

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of an application to **AUCKLAND
COUNCIL** by **KARAKA AND
DRURY LIMITED** for a private
plan change (PC51) to the partly
operative Auckland Unitary Plan
to rezone 33.65 hectares of land
in Drury West

**MEMORANDUM OF COUNSEL FOR KARAKA AND DRURY LIMITED
OPPOSING THE FILING OF LATE EVIDENCE**

Introduction

1. On Friday, 29 October 2021 (at 4.36pm), legal counsel for Kainga Ora ("KO") and the Ministry of Housing and Urban Development ("MHUD") filed further diagrams for Mr Mentz' evidence. No leave was sought on the basis that the evidence was not new and diagrams would merely assist to explain Mr Mentz' evidence in chief. The memorandum stated:

"1.3 *Kāinga Ora and HUD understand the limitations in presenting further evidence at this stage in the proceeding, however to assist the Commissioners Mr Mentz has presented 2 additional diagrams that he wishes to speak to at the hearing.*

1.4 *In my submission that evidence is explanatory in nature and merely conveys in diagrammatic terms what would otherwise need to be explained by Mr Mentz. Providing a diagram therefore assists with an efficient hearing process, particularly given the need to proceed with the hearing through the use of AVL. Because of that, no formal application for leave is considered necessary.*

(Our emphasis.)

Purpose and scope of memorandum

2. The purpose of this memorandum on behalf of Karaka and Drury Limited ("KDL") as the proponent of PC51 is to object to the filing of this material on the basis that the evidence filed is not merely explanatory but represents new evidence that calls for a substantive response.
3. To that end, KDL:
 - (a) Requests that Mr Mentz' further evidence be excluded, for reasons of natural justice and fairness; or
 - (b) If the evidence is allowed in for the purpose of the hearing, submits that this can only be done on the basis that Messrs Cullen and Munro are able to prepare and file supplementary evidence in response.

4. In doing so, it is proposed to address:
 - (a) The Panel's directions.
 - (b) Why Mr Mentz' evidence is considered to be new.
 - (c) The grounds for excluding the evidence.
 - (d) The outcome sought.

The Panel's directions

5. The filing of the new evidence is directly contrary to the Panel's direction dated 9 September 2021, which stated:

"5. *At the time the hearing was postponed, the evidence exchange had been completed (as set out in our Direction dated 31 March 2021). In this respect, we set out in our 2 September 2021 Direction:*

The Applicant has now filed its reply evidence. On this basis the evidence exchange process for PC51 is completed. The only further material we are expecting/accepting from parties prior to the re-convened hearing is the Applicant's and any Submitters' legal submissions.

6. *Accordingly, we are not seeking further evidence from any party. If any party seeks to file additional evidence, a waiver will need to be sought from the Hearing Panel addressing the matters set out in section 37 and 37A of the RMA.*

(Our emphasis.)

Why the evidence is considered to be new

6. KDL's relevant witnesses, Messrs Cullen and Munro, have advised counsel that they consider that Mr Mentz' diagrams represent new evidence, rather than an explanation of his evidence in chief. Their view is:
 - (a) That the diagrams already contained in Mr Mentz' evidence are sufficient to explain that evidence, as they addressed in their respective rebuttal statements.
 - (b) Having carefully examined Mr Mentz' new diagrams, that these represent a fundamentally new centre option than those addressed by Mr Mentz in his evidence.
7. In particular, the centre option shown in Mr Mentz' new diagrams is materially different from those addressed in his evidence, in terms of:
 - (a) Its layout and structure;
 - (b) Its relationship with bus services using the Jesmond Road frequent transit network;
 - (c) Its dependence on 'wider' networks and road alignments; and
 - (d) The wider implications it would have for catchment yield.
8. Accordingly, if Mr Mentz' new diagrams are admitted at this late stage in proceedings, Messrs Cullen and Munro would need (and must be given the opportunity) to file supplementary evidence in response.

Grounds for exclusion

9. In light of the above, KDL seeks that the new diagrams be excluded on the basis that:
- (a) For the reasons outlined above, it is new evidence which is being filed more than two months late, having regard to the Panel's directions on evidence exchange dated 31 March 2021. PC51 was notified on 27 August 2020, with submissions closing on 11 December 2020. Mr Mentz' evidence was filed (late), on 25 August 2021. As such, Mr Mentz had more than sufficient time to prepare all the diagrams he needed to "explain" his evidence in chief, at the time that evidence was filed.
 - (b) Counsel for KO and MHUD has provided no explanation as to why the new diagrams were not able to be prepared in time to be filed with Mr Mentz' evidence, or within the more than two months that has passed since.
 - (c) KDL would be prejudiced by the introduction of the evidence as it would be necessary to prepare and file supplementary evidence in response, less than three days out from the hearing commencing.
 - (d) Counsel for KO and MHUD has not sought any waiver from the Panel.

Outcome requested

10. On the basis of the above commentary, it is respectfully submitted that:
- (a) Mr Mentz' new plans represents late evidence the admission of which is opposed and should be excluded.
 - (b) The Panel has sufficient jurisdiction to exclude the evidence in accordance with section 39(1) of the Resource Management Act 1991, on the basis that this is required in order to maintain a hearing procedure that is appropriate and fair in the circumstances.
11. KDL respectfully requests that the Panel:
- (a) Issues a direction that the evidence be excluded; or
 - (b) Alternatively, issues directions that facilitate further evidence being filed before the commencement of the hearing.
12. We thank the Panel for its attention to this matter and are able to address the issue of Mr Mentz' new evidence further at the start of the hearing, if required.

Dated 1 November 2021



S J Berry / H C Andrews
Counsel for Karaka and Drury Limited