



**AGENDA FOR A MEETING OF THE PLANNING AND REGULATORY COMMITTEE  
TO BE HELD IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN,  
WAITAKERE CITY, ON TUESDAY, 11 APRIL 2006  
COMMENCING AT 9.30 AM**

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**PART A - OPENING OF MEETING**

**1 APOLOGIES**



**2 URGENT BUSINESS**

Section 46A(7) of the Local Government Official Information and Meetings Act 1987 provides that where an item of business is not on the agenda, it may only be dealt with at the meeting if:

- (i) the Committee by resolution so decides; and
- (ii) the Chairperson has explained at the beginning of the meeting (when open to the public) that the item will be raised for discussion and decision, why the item is not on the agenda, and why it cannot be delayed until a subsequent meeting.

The Committee may make a decision on a matter determined to be urgent.

**NOTE:** Urgent Business need not be dealt with now and may be delayed until later in the meeting.



**3 CONFIRMATION OF MINUTES**

Meeting Minutes - Tuesday, 14 March 2006

**RECOMMENDATION**

That the minutes of the Meeting of the Planning and Regulatory Committee held on Tuesday, 14 March 2006, as circulated, be taken as read and now be confirmed.



**PART B -**

## PRESENTATION

### 4 ENVIRONMENTAL RISK MANAGEMENT AUTHORITY

On the invitation of the Planning and Regulatory Committee, Geoff Mayes, Compliance Operation Manager, Hazardous Substance, from Environmental Risk Management Authority will make a presentation on Dangerous Goods issues.



## PART C - REGULATORY / ENFORCEMENT

### 5 LEGAL UPDATE (AS AT 4 APRIL 2006)

#### INTRODUCTION

The following is a list of legal actions in respect of matters which are currently before the Courts and which are ongoing or have been commenced since the date of the preceding report. The list does not include references to Council's District Plan, minor prosecutions for dogs, swimming pools, health, parking, and litter although advice on any particular such prosecution can be provided to the Committee if it wishes.

#### COURT OF APPEAL

*(Changed)* **Waitakere City Council v Estate Homes Limited (28 March 2002) (Ranui Station Road)**

An appeal by Council to the High Court (from an Environment Court decision) regarding a decision by Council relating to a requirement to construct and vest Marinich Drive, an arterial road that passes through Estate's subdivision in Ranui Station Road. The appeal was heard before Justice Venning on 29 June 2004. A decision was received from the Court on 30 July 2004 in Council's favour. The decision reversed the decision of the Environment Court. Estate Homes was granted leave to appeal to the Court of Appeal (on two issues, out of an original seven pursued).

A hearing took place in the Court of Appeal on 1 September 2005. The Court released its decision on 11 November 2005. The Court overturned the decision of Justice Venning in the High Court. However, the Court of Appeal did not restore the Environment Court findings, but instead referred the case back to that Court to reconsider its decision. The Court of Appeal agreed that the Environment Court had not taken into account the District Plan requirement that subdivision roading patterns should maximise connections within and between local neighbourhoods ("connectivity"). However, the majority judgment held that it was for the Environment Court to decide what weight should be placed on this factor, rather than for an appellate Court to do so.

The problem with the reasoning of the majority of the Court of Appeal is that it equates Council's role when approving subdivision consents, (particularly as to the roading component) as engaging in the expropriation of private land for public use, and overlooks (or at least relegates) councils' district planning role. This has significant consequences especially as it carries the implication that councils may be required to compensate developers for the "public benefit" aspects of subdivisions. An application for leave to appeal to the Supreme Court was heard in the week on 3 April 2006. Leave was granted on all grounds sought. A hearing has been scheduled for 11 and 12 July 2006.

## HIGH COURT

### **(Unchanged) C W Williams and others v Waitakere City Council (February 2006)**

Council has been served with six sets of proceedings under the Public Works Act in the High Court claiming Council breached its duty to offer back land on the Te Atatu Peninsula bordering the Waitemata Harbour. Counsel acting for the defendants has notified Council that one further set of proceedings will be filed in the High Court shortly. Once the seventh set of proceedings is filed, Council will file a statement of defence.

### **(Changed) Waitakere City Council v P W Mawhinney (February 2006)**

The background to this matter is that Mr Mawhinney was served with a bankruptcy notice on 21 October 2005 in relation to \$5,063.16. This is a costs award due to Council for winning a security for costs application in May 2005 in relation to the High Court proceedings referred to below. Mr Mawhinney opposed the application. This matter was heard on 21 March 2006. After oral argument the proceeding was stood down and Mr Mawhinney paid \$5,468.00 for the debt and costs of the bankruptcy notice. Associate Judge Faire then struck out Mr Mawhinney's application and awarded Council costs of \$2,610. An order has been made for Mr Mawhinney to pay within 14 days.

### **(Changed) Waste Management v Waitakere City Council, North Shore City Council, Rodney District Council and Christchurch City Council (August 2005) and Carter Holt Harvey v Waitakere City Council, North Shore City Council and Rodney District Council (August 2005)**

A1-A36

Councillors are already aware that Justice Asher handed down a decision on these matters on Monday, 3 April 2006. A copy of the decision is attached at pages A1 to A26.

By way of summary, the judge held:

- in relation to the challenge to the proposed waste levy by both Waste Management and Carter Holt Harvey proposal, that the levy was a tax and express words in an empowering statute were required to authorise the imposition of a tax. He was not persuaded by arguments which turned on Section 151 of the Local Government Act 2002 and Section 544 of the Local Government Act 1974, notwithstanding that the levy was to be applied to laudable waste minimisation objectives. The judge made an order quashing the relevant clauses in each of the Councils' bylaws.
- in relation to the challenge by Carter Holt to the licensing provisions of the bylaw, that paper destined to recycling was "waste" for the purposes of both the bylaw and the Local Government Act 1974, and that the Local Government Act 1974 expressly authorised the proposed licensing regime. An argument that the bylaw was otherwise "unreasonable" also failed. The relevant provisions of the Councils' bylaws were therefore upheld.

Council must now consider whether or not to lodge an appeal against this decision. At the time of writing this report it is thought that there would not be too much enthusiasm for this course of action amongst the other Councils. Nor is there any immediately obvious basis for an appeal. An oral update will be provided at the meeting.

In the meantime discussions continue with the Ministry for the Environment and industry representatives with a view to establishing a regional or national levy system. Whatever the outcome of these discussions legislation will be necessary. In this regard it is noted that no attempt has been made to address the perceived difficulties under a Local Government Act 1974 in relation to levy issues in a recently announced Local Government Reform Bill, notwithstanding the 2004 Local Government New Zealand remit which was promoted by Waitakere City Council and submissions by this Council to Department of Internal Affairs in 2005 requesting that those concerns be addressed in the Reform Bill.

**(Changed) P W Mawhinney (substituted plaintiff) v Waitakere City Council (February 2002) (Civil Proceedings)**

This claim was on hold pending the payment of security for Waitakere City Council's costs of \$60,000 ordered by Associated Judge Sargisson on 2 May 2005. After a defended hearing about an appropriate form of security, at which his proposal of a mortgage in favour of the Registrar had been rejected by the Court; Mr Mawhinney has paid the required security into Court. The Court awarded indemnity costs in relation to Council's application to strike out, because Mr Mawhinney's delay in providing security and leaving it to the last minute.

Mr Mawhinney filed an amended 62 page statement of claim on 31 March 2006, being the last day for doing so. A five day hearing has been allocated by the Court for the week of 6 November 2006. Once the amended claim has been assessed a decision will be made as to whether a further strikeout application should be filed.

**ENVIRONMENT COURT**

**(Changed) Weddings Etc Limited v Waitakere City Council (January 2006)**

These proceedings concern the noise levels generated by the operation of "Cassels" function centre in Scenic Drive. The application by Mr Chapman for an enforcement order requiring Cassels to comply with the relevant District Plan noise rule has been withdrawn and the Chapmans have now joined the proceedings, involving the appeal by Weddings Etc Limited (owners of Cassels) against an abatement notice issued by the Council, as an interested party. The abatement notice that is the subject of the appeal requires (amongst other things) that Cassels adopt the best practicable option to ensure that noise does not exceed a reasonable level. A judicial conference was convened on 21 February 2006 at which time the Court set an evidence exchange timetable. The parties are currently preparing evidence. Following exchange, the parties will consider whether mediation is appropriate. In the meantime, Weddings Etc Limited is seeking a stay of the abatement notice so that it can continue to operate at current levels (taking into account some proposed and already implemented noise mitigation measures). The Council supports that stay on certain conditions; the Chapmans do not consent to the stay - therefore, the Court has allocated hearing time to determine the application for stay, currently scheduled for 10 May 2006 (the Chapmans are now seeking an earlier hearing date). We expect to exchange evidence by 7 April 2006. Further discussions are likely following that exchange.

**(Changed) Waitakere Resource Consents Limited v Waitakere City Council (December 2005)**

This is an appeal against a refusal to issue a certificate of compliance under Section 139 Resource Management Act. In essence the application contends that through a 'sequence' of activities, the establishment of 77 barns/residential units are a permitted activity under the District Plan. The Application includes the creation of various 'allotments', the creation of barns and sheds, the conversion of barns to dwellings, terraces, decks and pergolas, earthworks, clearance of vegetation, driveways, establishment of lawn, and vesting of land as road.

Mr Mawhinney (the director of the appellant company) has breached timetable orders in relation to exchange of the evidence. The Court has determined to place this matter on hold pending the outcome of the Dilworth Structure plan proceedings (Resource Management Act 886/98) which are to be heard in mid May 2006. Following the resolution of the structure plan, Council is to file a memorandum with the Court suggesting a way forward.

**(Unchanged) Auckland Regional Council v Waitakere City Council (October 2005)**

An appeal by the Auckland Regional Council against a decision of this Council to grant consent to a proposed private high school and associated facilities. The Auckland Regional Council opposed the consent application alleging that granting consent to a new school outside of the Metropolitan Urban Limits ("MUL") would undermine the Auckland Regional Policy Statement, the Metropolitan Urban Limits ("MUL") and would create negative precedent effects. The parties are to file progress reports with the Court by 28 February 2006.

**(Unchanged) Denver Holdings Limited v Waitakere City Council (October 2005)**

An appeal by the applicant (Denver) against certain conditions imposed on a resource consent for a medium density housing development at 23 Denver Avenue, Sunnyvale. A related appeal by Mr J Baran against the Council's decision to grant the consent has since been withdrawn. We await case management directions from the Court. It is likely that the matter will be referred to mediation in the first instance.

**(Changed) R & G Britten - 19 Church Street, Swanson (October 2005)**

An application by the Council for interim and final enforcement orders in respect of a land slip that occurred at the Brittens property in Church Street, Swanson. The Council seeks interim orders requiring the cessation of all vehicular use of the access road that was affected by the slip/instability and prohibiting any earthworks in the vicinity of the slip. We are seeking final orders to require that the Brittens undertake appropriate remedial works to stabilise the affected area and to pay the costs incurred by the Council in its initial remedial operation undertaken in July/August.

The application and supporting evidence has been filed and served. At the last judicial conference in November Mr Britten gave an undertaking that there would be no further use of the access road and no earthworks would be undertaken in the vicinity of the slip and surrounding (potentially unstable) land. Mr Britten's engineer has undertaken an assessment of the affected land which has been filed in Court in affidavit form. On 24 March 2006, the Council filed further affidavits in reply (geotechnical, hydrological and planning evidence). Counsel for both parties will meet shortly to discuss options for remedial works. The Council must report back to the Court by 7 April, following which the Court will most probably set a date for a further Judicial Conference to determine how the matter should proceed.

**(Unchanged) I & Z Farac v Waitakere City Council**

A site-specific reference has been filed by Mr and Mrs Farac, relating to their property at 172A Don Buck Road, Massey. It seeks to rezone all (or part) of the property as 'Living 2 Environment'. Discussions are to take place on the relief being sought. Settlement discussions are continuing to take place in an attempt to refine the issues in dispute.

**(Unchanged) Auckland Regional Council v Waitakere City Council (May 2005)  
Waitakere Ranges Protection Society Inc v Waitakere City Council (May 2005)**

An appeal by the Auckland Regional Council and Waitakere Ranges Protection Society Inc ("WRPS") against a decision of the Council to grant consent to a subdivision by M and K Duncan, relating to the property at 46 Christian Road, Swanson. Both Auckland Regional Council and Waitakere Ranges Protection Society Inc oppose the consent on the basis of the density of the proposed subdivision and alleged precedent effect. A judicial conference was held on 5 September 2005 to consider issues including whether these appeals should be heard following resolution of the appeals on the Swanson Structure Plan. The Court has directed that these appeals should be put on hold to await the resolution of the structure plan appeals.

**(Changed) Glorit Subdivision Limited and P W Mawhinney v Waitakere City Council (June 2005)**

A further appeal by Glorit Subdivision Limited/Peter Mawhinney in relation to a refusal by Council to issue Certificates of Compliance for boundary changes to 27 separate Certificates of Title. This appeal was struck out by the Court in December 2005 and Mr Mawhinney's application to rehear has also been dismissed by the Environment Court (Judge Shepherd). Council has filed an application for costs.

However, Mr Mawhinney has lodged an appeal in the High Court alleging various errors of law. The appeal is late and will be opposed. Leave will also be sought to have the costs judgments entered against Mr Mawhinney in the Environment Court despite the High Court appeal.

**(Unchanged) M and C Brickell, W Ashton and L Schwab v Waitakere City Council (June 2005)**

This is an appeal by the applicants M and C Brickell, W Ashton and L Schwab under Section 121 of the Resource Management Act 1991 against a decision of the Council to refuse to grant consent to a 7 lot subdivision at 54-56 Christian Road, Swanson. The Auckland Regional Council and Waitakere Ranges Protection Society Inc have lodged applications with the Court in support of the Council as Section 274 parties. A judicial conference took place on 5 September 2005 at which time the Court directed that this appeal be put 'on hold' to await the resolution of the Swanson Structure Plan appeals.

**(Changed) Selak v Waitakere City Council (7 March 2002)  
Collett & Nye v Waitakere City Council (8 March 2002)**

Appeals filed by the applicant Mr Selak and his neighbours, Mr Collett and Ms Nye. Both appeals relate to the operation of a go-kart track on Mr Selak's property at Kennedy's Road, Whenuapai. Mr Selak has appealed a condition disallowing use of the track on Sundays and public holidays. Mr Collett and Ms Nye have appealed Council's decision to allow the go-kart track. Mr Selak has put forward a new proposal, involving additional mitigation of the noise impact of the go-kart track, which was considered by all parties at a Court assisted mediation held on 8 June 2005. We have prepared consent documentation in accordance with the agreement reached at mediation. The Council has granted consent for a noise mitigation fence. Consent documentation was finalised and filed with the Court at a judicial conference on 22 February 2006. A consent order has since been issued by the Court, resolving this appeal.

**(Unchanged) Abacus Developments Limited & Mawhinney v Waitakere City Council (February 2000)**

This case has been placed in the 'on hold' list by the Environment Court, until the Dilworth structure plan proceedings (Resource Management Act 886/98) have been concluded.

**DISTRICT COURT**

**(Changed) J D Heays - 13 Turanga Road, Henderson (February 2006)**

This matter relates to charges laid under the Building Act 2004 and the Resource Management Act 1991. The Building Act charges relate to the unauthorised building work which includes conversion and alteration of a building on the property, the erection of a double garage and new unit. The Resource Management Act charges relate to the contravention of the Waitakere City Council District Plan relating to increasing the net site area of the property without land use consent. The matter has been transferred to the Auckland District Court to be heard by an environment warranted judge. It is set down for the list on 7 April 2006.

**(Unchanged) Graham W Gordon - 159A Scenic Drive, Titirangi (October 2005)**

This matter relates to breaches of the Resource Management Act and Building Act. The matter was set down and heard at the Auckland District Court on 7 October 2005. Mr Gordon entered not guilty pleas to all charges and confirmed his election of trial by jury in relation to the Resource Management charges. A tentative hearing has been set down for the Resource Management Act charges on 11 June 2006.

**(Unchanged) G M and B K Wheeler - 21 Kirby Street, Glendene (October 2005)**

Charges laid under the Building Act for unauthorised building work undertaken to remove an existing deck from the second storey of the house and replace it with a new 2.4 metre high one. The new deck does not meet the standards of the building code and is considered to be unsafe. The defendants have sought building consent to remove and re-erect the deck. The matter has been adjourned until 19 May 2006.

**(Changed) M F Khan - 18 Patts Avenue, Glendene (October 2005)**

Charges were laid under the Building Act for unauthorised building work undertaken to convert and alter the downstairs area of the house into a separate dwelling. The matter was called on 16 December 2005 where Mr Khan entered a guilty plea and the charges against Mrs Khan were withdrawn. Sentencing took place on 2 March 2006. The Court convicted Mr Khan and imposed a penalty of \$4,000 plus Court costs of \$130 and solicitor's costs of \$226.

**(Changed) McGuigan Syme Chilcott Limited, R McGuigan, G Chilcott, T Donald, G Pitts, M Engle, D Owens Limited, D Owens - 71 Riverlea Road, Whenuapai (August 2005)**

Charges laid under the Building Act for unauthorised building work undertaken to construct concrete foundations and timber framing as well as failing to stop work following the direction of an authorised officer. A building consent was lodged, but work commenced prior to the consent being granted. The matter was adjourned on 17 March 2006 to 19 May 2006 for the parties to enter pleas.

**(Changed) P Clark - 97 Shaw Road, Oratia (August 2005)**

Charges laid under the Building Act for unauthorised building work. The work involved alterations and extensions to the house so as to create new rooms and move kitchen facilities. The matter was called on 16 December 2005 where Mr Clark entered a guilty plea and charges against Mrs Clark, Mr Hawkins and Mr Johnston were withdrawn. Sentencing took place on 28 February 2006 where Mr Clark was convicted and fined \$12,000 plus Court costs of \$130 and solicitor's costs of \$226. The Court ordered the entire \$12,000 to be paid to Council as a form of reparation considering that the Council lost its opportunity to collect development contributions.

**(Changed) G Nicola, A Casey, and Eurovision Building Removals Limited - 4 Bowers Road (June 2005)**

Charges laid under the Building Act for unauthorised building work undertaken to construct pile foundations to support a relocated house which was relocated onto the foundations. No building consent was obtained for the construction of the foundation or the relocation. The matter was heard in part on 18 November. Charges were withdrawn against Ms Freeman, and the defendant Mr Nicola pleaded guilty. The Court convicted Mr Nicola on 16 December and fined him \$3,000, plus court costs of \$130 and solicitor's costs of \$226. The Court ordered that 90% of the fine and solicitor's costs be paid to the Council. The co-defendants Mr Casey and Eurovision Building Removals Limited pleaded not guilty. A defended hearing was set down for 4 April 2006 for the latter two defendants. Mr Casey changed his plea to 'guilty'. The Court has reserved its decision to 5 May 2005. The hearing in relation to Eurovision Building Removals Limited was part heard. The hearing will reconvene on 11 April 2006 at 10am.

**(Changed) A Mackinnon - 5 Armour Road, Parau (June 2005)**

Charges were laid under the Resource Management Act for the clearance of at least 80 native trees including mānuka, kanuka, kahikatea, mahoe, and cabbage trees from a Protected Natural Area without resource consent. A restorative justice conference was held on 3 April 2006 where the defendant took responsibility for the actions and agreed to a planting programme. The parties are to report to the Court on 7 April 2006.

**(Changed) A Hafeez – 73 Huia Road, Titirangi (May 2005)**

Charges were laid under the Building Act for unauthorised building work (construction of a dwelling without consent) and under the Resource Management Act in respect of District Plan rule breaches relating to unauthorised vegetation clearance and earthworks. The defendant pleaded guilty to three charges of undertaking unauthorised building work, earthworks and vegetation clearance. All alternate charges against Hafeez were withdrawn. The matter was partially heard on 13 March 2006. The Court has deferred sentencing to give the Council an opportunity inspect the site one more time so as to seek an appropriate sentence, and to best inform the defendant as to what his options are in relation to the outstanding applications for building and resource consent. The matter has been set down for 17 May 2006.

**(Unchanged) S Mohammad - 73 Huia Road, Titirangi (May 2005)**

Charges were laid under the Building Act for unauthorised building work (construction of a dwelling without consent) and under the Resource Management Act in respect of District Plan rule breaches relating to unauthorised vegetation clearance and earthworks. The defendant has not appeared before the Court as he is now residing in Pakistan. The Court has issued a warrant for his arrest to be executed upon his entry into New Zealand.

**(Changed) D Thomson - 10 Pohutukawa Road, Whenuapai (March 2005)**

Charges laid under the Building Act for unauthorised building work undertaken to create two residential units within an existing warehouse building, and under the Resource Management Act for the use of those units in breach of the residential rules of the District Plan. The Council has been unable to serve summonses on Mr Thomson and a warrant to arrest has been issued. However, Mr Thomson has agreed to meet with the Council and this matter is listed for pleas to be entered in the Auckland District Court on 7 April 2006.

**(Unchanged) M K Kasprzak - 27 Bedford Street, Te Atatu South (March 2005)**

Charges were laid under the Building Act and Resource Management Act in respect of a second minor household unit constructed without the requisite building and resource consents. Mr Kasprzak entered not guilty pleas and the matter was set down for a defended hearing on 12 December 2005. Following receipt of the Council's evidence, Mr Kasprzak changed his plea. The Judge directed that he liaise with Council regarding the standard of the building work done and remedy any substandard work, if possible, at Council's direction. Sentencing is to occur on 10 April 2006.

**(Unchanged) I R Stanic - 11 Orchid Place, Henderson (May 2004)**

Charges were laid under the Resource Management Act regarding the contravention of District Plan Rules (as the property is being used to store vehicle wrecks and undertake vehicle repairs, without the requisite resource consent) and for contravention of an abatement notice. Mr Stanic pleaded guilty. A restorative justice conference was held on 13 May 2005, at which time the Council, affected neighbours and Mr Stanic discussed the situation. An agreement was reached that Council would assist the defendant to remove the vehicles from the property and that no further vehicle repair work would be undertaken at the property.

The Council will seek an enforcement order to ensure that this occurs. Sentencing was scheduled for 7 June 2005 but Mr Stanic failed to appear and an arrest warrant was issued. A new date is yet to be set as the Police have not executed the warrant.

### **RECOMMENDATION**

That the Legal Update As at 4 April 2006 be received.

Report prepared by: Setareh Masoud-Ansari, Contract Solicitor.



## **6 PAINTED APPLE MOTH - OMBUDSMAN COMPLAINT**

### **PURPOSE OF THE REPORT**

The purpose of this report is:

- to inform members of recent developments regarding the Council's complaint under the Official Information Act 1982 to the Ombudsmen's Office following the refusal by the Ministry of Agriculture and Forestry (the Ministry) to disclose the ingredients of Foray 48B;
- to advise of the basis upon which the complaint has now been resolved; and
- to make recommendations as to Council's next steps in the light of the findings contained in Dr Peter Di Marco's Report. A copy of the report is attached at pages A37 to A98.

A37-A98

### **BACKGROUND**

The complaint by Council to the Ombudsmen's Office regarding the non-disclosure by the Ministry of the ingredients of Foray 48B the chemical used by the Ministry in an aerial spraying programme to eradicate an infestation of Painted Apple Moth which had been found to exist in West Auckland, predominantly within the boundaries of Waitakere City. The spraying programme commenced in 2002 and continued through to 2004.

The background to the Council's complaint was:

- The Ombudsmen's Office had previously found, in respect of other complaints, that the Ministry was justified in refusing public disclosure of the ingredients of Foray 48B.
- Despite these earlier findings, Council decided to pursue a complaint on the basis that there was sufficient countervailing public interest in favour of some limited form of disclosure, particularly given Council's role as a regulatory body with statutory duties and functions generally and under s23(c) of the Health Act 1956 in particular. A copy of Section 23 is attached at pages A99 to A100.
- The investigation of such complaints is managed by the Ombudsmen's Office. Because a confidentiality agreement had been signed between the Ministry and Valent Biosciences Corporation based in Illinois, USA, ("Valent") the manufacturer of Foray 48B, the Ombudsmen's Office had already been engaged in communications with Valent during the course of their investigation into the earlier complaints against the Ministry.

A99-A100

The Ombudsmen's Office undertook a facilitative role during the investigation in order to attempt to arrive at a voluntary resolution of the Council's complaint. Council co-operated with the Ombudsmen's Office in this approach since that seemed the most likely way that a disclosure (albeit limited) of the ingredients might be achieved. The rationale for this approach was:

- An outcome under which there would be a full public disclosure of the ingredients of Foray 48B was unlikely, given that the Ombudsman had previously disallowed disclosure to the public at large and to the Council in its general capacity (as opposed to its specific regulatory role).
- Seeking disclosure direct to Council in its regulatory capacity would not prove practical as Council could not take any follow-up action. It did not have the necessary in-house expertise to assess the health effects of the ingredients. Nor would a disclosure of the ingredients to the Council in its regulatory capacity necessarily result in the Council being able to disclose those ingredients to the public.
- The approach which was agreed, and which allowed for some form of independent (i.e. independent of Valent and the Ministry) expert assessment while facilitating Council's ability to assess its regulatory responsibilities under the Health Act, was to pursue a voluntary disclosure by Valent to an acceptable independent expert. This was proposed on the basis that the independent expert's report would be accepted by the Council as a negotiated resolution to Council's complaint to the Ombudsman.

On the recommendation of the Ombudsman (Mr Mel Smith) it was agreed with Valent, subject to certain conditions, that the ingredients would be disclosed confidentially to an overseas independent expert whose expertise and experience was acceptable to the parties involved in the complaint. That expert would be retained by Council to advise as to whether the aerial spraying of Foray 48B in Waitakere City amounted to a nuisance which was "likely to be injurious to health or offensive" in the words of Section 23(c) of the Health Act.

The Ombudsmen's Office overviewed a process, facilitated by Council, to identify a suitable independent expert who had the confidence of not only the Ombudsmen's office and the Council, but also Valent and the Ministry. This process identified Dr Peter Di Marco as a person who was both appropriately independent and expert. Council's independent enquiries supported this conclusion. Dr Di Marco was accordingly retained by the Council.

The brief to Dr Di Marco required him to consider a number of matters including the following:

- Toxicological properties and hazards of Foray 48B;
- Likely health risks and conditions (including without limitation the likely short to long term health risks and conditions from inhalation, ingestion or absorption through skin and/or eyes) associated with exposure from aerial spraying programmes of Foray 48B in New Zealand, including specifically in Waitakere City;
- The formulation and manufacturing processes for Foray 48B;
- The risk assessment and risk management steps taken by the Ministry of Agriculture and Forestry to reduce and/or eliminate any risks associated with the aerial spraying programmes in New Zealand, including specifically in Waitakere City;
- Health risk assessments already undertaken and which would be referenced in the Report; and
- The risk management measures taken by Ministry of Agriculture and Forestry;
- A conclusion as to whether aerial spraying of Foray 48B in West Auckland (including Waitakere City) constituted a nuisance which is "likely to be injurious to health or offensive"; and

- An opinion, based on his work in preparing the report, as to whether future aerial spraying of Foray 48B both in West Auckland (including in Waitakere City) and elsewhere in New Zealand would be likely to constitute a nuisance which is “likely to be injurious to health or offensive”.

The Ombudsmen’s Office advised, in the light of these arrangements, that Mr Smith would expect his investigation to be concluded as follows:

*"I would then expect to complete investigation of its (Council’s) complaint on the basis that although good reason to withhold under section 9(2)(b)(i) of the Official Information Act was established, there was also a countervailing public interest in Council being able to satisfy itself regarding the existence or otherwise, of a public nuisance, which in the circumstances has been adequately met by the provision of Dr Di Marco's report."*

Council, Valent and the Ministry accepted that investigation of the complaint could be concluded on this basis.

### **REPORT FINDINGS**

The report has now been completed and received by Council. The principal findings of Dr Di Marco are that:

- the aerial spraying already undertaken by the Ministry in Waitakere City does not amount to a nuisance which is “likely to be injurious to health or offensive”;
- any future aerial spraying of Foray 48B is unlikely to constitute a nuisance that is “injurious to health or offensive” provided the risk management measures which had been developed and implemented in relation to the conduct of the spraying campaign in Waitakere City continued to be applied.

### **CONCLUSIONS**

The Ombudsmen’s Office has received a copy of the Report and has received confirmation from the other parties involved in the complaint that the bases for completion of the investigation have been satisfied. Although it has not been possible to achieve public disclosure of the ingredients of Foray 48B Council has now received independent and expert advice as to the health effects of the aerial spraying programme. The opinions offered by Dr Di Marco have been arrived at with the benefit of full knowledge of the ingredients of Foray 48B. The receipt of the report allows Council, in its regulatory capacity, to exercise its statutory discretion and make a decision which is as fully informed as is reasonably practical in all the circumstances.

It is recommended that Council:

- accept, on the basis of the findings in the Di Marco report, that there was no reasonable basis upon which it might be concluded that the aerial spraying of Foray 48B amounted to a nuisance that was likely to be “injurious to health or offensive” for the purposes of s23 of the Health Act 1956;
- notes the opinion of Dr Di Marco that future aerial spraying of Foray 48B is unlikely to constitute a nuisance that is “injurious to health or offensive” provided the risk management measures developed and implemented to date continue to be applied.

It is understood that some people within in the community may not agree with the opinions offered nor be reassured by the conclusions arrived at in the Di Marco Report. Given the nature of aerial spraying, and the level of concern which it understandably and rightly generated, it would be unrealistic to expect that there might ever be a unanimous consensus. Notwithstanding the diversity of views on such issues it is suggested that Council still has a role to perform on behalf of the community as a whole, as it has done throughout this matter, as an advocate for the promotion and protection of the public health of the people in Waitakere City. Accordingly it is also recommended that Council take reasonable steps to advocate for the periodical review and monitoring of the health effects of any past or future aerial spraying of Foray 48B within the City or elsewhere.

### **RECOMMENDATIONS**

1. That the Painted Apple Moth - Ombudsman Complaint report be received.
2. That Council:
  - a) accept, on the basis of the findings in the Di Marco report, that there was no reasonable basis upon which it might be concluded that the aerial spraying of Foray 48B amounted to a nuisance that was "likely to be injurious to health or offensive" for the purposes of s23 of the Health Act 1956;
  - b) notes the opinion of Dr Di Marco that future aerial spraying of Foray 48B is unlikely to constitute a nuisance that is "injurious to health or offensive" provided the risk management measures developed and implemented to date continue to be applied.
3. That Council take reasonable steps to advocate for the periodical review and monitoring of the health effects of any past or future aerial spraying of Foray 48B within the City or elsewhere.

Report prepared by: Denis Sheard, Legal Services Manager and Philip Griffiths Consultant.



**PART D - PUBLIC EXCLUDED MATTER**

**7 SWANSON STREAM LAND SLIP**

This item will be considered in the Confidential Supplement of the agenda, and has been circulated to members separately with this agenda.

**PROCEDURAL MOTION TO EXCLUDE THE PUBLIC**

That the public be excluded from the following part of the proceedings of this meeting, namely, Swanson Stream Land Slip.

The general subject of the matter to be considered while the public is excluded, the reason for passing this resolution in relation of the matter, and the specific grounds under Section 48(1) of the Local Government Official Information and Meetings Act 1987 for the passing of this resolution are as follows:

General subject of each of the matter to be considered.	Reason for passing this resolution in relation to each of the matter.	Ground(s) under Section 48(1)(a) for the passing of this resolution.
Swanson Stream Land Slip	The withholding of information is necessary in order to: <ul style="list-style-type: none"><li>• Maintain legal professional privilege.</li></ul>	That the public conduct of the relevant part of the proceedings of the meeting would be likely to result in the disclosure of information for which good reason for withholding would exist.

This resolution is made in reliance on Section 48(1)(a) of the Local Government Official Information and Meetings Act 1987 and the particular interest or interests protected by Section 7(2)(g) of that Act which would be prejudiced by the holding of the relevant part of the proceedings of the meeting in public as follows:

- *Making available of the information would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial.*

