Before a Hearings Panel appointed by Manawatū District Council

In the matter of	the Resource Management Act 1991 (RMA)
And	
In the matter of	a request by Te Kapitī Trust to change the Manawatū District Plan under clause 21 of Schedule 1 of the RMA (Private Plan Change 1)

Reply Submissions for Requestor

Dated 8 June 2023

May it please the Hearings Panel

1. This matter was heard on 30 May 2023. At the conclusion of the hearing, the Panel invited the Trust to provide a track change version of private plan change 1 (PC1) to the Manawatū District Plan (MDP), and its right of reply addressing various matters raised at the hearing, including scope for any suggested changes to PC1.

2. The planning witnesses, Ms Anstey and Mr Batley, undertook conferencing on 1 June 2023. Their joint witness statement (JWS), together with a track change version of PC1 is filed together with these submissions.

3. The matters raised at the hearing requiring a response were as follows:

   (a) A request for an updated version of the *Colonial Vineyard* test for plan changes. This is set out in Attachment A (a word version will also be provided through the Hearings Administrator);

   (b) The relevance of Plan Change 3 to the Horizons Regional Policy Statement (RPS PC3). An assessment of PC1 against RPS PC3, together with commentary as to the weight the planners consider should be applied to it, is included in the JWS. I do not address this further;

   (c) How the open space / wetland connection on the part of the Structure Plan zoned Rural (Rural Lot) will be secured by PC1. This is addressed by the track change version of PC1 and explained in the JWS. I comment on the scope for those recommended changes below;

(d) A comment from the Panel that standards in PC1 should not create a 'floating' activity status, and a request for comment on the requirement for development to be 'generally in accordance with' the structure plan. These issues are addressed through the track change version and are addressed in the JWS. I comment on scope for those changes below.

Scope for modifications to PC1

Modifications proposed

4. Through the s 42A report and in Ms Anstey's planning evidence, some minor changes to PC1 were suggested in response to submissions. The track change version filed with the JWS identifies these with comment boxes by reference to the submission to which they respond.

5. The additional modifications proposed to PC1 in the JWS are as follows:

   (a) Amendment to the final paragraph of the Introduction section to proposed Chapter 17 to clarify that the chapter applies to 'development' as well as subdivision and to the underlying Rural Zone, as well as the Village Zone;

   (b) Deletion of the words "and zoned Village Zone" in DEV-R1, to reflect the intention that this rule will also apply to the land within the Structure Plan zoned Rural;

   (c) Addition of DEV-R2 to provide:

   > Any activity within the Rongotea South Development Area as shown in Appendix 17A which is zoned Rural 2 that meets performance standards DEV S2 and S6.

   (d) Various modifications to DEV1-S6 – Comprehensive Development Plan;

   (e) Various modifications to DEV1-S8 – Stormwater Management Plan;

6. These changes fall into one of four categories, being changes to:

   (a) Apply Chapter 17 to the Rural Lot to ensure the outcomes sought for the wetland and related public open space are achieved (changes (a), (b) and (c) above);

   (b) Improve clarity and ensure the standard does not create a 'floating activity status' (change (d)); and

   (c) Ensure the outcomes sought in relation to stormwater management are achieved (change (e));

7. I address the scope for each of these categories below.

Jurisdiction to make changes

8. There are two main avenues for making changes to PC1:

   (a) Clause 16(2), First Schedule, RMA, which provides for amendments to alter information where the alteration is of minor effect; and/or

   (b) Clause 10, First Schedule, RMA, which provides that a local authority must give a decision on the provisions and matters raised in submissions.

9. In terms of changes made under cl 16(2), in *Re Christchurch City Council* (W177/96) the Environment Court considered a number of 'errata' identified in the Christchurch City District Plan and considered which could be corrected under cl 16(2). In terms of alterations to information, it held (at p10):

> In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16. Although to put it in that abstract way may seem unhelpful, I rather think that like pink elephants the neutral changes will be easier to recognise than to describe.

10. As discussed below, the changes proposed by the planners are wholly internal in that they only apply to land owned by the requestor and are 'neutral' from the perspective of the wider public.

11. In terms of changes that can be made pursuant to cl 10, a useful analysis of the caselaw is set out in In *Environmental Defence Society Inc v Otorohanga District Council* [2014] NZEnvC 70. It noted the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 had:

> … rejected the submission that the scope of the local authority's decision-making under clause 10 is limited to no more than accepting or rejecting a submission, holding that the word "regarding" in clause 10 conveys no restriction on the kind of decision that could be given. The Court observed that councils need scope to deal with the realities of the situation where there may be multiple and often conflicting submissions prepared by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.

12. The Court also referred to Pankhurst J's observation in *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 at 413 that:

> … it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety."

13. It then summarised the two "fundamental principles" for determining whether a submission provides jurisdiction for a change to a plan as being (at [18]):

    (i) The Court cannot permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected; and

    (ii) Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the appeal are not subverted by an unduly narrow approach.

14. I consider the proposed amendments against these principles below.

Application to the Rural Lot

15. PC1 seeks to provide for the creation of new public open space in the vicinity of the natural inland wetland, and for restoration of that wetland. That this is an outcome sought by PC1 is clear from:

    (a) The Introduction to Chapter 17, which refers to the defining elements of the structure plan and associated provisions as including "*The creation of new public reserve areas along waterways and in the vicinity of the natural inland wetland*";

    (b) Depiction of an 'Open Space/Reserve' area and 'Wetland Area' on the proposed Rongotea South Structure Plan;

    (c) Proposed policy DEV-P4 which seeks to "*Ensure the subdivision and development within Rongotea South Development Area…provides for biodiversity improvements through the creation of native riparian and wetland planting at appropriate locations within reserve areas…*"

    (d) The reservation of discretion over provision of open space (MD09) and whether a proposal is in general accordance with the Structure Plan (MD012).[1]

16. The notified version of PC1 sought to achieve these outcomes primarily by making subdivision within the Village Zone area at least Restricted Discretionary, meaning any application would need to show it achieved the outcomes, including the objective and policies of Chapter 17, set out above.[2] Any application that did not show and provide for the open space and wetland area as anticipated would be

1 Note the numbering and wording referenced is from the JWS version, but the content reflects the notified version regardless.

2 I note that for Restricted Discretionary activities, objectives and policies relating to the matters over which discretion has been reserved are required to be had regard to under s 104(1)(b)(vi). See *Edens v Thames Coromandel District Council* [2020] NZEnvC 13 at [117] - [126].

inconsistent with the Structure Plan and the objective and policies, and therefore would be unlikely to be granted consent.

17. Land use within the Village Zone area is proposed to be controlled by the Village Zone provisions. As subdivision almost inevitably precedes any development in reliance on the zone rules, there is negligible risk of permitted or controlled activities occurring on that land that would compromise the ability to achieve the outcomes sought by PC1.

18. Any subdivision of the Rural Lot would be Discretionary.[3] For Discretionary activities, all relevant objectives and policies are required to be had regard to, pursuant to s 104. For land within the Structure Plan area, this would include the objective and policies in proposed Chapter 17. Any subdivision of the Rural Lot that was inconsistent with the Structure Plan would again likely be declined. The same would apply to any land use seeking to establish on that Lot that had an activity status of Discretionary or higher.

19. At the hearing, Commissioner McMahon queried how land uses on the Rural Lot might be managed, and how the outcomes sought by the Structure Plan could be assured in the absence of specific rules regulating land uses on that site.

20. This is acknowledged as a valid concern, albeit one that is highly unlikely to occur in reality.[4] For instance, up to two dwellings (Rule B3.1.1(x)), and one family flat (B3.1.1(xi) would be a permitted activity on the Rural Lot, which, if built within the Structure Plan area, would compromise the ability to deliver the Structure Plan.[5]

21. In their post-hearing conferencing, the planners agreed that the provisions of chapter 17 could be improved to clarify the intention to ensure delivery of the wetland / open space aspects of the Structure Plan on the Rural Lot. Those amendments are outlined above and in the track change version. They essentially seek to have Chapter 17 apply to subdivision and development of the Rural Lot to

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3 There is provision for controlled activity subdivision within the Rural 2 Zone however the Rural Lot is not eligible for this category of subdivision.

4 Such an outcome would be highly unlikely to occur, given the Trust owns the Rural Lot and if it was to allow buildings within the Structure Plan area, it would be compromising its ability to develop the Village Lot, because it would be unable to meet requirements to show development was occurring in general accordance with the Structure Plan and that such development would meet the objectives and policies of Chapter 17.

5 Note however that the NES-FM would require consent for any building in proximity to the natural wetland, and presumably this would face significant hurdles to the grant of consent.

ensure PC1 gives effect to DEV-O1 and DEV-P1 (which refer to providing development in accordance with the Structure Plan), and particularly DEV-P4, which specifically refers to ensure subdivision *and* development within the Structure Plan area achieve certain outcomes.

22. It is submitted that the changes are sufficiently minor as to be able to be made under cl 16(2). The changes sought do not affect the rights of any member of the public but are restricted to land owned by the requestor. As the requestor has always proceeded on the basis that the intention is to give effect to the Structure Plan, including by provision of the open space and provision for protecting and enhancing the wetland, the changes sought are, in my submission, properly seen as minor changes of information in PC1 with neutral effect vis a vis the public, but which are consistent with obligations under s 75 (1)(c) RMA that rules are to implement policies.

23. In the alternative, there is scope to make the changes in:

    (a) The submission by Rongotea Lions Club which relates to "*Wetland development Banks rd Rongotea"* and seeks the following relief:

        > We seek a positive outcome for the endeavours of Duncan and Susan Chetham.

    (b) The submission by Horizons Regional Council which seeks the following decision:

        > …the applicant to confirm how the [wetland] 'restoration' will be undertaken on the existing natural wetland, which by its definition has no requirement for restoration.

24. Both seek to ensure the positive outcomes proposed by PC1 in relation to the wetland area are delivered.

25. Applying the principles set out in *Otorohanga*, the only person affected by the proposed changes (in any limiting way) is the Trust, as requestor. They have had full opportunity for participation and through these submissions confirm that the changes sought simply better reflect the intent of the Structure Plan and PC1. The rules do not apply beyond the subject site and no other person could be said to be affected (other than in an entirely positive way).

26. The second principle supports reading the broad relief sought by the Lions and Horizons in such a way as to enable wording amendments that secure positive

outcomes for the wetland, as is currently proposed. The amendments sought seek to achieve that general relief sought, noting that *Countdown* and *Otorohanga DC* both confirm the relief need only be "fairly and reasonably" raised by the submissions, with specific wording not being required in the relief sought.

Clarification to DEV1-S6 – Comprehensive Development Plan

27. DEV1-S6 requires that any application for development or subdivision have a Comprehensive Development Plan which meets various criteria.

28. As a standard, the meeting of which affects activity status, it is important that there essentially be 'yes/no' answers to whether the standard is achieved. The planners have suggested various amendments to remove any potential ambiguity or discretion from the various criteria. The amendments do not affect the substance of the requirement but fall within the cl 16(2) modifications to information of minor effect. The changes are entirely neutral, and there can be no suggestion that anyone is prejudiced by the minor changes proposed.

Amendment to DEV1-S8 – Stormwater Management Plan

29. DEV-S8 requires that any application for subdivision consent must include a stormwater management plan including various details.

30. The planners have agreed minor amendments to this standard to ensure the intended outcome is achieved, namely that the plan will cover the entire Development Area, rather than a smaller area being treated in isolation.

31. The changes are amendments to information of minor effect, and do not affect land outside that owned by the requestor.

32. Alternatively, there are a number of submissions concerning stormwater management for the Development Area, and seeking to ensure the area is self contained and appropriately serviced for stormwater.[6] The amendments proposed seek to achieve those outcomes and scope for the changes can be found in those submissions if necessary.

[6] See submissions of Marti Hodgins, Graham Edwards and Horizons Regional Council.

Conclusion

33. It is submitted that the changes proposed by the planners are sensible and logical modifications to ensure the wording of Chapter 17 achieves the overall objectives and purpose of PC1. There is no question of the amendments affecting the rights of anyone other than the Trust, as requestor and landowner. They simply seek a better outcome overall, as sought by the Trust and submitters.

34. In the event that the Panel considers it lacks scope to make the changes sought, then the Trust maintains its position that the appropriate outcome is for PC1 to be approved. The changes proposed are minor and are essentially for clarification, rather than being required to achieve the purpose of the RMA. PC1 still better achieves the purpose of the Act without the suggested amendments than would leaving the land zoned Rural.

Asher Davidson
Counsel for Te Kapitī Trust
8 June 2023

Attachment A – Adapted checklist from *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 and incorporating more recent amendments to the RMA as applicable to PC1

A. General requirements

1. A territorial authority must prepare and change its district plan in **accordance with**[7] — and assist the territorial authority to **carry out**[8] — its functions[9] so as to achieve the purpose of the Act.[10]

2. The district plan must also be prepared **in accordance with** any national policy statement, New Zealand coastal policy statement, a national planning standard,[11] regulation(s)[12] and any direction given by the Minister for the Environment.[13]

3. When preparing its district plan (change) the territorial authority **must give effect** to any national policy statement and New Zealand Coastal Policy Statement[14] and a national planning standard.[15]

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

   (a) **have regard to** any proposed regional policy statement;[16]

   (b) **give effect to** any operative regional policy statement.[17]

5. When preparing its district plan 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[18] 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;[19]

7 Section 74(1) RMA
8 Section 72 RMA
9 Section 31 RMA
10 Sections 72 and 74(1) RMA.
11 Section 74(1)(ea) RMA, introduced 19 April 2017.
12 Section 74(1)(f) RMA
13 Section 74(1)(c) RMA
14 Section 75(3) RMA.
15 Section 75(3)(ba), introduced 19 April 2017.
16 Section 74(2)(a)(i) RMA
17 Section 75(3)(c) RMA
18 Section 74(2)(b) RMA
19 Section 74(2)(c) RMA

(b) **have regard to** any emissions reduction plan made in accordance with section 5ZI of the Climate Change Response Act 2002 and any national adaptation plan made in accordance with section 5ZS of the Climate Change Response Act 2002;[20]

(c) **take into account** any relevant planning document recognised by an iwi authority;[21] and

(d) not have regard to trade competition or the effects of trade competition.[22]

6. The formal requirement that a district plan must also state its objectives, policies and the rules (if any)[23] and may state other matters.[24]

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.[25]

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;[26]

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:[27]

- Identifying other reasonably practicable options for achieving the objectives;[28] and
- Assessing the **efficiency and effectiveness** of the provisions in achieving the objectives by:[29]
  - Identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that

20 Section 74(2)(d) and (e) RMA, introduced 30 November 2022.
21 Section 74(2A) RMA.
22 Section 74(3) RMA.
23 Section 75(1) RMA.
24 Section 75(2) RMA.
25 Sections 74(1) and 32(1)(a) RMA
26 Section 75(1)(b) and (c) RMA.
27 Section 32(1)(b) RMA, as of 3 December 2013 (after the hearing of *Colonial Vineyard*).
28 Section 32(1)(b)(i) RMA
29 Section 32(1)(b)(ii) RMA

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;[30] and

(ii) employment that are anticipated to be provided or reduced.[31]

- If practicable, quantify the benefits in costs referred to above.[32]
- 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;[33]

- Summarising the reasons for deciding on the provisions;[34]
- 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.[35]

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.[36]

12. Rules have the force of regulations.[37]

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.[38]

30 Section 32(2)(a)(i)
31 Section 32(2)(a)(ii) RMA
32 Section 32(2)(b) RMA.
33 Section 32(2)(c) RMA.
34 Section 32(1)(b)(iii) RMA.
35 Section 32(4) RMA.
36 Section 76(3) RMA.
37 Section 76(2) RMA.
38 Section 76(2A) RMA.

14. There are special provisions for rules about contaminated land.[39]

15. There must be no blanket rules about felling trees in any urban environment.[40]

E. Other statues:

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

39 Section 76(5) RMA.
40 Section 76(4A) and (4B) RMA.