

15 November 2019

Proposed Waikato District Plan (Stage 1)
c/- Sandra Kelly
Hearing Coordinator / District Plan Administrator
Resource Management Policy Team

By Email only: districtplan@waidc.govt.nz

Dear Sir/Madam,

RE: HEARING 5: HEARING STATEMENT ON BEHALF OF THE OIL COMPANIES (SUBMITTER 785) ON CHAPTER 13 - DEFINITIONS PROPOSED WAIKATO DISTRICT PLAN (STAGE 1)

1. INTRODUCTION

- 1.1 I refer to the abovementioned matters set down for hearing commencing 10th December 2019. Z Energy Limited, BP Oil New Zealand Limited and Mobil Oil NZ Ltd (*"the Oil Companies"*) will not be presenting evidence at the hearing, but instead advise of their position in respect of these submission points through this tabled Hearing Statement. This Hearing Statement has therefore been prepared on behalf of the Oil Companies (identified as submitter 785) and represents their views.
- 1.2 This Hearing Statement relates to those submissions by the Oil Companies relating to definitions and therefore relevant to Hearing 5 of the Waikato District Council's Proposed District Plan (Stage 1) (*"WDC PDP"*). It confirms the basis of the concern raised in the submission and, in the context of the Section 42A (*"S42A"*) Report, confirms or modifies the relief sought. The Hearings Panel is urged to adopt the recommendations set out in this Hearing Statement.
- 1.3 It would be appreciated if this Hearing Statement could be submitted to the Hearings Panel.
- 1.4 The Oil Companies would also like to acknowledge at the outset, that they recognise that the timing of the notification of the WDC PDP and the Planning Standards has created a difficult transition or interface between the two which the WDC planning team has to manage throughout this hearings process, and which makes for a tricky integration process. Many of the concerns raised herein relate to that integration process.

2. DEFINITIONS OF COMMERCIAL ACTIVITY, RETAIL ACTIVITY AND SERVICE STATION

COMMERCIAL ACTIVITY AND RETAIL ACTIVITY

- 2.1 The Oil Companies opposed in part and supported in part the definitions of ‘Commercial Activity’ (*Means activities involving the sale or distribution of goods and services*) (Submission 785.32) and ‘Retail Activity’ (*Means the sale or hire of goods or services or equipment directly to the public*) (Submission 785.33).
- 2.2 The reason for the Oil Companies submission was that the proposed definitions of commercial and retail activities could be interchangeable insofar as an activity that ‘involves the sale of goods and services’ falls under both definitions. As an example, service stations could be included within both (or either). While the definition of retail activity specifies that the sale is to be directly to the public, there is nothing stopping direct sales to the public as also being a commercial activity. In any event, there does not appear to be an effects-based justification for differentiating between the two activities based on the consumer. The two definitions together are therefore considered to be inappropriate, uncertain and ambiguous.
- 2.3 The S42A Report recommends that the amendments sought to the definitions of Commercial Activity and Retail Activity are accepted in part (refer Section 3.62).
- 2.4 The Reporting Planner concurs that there is no ‘effects-based justification’ for differentiating between the two activities based on the consumer. The recommendation is to include a definition of ‘commercial activity’ that is consistent with the definition in the Planning Standards. This approach is consistent with the Ministry for the Environment 2019 *National Planning Standards 14. Definitions Standard*. Wellington: Ministry for the Environment, Mandatory Direction 1, and is accepted as being appropriate. The consequential deletion of the (overlapping) definition of ‘commercial services’ is also considered appropriate, as the definition would no longer be necessary.
- 2.5 Further, as it is not lawful to amend the Planning Standards definition, it is also acknowledged that any issues arising as a consequence of these recommendations will need to be addressed via other hearings on relevant specific plan provisions.
- 2.6 The Oil Companies urge the Hearings Panel to accept the recommendation to adopt the definition of commercial activity in the Planning Standards, and to consequentially delete the definitions of retail activity and commercial service, as follows:
Commercial activity: means any activity trading in goods, equipment or services. It includes any ancillary activity to the commercial activity (for example administrative or head offices).

Commercial service...

Retail activity...

SERVICE STATION

- 2.7 The Oil Companies also opposed the absence of a definition of service station and sought the inclusion of a separate definition of service station (Submission 785.34). Such a definition would appropriately ensure service stations (including activities accessory to service stations) are explicitly provided for. It would also, having regard to the submissions discussed above, avoid ambiguity around whether service stations are considered to be a 'commercial activity' or a 'retail activity' (or both).
- 2.8 The Section 42A Report recommends rejecting the inclusion of a definition of service station (refer Section 3.63).
- 2.9 The Oil Companies accept that the ambiguity around whether a service station is a commercial or retail activity would be resolved by making the changes outlined in paragraph 2.6 above. Notwithstanding that, the issue remains as to whether there is sufficient clarity in the WDC PDP as to what a 'service station' is. Rules must be clear and certain in their interpretation and therefore there should be no ambiguity as to what a service station is.
- 2.10 The term 'service station' is used in the hazardous substance rules (see Rules 17.2.5.4 C1, 18.2.5 C2, 20.2.6 C1, 22.2.4 C2). Those rules are solely concerned with limiting the quantities of petrol, diesel and LPG stored on service station sites (as a controlled activity). In the S42A Report, the Reporting Planner considers that in that context (ie: the limited references to service station in the WDC PDP) it is unnecessary to provide a definition of service station. While the Oil Companies sought the deletion of all rules pertaining to control hazardous substances where such controls are inappropriate, unnecessary, ineffective, inefficient and unable to be justified via a Section 32 analysis, they accept that if these specific rules are to be retained, then whether or not 'service station' should be defined is most appropriately considered in conjunction with those rules.
- 2.11 Accordingly, the Oil Companies urge the Hearings Panel to determine that submission 785.34 from the Oil Companies be given further consideration in Hearing 8 – Hazardous substances, contaminated land and genetically modified organisms.
- 2.12 Appendix 3 to the S42A Report contains a table of definitions that require further consideration, in other hearing topics. The Oil Companies urge the Hearings Panel to determine that Appendix 3 should be amended as follows, to avoid a situation where this submission point is overlooked:

Report Section Number	Definition	Summary of issue, submission point or consequential amendment which requires further consideration	Hearing topic where the definition will require further consideration
	Service stations	Consider whether a definition of service station would usefully assist in the interpretation and application of Rules 17.2.5.4 C1, 18.2.5 C2, 20.2.6 C1, 22.2.4 C2, should those rules be retained in the WDC PDP.	Hearing 8 - Hazardous substances, contaminated land and genetically modified organisms

3. DEFINITION – CUMULATIVE RISK

- 3.1 The Oil Companies sought the deletion of Policy 10.2.3. Policy 10.2.3 is the only Policy which addresses “cumulative risk”. In the absence of the Policy, it is not considered necessary to define the term “cumulative risk”.
- 3.2 This submission is not addressed in the relevant S42A Report or in Appendix 3 (Definitions That Require Further Consideration). The Oil Companies accept that the deletion of the definition is sought as a consequence of the deletion of Policy 10.2.3 and therefore that it is appropriate to consider its retention or deletion at the same time that Policy 10.2.3 is specifically considered.
- 3.3 The Oil Companies urge the Hearings Panel to determine that this submission from the Oil Companies be given further consideration in Hearing 8 – Hazardous substances, contaminated land and genetically modified organisms.
- 3.4 Appendix 3 to the S42A Report contains a table of definitions that require further consideration, in other hearing topics. The Oil Companies urge the Hearings Panel to determine that Appendix 3 should be amended as follows, to avoid a situation where this submission point is overlooked:

Report Section Number	Definition	Summary of issue, submission point or consequential amendment which requires further consideration	Hearing topic where the definition will require further consideration

	Cumulative Risk	Consider deletion of the definition of cumulative risk if Policy 10.2.3 is to be deleted.	Hearing 8 - Hazardous substances, contaminated land and genetically modified organisms
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4. DEFINITION – SIGNS

SIGN

4.1 The Oil Companies opposed in part the proposed definition of ‘Sign’ (Submission 785.37) to the extent that the definition is exceptionally broad and could be read to include any face of a building or structure that is painted (or finished) in recognisably “corporate colours” and also any sign necessary for traffic direction or instruction within a site (e.g. a sign identifying accessibility parking, opening hours inscribed onto a shop door or signs limiting parking to, say 120 mins, or internal traffic signs). Furthermore, the Oil Companies considered that the test of “visibility” from outside the site is too broad: the test should relate to whether the signage is directed to and clearly legible to people outside the site.

4.2 The Oil Companies sought amendment of the definition along the following lines:

Means any device, graphic or display of whatever nature that is ~~visible from~~ directed to and legible to a person in a public place, for the purposes of:

1. *providing information to the general public;*
2. *identifying and providing information about any activity, site or building;*
3. *providing directions; or*
4. *promoting goods, services or forthcoming events.*

A building or structure that is painted in whole or part in corporate colours does not, of itself, constitute a sign or signage.

4.3 Heritage New Zealand Pouhere Taonga lodged a further submission opposing the submission on the grounds that the proposed amendments to the definitions and the adverse effects that these could cause to historic heritage (FS1323.117).

4.4 The S42A Report recommends rejection of the submission and acceptance of the further submission (refer Section 3.89). The reason for this is that the term ‘sign’ as defined in the Planning Standards is considered to be used in the same context as the term is used in the WDC PDP, and therefore it is appropriate that the Planning Standards definition is adopted. Consequent to that, as it is not lawful to amend the Planning Standards definition, any issues arising as a consequence of its adoption will need to be addressed via other hearings on relevant specific plan provisions.

4.5 With respect to the clarification sought that a building finished in corporate colours is excluded from the definition of signs, at para 1126 of the S42A Report the Reporting Planner

states that while exclusions cannot be incorporated into Planning Standards definitions¹, they do not consider that necessary in any event. That's because the Reporting Planner considers that a building painted in such a way (without use of letters or numbers) would not fall under the definition of 'sign'. With respect to structures, they state that there may be instances where a structure that is painted in corporate colours will be considered a sign under the definition, and they consider that it would be appropriate for this to be subject to the WDC PDP objectives, policies and rules.²

- 4.6 The Reporting Planner therefore recommends the inclusion of the Definitions Standard definition of sign as follows:

means any device, character, graphic or electronic display, whether temporary or permanent; which
a. is for the purposes of—
i. identification of or provision of information about any activity, property or structure or an aspect of public safety;
ii. providing directions; or
iii. promoting goods, services or events; and
b. is projected onto, or fixed or attached to, any, structure or natural object; and
c. includes the frame, supporting device and any ancillary equipment whose function is to support the message or notice.

- 4.7 The concern that the definition of signs continues to include a very wide range of signage including, for example, signs not directed to or clearly legible to people outside of the site, remains. They also question whether there is, in actuality, a difference between a building and a structure finished in corporate colours.
- 4.8 The Oil Companies do not consider that the rules in the WDC PDP were intended to capture such signage and the implications of such a broad definition on the interpretation and application of the plan provisions (policies and rules) should have been carefully considered in the S42A Report associated with, and at the hearing of, the signs provisions in the WDC PDP. Those provisions were considered in Hearing 2, prior to the consideration of the definition. As such, while the Oil Companies accept the reasoning behind the adoption of a (now) standardised definition of sign that is consistent with the Planning Standards, they consider that recommendation does not address the valid concerns raised in the submission.

¹ Ministry for the Environment. 2019. *National Planning Standards 14. Definitions Standard*. Wellington: Ministry for the Environment. Mandatory Direction 1.

² Note that the definition of building as proposed in the WDC PDP included both buildings and some structures.

- 4.9 In this case, the sign provisions were considered in the S42A Report for Hearing 2 on the basis of the definition as proposed in the WDC PDP. The definition in the Planning Standards is far broader than even the definition as proposed in the WDC PDP. The definition in the Planning Standards captures *all* signs irrespective of purpose, visibility or location - as compared to the definition as proposed in the WDC PDP, which captures only signs visible from a public place. As such, this change to the definition has far-reaching consequences that have not been properly considered. At the very least, to be consistent with the WDC PDP signage provisions, there will need to be an exclusion added into the Signs Chapter for signs not visible from a public place. It is, however, the Oil Companies position that this needs to be further qualified to exclude signs that are not directed to, or legible to, a person in a public place. This would include, for example, instructional signs on petrol pumps, accessibility parking signs, car wash instruction signs and signs within buildings which are all examples of signs that do not need to be controlled through the WDC PDP signs rules.
- 4.10 Further, it is not clear why there would be a difference in how a building versus a structure painted in corporate colours was perceived. The definition of sign includes both a structure and a building, which are each proposed to be defined separately in the WDC PDP and where a structure includes a building, but a building does not necessarily include a structure. That means that if the signs rules are to be applied differently to structures and buildings, then this needs to be clear in the policies and rules, which it doesn't appear to be. This confirms an inherent uncertainty in the application of the sign provisions. The Oil Companies consider that a building (eg: the service station building or the canopy) or a structure (eg: the fuel pumps) finished in corporate colours should not be considered to be a 'sign' for the purposes of the WDC PDP, but in any event the provisions of the plan should be clear, consistent and certain in their application.
- 4.11 The Oil Companies urge the Hearings Panel to determine that Submission 785.37 be given further consideration in Hearing 26 – Other Matters, which is scheduled to include any integration matters that need to be resolved.
- 4.12 Appendix 3 to the S42A Report contains a table of definitions that require further consideration, in other hearing topics. The Hearings Panel should also recommend that Appendix 3 be amended as follows, to avoid a situation where this submission point is overlooked:

Report Section Number	Definition	Summary of issue, submission point or consequential amendment which requires further consideration	Hearing topic where the definition will require further consideration
	Sign	Consider whether changes are required to the rules to specifically	Hearing 26 – other matters (integration)

		<p>exclude signs that are not directed to and not legible to a person in a public place, and to consider whether or not there is a need to address buildings and/or structures separately in the signage provisions when determining if they qualify to be considered as signs.</p>	
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HEALTH AND SAFETY SIGN

- 4.13 The Oil Companies sought to include a new definition of health and safety sign that includes any signs required by other legislation, should that be necessary, as follows:

Health and Safety sign means any sign necessary to meet other legislative requirements (e.g. HSNO / Worksafe).
- 4.14 This submission (Submission 785.55) is not addressed in this S42A Report or in Appendix 3 (Definitions That Require Further Consideration): again it was addressed in Hearing 2, prior to the consideration of the definition of signs.
- 4.15 The Oil Companies continue to consider it inappropriate to regulate health and safety signs via the RMA when they are **required** by other legislation. This submission point is integrally linked to the changes sought to the definition of signs, insofar as most health and safety signs are directed to people already within a site, rather than being directed to persons that may otherwise be able to see them from a public place. This would include, for example, signage associated with accessibility parking or with the storage of hazardous substances.
- 4.16 Given that the changes to the definition of sign do not address the Oil Companies concerns, this matter remains outstanding. The definition of a term gives meaning and context to the plan provisions and guides understanding of the impact of and interpretation of the rules. The fact that signage matters were considered in a hearing prior to the consideration of the definition is again, therefore, a complication. As such, while the Oil Companies accept the reasoning behind the adoption of a definition of sign that is consistent with the Planning Standards, they again consider that recommendation does not address the valid concerns raised in the submission.
- 4.17 The Oil Companies urge the Hearings Panel to determine that Submission 785.55 be given further consideration in Hearing 26 – Other Matters, which is scheduled to include any integration matters that need to be resolved.

4.18 Appendix 3 to the S42A Report contains a table of definitions that require further consideration, in other hearing topics. The Hearings Panel should also recommend that Appendix 3 be amended as follows, to avoid a situation where this submission point is overlooked:

Report Section Number	Definition	Summary of issue, submission point or consequential amendment which requires further consideration	Hearing topic where the definition will require further consideration
	Health and Safety Sign	Consider inclusion of a definition and a specific exclusion of signs meeting that definition from the signage rules.	Hearing 26 - Integration

5. DEFINITION – EARTHWORKS

- 5.1 The Oil Companies supported the definition of earthworks (Submission 785.36) as follows:
Means modification of land surfaces by blading, contouring, ripping, moving, removing, placing or replacing soil or earth, or by excavation, or by cutting or filling operations.
- 5.2 Transpower NZ Limited made a further submission (FS1350.51) in support of the submission point.
- 5.3 The S42A Report recommends rejecting the submission and further submission (refer Section 3.43). The reason for this is that the term ‘earthworks’ as defined in the Planning Standards is considered to be used in the same context as the term used in the WDC PDP, and therefore it is appropriate that the Planning Standards definition is adopted. As a consequence of adopting this term, it is stated that the Planning Standards definition of ‘cultivation’ will also need to be adopted.
- 5.4 The Reporting planner therefore recommends including the following definitions of earthworks and cultivation:

earthworks

means the alteration or disturbance of land, including by moving, removing, placing, blading, cutting, contouring, filling or excavation of earth (or any matter constituting the land including soil, clay, sand and rock); but excludes gardening, cultivation, and disturbance of land for the installation of fence posts.

cultivation means the alteration or disturbance of land (or any matter constituting the land including soil, clay, sand and rock), for the purpose of sowing, growing or harvesting of pasture or crops.

5.5 The recommendation of the Reporting Planner satisfies the intent of the Oil Companies Submission 785.36, and the Hearing Panel is urged to adopt it.

6.0 DEFINITIONS – REVERSE SENSITIVITY

6.1 The Oil Companies lodged a further submission (FS1089.2) in support of a submission by Fonterra Limited (S797.21) that sought to include a definition of reverse sensitivity.

6.2 The Oil Companies did not seek to include a definition of 'reverse sensitivity' within the WDC PDP. That said, if a definition of 'reverse sensitivity' is to be included, then the Oil Companies considered that the Council should adopt the definition of the Waikato Regional Policy Statement 2016. On that basis, the Oil Companies supported the approach by Fonterra.

6.3 The Reporting Planner recommends rejecting the submission, and therefore also the further submission (refer Section 3.36) on the basis that it is not defined in the Planning Standards and that case law on this definition is still evolving.

6.4 The recommendation of the Reporting Planner satisfies the intent of the Oil Companies Further Submission 1089.2, and the Hearings Panel is urged to adopt it.

7.0 CONCLUDING STATEMENT

7.1 Thank you for your time and acknowledgement of the issues raised in the Oil Companies' submissions. Please do not hesitate to contact the writer 021 2333906 should you wish to clarify any matters addressed herein.

Yours sincerely,



Karen Blair
Principal Planning and Policy Consultant
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