reasonably necessary for the Panel to make its recommendations under section 144.]

[144 Hearings Panel must make recommendations to Council on proposed plan

- (1) The Hearings Panel must make recommendations on the proposed plan after it has finished hearing submissions, including any recommended changes to the proposed plan.
- (2) The recommendations must include recommendations on any provision included in the proposed plan under clause 4(5) or (6) of Schedule 1 of the RMA, as applied by section 123 of this Part (which relate to designations and heritage orders).
- (3) However, the Hearings Panel—
 - (a) **is not limited to making recommendations only within the scope of the submissions made on the proposed plan;** and
 - (b) may make recommendations on any other matters relating to the proposed plan identified by the Panel or any other person during the Hearing.
- (4) The Hearings Panel must not make a recommendation on any existing designations or heritage orders that are included in the proposed plan without modification and on which no submissions are received.
- (5) The Hearings Panel must provide the recommendations, in a report, to the Council.
- (6) The report must include—
 - (a) the Panel's recommendations, and identify any recommendations that are beyond the scope of the submissions made on the proposed plan; and
 - (b) the Panel's decisions on the provisions and matters raised in submissions; and
 - (c) the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
 - (i) the provisions of the proposed plan to which they relate; or
 - (ii) the matters to which they relate.
- (7) The report may also include—
 - (a) matters relating to any consequential alterations necessary to the proposed plan arising from submissions; and
 - (b) any other matter that the Hearings Panel considers relevant to the proposed plan that arises from submissions or otherwise.
- (8) To avoid doubt, the Hearings Panel is not required to make recommendations that address each submission individually.]