

**BEFORE THE HEARINGS COMMISSIONERS FOR THE WAIKATO DISTRICT
COUNCIL**

UNDER the Resource Management Act 1991

AND

IN THE MATTER of hearing submissions and further submissions
on the Proposed Waikato District Plan

Hearing 25 – Zoning

PARTIES REPRESENTED **POKENO WEST LIMITED (97)**

CSL TRUST AND TOP END PROPERTIES (89)

**MEMORANDUM REGARDING LEGAL AND PLANNING PROCEDURAL
ISSUES WITH THE S 42A FRAMEWORK REPORT**

4 March 2021

Counsel Instructed:

Peter Fuller
LLB, MPlan, DipEnvMgt, BHortSc.
Barrister
Quay Chambers
Level 7, 2 Commerce Street
PO Box 106215
Auckland 1143
021 635 682
Email:
peter.fuller@quaychambers.co.nz

MAY IT PLEASE THE PANEL

Introduction

1. This Memorandum is to bring to the Panel's attention legal and planning procedural issues with the Council's s 42A Framework Report (**Report**). As the Panel will be aware, this Report was intended to standardize subsequent area specific s 42A reports, the assessment of zoning relief, and the structuring and content of evidence. In summary, the main concern is that the focus in the Report on Lens 1 is inappropriate and is not the correct statutory test for the Panel's assessment.
2. Lens 1 could be better described as an "integration test" for horizontal and vertical consistency in the Plan. While such a check is appropriate, it should be a final internal check and is subservient to the relevant statutory assessments. The lens that best aligns with the statutory tests is Lens 2.
3. The reason that this matter is being brought to the attention of the Panel is to avoid zoning applications, that would otherwise meet the Purpose of the Act, from being rejected for a failure to meet the Lens 1 "tests". This outcome is a risk in the area specific s 42 report recommendations.
4. A further concern is to avoid the repetition and duplication of material that the 3 Lens approach requires.
5. For the avoidance of doubt, this Memorandum does not comment on any of the recommendations in the Report on factual or merit issues, such as projected housing demand and growth capacities. The concerns raised are procedural and legal and it is submitted that early resolution of these issues will clarify the proper basis for the assessment of zoning relief and will assist to focus the evidence for the Hearings.
6. Resolution before the Hearing will also free the Panel to concentrate on the merits of zoning relief sought, rather than on procedural/structural/legal and planning issues, regarding the Report itself.

Background

7. The suggestion of a Framework s 42A Report was made by the Council and endorsed by the Panel in its' 12 May 2020 Direction (par 9 & 10). There is no issue with the preparation of a Framework Report, however it is important to note that the Panel had not endorsed the 3 Lens methodology. The intention of the Panel was to ensure a consistent approach addressing the relevant statutory matters (planning and legal) and avoid unnecessary repetition.
8. Regrettably, it is submitted that the intention of the Panel has not been achieved in the Report. The Executive Summary of the Report stated that:

The framework includes a three-lens method for s42A authors to employ when assessing and making recommendations on zoning submissions. The first lens is an analysis of the proposal against the intent of the PWDP (the intent being indicated through relevant objectives and policies). The second lens is an analysis for consistency against higher order policy documents. The third lens is an assessment of the extent to which the submission meets good planning practice approaches to zoning. Based on the assessment of the submission against the three-lens process, the individual s42A author can then make a recommendation to the panel. (par 6)
9. The application of the Lenses is to be applied as a "hierarchy" as indicated on the flow chart on page 15, with **Lens 1: Assessment of Relevant Objectives and Policies in the PWDP** as the first test to be satisfied before proceeding to Lens 2 and then Lens 3.

Legal Issues

10. It is not the intention of this Memorandum to fully canvas the legal issues with the 3 Lens approach in the Framework Report. This is because it would be more appropriate for the Panel to formally seek legal submissions from the Council and submitters on this issue, as it sees fit.
11. However, to alert the Panel to the legal issues with the Report, sufficiently to commence that inquiry process, the following concerns are raised:
12. It may be a bit trite to state, but as far as counsel is aware the Lens 1 approach, as applied in the Report, has no statutory or case law authority to support it.

13. The Lens 2 approach is more reflective (but not entirely) of the statutory requirements for the assessment of proposed district plan provisions under s 74, s 75 and s 32 of the Act, and established legal principles, in cases such as *Long Bay*¹. For example, in *Thumb Point*² the proper assessment framework for district plan provisions was recorded as follows.

[6] The Environment Court [a reference to Long Bay] has set out tests to be applied when considering proposed district plan provisions as being whether the provisions:

(a) accord with and assist the Council in carrying out its functions under Part 2 of the Act;

(b) take account of effects on the environment;

(c) are consistent with and give effect to applicable national, regional and local planning documents; and

(d) meet the requirements of s 32 of the Act, including whether the policies and rules are the most appropriate for achieving the objectives of the plan.

14. Notwithstanding the 3 Lens approach recommended in the Report, it is respectfully submitted that the Panel is bound to assess zoning requests by reference primarily to the legal tests outlined above. Therefore, the following recommendation in the Report to the writers of area s 42A reports in paragraph 46 is of concern:

“If the overall determination is that the submission(s) is considered inconsistent, then the s42A author’s recommendation should be to reject. If the submission(s) is considered consistent with the intent of the PWDP, the assessment can proceed to consider the Lens 3 criteria before a final recommendation can be made on the submission(s).”
(emphasis added)

15. The requirement to be consistent with the intent of the PWDP or a submission is to be rejected, is, with respect, not based on sound legal principles. There is no rebuttable presumption that the notified provisions of a plan meet the relevant statutory tests³, nor that if a submission is inconsistent with a notified plan, it cannot meet the statutory tests.

¹ *Long Bay-Okura Great Park Soc Inc v North Shore CC* EnvC A078/08

² *Thumb Point Station Ltd v Auckland Council* [2015] NZHC 1035

³ *Te Kauwhata Action Group Inc v Waikato DC* [2012] NZEnvC 83 at [11]

16. Regarding Lens 2 the Report appears to use the term “consistency” interchangeably with “give effect to” under s 75 of the Act as if they are the same test. It is noted that prior to an amendment to s 75 in 2005 a district plan was not to be “inconsistent” with a higher order planning instrument, but now the obligation is to “give effect to”, which is a more directive requirement.
17. In paragraph 68 of the Report the writer cites proposed objective 5.1.1(a)(iii) which states “*urban subdivision, use and development in the rural environment is avoided*”. It appears from the subsequent discourse, and his difficulty reconciling this Objective with the need to provide for additional urban growth, that the writer is effectively treating the Objective as already “operative”. This is not the correct legal approach and a draft district plan level objective should not override, for example, a National Policy Statement – Urban Development (**NPS-UD**) policy to create a minimum amount of zoned developable urban land.
18. There are cases that do assess a new provision/zoning against a provision in same plan, but only where parts of the plan are already “operative”. Only then can it be presumed that the operative parts of the plan have satisfied the higher order statutory requirements setting aside the *King Salmon*⁴ exemptions and higher order provisions that post-date the operative parts of the plan (refer to *Thumb Point* and *Royal Forest and Bird v Bay of Plenty Regional Council*⁵).
19. It is accepted that the final district plan should ideally be internally consistent vertically and horizontally, and this helps to avoid gaps in the objectives/policies/rules and minimize conflict between provisions. However, these internal checks do not usurp the statutory requirements as outlined above. In this respect Lens 1 is best viewed as a final internal “best practice” check, arguably supported by s 31(1)(a) and achieving “integrated management”, but after the primary statutory tests have been satisfied.

⁴ Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] 1 NZLR 593

⁵ Royal Forest and Bird Protection Soc of New Zealand v Bay of Plenty Regional Council [2017] NZHC 3080

20. Lens 3, as stated (page 35 of the Report), is a “planning best practice” guide that is based upon work undertaken by the Auckland Unitary Plan Hearings Panel. These are not strictly legal assessments, but to the extent that they expand on the statutory tests, and s 32 in particular, they are not unhelpful, if treated as guidance only.

Planning Issues

21. The legal issues identified above, with Lens 1 in particular, have flowed into the planning evidence and some examples are provided below.
22. The Report itself illustrates the difficulty with the Framework lens methodology and reference is made to the interpretation of Objective 5.1.1(a)(iii), as quoted above. Because he had effectively treated the provision as being “operative”, the writer had significant difficulty getting to the point of finding that there could be new areas of urban development on rural land. This conundrum occurred even when the author had made factual findings that significant areas of new urban zoning were required to meet estimated demand.
23. Inevitably, the Report writer had to resort to higher order documents as per par 74, but with respect, there would not have been an alleged “conflict” in the first place if the higher order documents were the starting point of the assessment, as they legally should be. There are of course also relevant provisions in the Act itself, including s 31(1)(aa), that requires district plans to have objectives, policies, and rules, that ensure sufficient development capacity for housing and business to meet demand in the district.
24. Another way to frame this issue is that because Objective 5.1.1(a)(iii) is not yet operative, if it does not “give effect” to the s 31(1)(aa)/NPS-UD requirements, because it prevents urban development on rural land, and the Council could not meet its capacity obligations by adhering to that Objective, then the Objective is *ultra vires* the Act, and should be changed.
25. However, providing there is sufficient zoned capacity to meet the higher order requirements, this Objective could be maintained to control future planning applications (consents or private plan changes) on rural land, once the Plan is operative, as outlined by Mr Hill below. (NB: this is not

intended to be a submission on the merits of whether this Objective should be maintained as notified in the Panel's final decision).

26. The Council instructed David Hill to undertake a peer review of the Report and an excerpt is quoted below:

11. "...However, that suggests that zone boundaries can and ought to be adjusted to fit the broader policy framework without the need, at this stage, for adjusting the policy itself. That should certainly be done bearing in mind that once adjusted the strategic imperative will then apply going forward, so not disregarding the policy altogether at this stage. Once those revised zone boundaries are settled, any further and subsequent changes sought will then attract the full weight of the policy framework, including any avoidance policies.

12. The implication of this approach is that while a number of requests for changes from, for example, a rural to a more urban residential zoning may be superficially inconsistent with Lens 1, they may well pass the broader growth and development tests of Lens 2 for the purpose of refining the zone boundaries at this plan review stage. This will require some latitude in applying the notified objective/policy framework since, otherwise, the only option for Council would be to focus its "excess" growth beyond its immediate administrative boundary primarily into Hamilton and Auckland cities."

27. Mr Hill recognized the issues outlined above with the Report treating the proposed objectives and policies as effectively "operative", at this stage of the plan development process, when zonings are still to be determined. He has properly focused on the statutory requirements mostly covered in Lens 2.

28. Mr Stickney in planning evidence for Kainga Ora (17 February 2021) has interpreted the 3 Lens approach to mean:

"7.3.....Failing to satisfy this assessment [Lens 1] negates an assessment against both the 'Lens 2' and 'Lens 3' framework. That being the case, the rezoning submission is to be rejected by the section 42A author.

7.4 I have concerns in respect of 'Lens 1' given the emphasis on the notified suite of PDP Objectives and Policies as these provisions are subject to numerous submissions seeking amendments and changes."

29. Mr Stickney then goes on to highlight the importance of giving effect to the higher order planning instruments including the NPS-UD, and he does not

consider that these have been properly acknowledged in the 3 Lens approach.

30. Ms Nairn, the planner for the Buckland Landowners Group, stated in primary evidence (17 February 2021):

“9.1 The second step of the 3 Lens approach set out in the Framework Report is to assess the proposal against the relevant higher order documents, namely the National Policy Statement - Urban Development 2020 (NPS-UD) and the WRPS. I consider that this is the most important ‘lens’ in the ‘3 lens’ assessment as Sections 74 and 75 of the Resource Management Act 1991 requires district plans to give effect to any National Policy Statement and any operative regional policy statement.

9.2 These higher order documents are best assessed in a ‘top down’ fashion given that the higher level documents direct those that follow rather than the other way around. This approach is confirmed in the King Salmon decision.”

31. I acknowledge that I am acting as counsel for the Buckland Landowners Group, but Ms Nairn independently came to similar conclusions to Mr Stickney, that the Lens 1 test, in particular, is problematic regarding undertaking plan change assessments.
32. It is accepted that most of the planners in their 17 February 2021 planning evidence have attempted to accommodate the 3 Lens approach by undertaking an assessment under Lens 1. In my submission this does not validate the Report and their co-operation is generally qualified by stating what they understand to be the correct legal approach. No doubt their legal counsel will be intending to reinforce the correct legal assessment framework in legal submissions at the Hearing.
33. A quick perusal of the primary zoning evidence reveals that, rather than avoiding repetition (one of the original Panel objectives), the planning evidence typically has up to 3 sets of tables to address the 3 Lenses. Much of the same material is replicated across the tables, therefore increasing the volume of evidence significantly.

Way Forward – Further Directions

34. It is respectfully requested that the Panel addresses concerns with the 3 Lens approach in the Report as soon as convenient. Mainly this is to ensure that the Council's own area specific s 42 A reports refer to the correct legal tests and minimize the repetition of similar assessment material. Submitters would also benefit from Panel guidance for their future rounds of evidence.
35. I have broadly discussed the content of this Memorandum with some other counsel and no doubt they will express their views if provided with an opportunity by the Panel.
36. Regarding a possible process moving forward, it is suggested that:
 - (a) The Panel invite the Council and other submitters to comment on this Memorandum and provide feedback regarding whether they consider there is an issue with the 3 Lens approach that would benefit from Panel direction.
 - (b) If so, comments/legal submissions could be sought from the Council and submitters regarding the issue and suggesting directions that would address the issue.
 - (c) The Panel convenes a short Zoom Pre-hearing Conference to hear from submitters and for the Panel to ask any questions it may have of the Council and submitter representatives.
 - (d) The Panel issues Directions clarifying the role, if any, that the Lens 1 test/assessment is to play in the s 42A area specific reports and evidence moving forward.
 - (e) The Panel affirms what is the appropriate legal/planning approach to the assessment of zone change submissions in the s 42A area report recommendations.
37. It is respectfully submitted that the legal tests for district plan making are now well established and will ultimately prevail, subject to reform of the Act and further case law. It is also appropriate to recognize that submitters are largely free to present their legal submissions and evidence as they

see fit (assuming it meets the tests of relevance etc.). Therefore, it could be argued that there is no need to address the 3 Lens approach mandated by the Report.

38. However, the purpose of the Report is to provide an internal framework for consistency in the s 42A area specific reports. If for example, as is recommended in the Report, a zone change should be declined because it is allegedly “inconsistent” with the proposed plan, that would be applying the wrong legal test. Therefore, if not addressed now, there is a risk that the area specific s 42A report recommendations will be of limited assistance to the Panel and submitters.
39. Counsel is happy to assist the Panel further, and participate in a Pre-Hearing Conference, regarding the issues raised in this Memorandum.

DATED at **AUCKLAND** this *4th* day of March 2021

Pokeno West, CSL and Top End
by their barrister and duly authorised agent

Peter Fuller



Peter Fuller
Barrister
Quay Chambers