AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Relationship between the Resource Management Act 1991 and the Building Act 2004 - Legal Submissions

Topics:	022, 50, 59-63, 64 and 77
Date:	3 November 2015

Sub. No.	**Name**
839, FS 3338	Housing New Zealand Corporation
3184, FS 1464	Peter Hollenstein Associates Limited
3336, FS 3219	(Fish and Game New Zealand (Auckland/Waikato Region)
3746, FS 3497	Mission Bay Kohimarama Residents Association
4909, FS 3058	Todd Property Group Limited
4953	Neville Paterson
5253, FS 3297	Kiwi Property Group Ltd
2632, FS 2963	The National Trading Company of New Zealand Limited
5716, FS 3652	Auckland Council
5791, FS 3023	Carter Holt Harvey Limited
6103	Retirement Villages Association
6106	Ryman Healthcare Limited
6319	Ministry of Business Innovation and Employment
6496	Charles R Goldie
6523, FS 2422	Federated Farmers of New Zealand

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BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL AT AUCKLAND

IN THE MATTER	**of the Resource Management Act 1991 ("the Act")**
A N D	
IN THE MATTER	**of a submission lodged on the Proposed Auckland Unitary Plan**

FURTHER LEGAL SUBMISSIONS ON BEHALF OF HOUSING NEW ZEALAND CORPORATION

Hearing 077 – Sustainable Design

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CEK-004386-192-108-V1

1. These submissions are filed on behalf of Housing New Zealand Corporation ("the Corporation") in relation to Topic 077 – Sustainable Design, in accordance with the Panel's direction dated 8 October 2015 ("the Direction") which seeks the view of parties, including the Corporation, regarding the relationship between the Resource Management Act 1991 ("the RMA") and the Building Act 2004 ("the Act"), together with the Building Code which is in Schedule 1 to the Building Regulations 1992 ("the Building Code"). Specifically, the Panel has sought submissions on the following matters:

> *"Can the PAUP include a rule requiring building work to be undertaken to a standard higher than that required by the BC other than under ss68(2A) and 76(2A) RMA?*
>
> *If it can, then further questions arise:*
>
> *a. **Nature and extent:** Where the PAUP seeks to impose a higher standard, are there limits on the nature of such a rule or the extent to which such a rule can exceed building code standards?*
>
> *b. **Appropriateness:** Is it more appropriate for the PAUP to use the same performance standards for buildings as the Building Code, or should it impose higher standards?"*

2. These submissions are to be read in conjunction with the Corporation's submissions on Topic 077, which are attached as **Annexure 1**.

Panel's Purposive Interpretation

3. The Corporation agrees with the explanation of the legal position provided in the Direction, with two minor exceptions at paragraphs 14 and 26, which read:

> *14. On that approach there is a distinction to be drawn from the decision in CIAL v CCC & BIA, rather than an exception: <u>the RMA can address the control of effects of activities (including building work which will be used for such activities) that may or may not occur in certain locations, or may address the control of effects where the BC does not regulate building work itself</u>. In those ways, the general rule in s 18(1) BA remains effective but does not impede the making of RMA rules which may affect the location and use of buildings but otherwise address matters that are not intrinsic to building work.*
>
> *26. <u>In this context, "special" means controls in relation to matters which are not already addressed by the BC and are not covered within the purposes of the BA</u>. For example, the development of land close to an airport may require buildings to have special acoustic insulation before they are appropriate for*

residential use, or the development of land on the coast may require special setback or other building platform controls to protect any use from the effects of sea level rise. The development of land might require special controls to address the effects of potential flooding in an area, which could include earthworks or special design of buildings.

(Emphasis added)

4. Whilst agreeing with both of these paragraphs, the Corporation wishes to note that the Building Code is still in the process of being updated to reflect the additions to the purposes section of the Act, most notably the reference to buildings that are designed, constructed, and able to be used in ways that promote sustainable development.

5. As required by section 451 of the Building Act 2004, a review of the Building Code was required to determine the extent to which it met the requirements of the new Act. As noted in "Building for the 21st Century: Review of the Building Code", Department of Building and Housing, January 2007, in accordance with section 400 of the Building Act:

The purpose of the Building Code is to prescribe functional requirements for buildings, and the performance criteria with which buildings must comply in their intended use. In prescribing these, the Building Code should reflect the purpose and principles of the Building Act. It must take account of the requirements of the Building Act about:

- *the safety and health of people in buildings.*
- *buildings having attributes that contribute to the health, physical independence and wellbeing of the people who use them.*
- *people who use a building being able escape from the building if it is on fire.*
- *buildings being designed, constructed and able to be used in ways that promote sustainable development.*

(Refer: page 12)

6. The review of the Building Code was completed in late 2007 and as documented in "Building for the 21st Century: Report on the Review of the Building Code", Department of Housing, November 2007, the Building Code was found to largely comply with the requirements of the Building Act 2004, with the exception of the purpose of promoting sustainable development, which was not adequately addressed. As such a programme of staged releases of changes, which is still to be completed, was recommended. In that regard, the Report also recommended:

- *objective statements be retained in the Building Code and be amended to clearly align with the new purposes of the Act*

- *the following objectives and functional requirements define the scope of the Building Code.*

Objectives

Safety: *to limit the probability that, as a result of the design, construction, use or demolition of the building, a person in or adjacent to the building will be exposed to an unacceptable risk of injury.*

Health: *to limit the probability that, as a result of the design, construction, use or demolition of the building, a person in or adjacent to the building will be exposed to an unacceptable risk of illness.*

Wellbeing: *to limit the probability that, as a result of the design, construction, use or demolition of the building, a person in or adjacent to the building will be exposed to an unacceptable loss of wellbeing.*

Physical independence: *to limit the probability that, as a result of the design, construction, use or demolition of the building, a person in or adjacent to the building will be exposed to an unacceptable loss of physical independence.*

Sustainable development: *to promote sustainable development.*

(Refer: page 15)

And later at page 31-32

"The Building Code addressed some, but not all, of these principles. It attempts to limit the energy used for operating new buildings on a day-to-day basis by requiring designers to address energy efficiency. It sets limits on the design energy demand for heating housing and commercial buildings (which leads to the installation of insulation and, in some cases, double glazing), has energy efficiency requirements for domestic water heating systems, and has requirements for the efficiency of lighting in commercial buildings. Amendments to the Building Code to further improve energy efficiency of space heating and commercial lighting were recently announced by the government.

The Building Code does not account for the energy used over the whole lifecycle of a building. (Energy is used in the construction, operation, maintenance and demolition of the building, and is used directly or indirectly to produce and transport building materials.)

Nor does the Building Code have any requirements for the efficient use of material for minimising waste from construction and demolition, or for conserving water or using it more efficiently.

The Building Code is not clear about durability requirements for buildings. It requires building elements to last for a certain length of time with normal maintenance. These time periods do not necessarily reflect how consumers expect buildings to perform. They can also provide a disincentive for the building industry to develop products that last longer. The term 'normal maintenance' is not clearly defined in the Building Code, which leads to uncertainty about what should be expected for durability.

The Department concluded that the Building Code did not adequately address the purpose of promoting sustainable development"

7. Consequently the Corporation would reiterate the point that it made in its submissions in Topic 077, that in the absence of an express provision in any other statute, pursuant to section 18 a person cannot be required to undertake any building work in accordance with performance criteria that is additional to or more restrictive than the performance criteria prescribed in the building code pursuant to the Building Act. Further, that in line with the Court's

decisions in *Portmain Properties (No 7) Limited* and *Department of Survey and Land Information*, even when a resource management purpose (i.e. the safety and well-being of peoples and communities) can be established, that is in itself not sufficient to bring it outside of the restrictions in section 18. That is, it must be for a resource management purpose that is not a purpose of the Building Act. As noted by the Courts in these particular cases, structural safety and fire ratings were a clear purpose of the Building Act.

Further questions of Panel for the Topic 077 on the interpretation of the relevant sections of the Building Act 2004

8. During Topic 077 the Panel asked for the Corporation's response to the issue of whether or not the Building Act 2004 provides a code for the regulation of building work for individual buildings, as opposed to the regulation of building work for buildings in a collective sense. It is submitted that the starting point for considering this issue is section 3, which sets out the following purposes of the Act:

> **3 Purposes**
>
> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
>
> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
>
> (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

9. Comment: In that regard, it is noted, that for the majority of purposes listed in section 3, the reference is to "buildings" in a collective sense, rather than an individual building. For example, *"people who use buildings can do so safely and without endangering their health"*; *"buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them"* and *"buildings are designed, constructed, and able to be used in ways that promote sustainable development"*. This

contrasts with reference to the purpose relating to fire-safety which states *"people who use a building can escape from the building if it is on fire"* (emphasis added).

10. It is submitted that this distinction is likely to reflect the addition to the purpose section of the Act in 2004, which shifted the Act away from a building regime which focused on regulating construction of individual buildings so as to ensure a building was safe and sanitary, and which had only a limited consideration of how the construction of buildings might interact in a collective sense and a broader geographical sense to achieve social objectives (i.e. protecting neighbouring property from physical damage from fire).

History to the Purpose of the Building Act 1991

11. In that regard, the Building Industry Commission[1]("the Commission") which considered the potential to introduce a building act, gave some consideration to the purpose of a building control system that could be introduced through a building act, determining that it should be "*to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare, will be satisfied in the construction, alteration, maintenance in use and demolition of buildings*", and noting that "*because the mandatory requirements are limited to essential safeguards to protect users from injury and illness and to avoid damage to neighbouring property, these statements should not vary substantially over time unless there are major policy changes by Government to regulate other aspects of buildings*" (Refer: para 3.64)

12. As such there was a narrow focus on control of building work so as to ensure the safety of an individual building for people using that building, and the safety of neighbouring property from potential damage. Consequently the draft Building Act (1991) had as its purpose:

> **2 Purpose of this Act**
> (1) The purpose of this Act is to control the construction, alteration, maintenance in use, and demolition of buildings, to protect people from likely injury, illness and loss of amenity there from, and to protect neighbouring property from physical damage and household units from fire (whether or not on land held under the same title)

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[1] The background of this commission discussed later in these submissions.

13. The resultant Building Act 1991 incorporated this narrow focus and had as its purpose:

> **6 Purposes and principles**
>
> (1) The purposes of this Act are to provide for
>
> (a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and
>
> (b)The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.
>
> (Emphasis added)

Purpose of Building Act 2004

14. As noted above, section 3 of the Building Act 2004 now reflects an amended and much broader statutory purpose, which now includes that buildings are designed, constructed, and able to be used in ways that promote sustainable development. As noted by Minister Lianne Dalziel, at the time of amending the purpose of the Building Act, the amendments to the purposes of the Act to include sustainable development as a purpose, to enable the development of building standards in relation to energy efficiency, energy conservation, water efficiency and water conservation. In addition, there was also the inclusion of further amenity and public health objectives (i.e. section 3(a)(i) and (ii)).

15. It is submitted that these additional elements of the purpose of the Building Act move more towards a consideration of building construction, as regulated by the Building Act 2004, in the broader sense of how performance standards for buildings collectively might contribute to the achievement of social objectives (i.e. energy and water conservation), rather than a focus on individual buildings and ensuring that they are safe and sanitary and have a means of escape from fire. This, it is submitted, accords with the Supreme Court's recent decision in *University of Canterbury v Insurance Council of New Zealand Inc* [2014] NZSC 193, when O'Regan J noted than an important purpose of the Building Act 2004 regime was public safety, but that that was not the only purpose (Refer: [2014] NZSC 193 at [36]).

16. The Act also sets out a number of principles that are to be applied by those performing functions or duties, or exercising powers under the Act. The principles are set out below:

> **4 Principles to be applied in performing functions or duties, or exercising powers, under this Act**
>
> (1) This section applies to –
>
> (a) the Minister; and
>
> (b) the chief executive; and
>
> (c) a territorial authority or regional authority (but only to the extent that the territorial authority or regional authority is performing functions or duties, or exercising powers, in relation to the grant of waivers or modifications of the building code and the adoption and review of policy on dangerous, earthquake-prone, and insanitary buildings, or, as the case may be, dangerous dams).
>
> (2) In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person by this Act:
>
> (a) when dealing with any matter relating to 1 or more household units,—
>
> (i)the role that household units play in the lives of the people who use them, and the importance of—
>
> (A) the building code as it relates to household units; and
>
> (B) the need to ensure that household units comply with the building code:
>
> (ii)the need to ensure that maintenance requirements of household units are reasonable:
>
> (iii)the desirability of ensuring that owners of household units are aware of the maintenance requirements of their household units:
>
> (b) the need to ensure that any harmful effect on human health resulting from the use of particular building methods or products or of a particular building design, or from building work, is prevented or minimised:
>
> (c) the importance of ensuring that each building is durable for its intended use:
>
> (d) the importance of recognising any special traditional and cultural aspects of the intended use of a building:
>
> (e) the costs of a building (including maintenance) over the whole of its life:
>
> (f) the importance of standards of building design and construction in achieving compliance with the building code:
>
> (g) the importance of allowing for continuing innovation in methods of building design and construction:
>
> (h) the reasonable expectations of a person who is authorised by law to enter a building to undertake rescue operations or firefighting to be protected from injury or illness when doing so:
>
> (i) the need to provide protection to limit the extent and effects of the spread of fire, particularly with regard to—
>
> (i) household units (whether on the same land or on other property); and
>
> (ii) other property:
>
> (j) the need to provide for the protection of other property from physical damage resulting from the construction, use, and demolition of a building:
>
> (k) the need to provide, both to and within buildings to which section 118 applies, facilities that ensure that reasonable and adequate provision is made for persons with disabilities to enter and carry out normal activities and processes in a building:
>
> (l) the need to facilitate the preservation of buildings of significant cultural, historical, or heritage value:

(m) the need to facilitate the efficient use of energy and energy conservation and the use of renewable sources of energy in buildings:

(n) the need to facilitate the efficient and sustainable use in buildings of—

(i) materials (including materials that promote or support human health); and

(ii) material conservation:

(o) the need to facilitate the efficient use of water and water conservation in buildings:

(p) the need to facilitate the reduction in the generation of waste during the construction process.

(q) the need to ensure that owners, designers, builders, and building consent authorities are each accountable for their role in ensuring that—

(i) the necessary building consents and other approvals are obtained for proposed building work; and

(ii) plans and specifications are sufficient to result in building work that (if built to those plans and specifications) complies with the building code; and

(iii) building work for which a building consent is issued complies with that building consent; and

(iv) building work for which a building consent is not required complies with the building code.

(Emphasis added)

17. Comment: Again there are a number of references to buildings in a collective sense, for example, (m) the need to facilitate the efficient use of energy and energy conservation and the use of renewable sources of energy in buildings:(n) the need to facilitate the efficient and sustainable use in buildings of—(i) materials (including materials that promote or support human health); and (ii) material conservation; (o) the need to facilitate the efficient use of water and water conservation in buildings; and (p) the need to facilitate the reduction in the generation of waste during the construction process. This, it is submitted, reflects objectives that will be achieved if buildings collectively are required to meet various performance standards for building works, as opposed to a focus on the safety of a building, which as an objective has a more individualistic focus.

18. With respect to the Building Code, Part 2 of the Building Act sets out the following provisions:

16 Building code: purpose

The building code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.

17 All building work must comply with building code

All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

18 Building work not required to achieve performance criteria additional to or more restrictive than building code

(1) A person who carries out any building work is not required by this Act to—

(a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or

(b) take any action in respect of that building work if it complies with the building code.

(2) Subsection (1) is subject to any express provision to the contrary in any Act.

19. Comment: As also noted by the Commission, at the time of their consideration (i.e. prior to the introduction of a Building Act) there was an imperfect relationship between building and planning controls and that the introduction of a national building code would provide an opportunity to establish a consistency of scope and subject matter for building controls, for which planning schemes "can be made to accord":

"Extensive discussion on existing land use planning procedures in part 3 of the Government Review document led to a recommendation of a National Planning Code. The imperfect relationship between the processes of building and planning controls was recognised, and that "building bylaws and town planning ordinances are quite different and should not be confused". The Reviewers also stated that "the purposes of both sets of controls include safety and health" and that there are still areas of "overlap" between bylaws and planning schemes.

It is important to note that although building codes and planning ordinances both deal with health, safety and amenity issues, there are differences in the approach.

"(a) Building codes are essentially objective. They are rules based on, usually, physically measureable things – strength, stability, fire resistance, weather resistance, adequacy of light and ventilation, etc. They will vary little from place to place. It is the basic assumption of acceptable level of risk which is subjective and which more or less determines the cost of the controls.

(b) Planning ordinances are much more subjective than bylaws, are prepared at least in intent, by the local community to meet local needs and aspirations. There is the possibility of wide public input and debate. Any departures from the scheme must have public acceptance"

As the Reviewers stated, "The Town and Country Planning Act while expressing some guidelines is generally 'permissive'. It does not require councils to prepare district schemes in any particular form nor does it impose on them any significant constraints on presentation, innovation or degree of control. Schemes may be produced which are liberal and largely unregulated, or restrictive and over regulated". Consequently

the relationship between building bylaws and planning schemes varies from council to council throughout New Zealand.

The replacement of individual bylaws with a national building code presents an opportunity to establish a consistency of scope and subject matter for building controls matters to which planning schemes can be made to accord." (Refer: paras 1.13-1.16)

(Emphasis added)

20. In the *Insurance Council of NZ Incorporated* lines of cases, the Courts were asked if a policy of the Christchurch City Council requiring the strengthening of earthquake prone buildings to a level higher than that prescribed in regulations made under the Act overreached the Council's statutory powers under the Building Act 2004. In determining the question, the High Court considered the broader contextual analysis of the Act, noting:

> *"Part 2 of the Act headed* ***Building*** *governs the performance of all building work in New Zealand. Subpart 2 provides for the primacy of the building code. Section 17 specifies that all building work must comply with the building code, while s 18 provides that persons carrying out building work may not be required to achieve criteria additional to or more restrictive than the criteria in the code itself"* (Refer: [2013] NZHC 51 at [40]).
>
> *"These various provisions of the Act indicate the statutory scheme. The building code governs building requirements in New Zealand. Compliance with the code is required in relation to new building work. Persons may not be required to achieve performance criteria above those prescribed in the code. These tenets support the conclusion earlier reached as to the interpretation of s 124(1)(c)(i). It would be anomalous if territorial authorities could as a matter of policy utilise s 124 notices to achieve a strengthening performance criteria higher than that used to define an earthquake-prone building."* (Refer: [2013] NZHC 51 at [43])
>
> (Emphasis added)

21. Whilst this case was considering the ability of a Council to introduce a policy pursuant to the Building Act, which was higher than the performance criteria for earthquake-prone buildings otherwise required under the Act, it is submitted that the discussion about the primacy of the Building Code and the general scheme of the Act, that persons should not be required to achieve performance criteria above those prescribed in the code, support the Corporation's Interpretation of section 18 and the circumstances when Council is able to introduce sustainable design performance criteria under the RMA 1991.

22. Such conclusions regarding the broader statutory context, and its intent, are supported in the Supreme Court decision, which upheld the lower Courts decisions:

> *"The High Court Judge considered that the broader statutory context indicated a common theme within the Building Act that building owners are not to be required to achieve performance criteria above those prescribed in the building code. He said this applied to earthquake-prone buildings."* (Refer: [2014] NZSC 193 at [35])
>
> *"Section 17 requires that all building work must comply with the building code to the extent required by the Act and s 18 provides that a person carrying out building work is not required to achieve performance criteria additional to, or more demanding than, those in the building code. Mr Goddard said that s 18 makes it clear that a building consent authority does not have the ability to impose additional requirements on building work over and above those contained in the building code. He said this reflects the division of responsibility under the Act between central government and territorial authorities, which do not set standards under the Act."* (Refer: [2014] NZSC 193 at [35])
>
> *"The fact that this standard is not a standard that meets all safety objectives does not, in our view, count against that interpretation. Rather, it demonstrates that Parliament has provided that the power given to a territorial authority under s 124 is limited in its application to buildings that fail to meet the minimum standard set out in s 122(1) and is exercisable only to the extent necessary to bring a building up to that minimum standard.*
>
> *It is unlikely that Parliament would have intended to choose a threshold of 34 per cent of NBS (and likely to collapse) but then provide that the remedial power of a territorial authority can require a very significant upgrading of the building to a level up to 67 per cent of NBS (or, conceivably, even higher)."* (Refer: [2014] NZSC 193 at [57] – [58])
>
> (Emphasis added)

23. Likewise, in a separate MBIEBH Determination (2012/061, 24 September 2012) it was noted that: "*The performance criteria, functional requirements and objectives of the code, and the principles and purposes of the Act are all linked, and must be interpreted and applied consistently with each other*".

Building Act Reform process

24. It is submitted that further insight as to the intention of the legislature regarding the interplay between the Building Act and other legislation can also be gleaned from the various reports to the Minister of Internal Affairs regarding the building control reform, which led to the introduction of the

Building Act. In that regard the Building Industry Commission ("the Commission"), which was established in 1986 to report to the Government regarding the need for building activity reform, recommended that the building code becomes the single means of controlling building construction and design:

> *"The New Zealand Building Code will apply nationally and will bind the Crown. It is performance based and confined to essential safeguards for the users of buildings and those directly affected by them. Each Code provision establishes the social objectives the building must satisfy, the functions required of the building to meet those objectives, and the performance criteria for the resulting behaviour in use of the building and its component parts. The means by which the performance criteria can be met are not prescribed and are open to innovation of new technology and practices.*
>
> *The proposed Building Act provides for the Code to be part of regulations under the Act. Together they become the single focus of the building control system that draws together all building regulation controls that are currently dispersed through central and local government legislation. The reform will consolidate existing controls with the consequential repeal of current regulations and territorial authority binding bylaws related to technical building requirements"*
>
> *(Emphasis added)*

25. The Commission also specifically considered the future relationship between any building act and other legislation which was currently controlling aspects of future building construction and their ultimate use, noting:

> *"The Terms of Reference of the Commission confirmed the objective of making one set of regulations the sole source of functional requirements for buildings by including "the repeal or amendment of existing legislation and statutory regulations necessary to provide for the creation and on-going management of a simplified performance-oriented uniform national building code and means of compliance"*
>
> *In enacting the Code as a regulation, the most significant change will be the revocation of all existing local authority building bylaws, along with the powers to make and administer them.*
>
> *In addition, a very wide range of existing acts and regulations contain building control provisions. Collectively these have a considerable effect on the building control system, and will also be revoked or amended.*
>
> *Four important principles influenced the task of consolidating all building code requirements in the proposed Building Act and Regulations:*

- *No statutory functional requirement for buildings should exist outside the Building Act and its Regulations;*
- *The Code is to be in performance format;*
- *The territorial authorities are to be the sole building control agency in each district;*
- *A single system of building control is to apply throughout the life of buildings from design, through construction and use, to eventual demolition.*

> *Most relevant acts and regulations contain a mixture of matters concerning both buildings and their use. Research at Victoria University of Wellington identified over 60 Acts and related Regulations in force in 1982 that contained direct or indirect provisions relating to building development. This research was updated by the Commission and other legislation added as well. The Commission has distinguished between those provisions relating to building management and human behaviour, which should remain in other legislation, and those which concern the functional requirements of buildings. Building control provisions in other legislation will be revoked to meet the requirement that they be consolidated in the new Building Act and Regulations.*
>
> *The Commission has worked closely with government departments administering the present legislation to ensure that the Code, where appropriate, contains criteria relevant to management and use covered by regulation. Generally, equivalent requirements are provided for in the Code using the performance format or will be contained in Approved Documents as acceptable solutions."* (Refer: paras 5.1 -5.6)
>
> (Emphasis added)

26. The conclusion of the Commission was that the current plethora of bylaws, regulations and other control documents should be replaced by a performance-oriented national building code, which would set the regulatory framework for all buildings and construction activity, both public and private:

> *"Acts that empower the making of subordinate legislation affecting buildings include not only regulations made by central government, but also bylaws made by local government. Such items of legislation cannot be dealt with individually so the proposed Building Act will contain provisions to declare all such subordinate legislation void to the extent that it requires buildings to achieve performance criteria. The Act will also remove the power for such subordinate legislation for building controls to be enacted in the future."* (Refer: para 5.10)
>
> (Emphasis added)

27. As such the first draft bill proposed a section, which ultimately became section 7 of the Building Act 1991, providing that subordinate legislation under other Acts were not to require buildings to achieve performance criteria

additional to or more restrictive than those provisions required by the provisions of the building code:

> ***61 Subordinate legislation under other Acts not to require buildings to achieve performance criteria***
>
> (1) Any subordinate legislation made under any other Act shall be a nullity to the extent that it purports, directly or indirectly, to require buildings to achieve performance criteria additional to or more restrictive than those required by the provisions of the building code.

28. The commentary by the Commission on this proposed section noted:

> *"This provides that except as provided by this Act, any subordinate legislation made under any other Act shall be nullity to the extent that it requires buildings to achieve performance criteria additional to or more restrictive than those required by the building code. Some Government regulations come within this category, and while it is intended to amend or revoke them individually, this "catch-all" provision is considered justified not only for regulations but also for delegated legislation made by local authorities. Both territorial and ad hoc local authorities have made, under various authorising enactments, bylaws and other subordinate legislation on building matters that are either covered by the building code or are for purposes other than the purposes of this Act. The intention is that this Act and the building code made under it shall be the only statutory building controls (as distinct from planning controls and controls over the activities of people)."*
>
> (Emphasis added)

8. It is submitted that this intent is in line with the principles developed in the case law on section 18 (and the earlier section 7) of the Building Act that even when a resource management purpose (i.e. the safety and well-being of people and communities) can be established, that is in itself not sufficient to bring the building works outside of the restrictions in section 18. That is, the building works must be for a resource management purpose that is not a purpose of the Building Act.

9. The Commission did refer briefly to the potential interplay between the Building Act and the Town and Country Planning Act (noting that reform of this Act was already underway), confirming the Supreme Court's subsequent position that the Building Code should govern building regulations in New Zealand. Stating that:

> *"With the implementation of the Resource Management Law Reform program the Commission has maintained contact with the Ministry for the Environment and the*

*same arrangement has continued. The Commission has defined precisely the subject matter of proposed building controls in the expectation that matters more general than or beyond that subject can be regulated by other legislation. The Commission has not included control provisions for **land use** in this Report.*

The national building code is designed to limit its application to assuring that a building will be capable or protecting or mitigating the risk of danger to the health, safety and amenity of occupants, neighbours and nearby property.

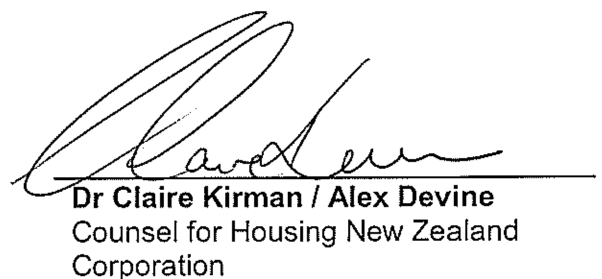
Several matters including drainage, on-site parking, off-street loading and vehicle access will appear in both the building code and the planning schemes but the code's provisions are limited to the functional requirements of buildings.

The definition of a nationally consistent scope for building controls will allow individual territorial authorities to ensure that there are no overlaps within their own District Schemes. The task should not involve extensive changes, as the selected code interface remains close to that generally accepted at the present time.

The question of harmony between the building code and planning schemes is a wider subject. The performance techniques adopted by the Commission are believed to be equally applicable to planning and it is highly desirable that further research into the application of performance in planning schemes be initiated. The Commission believes there would be much to gain from a common approach to land use planning and the construction of buildings thereon following the same process of formulating control provisions." (Refer: paras 1.57-161)

(Emphasis added)

DATED 3 November 2015



Dr Claire Kirman / Alex Devine
Counsel for Housing New Zealand Corporation

Annexure 1

BEFORE THE AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL AT AUCKLAND

IN THE MATTER	of the Resource Management Act 1991 ("the Act")
A N D	
IN THE MATTER	of a submission lodged on the Proposed Auckland Unitary Plan

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LEGAL SUBMISSIONS ON BEHALF OF HOUSING NEW ZEALAND CORPORATION
Hearing 077 – Sustainable Design

ELLIS GOULD
SOLICITORS
AUCKLAND

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Introduction

1. These legal submissions to be presented are in support of the submissions and further submissions of Housing New Zealand Corporation ("**the Corporation**") in respect of provisions to the Proposed Auckland Unitary Plan ("**Unitary Plan**") covered by Hearing 077 – Sustainable Design.

2. These submissions are structured as follows:

   (a) Background information regarding the Corporation and its role in the provision of social housing within the Auckland Region as it relates to Hearing 077; and

   (b) Legal review of the issues raised by the relief sought by the Corporation.

Background Information - Housing New Zealand Corporation

3. The Corporation's detailed evidence regarding social housing in the Auckland region, the public health benefits of such housing and the role the Corporation has in the provision of social housing on behalf of the Government was given in Hearing 013 – Urban Growth. A summary of the Corporation's background was provided in Hearing 005 – RPS Issues, and for the reference of other submitters not involved in that hearing, is attached as **Attachment A** to these legal submissions.

4. In summary, the Corporation manages a portfolio of approximately 30,800 dwellings in the Auckland region, providing housing to over 104,000 people (approximately 7% of the region's population). The Corporation's tenants are people who face barriers (for a number of reasons) to housing in the wider rental and housing market.

Relief sought

5. The Corporation lodged a number of primary submissions in relation to the provisions that are the subject of this Topic. In summary, the Corporation is supportive of sustainable development principles being introduced into the Unitary Plan, but has concerns regarding the legality of introducing such provisions when they require the use of a third party certification product and are in addition to performance criteria already set out in the Building Act 2004 ("**Building Act**"), as a means of achieving sustainable development design for multi-unit development.

6. As a consequence, the evidence of Ms Linzey and Mr Lindenberg propose a suite of provisions that "encourage" rather than "require" applicants to achieve sustainable development design outcomes, thereby ensuring these provisions are not *ultra vires* the Resource Management Act 1991 ("**RMA**") and the Building Act. The provisions proposed by the Corporation also avoid, what the Corporation considers to be, unnecessary compliance costs associated with having to obtain an assessment and accreditation from a third party. The evidence states:

> *"We consider these proposed amendments are appropriate, as they would ensure that an assessment of a proposal's consideration and use of sustainable design principles would be undertaken for any residential development which was identified as a restricted discretionary activity in the relevant zone activity tables (typically the establishment of multiple dwellings). We consider it is important that consideration of sustainable design principles becomes a standard component of any such development design process.*
>
> *Such an approach would still enable Auckland Council to undertake an assessment of a multi-unit residential development proposal's uptake of sustainable design principles, without requiring a third party assessment and accreditation process. Such a process involves additional financial costs, associated with the third-party assessment / accreditation administrative fees, as well as further processing time costs for an applicant (associated with a separate assessment and approval process, above and beyond that already required for a resource consent to establish multi-unit residential developments).*
>
> *As an anecdotal example, the Corporation has recently sought resource consent approval for the development of a site to accommodate 17 new dwellings, as part of a Special Housing Area (where applications are assessed on the basis of the PAUP provisions as notified).*
>
> *The approved land use consent contained two specific conditions in relation to the requirement to achieve Homestar accreditation. The first condition required a design rating assessment to be undertaken by the New Zealand Green Building Council (NZGBC) for each new dwelling at the building consent stage. The second condition required that copies of the certified Homestar ratings for each new dwelling be provided to Council within 3 months of Code of Compliance (COC) Certificates for each dwelling being issued. Demonstrating compliance with the current permitted activity control is a two-step compliance process.*
>
> *The cost of achieving the certification (as required by the second condition), including NZGB fees and Homestar assessment; supervision and documentation fees to review construction against Homestar requirements; and compile the necessary documentation and obtain the certificates for the development is $30,900 (inclusive of GST). This fee is associated with the multiple assessments required given the varied dwelling plans and layout within the development." (Refer: paras 15-19)*
>
> *"In addition to the compliance and administrative costs, there are also the further capital costs associated with undertaking the building and other site works required in order to achieve the Homestar 6 rating. For this development these additional costs, above the specification that was planned for the project, are estimated to be a further $25,800 (inclusive of GST)." (Refer: para 22)*

7. As an aside, it is noted that the certification costs that the Corporation has incurred in respect of accreditation of one of its developments differs markedly from the costs cited in the evidence of Mr Robinson regarding the expected compliance costs of these provisions. Importantly, however, it should be noted that unlike a certification process undertaken by the Council (whereby the RMA requires a consent authority to comply with provisions ensuring the transparency and reasonableness of compliance costs), should these provisions be recommended by the Panel there would be no statutory mechanism for ensuring that the costs of this third party accreditation process were transparent, reasonable or indeed able to be reviewed (Refer: section 36 of the RMA).[2]

Legality of third party accreditation process and the relationship with activity status

8. As noted in the evidence of Ms Linzey and Mr Lindenberg, the Corporation has concerns regarding the legality of requiring compliance with a third party accreditation process where it is determinative of the activity status of a proposed development. The RMA, as has been noted on numerous occasions, is focused solely on the management of adverse effects on the environment and is not to be used as a means of licensing or regulating competition (Refer: *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17). It is therefore the Corporation's submission that it is not within the bailiwick of the Council to include provisions within the Unitary Plan which require compliance with an identified third party certification product as such provisions are *ultra vires* the Act.[3]

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[2] Section 36 of the Act provides that " (1) A local authority may from time to time, subject to subsection (2) fix charges of all or any of the following kinds: ...(b) Charges payable by applicants for resource consents, for the carrying out by the local authority of any 1 or more of its functions in relation to the receiving, processing, and granting of resource consents (including certificates of compliance and existing use certificates); (c) Charges payable by holders of resource consents, for the carrying out by the local authority of its functions in relation to the administration, monitoring, and supervision of resource consents (including certificates of compliance and existing use certificates), and for the carrying out of its resource management functions under section 35; ...(cb) Charges payable by holders of resource consents, for the carrying out by the local authority of any 1 or more of its functions in relation to reviewing consent conditions...(3) Where a charge fixed in accordance with subsection (1) is, in particular case, inadequate to enable a local authority may require the person who is liable to pay the charge, to also pay an additional charge to the local authority....(6) Section 357B to 358 (which deal with rights of objection and appeal against certain decisions) shall apply in respect of the requirement by a local authority to pay an additional charge under subsection (3)". As noted in *Hill Country Corporation Limited v Hastings District Council* [2010] NZRMA 539 (HC): *"Section 36 is, as has been said on occasions, couched in reasonably straight-forward language and is capable of purposive, practical interpretation. Its rationale is to give local authorities power to fix charges in the manner set out in s 36(2) for the range of activities listed in s36(1) in which they may be required to engage and, should those fixed charges prove inadequate in the particular case for the local authority to recover its 'actual and reasonable costs', then to recover the deficiency by imposition of an 'additional charge'"* (para 36).

[3] It should be noted that the latest version of provisions now references the Homestar Tool Version 3 (2015) which itself raises the issue of jurisdictional scope, given that that version was not in

Legality of development controls that are more restrictive than the Building Code

9. This Topic also raises issues regarding the *vires* of development controls for individual buildings, which are more restrictive than or in addition to those provided for in the Building Code, and the ability for such controls to be included in the Unitary Plan. As directed in the Topic 077 Parties and Issues Report, dated 14 April 2015, the Corporation is addressing this legal issue now, although as previously indicated to the Panel, the issue is of relevance to other Topics, most notably Topic 022.

Statutory Provisions

Section 18 Building Act

10. Section 18 of the Building Act provides that:

> *(1) A person who carries out any building work is not required by this Act to—*
>
> *(a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or*
>
> *(b) take any action in respect of that building work if it complies with the building code.*
>
> *(2) Subsection (1) is subject to any express provision to the contrary in any Act.*

11. As such, in the absence of an express provision in any other statute, pursuant to this section a person cannot be required to undertake any building work in accordance with performance criteria that is additional to or more restrictive than the performance criteria prescribed in the building code pursuant to the Building Act.

Sections 68 and 76 RMA

12. In that regard the Resource Management Act 1991 provides two exceptions in sections 68 and 76 to the section 18 of the Building Act with respect to the protection of other property from the effects of surface water.

13. For completeness it should be noted that in the *Christchurch International Airport* case (discussed below), the High Court dismissed an argument that the general power for consent authorities to impose conditions when granting

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existence at the time of notification of the Unitary Plan and has never been available for public review.

resource consents under section 108 of the RMA could qualify as a express provision to the contrary.

14. As such the only express exceptions to section 18 of the Building Act in the RMA are sections 68 and 76, which provide:

> ***68 Regional Rules***
>
> (2A) *"Rules may be made under this section for the protection of other property (as defined in section 7 of the Building Act 2004) from the effects of surface water, which require persons undertaking building work to achieve performance criteria additional to, or more restrictive than, those specified in the building code as defined in section 7 of the Building Act 2004.*
>
> *(emphasis added)*
>
> ***76 District Rules***
>
> (2A) *Rules may be made under this section, for the protection of other property (as defined in section 7 of the Building Act 2004) from the effects of surface water, which require persons undertaking building work to achieve performance criteria additional to, or more restrictive than, those specified in the building code as defined in section 7 of the Building Act 2004".*
>
> *(emphasis added)*

15. These sections, which set out an exception to section 18 of the Building Act, are relevant to the agreed provisions on the proposed controls relating to the effects of flooding on other people and property agreed to by Council and the Planners Group on Topic 022.

Caselaw

16. There are a number of cases which have expressly considered the application of section 18 (or the equivalent section 7 under the previous legislation), particularly as it relates to the interplay between the Building Act and the RMA in the event of conflicting performance criteria relating to building work. It is submitted that each of these cases discussed below, when read together with section 18, establish the following preconditions for when performance criteria specified in a RMA planning instrument will be caught by section 18:

    (a) The performance criteria must be in relation to building work; and

    (b) The performance criteria must be for a matter already prescribed in the Building Code; and

    (c) That performance criteria must be additional to or more restrictive than the Building Code criteria.

The performance criteria must be in relation to building work

17. The starting point for determining whether or not a performance criterion is in relation to "building work" is the High Court case of *Christchurch International Limited v Christchurch City Council* [1997] NZRMA 145. In that case, the High Court was asked to consider whether or not noise attenuation conditions to mitigate airport noise that were required for the construction of dwellings, were contrary to the equivalent section 18 in the Building Act 1991.

18. Chisholm J firstly began by noting that section 7(2) in the Building Act 1991 applied only to building work, which was defined in the Act as *"work for or in connection with the construction, alteration, demolition or removal of a building and includes sitework".* As such, he noted that the Building Code would only prevail over other controls relating to buildings in the narrow context of "building work" and would not concern the use of buildings or controls for a different purpose arising from the management of natural and physical resources under the RMA:

> *"It is significant that whereas potential controls under s6(1)(a) of the Act include controls relating to building work and the use of buildings, s7(2) only applies to building work – in other words the physical process of constructing, altering, demolishing or removing buildings. The exclusion of the use of buildings from the scope of s 7(2) is consistent with the second purpose set out in s 6(1)(b) of the Building Act, namely, the co-ordination of Building Act controls with other controls relating to building use and the management of natural and physical resources. It follows that it must have been the statutory intention that the Building Code should only prevail over other controls relating to buildings in the narrow context of "building work" as defined in the Building Act"* (Refer: page 165)

19. The later case of *Maurice R Carter Limited v Christchurch City Council* (C079/01), concerned the *vires* of the proposed fire hazard rules in the revised proposed Christchurch City Plan. In that case, Judge Jackson held, referring to the *Christchurch International Airport* decision, that the fire hazard rule which controlled the planting of trees within 30 metres of a building was not *ultra vires* section 18, because the planting of trees was not an activity that came within the definition of a "building work" as defined in the Building Act and therefore section 18 did not apply.[4]

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[4] We therefore disagree with Council's closing submissions (Refer: Topic 022 Natural Hazards and Flooding and Topic 026 General – Closing Remarks on behalf of Auckland Council relating to Flooding) regarding this case, which seem to argue that the case is authority for the proposition that there is no breach of section 18 of the Building Act if there is a valid resource management purpose for a planning control even where the Building Code provisions have the same purpose (Council's closing submissions on Topic 022, para 2.17).

The performance criteria must be for a matter already prescribed in the Building Code

20. In the *Christchurch International Airport* case, Chisholm J noted with respect to this precondition that there were no performance criteria specified in the Building Code in respect of the transmission of sound outside the context of abutting buildings.

> *"Where the objective of the condition/rule is to control activities under the Resource Management Act, the condition/rule is not a performance criterion within s7(2). The noise attenuation condition or a district rule to similar effect is not caught (by s7(2)) because the purpose of the condition/rule is to control the effects of noise; the purpose is not to control the performance of the building in the isolated context of it being a structure."* (Refer: page 166)

And later he noted:

> *"The key is the purpose of the function performed. If the exercise of the power relates only to the physical building structure it will be caught by s 7(2). On the other hand, if the exercise of the power relates to the control of activities or the effects of activities in terms of the Resource Management Act it will not be caught out by s 7(2)"* (Refer: page 166)

Tipping J agreed with the conclusions of Chisholm J regarding the interplay between section 7 of the Building Act and the RMA, stating:

> *"Stated in the most simple terms, the code can be exceeded when, but only when, 'the use of land, air or water' requires it: see the long title to the Resource Management Act."* (Refer: page 152)

21. In his judgment, Tipping J therefore focused on the material difference between imposing a condition or other requirements for Building Act purposes, and imposing such conditions or other requirements for a resource management purpose under the RMA which are 'appropriate and necessary' for a resource management purpose which is a different or separate purpose from the Building Act.[5] In that regard, Tipping J noted that:

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[5] It should be noted that the purpose of the Building Act has changed since this case was decided and to now include the following purposes:

> **3 Purposes**
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> > (i) people who use buildings can do so safely and without endangering their health; and

> *"The construction which I prefer simply allows the building code to be exceeded when resource management considerations justify such a departure"* (p. 152)

22. Against this statutory analysis, the Court held that the noise attenuation condition at issue was not caught out by the exclusionary section in the Building Act, because the purpose of the condition was to control the effects of noise, not the performance of the building in the isolated sense of it being a building. It was a requirement imposed for the regulation of the residential *activity* within the building (as distinct from the activity of building, which although is an activity for resource management purpose, is also an activity which has a purpose captured by that of the Building Act) and was not the activity that the proposed condition was seeking to regulate.

23. In discussing the interrelationship between the sections of the Building Act and the RMA, the High Court considered the various purposes of those two Acts, noting that:

> *"The first purpose of the Building Act is to provide for "necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire." The second of the two statutory purposes of the Building Act is to provide for "the coordination of those controls with other controls relating to building use and the management of natural and physical resources". The concept of coordination implies that building controls and other relevant controls are intended to work together and enjoy a harmonious co-existence."* (Refer: page 147)
>
> *"It is quite consistent with that approach to say that when administering the Building Act a council may not, in terms of s 7(2), require the builder to achieve performance criteria additional to or more restrictive than those specified in the building code. It does not follow that this is a total embargo intended to apply when the council is administering the Resource Management Act. The only sensible and effective way to harmonise the potentially conflicting provisions of s 7(2) of the Building Act and, for example, s 108(2) of the Resource Management Act, is to focus of the different purposes of each statute. Reduced to the simplest level relevant to the present case, the Building Act allows a council to control building work in the interests of ensuring the safety and integrity of the structure,*

(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and

(iii) people who use a building can escape from the building if it is on fire; and

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code.

In circumstances where the Council has stated in evidence that the genesis of these provisions are as a method for addressing adverse environmental effects (i.e. the environmental, economic and health benefits of sustainable design) and to maximise resource efficiency, it is difficult to see what different resource management purposes there might be to justify performance criteria which exceed those set out in the Building Code (Refer: Horton EIC).

> *whereas the Resource Management Act allows the council to impose controls from the point of view of the activity to be carried out within the structure and the effect of that activity on the environment and of the environment on that activity."* (Refer: page 147-148)
>
> *"The Council, under the guise of resource management control, may not impose a requirement affecting the structure unless such requirement is appropriate and necessary for resource management purposes."* (Refer: page 148)

24. It is important to note that since this case was determined, the purpose section of the Building Act has been amended to include sustainable development, and is now arguably much more broadly aligned with that of the RMA. As such the opportunity for gaps, as counsel for Auckland Council has termed it, has arguably lessened as a result.

25. In *Portmain Properties (No 7) Limited* 4 ELRNZ 10 the Court considered whether or not it was lawful to impose a condition on a subdivision consent that required the balance of a building to be brought up to Building Code standards. The Environment Court held that in this case the condition could not be imposed because it was a condition relating to the physical structure of the building and was not a condition imposed for the purpose of controlling activities or the effects of activities in terms of the RMA. The Council, in light of the *Christchurch Airport* decision, submitted that it had a resource management purpose (being safety) which accorded with the purpose of the RMA as set out in section 5. However the Court did not accept this interpretation, and set out as follows:

> *"..both Act's fulfil different functions in respect of the control of buildings and it is permissible to impose conditions on a resource consent or provide rules in a Plan controlling buildings if those conditions or rules are intended to control activities or the effects of activities for the purpose of the Resource Management Act. <u>If they are intended to relate to the physical building structure then they are more properly Building Act requirements</u>"*
>
> (Emphasis added)

In holding that the conditions were *ultra vires*, Judge Skelton concluded:

> *"It is my conclusion that the kind of condition the Council is thinking of imposing here is unlawful because it would not be for the purpose of controlling activities or the effects of activities in terms of the Resource Management Act 1991. Rather it would be a condition relating to the physical structure of the building and going beyond the kind of condition contemplated by section 220(1)(c) of the Act. Thus to impose it would be for an ulterior motive or purpose unrelated to the subdivision that is the subject of the application of consent. <u>So far as safety is concerned too, and in a direct way for present purposes, is the first purpose of the Building Act – see section 6(1)(a) of that Act.</u>*
>
> (Emphasis added)

26. As a consequence, it is submitted that this case is authority for the proposition that even when a resource management purpose (i.e. the safety and well-

being of peoples and communities) can be established, that is in itself not sufficient to bring it outside of the restrictions in section 18. That is it must be for a resource management purpose that is not a purpose of the Building Act. As noted by the Court in this case, safety was also a clear purpose the Building Act. Further, the Court noted that the control proposed in this case was not for a resource management purpose that had a sufficient link to the effects of the activity in question, namely the activity of subdivision, and as such it could not be said to be for the purpose of controlling the effects of activities in terms of the RMA.

27. Also supporting the proposition that a resource management purpose in and of itself is not sufficient to bring a matter outside of the restrictions in section 18, is *Department of Survey and Land Information v Hutt City Council* (1997) 3 ELRNZ 222, which was a case in relation to a proposed condition on a subdivision requiring the owner to ensure that the buildings adjoining both sides of the new boundaries complied with the fire ratings aspect of the Building Code. The Court found that given there is a requirement in the Building Code to comply with fire ratings upon a change of activity, the Building Act was clearly concerned with fire ratings as between adjoining buildings and that section 18 therefore prevented the Council from imposing such a condition. Therefore, even though in this situation the Council was purporting to require compliance with the Building Code outside of the requirements of the Building Act (i.e. in this case there was no change in activity at the time of subdivision and the Building Act required compliance as soon as there was a change of activity), Judge Treadwell held that the Building Act had specifically set its mind to the situation of fire ratings as between adjoining buildings and so it was not a matter that could be controlled under the RMA:

> *"I have accordingly reached the conclusion that in respect of fire rating of existing buildings the BA has produced a code in itself which ties the upgrading of existing buildings to a change of use and/or the specific types of subdivision referred to in s224(f) of the RMA. In the face of the provisions of the BA and the RMA a council cannot take unto itself the power to impose a condition. If the council has such general conditions making powers what is the necessity for s224(f)? Furthermore, the requirement to comply with fire ratings upon a change of activity is clearly contemplated by the BA which also makes clear that existing buildings need not otherwise comply"* (Refer: page 8)[6]

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28. *Petone Planning Action Group Incorporated v Hutt City Council* (WO20/2008) is the most recent Environment Court case in which the issue in question has been discussed. This case concerned the granting of a resource consent, with conditions attached, to a residential and retail development that lay within the Wellington Fault Special Study area, and whether or not those conditions should be more restrictive than those imposed by the council given the building's location in a fault zone and the potential for broader safety risks. Judge Sheppard held, with reference to Tipping J's decision in *Christchurch International Airport*, that in this case there was no resource management purpose that went beyond that of the Building Code's (being to control the foundations to ensure the structural integrity of the proposed building) that would justify the placement of further conditions which were more restrictive than those contained in the Building Code. In coming to this conclusion, Judge Sheppard noted that the purpose of that Building Code provision was not narrowly focused on the building itself, but was also at least partly for the safety of people within the building and of people close by, and to that extent had a common and overlaying purpose with the RMA.

29. With reference to Topic 077, it is therefore difficult to see how an argument can be mounted that provisions can lawfully be included within the Unitary Plan where they are to achieve a purpose (i.e. sustainable development) that is already a purpose of the Building Act. Council's witness, Mr Horton, provides his opinion that notwithstanding the fact that the promotion of sustainable development is a stated purpose of the Building Act, that provisions in the Unitary Plan addressing sustainable design outcomes should be introduced because the Building Act does not deliver a satisfactory level of sustainability (Refer: Horton EIC para 7.12). With respect, the Corporation submits that as a matter of law, the Council cannot introduce performance criteria which are for a purpose already provided for in the Building Act, even if, in the Council's view, the Building Act does not deliver a satisfactory level of sustainability. As an aside, the Corporation also does not accept Mr Horton's conclusions regarding the adoption of sustainable design principles at the Talbot Park development.

That performance criteria must be additional to or more restrictive than the Building Code criteria

30. This is a matter of fact, which it is submitted is determined with reference to the performance criteria required under the Building Code and the performance criteria the Council is seeking to include in the relevant planning

instrument or as a condition of consent. As was noted by Chisholm J in the *Christchurch International Airport* case, there is a necessary degree of overlap between this precondition and the previous one, with respect to whether or not the matter is one already prescribed in the Building Act or whether or not it is for a resource management purpose.

31. The rebuttal evidence of Ms Linzey attempts to assess if the performance criteria proposed would avoid the prohibition set out in the section 18 of the Building Act (noting that details of the Homestar Tool, Version 3 is not yet publically available). The Corporation submits that on the information that it has available, at least some of the package of criteria that comprise the Homestar Tool include performance criteria that are in relation to building work, are for matters already prescribed in the Building Code, and are in addition to or more restrictive than the Building Code Criteria, and so fall within the ambit of the prohibition in section 18 (refer: **Attachment B**).

Evidence

32. For this topic, the Corporation has lodged joint primary planning evidence by Mr Matt Lindenberg and Ms Amelia Linzey.
33. Finally, in Topic 049 the Corporation said it would be back to the Panel with further information regarding the impact of those provisions on the development potential of sites owned or managed by the Corporation. Mr Liggett is available and can discuss this information with the Panel during questions.

DATED 3 November 2015

Dr Claire Kirman / Alex Devine
Counsel for Housing New Zealand Corporation

Attachment A

The Corporation

1. The Corporation was formed in 2001 as a statutory corporation established under the Housing Corporation Act 1974 (as amended by the Housing Corporation Amendment Act 2001). It is also a Crown agency under the Crown Entities Act 2004.

2. The Corporation's statutory objectives are to give effect to the Government's social objectives by providing housing and related services. To this end:

   - The Corporation owns or manages more than 68,000 rental properties throughout New Zealand, including about 1,500 homes for community groups that provide housing services. Approximately two-thirds of the total state housing portfolio was built before 1980, and half of it before 1960.

   - The Corporation has 200,000 people occupying Corporation tenancies, with 6,960 new tenancies started in the 2012/13 year.[7]

   - The Corporation manages a portfolio of approximately 30,800 dwellings in the Auckland region, providing housing to over 104,000 occupants.

   - The Corporation has social housing in locations spread throughout the Auckland region. With the exception of Great Barrier Island, the Corporation manages tenancies located within all of the Auckland Council Local Board boundaries.

Social Housing Policy

3. Social housing is a subset of affordable housing, and meets the housing needs of people who face barriers to housing in the wider rental and housing market. In general terms housing supply issues have made housing less affordable and as such there is an increased demand for social housing. This is particularly so in the Auckland region.

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[7] The figures in the first two bullet points are from the 2012-2013 Annual Report.

4. The Housing Corporation Act 1974 sets out the Corporation's functions to provide housing and housing-related services to support the Crown's social objectives. Under the Crown Entities Act 2004, the Corporation is listed as a Crown agent and is required to give effect to Government policies.

5. The Corporation works within a community of government, charitable and private sector organisations to provide social housing and housing support throughout New Zealand. From July 2011 the Corporation's primary goal has been to provide social housing to those with the highest need. This has meant moving away from a *"state house for life"* approach towards providing housing for people in need for the duration of that need.

6. The Corporation's tenant base is characterised by lower income households, with over 90 percent of tenants paying a subsidised income related rent. More than a third of the Corporation's tenants identify as Maori (compared with 14.67% of the general population) and over a quarter of tenants identify themselves as Pacific peoples (compared with 6.9% of the general population).[8]

7. There has been a marked change in the type of social housing that is required by the Corporation's tenant base:

   7.1. Demand has increased for single bedroom housing required for single persons, the elderly or disabled, and larger homes with four to six bedrooms required to house larger families.

   7.2. As a result the size of many state houses in the Auckland region do not match the changing demand for social housing, with a large proportion of the Corporation's housing stock comprising older 2-3 bedroom homes on large lots which are too large for smaller households and too small for larger households..

   7.3. This has meant that the Corporation has had to review its housing portfolio and assess how it can respond to the changes in demand, given its current housing supply is skewed towards 2–3 bedroom houses that do not meet the needs of tenants and/or are uneconomic to maintain.

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[8] Statistics taken from the Briefing for the Incoming Minister of Housing, 2013.

8. The Corporation has a long-term Asset Management Strategy which is focused on providing houses that are the right size, in the right place and in the right condition. As part of that strategy the Corporation will look to redevelop existing sites by using them more efficiently in order to improve the quality and quantity of social housing that is available.

9. The Corporation has been involved in a number of redevelopment projects that have amalgamated sites to allow for more efficient use of the Corporation's stock, or to use single sites more effectively. A recent example of this type of development was undertaken on sites owned by the Corporation on Garrison Avenue, Three Kings. In this instance, a group of four old, single-storey dwellings were replaced by a low-rise apartment complex, containing 22 dwellings, occupied by elderly and disabled persons.

10. The Corporation is increasingly looking to rebalance the state housing presence within communities, particularly in areas such as South Auckland, by managing the rebuilding programme to deliver projects comprising a mix of state, social and affordable housing. For instance, the *"Northern Glen Innes Project"* in East Auckland will redevelop 156 older state houses to deliver 260 new houses – including 78 state houses, 39 social housing properties and the balance being a mix of affordable rental and affordable home ownership opportunities.

Attachment B

Comparative Summary of Building Code / PAUP and Housing Corporation Requirements

		PAUP Council Rebuttal - Alternative Rule (H.6.4.2.1(b))	Building Code Acceptable Solutions	HNZC Property Quality Standards
a.	**Ceiling insulation**	Insulation R value 3.5	R value 2.9	R value 3.6
c.	**Windows**	Double glazing insulation R value 0.26	R value 0.26	No additional requirement above building code
d.	**Wall insulation**	Insulation R value 2.1	R value 1.9	R value 2.5
e.	**Floor**	Insulation R value 2.2. Concrete floors must feature continuous insulation underneath and at edges	R value 1.3	R1.5 Concrete floors shall also have slab edge insulation
f.	**Ventilation and moisture control**	Dedicated extraction installed in kitchen and bathrooms.	Ventilation shall be provided naturally or mechanically to comply with G4/AS1. Flow rates to bathrooms, toilet spaces and laundries in *household units*, exhaust the air to the outside at flow rates given in AS 1668.2, Table B1.	Extract vent capacity minimum 10 changes per hour ducted to exterior hardwire to delay timer or humidistat
f.	**Ventilation and moisture control**	Provision to vent a clothes drier to the outside of the residential unit or an external washing line.	No requirement for washing line Ventilation as above	PQS require both fixed vent to exterior and a washing line unless laundry located in garage (or an apartment)
g.	**Water efficiency**	WELS 3 Star Shower. WELS 4 Star Toilets. WELS 6 Star Taps.	No requirement	All taps min 3 star wells or deliver less than 10 litres per minute Shower rose to have low flow shower set at max flow of 8 litres per minute.
h.	**Recessed down lights**	No recessed down lights penetrating the thermal insulation envelope.	Building code allows downlights and technically difficult to maintain insulation due to fire hazard created by most fitting.	Recessed down lights not permitted – Must use specified LED fitting or bayonet fittings with CFL energy saving lamps.
h.	**Recessed down lights**	LED or CFL for a minimum of 75% of all light fittings.	No requirement for LED or CFL in housing	Must use specified LED fitting or bayonet fittings with CFL energy saving lamps.
I.	**Materials**	No non FSC certified tropical hardwoods for structural framing.	No requirement	No formal requirement but sustainable materials are in the assessment criteria for HNZC procured products

From: Peter Hollenstein [mailto:hollies@ihug.co.nz]
Sent: Tuesday, 3 November 2015 10:40 a.m.
To: Info IHP
Subject: Notice of panel direction on RMA & BA in the PAUP

SUBMITTER 3184

It is our view that the Unitary Plan should not impose on, and change matters covered by the Building Act.

Reason: because otherwise there will be confusion resulting in loss of effectiveness and higher costs and possibly legal implications.

If Council has relevant reasons and wishes to impose higher/different standards to the BA, we feel they should take that up with the central Government to seek direction & resolve it.

Best regards

Peter Hollenstein
Registered Architect NZIA

Peter Hollenstein & Associates Ltd
09 483 3816
hollies@ihug.co.nz
PO Box 34242, Birkenhead, Auckland 0746

From: John Dyer [mailto:JDyer@awfg.org.nz]
Sent: Wednesday, 14 October 2015 11:37 a.m.
To: Thomas Erikson
Cc: Ben Wilson; Adam Daniel
Subject: FW: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

Dear Mr Erikson

I am replying on behalf of Auckland Waikato Fish & Game Council as Adam Daniel originally left me to deal with this section of the Unitary Plan Draft. With regard to the Building Act and RMA matters below; the Auckland Waikato Fish & Game Council originally submitted on this section of the Unitary Plan Draft in regard to duck-hunter's maimais, (i.e. hunting huts). We asked that these remain as permitted activities subject to certain rules. One of those was that the floor area, (as defined by the Building Act, meaning "the area under a roof"), be not more than 10m2. A such they are exempt from needing a building permit. So I would imagine that the information you have forwarded, (below), does not therefore apply directly to us.

Maimais take on many forms, everything the simplest structure involving a few tea-tree sticks pushed into the ground to make a rough and temporary hide, to more permanent wooden structures that are small huts for shooting from. Provided they do not violate the current set of rules set for them, such as impeding navigation or flood-waters, for instance, then their effects are judge to be "no more than minor". They are not dwellings, excepting for very short periods of time, typically measured in hours and rarely measured in more than a few days each season. I'm not aware of anyone living in one and I would think that would be unlikely in such a small space in such typically remote areas.

Our original submission dealt with all this in more detail.

If there is anything more you wish to further now know in regards to this matter, I am happy to make contact in whatever way can best resolve any new issues. To us, maimais are a very important part of our submission. The process of buying a licence, to get a claim tag attached to it, to claim that maimai each year, is a central part of our overall funding. Without maimais, we would have to seek taxpayer assistance to do our many works around waterfowl, wetland and waterway advocacy and management as well as recreational-user management. For instance, our most recent wetland restoration topped $1 million.

Kind regards
John Dyer
Northern Wildlife Manager
Auckland Waikato Fish & Game Council.

From: Thomas Erikson [mailto:Thomas.Erikson@aupihp.govt.nz]
Sent: Thursday, 8 October 2015 2:45 p.m.
To: Adam Daniel
Subject: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

8 October 2015

Sub No.: FS 3219

Fish and Game New Zealand (Auckland/Waikato Region)
Attn: Adam Daniel

Dear Sir/Madam

Direction of the Independent Hearings Panel on the Resource Management Act 1991 and the Building Act 2004 and proposed PAUP rules

PLEASE NOTE

This direction from the Independent Hearings Panel seeks the views of parties on a technical matter concerning the jurisdiction of the Resource Management Act (RMA). Responses will inform the Panel's thinking on matters it has heard and is yet to hear. The Panel may issue interim guidance on this matter prior to the hearings in 2016 on rezoning and precincts.

This is an opportunity for you to comment if you have an interest in this matter. There is no requirement for you to respond and this direction does not affect your previous submissions to the Panel.

Any responses received by the Panel will be published on our website.

If you have any queries please email info@aupihp.govt.nz or call 09 979 5566.

MISSION BAY-KOHIMARAMA RESIDENTS' ASSOCIATION INC.

13 October 2015

Comments on Direction of the Independent Hearings Panel on the Resource Management Act 1991 and the Building Act 2004 and proposed PAUP rules.

We note the invitation to submit comments with respect to the above direction. While we understand that the Panel is primarily looking for legal submissions on a technical matter, we believe that there are practical common sense aspects to this issue which should not be overlooked, and our submission focusses on these.

Our primary concern is to ensure there is as much clarity, simplicity and common sense in the building process as possible so that ordinary people can easily understand what they can and cannot do.

Controls over development are currently primarily exercised by three interlocking sets of regulations:

1. the RMA which deals with potential impacts on the environment, including social impacts;
2. the Building Code which ensures that building quality is of adequate standard; and
3. urban planning rules set by local councils to ensure development is consistent with urban planning principles adopted by the local community.

For clarity of the process, it is essential that these three sets of regulations are consistent with each other rather than conflicting. Any attempt to include provisions in PAUP that compete with and override explicit Building Code provisions simply confuses the situation and makes it more difficult for people to understand development requirements.

For this reason, even if a legal interpretation were to conclude that PAUP could contain provisions requiring higher standards than the Building Code, we believe that to do so would be poor practice, serving only to confuse the public and raise costs. For example, common sense suggests that if the Building Code lays out requirements for dealing with flood-sensitive areas, the PAUP should not contain conflicting rules based on a different assessment system.

Common sense also would recognise that flooding in Auckland is not fundamentally different from flooding in other local authority jurisdictions and that generating a myriad of different rules, each purporting to deal with the same underlying issue but in a different way, only serves to increase complexity, decrease understanding and increase building costs.

An example of this is the way that spa pools have been regulated over the past 15 years or so, where local body regulations have conflicted with a NZ Standard. In many cases (including Auckland), compliance with the relevant NZ Standard is deemed to be irrelevant

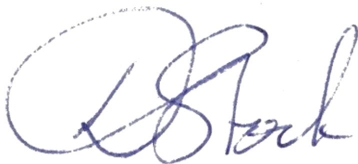
and non-conforming. The result has been that the public has been confused, different standards have been in place in different areas, and there have been many frankly stupid decisions around fencing all adding to cost while not reducing risk.

Our comments do not preclude PAUP containing provisions that provide more explicit requirements for matters dealt with in less detail in the Building Code, as long as the two are aligned and consistent.

Should the Council believe that the Building Code or RMA does not adequately deal with issues, then the most appropriate course of action would be to work to improve the Building Code or RMA, rather than to simply try to override it.

While your primary interest may be in the legal arguments around whether PAUP can contain provisions conflicting with other regulatory instruments, we ask you not to overlook the common sense arguments. Just because something can be legally done does not means that it should, particularly if it serves to make building and development processes more complex, confusing and expensive.

Yours sincerely



Don Stock
Chairman
Mission Bay Kohimarama Residents Association

IN THE MATTER	of the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010
AND	
IN THE MATTER	of the Proposed Auckland Unitary Plan Topics 022, 50, 59-63, 64 and 77
SUBMITTER	Todd Property Group Limited (4909), Long Bay Communities Limited (FS 2930), and Okura Holdings Limited (FS2923)

OUTLINE OF LEGAL SUBMISSIONS OF COUNSEL FOR TODD PROPERTY GROUP LIMITED, LONG BAY COMMUNITIES LIMITED, AND OKURA HOLDINGS LIMITED

Dated 21 October 2015

1. INTRODUCTION

1.1 We refer to the email from the Independent Hearings Panel ("Panel") on 8 October 2015 inviting submissions on the relationship between the Resource Management Act 1991 ("RMA") and the Building Act 2004 ("BA") together with the Building Code which is in Schedule 1 to the Building Regulations 1992 ("BC"). As noted in the Panel's email, this issue has implications for a number of recent hearing topics and for the rules proposed in the Proposed Auckland Unitary Plan ("PAUP").

1.2 The Panel's preliminary assessment of this issue has led it to the following conclusion:

(a) That the subdivision, development and use of land that is subject to a hazard such as inundation (whether by stormwater or by the sea in storm events or as a result of a rise in sea level) is able to be controlled by the RMA, but the floor levels of individual buildings on sites which are zoned for development and use are to be determined in accordance with the BA and BC; and

(b) That controls on internal aspects of buildings under the RMA, to the extent that they are appropriate at all, cannot exceed the requirements for such controls set by the BC.

1.3 Todd Property considers that the Panel's assessment of the relationship between the RMA and BA is correct, and supports the reasoning by which the Panel came to that assessment.

1.4 In addition, Todd Property submits that the following additional reasons support the Panel's preliminary assessment:

(a) Case law applying *CIAL v CCC & BIA* following the introduction of the BA in 2004 also supports the Panel's preliminary assessment (Section 3);

(b) The practical impact on developers and on further development in Auckland of creating additional building requirements in the PAUP (Section 4); and

(c) Specific concerns regarding the Council's consideration of climate change in the PAUP (Section 5).

2. RECENT CASE LAW SUPPORTING THE PANEL'S PRELIMINARY ASSESSMENT

2.1 The Panel considered *Christchurch International Airport Ltd v Christchurch City Council and Building Industry Authority*[1] in detail in its preliminary assessment. We do not propose to repeat that detailed consideration here, beyond noting that Todd Property supports the Panel's interpretation of that judgment.

2.2 The Environment Court in *Petone Planning Action Group Inc v Hutt City Council*[2] applied *CIAL v CCC & BIA* after the Building Act 2004[3] came into force, and found that the District Plan could not be considered to impose building design criteria for earthquake protection beyond those imposed by the BC. In considering expert evidence suggesting that the BC did not sufficiently provide for earthquake risk to the proposed building, which would be located near the Wellington Fault, the Court held:

[1] *Christchurch International Airport Ltd v Christchurch City Council and Building Industry Authority* [1997] 1 NZLR 573 (HC).

[2] *Petone Planning Action Group Inc v Hutt City Council* EnvC W020/2008, 2 May 2008.

[3] The judgment at various points discusses the Building Act 1991 (which was referenced in the District Plan and some of the judgments considered), but primarily focuses on the Building Act 2004 (which was in force at the time). However, during the Court's discussion of the relationship between the BA and the RMA, it quoted from the Building Act 1991. This appears to be because it was considering *CIAL v CCC & BIA*, which had considered the Building Act 1991. In upholding the Environment Court's reasoning on this point and dismissing an appeal, the High Court stated that the Environment Court had considered the equivalent section (s 18) of the Building Act 2004.

> *[218] Therefore we do not accept PPAGI's submission that leaving the performance of the structure and the safety of people in earthquake events to compliance with the Building Code and Standard is insufficient in deciding the resource-consent application. We accept the Council's submission, and hold that there is no resource-management purpose for controlling the building work to achieve performance criteria other than those specified in the Building Code (including NZS1170.5:2004).*

2.3 The High Court dismissed an appeal against the Environment Court decision.[4] In considering the Environment Court's consideration of this point, it stated:

> *[35]...By way of relevant authority [the Environment Court] cited the decision in Christchurch International Airport v Christchurch City Council [1997] 1 NZLR 573. That is agreed by the appellant to be the appropriate precedent. The Court then reviewed all the evidence about safety, and concluded that the safety matters raised were appropriately covered by the building consent process.*
>
> *[36] It is clear the Court perceived that the safety expert called by the appellant, Dr Oldfield, was challenging the adequacy of the Building Code's standards. In response to this evidence the Court indicated it did not see its role to be to review those matters, citing s 18 of the Building Act which says that buildings need not achieve performance criteria greater than the Code. That is, with respect, plainly right.*
>
> ...
>
> *[40]...In my view the Court is merely concluding that on the evidence before it, there has not been shown to be any resource management purpose requiring controls on the building other than those specified in the Code (para [218]), and it does not intend to second guess the standards established by the Code.*

2.4 Todd Property submits that it is similarly inappropriate for the Panel or the Council to second guess the building standards established by the BC in a RMA process.

[4] *Petone Planning Action Group v Hutt City Council* HC Wellington CIV-2008-485-1112, 22 September 2008.

3. PRACTICAL IMPACT OF THE PROPOSED DUPLICATION OF BUILDING STANDARDS

3.1 Todd Property submits that the imposition of building standards beyond those imposed by the BC will cause significant confusion and inefficiency.

3.2 The RMA consent process often involves substantial modifications to proposals in order to reach agreement between the applicant, the Council, and submitters. At the resource consent stage a more general concept of the building design is provided, to allow for these changes before a more detailed and costly building design is developed.

3.3 Changes made to one part of the design often have a flow-on effect to other aspects of the design. It is therefore difficult, if not impossible, to provide detailed designs for only the aspects of the building that are subject to additional building requirements in the PAUP.

3.4 With only this more general building design available, it will be difficult to determine at this stage whether a proposal complies with the additional building requirements included in the PAUP. However, requiring a detailed building design to be submitted along with an application and then modified repeatedly during the resource consent process would make development prohibitively costly.

3.5 While a general building design may be available at the resource consent stage, a more detailed building design is usually provided later, at the building consent stage. This detailed building design is significantly more costly to develop than the general resource consent stage building design. Any changes to the building design at the building consent stage to ensure compliance with the BC may affect compliance with building standards in the PAUP, adding additional delays and costs at this stage of development.

3.6 Compliance with building standards is then confirmed after the building is constructed, when the building consent authority determines whether to issue a code compliance certificate. The matters for consideration in determining whether to issue a code compliance certificate are prescribed by section 94 of the BA. RMA matters, including plan rules, are not included in the list of matters for consideration. This will lead to difficulties in ensuring compliance with the PAUP following construction.

3.7 In addition, the inclusion of building standards in the PAUP would result in a fragmentation of otherwise nationally consistent building standards. This would result in confusion for developers and anyone involved in the

construction industry. This would also mean that Auckland would be the most complex and costly region in New Zealand in which to develop housing, despite being the region most in need of more affordable housing.

4. COUNCIL CONSIDERATION OF CLIMATE CHANGE IN THE PAUP

4.1 The PAUP includes a chapter on responding to climate change[5] in its Regional Policy Statement. The PAUP also contains several objectives and policies[6] and rules[7] requiring compliance with sustainable design standards beyond those required by the BC.

4.2 In addition to the concerns stated above regarding building standards beyond those required by the BC, we note that section 3(b)(ii) of the Resource Management (Energy and Climate Change) Amendment Act 2004 required local authorities "not to consider the effects on climate change of discharges into air of greenhouse gases". Instead, the Amendment Act sought to ensure that policies to address greenhouse gas emissions be implemented at a national level.[8]

4.3 In light of this guidance in the Amendment Act, and the efficiency provided by nationally consistent energy efficiency and renewable energy standards, Todd Properties submits that these matters would be more appropriately addressed in the BC than through the PAUP.

5. CONCLUSION

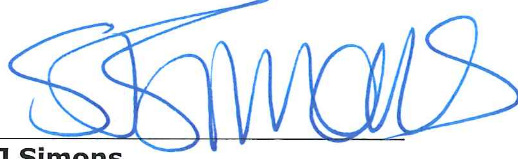
5.1 For the foregoing reasons, Todd Properties supports the Panel's preliminary assessment of this issue:

(a) That the subdivision, development and use of land that is subject to a hazard such as inundation (whether by stormwater or by the sea in storm events or as a result of a rise in sea level) is able to be controlled by the RMA, but the floor levels of individual buildings on sites which are zoned for development and use are to be determined in accordance with the BA and BC; and

[5] Part 1, Chapter B, 9: Responding to climate change.
[6] Part 2, Chapter C, 7.7: Sustainable design.
[7] Part 3, Chapter H, 6.4: Sustainable development.
[8] Nolan *Environmental and Resource Management Law* (online ed) at [17.38].

(b) That controls on internal aspects of buildings under the RMA, to the extent that they are appropriate at all, cannot exceed the requirements for such controls set by the BC.

Dated this 16th day of October 2015



S J Simons

Counsel for Todd Property Group Limited, Long Bay Communities Limited, and Okura Holdings Limited

From: Neville Paterson [mailto:apconpaterson@nettel.net.nz]
Sent: Friday, 9 October 2015 11:21 a.m.
To: Thomas Erikson
Subject: RE: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

Thank you supplementary comment for panel

Another problem you can get is you can get a resource consent to consent a lower floor level for flooding which then does not pass for building consent - had to raise floor level , redesign existing house alterations and revise resource consent with additional height to boundary infringements. This would not happen if flooding was only a building consent matter.

Kind regards,

NEVILLE PATERSON
CHARTERED PROFESSIONAL ENGINEER
On behalf of
APCON PATERSON LTD
10 Keystone Ave
Mt Roskill
Auckland 1041
Ph 09 620 9099
Mob 021 156 3814
neville@apconpaterson.co.nz

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From: Thomas Erikson [mailto:Thomas.Erikson@aupihp.govt.nz]
Sent: Friday, 9 October 2015 10:48 a.m.
To: neville@apconpaterson.co.nz
Subject: RE: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

Hi Neville,

Many thanks for your comments I will put these to the Panels attention.

Regards

Thomas Erikson | Democracy Advisor Unitary Plan Hearings
Independent Hearing Panel Office
Ph 09 890 7732 | Extn (46) 7732 | Mobile 021 686 404
Level 15, Tower One, 205 Queen Street, Auckland Central
Visit our website: www.aupihp.govt.nz

From: Neville Paterson [mailto:apconpaterson@nettel.net.nz]
Sent: Thursday, 8 October 2015 3:26 p.m.
To: Thomas Erikson
Subject: RE: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

Here is my submission,
I do not have time to attend but is a real pain when planners have to be involved in traditional building code matters especially if the standard is higher.

You end up with such a range of topics that need to be nailed down in full building consent detail such as detention tanks when you are really trying to get resource consent to do the main activity or development in the first place. Normally the detailed design was done afterward at building consent stage. Now it has to be assessed twice at additional cost.

There is the duplication of having to get resource consent and building consent for the same drainage item.

You need to do an assessment of effects as well which are already taken care of by following the code of practice. (which was revised to suit the PUAP).

Planners do not know much about engineering and drainage engineers – council and private do not see a benefit from their involvement – just another layer of red tape.

If the building code is too lax then get it revised not override it in the PUAP.

I have jobs that have resource consent held up section 92 waiting for a drainage plan to be revised when it has already been agreed with the council drainage engineer.

Another job that has been waiting over a month on Auckland Transports agreement.

I have had council planners ask for a soakage report (for the third time and overriding preapplication advice from a council drainage engineer) because they believe the site may be suitable for soakage when it clearly doesn't meet council rules. The drainage engineer from council has already decided soakage is no good.

Please do not add extra layers of red tape, duplication, cost and conflicting standards.

Kind regards,

NEVILLE PATERSON
CHARTERED PROFESSIONAL ENGINEER/PLANNER.
On behalf of
APCON PATERSON LTD
10 Keystone Ave
Mt Roskill
Auckland 1041
Ph 09 620 9099
Mob 021 156 3814
neville@apconpaterson.co.nz

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From: Thomas Erikson [mailto:Thomas.Erikson@aupihp.govt.nz]
Sent: Thursday, 8 October 2015 2:55 p.m.
To: neville@apconpaterson.co.nz
Subject: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

8 October 2015

Sub No.: 4953

Neville Paterson
10 Keystone Avenue
Mount Roskill
Auckland 1041

Dear Sir/Madam

Direction of the Independent Hearings Panel on
the Resource Management Act 1991 and the Building Act 2004
and proposed PAUP rules

PLEASE NOTE

This direction from the Independent Hearings Panel seeks the views of parties on a technical matter concerning the jurisdiction of the Resource Management Act (RMA). Responses will inform the Panel's thinking on matters it has heard and is yet to hear. The Panel may issue interim guidance on this matter prior to the hearings in 2016 on rezoning and precincts.

This is an opportunity for you to comment if you have an interest in this matter. There is no requirement for you to respond and this direction does not affect your previous submissions to the Panel.

Any responses received by the Panel will be published on our website.

If you have any queries please email info@aupihp.govt.nz or call 09 979 5566.

BEFORE THE AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

IN THE MATTER	of the Resource Management Act 1991 as amended by the Local Government (Auckland Transitional Provisions) Amendment Act 2010
A N D	
IN THE MATTER	of a Direction of the Hearing Panel dated 8 October 2015
REGARDING	the Resource Management Act 1991, the Building Act 2004 and proposed PAUP rules

---

MEMORANDUM ON BEHALF OF KIWI PROPERTY GROUP LIMITED AND KIWI PROPERTY HOLDINGS LIMITED AND THE NATIONAL TRADING COMPANY OF NEW ZEALAND LIMITED

15 OCTOBER 2015

ELLIS GOULD
SOLICITORS
AUCKLAND

REF: D A Allan

Level 17, Vero Centre
48 Shortland Street, Auckland
Tel: (09) 307 2172 Fax: (09) 358 5215
PO Box 1509
DX: CP22003
AUCKLAND

DAA-004282-186-125-V1

May it please the Panel:

1. This memorandum is filed in response to the direction issued by the PAUP Hearing Panel on 8 October, 2015 ("**the Direction**") inviting legal submissions with respect to the relationship between the Resource Management Act 1991 ("**RMA**") and the Building Act 2004 ("**BA**") and the implications of that relationship for certain PAUP provisions.

2. The memorandum is lodged on behalf of:

   (a) Kiwi Property Group Limited and Kiwi Property Holdings Limited ("**Kiwi**"); and

   (b) The National Trading Company of New Zealand Limited ("**NTC**")

   (collectively, "**the Submitters**").

3. The Submitters have previously addressed these issues in legal submissions (eg: on Topic 022). Is not proposed to repeat that analysis. Furthermore, the Submitters agree with the analysis set out in paragraphs 9 to 29 of the Direction, subject to the minor point commented on below.

4. In paragraph 10 of the Direction it is noted that "*the purpose of the RMA is broad enough to encompass the purpose of the BA*". In paragraph 13(a) of the Direction it is stated that "*the purpose of the RMA being greater than the purpose of the BA*". The Submitters consider that whilst there is some degree of overlap between the purposes of the two statutes, they are at their core concerned with different matters and are essentially complementary.

5. The purpose of the BA is set out in section 3 of that Act and reads:

   > *"(a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—*
   >
   > > *(i) people who use buildings can do so safely and without endangering their health; and*
   > >
   > > *(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and*
   > >
   > > *(iii) people who use a building can escape from the building if it is on fire; and*

(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:

(b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code."

Comment:

(a) The chapeau of subsection (a) refers to three regulatory activities:

(i) The "*regulation of building work*" on its face addresses the manner in which building works will be undertaken. It does not concern the effects that would be generated by such building works on completion.

(ii) Similarly the "*establishment of a licensing regime for building practitioners*" is unrelated to the effects of buildings once complete.

(iii) The "*setting of performance standards for buildings*" does address the manner in which buildings will function following completion. It is this aspect of the BA that might possibly interact with the RMA.

(b) The purposes for which those regulatory activities will be undertaken are set out in items (i) to (iv) of sub-section (a):

(i) Items (i) to (iii) each explicitly refer to and protect the interests of people who use buildings. The Submitters consider that these provisions are focused solely on the interests of the inhabitants of or visitors to the buildings for which consent would be sought pursuant to the BA. That is, the provisions are not concerned with impacts on people who are using neighbouring properties or buildings (although interface issues will necessarily need to be considered where structures abut one another).

(ii) Item (iv) does not explicitly refer to people who use buildings. It does, however, address the manner in which buildings will be designed, constructed and used. The Submitters consider that this provision, too, is focused on the building for which consent would be sought under the BA rather than the interests of neighbours or passersby.

(c) Sub-section (b) is concerned with regulatory measures by which accountability can be ensured.

6. The purpose of the RMA reads:

> *"(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
>
> *(2) In this Act,* ***sustainable management*** *means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which* <u>*enables people and communities*</u> *to provide for their social, economic, and cultural well-being and for their health and safety* <u>*while*</u> *—*
>
> > *(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> >
> > *(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
> >
> > *(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."*

<u>Comment</u>:

(a) Whilst promotion of the sustainable management of natural and physical resources is a very wide phrase, its meaning is defined in subsection (2). That definition speaks of <u>enabling</u> people and communities to provide for their well-being <u>while</u> addressing the matters set out in (a) to (c).

(b) The Submitters see the enabling aspect of section 5 as relating to the flexibility of landowners or occupiers to develop their land while (a) to (c) set out the constraints that temper that flexibility:

  (i) Items (a) and (b) address high level environmental issues. They are not concerned with the detailed interface between buildings and activities.

  (ii) Item (c) is relevant to those interface issues as it addresses adverse effects of activities on the environment. In that regard the Submitters consider that it is the effects on other users of the environment (including, most obviously, occupants of neighbouring sites or passersby) that is relevant under RMA, rather than effects on the proponent of an activity.

  (iii) In that regard the Submitters agree with the Panel's comment in paragraph 16 of the Direction that, *"while the definition of 'environment' in s2 RMA is broad enough to include the person*

undertaking the activity, the context of the various provisions relating to dealing with effects of activities indicates that such a reflexive interpretation should not be applied".

7. Accordingly, the Submitters consider that:

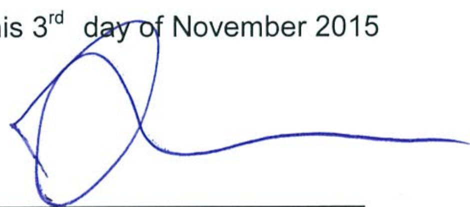
   (a) The purpose of the BA is focused on the performance of the building in terms of the people occupying it; whereas

   (b) The purpose of the RMA is concerned with the manner in which an occupier's ability to use their land as they wish should be constrained as a consequence of the effects on others that such use might generate.

8. While those purposes can overlap in some circumstances, as a generality they are distinct and complementary. The RMA purpose is not wider than that of the BA. Rather, it is a different purpose with an outward rather than on-site focus.

9. The practical implication is that PAUP rules which endeavour to constrain an applicant's flexibility because of effects on neighbouring land (eg: to prevent increased flood levels on neighbouring properties) are likely to be lawful but PAUP rules which endeavour to constrain an applicant's flexibility in order to safeguard the applicant (eg: to elevate habitable rooms well above the freeboard required under the BA) are likely to be problematic.

Dated this 3rd day of November 2015



DA Allan - Counsel for the Submitters

IN THE MATTER of the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010

AND

IN THE MATTER of the Proposed Auckland Unitary Plan ("**PAUP**")

DIRECTION ON THE RESOURCE MANAGEMENT ACT 1991 AND BUILDING ACT 2004 AND PROPOSED PAUP RULES (8 OCTOBER 2015) – LEGAL SUBMISSIONS ON BEHALF OF AUCKLAND COUNCIL

MAY IT PLEASE THE PANEL

1. INTRODUCTION AND SUMMARY OF COUNCIL'S POSITION

1.1 These submissions relate to the Direction of the Independent Hearings Panel of 8 October 2015 concerning the relationship between the Resource Management Act 1991 (**RMA**) and the Building Act 2004 (**BA**) (**Direction**).

1.2 By way of a summary, the Council responds to the issues in paragraphs 2 to 3 of the Direction as follows:

(a) **Jurisdiction:** There is jurisdiction for the Proposed Auckland Unitary Plan (**PAUP**) to seek to include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code (**BC**) other than under sections 68(2A) and 76(2A) of the RMA.

(b) **Nature and extent**: Where the PAUP seeks to impose a higher standard, the limits on the nature of such a rule or the extent to which such a rule can exceed BC standards are circumscribed by the statutory criteria of the RMA (and the case law applicable to the validity of plan rules). The

statutory criteria applicable to plan rules include that the rule must be the most appropriate way to achieve the relevant PAUP objectives and must give effect to any national policy statement and regional policy statement in the PAUP.

(c) **Appropriateness**: In light of section 32 of the RMA, the PAUP rules should not include the same performance standards for buildings as the BC where those standards are mandatory. That would result in unnecessary duplication of regulation. However subject to satisfaction of the matters in paragraph 1.2(b) above, it may be appropriate for the PAUP to include rules that are the same as BC performance standards where those standards are not mandatory in the Auckland region or for the PAUP to include rules that impose higher standards than the BC.

2. RELEVANT STATUTORY CONTEXT

2.1 The issues addressed in the Direction arise because of section 18 of the BA, which says:

> **18 Building work not required to achieve performance criteria additional to or more restrictive than building code**
>
> (1) A person who carries out any building work is not required by this Act to-
>
> (a) achieve performance criteria that are additional to, or more restrictive than, the performance criteria prescribed in the building code in relation to that building work; or
>
> (b) take any action in respect of that building work if it complies with the building code.
>
> (2) Subsection (1) is subject to any express provision to the contrary in any Act.

2.2 As discussed below, section 18 replaced section 7(2) of the Building Act 1991, which said:

> Except as expressly provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

2.3 The BA has various purposes set out in section 3, and these include (relevantly):

(a) to provide for the regulation of building work…and the setting of performance standards for buildings to ensure that:

(i) people who use buildings can do so safely and without endangering their health; and
(ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
(iii) …
(iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development.

3. COUNCIL'S APPROACH TO KEY ISSUE

3.1 The key issue arising from the Direction is whether, in light of section 18 of the BA, performance standards can be imposed in plan rules under the RMA that are "additional to, or more restrictive than, the performance criteria prescribed in the BC in relation to building work".

3.2 The Council considers that there is no jurisdictional reason why the PAUP cannot include rules that include higher performance standards than the BC. This is not prevented by section 18 of the BA. The Council submits that this is established by:

(a) the case law about the relationship between the RMA and the BA; and

(b) the accepted principles of statutory interpretation.

3.3 These issues are discussed in turn below. We also discuss the purpose of the PAUP rules that have been identified as being of potential concern during the PAUP hearing process and briefly refer to the issue of assumption of risk.

4. THE RELEVANT CASE LAW

4.1 In the Council's submission, the fundamental legal principles addressing the relationship between the RMA and the BA are those determined by a full bench of the High Court in *Christchurch*

International Airport v Christchurch City Council.[1] This case has not been displaced by any higher authority.[2]

4.2 As the Panel is aware, the issue in *Christchurch International Airport* was whether the Council could impose a condition on a resource consent for dwellings that required noise attenuation in excess of what was required under the building code. The condition would have the effect of protecting the occupiers of the dwellings from adverse amenity effects resulting from aircraft noise. The question was whether this condition contravened section 7(2) of the Building Act 1991, which is set out above at paragraph 2.2.

4.3 In our submission the ratio of the *Christchurch International Airport* case is that controls under the RMA can require buildings to achieve standards that are "additional to, or more restrictive than, the performance criteria prescribed in the building code" if the controls are imposed for a resource management purpose. Three extracts from that decision are of particular relevance in this regard. The first two ((a) and (b) below) are from the judgement of Tipping J and state:

> (a) It is quite consistent with that approach to say that when administering the Building Act a council may not, in terms of s 7(2), require the builder to achieve performance criteria additional to or more restrictive than those specified in the building code. It does not follow that this is a total embargo intended to apply when the council is administering the Resource Management Act. The only sensible and effective way to harmonise the potentially conflicting provisions of s 7(2) of the Building Act and, for example, s 108(2) of the Resource Management Act, is to focus on the different purposes of each statute. Reduced to the simplest level relevant to the present case, the Building Act allows a council to control building work in the interests of ensuring the safety and integrity of the structure, whereas the Resource Management Act allows the council to impose controls from the point of view of the activity to be carried out within the structure and the effect of that activity on the environment and of the environment on that activity.
>
> The council, under the guise of resource management control, may not impose a requirement affecting the structure unless such requirement is appropriate and necessary for resource management purposes. If it is, the fact the requirement could not be imposed under the Building Act does not vitiate it.[3]

---

1 *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1NZLR 573 (HC).

2 Refer to the Council's Closing Remarks of 21 April 2015 in relation to Topic 022 which discuss related caselaw (paragraphs 2.14-2.29).

3 Page 576, lines 32-47.

(b) I return to what I see as the crucial point for the purposes of this part of the case. Under s 76(1) of the Resource Management Act territorial authorities are concerned with activities. Their rule-making powers are limited to rules which "prohibit, regulate, or allow activities". Under s 76(3) territorial authorities must in making rules have regard to the effect of activities on the environment. Thus a council in its resource management capacity is concerned with activities and their actual or potential effect.

The relevant activity for present purposes is the residential occupation and use of land and buildings. In regulating that activity in the area in question, the Christchurch City Council considered that the activity should be allowed only if the dwelling was satisfactorily insulated against the noise of the airport. That was a requirement imposed because of the location of the proposed building and as a condition of allowing the building to be used for its intended purpose in that location. It was a requirement imposed for the regulation of the activity within the proposed building. It was not imposed, other than incidentally and indirectly upon the intended occupier "in undertaking any building work" within the meaning of s 7(2) of the Building Act. While the activity of building is no doubt an activity for resource management purposes, it is not that activity which, by imposing the noise insulation requirement the council was seeking to regulate.

The Council was not prepared to allow the building, once built, to be occupied and used for residential purposes unless it had sufficient noise control insulation. Thus the council was not imposing the requirement on the relevant person in undertaking the building work but rather the requirement was imposed as a precondition to the use of the building for its permitted activity, ie residential occupation. A building consent could have been obtained without the extra insulation but without that insulation the building could not have been occupied and used, ie the intended activity could not have taken place.[4]

4.4 The third extract is from the judgement of Chisholm J, as follows:

(c) It is significant that whereas potential controls under s 6(1)(a) of the Act include controls relating to building work *and* the use of buildings, s 7(2) only applies to building work – in other words, the physical process of constructing, altering, demolishing or removing buildings. The exclusion of the *use* of buildings from the scope of s 7(2) is consistent with the second purpose set out in s 6(1)(b) of the Building Act, namely, the coordination of Building Act controls with other controls relating to building use and the management of natural and physical resources. It follows that it must have been the statutory intention that the building code should only prevail over other controls relating to buildings in the narrow context of "building work" as defined in the Building Act. It was not part of the statutory intention that building controls concerning the use of buildings or controls arising from the management of natural and physical resources under the Resource Management Act should be circumscribed by the building code.[5]

4 Page 579, lines 21-47.
5 Page 594, lines 11-25.

4.5 Paragraph 13(b) of the Direction states that the *Christchurch International Airport* decision:

> …reasons that where the BC does not cover the particular effect that the RMA rule directly seeks to control then it is open to make RMA rules to deal with that effect. On that basis, the decision concludes that the way is clear for there to be RMA regulation of dwellings to address such external noise effects.

4.6 With respect, the Council submits that this interpretation of the case is not correct, because:

(a) the key inquiry is not whether there is an "effects gap" in the BC that needs to be "filled" with regulation under the RMA. Rather, in light of the above excerpts from the High Court's decision, the key inquiry is whether the RMA regulation has a legitimate resource management purpose;

(b) the High Court's analysis addresses the issue in a general manner and undertakes no assessment of whether the BC was inadequate in the circumstances. In any event, the BC does address acoustic matters, but not in relation to external noise sources such as aircraft noise.

4.7 The Council surmises that the Panel may have an underlying concern that this interpretation of the scope of RMA control has the potential effect of usurping the BA/BC. In that regard it is noted that unlike the BA requirements, RMA controls are subject to the statutory processes that allow RMA decision-making to be challenged. Through those processes the purpose, lawfulness and reasonableness of the decision can be tested.

5. STATUTORY INTERPRETATION

5.1 The Direction notes that the purpose of BA is different (and arguably broader) than the purpose of the Building Act 1991, which was the subject of the *Christchurch International Airport* decision. In the Council's submission this modification of the statutory purpose does not alter the application of the principles for that case to the BA because:

(a) While section 3 of the BA now refers to terms and concepts such as "well-being" and "sustainable development", the purpose of the BA is not the same as the RMA. For instance, section 3 of the BA has no reference to "social, economic and cultural wellbeing", "sustaining the potential of the natural and physical resources…to meet the reasonable needs of future generations" or "managing the effects of activities on the environment". Rather, the BA purpose is generally focussed on the performance of buildings from the perspective of the people who use them. Recognising that there is an established body of case law where the Courts have explicitly recognised that reference to legislative history is helpful and may be necessary to determine the true purpose and meaning of legislation,[6] this conclusion is reinforced by the following from the Select Committee Report on the Building Bill:[7]

> We recommend the words "able to be used" be inserted in clause (3d) to clarify that the bill does not intend to regulate the use of buildings…. The intent of the bill is to set building standards which impact on use.

(b) Section 3(a)(iv) of the BA refers to buildings being "designed, constructed and able to be used in ways that promote sustainable development". However:

(i) Parliament has intentionally not used the term "sustainable management" indicating that the intention was for the BA not to have the same purpose as the RMA;

(ii) The BA does not define "sustainable development". According to the Select Committee Report for the BA the decision not to define sustainable development was intentional because there was an intention "that the concept will be articulated in the

6 See for example *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 658 and *Art Deco Society (Auckland) Inc v Auckland City Council* [2006] NZRMA 49 (HC) at [34].

7 Government Administrative Committee report on the Building Bill, page 3.

BC on the basis of current values and knowledge".[8] This means that it is only the performance standards in the BC that represent "sustainable development" under the BA. The term is not intended to cover anything broader.

5.2 Further, the key provision, for the purposes of the Direction is section 18 of the BA. As noted in the Direction, the fundamental principle set out in section 5(1) of the Interpretation Act 1999 is that the meaning of an enactment must be ascertained from its text and in light of its purpose.

5.3 It is notable that section 18 of the BA was drafted in full knowledge of the *Christchurch International Airport* decision. Parliament could have, for instance, drafted section 18 in a way to exclude the ability for councils to require buildings to meet standards greater than the BC under the RMA – but it did not do so.

5.4 Rather, in contrast to section 7(2) of the Building Act 1991, section 18(1) of the BA now makes it clear that it is only addressing the performance criteria (etc) required "by this Act". In our submission it is clear that section 18 is only limiting decision-making under the BA. It does not limit decision-making under other statutes. In this context section 18(1) only relates to decision-making under the BA. As an aside, we note that section 18(2) means in our submission that other statutes can modify a council's decision-making under the BA to impose different criteria to the BC.

5.5 In light of the above, it is submitted that the enactment of the BA has, if anything, strengthened the findings of the High Court in the *Christchurch International Airport* case that "it was not part of the statutory intention that building controls concerning the use of buildings or controls arising from the management of natural and physical resources under the [RMA] should be circumscribed by the building code".[9]

8 Ibid.
9 Per Chisolm J, quoted above at paragraph 4.4.

5.6 It is also noted that the BA is not the only legislation where there is perceived potential for overlap with the RMA. There is for example a potential overlap between the RMA and the Civil Aviation Act 1990 in relation to aviation safety issues. However, consistent with the Council's interpretation of the relationship between the BA and the RMA, when assessing the merits of a resource consent application, the Environment Court has found that it is separately entitled to take into account the effects of potential accidents (being health and safety considerations) as they affect people and communities pursuant to the provisions of section 5(2) in Part 2 of the RMA which defines the "sustainable management" purpose of the RMA.[10]

6. RESOURCE MANAGEMENT PURPOSE

6.1 Of key importance, given the legal matters outlined above, is the purpose of the provisions of concern to the Panel (listed broadly at paragraph 4(c) of the Direction). This section of the submissions addresses the purposes for the key provisions at issue.

Topic 022 Flooding and Natural Hazards

6.2 Within the flooding provisions, it is understood that the Panel is solely concerned with the proposed rules that used finished floor levels above the 1% AEP event as performance criteria to determine the activity status of "more vulnerable" activities. In this regard, clause E1.3.2 of the building code says that "surface water, resulting from an event having a 2% probability of occurring annually, shall not enter buildings". It is noted that E1.3.2 does not refer to finished floor levels, and its purpose refers to safeguarding people's "injury or illness" from damage caused by surface water.

6.3 At the outset it is noted that the latest version of the Council's proposed rules did not include any finished floor level requirement.[11] Nevertheless it is submitted that there is scope to include such rules

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10 See for example *Glentanner Park (Mount Cook) Limited v MacKenzie District Council* PT Decision W50/94 and *Aviation Activities Limited v Mackenzie District Council* ENC Christchurch Decision C72/2000

11 Second Statement of Rebuttal Evidence of Larissa Clarke – 29 July 2015, Attachment A pages 39-54

in the PAUP for the reasons set out in the Council's closing remarks of 21 April 2015.[12] In broad terms:

(a) there is a need to address the cumulative social, economic and environmental effects of significant levels of development within the 1% AEP flood plains, within the context of climate change resulting in more frequent/intense rainfall events. These matters are not within the purpose of E1.2.3; and

(b) the BA assessment of proposed buildings is focussed on the structured performance of individual buildings at the time a building consent application is assessed – and does not take into account the wider environmental and natural hazard management issues facing the community and Council.

6.4 Returning to the *Christchurch International Airport* case, the proposed rules deal with the residential (and other more vulnerable) use of buildings within particular locations. This is, in the Council's submission, on all fours with the Court's decision in that it is "a requirement imposed for the regulation <u>of the activity</u> within [a] proposed building". It was not imposed, other than incidentally and directly, upon the intended occupier in relation to any building work.

Topic 050 City Centre

6.5 With respect to the City Centre zone rules, the Council understands that the development controls of concern to the Panel in light of section 18 of the BA, are those relating to ground floor and entrances at street frontage level, minimum dwelling size, daylight to dwellings and universal access for residential buildings. Similar concerns have been raised in respect of a number of the controls that apply to Terrace Housing and Apartment Buildings zone discussed during the hearing on Topics 059 to 063 Residential objectives and policies, activities, development controls and controls and assessment.

[12] It is noted that such an approach is consistent with the wording of the Northland Regional Policy Statement recently approved by the Environment Court (consent order dated 29 June 2015). See, for example, policy 7.1.2(c).

6.6 As was discussed in the Council's closing remarks for Topic 050 City Centre,[13] these development controls have predominantly been designed to address amenity effects on people who live in and visit buildings and, in the case of universal access to buildings, are fundamentally about enabling people to provide for their social and economic well-being. Some of the development controls also address wider urban design considerations. Small apartments with small outlook spaces have the potential to adversely impact on members of the public in the external wider viewing catchment. All of these controls therefore have a resource management purpose.

6.7 As in the *Christchurch International Airport* case, the relevant activity for the purpose of these controls is the residential occupation and use of land and buildings. In including these rules in the PAUP, the Council is not prepared to allow a building, once built, to be occupied and used for residential purposes until it has sufficient access, daylight, and room sizes. In this regard, the PAUP development controls are not imposing the requirement on the relevant person in undertaking building work but rather they are imposed as a precondition of the use of the building for its permitted activity i.e. residential occupation.

Topic 077 Sustainable design

6.8 The sustainable design rules proposed by the Council in H6.4 of the PAUP require all new dwellings to achieve either a minimum 6-star rating from the New Zealand Green Building Council Homestar Tool Version 3 (2015) or to comply with an alternative specified list of sustainable design features.

6.9 The intent of the PAUP sustainable design rules[14] is to ensure that new development is designed to:

(a) operate efficiently and to minimise the use of energy and water resources;

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[13] Closing remarks on behalf of Auckland Council in relation to Topic 050 City Centre, at [2.11] and [2.12].

[14] Anthony Horton, evidence-in-chief for Topic 077 Sustainable design at [7.1].

(b) minimise adverse environmental effects; and

(c) create healthy and comfortable living and working environments.

6.10 As noted in the Council's legal submissions for Topic 077 Sustainable design (C7.7 and H6.4) there appeared to be general acceptance amongst submitters that sustainable design is a valid resource management issue. For example, Bruce Klein in his evidence on behalf of the Ministry for Business Innovation and Employment referred to the Government's support for the Homestar tool as one approach to achieving sustainability (in housing), and the efficient use of energy which he stated were both matters for regard under the RMA[15] .

6.11 As with the City Centre zone development controls discussed above, the relevant activity for the purpose of the PAUP sustainable design controls is the residential occupation and use of land and buildings. The controls address a range of resource management issues including the health and economic wellbeing of occupants, as well as the effects of residential activity on the environment through matters such as less waste in landfills and water and energy efficiency.

7. ASSUMPTION OF RISK

7.1 Section 104(3)(a)(ii) of the RMA provides that the consent authority must not, when considering a resource consent application, have regard to any effect on a person who has given written approval to the application. At paragraph 18 the Direction states that because of section 104(3)(a)(ii) of the RMA there is a general principle that the "voluntary assumption of risk is acceptable under [the] consenting provisions in Part 6 of the RMA". The Direction then goes on to say that "while there is no comparable provision in the plan-making provisions of Part 5, or Schedule 1 to the RMA, the principle must still be available by analogy".

7.2 We do not wish to express a definitive view on the nature and extent of such a general principle, especially in the context of proposed plan

[15] Bruce Klein, evidence-in-chief for Topic 077 Sustainable design at 4.2.

provisions, and especially where the provisions are intended to mitigate or avoid natural hazards. Overall, any PAUP provision needs to be assessed against the relevant statutory matters, including section 32. This assessment allows the impacts of proposed provisions on land owners to be considered in the context of the purpose of the RMA.

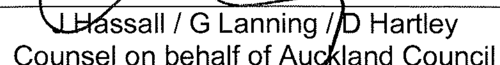
7.3 At paragraph 18 the Direction gives an example of an applicant seeking consent to not comply with floor level requirements (if they existed) and by implication giving their "affected party" approval to the effects of the non-compliance. As explained above, the purpose of the rules relating to flooding are intended to address a broad range of effects that go beyond the individual owner/occupier.

7.4 Finally on this issue, paragraph 19 of the Direction indicates a preference for including the PAUP non-statutory layer information in the Council's main GIS viewer. We note that the flooding non-statutory information is also included on the GIS viewer. In fact, the information in the PAUP viewer is a copy of the data available on the GIS viewer.

8. CONCLUSION

8.1 For the reasons outlined above, the Council submits that section 18 of the BA does not limit the ability to include rules in the PAUP that may require buildings to achieve higher performance standards than the BC where the rules meet the statutory tests of the RMA.

DATED at Auckland this 3rd day of November 2015



J Hassall / G Lanning / D Hartley
Counsel on behalf of Auckland Council

AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

IN THE MATTER	of the Local Government (Auckland Transitional Provisions Act 2010) ("the Act")
AND	
IN THE MATTER	of hearings pursuant to section 128 of the Act
TOPIC:	Direction of the Independent Hearings Panel on the Resource Management Act 1991 and the Building Act 2004 and proposed PAUP rules

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MEMORANDUM OF COUNSEL ON BEHALF OF CARTER HARVEY LIMITED

3 NOVEMBER 2015

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MAY IT PLEASE THE HEARINGS PANEL

1. This memorandum is filed on behalf of Carter Holt Harvey Limited (5791, FS 3023) ("CHH").

2. CHH provided legal submissions on the PAUP Topic 077 in the context of the Council's proposal to duplicate and exceed the requirements of the Building Code relating to matters including insulation, glazing and ventilation. Its legal submissions referred to the High Court's finding in *Petone Planning Action Group v Hutt CC*, High Court, Wellington (CIV-2008-485-1112) per Simon France J, that it is not the role of the Court to review the Building Code where there has not been shown to be any resource management purpose requiring controls on a building other than those specified in the Code [refer to part 4 of CHH's legal submissions, Topic 077].

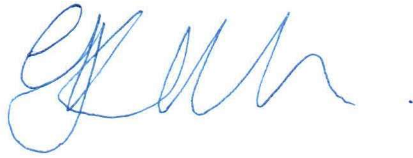
3. During Topic 077, the company also adopted the detailed legal submissions of Housing New Zealand which traversed the relevant case law.

4. It is submitted that Housing New Zealand's legal submissions are consistent with the Panel's initial guidance. In particular, Counsel respectfully concurs with the Panels' statement that:

> *"…the RMA can address the control of effects of activities (including building work which will be used for such activities) that may or may not occur in certain locations, or may address the control of effects where the BC does not regulate building work for that purpose, but cannot duplicate or exceed any BC controls on building work itself. In those ways, the general rule in s18(1) BA remains effective but does not impede the making of RMA rules which may affect the location and use of buildings but otherwise address matters that are not intrinsic to building work." [para 14]*

5. The performance criteria that the PAUP proposes to regulate through the application of the Sustainable Design provisions control building work for matters already prescribed in the Building Code, in a manner that is additional to or more restrictive than the Building Code. It is submitted that these matters are not properly matters for the PAUP to control.

Dated at Auckland this 3rd day of November 2015



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Gill Chappell
Counsel for Carter Holt Harvey Limited

Before the Auckland Unitary Plan
Independent Hearings Panel

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under:	the Resource Management Act 1991, as amended by the Local Government (Auckland Transitional Provisions) Amendment Act 2010
in the matter of:	submissions lodged on the Proposed Auckland Unitary Plan
regarding:	the direction of the Independent Hearings Panel on the Resource Management Act 1991 and the Building Act 2004 and proposed PAUP rules

Legal Submissions on behalf of Ryman Healthcare Limited (6106) and the Retirement Villages Association (6103)

Dated: 3 November 2015

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LEGAL SUBMISSIONS ON BEHALF OF RYMAN HEALTHCARE LIMITED AND THE RETIREMENT VILLAGES ASSOCIATION

INTRODUCTION

1 The Independent Hearings Panel (*Panel*) issued a direction dated 8 October 2015 concerning the relationship between the Resource Management Act 1991 (*RMA*) and the Building Act 2004 (*Building Act*) and Schedule 1 of the Building Regulations 1992 (*Building Code*).

2 The Panel has given submitters the opportunity to comment on three issues:

2.1 Jurisdiction: Can the PAUP include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code, other than under sections 68(2A) and 76(2A) of the RMA?

2.2 And, if the PAUP can impose a higher standard:

(a) Nature and extent: are there limits on the nature of such a rule or the extent to which such a rule can exceed Building Code standards?

(b) Appropriateness: is it more appropriate for the PAUP to use the same performance standards for buildings as the Building Code, or should it impose higher standards?

3 These submissions address those matters on behalf of Ryman Healthcare Limited (*Ryman*) and the Retirement Villages Association (*RVA*). Ryman and the RVA made submissions on the Proposed Auckland Unitary Plan (*PAUP*). Those submissions sought amendments to recognise the particular importance of, and need for, retirement accommodation and care, and to enable its

efficient and effective development. Ryman and the RVA sought a planning framework that (among other things):

3.1 Focuses on managing the external effects of retirement villages; and

3.2 Does not impose unnecessary controls on on-site activities.

JURISDICTION: CAN THE PAUP REQUIRE BUILDING WORK TO BE UNDERTAKEN TO A HIGHER STANDARD?

4 No. Ryman and the RVA respectfully agree with the preliminary view in the Panel's direction, that the PAUP cannot require building work to be undertaken to a higher standard than that required by the Building Code, other than under sections 68(2A) and 76(2A) RMA. Ryman and the RVA also agree with the Panel's interpretation of the High Court's decision in *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573.

Analysis

5 Section 18 of the Building Act prevents additional or more restrictive performance criteria where:

5.1 A person carries out any "building work";

5.2 There are "performance criteria prescribed in the building code" which relate to that building work; and

5.3 There is no "express provision to the contrary in any Act".

Building work

6 Section 18 only applies where a person carries out any "building work". "Building work" is defined to mean "*work for, or in connection with, the construction, alteration, demolition, or removal of a building…*".[1]

[1] Building Act 2004, s7.

7 Section 18 does not prevent controls which do not relate to "building work".[2] The PAUP rules may therefore control other matters relating to buildings, such as the effects of the location or use of buildings.

8 That principle is endorsed in *Christchurch International Airport Ltd v Christchurch City Council*. The High Court in that case found that a consent condition was lawful as it did not relate to building work. The Council imposed a condition on a land use consent which required the new dwellings to incorporate noise insulation, in order to prevent reverse sensitivity effects arising from the development of dwellings near the airport. The High Court found that the Building Code did not specify performance criteria in respect of the transmission of sound, outside of the context of abutting buildings.[3] The High Court said:[4]

> If the exercise of the power relates only to the physical building structure it will be caught by s 7(2). On the other hand, if the exercise of the power relates to the control of activities or the effects of activities in terms of the *Resource Management Act* it will not be caught by s 7(2).[5]

Performance criteria prescribed in the Building Code

9 Section 18(1) only applies where there are "performance criteria prescribed in the building code". Accordingly, if the Building Code does not contain performance criteria which address an issue, there is jurisdiction for the PAUP rules to do so, subject to satisfying other statutory tests and considerations.

10 In *Department of Survey & Land Information v Hutt City Council*[6] the Environment Court found that a consent condition related to a

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[2] *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573, at 594. See also *Maurice R Carter Limited v Christchurch City Council* (C79/2001), at [12], where the Court held that a rule controlling tree planting within 30 metres of a building was not ultra vires, especially as it was not a 'building work'.

[3] Ibid, at 594.

[4] Ibid, at 595.

[5] Section 7(2) has been replaced by section 18. Although the provisions have slightly different wording, the changes are not material for the present purposes.

[6] [1997] NZRMA 378

matter that was covered by performance criteria in the Building Code. The Council had imposed a condition on a subdivision consent which required a report confirming that the fire ratings of buildings adjoining the new boundaries complied with the Building Code. The Environment Court determined that the Building Act "has specifically set its mind to the situation of fire ratings as between adjoining buildings and it is that specific instance which the council condition seeks to control". The Court held that the Building Act is a code, and the Council did not have the power to impose the condition.[7]

11 Similarly, in *Petone Planning Action Group Inc v Hutt City Council*[8], the Court did not accept that the Council erred in relying on the Building Code to manage the performance of the structure and the safety of people in an earthquake to the Building Code.[9] This decision was upheld in the High Court.[10]

Subject to any express provision to the contrary in any Act

12 The RMA contains express provisions which exclude the application of section 18(1). Sections 68(2A) and 76(2A) relate to rules "for the protection of other property from the effects of surface water", which is addressed by Clause E1 – Surface Water of the Building Code. Accordingly, the RMA provisions were necessary to enable councils to impose their own controls over the physical building structure.[11]

13 There is nothing in sections 68 and 76 of the RMA (other than the provisions discussed above) to suggest that they are "express

[7] Ibid, at 383.

[8] W020/2008.

[9] Ibid, at [218].

[10] *The Petone Planning Action Group v Hutt City Council* (CIV-2008-485-1112)

[11] *Christchurch International Airport Ltd v Christchurch City Council*, at 596. Similarly, section 49(1B) of the Meat Act is an express provision which excludes the application of section 18(1).

provisions" capable of excluding the operation of section 18.[12] Further, the PAUP rules are not an "Act" and therefore they cannot exclude the operation of section 18.[13]

Conclusion

14 The PAUP rules cannot control matters:

14.1 Which relate to "building work";

14.2 Where there are "performance criteria prescribed in the building code" relating to that building work; and

14.3 Where there is no "express provision to the contrary in any Act".

15 If the Council has an issue with the Building Code standards, with respect, Ryman and the RVA consider the appropriate solution is for the Council to promote changes to the Building Code.

Application

16 The conclusion outlined above requires the Panel to determine whether a proposed PAUP rule relates to building work that is already covered by a performance criterion prescribed by the Building Code and is not covered by ss 68(2A) and 76(2A) RMA.

Daylight and outlook standards

17 As an example, at the Topic 059-063 – Residential hearing, Ryman and the RVA sought the deletion of daylight and outlook space standards, including because the Building Code already manages those matters.

18 It is submitted that the PAUP's daylight and outlook space standards relate to 'building work' (i.e. the physical building structure), and are addressed by performance criteria prescribed in the Building Code.

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[12] Similarly, the Court in *Christchurch International Airport Ltd v Christchurch City Council*, at 592-593, held that section 108 of the RMA is not an express provision capable of excluding the operation of s7(2) of the Building Act (now s18).

[13] Ibid, at 593.

19 Clause G7, Natural Light of the Building Code specifies:

> **Objective**
> **G7.1** The objective of this provision is to safeguard people from illness or loss of *amenity* due to isolation from natural light and the outside environment.
>
> **Functional requirement**
> **G7.2** *Habitable spaces* shall provide *adequate* openings for natural light and for a visual awareness of the outside environment. Requirement G7.2 shall apply only to *housing*, old people's homes and early childhood centres.
>
> **Performance**
> **G7.3.1** Natural light shall provide an *illuminance* of no less than 30 lux at floor level for 75% of the *standard year*.
>
> **G7.3.2** Openings to give awareness of the outside shall be transparent and provided in suitable locations.

20 Key purposes of these Building Code provisions are to:

20.1 Safeguard people from illness;

20.2 Safeguard people from loss of amenity. "Amenity" under the Building Act means "an attribute of a building which contributes to the health, physical independence, and well being of the building's users but which is not associated with disease or a specific illness"; and

20.3 Allow building inhabitants to have a visual awareness of the outside.

21 The purpose of the daylight provision in the PAUP is noted as:

- Ensure adequate daylight for living areas and bedrooms in dwellings, retirement villages, supported residential care and boarding houses.
- In combination with the outlook control, manage visual dominance effects within a site by ensuring that habitable rooms have an outlook and sense of space.

22 These matters are addressed by Clause G7 of the Building Code. They also relate to on-site activities which, as discussed below, should not be regulated by the PAUP. Therefore there is no jurisdiction for the PAUP to include daylight standards.

23 The purpose of the outlook standard in the PAUP is noted as:

- Ensure a reasonable standard of visual privacy between habitable rooms of different residential buildings on the same or adjacent sites.
- Encourage the placement of habitable room windows to the street or public open space to maximise passive surveillance of those areas.
- In combination with the daylight control, manage visual dominance effects within a site by ensuring that habitable rooms have an outlook and sense of space.

24 Most of these matters are addressed by Clause G7 of the Building Code and relate to on-site activities which, as discussed below, should not be regulated by the PAUP.

25 Although visual privacy between habitable rooms of different residential buildings on adjacent sites is a potential external effect, other standards, such as yards and height to boundary, manage such effects. Similarly, passive surveillance of the street and public open space can be achieved through the fences, garages and dwellings fronting the street standards in the PAUP.

26 Overall, it is submitted that the PAUP should not include outlook space standards.

Sustainable design

27 Another example is the proposed PAUP's "sustainable design" standards. Ryman submitted at the Topic 013 hearing that the RPS should 'encourage' (not 'require') best practice sustainable design, including because some of those matters are controlled by the Building Code.[14]

28 For reasons already noted, Ryman and the RVA consider there is no jurisdiction for the PAUP to include "sustainable design" standards which relate to building work and where the Building Code contains performance criteria which address these matters already. Ryman and the RVA have not undertaken a full analysis of the relevant Building Code provisions, but note that:

[14] Evidence of Phil Mitchell for Ryman for Topic 013, paragraph 6.4. Ryman did not appear at Topic 077 Sustainable Design, but its submission opposed such standards.

28.1 One of the purposes of the Building Act 2004 is to ensure buildings are designed, constructed, and are able to be used in ways that promote sustainable development.[15]

28.2 Clause H1 of the Building Code already addresses energy efficiency.

29 In addition, under the RMA there must be an evidential basis to support sustainable design standards. It is not clear that such standards relate to any effects caused by an activity.

30 If the Council considers the Building Code standards do not sufficiently address sustainable design, with respect, Ryman and the RVA consider the appropriate solution is for the Council to promote changes to the Building Code.

NATURE AND EXTENT: ARE THERE LIMITS ON THE NATURE OF A RULE IMPOSING A HIGHER STANDARD?

31 Ryman and the RVA submit that a PAUP rule cannot require building work to be undertaken to a standard higher than that required by the Building Code. It follows that the issue of limits on the nature of such a rule does not arise.

APPROPRIATENESS: IS IT MORE APPROPRIATE FOR THE PAUP TO USE THE SAME PERFORMANCE STANDARDS AS THE BUILDING CODE OR SHOULD IT IMPOSE HIGHER STANDARDS?

32 If, contrary to Ryman and the RVA's submissions, the Panel considers there is jurisdiction for a PAUP rule to impose a standard higher than that required by the Building Code, Ryman and the RVA consider that it would be inappropriate for the PAUP to impose such a rule.

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[15] Building Act 2004, s3(a)(iv).

33 The evidential basis for this position, and why Ryman's proposed provisions are more appropriate than Council's, are set out in Ryman's legal submissions and evidence on the Residential Chapter topic.

34 It is further submitted that:

34.1 It is a reasonably practicable option to rely on the Building Code to manage the issues the overlapping provisions address.[16] As set out in Mr Clinton Bird's Topic 059-063 evidence, developers and designers are well aware of the need to obtain a building consent following a resource consent. There is no need for the PAUP to ensure a building consent is obtainable.[17]

34.2 It is inefficient and ineffective for regulation to be duplicated or for one regulation to require a higher standard than another.[18] For example, if daylight regulations are duplicated, a developer would need to show at both resource consent and building consent stage that the daylight standard is satisfied. And, both the resource consent processing authority and the building consent processing authority would need to assess the proposal against the standard. Inconsistent regulation (i.e. two different daylight standards) would cause confusion and may reduce effectiveness and efficiency.

34.3 As noted, there are other standards in the PAUP that manage the external effects of concern.

35 It is submitted that duplication of regulation and/or inconsistent regulation would also create economic costs, without material environmental or social gains. This issue has been raised

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[16] RMA, s32(1)(b)(i).

[17] Mr Clinton Bird's evidence for Ryman and the RVA for Topic 059-063, at paragraph 102.

[18] RMA, s32(1)(b)(ii).

throughout Ryman and the RVA's PAUP evidence. For example, Mr Clinton Bird's evidence for Topic 059 – 063 says:

> [81] In my opinion, the daylight controls will add yet another layer of unnecessary complexity and control for a designer grappling with the already considerable three-dimensional building form complexities associated with designing a retirement village. This design complexity will be exacerbated by the PAUP daylight controls. In my view the controls are not needed. I also do not consider there will be any significant improvements in the quality and amenity of the built outcome. I am not convinced of the reasons provided by Council witnesses for the controls.
>
> [82] I am also of the opinion that the rule would make the consenting process more complex and time consuming. In a typical Ryman retirement village with approximately 200 independent living residential units (i.e. excluding assisted living suites, care rooms, and dementia rooms) and allowing for the usual numerical mix of 1, 2 and 3 bedroom units, there would typically be 200 living rooms and between 400 and 450 bedrooms for which compliance with the daylight controls would need to be checked. In my opinion, this checking process is likely to increase the time and costs associated with the consenting process…
>
> [87] For many years now a combination of common sense, marketability, the New Zealand Building Act: Clause G7: Natural Light, and height in relation to boundary controls have, in my opinion, ensured that habitable rooms enjoy an appropriate minimum level of access to daylight.

INTERNAL AMENITY

36 More generally, Ryman and the RVA strongly support the Panel's preliminary view that the PAUP "*should not extend to regulating on-site activities which have no external effects*".[19]

37 It is submitted to be highly compelling, as the Panel points out,[20] that an applicant, could in effect give itself written approval to any internal effects from its development. In doing so, the Council would be barred from giving any consideration to those effects under s105(3)(a)(ii).

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[19] The Panel's 8 October direction, at paragraph 27.

[20] The Panel's 8 October direction, at paragraph s16-23.

38 Ryman and the RVA's submissions and evidence for various PAUP topics have set out both jurisdictional and merits reasons for this view. For example, Mr Kyle's Topic 059-063 evidence says:

> [48] As Mr Mitchell has stated, retirement village operators are registered operators who must design and operate the villages to meet the standards under the Retirement Villages Act 2003 and to meet the specific and sometimes specialised needs of residents. The operators are therefore best placed and informed to manage internal amenity matters such as outlook and daylight access for their residents.

CONCLUSION

39 Ryman and the RVA consider that there is no jurisdiction for the PAUP to include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code performance standards. However, if there is jurisdiction, Ryman and the RVA consider it would be inappropriate for the PAUP to include such rules.

Luke Hinchey
Counsel for Ryman Healthcare Limited
3 November 2015

BEFORE THE AUCKLAND UNITARY PLAN
INDEPENDENT HEARING PANEL AUCKLAND

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a submission lodged on the Proposed Auckland Unitary Plan

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LEGAL SUBMISSIONS ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT
Hearing 077 – Sustainable Design

Dated: 3 November 2015

MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

Level 7, 15 Stout Street
WELLINGTON
Ph: (04) 901-1599
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MBIE-MAKO-19479628

1. These submissions are filed on behalf of the Ministry of Business, Innovation and Employment ("The Ministry") in relation to Topic 077 – Sustainable Design, in accordance with the Panel's direction dated 8 October 2015 seeking the view of the parties on the relationship between the Resource Management Act 1991 ("the RMA") and the Building Act ("the Building Act").

2. The Ministry has reviewed the submissions filed by the Housing New Zealand Corporation. The Ministry agrees with the background, legal analysis and conclusions of those memoranda. The District Plan can, in limited circumstances, include a rule requiring building work to be undertaken to standard higher than required by the Building Code. This can only occur where there is a resource management purpose for the rule that is not a purpose of the Building Act. Given the alignment of the purpose between the two Acts there is very little scope for implementing Building Controls via the RMA.

3. The purpose of this memorandum is to briefly provide further detail around the role of Building Consent Authorities under the Building Act. This role does not extend to enforcing building controls imposed under the Resource Management Act. The inference is that Parliament intended for building control to be imposed in most cases under the Building Act, rather than under the powers of the RMA. From a practical perspective it is undesirable for building controls to be imposed outside the powers of the Building Act and the Ministry submits that this should only occur in exceptional and unique circumstances.

Functions of Building Consent Authorities and Territorial Authorities under the Building Act 2004

4. Under the Building Act building control functions are undertaken by Building Consent Authorities (BCAs). While it is a requirement of the Building Act that all Territorial Authorities must be registered as BCAs (section 212), Territorial Authorities and the BCAs are distinct with separate powers and obligations under the Building Act. The Building Act

also provides for private BCAs separate from the Territorial Authority, although none are registered at present. BCA's under the Building Act are separate to Consent Authorities under the RMA.

5. The key BCA powers can be summarised as follow:

a. A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications that accompanied the application (section 49 (1). There is no power to deny a consent on the basis of non-compliance with the Resource Management Act;

b. Every building consent is subject to the condition that agents authorised by the BCA are entitled to inspect building work being carried out (section 90);

c. If the building work is completed in accordance with a building consent the BCA must issue a Code Compliance Certificate (section 94);

d. If a person fails to comply with their obligations under the Building Act, the BCA (as well as the Territorial Authority and the Regional Authority) is able to issue a notice to fix requiring compliance (section 164);

e. Where there is a dispute between the parties over whether a particular matter complies with the Building Code, or certain other decisions made by the BCA are correct, the applicant can apply to the Chief Executive of MBIE for a determination on the rights and obligations of the parties under the Building Act (sections 176 – 190).

These key provisions are not replicated in the RMA.

6. BCA's have no power to require compliance with the District Plan, or other controls imposed under the RMA. While an application for building consent

can include building work which exceeds the requirements of the Building Code, this requires the applicant to elect to take this step. It cannot have been parliament's intention that broad and substantive building controls would be introduced under the RMA, and then leave BCA's with no powers to effectively enforce these provisions. Enforcement of breaches of the RMA would be left to the consent authority, with the much more limited inspection and enforcement powers in the RMA.

7. The likely result of including building controls in the District Plan is confusion for applicants, BCAs and Territorial Authorities with many of the tools to assist the parties to comply with their obligations under the Building Act unavailable. This confusion would be further exacerbated in the case where the BCA was a private company separate from the Territorial Authority.

Dated this 3rd day of November 2015

Iain Feist
Counsel for the plaintiff

From: Richard Goldie | peddlethorp [mailto:richard@peddlethorp.co.nz]
Sent: Thursday, 15 October 2015 9:08 a.m.
To: Info IHP
Cc: David Gibbs; Julie Stout
Subject: Auckland Unitary Plan Independent Hearings Panel - Notice of Panel direction on the Resource Management Act 1991 and the Building Act 2004 in the PAUP for Topics 022, 50, 59-63, 64 and 77

14th October 2015

Sub No.: 6496

Charles R Goldie
c/- Peddle Thorp
Level 5
23 Customs Street
Auckland 1010

Thank you for the opportunity to comment on this matter.

The overlap of the PAUP with the BA and BC is something that formed part of my submission which was on behalf of the NZIA and Urban Auckland.

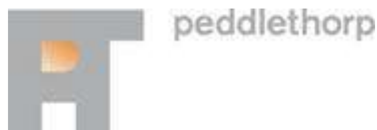
I do feel very strongly that the PAUP should restrict itself to matters within the RMA and leave building matters to the BA and BC. New Zealand is a tiny country, only 4.4m or so people. To have a proliferation and divergence of controls within such a small country and industry seems nonsensical to me because a) we are so small, 2) we are able disseminate information quickly, 3) we need to deliver legislation that makes our businesses effective and productive, 4) complications such as how is the industry expected to establish and understand the legal precedence of the either UP or BC where suggested controls may affect building arise, especially where conflicts arise?

Council(s) should be able to (and I believe can already) petition and modify the BC fairly easily. I note that in my experience modifications to the BC are fairly commonplace, suggesting the reasonable ease which this may be achieved.

In my experience also we see an almost daily proliferation of policy and rules by Auckland Council that only make our industry less efficient and productive, further complications to the Unitary Plan will not slow this.

The legal matters are beyond my expertise but I would be disappointed to see these fine points of law prevail over common sense.

Kind Regards



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GOOD LUCK ALL BLACKS -
Peddle Thorp are excited to be part of The All Blacks Experience to be built in Wynyard Quarter.

BEFORE THE 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 the Proposed Auckland Unitary Plan and procedures established under the relevant legislation to address the submissions and further submissions processes in relation to the Proposed Auckland Unitary Plan following notification of it by the Auckland Council

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LEGAL SUBMISSIONS

IN RESPECT OF THE RELATIONSHIP BETWEEN THE RESOURCE MANAGEMENT ACT 1991 AND THE BUILDING ACT 2004

VARIOUS TOPICS, INCLUDING 022 - FLOODING & 064 - SUBDIVISION

Submitter 6523 / Further Submitter 2422 - Federated Farmers of New Zealand

DATED 3 NOVEMBER 2015

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Introduction

1 The Hearing Panel has issued a Direction in which it invites legal submissions in response to a discussion in the Direction regarding certain issues that have arisen concerning the relationship between the Resource Management Act 1991 and the Building Act 2004, together with the Building Code, which is Schedule 1 to the Building Regulations 1992. It seems there is a primary issue of jurisdiction, being:

> Can the PAUP include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code other than under RMA ss 68(2A) and 76(2A)?

Some subsidiary issues arise, if there is jurisdiction, including: whether it is more appropriate that the PAUP use the same performance standards for buildings as the Building Code, or that it impose higher standards; and if it is more appropriate for the PAUP to impose higher standards, whether there are limits on those standards.

2 The issues are considered important for a number of reasons, including: that duplication or inconsistency of regulation is generally inefficient and reduces effectiveness; and that Building Act s 18 limits the extent to which other regulatory provisions can affect building work.

3 It is apparent from the Direction that the Hearing Panel considers that the Building Act and associated regulation standards cannot be exceeded. In my submission that view is correct, but, with respect, I support that conclusion by way of different reasoning from that of the Panel.

4 The essence of the Panel's position seems to be set out in paragraph 14 of the Direction:

> … the RMA can address the control of effects of activities (including building work which will be used for such activities) that may or may not occur in certain locations, or may address the control of effects where the BC does not regulate building work for that purpose, but cannot duplicate or exceed any BC controls on building work itself.

The Panel notes, at paragraph 15, that the Building Act has a purpose provision which expressly relates to the health, safety and well-being of people, and the promotion of sustainable management.

5 Having set out its position on the relationship between the RMA and the Building Act, the Panel states, at paragraph 27, that:

> On a fundamental level, the Plan should not extend to regulating on-site activities which have no external effects.

Immediately following which, and on the basis of which, the Panel sets out, at paragraph 28, what appears to be a test of how it sees that the relationship between the RMA and the Building Act is to work in practice:

> … controls under the RMA on the use of land (including use by constructing buildings) would be lawful, but additional controls on building work would not be unless they are incidental to the basis on which the use is controlled.

6 Thus the test proposed by the Panel appears to be focussed on the external effects of activities. It appears to propose that controls under the RMA on activities that are already controlled under the Building Act are not allowed unless there are external effects that arise from the activities, which are relevant to consideration under the RMA, but are not relevant to the Building Act.

7 Two concerns arise: firstly, the test appears to be more of a "section 32" evaluation than a jurisdictional test; and secondly, it is extremely difficult to envisage the situation where there would be no external effects which are relevant to the RMA, but which are not relevant to the Building Act.

8 It is respectfully suggested that a better test might be a test based on the proposition that there would be jurisdiction for the RMA to control matters that are controlled under other legislation only where there is a residual resource management purpose, and that such RMA controls could address only the promotion of that residual purpose.

9 First the two concerns are considered in more detail, and then an alternative test is proposed.

<u>The Panel's "Test"</u>

10 The test implied by the Panel appears to be focussed on the external effects of activities. In order to assess those effects, it would seem that there is a necessary implication that there is jurisdiction under the RMA which enables that assessment to take place. If there is jurisdiction for the assessment to take place, then it would seem that it must follow that there is jurisdiction for the outcome of that assessment, whatever it is, to be implemented.

11 In a plan preparation context, it would seem that the appropriate place for this assessment to take place would be in the context of the requisite "section 32 evaluation". The RMA requires that, when preparing plans, local authorities are to prepare an evaluation report in accordance with s 32 and are required to have particular regard to that report when deciding whether to proceed with the plan.[1]

12 Section 32 of the RMA requires the evaluation report to examine the extent to which the objectives of the plan are the most appropriate way to achieve the purpose of the RMA[2] and whether other provisions are the most appropriate way to achieve the objectives,[3] by identifying other reasonably practicable options for achieving the objectives,[4] assessing the effectiveness of the other provisions,[5] and summarising the reasons for deciding on the provisions.[6] Importantly, the evaluation must contain a level of detail that corresponds to the scale and significance of the environmental, social and cultural effects that are anticipated from the implementation of the provisions,[7] and the assessment of the efficiency and effectiveness of the provisions must, amongst other things, also identify the benefits and costs of the environmental, social and cultural effects that are anticipated from the implementation of the provisions.[8]

13 As splendid and far-reaching as the requirements might appear to be, it seems that the only recourse that might be had if the requirements of s 32 are not complied with is by way of a submission made at the time the plan is open for making submissions.[9] Councils are required to prepare and change their plans in accordance with their obligations to have particular regard to the s 32 evaluation report,[10] but that appears to be where their obligations end. This is because there is, in effect, a bar on any review taking place, including by way of declaration proceedings, of the duty to undertake those obligations,[11] albeit that the Court of Appeal has found that the Environment Court does have jurisdiction to take into account the adequacy or total absence of a s 32 evaluation.[12]

14 The Courts have found that the requirement to have "particular regard" to a matter means that the matter must be considered, but no absolute requirement or

[1] Sch 1, cl 5(1)(a).
[2] s 32(1)(a).
[3] s 32(1)(b).
[4] s 32(1)(b)(i).
[5] s 32(1)(b)(ii).
[6] s 32(1)(b)(iii).
[7] s 32(1)(c).
[8] s 32(2)(a).
[9] s 32A.
[10] s 66(1)(d) in the case of regional plans, s 74(1)(d) in the case of district plans.
[11] s 310(a)(i). See *Kirkland v Dunedin City Council* [2001] NZRMA 129.
[12] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184.

standard is set.[13] Thus, although the s 32 evaluation must be given genuine attention and thought, decisions on the content of the plan are not bound by that assessment. So, in the context of providing for activities in a plan in a way that is based on the external effects of those activities, a local authority would not be prevented from including a provision in the plan regulating a particular activity even where there are no external effects generated by the activity. Probably the most that could be said about such a provision would be that it was bad planning practice to regulate activities that have no external effects, or indeed to regulate activities where the regulations are duplicated elsewhere.

The Nature of External Effects

15 The RMA defines "effects" very broadly. In *King Salmon*,[14] the majority of the Supreme Court stated that:[15]

> … the word "effect" is broadly defined to include any positive or adverse effect, any temporary or permanent effect, any past, present or future effect and any cumulative effect.

And the minority decision noted that this included:[16]

> … any perceptible adverse effect, even temporary …

16 In *Batchelor v Tauranga District Council*,[17] the High Court established that the effect on public confidence in the consistent administration of the district plan and on the integrity and coherence of the plan is an effect that is to be taken into account. It is submitted that, in situations where a rule in a local authority plan diverges from the standards set elsewhere, for example in the Building Code, public confidence in those standards and on the integrity and coherence of the standards in a national context would be eroded, which would be an external effect of such a rule.

17 There may also be cumulative effects that might arise. As the Court of Appeal said in *Dye v Auckland Regional Council*,[18] a cumulative effect is concerned with things that will occur, and relates to a gradual build up of consequences as a result of a combination of effects. So, even if the immediate effects of an activity on a site were able to be contained on that site, there may well be cumulative effects that

[13] *Donnithorne v Christchurch City Council* [1994] NZRMA 97.
[14] *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.
[15] Ibid, at [23].
[16] Ibid, at [201].
[17] AP189/92, High Court, Wellington, 12 November 1992.
[18] [2002] 1 NZLR 337.

arise when the same activity takes place on many sites in an area. At paragraph 18 of the Direction, the Panel advances the proposition that there is a general principle that voluntary assumption of risk is acceptable in plan-making provisions. The Panel gives by way of example a non-complying activity of a house being built with a floor level that complied with the requirements of the Building Code, but not with the rules in the plan. The principle is illustrated by the statement that, if the applicant were to give written approval to an application to build the house, the consent authority could have no regard to the effects of choosing that floor level on the applicant, or his invitees or successors, and so there would be no bar to the grant of consent.

18 However, there may be cumulative effects that arise in this situation, in that neighbouring property owners may or may not choose to assume that same risk themselves, and the outcome across the area as a whole will be something of a mish-mash should it come to be pass at a later stage that the standards for determining, for example, whether buildings are flood-prone, change. As is noted in the Direction in the preceding paragraph 17, "… the zoning of land should not leave people to fend for themselves and may also seek to protect them from their own folly", and "… the RMA is properly concerned with area-wide controls on development …".

19 Another type of external effect that might arise is the effects that arise from the assessment of risk. Taking the example of the risk of flooding, a provision which is based on a 1% AEP flood risk is less likely to eventuate in adverse effects arising from flooding than is a provision based on a 2% AEP risk. While the actual damage that arises from the flooding might be an "internal" adverse effect, there will always be external adverse effects that arise as well, such as liability of insurance companies, and perhaps liability of the relevant council and central government as well if it could be shown that a 1% AEP flood risk factor should have been used where in fact a 2% AEP factor was used.

20 Thus it would seem that it is unlikely to ever be the case that an activity can be said to have no external effects.

Towards a "Residual Resource Management Purpose" Test.

21 The Direction states, at paragraph 9a, that the RMA has a single purpose, that of the sustainable management of natural and physical resources. It would seem that it has been established in case law that, where that purpose is achieved by means

outside of the RMA, the RMA has no role to play, and it cannot be said that there is a resource management purpose in making further regulations under the auspices of the RMA.

22 In the Environment Court case *Petone Planning Action Group Inc v Hutt City Council*,[19] the Court considered whether designing and constructing the building development according to the Building Code was sufficient to decide a resource consent application, and found that it was, and the Court found that there was no resource management purpose for controlling the building work to achieve any criteria other than those specified in the Building Code. The Court said, after noting that the Building Code prevailed over the RMA by way of an express exemption in the Building Act, that the RMA can govern matters within the purview of the Building Act if a valid resource management purpose justifies the exercise of power under the RMA. In the case the Court found that:[20]

> … there is no resource management purpose for controlling the building work to achieve performance criteria other than those specified in the building code.

The approach taken by the Environment Court was seemingly endorsed by the High Court in a subsequent appeal that was taken to that Court.[21]

23 In the case *Dome Valley Residents Association v Rodney District Council*,[22] the High Court considered the adverse effects of noise created by helicopters when in the air. The Court stated that the field of overflying aircraft was properly the subject of the Civil Aviation Act 1990. The Court found that, after take off or landing, and in particular when the aircraft was operating over 500 ft above land, the effects lay outside the ambit of the RMA. The High Court Judge said:[23]

> … as a matter of legislative commonsense it seems to me that the entire field of overflying aircraft, its regulation and control, is properly the subject of the Civil Aviation Act 1990 and related regulations and rules.

24 In neither the *Petone* case nor the *Dome Valley* case is the role of the RMA presented as a jurisdictional issue but, nevertheless, it is considered that a suitable jurisdictional test can be synthesised from these cases. Such a test would seem to be based on the proposition that, if a resource management matter is completely covered by other legislation, then there is no role for the RMA to play.

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[19] Environment Court decision W020/08, 2 May 2008.
[20] Ibid, at [218].
[21] *Petone Planning Action Group Inc v Hutt City Council*, CIV 2008-485-1112, High Court, Wellington, 22 September 2008, at [40].
[22] [2008] 3 NZLR 821.
[23] Ibid, At [59].

25 A parallel can be drawn from the *King Salmon* case, where the Supreme Court discussed the requirement to "give effect" to the NZCPS.[24] The Court found that:[25]

> In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" pt 2 and there is no need to refer back to the part when determining a plan change.

However, the Court went on to identify three caveats to this principle,[26] which it summarised as being "invalidity", "incomplete coverage" and "uncertainty of meaning".[27] As regards "incomplete coverage", the Supreme Court said:[28]

> … there may be instances where the NZCPS does not "cover the field" and a decision-maker will have to consider whether pt 2 provides assistance in dealing with the matter(s) not covered

26 Applying this to the relationship between the RMA and other legislative material, it would seem that matters of invalidity and uncertainty of meaning in that other material could be, or could be assumed to have been, determined by way of declaration proceedings or other legal action. However, the same cannot be said of matters of incomplete coverage. If there are resource management matters that are not covered by the other legislation then, following the Supreme Court's logic, it would be proper for the RMA to address those matters, but only those matters. On the basis that reference is able to be made to Part 2 of the RMA in interpreting the NZCPS in cases of incomplete coverage, a corollary that follows is that reference can be made to the RMA in cases where matters that might be considered to be resource management matters in other legislation are not completely covered by that other legislation.

27 This would also seem to follow from the scheme of the RMA. Given that the sole purpose of the RMA is the sustainable management of natural and physical resources, then the inclusion of a provision in a local authority planning instrument which does not contribute towards the promotion of that purpose, the reason being that the contribution is already made elsewhere, means that it cannot be said that the provision is within the jurisdiction of the RMA.

28 Thus it would seem that there is a test that can be couched in terms of jurisdiction and, articulating that test, it would seem that there is jurisdiction for the RMA to control matters that are controlled under other legislation only where there is a residual resource management purpose, and then such controls as may be

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[24] Above at fn 14, at [75] et seq.
[25] Ibid, at [85].
[26] Ibid, at [88].
[27] Ibid, at [90].
[28] Ibid, at [88].

applied under the RMA would be within jurisdiction only if they addressed just that residual resource management purpose.

29 One advantage of such a test is that it is clear and certain, compared to the external effects based test which, it would seem, is able to be applied at the discretion of the local authority. It resolves issues of duplication, whereby the same resource management matter might be controlled by two pieces of legislation, and it avoids inconsistency. As the High Court said in the *Dome Valley* case, such a test would amount to "… a matter of legislative commonsense".

30 Such a test also succinctly responds to the dilemma the Panel poses with reference to the *Christchurch International Airport* case,[29] being whether or not there can be exceptions to the general rule in s 18 of the Building Act, which restricts the ambit of the RMA. On the analysis provided by the test, the RMA could control the effects of activities such as the effect of airport noise on adjacent residential activity, because the Building Act does not control activities for that purpose, but such controls cannot go beyond what is necessary to address those effects.

The Issues raised by the Panel

31 Finally, to respond directly to the issues raised by the Panel in its Direction, on the basis of the test outlined above, it is submitted that the PAUP cannot, as a matter of jurisdiction, include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code other than under RMA ss 68(2A) and 76(2A).

32 On the basis that there is no jurisdiction to include a rule requiring building work to be undertaken to a standard higher than that required by the Building Code other than under RMA ss 68(2A) and 76(2A), no response is provided in respect of the subsidiary issues that the Panel identifies.

Conclusion

33 I agree with the Hearing Panel that that the Building Act and associated regulation standards cannot be exceeded.

[29] *Christchurch International Airport Ltd v Christchurch City Council and Building Industry Authority*, [1997] 1 NZLR 573.

34 I disagree with the Hearing Panel that an appropriate test could be a test based on the external effects of activities.

35 I respectfully suggest that an appropriate test might be a test based on the proposition that there would be jurisdiction for the RMA to control matters that are controlled under other legislation only where there is a residual resource management purpose. Such RMA controls as might be imposed in this situation could address only the promotion of that residual purpose.

Dated at Auckland this 3rd day of November 2015

Richard Gardner
Solicitor