BEFORE THE HEARINGS PANEL

UNDER the Resource Management Act 1991

IN THE MATTER of Proposed Plan Change 17 to the Waipā District Plan

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OPENING LEGAL SUBMISSIONS ON BEHALF OF WAIPĀ DISTRICT COUNCIL
Date 9 June 2023

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MAY IT PLEASE THE HEARINGS PANEL

Introduction

1. Proposed Plan Change 17 (**PC17**) to the Operative Waipā District Plan (**District Plan**) is a plan change initiated and promoted by Waipā District Council (**Council**) as the most appropriate way to achieve the purpose of the Resource Management Act 1991 (**RMA**) in the context of its objectives: an urgently required update to the Hautapu Industrial Structure Plan and the provision of more industrial land in the District in order to meet unexpected high demand.[1] The provisions in Part 1 of the First Schedule to the RMA expressly anticipate and provide for Council to both promote and decide changes to its own District Plan; these provisions apply to and regulate the PC17 process.

2. An important function of this hearing is to ensure that the Hearings Panel, pursuant to its delegations from Council,[2] can carry out the following statutory obligations under the First Schedule to the RMA:

   (a) Give a decision on the provisions and matters raised in submissions on PC17;[3]

   (b) Include reasons for accepting or rejecting those submissions;[4]

   (c) Have particular regard to a further evaluation of PC17 pursuant to s32AA of the RMA[5] when making its decision;[6] and

   (d) Include, at its discretion, matters relating to consequential amendments or other relevant matters.[7]

[1] Section 32(1)(a) of the RMA.
[2] As noted in paragraph [3] of Minute #1, 13 December 2022.
[3] Clause 10(1), Schedule 1 of the RMA.
[4] Clause 10(2)(a), Schedule 1 of the RMA.
[5] Clause 10(2)(ab), Schedule 1 of the RMA.
[6] Clause 10(4)(aaa), Schedule 1 of the RMA.
[7] Clause 10(2)(b), Schedule 1 of the RMA.

3. Against the backdrop of the Hearings Panel's statutory obligations, these Opening Legal Submissions (**Legal Submissions**) focus on the following legal issues:

   (a) Making a decision on the provisions and matters raised in submissions on PC17;

   (b) The legal matters relevant to the Hearings Panel's consideration of submissions and evidence to be heard on PC17;

   (c) The original evaluation required under s32 and the further evaluation required under s32AA of the RMA;

   (d) The application of the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**); and

   (e) The application of the National Policy Statement on Urban Development 2020 (**NPS-UD**).

4. Suffice to say, prior to 26 May 2023 when submitter expert evidence was filed, the s42A Report Team recommended the Hearings Panel confirm the rezoning proposed in PC17 as notified as well as the deferred industrial rezoning sought by the Hautapu Landowners Group (**HLG**) in its submission on PC17. On 26 May 2023 HLG filed supplementary evidence requesting, for the first time, the rezoning of their land to a live industrial zoning.[8] The s42A Report Team position on this latest request has yet to land and these Legal Submissions reflect this fact.

Making a decision on the provisions and matters raised in submissions on PC17

5. HLG's position is now understood to be a request to rezone its land from Rural to a live Industrial Zone or, if the Hearings Panel is not persuaded to grant that relief, to alternatively rezone its land from Rural to Deferred

[8] Statement of Supplementary Evidence of Mark Bulpitt Chrisp on behalf of the Hautapu Landowners Group, Planning, 26 May 2023 at paragraph 7.1.

Industrial Zone. Legal submissions to be filed by Counsel for HLG today may yet clarify this point; in the meantime these Legal Submissions on behalf of Council have been prepared on the basis of this understanding of the relief now sought by HLG in its submission.

6. It is submitted that HLG's new rezoning request does now mean that the Hearings Panel must work through three consecutive decision points on HLG's revised submission:

   (a) The Hearing Panel must first decide if it has jurisdiction to consider HLG's new rezoning request;

   (b) If the Hearing Panel is satisfied that it has jurisdiction to consider the change to the HLG submission, it must then decide if HLG's new rezoning request is within the scope of PC17; and

   (c) Finally, if the Hearing Panel is satisfied that HLG's rezoning request is within scope of PC17, it must then decide whether it should grant or decline that request.

   We address each of these three consecutive decision points in turn.

Jurisdiction

7. A change to the original relief sought in submissions on plan changes or district plan reviews does occur from time to time and does occur during council hearings as well. This was the factual scenario considered by the Environment Court in two decisions on Land Equity Group's (**LEG**) appeal against decisions on the Proposed Napier District Plan.[9]

8. In the course of the Court's rejection of an application to strike out LEG's appeal on the grounds that LEG's change to the relief sought in its original submission during the council hearing did not give either the council, or the Court on appeal, jurisdiction to consider that change, Judge Newhook

[9] *Land Equity Group v Napier City Council* W56/2005 and W014/2206.

provided a useful overview of the matters that a council (or the Court on appeal) should consider when identifying the jurisdiction set for it by a plan and a submission on that plan:[10]

> The jurisdiction set by the LEG submission and the proposed plan
>
> [8] A case in which guidance has been provided by the Environment Court[4] in this area is often cited. It is appropriate to quote from that decision here. The Court said:
>
> > …
> >
> > (19)… I consider that in order to start to establish jurisdiction a submitter must raise a relevant 'resource management issue' in its submission in a general way. Then any **decision of the Council**, or requested of the Environment Court in a reference [appeal], **must be**:
> >
> > (a) **fairly and reasonably within the general scope of**:
> >
> > **(i) an original submission; or**
> > **(ii) the proposed plan as notified; or**
> > **(iii) somewhere in between provided that:**
> >
> > (b) **the summary of the relevant submissions was fair and accurate and not misleading**.
>
> [4] See *Re Vivid Holdings Limited* [1999] NZRMA 467 at para 19.
>
> [Our clarification added.]

9. The Environment Court in *Solid Energy Limited v Central Otago District Council*[11] subsequently recommended caution when applying *Re Vivid Holdings,* quoted above by Judge Newhook in the *LEG* decision, to plan change appeals (as opposed to appeals on district plan reviews which the *Re Vivid Holdings* and *LEG* decisions considered) because "a proposed new plan… raises rather broader issues than does a plan change… and so I do not think it is helpful here."[12] However the Court in *Solid Energy*, which was considering a plan change appeal, provided the following insight into matters which, it is submitted, are relevant to the Hearings Panel's consideration of the new HLG rezoning request:

[10] *Land Equity Group v Napier City Council* W56/2005 at [8].
[11] [2012] NZEnvC 173.
[12] Ibid at [16].

> [6] The SEL submission to the CODC[13] dated 16 December 2008 states… It will be seen that SEL express two general concerns about all the plan changes and commented specifically on Plan Changes 5J and 5K. Nowhere in the submission is there a reference to a new policy (of any kind) being added to the plan changes. Certainly there is no suggestion that a new policy enabling mining be introduced to the plan change.
>
> [7] On 1 October 2009 SEL filed a 'further submission' on Plan Changes 5A, 5C and 5J and responding to the submissions of several parties to the plan changes.
>
> [8] The CODC hearings panel heard submissions between 17 May 2010 and 10 August 2010 and released a decision on or about 29 May 2011. SEL subsequently lodged its notice of appeal… The reference in the notice of appeal to the council's failure to refer "… to the appellant's submission that a new policy… be inserted…" is at first sight rather curious since, as I have noted above, **SEL's submission does not expressly (or by reasonable implication) refer to the additions of any new policy… Counsel for the SEL explained this by pointing to the legal submissions given at the council hearing. Frankly that is ingenuous: submissions by counsel can rarely if ever give jurisdiction for a number of reasons. Most importantly, they occur too late in the process to give the public notice of what a submitter seeks.**
> …
> [18] I accept that the notice of appeal relates to a matter – a policy enabling mining – which has been excluded from the plan, but the real question is whether SEL referred to that omission in its submission. The only relief sought in SEL's submission in respect of Plan Change 5D… was that "… exploration and mining activities are not further restricted by the proposed plan change". That submission cannot justify the insertion of a policy (as sought in the appeal) "enabling the investigation, identification and utilization of the district's mineral resources"… The latter words are not fairly and reasonably implied by the words of the submission. That is important because it means that the public has had no opportunity to make submissions to, or be heard by, the council on the issue of enabling mining… **As the High Court pointed out in *General Distributors Limited v Waipa District Council*[14]: "One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed."** I consider that there may well be members of the public who could be concerned to know that a policy enabling mining could result from the hearing of the SEL appeal.
>
> [14] *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 at [55].
>
> [Our emphasis added.]

10. Collating the Environment Court's guidance from the decisions discussed above and set against the background of the timetable steps already completed in the PC17 process, it is recommended that the Hearings

[13] The Court's abbreviation for the Central Otago District Council.

Panel now consider the following questions during the hearing in order to form a view as to whether it has jurisdiction to consider the new live industrial rezoning now requested by HLG:

(a) What changes to the Operative Waipā District Plan did the notified version of PC17 propose?

(b) What relief did HLG seek in its original submission on PC17?[14]

(c) Was Council's summary of HLG's original submission in its summary of submissions fair, accurate and not misleading?

(d) What relief did other submitters seek in their further submissions on HLG's original submission?

(e) Acknowledging that HLG did not make any further submissions on other submitters' original submissions, how did the s42A Report identify and assess the relief sought by HLG in its original submission on PC17?

(f) How did the s42A Report identify and assess the relief sought by other submitters' further submissions on HLG's original submission?

(g) What did other submitters understand the relief sought by HLG to be in its original submission on PC17?

(h) Are there now members of the public who were not sufficiently informed through the PC17 notification, submission and further submission processes of the live industrial zoning now sought by HLG?

[14] As confirmed in Council's decision dated 6 March 2023 on the scope of HLG's original submission.

11. As counsel for the Council on its own plan change to its District Plan, I propose to respond to these questions in Reply following the provision and consideration of all parties' relevant submissions and evidence presented during the course of the hearing.

Scope

12. As noted in our earlier legal submissions to the Hearings Panel when it considered the scope of HLG's original submission to rezone its land from Rural to a deferred Industrial Zone, the clear purpose of PC17 is to provide live Industrial Zoned land in Hautapu in order to satisfy demand to relocate and establish additional industrial activities in the Waipā District:[15]

> 8. The clear purpose of PC17 is to both recognise existing and enable additional industrial land use through the 'live' industrial zoning of land in the short-term in order to respond to a current shortfall in available, appropriately zoned land for industrial use in the Waipā district. PC17's proposal to rezone land to a 'live' industrial zoning responds directly to this purpose...

13. In this respect, the change to HLG's submission to now request live industrial zoning of its land means that the relief sought by HLG in its submission aligns with the purpose of PC17 and therefore would, it is submitted, satisfy the first limb of the *Clearwater* test.[16]

14. It is further submitted that satisfaction of the second limb of the *Clearwater* test will be determined by the answer to the question outlined above in paragraph 10 of these Legal Submissions because that answer will identify whether or not there is a real risk that people affected by HLG's rezoning request would be denied an opportunity to participate in this process:

> (h) Are there now members of the public who were not sufficiently informed through the PC17 notification, submission and further submission processes of the live industrial zoning now sought by HLG?

[15] Legal Submissions on Behalf of Waipā District Council on Scope, Date 21 February 2023 at paragraph 8.
[16] *Clearwater Resort Ltd v Christchurch City Council*, High Court AP34/02.

Decision

15. As noted earlier, only after the Hearings Panel is first satisfied that it has jurisdiction to consider HLG's new rezoning request and then satisfied that that request is within scope of PC17, can the Panel then proceed to decide whether it should grant or decline that request. If the Hearings Panel, in the course of the hearing on PC17, reaches this third decision point then the following checklist of legal matters will apply to its consideration of HLG's revised submission.

Legal matters relevant to the Hearings Panel's consideration of submissions and evidence

16. The checklist of legal matters relevant to the Hearings Panel's consideration of submissions and evidence to be heard in this hearing was first compiled by the Environment Court in its *Long Bay-Okura* decision.[17] That checklist has subsequently been updated several times and is now recorded, in its revised form, in the Court's decision in *Colonial Vineyard*.[18] For the sake of brevity, a copy of the relevant paragraph from the Court's decision recording the checklist is **attached** to these legal submissions at **Annexure A**.

17. Applying the Court's checklist to PC17, the following observations are made at the outset of the hearing. The Hearings Panel must be satisfied that PC17:

    (a) Accords with and assists Council to carry out its functions under s31 of the RMA so as to promote the sustainable management of natural and physical resources in the Waipā District.[19] This includes the establishment and implementation of District Plan provisions to ensure there is sufficient development capacity in respect of business land to meet expected demand in the

[17] *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* EnvC A078/08 at [34].
[18] Colonial Vineyard Limited v Marlborough District Council [2014] NZEnvC 55 at [17].
[19] Section 74(1)(a) and (b) of the RMA.

District.[20] The statutory definition of 'business land' includes land in industrial zones;[21]

(b) Has been prepared in accordance with relevant regulations.[22] It is submitted that no current regulations are relevant to the Hearings Panel's consideration of PC17;

(c) Gives effect to relevant national policy statements, national planning standards and the RPS.[23] In addition to the discussion of these matters in the s42A Report[24] and acknowledging the expert planning opinions expressed on the same matters in the evidence filed on behalf of submitters, the relevance of the NPS-HPL and NPS-UD to PC17 is discussed further in these Legal Submissions below;

(d) Has been prepared having had regard to any proposed change to the RPS, as well as any relevant management plans and strategies.[25] These matters are addressed in the s42A Report[26] and again in the statements of evidence of expert planning witnesses called by some of the submitters;

(e) Takes into account any relevant planning document recognised by an iwi authority.[27] This matter is addressed in the s42A Report;[28]

(f) Has been examined under s32 (and s32AA) of the RMA to evaluate the extent to which the objectives of PC17 are the most appropriate way to achieve sustainable management,[29] and the

[20] Section 31(1)(aa) of the RMA.
[21] Section 30(5)(d) of the RMA.
[22] Section 74(1)(f) of the RMA.
[23] Section 75(3) of the RMA.
[24] s42A Report at para 4.2.1 to 4.7.3 and s42A Report Addendum para 4.1.3 to 4.1.42.
[25] Section 74(2) of the RMA.
[26] s42A Report at para 4.4.3 to 4.4.5.
[27] Section 74(2A) of the RMA.
[28] s42A Report at para 4.6.1 to 4.6.3.
[29] Section 32(1)(a) of the RMA.

policies, rules and other methods are the most appropriate methods to achieve those objectives.[30] This matter is addressed both in the s42A Report[31] and in these Legal Submissions below;

(g) In making the rules proposed in PC17, Council has had regard to the actual or potential adverse and positive effects on the environment of the activities regulated by those rules.[32]

Section 32 original evaluation and section 32AA further evaluation

18. Council was obliged to have particular regard to the original evaluation of PC17 under s32 of the RMA when it decided to proceed with PC17.[33] Council's decision to proceed[34] with PC17 triggered the requirement to publicly notify it for submissions.[35] The original evaluation report for PC17 was provided in the public notification bundle dated 30 September 2022 (**s32 Evaluation Report**).[36] The further evaluation required under s32AA of the RMA (**Further Evaluation Report**) is only required for those changes to PC17 that are proposed to the notified version of PC17 which was the subject of the original s32 Evaluation Report. The Further Evaluation Report can either be recorded in a specific report published when Council notifies its decision on PC17 or recorded in Council's decision itself provided that is done in sufficient detail to show that the further evaluation has been undertaken in accordance with the requirements of s32AA of the RMA.[37]

19. The Council, when having particular regard to both the original and further evaluations of PC17 under ss 32 and 32AA of the RMA, is required

[30] Section 32(1)(b) of the RMA.
[31] s42A Report para 4.1.1 to 4.1.8 and 6.10.2.
[32] Section 76(3) of the RMA.
[33] Clause 5(1)(a) of Schedule 1 of the RMA.
[34] 6 September 2022.
[35] 30 September 2022.
[36] Proposed Plan Change 17: Hautapu Industrial Zones incorporation Section 32 Evaluation Report, 30 September 2022: ECM 10881239 v19 FINAL Plan Change 17 & s32 - Aug 2022 (waipadc.govt.nz)
[37] Section 32AA(1)(d) of the RMA.

to examine the extent to which the objectives of PC17, as noted above in paragraph 1 of these Legal Submissions, are the most appropriate way to achieve the purpose of the RMA.

20. The level of detail required in the Further Evaluation Report must correspond to the scale and significance of the changes now proposed, through submissions, to the notified version of PC17[38]. The Council report and recommendations issued under s42A of the RMA in February 2023 (**s42A Report**) summarised the notified version of PC17 on the following basis:

    (a) No new objective is proposed to be introduced into the District Plan;

    (b) Two new policies specific to the Hautapu Industrial Area are proposed to be included in the District Plan which are, in turn, supported by amendments to existing rules and the introduction of a new rule, amendments to the Hautapu Industrial Structure Plan and District Plan maps; and

    (c) The rezoning of specified land.[39]

21. The only significant proposed changes between the notified version of PC17 assessed in the original s32 Evaluation Report and the changes now proposed to PC17 result from changes requested or matters raised by submitters. This includes HLG's original submission to rezone its land from Rural to Deferred Industrial Zone and its new request to rezone its land from Rural to live Industrial Zone. These are the changes that are required to be addressed in Council's Further Evaluation Report recorded, to date, in the addendum to the s42A Report filed on 19 May

[38] Section 32AA(1)(c) of the RMA.
[39] Section 42A Hearing Report on Proposed Plan Change 17 Hautapu Industrial Zone, Appendix A – Recommended Tracked Changes to Waipā District Plan, 27 February 2023.

2023 (**s42A Report Addendum**)[40] and to be supplemented in expert evidence to be presented during the course of the hearing on PC17.

Application of the NPS-HPL

22. The Environment Court in its decision in *Balmoral Developments (Outram) Ltd v Dunedin City Council*[41] issued just before Easter this year, considered whether the council had to apply the requirements of the NPS-HPL to highly productive land which the appellant sought to rezone through its submission on a council plan change which, like PC17, had been notified before the commencement of the NPS-HPL. The requirements of the NPS-HPL do not apply to the rezoning of highly productive land that satisfies the exemption in cl 3.5(7)(b) of the NPS:

> (7) Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:
>
> (a) is:
> (i) zoned general rural or rural production; and
> (ii) LUC 1, 2, or 3 land; but
>
> (b) is not:
> (i) identified for future urban development; or
> (ii) **subject to a Council initiated**, or an adopted, **notified plan change to rezone it** from general rural or rural production to urban or rural lifestyle.
>
> [Our emphasis added.]

23. The appellant argued that because its submission (and subsequent appeal) sought the urban rezoning of its rural-zoned land in response to a council-initiated and notified plan change, the land was within the scope of the NPS-HPL's exemption clause. Council argued that the appellant's land did not satisfy the exemption because the NPS-HPL distinguishes between a council-initiated and notified plan change which

[40] Addendum to Section 42A Hearing Report on Proposed Plan Change 17 Hautapu Industrial Zone, 19 May 2023.
[41] [2023] NZEnvC 59

proposes to rezone rural land and a submission on that notified plan change that requests rezoning of that rural land.

24. While the Court in *Balmoral* accepted that the appellant's rezoning submission was part of a council plan change process in a broad sense, the Court stated that this was not the same as the appellant's land being "subject to" a council plan change which itself proposed the rezoning of that land. On this basis, the Court held that a submission on a plan change requesting the rezoning of land was not sufficient to exempt that land from the NPS-HPL:

> [63] To come within the exemption, it is implicit that **the rezoning** to urban or rural lifestyle **has to be reflected in the plan change initiated by the Council** when it is initiated, that is, **at the notification stage**. The reference to "that proposes" in the exemption is a reference back to the council-initiated plan change and **not to the submissions or appeals lodged** in the course of the Sch 1 RMA process that follows notification.
>
> [64] Moreover urban and/or rural lifestyle zones being sought for the land are only potential outcomes of the appeals. The zones by the appellants do not form any part of the plan change until (and only if) the court directs the council to rezone the land having held a hearing and considered all relevant matters, and decided the appeals in favour of the appellants.
>
> [Our emphasis added.]

25. Applying the Court's reasoning in *Balmoral* to the land that HLG seeks to rezone from a Rural to deferred Industrial Zone, or now to live Industrial Zoning, it is submitted that:

(a) PC17 is a Council-initiated and notified plan change;

(b) The rezoning of the HLG land was not proposed in the notified version of PC17;

(c) The rezoning of the HLG land to deferred industrial is proposed through HLG's original submission on the notified version of PC17, and the rezoning of the HLG land to live industrial has been very

recently proposed through a change to HLG's original submission six months after the close of the further submission period;

(d) The HLG land is not, therefore, "subject to" PC17;

(e) The HLG land does not, therefore, come within the exemption in clause 3.5(7)(b) of the NPS-HPL; and

(f) It is therefore necessary for Council, through the Hearings Panel, to apply the requirements of the NPS-HPL to the proposed rezoning of the HLG land to either a Deferred Industrial Zone or a live Industrial Zone.

26. In terms of HLG's original submission to rezone its land from a Rural to Deferred Industrial Zone, the s42A Addendum Report concluded that, assuming detailed design of infrastructure and specific rules are not required for the Deferred Industrial zoning sought by HLG until a future plan change triggers live Industrial zoning,[42] the Deferred Industrial rezoning of the HLG land satisfied the three statutory criteria in clause 3.6(1) of the NPS-HPL: [43]

> 3.6 Restricting urban rezoning of highly productive land
>
> (1) Tier 1 and 2 territorial authorities may allow urban rezoning of highly productive land only if:
>
> > (a) the urban rezoning is required to provide sufficient development capacity to meet demand for housing or business land to give effect to the National Policy Statement on Urban Development 2020; and
> >
> > (b) there are no other reasonably practicable and feasible options for providing at least sufficient development capacity within the same locality and market while achieving a well-functioning urban environment; and
> >
> > (c) the environmental, social, cultural and economic benefits of rezoning outweigh the long-term environmental, social, cultural and economic costs associated with the loss of highly productive land for land-based primary production, taking into account both tangible and intangible values.

[42] s42A Report Addendum at para 4.1.2.
[43] s42A Report Addendum at para 4.1.12, 4.1.17 and 4.1.26.

> (2) In order to meet the requirements of subclause (1)(b), the territorial authority must consider a range of reasonably practicable options for providing the required development capacity, including:
>
> (a) greater intensification in existing urban areas; and
>
> (b) rezoning of land that is not highly productive land as urban; and
>
> (c) rezoning different highly productive land that has a relatively lower productive capacity.
>
> (3) In subclause (1)(b), development capacity is within the same locality and market if it:
>
> (a) is in or close to a location where a demand for additional development capacity has been identified through a Housing and Business Assessment (or some equivalent document) in accordance with the National Policy Statement on Urban Development 2020; and
>
> (b) is for a market for the types of dwelling or business land that is in demand (as determined by a Housing and Business Assessment in accordance with the National Policy Statement on Urban Development 2020).

27. This allows Council to proceed to consider rezoning the highly productive land owned by HLG members from Rural to Deferred Industrial Zone, provided the requirements of s32AA of the RMA are satisfied. These requirements are documented in the Further Evaluation Report matters assessed in the s42A Report Addendum.[44] Overall, the s42A Report Addendum on this basis recommended that Council rezone the HLG land from Rural to Deferred Industrial Zone.[45]

28. Following HLG's more recent request to rezone its land from Rural to a live Industrial Zone, a clear position and recommendation from the s42A Team on whether this rezoning proposal can satisfy the three statutory criteria in clause 3.6(1) of the NPS-HPL has yet to land, however this will be reported and presented to the Hearings Panel in the course of the PC17 hearing.

[44] s42A Report Addendum at para 4.1.32 to 4.1.44.
[45] S42S Report Addendum at para 4.1.45.

Application of the NPS-UD

29. The HLG request to now rezone its land to live Industrial Zoning does, it is submitted, raise the prospect that Objective 6 and Policy 8 of the NPS-UD should now be elevated in the range of considerations informing the Hearings Panel's ultimate decision on the revised HLG submission. Those NPS-UD provisions require that:

> **Objective 6:** Local authority decisions on urban environments that affect urban environments are:
>
> (a) integrated with infrastructure planning and funding decisions; and
>
> (b) strategic over the medium and long term; and
>
> (c) responsive, particularly in relation to proposals that would supply significant development capacity.
>
> **Policy 8:** Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is:
>
> (a) unanticipated by RMA planning documents; or
>
> (b) out-of-sequence with planned land release.

30. As we have previously noted in our opening legal submissions to Council in the context of the recent hearing on Proposed Private Plan Change 20 to the District Plan,[46] Policy 8 of the NPS-UD has resulted in proposed changes to both the RPS[47] and the District Plan[48]:

> 3.3 To implement Policy 8, clause 3.8(8) provides that:
>
> > (1) Every regional council must include criteria in its regional policy statement for determining what plan changes will be treated, for the purpose of implementing Policy 8, as adding significantly to development capacity.
>
> 3.4 The criteria required by clause 3.8(3) has recently been included in the Waikato Regional Policy Statement (WRPS) by Change 1 which was publicly notified on 18 November 2022…
>
> 3.5 Change 1 includes criteria for assessment of out of sequence or unplanned development at APP11 and APP13…

[46] Legal Submissions of Counsel for Waipā District Council, Dated 16 March 2023, paragraphs 3.3 to 3.6.
[47] Proposed Plan Change 1.
[48] Proposed Plan Change 26.

> 3.6 The following policy has been proposed to be added to the District Plan by Proposed Plan Change 26 (notified 19 August 2022):
>
> *Policy – Out of sequence and out of zone plan changes*
>
> 1.3.3.2 To have regard to potential plan changes that are otherwise not enabled or not in sequence with the planned release of land where that plan change would:
>
> (a) Contribute to a well-functioning urban environment; and
>
> (b) Provide the necessary infrastructure required for the proposed development; and
>
> (c) Be well connected to public transport and transport corridors; and
>
> (d) Provide significant development capacity.

31. As noted by Ms Andrews for Waikato Regional Council,[49] Proposed Change 1 to the RPS was notified on 18 October 2022 for submissions and a hearing on those submissions was held on 8 and 9 May. That hearing, it is understood, resumes on the same day as these Legal Submissions are filed, being 9 June 2023. The Hearings Panel will also be aware that Council's Proposed Plan Change 26 to its District Plan, the intensification planning instrument Council was required to notify under s80F(1)(a) of the RMA, was notified for submissions on 19 August 2022 and a two-staged hearing commenced on 14 February and recently adjourned on 2 May 2023 (pending the filing of closing legal submissions and more recent legal submissions responding to a caselaw enquiry by the Hearing Panel).

32. Against this background, the respective changes to the RPS and District Plan to implement Policy 8 of the NPS-UD are informative but do not yet carry significant statutory weight. Nevertheless, commentary on these provisions from HLG in the course of the hearing may yet assist the s42A Report Team to form a final recommendation to the Hearings Panel on the revised HLG submission to rezone its land to a live Industrial Zone.

[49] Statement of Evidence of Katrina Rose Andrews for the Waikato Regional Council, Planning, Dated 26 May 2023 at

Evidence to be called by Council

33. The following expert witnesses and Council officers have filed evidence for Council, including through Joint Witness Statements, pursuant to the Hearings Panel's timetable directions and will appear before the Hearings Panel to address any required updates to their evidence, answer the Panel's questions and provide clarification where required:

(a) Neda Bolouri, s42A Report author, Consultant Planner at Beca Limited;

(b) Britta Jensen, s42A Report Appendix B: PC17 Hautapu Industrial Three Waters Evidence author, Managing Director and Principal Engineer, Te Miro Water Consultants;

(c) Mark Apeldoorn, s42A Report Appendix D: PC17 Hautapu Industrial – Transportation Review, Assessment and Recommendations author, Practice Leader Transportation Advisory, Stantec;

(d) Rhulani Mothelesi, s42A Report Appendix D: PC17 Hautapu Industrial – Transportation Review, Assessment and Recommendations author, Senior Traffic Engineer, Stantec;

(e) Tony Coutts, Principal Engineer for Growth, Waipā District Council; and

(f) David Totman, Principal Policy Advisor, Strategy, Waipā District Council.

Signed this 9th day of June 2023

Theresa Le Bas.

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T Le Bas & K Goss
Counsel for Waipā District Council

Annexure A

Excerpt from the Environment Court's decision in *Colonial Vineyard*.

1.4 What matters must be considered?

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*[14] the Environment Court listed a "relatively comprehensive summary of the mandatory requirements" for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council ("High Country Rosehip")*[15]. We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions[16] since *High Country Rosehip*[17]:

A. General requirements

1. A district plan (change) should be designed to **accord with**[18] — and assist the territorial authority **to carry out** — its functions[19] so as to achieve the purpose of the Act[20].
2. The district plan (change) must also be prepared **in accordance with** any regulation[21] (there are none at present) and any direction given by the Minister for the Environment[22].
3. When preparing its district plan (change) the territorial authority **must give effect** to[23] any national policy statement or New Zealand Coastal Policy Statement[24].
4. When preparing its district plan (change) the territorial authority shall:
   (a) **have regard to** any proposed regional policy statement[25];

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14 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

15 *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

16 Some additions and changes of emphasis and/or grammar are not identified.

17 Noting also:
   (a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;
   (b) that the list in D has been expanded to cover fully the 2005 changes.

18 Section 74(1) of the Act.

19 As described in section 31 of the Act.

20 Sections 72 and 74(1) of the Act.

21 Section 74(1) of the Act.

22 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

23 Section 75(3) RMA.

24 The reference to "any regional policy statement" in the *Rosehip* list here has been deleted since it is included in (3) below which is a more logical place for it.

25 Section 74(2)(a)(i) of the RMA.

(b) **give effect to** any operative regional policy statement[26].

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[27]; and
   (b) **must have regard to** any proposed regional plan on any matter of regional significance etc[28].
6. When preparing its district plan (change) the territorial authority must also:
   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[29] 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[30];
   - **take into account** any relevant planning document recognised by an iwi authority[31]; and
   - not have regard to trade competition[32] or the effects of trade competition;
7. The formal requirement that a district plan (change) must[33] also state its objectives, policies and the rules (if any) and may[34] 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[35].

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[36];
10. Each proposed policy or method (including each rule) is to **be examined, having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives[37] of the district plan **taking into account**:
    (i) the benefits and costs of the proposed policies and methods (including rules); and
    (ii) 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[38]; and
    (iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment[40].

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26 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
27 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
28 Section 74(2)(a)(ii) of the Act.
29 Section 74(2)(b) of the Act.
30 Section 74(2)(c) of the Act.
31 Section 74(2A) of the Act.
32 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.
33 Section 75(1) of the Act.
34 Section 75(2) of the Act.
35 Section 74(1) and section 32(3)(a) of the Act.
36 Section 75(1)(b) and (c) of the Act (also section 76(1)).
37 Section 32(3)(b) of the Act.
38 Section 32(4) of the RMA.
39 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
40 Section 76(3) of the Act.

12. Rules have the force of regulations[41].
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[42] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land[43].
15. There must be no blanket rules about felling of trees[44] in any urban environment[45].

E. Other statues:
16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)
17. On appeal[46] the Environment Court must have regard to one additional matter — the decision of the territorial authority[47].

[18] In relation to A above:

(1) it is expressly within the prescribed functions of the council to control[48] the actual or potential effects of the use, development and protection of land by establishing and implementing[49] objectives, policies and rules. Part 2 of the Act is considered later;
(2) there are no directions from the Minister for the Environment;
(3) no national policy statement is relevant, nor is the NZ Coastal Policy Statement;
(4) we outline the relevant provisions in the operative regional policy statement in Part 2 of this Decision;
(5) the regional plan is the district plan in this case because, as a unitary authority the Marlborough District Council has prepared a combined plan[50];
(6) none of the witnesses identified any relevant matter under this heading;
(7) section 75(2) would be satisfied by acceptance or refusal of PC59.

We will return to the issue of whether the plan change achieves the purpose of the RMA at the end of this decision.

[19] Item B is irrelevant since objectives of the district plan are not sought to be changed by the plan change as notified.

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41 Section 76(2) RMA.
42 Section 76(2A) RMA.
43 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.
44 Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
45 Section 76(4B) RMA — this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
46 Under section 290 and Clause 14 of the First Schedule to the Act.
47 Section 290A RMA as added by the Resource Management Amendment Act 2005.
48 Section 31(1) RMA.
49 Section 31(1)(b) RMA.
50 Chapter 1 para 1.0 [WARMP p 1-1].