Before the District Plan Hearings Panel appointed by Central Hawke's Bay District Council

In the matter of	the Resource Management Act 1991 (RMA)
And	
In the matter of	the hearing of submissions on the Proposed Central Hawke's Bay District Plan

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Opening Legal Submissions for Central Hawke's Bay District Council

Dated 9 March 2022

May it please the Panel

Introduction

1. These submissions are given on behalf of Central Hawke's Bay District Council (Council) as proponent of the Proposed Central Hawke's Bay District Plan (PDP).

2. As the Panel is aware, the intention is for submissions made on the PDP to be heard over seven hearing streams, all dealing with different aspects of the Plan. While it is not intended that I will attend every hearing, the Council has asked that I address the Panel at this first hearing on some legal matters that may assist your deliberations over the next few months.

3. I have addressed those matters under the following headings:

   (a) Overview of the PDP process;

   (b) The Panel's task;

   (c) Legal Framework;

   (d) Section 32 Resource Management Act 1991 (RMA);

(e) The *King Salmon* decision;

(f) Relevance of National Instruments;

(g) Issues of scope; and

(h) Correction of errors.

4. I note that where judicial decisions are referenced, I have provided a link to the case, and links to other reference texts and websites are also provided. The folder containing all cases is accessible here.

Overview of the PDP Process

5. The current Central Hawke's Bay District Plan was made operative on 1 May 2003.

6. The Council commenced a review of the operative plan in 2012, releasing a Draft District Plan for consultation in 2019. The Council held meetings where members of the public and interested parties were invited to provide feedback, and held informal hearings for submitters who wished to present to the District Plan Committee in February 2020. The Committee then reported back to Council.

7. Council officers took the feedback received through that detailed consultation process into account in preparing the PDP. In the interim, the National Planning Standards came into effect, and the requirements of those standards were also implemented. The PDP was notified in May 2021. 123 submissions and 29 further submissions were made, capturing over 2,500 submission points.

8. Officers have identified topics addressed by the submissions, and hearings will be held on a topic basis, as follows:

(a) Hearing Stream 1 – Natural and Coastal Environment;

(b) Hearing Stream 2 – Urban Environment, Sustainability and General District Wide Matters;

(c) Hearing Stream 3 - Rural Environment;

(d) Hearing Stream 4 - Tangata Whenua and Historic Heritage;

(e) Hearing Stream 5 - Hazards and Risks and Subdivision;

(f) Hearing Stream 6 - Miscellaneous, Introduction and Rezoning;

(g) Hearing Stream 7 - Energy, Infrastructure and Transport.

9. Each hearing stream will have several sub-topics, all addressed by a separate hearing report, which will be made available at least 3 weeks (with officers generally aiming for 4 weeks) before the relevant hearing. Minute 4 issued by the Panel requires expert evidence to be filed 2 weeks before the hearing, with non-expert statements and legal submissions also requested prior to the hearing. This staggered exchange of information provides an appropriate opportunity for submitters to understand the Council and other submitters' positions, with a view to all participants providing an informed and focused presentation to the Panel.

10. Given the number of individual submission points and range of topics, there is the potential for some points to 'slip between the cracks', for instance, where a point has been allocated to a later hearing stream, it may later be realised that it would have been better dealt with in an earlier report. Similarly, consideration of submissions on a later topic, including as a result of evidence heard, may affect a recommendation given for an earlier topic. The officers will endeavour to report on this as they go, and Council anticipates there may need to be something of a 'mop up' session towards the end of the hearing process where any affected submitters can be invited to be heard if necessary.

11. At the conclusion of the hearings, the Panel will make recommendations to the full Council, who will make the final decision under clause 10, First Schedule RMA.

The Panel's task

12. The Hearings Panel has been delegated the task, under clause 8B, Schedule 1, RMA, of hearing submissions on the PDP, as well as requirements for designations that have been included in the PDP. Under clause 10, the Panel is required to make recommendations to the Council as to decisions on the provisions and matters raised in submissions, including reasons for its decisions. The Panel may address submissions in groups, in a similar way to how the reporting officers have approached their assessments in the s 42A reports. The Panel is not required to give a decision that addresses each individual submission.[1]

[1] Schedule 1, cl 10(3) RMA.

13. As is discussed further below, the Panel's recommended decisions must include a further evaluation of the PDP under section 32AA RMA, and the Council will be required to have particular regard to that further evaluation when making its decision.[2] The Panel may recommend consequential alterations necessary to the PDP arising from submissions.[3]

14. The Council is required to make decisions on submissions on the PDP must be given no later than two years after notification of the PDP, which is 28 May 2023.

15. The PDP also includes requirements for designations which have a different statutory test, and which the Panel need to consider under cl 9, Schedule 1, RMA. Requirements for designation are not scheduled to be considered until Hearing Stream 7, and if it is of assistance, I can provide a similar type of statutory overview for assessment of designations at that time.

Legal framework

16. The preparation of a district plan takes place in quite a complex statutory framework and there are a number of cases where the Environment Court has helpfully summarised the relevant tests. Probably the most comprehensive is one set out by the Court in *Long Bay-Okura Great Park Society Inc v North Shore City Council*[4] which has subsequently been updated in a series of cases to provide for progressive amendments to the RMA. The most recent version I am aware of is in *Colonial Vineyard*, in 2014, and this is set out in **Appendix A**, with some updates to reflect changes to the RMA since then.

2 Schedule 1, cl 10(4)(aaa) RMA.
3 Schedule 1, cl 10(2)(b)(i) RMA.
4 Environment Court A078/08, 16 July 2008.

17. There are some more concise versions of the fuller test, with a useful one being set out in *Edens v Thames-Coromandel District Council*,[5] as follows:

A An objective in a district plan is to be evaluated by the extent to which:

1 it is the most appropriate way to achieve the purpose of the Act (s 32(1)(a)); and

2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72); and

3 it is in accordance with the Council's functions under s 31 and the provisions of Part 2 (s 74(1)).

B. A policy, rule, or other method in a district plan is to be evaluated by whether:

1 it is the most appropriate way to achieve the objectives of the plan (s 32(1)(b)) by

(i) identifying other reasonably practicable options for achieving the objectives; and

(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives by identifying and assessing (quantitatively if practicable) the benefits and costs of the effects anticipated from its implementation together with the risk of acting or not acting if there is uncertain or insufficient information about the matter; and

(iii) summarising the reasons for deciding on the provisions; and

2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s 72);

3 it is in accordance with the Council's functions under s 31 and the provisions of Part 2 (s 74(1)); and

4 (if a rule) it achieves the objectives and policies of the plan (s 76(1)(b)).”

Section 32 RMA

18. The section 32 assessment is a critical aspect of the Panel’s role in considering submissions on the PDP. Section 32 reports have been prepared in support of the PDP as notified, and are available on the Council’s website. They are a useful resource for the Panel and submitters in understanding the rationale behind, and planning justification for, what has been proposed.

19. As submissions on particular aspects of the PDP are considered through hearing reports, officers will consider any alternative provisions put forward in the context of what s 32 requires, and when changes are recommended, a further assessment

5 [2020] NZEnvC 13

under s 32AA will be provided if the change is a material departure from what was notified. That same obligation to make a further assessment under s 32AA will also apply to the Panel if it decides to recommend changes as a result of submissions which materially depart from the notified version.

20. So what does s 32 RMA require? Essentially, it requires an evaluation report to be prepared which considers whether the objectives proposed are the most appropriate way to achieve the purpose of the RMA, and whether the other provisions – primarily policies and rules – are the most appropriate way to achieve the objectives. The latter requires:[6]

    (i) identifying other reasonably practicable options for achieving the objectives; and

    (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and

    (iii) summarising the reasons for deciding on the provisions.

21. The report must contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.[7]

22. The assessment of the efficiency and effectiveness of the provisions in achieving the objectives must:

    (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

        (i) economic growth that are anticipated to be provided or reduced; and

        (ii) employment that are anticipated to be provided or reduced; and

    (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

    (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

23. When considering objectives under the s 32 test, every objective needs to be examined, but they cannot be looked at in isolation, because the objectives may have overlapping ways of achieving sustainable management of natural and

6 Section 32(1)(b) RMA
7 Section 32(1)(c) RMA

physical resources - the purpose of the Act.[8] For example, in the Coastal Environment section, you may consider it appropriate to consider CE-O2 (protection of the natural character of the coastal environment) and CE-O3 (providing for activities with a functional need to locate in the coastal environment) together, to ensure they are complementary and work together, rather than pulling against each other.

24. There are a number of terms used in s 32 which the Courts have considered and provided further guidance on, as follows:

(a) "Most appropriate", this means the most "suitable" and does not require it to be the objective or method to be the most "superior".[9] This requires a value judgment.

(b) "Effectiveness" assesses the "contribution new provisions make towards achieving the objective, and how successful they are likely to be in solving the problem they were designed to address."[10]

(c) "Efficiency" measures whether the provisions will be likely to achieve the objectives at the lowest total cost to all members of society, or achieves the highest net benefit to all of society. The assessment of efficiency under the RMA involves the inclusion of a broad range of costs and benefits, many intangible and non-monetary.[11] One measure of efficiency is where the purpose of the Act and the objectives of the plan can be met by a less restrictive regime, then that regime should be adopted.[12]

(d) "Benefits" or positive effect, can be described as a consequence of an action (e.g. a plan provision) that enhances well-being within the context of the RMA, and includes monetary and non-monetary benefits associated with environmental, economic, social and cultural effects;[13]

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8 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [46].

9 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [45].

10 Ministry for the Environment, '*A Guide to Section 32 of the Resource Management Act 1991*", p18.

11 Ministry for the Environment, '*A Guide to section 32 of the Resource Management Act 1991*", p18.

12 *Royal Forest and Bird Protection Soc of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59] confirming *Wakatipu Environment Society Inc v Queenstown Lakes District Council* EnvC C153/04 at 56.

13 Summarised from Ministry for the Environment, '*A Guide to section 32 of the Resource Management Act 1991*", p18 -20

(e) "Costs" or negative effect, can be described as what society has to sacrifice to obtain a desired benefit and includes monetary and non-monetary costs associated with environmental, economic, social and cultural effects.[14]

25. These are, of necessity, very brief summaries of quite complex issues in the abstract. If the Panel wishes to hear legal submissions for the Council on the application of s 32 to a particular scenario as it arises, more specific assistance can be provided.

26. As noted above, a further evaluation must be undertaken in accordance with section 32(1) to (4) where changes are made to the PDP as a result of your consideration of submissions. The required level of detail must correspond to the scale and significance of the changes.

27. The further evaluation under s 32AA must be published in a report made available for public inspection at the same time as the decision on the PDP is notified or be referred to in the decision-making record in sufficient detail to demonstrate that the requirements have been met. The s 32AA reports will be provided with the Panel's recommendations to the Council. As indicated above, where reporting officers recommend changes be made to the PDP, they will include an analysis under s 32AA.

28. It is expected that submitters seeking significant changes to the PDP will similarly address the matters relevant under s 32, such as the effects of the change, the costs and benefits of what they are proposing, and how the proposed new provisions fit with the objectives and policies of the PDP. Where these matters are not addressed specifically, the Panel may find it useful to question submitters on these matters, to ensure they have the information necessary to make informed recommended decisions that meet the requirements of s 32AA.

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14 Summarised from Ministry for the Environment, '*A Guide to section 32 of the Resource Management Act 1991*", p18 -20

The *King Salmon* decision

29. In 2014, the Supreme Court issued its decision in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[15] (***King Salmon***), and this has had important ramifications for plan making.

30. The first is the way, or the extent to which, it is appropriate to refer back to Part 2 of the RMA when making decisions as to the content of the PDP. Part 2 of the Act is sections 5 (the purpose of the Act), 6 (Matters of national importance), 7 (other matters) and 8 (Treaty of Waitangi).

31. The Supreme Court's decision essentially holds that where a higher order statutory planning document has interpreted what is required by Part 2 and made provisions to give effect to that, it is not necessary to go 'higher up the chain' and apply Part 2 directly. For instance, in relation to the Coastal Environment section, the New Zealand Coastal Policy Statement (**NZCPS**) has already considered, at a national level, what is required under Part 2 for the coastal resource and set this out through a series of policies. As a result, when considering appropriate objectives, policies and rules for the Coastal Environment section of the PDP, the Panel does not need to, and should not, separately consider what Part 2 requires, but only needs to consider whether the PDP provisions give effect to the NZCPS.

32. The Supreme Court held that this approach applies absent "invalidity, incomplete coverage or uncertainty of meaning" in the relevant higher order statutory planning documents. If one or more of these three caveats apply, reference to Part 2 may be justified and it may be appropriate to apply an "overall balancing exercise".

33. An important higher order planning document for the PDP will be the Hawke's Bay Regional Policy Statement, which forms part of the Hawke's Bay Regional Resource Management Plan (**RRMP**). The RRMP was prepared some time ago, prior to *King Salmon*, and prior to a number of national policy statements. Because of those factors, it is possible that one of the caveats – particularly incomplete coverage – might apply and recourse to Part 2 may be required. Plans that were prepared before *King Salmon* generally proceeded on a different understanding of how they

15 [2014] NZSC 38.

would be applied, and therefore the language used may not have been as careful as it now needs to be.

34. This brings us to the second major implication of *King Salmon*, which is where a planning instrument – in that case, the NZCPS - uses directive terminology, that is to be strictly interpreted. In that case, the word "avoid" in relation to adverse effects on the coastal environment was considered a directive term that should be applied. If a proposal is going to have adverse effects which an objective or policy requires to be "avoided", as opposed to being remedied or mitigated, it will have a high chance of being declined, even if those effects can be mitigated, for instance by an environmental off-set being provided elsewhere.

35. As such, plan makers since *King Salmon* have needed to be more conscious about terminology used. Previously, it was assumed that Part 2 would apply to all resource consent assessments required under the plan, under the "overall broad judgment" approach. This meant that, while objectives and policies of a plan were a factor to be considered, a decision-maker would tend to make an overall judgement as to the merits of a particular proposal, sometimes, for instance, with reference to the social or economic benefits a proposal would have to an applicant, even if this was not expressed as an important factor within the plan.

36. As the RRMP was mostly prepared before *King Salmon*, it will not have been prepared with that focus, and therefore, it will not always be appropriate for the Panel to apply that policy statement without also considering Part 2.

37. The importance now placed on terminology, and the much reduced ability to rely on an overall balancing exercise at resource consent stage, means that the Panel should be very aware of the wording they choose to employ when considering objectives and policies. *King Salmon* emphasises the importance of planning instruments as a reflection of the community's aspirations, and the specific words used will be critical in determining future applications under this plan.

Relevance of National Instruments

38. The emphasis placed by *King Salmon* on higher order planning documents is consistent with the RMA's requirement that a district plan must give effect to any

national policy statement and New Zealand Coastal Policy Statement and a national planning standard. [16] Potentially relevant documents for the PDP are the:

(a) NZCPS;

(b) National Policy Statement for Freshwater Management 2020 ;

(c) National Policy Statement for Renewable Electricity Generation 2011;

(d) National Policy Statement on Electricity Transmission;

(e) National Planning Standards 2019.

39. Authors of the s 42A reports will address these as they apply to topics addressed, and will explain how they apply to the matters being considered.

40. Given the requirement to give effect to these documents, they may limit the extent to which the relief sought by some submissions can be approved.

41. In the case of the National Planning Standards, it is important to be aware that the way the PDP is laid out and many of the defined terms are set by this document. For instance, where a term is defined in the Planning Standards, there are limits to the ability to modify the meaning. Again, the reporting officers will alert you if there is an issue, through their s 42A reports.

42. In addition to the NPSs, there are a number of National Environmental Standards (**NES**), including (most relevantly) the:

(a) National Environmental Standards for Plantation Forestry 2017

(b) National Environmental Standards for Telecommunications Facilities 2016

(c) National Environmental Standards for Electricity Transmission Activities 2009; and

(d) National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health 2011.

16 Section 75(3) RMA.

43. NES generally provide a national set of planning rules for a particular activity. For instance, the NES for Telecommunication Facilities provides a set of rules for transmission lines, conductors and ancillary equipment and activities that mean each Council does not need to determine its own rules and is required to apply a consistent set.

44. Section 43B RMA sets out the requirements for whether rules can be more stringent or more lenient than what is provided for in the standard. This largely depends on how the NES is drafted, and its coverage. In Hearing Stream 1, the Panel will be required to consider the NES for Plantation Forestry (**NESPF**), and the extent to which it covers activities in Significant Natural Areas. The s 42A report sets out the relevant aspects of the NESPF and how it relates to rules in the PDP, and this will need to be carefully considered by the Panel.

45. I note that I did not include in the list above the National Policy Statement on Urban Development 2020 (**NPSUD**). This applies to urban environments, which is defined in such a way as to exclude Central Hawke's Bay. The NPSUD may still provide some useful guidance, but you are not required to 'give effect' to it. I note that Central Hawke's Bay is similarly not captured by the recent Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

46. I have also not listed above the Draft National Policy Statement on Highly Productive Land (**NPS-HPL**) or the Draft National Policy Statement for Indigenous Biodiversity. The RMA does not require you to consider, or give effect to, draft NPS. The Environment Court in *Mainpower NZ Limited v Hurunui District Council* held that while draft national policy statements can be considered in the context of relevant matters, no weight should be given to them as they may yet change.[17]

47. Notwithstanding that strict legal position, the NPS-HPL is expected to take effect in the first half of this year, and will therefore likely to become operative part way through the hearings process. It is therefore useful to consider what it is likely to require. Essentially, the NPS-HPL will seek to improve the way highly productive land is managed under the RMA to recognise the full range of values and benefits associated with its useful primary production; maintain its availability for primary

17 [2011] NZEnvC 384 at [27].

production; and protect it from inappropriate subdivision, use and development.[18] It is likely that the NPS-HPL will direct changes to district plans to give effect to certain requirements if necessary. Where there is the opportunity to ensure the PDP gives effect to the operative NPS-HPL, the Panel will need to consider that before it makes its final recommendations.

48. The reporting officers will keep the Panel briefed on any update in this regard.

Issues of Scope

49. The Panel has the task of considering submissions that have been made "on" the PDP. In some cases, submissions might be considered to not be "on" the PDP, or to be out of scope.

50. There is quite a lot of caselaw on the scope of submissions, however it is fair to say that many of them relate to plan changes, which have a much narrower focus than a full plan review of the type being undertaken here. The High Court in the *Albany North Landowners v Auckland Council* held:[19]

> … the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in [other scope cases]. The notified PAUP encompassed the entire Auckland region… and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP…The scope for a coherent submission being "on" the PAUP in the sense used [in the earlier decisions] was therefore very wide.

51. As such, for a full plan review such as the PDP, almost everything is open for challenge through the current submission process, provided the submission is sufficiently clear and the relief sought it is something that can properly be managed in a district plan under the RMA.

52. In terms of whether relief sought properly raised by a submission, the High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council* held that an amendment made to a proposed plan as notified must be "*reasonably and fairly raised in submissions*" on the proposed plan.[20] This is to be approached "*in a realistic and workable fashion, rather than from the perspective of legal nicety*".[21]

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18 Summary provided at Proposed National Policy Statement for Highly Productive Land | NZ Government (mpi.govt.nz)
19 [2017] NZHC 138 at [129].
20 [1994] NZRMA 145 at 166.
21 *Royal Forest and Bird Protection Soc NZ v Southland District Council* HC Christchurch AP198/96

53. In some cases a submission may be so unclear as to the relief it is seeking that it not possible to discern what is being sought. The Panel will need to decide whether, read as a whole, the relief can be reasonably and fairly identified. A submitter may seek to clarify this at the hearing, but they cannot expand the scope of their written submission through their evidence at the hearing. There is likely to be an issue if the written submission was so unclear that potentially affected persons would not have been sufficiently alerted to the need to make a further submission.

54. Often submissions will seek relief which is clearly outside the jurisdiction of the RMA – for instance matters such as funding of infrastructure, rates levied by Council, and other grievances against the Council will not be amenable to coverage in the PDP. Similarly some matters, such as air discharges and wetland protection, are within the jurisdiction of the Hawke's Bay Regional Council, and cannot be controlled under the district plan.

55. Reporting officers will identify any submissions where scope is a potential issue, and the Panel will need to carefully consider whether the submission can be advanced. Further legal submissions on particular submissions may be appropriate in difficult cases.

Correction of Errors

56. As reporting planners have started to prepare s 42A reports in preparation for hearings on the PDP, there have been a few errors discovered. Given the complexity of the plan preparation process, this is not unexpected, and the RMA provides a number of methods for correcting such errors, some of which reporting officers may recommend the Panel employ.

57. For minor mistakes, clause 16(2), Schedule 1, RMA provides:

> A local authority may make an amendment, without using the process in this schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

58. The key to this power is that it may only be used for "minor" changes to the Plan. In *Re Christchurch City Council*,[22] the Environment Court considered a number of

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'errata' identified in the Christchurch City District Plan and considered which could be corrected under cl 16(2). In terms of alterations to information, it held (at p10):

> In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16. Although to put it in that abstract way may seem unhelpful, I rather think that like pink elephants the neutral changes will be easier to recognise than to describe.

59. The Court used the example of the Council's proposal to correct a reference to a protected tree on a particular property from a 'Pin Oak' to a 'Scarlet Oak'. It said that if there was only one tree on the property, and it was obvious what was meant to be referred to, then a change of name would be neutral and could be made under cl 16(2). However if there were a number of oak trees on the property, an owner might not have objected to protecting the Pin Oak because it was away from the house, but the Scarlet Oak might be closer and dropping leaves in gutters and "otherwise intended for an early demise". In that situation, where the owner might have been mislead by the original information into not making a submission, cl 16 could not be used.

60. In terms of corrections of "minor errors", this was confirmed as being restricted to typographical errors, such as spelling mistakes and correction to paragraph numbers. The Court held (at p 11):

> By definition slips in spelling punctuation cross referencing and the like will be minor in nature because their correction will not cause prejudice to any person or give rise to misunderstanding. Providing the draftsperson seeks only to clarify what is clearly intended by the document and does not in any way make a change to it which alters its meaning then the correction will be within Clause 16.

61. The power under cl 16(2) can be used at any time prior to the PDP being made operative, i.e. there is no requirement to wait until appeals have been determined. It may be that Council exercises this power directly, however the more likely path is probably for officers to request that the Panel to consider whether use of cl 16 is appropriate, or, if not, to recommend that a variation is required to amend the provision.

62. If the Panel consider cl 16 can be used, this could be recorded in a minute, and actioned by Council at any time (i.e. there is no need to wait until decisions on submissions are notified). Similarly, if the Panel considers a submission does not

provide scope for correction, this could usefully be communicated to officers separately, so consideration can be given to whether a variation to the PDP is warranted.

63. For more substantial errors which do not fall within clause 16, there may be potential for these to be corrected through decisions on submissions. This may arise either directly, through the submission directly pointing out the error, or indirectly, if the relief sought is broad enough to allow an error to be corrected. These would likely be identified in the s 42A reports and a correction recommended.

64. Officers are keeping a running record of any errors noted, and how they are to be rectified.

Conclusion

65. I am happy to assist the Panel on particular legal issues as they arise, in the form of legal submissions for the Council.

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Asher Davidson

9 March 2022

APPENDIX 1

Adapted checklist from *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 and incorporating recent amendments to the RMA as applicable to the PDP.

A. General requirements

1. A territorial authority must prepare and change its district plan in **accordance with**[23] — and assist the territorial authority to **carry out**[24] — its functions[25] so as to achieve the purpose of the Act.[26]

2. The district plan must also be prepared **in accordance with** any national policy statement, New Zealand coastal policy statement, a national planning standard,[27] regulation(s)[28] and any direction given by the Minister for the Environment.[29]

3. When preparing its district plan (change) the territorial authority **must give effect** to[30] any national policy statement and New Zealand Coastal Policy Statement and a national planning standard.

4. When preparing its district plan the territorial authority shall:

   (a) **have regard to** any proposed regional policy statement;[31]

   (b) **give effect to** any operative regional policy statement.[32]

5. When preparing its district plan the territorial authority must also:

   (a) **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the *Heritage List/Rarangi Korero* and to various fisheries regulations[33] to the extent that their content has a bearing on resource management issues of the district; and to consistency with

23 Section 74(1) RMA
24 Section 72 RMA
25 Section 31 RMA
26 Sections 72 and 74(1) RMA.
27 Section 74(1)(ea) RMA
28 Section 74(1)(f) RMA
29 Section 74(1)(c) RMA
30 Section 75(3) RMA.
31 Section 74(2)(a)(i) RMA
32 Section 75(3)(c) RMA
33 Section 74(2)(b) RMA

plans and proposed plans of adjacent territorial authorities;[34]

(b) **take into account** any relevant planning document recognised by an iwi authority;[35] and

(c) not have regard to trade competition or the effects of trade competition.[36]

6. The formal requirement that a district plan must also state its objectives, policies and the rules (if any)[37] and may state other matters.[38]

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act.[39]

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies;[40]

10. Each proposed policy or method (including each rule) is to be examined, as to whether it is the most appropriate method for achieving the objectives of the district plan by:[41]

- Identifying other reasonably practicable options for achieving the objectives;[42] and
- Assessing the **efficiency and effectiveness** of the provisions in achieving the objectives by:[43]
  - Identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposed policies and methods (including rules), including the opportunities for:

34 Section 74(2)(c) RMA
35 Section 74(2A) RMA.
36 Section 74(3) RMA.
37 Section 75(1) RMA.
38 Section 75(2) RMA.
39 Sections 74(1) and 32(1)(a) RMA
40 Section 75(1)(b) and (c) RMA.
41 Section 32(1)(b) RMA.
42 Section 32(1)(b)(i) RMA
43 Section 32(1)(b)(ii) RMA

(i) economic growth that are anticipated to be provided or reduced;[44] and

(ii) employment that are anticipated to be provided or reduced.[45]

- If practicable, quantify the benefits in costs referred to above.[46]
- Assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods;[47]

- Summarising the reasons for deciding on the provisions;[48]
- If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.[49]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.[50]

12. Rules have the force of regulations.[51]

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.[52]

14. There are special provisions for rules about contaminated land.[53]

15. There must be no blanket rules about felling trees in any urban

44 Section 32(2)(a)(i)
45 Section 32(2)(a)(ii) RMA
46 Section 32(2)(b) RMA.
47 Section 32(2)(c) RMA.
48 Section 32(1)(b)(iii) RMA.
49 Section 32(4) RMA.
50 Section 76(3) RMA.
51 Section 76(2) RMA.
52 Section 76(2A) RMA.
53 Section 76(5) RMA.

environment.[54]

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes.

54 Section 76(4A) and (4B) RMA.