

Memo

3 February 2017

To: All members of the Planning Committee and Local Board Chairs
From: Katherine Anderson and John Duguid
Copy to: Stephen Town, Jim Quinn, Penny Pirrit, Phil Wilson
Subject: Unitary Plan appeal decision-making by Planning Committee

Executive Summary

1. The Chair of the Planning Committee (**Committee**) has asked for advice to be circulated to all Committee members and Local Board Chairs relating to the role of Local Boards in Planning Committee decision-making relating to Unitary Plan appeals.
2. The question has arisen in the context of requests by Local Boards to provide input into items on the Committee agenda for 7 February 2017 that relate to Unitary Plan appeals. Some of the appeals to be discussed on 7 February are merits-based appeals to the Environment Court, while others are appeals on points of law to the High Court.
3. The role of Local Boards in the Committee discussions of the appeals differs depending on whether the appeal is an Environment Court or High Court appeal. The reason for the distinction arises out of the different roles the Court has in relation to those types of appeal. In the Environment Court, the Court will determine the substantive content of the relevant provisions or matters for the Unitary Plan that are at issue on appeal.
4. In relation to the points of law appeals / judicial reviews in the High Court however, the High Court must decide whether or not to set certain matters aside and refer matters back to the Panel or Council to reconsider / remake relevant decisions, in light of the Court's finding that there has been an error of law. In this scenario (should it arise), Council may be required to remake a decision under the same strict parameters that applied in August 2016 when the Council's Governing Body made decisions on the Panel's recommendations for the Unitary Plan. This dynamic means that care is needed to ensure that Council preserves its ability to act lawfully when making decisions on matters that the High Court refers back to Council.
5. In this context, and for the reasons explained below in more detail, the Chair is likely to:
 - a. exercise his discretion to permit any requests for Local Board input into agenda items relating to Environment Court appeals, and
 - b. refuse requests for Local Board input in relation to agenda items relating to High Court appeals.

Discussion

6. This memorandum provides advice in relation to the upcoming meetings of the Planning Committee and the role that the Committee and Local Boards will have in relation to the appeals lodged against the Council's decisions on the proposed Auckland Unitary Plan (**Plan**).

7. As part of the upcoming meetings, staff will be reporting on the Unitary Plan appeals and, in some cases, seek direction from the Committee that may enable certain appeals to be resolved. All Committee members and Local Board Chairs will need to be careful to consider the impact that certain actions may have on the Council's ability to make new decisions, due to specific statutory restrictions placed on the Council as "decision maker" in relation to the recommendations provided by the Panel.

Council's decision-making process

8. **Attached** is an earlier memo that was circulated to the Auckland Development Committee of the previous term of Council, dated 13 May 2016. That memo highlighted the particular statutory restrictions placed on the Council, as decision-maker, pursuant to section 148(2) of the Local Government (Auckland Transitional Provisions) Act 2010 (**Act**). Specifically, those restrictions were:

- (2) *When making decisions under subsection (1) [deciding whether to accept or reject each of the Panel's recommendations] –*
 - (a) ...
 - (b) *The Council **must not** consider any submission or other evidence that was not made available to the Hearings Panel.*

9. As part of the upcoming meetings of the Committee, staff will be seeking directions in relation to Council's position for various Unitary Plan appeals; which will inform the approach to off-line discussions with other parties, Environment Court mediation and hearings (before either the Environment or High Courts). In this context there is an important distinction between High Court and Environment Court appeals that must be appreciated in order to safeguard the Council's possible future decision-making role in relation to High Court appeals.

Appeals lodged in the Environment Court

10. The Act provides rights of appeal to the Environment Court in relation to two forms of Council decision, being:
 - a. where the Council rejects a recommendation of the Panel and decides an alternative solution,¹ and
 - b. where the Council accepts a recommendation of the Panel that was identified (by the Panel) as being beyond the scope of submissions made on the proposed plan.²
11. All appeals to the Environment Court are on the merits, with decisions to be made by the Environment Court. As a result, there is no obvious impediment to the Committee receiving external input (including Local Board input) in relation to reports addressing Environment Court appeals. The expectation will be that the authors of all reports addressing Environment Court appeals will, where possible, seek the views of relevant Local Boards prior to those reports being included on the agenda.

Appeals lodged in the High Court

12. The role of the Committee in relation to High Court appeals is more complicated due to the nature of the relief that may be granted by the High Court arising out of any successful appeal or application for judicial review. The Council will need to be careful to safeguard its

¹ Section 156(1).

² Section 156(3).

ability to make decisions that comply with the specific restrictions set out in the Act (as above), in the event that the Court directs the Council to reconsider and make a new decision on any Panel recommendation.

13. High Court appeals against the Council's decisions can be made only on a "question of law".³ As a result the planning merits will rarely be considered by the Court, with the focus on matters associated with procedural defects or errors of law (illegality or unlawfulness).
14. There is a range of potential relief available to the High Court in the event of a successful appeal or application for review, including to:
 - a. Substitute its own decision for that of the Council;
 - b. Refer the matter back to the Council (as decision-maker) for reconsideration and to make a new decision in light of the error of law; or
 - c. Refer the matter back to the Panel to make a new recommendation on the matter to the Council, which will require Council to make a new decision on that recommendation.
15. Were the High Court to grant relief which requires the Council to make a new decision, the specific restrictions set out in the Act will again be relevant.
16. While the Committee will typically receive status reports or be asked to direct staff to support the Council's decision made in August 2016, it may also be asked to provide direction to staff (including on substantive planning matters) that could result in settlement of certain High Court appeals. In all cases, the Committee will need to be careful to preserve its ability to act lawfully as decision-maker in the event that the High Court refers any matter back to Council for reconsideration in light of any error of law.
17. The Committee will be able to ensure that its decision-making role is not compromised by carefully managing the receipt of any external input into any agenda items that address High Court appeals. This will, importantly, include managing input provided by Local Boards, particularly any input that seeks to provide new evidence / information to the Committee.
18. The authors of High Court-related reports will need to provide a balanced view to the Committee of the submissions and evidence presented to the Panel, and any Local Boards who wish to provide input will need to ensure that they do not go beyond the evidence or information already before the Panel. If those considerations are satisfied, then the Council should be able to lawfully act as decision-maker on any appeal that is referred back for reconsideration.

³ Section 158(4).