

IN THE MATTER of the Resource Management Act 1991 ("RMA" or "the Act")

AND

IN THE MATTER of a submission in respect of the **PROPOSED WAIKATO DISTRICT PLAN** by **AMBURY PROPERTIES LIMITED** pursuant to Clause 6 of Schedule 1 of the Act

MEMORANDUM OF COUNSEL FOR AMBURY PROPERTIES LIMITED

MAY IT PLEASE THE PANEL

1. Counsel for Ambury Properties Limited ("APL") respectfully refers to the Panel's further minute dated 4 May 2020 regarding "in principle" concerns expressed by the Waikato Regional Council ("WRC") and the New Zealand Transport Agency ("NZTA") relating to the proposal that Dr Mitchell and Mr Cooney facilitate expert conferencing of the Ohinewai Rezoning submissions.
2. The purpose of this memorandum is to:
 - (a) Confirm that APL strongly supports holding expert conferencing prior to the hearing and that this conferencing be facilitated by Dr Mitchell and Mr Cooney.
 - (b) Advise that counsel for APL agree with the analysis reflected in the Minute:
 - (i) Regarding the jurisdiction of the Panel to carry out the facilitation in light of its powers under section 39 of the Resource Management Act 1991 ("RMA");
 - (ii) That the procedure proposed is "appropriate and fair in the circumstances" in terms of that provision.

Benefits of facilitation by Dr Mitchell and Mr Cooney

3. Given the breadth and complexity of the issues arising and the quantity of technical reports to consider, APL considers that expert conferencing is likely to be highly effective in identifying and condensing the number of complex issues for each topic and reducing the points of contention between all experts prior to the hearing. That will assist in ensuring the hearing is efficiently conducted and focused primarily on the technical issues that remain in contention between the experts.
4. It is considered that the efficiency and effectiveness of the conferencing would be enhanced if it is facilitated by Dr Mitchell and Mr Cooney who are familiar with the issues arising, the circumstances applying to this part of the district and the architecture of the Proposed District Plan.

Section 39 of the RMA and related legal issues

5. Section 39(1) of the RMA requires a local authority conducting a plan hearing "establish a procedure that is appropriate and fair in the circumstances" and, in establishing that procedure, is required to "avoid unnecessary formality".
6. Counsel for APL are in complete agreement with the Panel's minute that:
 - (a) Section 39 provides a high degree of flexibility for the Panel to set its own procedure.
 - (b) Section 39 confers more than adequate jurisdiction to authorise Panel members to undertake the facilitation of expert conferencing.
 - (c) Facilitation of the conferencing by Dr Mitchell and Mr Cooney will also result in the hearing being conducted more efficiently and with less formality vis a vis the expert witnesses than if the conferencing were conducted by an independent consultant.
 - (d) The principles of natural justice can be achieved on the basis of the reasons contained in paragraph 9(e) of the Minute.

Response to WRC and NZTA position

7. Counsel for WRC and NZTA has expressed a "preference", as a matter of principle or sound practice, that commissioners who facilitate conferencing "should not" then determine the merits. It is acknowledged that there is a need for care to be taken in these circumstances – hence the reason why the Panel sought the view of the parties.
8. But, with respect, NZTA / WRC's position on this issue cannot be elevated to an immutable principle that must be strictly adhered to. Both the Environment Court Practice Note 2014 and the RMA itself make this clear.

Environment Court Practice Note 2014

9. The Environment Court Practice Note 2014 in relation to expert conferencing specifically contemplates that commissioners who facilitate conferencing may also sit on the substantive hearing only if the parties agree. That does not represent a prohibition but rather an opportunity to ensure that it is procedurally appropriate to do so.

Clause 8AA of Schedule 1 to the RMA

10. Clauses 8AA(1) and (2) of Schedule 1 of the RMA state:

"8AA Resolution of Disputes

- (1) For the purpose of clarifying or facilitating the resolution of any matter relating to a proposed policy statement or plan, a local authority may, if requested or on its own initiative, invite anyone who has made a submission on a proposed policy statement or plan to meet with the local authority or such other person as the local authority thinks appropriate.
- (2) A member of the local authority who attends a meeting under sub clause (1) is not disqualified from participating in a decision made under clause 10. "

(Emphasis ours.)

11. To the extent that expert conferencing represents a meeting with submitters' representatives to facilitate matters relating to the Proposed District Plan, clause 8AA

makes abundantly clear that local authority representatives attending that meeting are not precluded from participating in the substantive decision-making on submissions under Clause 10.

12. Even if it were argued that the meetings provided for in Clause 8AA does not extend to expert conferencing (which would represent an unduly narrow interpretation of the clause and is not conceded), the provisions make clear that decision-makers on planning instruments can be involved in facilitated pre-hearing dispute resolution processes and still be involved in determination of the merits.

APL submission

13. In light of the above, it submitted that:
- (a) There are significant benefits having expert conferencing in relation to the Ohinewai rezonings.
 - (b) The Panel has jurisdiction under section 39 of the RMA to appoint panel members to participate in conferencing.
 - (c) The efficiency and effectiveness of the conferencing will be considerably enhanced if the conferencing is facilitated by Dr Mitchell and Mr Cooney, as will the substantive hearing as a result.
 - (d) There is no immutable principle that commissioners who participate in expert conferencing cannot be involved in the subsequent substantive decision-making nor does it represent poor practice for them to do so provided that the issues canvassed in the Panel's minute have been addressed. Further, clause 8AA of Schedule 1 to the RMA specifically provides that local authority representatives who have been involved in dispute resolution procedures in the context of plan processes can still participate in determining the merits.
 - (e) Having the expert conferencing facilitated by Dr Mitchell and Mr Cooney is "appropriate and fair in the circumstances" and no parties rights or interests will be adversely affected. On the contrary, the interests of the community in achieving adequate assessment of the Proposed District Plan will be enhanced by the proposed conferencing arrangements.
 - (f) In the circumstances, it is respectfully submitted that the balance of convenience clearly lies in favour of proceeding with the expert conferencing in accordance with the proposals set out in the Panel's minute dated 4 May 2020.
14. Counsel is grateful to the Panel for its consideration of this matter.

DATED this 7th day of May 2020



S J Berry

Counsel for Ambury Properties Limited