BEFORE THE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY WAIKATO DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on the Proposed Waikato District Plan (Stage 1)

OPENING LEGAL SUBMISSIONS BY COUNSEL FOR WAIKATO DISTRICT COUNCIL
23 September 2019

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MAY IT PLEASE THE COMMISSIONERS:

INTRODUCTION

1. My name is Bridget Parham and I appear as counsel for the Waikato District Council ("Council") which is the proponent of the Proposed Waikato District Plan (Stage 1) ("PDP").

2. These opening submissions are prepared in accordance with the "Directions from Hearing Commissioners Regarding Opening Submissions" dated 9 August 2019 ("Directions"). Of relevance to these submissions, the Directions requested Council provide an overview of the legal framework within which the Hearing Panel's decisions are to be made.[1]

3. The Directions also request Council to provide the Hearing Panel with an overview of the PDP, including the process followed in preparing it and its content, and an overview of the key issues the Council anticipates will require addressing in the subsequent topic hearings. This overview will be provided by William Gauntlett, Council's Resource Management Policy Team Leader, and will precede the presentation of these legal submissions.

4. I will not be present throughout all hearings but will attend selected topic hearings and other hearings on an as-needed basis to assist the Hearing Panel with any legal issues that may arise.

THE WAIKATO DISTRICT COUNCIL

Jurisdictional boundaries

5. The Council was constituted as a territorial authority under the Local Government (Waikato Region) Re-organisation Order 1989 and the Local Government Act 1974.

[1] Directions from Hearing Commissioners Regarding Opening Submissions, dated 9 August 2019, at para. 4a.

6. As the Hearing Panel will be aware, the boundary of the Waikato District was amended as a result of the 2010 re-organisation of local government in the Auckland Region. This resulted in the territory of the former Franklin District being split between Auckland Council, Hauraki District Council, and Waikato District Council. The former Franklin towns of Pokeno and Tuakau, along with a number of small village settlements, came under the jurisdiction of the Waikato District.

7. The Operative Franklin District Plan 2000 which existed at the time of the local government re-organisation, continues to apply to the same geographical areas as it did immediately before the re-organisation until it is replaced in those areas by a later district plan regime initiated by the relevant territorial authority.[2] The Operative Franklin District Plan 2000 became part of the Operative Waikato District Plan 2013 (ODP) on the date of the 2010 local government re-organisation.

8. The PDP applies to the entire Waikato District and integrates the Franklin and Waikato sections of the ODP into a single consolidated District Plan for the Waikato District. For the first time since the 2010 local government re-organisation, the PDP will ensure the Waikato District has a consistent approach to the integrated management of the effects of the use, development and protection of land and associated natural and physical resources in its district.

Council's role as submitter

9. As well as being the proponent of the PDP, the Council is also a submitter on the PDP. Clause 6(2) of Schedule 1 provides that a local authority in its own area may make a submission on a proposed plan. The Council's submission largely seeks to improve workability of the document (for example, better clarification and consistency throughout the document).

[2] Local Government (Auckland Transitional Provisions) Act 2010, s 78(5); Local Government (Auckland Boundaries) Determination 2010, cl 21.

The Council's submission does not seek to change the overarching policy direction in the notified PDP.

10. The Council's submission is to be treated in the same way as any other submission. There is no presumption that as the proponent of the PDP, the Council's submission is to be automatically accepted by the Hearing Panel without due consideration or that the provisions of the PDP are not otherwise correct or appropriate on the date of notification.[3] Equally, if the section 42A report writer addressing any aspect of the Council submission is a Council officer, that does not warrant the Hearing Panel giving less weight to the Council's submission than other submissions. It must be considered on its own merits.

NATURE OF THE DISTRICT PLAN REVIEW

Nature of Review under Section 79

11. In April 2014, Council resolved[4] to commence a full review of its ODP pursuant to section 79(4) of the RMA ("the 2014 Resolution"). This would have enabled every section (or chapter) of the ODP to be reviewed. As the review progressed, there were significant delays in receiving the flood mapping data and other technical information from third parties. These delays were beyond the control of Council, its officers and experts.

12. By August 2017 it became clear that the natural hazard and climate change topics would not be completed in time for the scheduled notification of the remaining sections of the PDP. Council did not wish to delay notification of the PDP as there was no certainty as to when the further technical information would be available.

13. Accordingly, on 12 March 2018, Council resolved[5] to revoke the 2014 Resolution and instead undertake a rolling review (or partial review) of the PDP pursuant to sections 79(1) to (3) of the RMA, and to notify the

[3] *Leith v Auckland City Council* [1995] NZRMA 400 at [408].
[4] Waikato District Council, Resolution No.WDC 1404/08/1/7.
[5] Waikato District Council, Resolution No. WDC 1803/11.

natural hazard and climate change topics after notification of the remainder of the PDP ("the 2018 Resolution"). Hence, the district plan review was divided into two stages – Stage 1 constituting those PDP topics now before you for hearing, and Stage 2 being the natural hazards and climate change topics.

14. The key difference between a full review under section 79(4) and a partial review under section 79(1) was recently discussed by the Environment Court in *Tussock Rise Limited v Queenstown Lakes District Council.*[6] The Court said the difference is that section 79(1) appears to require a one-on-one correspondence between the provisions being altered and the replacement provisions, or at least that every provision being changed is identified. In contrast, it said section 79(5) can simply replace an operative plan, chapter by chapter.

15. While Council has resolved to undertake a partial review (because it could not notify all chapters at the same time), the process followed by Council is more akin to the process followed in a full review. That is, the ODP has been reviewed chapter by chapter, rather than provision by provision. As a result, Stage 1 of the PDP looks like a full review, despite the 2018 Resolution. That of course is not surprising given the review commenced life as a full district plan review.

16. It would have otherwise been inefficient, costly and timely for Council to have effectively started the review process from scratch when Council resolved, very late in the review process, to move from a full review to a partial review.

17. It is noted that despite the 2018 Resolution confirming Council was undertaking a partial review, the public notice for Stage 1 of the PDP

[6] *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111 at [41].

under clause 5 of Schedule 1, referred to it being a "full review of the current Operative Waikato District Plan".

18. Whether the public notice and partial review has implications for submitters on scope considerations will be addressed later in these submissions.

Implications of Hearing Stage 1 ahead of Stage 2

19. Stage 2 addresses the identification and management of natural hazard risk (including river flooding, mine subsidence risk, liquefaction and coastal inundation and erosion risk) and climate change. It investigates how natural hazards and the effects of climate change may affect land use and development across the district and considers options for managing these effects.

20. Draft Stage 2 provisions are due to be released in October 2019 for consultation, with a view to public notification in March 2020.

21. Several submitters[7] request that Stage 1 of the PDP be withdrawn, or placed on hold, until Stage 2 reaches the same procedural stage as Stage 1. Mercury NZ Limited in particular, submits that without the results of the flood hazard assessment, it is not clear from a land use management perspective, either how effects from a significant flood event will be managed, or whether the notified land use zone is appropriate from a risk exposure perspective.

22. Council acknowledges that best planning practice would have been to analyse the results of the flood hazard assessment prior to designing the district plan policy framework for areas subject to natural hazard. However, the significant delays in obtaining the flood hazard and other technical information from third parties meant a staged approach to the PDP was required.

[7] Mercury NZ Limited, Waikato-Tainui, Auckland Council and Waikato Regional Council.

23. Despite the staged approach, Council's intention is to release one comprehensive decision for Stages 1 and 2 at the same time to ensure integrated decision-making is achieved across both stages of the PDP[8]. Council is also carefully managing the hearing schedule for Stage 1 to ensure rezoning requests and other growth-related matters fundamental to Stage 2 will be heard after the close of further submissions on Stage 2. Stage 2 hearings will immediately follow the completion of the Stage 1 hearings and will be decided by the same Hearing Panel.

24. Furthermore, if any provision in Stage 1 subsequently requires amendment as a result of the technical work carried out under Stage 2 (for example if Stage 2 identifies that land rezoned in Stage 1 from rural to residential is subject to flooding and the notified zoning is either no longer appropriate or more restrictive controls or activity statuses are required), and there is no scope within submissions to make the necessary changes, Council will be required to notify a variation to Stage 1 under Schedule 1 at the time it publicly notifies Stage 2. Variations to a proposed district plan are a legitimate statutory process that is provided for in the First Schedule of the RMA and there are many examples of its use since the commencement of the Act in 1991.

25. Accordingly, Council's approach to managing Stages 1 and 2 is an appropriate and efficient mechanism to address the submitters' concerns and ensure integrated decision-making is achieved across the two stages, in accordance with its statutory function under s31(1)(a) and Part 2 of the RMA.

[8] With the exception of decisions on the Ohinewai rezoning requests which will be released earlier than other decisions on Stage 1. See Hearing Commissioner's Directions dated 20 August 2019.

THE LEGAL FRAMEWORK

Preparing and changing a district plan

26. The Hearing Panel's decision-making on submissions on the PDP sits within a comprehensive framework established under the RMA. While the key provisions are well known to the Hearing Panel, it is helpful to set them out.

27. As the PDP was notified in July 2018, the applicable version of the RMA is the version following the amendment of the Act by the Resource Legislation Amendment Act 2017 ("RLAA").

28. The starting point is Council's functions set out in section 31 of the RMA which provides (relevantly):

> 31(1). Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
>
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
>
> (aa) the establishment, implementation, and review of objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district:

29. These functions are achieved, in part, through the implementation of an operative district plan and/or proposed district plan. The RMA requires that there shall at all times be one district plan for each district.[9] A district plan may be changed by a territorial authority in the manner set out in Schedule 1 of the RMA.[10] The purpose of a district plan is to assist a territorial authority to carry out its functions in order to achieve the purpose of the Act.[11]

[9] Section 73(1).
[10] Section 73(1A).
[11] Section 72.

30. The Council is required to establish, implement and *review* the objectives, policies and methods of its district plan. The concept of *review* signals that the district plan is an evolving document which changes with the changing needs of the district and its community. The current planning regime in the Waikato section of the ODP was established in 1996 when decisions on the then Waikato Proposed District Plan were notified. The current planning regime in the Franklin section of the ODP dates back to October 1995 when decisions were notified on the then Franklin Proposed District Plan.

31. These existing planning regimes were established:

    (a) In the case of the Waikato section, prior to population projections and settlement patterns being undertaken on Future Proof, the Sub-Regional Growth Strategy adopted in 2009 for the Waikato Region ("Future Proof"); and

    (b) In the case of the Franklin section, prior to the 2010 local government re-organisation and before the significant growth pressures on Auckland and the resulting overspill of population into the former Franklin areas and further south.

32. Under section 74(1) of the RMA, Council must change its district plan *in accordance with*:

    (a) Its functions under section 31; and

    (b) The provisions of Part 2; and

    (c) A Ministerial direction (not applicable in this instance); and

    (d) Its obligations to prepare an evaluation report in accordance with sections 32; and

    (e) Its obligations to have particular regard to an evaluation report prepared in accordance with section 32; and

(f) A national policy statement, a New Zealand coastal policy statement, and a national planning standard; and

(g) Any regulations.

33. When changing a district plan, Council *must have regard to*:[12]

(a) Any proposed regional policy statement (not applicable because the Waikato Regional Policy Statement is operative); and

(b) Any proposed regional plan;[13] and

(c) Any management plans and strategies prepared under other Acts; and

(d) Any relevant entry on the New Zealand Heritage List required by the Heritage New Zealand Pouhere Taonga Act 2014; and

(e) Any fisheries regulations to the extent that their content has a bearing on resource management issues in the district; and

(f) The extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.

34. Council must also *take into account* any relevant planning document recognised by an Iwi authority.[14]

35. Finally, Council *must not have regard to* trade competition or the effects of trade competition when changing a district plan.[15]

Content of a district plan

36. Pursuant to section 75(3), a district plan *must give effect to*:

[12] Section 74(2).
[13] Proposed Plan Change 1: Waikato and Waipa River Catchments to the Waikato Regional Plan, notified October 2016. Variation 1 to PC1 was notified in April 2016. Decisions have not been made.
[14] Section 74(2A).
[15] Section 74(3).

(a) Any national policy statement; and

(b) Any New Zealand costal policy statements; and

(c) A national planning standard; and

(d) Any regional policy statement.

37. The Supreme Court in the *King Salmon* decision[16] held the words "give effect to" simply means "implement". The Court said on the face of it, it is a strong directive, creating a firm obligation on planning authorities.

38. A district plan *must not be inconsistent with*:[17]

(a) A water conservation order; or

(b) A regional plan for any matter specified in section 30(1).

39. Finally, under section 75(1), district plan policies *must* implement objectives while any rules *must* implement the polices. Section 76(1) requires rules to achieve the objectives and policies of the plan. In making a rule, Council *must have regard to* the actual or potential effect on the environment of activities, including any adverse effect.[18]

Section 32 Evaluation

40. When preparing a proposed plan, the critical component of the legal framework assessment is the section 32 evaluation. The primary function served by the section 32 evaluation is to ensure that Council has properly assessed the appropriateness of the PDP prior to notification.

41. As the PDP was notified in July 2018, section 32 as amended by the RLAA applies to the Panel's decision-making on the PDP.

[16] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [77].
[17] RMA, s 75(4).
[18] Section 76(3) RMA.

42. The tests under section 32 have been considered in many decisions of the Environment Court. In *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*[19] the Environment Court listed a comprehensive summary of the mandatory district plan requirements under the RMA, as it was before the Resource Management Amendment Act 2005. The summary checklist was most recently updated by the Environment Court in 2014 in *Colonial Vineyard Limited v Marlborough District Council*[20] to reflect the major changes made by the Resource Management Amendment Act 2009. There has been no further update to reflect the significant changes made to section 32 in either 2013 or 2017.

43. **Attached** as Appendix 1 to these submissions, is an updated checklist to reflect the further amendments made to the RMA since *Colonial Vineyard*.

44. Turning specifically to section 32, each chapter of the notified PDP was accompanied by a section 32 evaluation report. These reports are public documents and are available on the Council's website.[21]

45. Pursuant to section 32(1), an evaluation must -

> (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
>
> (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
>
> (i) identifying other reasonably practicable options for achieving the objectives; and

[19] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* A078/08, 16 July 2008, at [34]. This case related to the district plan provisions controlling urban development behind Long Bay and Grannie's Bay within the North Shore City.
[20] *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.
[21] https://www.waikatodistrict.govt.nz/your-council/plans-policies-and-bylaws/plans/waikato-district-plan/district-plan-review/stage-1/section-32-reports

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

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

(c) 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.

46. Each objective must be examined during the evaluation, but it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the Act. The High Court has held that it may be through their interrelationship and interaction that the purpose of the Act is able to be achieved.[22]

47. The "most appropriate" test does not mean the most "superior" method.[23] The High Court has held section 32 requires a value judgment as to what, on balance, is the most appropriate when measured against the relevant objectives. "Appropriate" means suitable.

48. Section 32(2) provides that an assessment of the efficiency and effectiveness of the provisions (being policies, rules or other methods) under subsection (1)(b)(ii) 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

[22] *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 HC at [46]
[23] At [45].

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

49. "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."[24]

50. "Efficiency" means:[25]

> "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.
>
> There have been differing views of how efficiency should be interpreted. In one case an approach based on a strict economic theory of efficiency was taken. A more holistic approach was adopted in another case. Referring to those two cases, the High Court stated that:
>
> "The issue of whether s32 requires a strict economic theory of efficiency or a more holistic approach was raised before Woodhouse J in *Contact Energy Limited v Waikato Regional Council* [2011] NZEnvC 380…while economic evidence can be useful, a s32 evaluation requires a wider exercise of judgment. This reflects that it is simply not possible to express some benefits or costs in economic terms…in this situation it is necessary for the consent authority to weigh market and non-market impacts as part of its broad overall judgement under Part 2 of the RMA. "

51. The Ministry for the Environment ("MFE") Guidance explains benefits and costs in the context of section 32(2) in the following way:[26]

> "A cost, or negative effect, can be described as what society has to sacrifice to obtain a desired benefit.
>
> A benefit, or positive effect, can be described as a consequence of an action (e.g., a plan change) that enhances well-being within the context of the RMA.
>
> The RMA defines costs and benefits to include those that are both monetary or non-monetary. Requiring the benefits and costs to be identified and assessed encourages a thorough approach is taken to examining provisions, drawing on sound evidence."

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[24] Ministry for the Environment. 2017. *A guide to section 32 of the Resource Management Act: incorporating changes as a result of the Resource legislation Amendment Act 2017.* Wellington. Ministry for the Environment, at 18.
[25] Ministry for the Environment, above n 24, at 18 (footnotes within the quote are omitted).
[26] Ministry for the Environment, above n 24, at 18.

52. Under section 32(2)(a), the assessment of benefits and costs should encompass the full spectrum of environmental, economic, social and cultural effects so that "all of these types of effects are considered in the s32 evaluation, rather than to create an artificial distinction between these categories. This ensures the regulatory impact of a proposal on society is comprehensively evaluated."[27]

Section 32AA further evaluation

53. Under section 32AA, a further evaluation is required only for any changes made to the PDP after the evaluation report was completed at notification. A further evaluation must be undertaken in accordance with section 32(1) to (4) and must be undertaken at a level of detail that corresponds to the scale and significance of the changes.

54. A further evaluation 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 further evaluation was undertaken in accordance with section 32AA.

55. The Hearing Panel must have particular regard to the further evaluation when making its decision and must include a further evaluation in its decision.[28] This effectively means the further evaluation report needs to be prepared before a decision is made. To assist the Hearing Panel to meet its obligations under Schedule 1, the section 42A report writer for each hearing topic will include in their report, a further evaluation prepared under section 32AA to support any recommended changes to the notified PDP.

THE ROLE OF PART 2

56. The role Part 2 of the RMA plays in decision-making processes for plan changes/plan reviews at the regional and district level was refined by the

[27] Ministry for the Environment, above n 24, at 19.
[28] Schedule 1, Cl 10(2)(ab) and 10(4)(aaa).

Supreme Court in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*[29] ("*King Salmon*"). The Supreme Court held that, absent invalidity, incomplete coverage or uncertainty of meaning in the relevant higher order statutory planning documents, there is no need to refer back to Part 2 of the RMA when determining a plan change.[30] This is because the higher order planning document is assumed to already give substance to Part 2. If one or more of these three caveats apply, reference to Part 2 may be justified and it may be appropriate to apply the overall balancing exercise.[31]

57. If, in relation to a higher order planning document, there is conflict or tension between one or more provisions that pull in opposite and competing directions, the Supreme Court held provisions expressed in more directive terms carry more weight than those expressed in less directive terms[32]. If the conflict cannot be resolved, then this, along with any unresolved ambiguity in relation to any provision in the higher order planning document, amounts to "uncertainty of meaning", being one of the caveats identified by the Supreme Court. In such circumstances, it is necessary to separately refer back to Part 2 when determining the particular provisions on the PDP.

58. It should be noted that the fact the Waikato Regional Policy Statement ("WRPS") is operative does not, in and of itself, remove the possibility of any of the three caveats applying; recourse to Part 2 may be required at some point during the hearing process.

59. In the post *King Salmon* era, the timing of higher order planning documents is particularly relevant. The WRPS was made operative on 20 May 2016. While this was two years after the Supreme Court released its decision in *King Salmon* in 2014,[33] it was four years after the then

[29] *King Salmon,* above n 16.
[30] At [85] and [88].
[31] At [88]
[32] At [129].
[33] *King Salmon,* above n 16.

proposed WRPS was notified in 2010 and two years after decisions were released in 2012.[34] When the *King Salmon* decision was released, the then proposed WRPS was in the appeal stage.

60. Planning instruments prepared after the release of the *King Salmon* decision are more likely to give effect to Part 2 and, adopting the language of the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council,*[35] be "competently prepared" having regard to Part 2 and with a "coherent set of policies designed to achieve clear environmental outcomes." This is because up until the *King Salmon* decision, planning instruments were prepared, in reliance on case law at the time, that Part 2 would automatically apply to all plan change and resource consent assessments under the "overall broad judgment" approach. This provided an extra lens through which plan changes and resource consents would be assessed.

61. Since the *King Salmon* decision, greater care has been applied across the board by authors of planning instruments to ensure plan provisions are expressed in the way they are intended to be implemented and with the knowledge that the final "safeguard of Part 2" would only be available, in the case of plan changes and proposed plans, in very limited circumstances. The result is that plans prepared in the post *King Salmon* era arguably incorporate a greater focus on Part 2 considerations during the drafting of the plan than was previously the case.

62. Given the then proposed WRPS was prepared and notified well before the *King Salmon* decision, it cannot be said with any certainty that it gives substance to Part 2 in all respects ("incomplete coverage").

63. In light of the above, when considering each PDP hearing topic, if the Hearing Panel is uncertain as to whether a higher order planning

[34] 2 November 2012.
[35] *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, at [74] and [75].

document (including the WRPS) gives effect to Part 2, it is appropriate and indeed necessary to refer back to Part 2.

DECISIONS UNDER SCHEDULE 1

64. The Hearing Panel is required, under clause 10, to give decisions on the provisions and matters raised in submissions, including reasons for its decisions. In its reasons the Hearing Panel may address the submissions by grouping them according to the provisions or subject matter.[36] However the Hearing Panel is not required to give a decision that addresses each individual submission.[37]

65. As mentioned above, the decision must include a further evaluation of the PDP under section 32AA[38] and must have particular regard to the further evaluation when making its decision.[39] The decision may include any consequential alterations necessary to the PDP arising from the submission.[40]

66. Pursuant to clause 10(4)(a) of the First Schedule, decisions on submissions on the PDP must be given no later than two years after notification of the PDP under clause 5. This means decisions on Stage 1 must be given no later than 18 July 2020. As a result of the RLAA, Council will be required to apply to the Minister for any extension beyond the statutory two year period.[41]

RELEVANCE OF NATIONAL PLANNING STANDARDS

67. Pursuant to section 74(1)(ea), Council must prepare and change its district plan in accordance with any national planning standards. The first set of National Planning Standards ("the Standards") came into effect on

[36] Schedule 1, Cl 10(2).
[37] Schedule 1, Cl 10(3).
[38] Schedule 1, Cl 10(2)(ab).
[39] Schedule 1, Cl 10(4)(aaa).
[40] Schedule 1, Cl 10(2)(b).
[41] Schedule 1, Cl 10A.

5 April 2019.[42] As the PDP was notified well before that date, it was not prepared in accordance with the Standards.

68. The Standards provide that if a Council notifies a proposed district plan after the Standards come into effect, the new plan must comply with the Standards when it is notified for submissions.[43] This does not apply to the PDP (Stage 1) as it was notified before the Standards came into effect.

69. Pursuant to section 58I(1) of the RMA, a "document" must be amended to give effect to the Standards. A document includes a proposed plan. Therefore, Council is required to meet the following implementation timeframes in respect of the PDP:

    (a) Meet basic electronic accessibility and functionality requirements within one year of 5 April 2019;[44] and

    (b) Adopt the planning standards within five years,[45] and the definitions standard within 7 years,[46] of 5 April 2019.

70. Some submissions seek that the PDP be withdrawn or hearings deferred to enable the plan to align with the Standards. There is no legal requirement to do so. Other submissions seek that the PDP be amended to implement the Standards. These submissions therefore seek a more restrictive timeframe for implementation (in relation to (b) above) than what is required by the Standards themselves.

71. It is simply not feasible as part of the PDP hearing process to alter the entire architecture of the PDP to comply with most of the Standards, such as structure and formatting. It is more efficient to do this at a later time without the time constraints of evidence and hearing timetables.

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[42] Gazette Notice, Approval of National Planning Standards 2019, 5 April 2019.
[43] Ministry for the Environment. 2019. National Planning Standards, 17: Implementation Standard, page 69, mandatory directions 4 and 6.
[44] Ministry for the Environment, above n 43, *17. Implementation Standards*, direction 11.
[45] At *17. Implementation Standard*, direction 4.a.
[46] At *17. Implementation Standard*, direction 6.a.

72. However, it is acknowledged that there are cost and time efficiencies to be gained in adopting some of the Standards through the hearing process, where doing so will not create unintended consequences for the remainder of the PDP. One example is the Definitions Standard[47] which consists entirely of mandatory directions. Section 58I(3) of the RMA provides that amendments to a document to give effect to mandatory directions (including consequential changes to a avoid duplication or conflict with the amendments) must be made without using the Schedule 1 process. Therefore, these changes can be made without the need for the Hearing Panel to make a decision on such changes under Schedule 1.

73. However, where the proposed changes to give effect to the mandatory directions in the Definitions Standard go beyond consequential changes, the Schedule 1 process must be used. This means, the Hearing Panel has jurisdiction to adopt such changes only if there is scope within the submissions on the PDP to do so. If there is no scope within the submissions, a variation (or subsequent plan change) will be required using the Schedule 1 process.

74. The author of the section 42A hearing report for the definitions topic will identify:

    (a) Any mandatory and consequential changes that will be adopted to give effect to the definitions without using Schedule 1; and

    (b) Any recommended changes that go beyond consequential changes, where there is scope within submissions for the Hearing Panel to make the recommended changes under the Schedule 1 process.

NOTIFIED PPC1 TO WAIKATO REGIONAL PLAN

75. Proposed Plan Change 1 to the Waikato Regional Plan ("PPC1") was notified on 22 October 2016. After being withdrawn in part, a variation

[47] At *14. Definitions Standard*, page 53.

to PPC1 ("Variation 1") was notified on 10 April 2018. Over 1,000 submissions were received across both PPC1 and Variation 1. PPC1 introduces objectives, policies and rules to regulate farming activities within the Waikato catchment. The PDP provides for farming (except intensive farming) as a permitted activity in the Rural Zone. The PPC1 provisions are primarily aimed at controlling diffuse discharges of nutrients. However, PPC1 also introduces additional policies relating to point source discharges.

76. PPC1 seeks to give effect to the Vision and Strategy for the Waikato River and the NPS-FM (2014).[48] As regards statutory weight for the purposes of the PDP, the submissions on PPC1 were heard during the course of 2019 and the hearings concluded on 19 September 2019. At this stage, counsel anticipates that decisions will be released in the first quarter of 2020.

77. While the rules have legal effect, no decisions have yet been made on the rules or submissions on the rules. Accordingly, when having regard to PPC1, as required by section 74(2)(a)(ii), the Hearing Panel are not obliged to place significant weight on PPC1. The Hearing Panel may, however, consider that, in the interests of efficiency, and provided there is scope to do so, the provisions in the PDP which relate to farming activities are consistent with, or no less onerous, than those in PPC1 – bearing in mind the different roles and responsibilities of territorial authorities and regional councils. However, given the highly contentious nature of the PPC1 provisions, it is very likely that the decisions on PPC1 will be subject to appeals. These matters will be addressed in the section 42A reports on each of the relevant topics.

[48] Notification of PPC1 preceded the 2017 amendments to the NPS-FM. However, Variation 1 to PPC1 was notified subsequently.

RELEVANCE OF DRAFT NATIONAL POLICY STATEMENTS

78. The MFE has recently released three draft national policy statements, the draft National Policy Statement-Highly Productive Land ("NPS-HPL"),[49] the draft National Policy Statement – Urban Development ("NPS-UD")[50] and the draft National Policy Statement – Fresh Water Management ("NPS-FM").[51] Consultation for the first two closes on 10 October 2019 and the third on 17 October 2019.

79. The NPS-FM primarily applies to regional councils who must publicly notify their final decisions on changes to policy statements and regional plans to give effect to the NPS-FM by 31 December 2025. Territorial authorities must amend their district plan at the next plan review.[52] As such, no further comment is made on the NPS-FM.

80. The Hearing Panel is not required to give any weight to any draft NPS's in existence when hearing and deciding submissions on the PDP. This was confirmed by the Environment Court in *Mainpower NZ Limited v Hurunui District Council.*[53] The Court held that while draft national policy statements can be considered in the context of matters, no weight should be given to them as they may yet change.[54]

81. Further, there is nothing in sections 73 to 76 that requires Council to consider a draft national policy statement when changing a district plan.

82. However, it is likely the draft NPS-HPL, NPS-UD and NPS-FM will come into force before decisions are made on the PDP. The issue that arises is what impact that has or may have on your decision-making on the PDP.

[49] 14 August 2019.
[50] 21 August 2019.
[51] 5 September 2019. This will replace the NPS-FM 2014 (as amended in 2017).
[52] Draft NPS-FM, Part 3.4.
[53] *Mainpower NZ Limited v Hurunui District Council* [2011] NZEnvC 384 at [27].
[54] At [49].

NPS - Urban Development

83. The NPS-UD will provide decision makers with clear direction on how to enable opportunities for development in New Zealand's urban areas in a way that delivers quality urban environments. The discussion document for the NPS-UD indicates it is likely to take effect during the first quarter of 2020.[55]

84. In its current draft form, a territorial authority in a major urban centre will be required to implement the most directive policies within 18 months from the date of gazette without using the Schedule 1 process[56]. MFE has confirmed to Council that its entire district is a "major urban centre". However, Council has sought clarification from MFE on the extent to which these directive policies apply to the district.

85. Once gazetted, Council would still be required to amend its PDP (being a 'document' as defined under section 55(1)) to give effect to the remaining provisions using the Schedule 1 process as soon as practicable.[57]

NPS - Highly Productive Land

86. The draft NPS-HPL seeks 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 production; and protect it from inappropriate subdivision, use and development.[58]

87. The draft sets timeframes for when Council is required to give effect to certain policies. As currently drafted, it requires:

[55] Ministry for the Environment. 2019. *Planning for Successful Cities:* A discussion Document on a proposed National Policy Statement on Urban Development.
[56] Ministry for the Environment, above n 55; Sections 55(2) and (2A) RMA.
[57] Sections 55(2B), (2C) and (2D)(a).
[58] Ministry for Primary Industries. 2019. A draft discussion document on a proposed National Policy Statement for highly productive land.

(a) Regional councils to identify highly productive land within the region no later than three years after the NPC is gazetted (Policies 1.1 and 2); and

(b) Territorial authorities to implement Policies 1.2, 2, 4 and 5 no later than two years after the relevant regional council identifies highly productive land in accordance with proposed Policy 1.1, or no later than five years after the NPS is gazetted.

88. The objectives and remaining policies in the draft NPS-HPL would have immediate effect from the date the NPS is gazetted and, pursuant to section 55, Council would be required to change its PDP to give effect to them as soon as practicable after this date through the Schedule 1 process.[59]

89. In summary, the PDP was drafted to give effect to all national policy statements in existence at the time of notification. If a new NPS comes into force before decisions are made, the PDP must be assessed against that NPS. If the NPS directs changes to be made under section 55(2), Council can amend the PDP without using the Schedule 1 process. This would therefore occur independent of this hearing process.

90. However, all other changes required to the PDP to give effect to the NPS must be made using the Schedule 1 process. The Hearing Panel can only make such changes if there is scope in the submissions to make the changes. Where amendments are required to give effect to any approved NPS and those amendments are not within the scope of submissions, a further variation or plan change using the Schedule 1 process will be required.

[59] Sections 55(1), (2B), (2C), and (2D)(a).

RELEVANCE OF NON-STATUTORY DOCUMENTS YET TO BE ADOPTED BY COUNCIL

91. During the hearings on the PDP, the Hearing Panel will hear from a number of submitters in relation to the following non-statutory documents yet to be adopted by Council:

    (a) The Hamilton-Auckland Corridor initiative ("H2A");

    (b) The Hamilton-Waikato Metropolitan Spatial Plan ("H-WNSP");

    (c) Waikato District Growth Strategy 2019 ("Growth Strategy");

    (d) Stage 2 review of Future Proof ("Future Proof Review").

92. The Panel will be asked by submitters to take those non-statutory documents into account in its decision-making on the PDP. Some submitters go further and ask that the PDP hearings be placed on hold pending the adoption of the spatial plans in (a) and (b) above.

93. The Panel is not required to give any weight to any of the above "draft" non-statutory documents or any such non-statutory document once it is adopted. Section 74(2)(b)(i) will not apply to these documents once adopted as they will not be management plans or strategies prepared under other Acts.[60] Non-statutory documents can however be considered in the context of a plan change and given such weight as the Panel considers appropriate,[61] having regard to the hierarchy of RMA documents.[62]

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[60] *Auckland Memorial Park Ltd v Auckland Council* [2014] NZEnvC 9 at [70].

[61] *Tram Lease Limited v Auckland Council* [2015] NZEnvC 133 at [81], where the Court considered a spatial outline/plan that addressed strategic direction for Auckland's growth, was a non-statutory document. Its only intent was to inform strategic planning for the Auckland Council, that will have informed the preparation of the Proposed Unitary Plan. The Court held that it could have no status in the Court in the context of a plan change. To that end, the Court gave no weight to the aspects of the evidence of the witnesses that relied upon the spatial outline to justify intensification of commercial buildings within particular zones.

[62] *South Epsom Planning Group Inc v Auckland Council* [2016] NZEnvC 140 at [168-184]; *Friends of Shearer Swamp Inc v West Coast Regional Council* [2012] NZEnvC 6 at [12]; *St Lukes Group Ltd v The Auckland City Council* A132/2001, 3 December 2001.

Hamilton-Auckland Corridor and Hamilton-Waikato Metropolitan Spatial Plan

94. The H2A is a central government proposal for a 100 year spatial plan to plan for sustainable growth and increase connectivity within the corridor. It encompasses the settlements along the transport corridor between Cambridge-Te Awamutu and Papakura. It builds on the Future Proof Sub-Regional Growth Strategy.

95. The H2A obtained Cabinet approval in May 2018. The Steering Group includes representatives from various ministries,[63] the New Zealand Transport Agency, Waikato-Tainui, Waipa District Council, Hamilton City Council, Waikato District Council, Waikato Regional Council and Auckland Council.

96. An outcome of the H2A Corridor Plan is expected to be a joint Council-Crown-Iwi spatial plan for the Hamilton-Waikato metropolitan plan area. The objective of the H-WMSP is to support and unlock the residential and employment development potential and Iwi aspirations for this fast-developing metropolitan area through joint planning and integrated growth management.

97. However, no draft spatial plan for either the H2A or Hamilton-Waikato metropolitan area has yet been released for public consultation.

98. While they are important and significant initiatives for the Waikato Region, given their non-statutory origin, there is no requirement for the Panel to give any weight to either the current initiatives, or any "draft" spatial plan when they are released in the future. As such, there is no legal basis for the Hearing Panel to place the PDP hearings on hold, or to amend the PDP to reflect the current non-statutory status of those yet to be approved plans. They should be given little or no weight.

[63] Such as Ministry of Transport, Treasury, Ministry of Housing and Urban Development and Ministry of Business, Innovation and Employment.

99. Central government is yet to confirm what statutory weight will be given to these spatial plans. Currently the only legislation governing spatial plans is the Local Government (Auckland Council) Act 2009[64] which is limited to the Auckland boundaries. There is no mechanism under the Local Government Act 2002 (LGA) to adopt spatial plans. If the initiatives are formulated into spatial plans and adopted as non-statutory documents before decisions are made on the PDP, the Hearing Panel has the discretion whether to take them into account and to give them such weight as is considered appropriate, having regard of course to the hierarchy of the RMA planning documents. However, the PDP cannot be amended to reflect the adopted spatial plans unless there is scope within the submissions to do so.

100. Subject to any RMA reform giving these non-statutory spatial plans legal status, it is likely the adopted spatial plans will subsequently be given effect to via a higher order planning instrument under the RMA (such as the Waikato Regional Policy Statement). If that is the case, a future variation or plan change to the district plan will be required under the Schedule 1 process. Communities of interest will have an opportunity to submit on the proposed provisions at that time.

Waikato District Growth Strategy 2019

101. Council expects to release a draft Growth Strategy in October 2019 for public consultation, with formal adoption in March/April 2020. No weight should be given to the draft strategy. Section 74(2)(b)(i) will not apply to any adopted Growth Strategy because it is a non-statutory document. Once adopted, the Panel can decide what weight, if any, to give this document but cannot amend the PDP unless there is scope within the submissions to do so.

[64] Local Government (Auckland Council) Act 2009, s 79(1).

Future Proof Review

102. Future Proof[65] was reviewed in 2018/2019 as a result of the National Policy Statement for Urban Development Capacity 2017. The Future Proof Review is yet to be adopted by the Future Proof partners, which includes Council. As such, no weight should be given to its current status. Once adopted, as a non-statutory document, the Hearing Panel can give it such weight as it considers appropriate but can only amend the PDP to reflect the outcomes in the Future Proof Review if there is scope within submissions to do so.

RELEVANCE OF WAIKATO DISTRICT BLUEPRINT

103. A number of submitters also raise the Waikato District Blueprint which was approved by Council in 2019 (the "District Blueprint"). While it was completed following a community engagement process in 2018 under the LGA, it is a non-statutory document. The District Blueprint addresses Council's vision and high level master planning over the next 30 years. It is made up of Local Area Blueprints which are focussed at the town, village or rural area level and address the specific needs of each settlement within the district. They do not however provide for land use controls or growth. Local Area Blueprints have been prepared for 15 areas in the district.[66]

104. The Hearing Panel has the discretion whether to take the District Blueprint into account and if so, what weight to give to it in its decision-making. However, the PDP cannot be amended to reflect the District Blueprint unless there is scope within the submissions to do so.

[65] Future Proof was completed in the broad context of the Local Government Act 2002 using the special consultative process set out in section 83 of the Act. However, there is no formal mechanism under that Act to adopt Future Proof.

[66] Tuakau, Pokeno, Mercer, Meremere, Te Kauwhata/Rangariri, Ohinewai, Huntly, Taupiri, Ngaruawahia, Horotiu, Te Kauwhai, Whatawhata, Raglan, Tamahere, and Matangi.

JURISDICTION TO AMEND PDP ("SCOPE")

105. Submissions on the PDP are made under clause 6 of Schedule 1:

> Once a proposed … plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission **on it** to the relevant local authority.
>
> (our emphasis)

106. The Panel's role is to hear submissions on the PDP and give a decision on the provisions and matters raised in submissions.[67]

107. In terms of the Panel's jurisdiction to make changes to the PDP in response to a submission:

(a) A submission must first be "on" the PDP; and

(b) The changes made to the PDP must be within the scope of the submission.

Principles from case law

108. The test laid down by the High Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*[68] is whether an amendment made to a proposed plan as notified is "reasonably and fairly raised in submissions" on the proposed plan. This was recently endorsed by the High Court in *Albany North Landowners v Auckland Council*[69].

109. The Courts have also stated that whether any amendment is reasonably and fairly raised in the course of submissions should be approached "in a realistic and workable fashion, rather than from the perspective of legal

[67] RMA, Sch 1, cl 8(B) and 10(1).
[68] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166.
[69] *Albany North Landowners v Auckland Council* [2017] NZHC 138, Whata J. This case concerned the Proposed Unitary Plan.

nicety"[70]. The "workable" approach requires the Hearing Panel to take into account the whole relief package detailed in each submission[71].

110. The leading authority[72] on whether a submission is "on" a variation or plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council.*[73] It set out a two limb test:[74]

(a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and

(b) Whether there is a real risk that people affected by the plan change (if modified in response to the submission), would be denied an effective opportunity to participate in the plan change process.

111. A submission can only fairly be "on" a proposed plan if it meets both these limbs. The *Clearwater* test has been adopted in a number of High Court decisions. In *Option 5 Inc v Marlborough District Council*[75] the High Court stated that the first limb may not be of particular assistance in many cases, but the second limb of the test will be of vital importance in many cases and may be the determining factor in some cases.[76]

112. The *Clearwater* test was applied by Kos J in *Palmerston North City Council v Motor Machinists.*[77] He described the first limb in the *Clearwater* test as the dominant consideration, namely whether the submission addresses the proposed plan change itself. This was said to involve two aspects: the degree of alteration to the status quo proposed by the

[70] *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZRMA 552 at [13], confirmed by the High Court in *Albany North Landowners v Auckland Council* [2017] NZHC 138.
[71] *Shaw v Selwyn District Council* [2001] 2 NZLR 277 at [31].
[72] As confirmed by the High Court in *Turners & Growers Ltd v Far North District Council* [2017] NZHC 764.
[73] *Clearwater Resort Ltd v Christchurch City Council* AP 34/02, 14 March 2013, Young J.
[74] At [66]
[75] *Option 5 Inc v Marlborough District Council* CIV 2009-406-144 28 September 2009, HC Blenheim.
[76] At [29].
[77] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.

notified plan change; and whether the submission addressed that alteration[78].

113. The first test is arguably of limited relevance to a plan review because a notified PDP will not always change that status quo. This is because under section 79 (which applies to both a full and partial plan review), Council must, even after reviewing operative provisions and deciding they do not need altering, notify them as part of the PDP. Therefore, there may be no change to the "status quo" on a review.

114. The High Court noted the second limb in *Clearwater* concerns procedural fairness. It is whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission (so called "submissional side-winds") have been denied an opportunity to respond to those proposed changes.[79]

115. The High Court in *Motor Machinists* set out two further tests for determining whether a submission can be reasonably said to fall within the ambit of the plan change (being the first limb of *Clearwater*):[80]

(a) If a submission raises matters that should have been addressed in the section 32 evaluation and report, then it is unlikely to be within the ambit of the plan change.

(b) If the submission seeks a new management regime in a district plan for a particular resource, it must be in response to a plan change that alters the management regime.

116. The second test is most relevant in considering those submissions, if any, that seek to add a management regime for the district wide matters that have not been notified in Stage 1 of PDP. An example is a submission which seeks to make provision for a genetically modified organism.

[78] At [80] to [81].
[79] At [83].
[80] At [81].

117. Turning to the first test posed by *Motor Machinists*, the Environment Court in *Bluehaven Management Limited v Western Bay of Plenty District Council*[81] considered the inquiry into matters raised in the section 32 report. The Court did not regard the inclusion or exclusion of matters in the section 32 report as determinative as to whether the submission is reasonably within the plan change. It stated:

> [39] Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal within robust, notified and informed public participation.

118. Significantly, the High Court in *Albany North Landowners* departed from the *Motor Machinists* section 32 test in the context of a full district plan review, as that dicta was specifically directed to plan changes. Whata J stated:

> [130] …I respectfully doubt that Kós J contemplated that his comments about s32 applied to preclude departure from the outcomes favoured by the s32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.
>
> [131] By contrast a s32 report is, **in the context of a full district plan review**, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.
>
> (our emphasis added)

119. Accordingly, while some of the proposed changes in submissions on the PDP may be so far removed from the notified PDP that they are out of scope, changes to the PDP should not be considered out of scope simply

[81] *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191, Smith J and Kirkpatrick J (sitting together).

because they are not specifically subject to the original section 32 evaluation (regardless of whether the PDP is treated as a full review or partial review for questions of scope).

120. The above case law on scope largely deals with discrete variations or plan changes rather than a full district plan review or a (substantive) partial review. Plan changes or variations are usually directed at defined geographical areas or specific issues to be resolved. By contrast, a plan review by its nature involves a broader approach to the question of scope. This difference was acknowledged by the High Court in the *Albany North Landowners* decision when Whata J stated:

> [129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*; *Option 5* and *Motor Machinists*. 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 *Clearwater*] was therefore very wide.**
>
> (our emphasis added)

121. The difference in scope considerations between a plan change and a replacement plan was also identified by the Environment Court in *Tussock Rise Limited v Queenstown Lakes District Council*, where it stated:[82]

> "There appears to be a large difference between the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans. Much of that difference can be understood in the context of specific plan changes. For example, if a local authority wishes to change a rule in a plan, submissions on the operative objectives and policies would be beyond jurisdiction as not "on" the plan change. **In contrast, on new plans almost everything may be open to challenge as in *Albany North***, although the strategic issues I have identified do then often arise."
>
> (our emphasis added)

[82] *Tussock Rise Limited,* above n 6, at [62].

122. The issue here of course is whether, for the purpose of determining questions of scope, a partial review should be treated like a plan change or a full district plan review or replacement plan (where almost anything is "on" the plan).

123. In *Tussock Rise*, the Environment Court said the Queenstown Lakes District Council's ("QLDC") Stage 1 Proposed District Plan under section 79(1) was effectively a plan change to the Operative District Plan. For that reason, the Court rejected the appellant's (submitter's) argument that the section 32 tests in *Motor Machinists* was less relevant to jurisdictional issues on a "full review" of a plan and the resultant proposed plan. The Court stated:

> "[80]…However, while as I have noted the PDP looks like Stage 1 of a full review, the Council has now produced its resolutions stating that its review was under section 79(1) RMA, not a full review under section 79(4) of the Act. Accordingly, [that] argument cannot succeed on this point."

124. With respect, the above view of the Court in *Tussock* is at odds with *Bluehaven* where, even on a narrow plan change, the Court did not regard the issue of whether a matter was addressed in a section 32 report as determinative of scope.

125. Further, it is submitted Stage 1 of the Council's PDP before you can be distinguished from Stage 1 of the QLDC's Proposed Plan. While the QLDC's Proposed Plan consisted of 3 stages, with Stage 1 being the largest, Stages 2 and 3 (consisting of 14 chapters) were significantly larger than the Council's forthcoming Stage 2 which is limited to two topics. Stage 1 of Council's PDP contains by far the majority of the provisions and applies to the entire district.

126. Furthermore, the public notice for Stage 1 of the PDP expressly referred to a "full review" of the ODP. The Environment Court has considered the issue of whether the public notice is relevant to determinations on

scope.[83] It found that the public notice is not determinative of scope, but is a document that can assist interpretation of the intention of the notified plan change, but cannot operate to change the meaning of a notified change.[84]

127. In particular, the Court found the public notice was directly relevant to the procedural fairness test in *Clearwater* and therefore, to determining whether a submission is "on" a plan change.[85]

128. Ultimately, all cases emphasise the need to ensure persons affected by a new plan have an opportunity to participate in the Schedule 1 process. In the circumstances, for the purposes of determining scope issues on the PDP, it is appropriate to treat the PDP akin to a full plan review, rather than a narrower plan change, to avoid any prejudice to submitters if a more strict approach to issues of scope were adopted.

129. The exception to this approach may be rezoning requests which relate to a particular geographic area of land notified in the PDP, similar to that of a plan change. Council has not yet undertaken an analysis of the rezoning requests. It is more appropriate that separate submissions on scope be presented at the commencement of the rezoning topic, if issues of scope arise during the preparation of the section 42A hearing report on that topic.

Approach to scope issues on the PDP

130. Neither Council nor I have reviewed the numerous submissions on the PDP to determine whether they are "on" the PDP. The section 42A reporting officer for each topic will identify any submissions that they consider may be out of scope. The Hearing Panel will need to carefully consider those submissions through the hearings as they arise, on a case

[83] *Hawke's Bay Fish and Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187.
[84] At [42].
[85] At [46].

by case consideration. Legal submissions may be required for specific submissions.

131. Based on Council's review of the submissions to date, I make the following comments:

(a) There are many submissions that do not specify with sufficient particulars, the relief sought. The Panel will need to decide whether, read as a whole, the relief can be reasonably and fairly identified. Submitters can be asked to clarify the relief sought at the hearing. However, a submitter cannot expand the scope of their written submission through their evidence at the hearing.

(b) In many cases further submissions under clause 8 seek to extend the scope of the original submission. Further submissions can only be in support of, or opposition to, an original submission. A further submission cannot seek relief beyond the scope of the original submission[86]. Such relief must be disregarded by the Panel.

_____

B A Parham
Counsel for Waikato District Council

[86] *Offenberger v Masteron District Council* WO53/6 (PT).

APPENDIX 1

Updated checklist post *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 and incorporating the 2013 and 2017 amendments to the RMA.

A. General requirements

1. *A territorial authority must prepare and change its district plan in* ***accordance with***[87] — and assist the territorial authority to **carry out** — its functions[88] so as to achieve the purpose of the Act.[89]

2. The district plan (change) must also be prepared **in accordance with** any *national policy statement, New Zealand coastal policy statement, a national planning standard,*[90] regulation(s)[91] and any direction given by the Minister for the Environment.[92]

3. When preparing its district plan (change) the territorial authority **must give effect** to[93] any national policy statement and New Zealand Coastal *Policy Statement and a national planning standard*[94]*.*

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

   (a) **have regard to** any proposed regional policy statement;[95]

   (b) **give effect to** any operative regional policy statement.[96]

5. In relation to regional plans:

   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order;[97] and

[87] Section 74(1) (replaced on 3 December 2013, for all purposes, by section 78 RMAA 2013).
[88] Section 31.
[89] Sections 72 and 74(1).
[90] Section 74(1)(ea) (inserted, on 19 April 2017, by section 59 of the Resource Legislation Amendment Act 2017).
[91] Section 74(1)(f).
[92] Section 74(1)(c).
[93] Section 75(3).
[94] Section 75(3)(ba) (inserted, on 19 April 2017, by section 60 of the RLAA 2017).
[95] Section 74(2)(a)(i).
[96] Section 75(3)(c).
[97] Section 75(4).

(b) **must have regard to** any proposed regional plan on any matter of regional significance etc.[98]

6. When preparing its district plan (change) 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[99] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;[100]

(b) **take into account** any relevant planning document recognised by an iwi authority;[101] and

(c) not have regard to trade competition[102]or the effects of trade competition;

7. The formal requirement that a district plan (change) must[103] also state its objectives, policies and the rules (if any) and may[104] state other matters.

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.[105]

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;[106]

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[98] Section 74(2)(a)(ii).
[99] Section 74(2)(b) (amendments to 74(2)(b)(iia) on 20 May 2014 by section 107 of the Heritage New Zealand Pouhere Taonga Act 2014).
[100] Section 74(2)(c).
[101] Section 74(2A) (replaced on 1 April 2011 by section 128 of the Marine and Coastal Area (Takutai Moana) Act 2011 – however no fundamental difference in relation to the test).
[102] Section 74(3).
[103] Section 75(1).
[104] Section 75(2).
[105] Section 74(1) and section 32(1)(a).
[106] Section 75(1)(b) and (c).

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:*[107]

- *Identifying other reasonably practicable options for achieving the objectives;*[108]*and*
- *Assessing the* ***efficiency and effectiveness*** *of the provisions in achieving the objectives by:*[109]
  - *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:*
    - *(i) economic growth that are anticipated to be provided or reduced;*[110]*and*
    - *(ii) employment that are anticipated to be provided or reduced*[111]*.*
  - *If practicable, quantify the benefits in costs referred to above.*[112]
  - *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;*[113]
- *Summarising the reasons for deciding on the provisions;*[114]
- *If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction*

[107] Section 32(1)(b).
[108] Section 32(1)(b)(i)
[109] Section 32(1)(b)(ii).
[110] Section 32(2)(a)(i).
[111] Section 32(2)(a)(ii).
[112] Section 32(2)(b).
[113] Section 32(2)(c).
[114] Section 32(1)(b)(iii)

than that, then whether that greater prohibition or restriction is justified in the circumstances.[115]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.[116]

12. Rules have the force of regulations.[117]

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[118]than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.[119]

15. <u>There must be no blanket rules about felling of trees[120] in any urban environment.[121]</u>

E. Other statues:

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

F. (On Appeal)

17. On appeal[122] the Environment Court must have regard to one additional matter — the decision of the territorial authority.[123]

[115] Section 32(4).
[116] Section 76(3).
[117] Section 76(2).
[118] Section 76(2A).
[119] Section 76(5).
[120] Section 76(4A).
[121] Section 76(4B).
[122] Section 290 and Clause 14 of the First Schedule.
[123] Section 290A RMA as added by the RMAA 2005.