AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Report to Auckland Council
Hearing topic 004
General rules

July 2016

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Contents

1. Hearing topic overview

1.1. Topic description

Topic 004 addresses the regional coastal plan, regional plan and district plan provisions of the proposed Auckland Unitary Plan relating to:

Topic	Proposed Auckland Unitary Plan reference	Independent Hearings Panel reference
Topic 004 – Chapter G General Provisions	G General provisions	C General rules

Under the Local Government (Auckland Transitional Provisions) Act 2010, section 144 (8) (c) requires the Panel to set out:

> 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.

This report covers all of the submissions in the Submission Points Pathways report (SPP) for this topic. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) and, while individual submissions and points may not be expressly referred to, all points have nevertheless been taken into account when making the Panel's recommendations.

1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

The Panel recommends that there should be a section containing general rules applicable to the whole of the regional coastal plan, the regional plan and the district plan. The Panel recommends that Chapter G as notified should be substantially amended to focus on general rules that are appropriate to resource management plans.

1.3. Overview

Chapter G as notified was in two sections:

i. administration; and

ii. general rules and special information requirements.

The Panel recommends that the administration section be deleted, with some parts of it relocated and rewritten as general rules. The Panel also recommends that the information requirements be relocated into the relevant sections of the Plan to which they relate. They should also be substantially reduced in length, detail and complexity, placing greater reliance on the relevant statutory process provisions and on greater use of guides for applicants outside the Unitary Plan.

The Panel recommends a number of amendments to the general rules, as set out below.

i. Delete the administration section and provide user information in separate documents outside the Plan, so that it can be kept up to date and presented in more accessible formats.

ii. Move the bundling provision from the administration section to be a general rule and amend it to delete the test of whether the activities are 'inextricably linked' and replace that with a test of whether the effects of the activities overlap.

iii. Move the provision for activities on sites with multiple zones from the administration section to be a general rule, and amend it to clarify how it will apply in a range of circumstances.

iv. Clarify the rule which states how activity status is determined where more than one layer (overlay, zone, Auckland-wide or precinct provision) applies, so that overlays generally take precedence unless otherwise specified, and precincts take precedence over zones and Auckland-wide rules unless otherwise specified.

v. Make activities not otherwise provided for in the Plan discretionary rather than non-complying activities.

vi. Clarify that the assessment of restricted discretionary activities is limited to matters stated in the Plan.

vii. Provide for regard to be had to relevant standards for permitted activities as part of the context of assessment of effects on the environment when considering applications for discretionary or non-complying activities.

viii. Include new rules to support the format of activity tables as recommended and to clarify the standard approach to the interpretation and application of rules with numerical limits or the treatment of fractional amounts.

ix. Delete the rule that restricted discretionary activities will be considered on a non-notified basis and without obtaining written approvals from affected persons, and provide that the standard provisions in the Resource Management Act 1991 relating to notification are to apply unless the Plan otherwise specifies.

x. Include a rule requiring that specific consideration be given to certain persons or organisations when deciding whether any person may be affected in relation to any application for consent.

xi. Move accidental discovery rules to the land disturbance/earthworks sections and simplify them.

xii. Delete framework plan/consent provisions.

xiii. Substantially simplify requirements for information accompanying applications for resource consent, deleting the detailed requirements and relying on the specified provisions of the Resource Management Act 1991.

xiv. Delete requirements for design statements, cultural impact assessments and integrated transport assessments which can all be done by way of the assessment of effects on the environment.

xv. Rewrite the general rules to focus each rule on a specific requirement and use the same language as used in the Resource Management Act 1991.

xvi. Re-order rules to follow an assessment logic from the more general considerations to the more particular.

xvii. Relocate all general rules to Chapter C as a consequence of restructuring the Plan so that objectives, policies and rules for most topics are located together.

1.4. Scope

The Panel considers that the recommendations in 1.2 and 1.3 above and the changes made to the provisions relating to this topic (see 1.1 above) are within scope of submissions. Several submitters made repeated submissions seeking that the Plan be simplified and clarified. The Panel considers that general rules, appropriately drafted, can assist in making the Unitary Plan easier to use by providing overall direction about how the provisions of the Unitary Plan generally work.

For an explanation of the Panel's approach to scope see the Panel's Report to Auckland Council – Overview of recommendations July 2016.

1.5. Documents relied on

Documents relied on by the Panel in making its recommendations are listed below in Section 12 Reference documents.

2. Administration

2.1. Statement of issue

Whether the general rules should contain a section on administration.

2.2. Panel recommendation and reasons

The administration section was acknowledged by the Council at the hearing of submissions to consist of procedural information and guidance rather than rules. Submissions raised issues concerning the appropriateness and accuracy (in both legal and substantive terms) of the guidance.

There can be little doubt that many people are likely to require assistance in using the Unitary Plan. The issue is whether this section of the Plan is the best method of providing that assistance.

Legally, there is no requirement for a regional policy statement or a regional or district plan to include administrative guidance. Equally, there does not appear to be anything in the Resource Management Act 1991 or in case law that forbids the inclusion of such material. The inclusion of such material in the Plan would mean that any amendment to it would require a change under Schedule 1 to the Resource Management Act 1991.

Logically, putting this information in the Plan means that a user must already have access to the Plan and some ability to navigate to it. It is not located at the front or head of the notified Plan, where one might expect most users to look for such introductory material. The location of this material in Chapter G, within the section of the notified Plan dealing with rules, suggests that these provisions may have the character of rules or at least a kind of advice on the meaning and effect of the rules or the procedural provisions in the Resource Management Act 1991.

Practically, little if any of the material in this section is likely to be referred to by people with training in resource management matters. The Council already produces a great deal of information and guidance about the planning process and the use of the Plan, both on its website and in printed brochures and guides. This is appropriate and is more likely to be the sort of information which an inexperienced user would look for.

As with the general information included in Chapter A as notified, the Panel considers that there are other and better ways in which information about the administration of the Plan can be made available in accessible and understandable ways that can be kept up to date without requiring changes to the Plan.

For those reasons, the Panel recommends that most of this section be deleted. Parts of this section dealing with basic information requirements, multiple applications (bundling), and applications across zone, overlays and precincts have been relocated to a general rules section and are discussed below.

3. General rules

3.1. Statement of issue

Whether the Unitary Plan should contain general rules.

3.2. Panel recommendation and reasons

The general rules as notified dealt with the following matters:

- G2.1 Determining activity status
- G2.2 Activities not provided for
- G2.3 Rule infringements for permitted, controlled and restricted discretionary activities
- G2.4 Notification
- G2.5 Accidental discovery protocols
- G2.6 Framework plans
- G2.7 Information requirements for resource consent applications

These are matters that can arise with any application for any activity. Having general rules helps provide a consistent framework for dealing with applications and avoiding duplication (and the risk of inconsistency) by not repeating standard rules throughout the Plan.

The Panel accordingly recommends that there be a section for general rules. However, having considered the submissions and reviewed the notified provisions in detail, the Panel considers that they would be clearer and more useful if they were re-ordered to follow the usual sequence of an application.

The Panel also considers that certain matters that were previously set out as information in the administration section should be made into rules in this section. In particular, determining the overall status of an activity and whether an application for more than one activity should be assessed on the basis that all activities are bundled together are very important matters. The Plan should clearly state how the Council will proceed, so that applicants and submitters know this at the outset.

The Panel recommends moving the accidental discovery protocols to the sections on land disturbance, where they are recommended to be simplified (see the Panel's Report to Auckland Council – Hearing topic 041 Earthworks July 2016). The Panel recommends deleting the provisions for framework plans, as discussed in detail both in the Overview Report and in section 9 below.

There are also some additional rules to address certain procedural points which were previously in the administration section and which the Panel considers will assist in providing clear statements of what is required to be done by applicants and the Council.

The general rules address matters that were in the administration section relating to the application of these rules and the requirement not to contravene a rule without the necessary consent or other authorisation under the Resource Management Act 1991, reflecting the requirements of Part 3 of the Resource Management Act 1991.

The four rules relating to information requirements repeat key statutory requirements from section 88 and Schedule 4 in the Resource Management Act 1991. They include rules requiring an application to cover all matters for which consent is required and provide details of any staging that is intended. There is a note to direct users to guidance on the Council's website and at Council offices. The issues relating to information requirements are discussed further below.

The rule relating to deferral of an application pending additional consents is based closely on section 91 of the Resource Management Act 1991. While its existence in the statute might be sufficient, the Panel recommends its inclusion here so that users of the Plan who may be unfamiliar with the statutory requirements have this brought to their attention.

The rules relating to the assessment of restricted discretionary, discretionary and non-complying activities are consequential additions resulting from the Panel's consideration of submissions in a number of topics raising concerns about the broad approach indicated in the administration section as to how the Council might treat such applications. The first rule requires consideration of all relevant objectives and policies, including those in Plan layers (overlays, zones, Auckland-wide and precincts), which is required by section 104(1)(b) of the Resource Management Act 1991 and is consistent with good practice. The second rule draws attention to the relevance of standards for permitted activities when considering discretionary or non-complying activities. This rule does not require consideration of the permitted baseline, as this is discretionary in terms of section 104(2) of the Resource Management Act 1991, but it does indicate the relevance of these standards as part of the context of the environment for the purposes of the assessment of effects and as a matter of good practice.

The rules relating to reading the activities in conjunction with activity table headings, numerical limits and fractional amounts have been added as consequential amendments resulting from reviewing rules in a number of topics. The Panel considers that the clarity of the Plan can be improved by the way in which activity tables are laid out, including the use of headings. In many cases the headings or sub-headings which indicate the way in which the tables are organised are helpful in understanding the listed activities. The rules for numerical limits and fractional amounts ensure a consistent approach is taken to the drafting and implementation of quantitative rules.

The general rules have also been re-written to better reflect the relevant wording of corresponding provisions in the Resource Management Act 1991.

The revised order of the general rules (including recommended new rules) is:

C1.1 General rules;

C1.2 Information requirements for resource consent applications;

C1.3 Deferral pending application for additional consents;

C1.4 Applications across sites with multiple zones, overlays or precincts;

C1.5 Applications for more than one activity;

C1.6 Overall activity status;

C1.7 Activities not provided for;

C1.8 Assessment of restricted discretionary, discretionary and non-complying activities;

C1.9 Infringements of standards;

C1.10 Activities to be read in conjunction with activity table headings;

C1.11 Numerical limits;

C1.12 Fractional amounts;

C1.13 Notification.

As part of a larger scale reorganisation of the Plan, including placing related objectives, policies and rules in the same chapters rather than separating them, this chapter becomes Chapter C.

4. Determining activity status and bundling

4.1. Statement of issue

How the Plan should provide for the determination of the activity status of an application.

4.2. Panel recommendation and reasons

The general rules dealing with applications across multiple zones, overlays or precincts or on parts of sites address a matter that was previously in the Administration section and which ought to be stated as rules. The general rules require an identification of which Unitary Plan rules apply to which parts of a site, based on the planning maps. In cases where a rule or standard affects an activity by reference to a percentage or proportion of a site, then that rule or standard is limited to the part of the site to which that rule or standard applies. This deals with the situation where a portion of a site may be affected by a different rule or standard to the rest of the site and avoids the potential uncertainty or unfairness of having a rule or standard which should only apply to part of the site affecting all of it. This can be particularly important in the case of linear network infrastructure (electricity or telecommunications lines or water or fuel pipes) which traverse extensive areas which are subject to several different Plan controls.

The rules addressing applications for more than one activity deal with ‘bundling’: that is, how to assess and decide on an application consisting of more than one activity where the rules provide for more than one activity status. In the Plan as notified this issue was addressed in the administration section by saying that where a proposal involves several activities with different types of consent classification that are ‘inextricably linked’, the Council will generally bundle all activities and apply the most restrictive activity status. This statement attracted a number of submissions that were concerned about the basis for bundling and the general approach to bundling.

The fundamental test established by case law of whether activities should be considered together is based on whether the effects of the activities overlap.[1] The test is discretionary. The Panel does not consider that the Plan should depart from that approach, both because it is supported by high authority and because the test of whether effects overlap is more closely based on resource management considerations than whether the activities are inextricably linked. Merely because a component activity of a proposal might be able to stand alone is not, in the Panel's view, a good reason why its effects should not be assessed together with the effects of other component activities. The discretionary nature of the assessment is important because while an overlap of effects may be a strong indication that a holistic assessment is appropriate, in some cases there may be countervailing factors that make it more appropriate for the parts of an activity to be considered separately. The rule is explicit that where different activities have effects that do not overlap, then they will be assessed separately.

In the rule relating to applications for more than one activity, the Panel recommends including a rule dealing with applications which are subject to different parts of the Plan. This rule relates to activities that may require consent under both the district plan and the regional plan or regional coastal plan (or in some cases all three). This issue was raised by numerous submitters, particularly those who operate network infrastructure, who were concerned that problems could arise if land use activities were assessed in terms of, for example, coastal objectives and policies. The Panel accepts these submissions and accordingly recommends a rule which addresses this by stating that activities will be assessed in terms of the objectives and policies which are relevant to that activity. This reflects that fact that the objectives and policies in one part of the Plan are unlikely to be useful in assessing applications controlled by rules in another part.

The rules setting out how to determine the overall activity status of an application start with the basic approach of identifying all rules which apply and then determining the most restrictive status from those rules. Recommended Rule C1.6(3) makes it clear that any relevant overlay rule takes precedence over a conflicting precinct rule unless otherwise specified. The Panel recommends this rule, giving precedence to overlay rules ahead of other rules, to recognise that the overlays deal with recognition and provision for matters of national importance, having regard to other matters and taking into account the principles of the Treaty of Waitangi/Te Tiriti o Waitangi as required by sections 6, 7 and 8 of the Resource Management Act 1991.

Some precinct rules are intended to be more enabling of activities and developments in certain precincts than the underlying zoning or any relevant Auckland-wide rule. This possibility is addressed by recommended Rule C1.6(4) which gives precedence to precinct provisions over zone and Auckland-wide rules.

[1] See *Bayley v Manukau CC* [1998] NZRMA 396 (HC) and *Body Corporate 97010 v Auckland CC* [2000] 3 NZLR 513, [2000] NZRMA 529, (2000) 6 ELRNZ 303 (CA)

5. Activities not provided for

5.1. Statement of issue

Status of an activity where it is not provided for in the Unitary Plan.

5.2. Panel recommendation and reasons

The recommended rule dealing with activities that are not otherwise provided for in the Unitary Plan makes such activities discretionary, consistent with section 87B(1)(b) of the Resource Management Act 1991 rather than non-complying as proposed in the Plan as notified.

While it may be possible to make such activities non-complying, the Panel considers that such an approach could create unnecessary difficulties when assessing applications for truly novel or unforeseen proposals under section 104D of the Resource Management Act 1991, given the nature of the threshold tests in that section. A truly novel or unforeseen proposal would be unlikely to be contemplated by the objectives and policies in the Plan and so could be considered contrary to them because of that novelty rather than for any explicit policy reason. Such a proposal may also have adverse effects that are more than minor, but the opportunity to consider it on its merits to evaluate whether it was appropriate would be foreclosed because of the statutory constraint on assessing non-complying activities.

The scope for evaluation and consideration of a discretionary activity under section 104B of the Resource Management Act 1991 normally provides sufficient breadth of control in such circumstances to enable any truly novel or unforeseen proposal to be considered on its merits, including in terms of its effects on the environment and having regard to any relevant objectives and policies.

In circumstances where the Panel considers it would be appropriate to require an activity to be subject to the threshold assessment in section 104D, the relevant activity tables do classify any activity that is not otherwise provided for in that activity table as a non-complying activity. Examples include the activity tables for residential zones, where the maintenance of residential amenity values warrants the use of that threshold assessment.

6. Rule infringements

6.1. Statement of issue

Assessment of rule infringements for permitted, controlled and restricted discretionary activities.

6.2. Panel recommendation and reasons

As notified, the Plan proposed that rule infringements for permitted, controlled and restricted discretionary activities be considered as a restricted discretionary activity with the matters for discretion restricted to ‘site/development characteristics’ and ‘the purpose of the control.’

While the Panel agrees with that general approach, it is concerned that these matters are insufficiently detailed to justify a restricted discretionary status. These matters appear to the

Panel to be more suited to land uses and the provisions in the district plan than to the matters that are controlled under the regional plan. As well, many controls were not provided with purpose statements, leaving that aspect of assessment in a very uncertain state.

The Panel recommends that additional matters be listed in this rule which include relevant objectives and policies, whether the purpose of the control (now known as standards) can still be achieved, any specific matters identified in the relevant rule, and the effects of the infringement including the cumulative effects where more than one infringement occurs.

7. Notification

7.1. Statement of issue

General or default rules in relation to the notification of applications for resource consent.

7.2. Panel recommendation and reasons

The Plan as notified provided for all applications for resource consent for controlled and restricted discretionary activities to be considered without public or limited notification, or the need to obtain written approval from affected parties, unless otherwise specified in the Plan or special circumstances exist.

The Panel understands and appreciates that notification and the submission and hearing process that follow are significant factors in the time and cost involved in applying for resource consent. The Panel is also aware that the vast majority of applications for resource consent are processed on a fully non-notified basis without apparent issue. The Panel also recognises that disputes over non-notification, while arising in a very small percentage of all applications, nevertheless demonstrate that the ability of people to participate in decision-making processes about matters that directly affect them is considered to be an essential element of the resource management process.

It is apparent to the Panel from many submissions that some people treat the activity status of restricted discretionary as necessarily resulting in the application being processed on a non-notified basis. The Panel's firm view is that the two issues of activity status and notification are distinct: the status of an activity should be based on the nature and extent of the provisions that are most appropriate to it; while the notification of an application should depend on the effects the activity may have beyond the site.

The Panel considers that the issues surrounding the problems of notification are better addressed directly by clearer and better-focussed plan provisions which make explicit the matters which are subject to the Plan's rules or standards and the issues which are or should be relevant to the consenting process. The Panel therefore recommends that the usual (but not invariable) structure of the Plan should be to include a notification rule immediately after the activity table for each section. The Panel recommends that this structure be used in every overlay, zone, Auckland-wide and precinct section on the principle that plan provisions should be located where the user is most likely to expect to find them. The rule in this chapter is then a catch-all provision which is indicative of the general approach to notification.

The Panel recommends a new rule which directs the Council to have regard to the standards for any permitted activity on the same site as an application as part of the context of the assessment of effects on the environment when deciding whether to notify an application or who is affected for the purposes of notification.

The Panel also recommends a new rule which requires consideration of certain entities who have responsibility for certain resources which may be affected by a proposed activity, including network utility operators, Heritage New Zealand Pouhere Taonga, the Minister of Conservation, the Tūpuna Maunga Authority, relevant iwi authorities and operators of activities related to a reverse sensitivity overlay.

For these reasons, the recommended rules for notification provide only for controlled activity applications to be processed on a non-notified basis generally. All other proposals will be subject to the normal statutory provisions for notification. Both rules are subject to any specific rule in relation to whether a particular activity is to be notified or not.

8. Accidental discovery protocols

8.1. Statement of issue

Control of the accidental discovery of human remains, heritage or protected items, or site contamination.

8.2. Panel recommendation and reasons

Proposed Rule G2.5 in the Plan as notified provided accidental discovery protocols to address the situation where works are being undertaken on a site and, unexpectedly, something is found which may require further resource consent before it can be disturbed or otherwise works may continue.

By general agreement, these provisions have been relocated to the land disturbance sections (E11 and E12), which are the rules most likely to be engaged in relation to activities that could accidentally uncover things to which the protocols would apply: human remains, historic heritage items, items of significance to Mana Whenua, protected objects or evidence of site contamination.

The protocols have also been amended to provide a consistent approach to dealing with accidental discoveries and any further resource consent that may be required in light of such discoveries.

Details of the provisions and the amendments to them are addressed in the Panel's report to Auckland Council – 041 Earthworks and minerals July 2016.

This relocation accords with the general principle that plan provisions should be located where the user is most likely to expect to find them.

9. Framework plans

9.1. Statement of issue

Whether framework plans or framework consents should be provided for as a method or type of application in the Plan.

9.2. Summary of recommendation and reasons

Proposed Rule G2.6 for framework plans in the Plan as notified is recommended to be deleted, principally because the Panel does not consider that framework plans are the most appropriate method for controlling future development.

The Panel holds this view regardless of whether the proposed rule, or a version of it, is lawful. The Panel considers that the status of an activity should be determined by the Plan and should not be amended by a resource consent. There is an overarching public interest in ensuring that statutory planning is open and transparent, so that any person can ascertain from a plan what rules apply to a site or area of land or water or the coastal marine area.

It appears from the evidence that the primary argument in support of such a rule on its merits is that it enables changes to the controls applicable to development on a site more quickly than a plan change. This argument does not address the policy behind sections 65 and 73 of and Schedule 1 to the Resource Management Act 1991, and in particular the principle that the basis for enabling tertiary legislation to control the rights not only of landowners but also their neighbours (and those with an interest in the environment as a whole) depends on a transparent regime and the opportunity for affected persons to participate in decisions which directly affect them.

The acknowledged problems relating to plan changes (including time and resource cost, and procedural complexity) are proposed to be addressed by improvements to Appendix 1-Structure plan guidelines. These will obviously have to be supported by practice and procedure improvements in processing plan changes (whether initiated by the Council or privately).

This issue is discussed in detail in the Panel's Report to Auckland Council – Overview of recommendations July 2016 as it is a significant recommended change to the Plan. That discussion is repeated here as this was the topic where the issue was mainly addressed in the hearing of submissions.

9.3. Background and Environment Court decisions

Framework plans were included in the Plan as notified, particularly in a number of precincts, as a means of promoting comprehensive and integrated development of those precincts through the resource consent process rather than by plan provisions. Features of the proposed method were:

i. the status of an activity in a precinct could change depending on whether there was a framework plan in place or not; and

ii. a criterion for the assessment of any subsequent consent was its consistency with any prior framework plan.

After the Plan was notified but before the Panel commenced hearing submissions, two related decisions of the Environment Court in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council* [2] were delivered which held that the status of an activity could not be determined by a rule that required compliance with a resource consent: that is, the status of an activity should be determinable from the provisions of the relevant plan. In light of this decision, the Council reviewed the proposed provisions and presented amendments at a hearing session for Topic 004 Chapter G (General rules) in November 2014.

The Panel had concerns about the lawfulness of the amended provisions and sought advice from Dr R Somerville QC. The brief to counsel was made publicly available, as was the advice received on 13 March 2015. The advice was to the effect that even with the amendments proposed by the Council, the proposed framework plan provisions were in several respects likely to be unlawful being *ultra vires* or beyond the power conferred under the Resource Management Act 1991. The Panel convened a conference of interested parties on 13 April 2015 to consider how to proceed in light of this advice. At that conference the Council proposed to initiate declaration proceedings in either the High Court or the Environment Court to resolve the issue of lawfulness.

The application for declarations was ultimately lodged with the Environment Court in October 2015 and heard on 12 February 2016 with further materials and submissions being lodged up to 8 March 2016. The Court delivered an interim decision on 24 March 2016 (*Re an application by Auckland Council* [3]) affording the Council a further opportunity to revise its proposed framework plan/consent provisions. The Court's final decision was delivered on 15 April 2016 (*Re an application by Auckland Council* [4]). Reference should be made to both decisions to understand the full extent of the issues raised, the arguments presented and the Court's findings and reasons.

In brief summary, the decisions resulted in a declaration that the Plan may lawfully include a provision enabling an application for a bundle of land use consents which authorise the key enabling works necessary for development associated with the first stage of urbanisation and/or redevelopment of brownfield and greenfield land within precincts in the form set out in attachments to the final decision. The Court refused to make a declaration that in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with a framework plan for that precinct is a matter to which regard must be had by the consent authority. The Court also refused to make a declaration endorsing the template provisions submitted by the Council as it did not have evidence of the actual application of such provisions, nor evidence addressing the effects on the environment of the activities that would be subject to them. The Court noted that the merits of such provisions could be a matter to be recommended on by the Panel.

Consequent on these decisions, the Council lodged further revised framework consent provisions with the Panel on 3 June 2016 in relation to Topic 081 Rezoning and precincts. The Panel has taken these into account when making its recommendations.

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[2] [2014] NZEnvC 93 and 197
[3] [2016] NZEnvC 56
[4] [2016 NZEnvC 65

9.4. Reasons for deletion

The Panel respectfully acknowledges the decisions of the Environment Court as being decisions by a Court of competent jurisdiction on issues relating to matters before the Panel. The Panel accordingly accepts the decisions as determining the questions before the Court in their terms. On that basis the Panel accepts the declaration made in the final decision, summarised above, as stating the lawful scope for framework plan provisions in the Plan as a bundle of land use consents authorising key works that enable urban development or redevelopment. The Panel has accordingly proceeded to consider the submissions on the Plan and the evidence presented to it on the basis that the further revised framework provisions presented by the Council are a lawful method of seeking to achieve the objectives of the Plan.

The Panel is grateful for the detailed legal submissions and evidence it received on framework plans/consents. There was support for the Council's position from several submitters who submitted that framework consents would contribute to achieving the integrated management of natural and physical resources on larger sites and better co-ordinate development over time.

However, due to concerns about how these provisions would work in practice, the Panel recommends that such provisions not be included in the Plan as the framework plan/consent method is not the most appropriate way of achieving the objectives of the Plan. The reasons for this recommendation are set out below.

i. The objective of promoting comprehensive and integrated development generally requires, in its own terms, a broad and wide-ranging assessment. Except in those cases where a very large area is owned by a single person or entity (including a corporate entity made up of various landowners), the existence of multiple landowners presents planning problems which are likely to be better addressed through plan provisions that apply to everyone rather than framework consents which only apply to the consent holder.

ii. There is no statement in the revised provisions about whether the applicant for a framework plan consent must own all the affected land. The activity table says that a framework consent must be for an entire precinct or sub-precinct. There are no machinery provisions to address a situation where land in a precinct is owned by more than one person.

iii. Where a single owner (including a corporate entity made up of various landowners) owns a very large area, the capacity of that person or entity to make an application for a bundle of land use consents which authorise the key enabling works necessary for development associated with large-scale development exists in any event.

iv. The incentives for using the framework plan provisions appear to rest mainly on giving the original application for a framework consent and any subsequent alteration to it the status of a restricted discretionary activity and then providing that all such restricted discretionary activities should be processed on a non-notified basis. The Panel does not support this approach.

v. In relation to activity status, it appears to be axiomatic that the extent of the effects of activities that would be authorised by a framework plan consent

would not be known prior to an application being made. That lack of knowledge raises a question as to how the restriction on matters of discretion could be understood and fixed, as required by sections 87A(3) and 104C of the Resource Management Act 1991.

vi. As amended during the course of the declaration proceedings, the scope of framework consents appeared to reduce to the location of infrastructure, roads, open space and pedestrian linkages. These are typical land use activities associated with subdivision proposals and they, together with their effects and any proposed staging, can be considered as part of a subdivision application. The Panel is satisfied that the recommended provisions of the Plan in relation to subdivision enable that to be done.

vii. Examples of framework plan provisions in precincts indicate that even quite fundamental controls such as those for the bulk and location of buildings might change depending on whether there is an approved framework consent in place. The Panel considers that it is not good resource management practice, nor is it consistent with the requirement in section 76(3) of the Resource Management Act 1991 to make rules having regard to the effects of an activity, to apply different standards to the same activity on the basis of whether a resource consent exists or not.

viii. In relation to notification, the lack of knowledge of the effects of activities also raises a question as to how the Council as consent authority could be satisfied that no such application could have effects on the environment (including people) beyond the immediate vicinity of the site or in relation to the objectives and policies of the Plan.

ix. Buildings and subdivision on sites where there is no framework consent are subject to the normal notification tests. That appears to be the main 'incentive' to using them. It is not apparent to the Panel that there would necessarily be any difference in the effects of any such building or subdivision based merely on the existence or not of a framework consent.

x. The matters for discretion and assessment criteria include just about everything that might be involved in designing a building or a subdivision.

As a result the Panel does not support framework plan consents and recommends that they be removed from the general rules and from precinct provisions.

10. Information requirements

10.1. Statement of issue

Should the general rules specify information requirements?

10.2. Panel recommendation and reasons

Part 2 of Chapter G as set out in the notified Plan was titled "General rules and special information requirements". However, sub-part G2.7 was titled "Information requirements for resource consent applications" and only contained information requirements general to all applications rather than any 'special' information requirements. Special information

requirements have their own parts in individual sections of the plan as notified and this continues in the Panel's recommended version of the Plan. Therefore, the word 'special' is recommended to be removed from this section.

The information requirements as notified were lengthy and detailed in relation to land use consents and, especially, design matters. They were limited in relation to applications under the regional plan.

As noted above, the Council produces standard forms for applications and guidance material to assist in preparing and lodging applications. That material can be focussed on the particular requirements for different types of consent. That appears to the Panel to be a better method for dealing with the complex information requirements under the Resource Management Act 1991.

On that basis, these information requirements should be deleted. They should be replaced by a more straightforward reference to the statutory requirements in section 88 of and Schedule 4 to the Resource Management Act 1991. To ensure that users are clear about the consequences of failing to provide sufficient information, the rules should include a rule that mirrors the power in section 88(3) of the Resource Management Act 1991 to return an incomplete application. The Panel also recommends that there be a rule which mirrors the power of the Council under section 91 of the Resource Management Act 1991 to defer the processing and hearing of an application where further consents are required.

In relation to the provisions requiring design statements, the Panel recommends that these be deleted for the same reasons set out in the report for Topic 077 Sustainable design.

In relation to the provisions requiring cultural impact assessments, the Panel recommends that these be deleted on the grounds that they are unnecessary, because an assessment of effects on the environment prepared in accordance with section 88(2)(b) of and Schedule 4 to the Resource Management Act 1991 must include an assessment of the activity against the matters set out in Part 2 of the Act and on any cultural or spiritual values or other special value.

In relation to integrated transport assessments, these are now addressed in the transport provisions in E27 Transport as a policy to be addressed as part of any application for resource consent which requires consent under the relevant transport rules.

As with the general information included in Chapter A as notified and the administration section discussed above, the Panel considers that there are other and better ways in which information about the administration of the Plan can be made available in accessible and understandable ways that can be kept up to date without requiring changes to the Plan.

11. Consequential changes

11.1. Changes to other parts of the plan

As a result of the Panel's recommendations on this topic, there are consequential changes to other parts of the Plan as listed below.

i. Notification rules have been added to each section with notification requirements based on the anticipated effects that could be generated by activities in the activity tables.

ii. The relationship between potentially overlapping rules or standards in overlays, zones, Auckland-wide provisions and precincts has been considered in all sections, with amendments where necessary to ensure consistency with the general rule on overall activity status and, in particular, the general principle (with only limited exceptions) that overlay provisions should prevail over all other provisions.

iii. Removal of need for cultural impact assessments from all sections where they were previously referenced, but leaving specific requirements for assessment of Mana Whenua values were it is considered that these are likely to be present.

11.2. Changes to provisions in this topic

There are no changes to provisions in this topic as a result of the Panel's recommendations on other hearing topics.

12. Reference documents

The documents listed below, as well as the submissions and evidence presented to the Panel on this topic, have been relied upon by the Panel in making its recommendations.

The documents can be located on the aupihp website (www.aupihp.govt.nz) on the hearings page under the relevant hearing topic number and name.

You can use the links provided below to locate the documents, or you can go to the website and search for the document by name or date loaded.

(The date in brackets after the document link refers to the date the document was loaded onto the aupihp website. Note this may not be the same as the date of the document referred to in the report.)

12.1. General topic documents

Panel documents

Submission Point Pathway Report - 13 November 2014

004-Parties and Issues Report 13 November 2014

004 - Mediation Joint Statement - Applying for resource consent (Assessment Criteria), Fees and Charges (4 November 2014)

004 - Mediation Joint Statement - Applying for Resource Consent, Determining Activity Status, Activities not provided for (4 November 2014)

004 - Mediation Joint Statement – Editorial (4 November 2014)

004 - Mediation Joint Statement - Framework Plans (4 November 2014)

004 - Mediation Joint Statement - General duty to comply, Activities, Applying for Resource Consent (Consultation) (4 November 2014)

004 - Mediation Joint Statement - General Information Requirements (4 November 2014)

004 - Mediation Joint Statement - Notification (4 November 2014)

004 - Mediation Joint Statement - Rule Infringements for permitted, controlled and restricted discretionary activities (4 November 2014)

Auckland Council closing statement

Hearing - Final Statement and Points of Clarification (17 December 2014)

Panel Interim Guidance

Regional and District Rules - PAUP Chapter G - General Provisions (PDF 231KB)

12.2. Specific evidence

Hearing Evidence - Framework Plans - Rachel Dimery (10 November 2014)

004 - Auckland Council - Memorandum on Framework Consents (3 June 2016; loaded to website 7 June 2016)

Framework plan provisions legal opinion Dr RJ Somerville QC 13 March 2015

Outcome of judicial conference on framework plans 13 April 2015