

# AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

*Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau*

## Topics 080/081 – Rezoning and Precincts

### **Directions of Chairperson in relation to Auckland Council’s preliminary position on residential zonings and issues of scope and waivers for late submissions**

I refer to:

1. Letter from Mark Thomas dated 18 December 2015;
2. E-mail from Clare Burlinson dated 21 December 2015;
3. Memorandum of counsel for and proposed submission of Ross Newman dated 22 December 2015;
4. Memorandum of Auckland 2040 dated 22 December 2015; and
5. Memorandum of Housing New Zealand Corporation dated 13 January 2016.

Copies of these documents are available on the Panel’s website.

These communications all relate to the Auckland Council’s announcement<sup>1</sup> on or about 17 December 2015 of its “current preliminary position” on residential zonings in the proposed Auckland Unitary Plan (**PAUP**). They raise concerns about the extent to which the Council’s proposals are within the scope of submissions made on the PAUP and the potential effect on persons who have not already made submissions on the PAUP. Mr Thomas seeks generally that the Panel accept late submissions on the Council’s proposals. Ms Burlinson seeks that the Panel reject the Council’s out-of-scope proposals for Westmere. Mr Newman seeks a waiver for his late submission in relation to his property in Remuera and leave to lodge evidence. Auckland 2040 seeks interim guidance from the Panel as to the extent to which the Panel may use its ability to make recommendations on out-of-scope submissions in these circumstances. In response to Auckland 2040, Housing New Zealand submits that the scope for amended residential zonings is not as limited as the Council’s position indicates.

Acknowledging the general nature of Mr Thomas’ request and the ambit of the concerns raised by Auckland 2040, I am treating the positions of Ms Burlinson and Mr Newman as representative of the positions that potentially many landowners and occupiers would be in, rather than being confined to their own properties.

Given current hearing pressures, I will not traverse in detail the legal background to the issues of scope to make changes to a notified plan or the exercise of the power to grant waivers for late submissions. Those who seek some background on the issue of scope may wish to read the decisions of the High Court in *Palmerston North City Council v Motor*

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<sup>1</sup>Documents relating to the Council’s announcement may be obtained at:

<http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/plansstrategies/unitaryplan/Pages/preliminaryzoningmaps.aspx>

*Machinists Ltd* [2013] NZHC 1290 and the Environment Court in *Environmental Defence Society Inc v Otorohanga District Council* [2014] NZEnvC 70. It is important to note that the legal position set out in those decisions is altered in relation to the Panel's powers by section 144(5) of the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**), which provides that the Panel is not limited to making recommendations only within the scope of submissions on the PAUP. The issue of waivers for late submissions is governed by sections 135 and 165(c) LGATPA and is addressed in Procedural Minutes 1 – 4 issued by the Panel.

Relevant factors in considering waivers for late submissions are set out in s135(3) LGATPA. I must take into account:

- (a) The interests of any person who or that, in my 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.

In relation to those matters:

1. Directly affected persons would include every person with an interest in land where the zoning as proposed in the notified PAUP would change if the Council's position were accepted. Some of these people will already be involved in the hearing process as submitters on issues relating to the nature and extent of the residential zones and some will not. I must also consider the effects that might result from other submissions which are already before the Panel, some of which are referred to in Housing New Zealand's response to Auckland 2040.
2. The Council's current preliminary position does not amount to a variation to the PAUP and so does not alter the starting point for the Panel's consideration of submissions and its recommendation on the most appropriate zoning provisions in the Plan. Even for the zoning changes which are within the scope of submissions, the Panel is not obliged to accept and recommend in favour of the Council's position ahead of that of any other submitter. The Panel's recommendations will be based on what the Panel considers are the most appropriate provisions to be included in the Plan.
3. The issues of scope are complex and cannot be determined at this preliminary stage before hearing from existing submitters (including the Council).
4. I expect that existing submitters (including Auckland 2040 and Housing New Zealand) will present submissions as to both the scope and the merits of a range of residential zonings all over the region, so that the effects of various residential zonings will be able to be adequately assessed.
5. In relation to the stage of the Hearing, if a general waiver were granted to allow late primary submissions to be lodged in relation to the Council's announcement of its current preliminary position, then the Panel would be very unlikely to be able to make

its recommendations to the Council by the deadline imposed by section 146 LGATPA (22 July 2016). Any extension of the hearing process, while potentially assisting those who may now wish to make submissions, would also adversely affect those who have already made submissions by delaying the conclusion of this process and making the Plan operative.

6. The present process is not the only one available to deal with any rezoning proposals: once the PAUP is made operative, it may be changed in accordance with Schedule 1 to the RMA.

Overall, these considerations stand against the grant of waivers for late submissions and also raise the question whether the current process is the most appropriate one in which to consider all aspects of the Council's current position. For those reasons I refuse to grant waivers either generally, as sought by Mr Thomas, or in the particular case of Newman. I also refuse to reject the Council's material as to its position on residential zonings at this preliminary stage.

I will now briefly address the request by Auckland 2040 for guidance on how the Panel will deal with out-of scope submissions. The Panel has a general power to consider out-of-scope submissions (s144(5) LGATPA), but it must also adhere to a hearing procedure that is appropriate and fair in the circumstances (s136(4)(a) LGATPA). Even where a discretion is expressed in unlimited terms, the general law requires a statutory body which makes decisions that could affect people's rights and interests to act in accordance with the principles of natural justice.

It is important to bear in mind that the Council's proposals are no more than its current preliminary position. Having notified the PAUP and then lodged its own submission on it, the Council is in no different position to other submitters at this stage in the process. In presenting its case in support of its submission it may advance out-of-scope matters, but in doing so it must satisfy the Panel that it would be appropriate for that matter to be the subject of an out-of-scope recommendation. The Panel will be exploring this in detail when the Council presents its case in relation to these out-of-scope submissions.

Accordingly:

1. The requests for waivers for late submissions, both general and specific, are refused.
2. The request that the Council's current preliminary position be rejected at this stage is also refused.



Judge David Kirkpatrick  
Chairperson  
Auckland Unitary Plan Independent Hearings Panel

14 January 2016

