

**IN THE MATTER**

of the Local Government (Auckland Transitional Provisions) Act 2010, and the Resource Management Act 1991

**AND**

**IN THE MATTER**

of the Proposed Auckland Unitary Plan

---

**MEMORANDUM OF COUNSEL FOR THE AUCKLAND UTILITY OPERATORS  
GROUP IN RELATION TO PROPOSED COMBINED CHAPTER H1.1**

**3 NOVEMBER 2015**

---

---

**RUSSELL McVEAGH**

B J Matheson  
Phone +64 9 367 8000  
Fax +64 9 367 8163  
PO Box 8  
DX CX10085  
Auckland

**MAY IT PLEASE THE HEARINGS PANEL:**

**Purpose**

1. The purpose of this memorandum is to:
  - (a) provide the planning and legal rationale to AUOG's request that there be a dedicated Network Utilities section in the Unitary Plan; and
  - (b) if the Panel considers that such an approach has merit, to seek formal directions:
    - (i) requiring Auckland Council to engage with AUOG in a manner that would allow Auckland Council's concerns to be understood and responded to by AUOG; and
    - (ii) providing the opportunity for any other interested network utility providers, or other interested parties, to comment on the proposed approach.
2. Before we address those matters expressly, we set out the relevant background and describe the proposed dedicated Network Utility section.

**Background**

3. In a number of topics, the Auckland Utility Operators Group Incorporated and its members ("**AUOG**") have:
  - (a) emphasised the region-wide nature of its network utility assets - such assets are within every zone and precinct, and beneath every Overlay, and AUOG has confirmed to the Panel that its contractors are using the Unitary Plan (literally) on a day by day basis;
  - (b) highlighted the fact that the Unitary Plan will be one of the only (and perhaps the only) district plan in New Zealand that does not have a dedicated/consolidated infrastructure chapter;
  - (c) expressed a real concern that, for any network utility works, even potentially minor maintenance work, it will be incredibly complicated for a contractor to determine whether a resource consent is needed - to answer that question a contractor will need to examine:
    - (i) the "zone" rules in Chapter H1.1;
    - (ii) up to 40 Overlays;
    - (iii) all of the Auckland-wide rules, in particular those relating to earthworks, street trees and vegetation management; and

- (iv) (possibly) specific Precinct controls;
  - (d) recorded that AUOG intends to develop and present to the Panel for its consideration a combined chapter, which incorporates not only H1.1 (Network Utilities within zones), but also the relevant Overlays and key Auckland-wide rules relating to network utilities.<sup>1</sup>
4. The result of that process is the *Combined Infrastructure Chapter H.1.1*, which contains all the primary controls for network utilities ("**Combined Chapter**"). A copy of the Combined Chapter is attached as **Appendix 1** to this memorandum, provided in Word format rather than PDF.
  5. As part of our review of the Combined Chapter, we have had regard to the interim guidance: *Further Interim Guidance for Chapter G - Regional and District Rules*, released 9 October 2015, and made changes as a result of this guidance.

### **Purpose and description of the Combined Chapter**

6. The Combined Chapter does not include any rules relating to:
  - (a) road network activities - these activities are addressed in Chapter H1.2; or
  - (b) works within the CMA - all of these infrastructure rules instead remain within the coastal provisions.<sup>2</sup>
7. The Combined Chapter is structured as follows:
  - (a) Objectives and Policies relating to H1.1
  - (b) Activity Tables:
    - (i) 1.1A - Network Utilities and Electricity Generation
    - (ii) 1.1B - Trees and Vegetation Management - Zones & Overlays
    - (iii) 1.1C - Earthworks - Zones
    - (iv) 1.1D - Earthworks - Overlays except ONFs
    - (v) 1.1E - Earthworks - ONFs
    - (vi) 1.1F - Historic Heritage, Historic Character and SPSMW
    - (vii) 1.1G - Viewshafts and HSAs, Local Public Views, Sensitive Ridgelines
    - (viii) 1.1H - ONLs, ONCs, HNCs

---

<sup>1</sup> Through legal submissions presented to the Panel in relation to Topics 042 (Infrastructure), 023 (SEA and Vegetation Management) and 025 (Trees).

<sup>2</sup> This was a deliberate decision which recognises the unique and integrated nature of the coastal provisions, and the fact that, while there is important infrastructure within the CMA, there are far fewer day to day works in the CMA.

- (ix) 1.11 - ONFs
- (c) Notification
- (d) Permitted Activity Development Standards:
  - (i) In Roads (3.1)<sup>3</sup>
  - (ii) In Zones - General (3.2)
  - (iii) In Zones - Specific (3.3)
  - (iv) All Overlays (3.4)
- (e) Controlled activity - Development Controls (3.5)
- (f) Assessment - Controlled activities - All Zones & Overlays (4.0)
- (g) Assessment - Restricted discretionary activities - Zones (5.0)
- (h) Assessment - Restricted discretionary activities - Overlays (6.0) [cross-referenced through the Combined Chapter to relevant parts of the Unitary Plan]
- (i) Assessment - Development control infringements (7.0)

#### **Planning & legal rationale for the Combined Chapter**

8. The planning rationale for the Combined Chapter is compelling:
- (a) In respect of network utilities, it is more effective and efficient than the Council's proposed structure, and it more appropriately gives effect to the Unitary Plan's objectives and to the purpose of the RMA.
  - (b) The Combined Chapter will allow a "one stop shop" for all of the key rules applying to network utilities and will allow a contractor to be able to determine in nearly all cases:
    - (i) the activity status of an activity; and
    - (ii) what permitted activity standards or controlled activity controls apply.
  - (c) There is no substantive duplication<sup>4</sup> of provisions, and therefore the Unitary Plan has not been made "longer" because of its inclusion. This has been achieved by:
    - (i) relocating the network-utility specific activities within the Overlay tables into Chapter H1.1;

---

<sup>3</sup> Note that this is infrastructure in roads - it does not include road network activities. Those are provided for in Table H1.2.

<sup>4</sup> The exception relates to the assessment criteria for earthworks, which, because they are very general, they have had to be repeated in the Combined Chapter.

- (ii) retaining the Objectives and Policies for each of the Overlays within the Overlay section themselves - rather than duplicating this in H1.1; and
  - (iii) for assessment criteria for restricted discretionary activities, using hyperlinks.
- (d) The use of network specific activity tables has allowed AUOG to combine the rules relating to vegetation management (Overlay) and street trees and trees in public open space (Auckland-wide rule) into one activity table applying to network utilities. In practice, users of the plan would not expect to see vegetation management rules (which include trees) in an Overlay, with other rules relating to trees in certain other locations (in streets and public open spaces) elsewhere in the Unitary Plan. For network utilities, who work with the vegetation management and street tree rules on a daily basis, consolidating these rules into one table removes complexity and duplication.
- (e) Under the Council's notified Unitary Plan, the intention is to separate out Objectives and Policies from the activity tables (ie Objectives and Policies for Auckland-wide rules are in Chapter C whereas the rules are in Chapter H). Accordingly, whether the Objectives and Policies are cross referenced from within an expanded Chapter H1.1 or elsewhere in the plan makes no difference in terms of complexity.
- (f) The Combined Chapter is more user-friendly. A reader would expect that all of the rules relating to network utilities be in the Network Utility section, rather than sprinkled throughout each of the Overlays. To reflect the reality of the Council's notified structure, AUOG has accepted:
  - (i) the relevant assessment criteria and Objectives and Policies for the other Auckland-wide rules and Overlays remain in those other sections of the Unitary Plan;
  - (ii) that not all Auckland-wide rules have been relocated into Chapter H1.1 - rather the focus has been on those Auckland-wide rules that network utilities will use most often; and
  - (iii) all works within the CMA are addressed by the coastal provisions (refer paragraph 6(b) above).
- (g) The Combined Chapter is consistent with Panel's expressed desire to simplify (ie delete) many of the Overlays, and instead incorporate any necessary rules within the zones themselves.
- (h) For individual sites, the complexity of the Unitary Plan and the sheer number of Overlays is ameliorated by the ability to generate an electronic report for all rules applying to a site. However, this is of no benefit to network utility providers, who work across a large number of sites or, most often, work

within road reserves or on other land that has no formal title. It is for this reason that a single, consolidated chapter, is essential for network utility operators.

9. In respect of legal issues:
- (a) While the Combined Chapter is a "different approach" to the Council's proposed structure, the Council's version does not have any special status and it is open to any submitter to suggest any structure they wish as part of their submission.
  - (b) There is no jurisdictional barrier to the inclusion of the Combined Chapter:
    - (i) AUOG expressly requested a combined chapter in its submission on the PAUP.<sup>5</sup>
    - (ii) In respect of the changes sought in the Combined Chapter, these directly reflect what AUOG sought in its submission and in its evidence submitted on the various topic, or are editorial changes that are the result of the proposed consolidation.
  - (c) In any event, even if there were any concerns about jurisdiction:
    - (i) the Unitary Plan Panel has wide powers to make out of scope recommendations - and Council has been frequently requesting that the Panel take advantage of that power; and
    - (ii) if the Panel considered the Combined Chapter had merit, the Panel could notify all submitters of the proposed structure and seek written submissions (or the holding of a short hearing).

*Example of how the Combined Chapter would work*

10. The below example will illustrate how the Combined Chapter is intended to work.
11. Assume that an undergrounding project is proposed that will involve removal of lines, trenching, co-location of telecommunications and electricity, works on trees and removal of vegetation, and installation of distribution substations. Some of the works are within and others adjacent to the road reserve. The adjacent zone is part Open Space and part Rural. The site is not within an identified flood plain. The initial steps are as follows:
- (a) Maps are checked and show that the project area is within an ONL and vegetation management Overlay. There is a SSMW in the vicinity of the works.
  - (b) Activity Table 1.1A is reviewed, to give the activity status for the works within the road reserve, and in the Rural and Open Space zones. These activities are permitted, subject to

---

<sup>5</sup> See 2.10(d) and (e) on page 6 of AUOG's submission.

compliance with the Permitted Activity Standards, set out in H1.1.3.1 (for the permitted activities within the roads) and in H1.1.3.2 (for the permitted activities within the Rural and Open Space zone).

- (c) Activity Table 1.1B (Trees and Vegetation Management) is reviewed to assess the activity status of the tree works and vegetation removal within the road reserve, in the Open Space, and in the adjacent Rural zone. Because there is an ONL Overlay, there are separate rules for vegetation management in that Overlay, however these are all contained within the consolidated Table 1.1B. The relevant permitted activity standards are all found in H1.1.3.4.
  - (d) Activity 1.1C (Earthworks in roads and zones) is then reviewed. This activity table has both the district plan and regional plan earthworks rules applying to network utilities. Activity Table 1.1D (Earthworks in all Overlays except ONFs) is also reviewed to confirm the activity status for the earthworks within the section of the project area that falls within an ONL. (Activity Table 1.1E (Earthworks in ONFs) is not relevant because there is no ONF identified in the project area.) The relevant permitted activity standards are found in H1.1.3.4.
  - (e) The other activity tables that apply are Activity Table H1.1H (ONLs), and Activity Table 1.1F (Sites and Places of Significance to Mana Whenua). Because earthworks and vegetation management in ONLs is specifically addressed by other rules, Chapter H1.1H has a cross reference back to H1.1C and H1.1D.
12. If Activity Table 1.1A identifies an activity as RD, then reference is made to H1.1.5.1 (general matters of discretion), H1.1.5.2 (specific matters of discretion) and H1.1.5.3 (general assessment criteria). If any of Activity Tables 1.1B - 1.1I identifies an activity as an RD, then H1.1.6.1 (general matters of discretion) and H1.1.6.2 (general assessment criteria) have specific hyperlinks into the relevant locations within the Overlay chapters.
13. In the event that the Objectives and Policies need to be reviewed in respect of:
- (a) Activity Table H1.1A - these are (as is already proposed by Council) located in C1.1.
  - (b) Activity Table H1.1B-1.1I, then reference needs to be made to C5.2 (Objectives and Policies for earthworks), C4.1 (Objectives and Policies for trees in streets and in Open Space), and Chapter E for the Overlays. Each of these relevant Objectives and Policies are identified at the start of the relevant activity table: eg

Activity Table 1.1C gives effect to the objectives and policies of C5.2 (Earthworks).

14. Activity Table 1.1F gives effect to the Objectives and Policies of E2 (Historic Heritage), E3.1 and 3.2 (Historic Character), and E5.1 (Sites and Places of Significance to Mana Whenua). Finally, while none would apply in this case, in other situations it may be necessary to briefly review other Auckland-wide rules to determine whether consents may be required under those provisions (eg 4.11 Natural Hazards, 4.5 Contaminated Land, etc).

#### **Council's failure to engage on Combined Chapter**

15. While AUOG has been grateful for the Council's willingness to engage in many of the hearing topics to date, AUOG has been very disappointed with the Council's approach to the Combined Chapter:
- (a) AUOG has been advocating for a standalone network utilities chapter, since it filed comments on the draft PAUP. Despite the Council wanting to keep its proposed structure, AUOG has nonetheless been pushing for its relief.
  - (b) In multiple hearings since the start of the hearing, Council's solicitors have formally told the Panel (and AUOG) that it is agreeable to the Overlay rules being incorporated into H1.1, but is reluctant to move the Auckland-wide rules.
  - (c) At the conclusion of the primary hearing for network utilities, Topic 042 - Infrastructure, AUOG commenced preparation of the Combined Chapter, and we have repeatedly sought a meeting with Council staff to take the staff through the proposed structure. We have had several meetings scheduled, all of which have been cancelled. The most recent meeting was cancelled the day before it was due to occur, with the Council advising that:
    - (i) it does not support the Combined Chapter; and
    - (ii) it does not now support the relocation of the Overlay rules into Chapter H1.1 (in other words, reneging on its previous commitment).
  - (d) The most disappointing aspect of this refusal to engage was that the Council's purported concerns (ie, complexity and how the chapter works) were exactly the matters that we were intending to address at the meeting. The provisions have been drafted by two senior planners who are among the most experienced in working with network utility provisions (David Hay, OsborneHay, and Chris Horne, Incite), and both planners were scheduled to attend the meeting.
  - (e) Furthermore, while AUOG members comprise many of the network utilities that will be subject to the Combined Chapter, a number of the other providers (notably Watercare Services and Auckland Stormwater) will also be affected. AUOG would be surprised if both these entities were not supportive of the proposed approach, however the Council's failure to engage has meant that AUOG has not had the benefit of a formal engagement with those network utility operators.



16. The Council's failure to engage has left AUOG with no choice but to file the Combined Chapter and to seek the directions set out below.

**Directions Sought**

17. If the Panel considers that the Combined Chapter has merit, we respectfully request that the Panel:
- (a) directs that Council (including Auckland Stormwater and Watercare) meet with AUOG to elaborate on its concerns and to identify areas of agreement or disagreement;
  - (b) uploads any amended Combined Chapter on to the website, together, if necessary, with the recoding of AUOG relief's relief in respect of a consolidated chapter to Topic 001;
  - (c) notifies submitters that AUOG has proposed a consolidated chapter addressing network utilities (excluding road network activities), and advising of a day during which the submitters are invited to meet with AUOG to discuss any concerns; and
  - (d) schedules time during Topic 001 for AUOG and any other interested party to appear to present on the Combined Chapter, or otherwise provides an opportunity for any submitter wanting to comment on the proposed Combined Chapter to do so.
18. Counsel will appear and provide further details to the Panel if that would assist.

**DATED:** 3 November 2015



---

**Bal Matheson**  
Counsel for Auckland Utility Operators Group Inc