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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Legal Submissions for Central Hawke's Bay District Council in relation to Designations and Amendments to RMA relevant to Panel's task

Dated 9 December 2022

May it please the Panel

Introduction

1. My opening legal submissions presented in Hearing Stream 1 set out the statutory tests for consideration of submissions on the notified PDP, and noted:

> 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.

2. These submissions therefore address the statutory tests for assessment of designations.

3. I also note that as of 30 November 2022, there are amendments to s 74 Resource Management Act 1991 (RMA) which are relevant to your consideration of submissions. These relate to documents prepared under the Climate Change Response Act 2002, and are addressed below.

Designations

An overview of designations in the PDP

4. Designations are a form of approval for public works or network utilities which are essentially a hybrid of a rule in a plan and a resource consent. They can only be secured by the Crown, local authorities or approved network utility operators. Once a designation is included in a district plan, the provisions of the district plan do not apply to the approved work, and the body responsible for it (known as the requiring authority) can do anything approved by the designation without the need to obtain consent.[1] It also prevents any other person from doing anything in relation to land that is the subject of the designation that would prevent or hinder the approved work without the requiring authority's written consent.[2]

5. Where new construction is proposed in reliance on a designation, the requiring authority must usually produce an outline plan showing details of the work and proposals to avoid, remedy or mitigate any adverse effects on the environment. The Council then has 20 working days to review that and request the requiring authority to make changes, but the requiring authority is not obligated to agree to do so.[3] Importantly, there is no ability to notify an outline plan, and no right for affected persons to participate in the assessment process.

6. Designations are therefore afford requiring authorities significant powers under the RMA, and must be carefully considered before they are confirmed for inclusion in the PDP. It is for the requiring authority to provide all relevant information to satisfy the Panel that the statutory tests are met, and that the designation should be confirmed.

7. The process for confirming a designation is different from the usual plan-making or resource consent process, in that rather than Council making the final decision as to whether a proposal can proceed, it makes a recommendation to the requiring authority who has the final say. The exception is for Council designations, where the Council makes that decision. In this case, the Panel will therefore be making recommendations to the Council:

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1 Section 176(1)(a). Note that any regional consents are still required.

2 Section 176(1)(b)

3 Section 176A. Note the Council can appeal any decision not to make modifications requested.

(a) That pursuant to cl 9(1), the Council recommend to the requiring authority that a designation be confirmed, modified or withdrawn, and impose any conditions;

(b) Or in the case of Council designations, that pursuant to cl 9(2), the Council confirm, modify or withdraw the designation and impose conditions.

8. There are two distinct categories of designations that have been included in the PDP:

(a) Designations which were approved some time ago and are simply being 'rolled over' into the PDP (**rollover designations**); and

(b) Requirements for new designations, which have been included in the PDP under Schedule 1, clause 4(5) and (6) (**NoRs**).

9. For rollover designations, there was the ability at the time the PDP was prepared for the requiring authority to advise that it sought modifications to its existing designation. Where no such modification has been sought and no submission has been received, the Panel is prevented from considering these further.[4] However, for rollover designations which are sought to be modified and/or which are subject to submissions, the Panel will need to assess them according to the relevant statutory tests, which are discussed below.

10. For NoRs, a full assessment under s 171 RMA (for non-Council designations) or s 168A RMA (for Council designations) is required.

Statutory tests

11. The statutory test for consideration of new or modified designations for requiring authorities other than the Council, the test is set out in s 171 RMA as follows:

> When considering a requirement and any submissions received, a territorial authority must, subject to Part 2, consider the effects on the environment of allowing the requirement, having particular regard to—
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> (a) any relevant provisions of—
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> (i) a national policy statement:

[4] RMA, Schedule 1, cl 9(3).

(ii) a New Zealand coastal policy statement:

(iii) a regional policy statement or proposed regional policy statement:

(iv) a plan or proposed plan; and

(b) whether adequate consideration has been given to alternative sites, routes, or methods of undertaking the work if-

(i) the requiring authority does not have an interest in the land sufficient for undertaking the work; or

(ii) it is likely that the work will have a significant adverse effect on the environment; and

(c) whether the work and designation are reasonably necessary for achieving the objectives of the requiring authority for which the designation is sought; and

(d) any other matter the territorial authority considers reasonably necessary in order to make a recommendation on the requirement."

12. The equivalent provision for Council designations is s 168A(3) which is substantively the same.

13. In summary, the matters for consideration are:

(a) Any submissions received;

(b) The effects on the environment that will or may arise from confirming the designation;

(c) An assessment against relevant higher order documents and the PDP;

(d) Whether the requiring authority has given adequate consideration to alternatives for undertaking the work. This requirement can be excluded in certain cases;

(e) Whether the work itself, and the designation as a planning method, are 'reasonably necessary' for achieving the requiring authority's objectives;

(f) Part 2 of the RMA.

14. I address these tests briefly below.

Submissions, effects and other documents

15. The Panel will be familiar with the assessment of submissions, effects and higher order documents, such as the relevant national policy statements and the Regional Policy Statement.

16. For the rollover designations and NoRs included in the PDP, there have been markedly few submissions, with most of those received being in support. Where submissions have been received, the reporting officer has identified and considered these, and the Panel will need to consider those in the usual way.

17. In terms of effects on the environment, it is important to remember that a designation precludes the need for resource consent to be obtained for works in accordance with the designation, or for any form of assessment of effect other than in relation to new construction. It is therefore important to understand the range of activities that could be carried out under a requirement for designation, and consider whether the effects of those activities are appropriately controlled by conditions. In some cases, the reporting officer has identified a lack of appropriate effects assessment by the requiring authority, and they have been asked to address the Panel on this at the hearing.

18. I note that conditions are quite important for designations because they essentially become rules in the PDP. If work is proposed that does not comply with a condition of that designation, then it is not carried out 'under the designation', and the requiring authority will either need to apply for resource consent in the usual way or seek a modification to the designation to amend the condition.

19. The reporting officer has also included a brief assessment of the rollover designations and NoRs against the higher order documents, such as the RPS as well the objectives and policies of the PDP. The Panel may well have questions for the requiring authorities on the relevance of national policy statements and provisions of the PDP, particularly in the case of linear designations or where requiring authorities have multiple designated sites.

Adequate consideration of alternatives

20. The requirement to consider alternatives only arises where the requiring authority does not have a sufficient interest in the land in order to undertake the work or the work is likely to have significant adverse effects on the environment. In most cases the Panel will consider as part of this hearing, the requiring authority either owns the land or holds some lesser form of property right such as an easement which allows the work to be present in that location. Similarly, in most cases the work is existing and it is not expected to give rise to significant adverse effects on the

environment. The exception is that Mr Roberts on behalf of FirstGas acknowledges there is the potential for significant adverse effects associated with its designation, particularly where construction is undertaken.[5]

21. As such, consideration of alternative 'sites, routes or methods' is unlikely to be a major issue for the Panel, but for completeness, I set out the accepted test for consideration of alternatives as adopted by the High Court in *Queenstown Airport Corp Ltd v Queenstown Lakes District Council* at [18]:[6]

    a) the focus is on the process, not the outcome: whether the requiring authority has made sufficient investigations of alternatives to satisfy itself of the alternative proposed, rather than acting arbitrarily, or giving only cursory consideration to alternatives. Adequate consideration does not mean exhaustive or meticulous consideration.

    b) the question is not whether the best route, site or method has been chosen, nor whether there are more appropriate routes, sites or methods.

    c) that there may be routes, sites or methods which may be considered by some (including submitters) to be more suitable is irrelevant.

    d) the Act does not entrust to the decision-maker the policy function of deciding the most suitable site; the executive responsibility for selecting the site remains with the requiring authority.

    e) the Act does not require every alternative, however speculative, to have been fully considered; the requiring authority is not required to eliminate speculative alternatives or suppositious options.

Whether the work and designation are 'reasonably necessary' for achieving objectives

22. The first step in apply the 'reasonably necessary' test is to identify the requiring authority's objectives for the designation. In many cases, the requiring authority has not articulated these, and they have had to be inferred, particularly where designations have been rolled-over, as these may have been prepared some time ago. The reporting officer has stated these in her report, and where the requiring authority has not disputed them, it is reasonable to assume they are accurate.

23. There has been considerable judicial consideration given to what constitutes reasonable necessity, with the Environment Court in *Chen v NZTA* recently summarising that as follows:[7]

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5 Evidence of Graham Roberts for FirstGas on Designations, para 34.

6 [2013] NZHC 2347, cited by *Chen v New Zealand Transport Agency Waka Kotahi* [2022] NZEnvC 220 at [30].

7 [2022] NZEnvC 220, from [31]. Internal citations omitted but available in the copy of the case provided with these submissions.

[31] The meaning of "reasonably necessary" in s 171(1)(c) has been interpreted as follows:

> "the meaning of the word necessary falls between expedient or desirable on the one hand, and essential on the other, and the epithet reasonably qualifies it to allow some tolerance."

[32] The High Court has explained this interpretation as follows:

> "[95] The inbuilt flexibility of this definition enables the Environment Court to apply a threshold assessment that is proportionate to the circumstances of the particular case. This is mandated by the broad thrust of the RMA to achieve sustainable management and the inherently polycentric nature of the assessments undertaken by the Environment Court. Provided therefore that the Environment Court was satisfied that the works were clearly justified, there was no error of law in applying this orthodoxy."

[33] Further, the following principles have been identified:

> "(a) The words 'requirement' and 'reasonably necessary' in ss 168(2) and 171(1)(c) of the Act (and in s 24(7) of the Public Works Act 1981) are statutory indicia that any proposed works must be clearly justified by reference to the objective of the notice of requirement.
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> (b) The concepts of 'reasonably necessary' and 'essential' may be interchangeable;
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> (c) A requirement that derogates from private property rights calls for closer scrutiny;
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> (d) The assessment of the exercise of the power to compulsorily acquire land under s 24(7) of the Public Works Act 1981 and that of the designation power under the Act both deal with the coercive powers of public authorities to derogate from private property rights and should be interpreted in a consistent way, so that a threshold between essential and desirable may be in error."

[34] Equating "essential" with requiring the "best" site to be selected sets the test beyond what is "reasonably" necessary and significantly limits the capacity of a requiring authority to achieve the purpose of sustainable management.

24. In the majority of designations to be considered by the Panel, the work is already in place, and a designation is sought to secure the right to expand or maintain the work without the need to obtain further consents. In some cases (particularly for the First Gas designation), the designation may also be sought to ensure that no-one may do anything over the designation that might conflict with the work.

25. Even where the work exists already, the Panel must turn their mind to whether the designation, as a planning mechanism is 'reasonably necessary' to achieve the objectives. For instance, it may be that there are existing methods by which a work is protected, or statutory or other legal rights for the work to be present on the

land. In that case, the question is what more does the designation add, and is that further protection reasonably necessary? Why is reliance on the permitted activity rules in the PDP, or obtaining a resource consent, not appropriate. Again, it is for the requiring authority to provide the Panel with the information to satisfy you on that. This is particularly the case where it involves the use of private land.

Part 2 of the RMA

26. The Panel is also required to assess the rollover designations and NoRs against Part 2 of the RMA, which includes the matters in s 5, and whether there are any relevant matters in s 6, 7 or 8 affected by the proposed designation.

Conclusion on designations

27. My intention is to assist the Commissioners at the hearing in terms of comments on application of these statutory tests to the requirements before the Panel at the outset of the hearing, and in reply if necessary.

Section 74(2) – Climate Change Response Act documents

28. As of 30 November 2022, the RMA was amended to introduce two new matters to which regard must be had when preparing the PDP, namely:[8]

(d) any emissions reduction plan made in accordance with section 5ZI of the Climate Change Response Act 2002; and
(e) any national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002.

29. The Government has released an Emissions Reduction Plan,[9] and a National Adaptation Plan,[10] and their relevance is discussed below.

Emissions Reduction Plan

30. The Emissions Reduction Plan states:

> Local government is fundamental to meeting our 2050 targets, mitigating the impacts of climate change and helping communities to adapt to climate change. Local government makes decisions in many sectors that will need to transition. Councils provide local

8 Section 74(2) and see cl 2 Resource Management Amendment Act 2020 Commencement Order 2021 as to commencement.
9 Aotearoa New Zealand's first emissions reduction plan (environment.govt.nz)
10 Urutau, ka taurikura: Kia tū pakari a Aotearoa i ngā huringa āhuarangi | Adapt and thrive: Building a climate-resilient New Zealand (environment.govt.nz)

> infrastructure and public services, such as roading and transport, three waters, kerbside collections and waste management, building consenting and compliance, and flood and coastal hazard management. They also have planning and decision-making powers in relation to land use and urban form.

31. In terms of the PDP, the chapter with the greatest potential relevance is Chapter 7, which relates to Planning and Infrastructure, and promotes well-functioning urban environments, higher density development, strategic planning and protection of areas of cultural significance. Having said that, my reading of the 'actions to reduce emissions through improvements to the planning and infrastructure system' are focused on amending environmental legislation; applying direction to urban developments to provide for intensification and housing close to workplaces; addressing infrastructure financing issues; promoting Crown-led and private sector urban regeneration projects; and improving the evidence base for decisions. These have limited application to the PDP, particularly where Central Hawke's Bay has no 'urban' areas.

32. As such, my view is that the Emissions Plan has no direct relevance to the PDP. However in my view the approach taken in the PDP, and in recommendations on submissions, has been consistent with the general direction of the Emissions Plan in its focus on concentrating development in and around existing developed areas, including through provision for infill and through identifying that any growth should be contiguous with existing township boundaries. The new Rural Lifestyle Zone is similarly contiguous with existing built-up areas. This approach is well summarised in the Introduction to the Urban Form and Development Strategic Direction section of the PDP. Provision for the Waipukurau South Structure Plan is also beneficial here, as it seek to put in place a structure plan enabling infrastructure which will unlock the ability to develop that area for its intended residential purpose.

33. The flipside of that is that officers have recommended against the submission by James Bridge to rezone land for Large Lot Residential where it is not contiguous with existing developed areas.

National Adaptation Plan

34. The National Adaption Plan has the following to say about the role of local government:

> Local government is at the centre of risk management planning and response because most hazard events occur at the local or regional scale. Climate change is felt locally, so local government will maintain its central role in helping communities to understand and respond together. Many communities and sectors are already collaborating to plan for a changing climate. Councils have statutory responsibilities to avoid or mitigate natural hazards and to have regard to the effects of climate change when making certain decisions. They are also responsible for civil defence and emergency management, and improving community resilience through public education and local planning. Their functions and duties relating to natural hazards include:
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> - land-use planning under the Resource Management Act 1991, including national direction
> - civil defence as outlined in the Civil Defence Emergency Management Act 2002 and civil defence emergency management (CDEM) group plans
> - asset management based on the Soil Conservation and Rivers Control Act 1941 and councils' long-term plans and infrastructure strategies developed under the Local Government Act 2002
> - building regulation based on the Building Act 2004
> - disclosure of hazard information as required by the Local Government Official Information and Meetings Act 1987

35. The Plan anticipates producing guidance for local authorities as to how to plan for adaptation for climate change in the next 1-2 years, and to regularly update that guidance.[11]

36. In Chapter 4, the document states:

> The effects of climate change are being felt now. During the transition to the new system, councils need to avoid locking in inappropriate land use or closing off adaptation pathways before the new resource management system takes full effect. Councils have existing functions and powers that can be used to avoid, mitigate or manage the impacts of natural hazards. These functions can support climate-resilient development in the right locations. 68 Aotearoa New Zealand's first national adaptation plan In particular, councils must recognise and provide for the management of significant risks from natural hazards as a matter of national importance in exercising their functions and powers under the Resource Management Act 1991 (RMA). Both regional and territorial authorities have functions under the RMA that relate to avoiding or mitigating natural hazards.

37. The Council has sought to address risks from natural hazards in the PDP, and this was thoroughly addressed in Hearing Stream 5. Recommendations were to update the river flood risk maps in the PDP to reflect HBRC's latest modelling work, which is directly relevant to mitigating the effects of climate change and to avoiding locking in inappropriate land use.

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11 Pages 51-52.

38. The PDP has intentionally not provided for any extension of the coastal settlement boundaries (Large Lot Residential Zone) from those contained in the Operative Plan. This is directly relevant to avoiding locking in inappropriate land use that may be subject over time to coastal erosion and inundation, and not closing off adaptation pathways.

39. I have asked the reporting officers to be ready to provide comment to the Panel at Hearing 7 on whether any further changes (within the scope of submissions) are required to take regard of this document. I have not identified any other parts of the PDP which raise issues relevant to the Adaption Plan which may require further amendment as a result of s 74(2)(e).

Asher Davidson
9 December 2022