
BEFORE THE HEARINGS COMMITTEE

IN THE MATTER

of hearings on submissions
concerning the proposed One Plan
notified by the Manawatu-
Wanganui Regional Council

**SECTION 42A REPORT BY JOHN MAASSEN
FOR HORIZONS REGIONAL COUNCIL**



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Introduction

1. My name is John Maassen. I am a resource management lawyer. I have 20 years legal experience. I am a partner of the Manawatu and Central Region law firm Cooper Rapley. In the last decade I have undertaken work for at least six local authorities in the lower North Island and top of the South Island. I also regularly act as a commissioner having completed the Making Good Decisions Program which I co-presented on behalf of the Ministry for the Environment in the lower North Island.
2. I have been requested by Horizons Regional Council (HRC) to provide legal commentary on various issues raised in submissions. My report is confined to legal matters and not intended to be advocacy. My role is one of servant to the hearings committee. This report, of necessity, makes assumptions as to the nature and scope of issues that are advanced by the submitters and is therefore provisional only and may require refinement during the course of the hearing.
3. The matters upon which I comment are:
 - (a) consultation;
 - (b) section 32 analysis;
 - (c) comments specifically on matters raised in submissions by some Territorial Authorities (TA's); and
 - (d) evaluation methodology for proposed planning provisions.

Context

4. HRC has notified the Proposed One Plan (POP). The purpose of the hearing is to consider and determine submissions on POP.
5. The reasons POP was developed include:
 - (a) a desire for a simplified and easy to read document incorporating both the RPS and regional plans;
 - (b) greater understanding of relevant resources and their values and in particular rivers enabling a more integrated and comprehensive planning framework¹;
 - (c) failure to achieve improvements in water quality throughout the region;
 - (d) increasing demand for ground water and surface water resources;
 - (e) continuing decline in biodiversity;
6. In addition, HRC has a statutory obligation to review its plans every ten years². That requirement led to consideration of a comprehensive review of all planning instruments and the decision to promote POP.

¹ See schedule D POP and detail behind water management zones

² S.79 RMA

7. The process of preparing an RPS and/or plan is commenced by the preparation by a local authority of a proposed RPS or plan³. These documents are necessary for the proper discharge of region wide resource management functions and are different in character from private plan changes where they are initiated to address specific initiatives by individuals.
8. While the plans are prepared by HRC the process of inquiry by the hearing committee is not one where HRC is on trial. Rather, the process is established to determine the most appropriate policy framework to achieve the purpose of the Act. There is no burden of proof on any submitter or indeed on HRC. What is required is an evaluation on the totality of the evidence⁴. The hearings committee is acting as a regional planning authority⁵. The power of the committee however, is limited to responding to submissions and the relief sought is limited to the scope of submissions and any other modifications that can be fairly and reasonably described as being within the scope of those submissions.
9. The submission process provides for constructive engagement by interested parties. Because of:
 - (a) the mandatory requirements of the Act (including the requirement to meet the purpose of the Act and that regional councils discharge their functions);
 - (b) the process of submissions and further submissions; and
 - (c) the methodology required when evaluating submissions;

the implicit requirement of the Act is that submitters will propose reasonably detailed alternatives (ie: alternative objectives, policies and rules) (including do nothing which is an alternative) to those proposed by the local authority for consideration.

Consultation

10. Some submitters have questioned the sufficiency of consultation in the preparation of POP.
11. The sufficiency or otherwise of consultation is incapable of precise measurement. It is reasonable to expect submitters raising this issue to also explain how the contents of the POP would be different or should be different for the reasons explained above.
12. As a general proposition it is for HRC to decide how to observe statutory requirements for consultation⁶.
13. Clause 2 schedule 1 RMA requires in respect of the Regional Coastal Plan that there must be consultation with:

³ See schedule 1 clause 2 RMA

⁴ See for example *Foreworld Developments Ltd v. Napier City Council* W008/05 para 22, *Eldamos Investments v. Gisborne District Council* W47/05 para 129 and *Kerr Trusts v. Whangarei District Council* A060/2004

⁵ *Coromandel Watchdog of Hauraki Inc v. Ministry of Economic Development* 2008 RMA 77 para 22

⁶ See *Friends of Turitea Reserve Society Incorporated v. Palmerston North City Council* CIV-2006-454-879 dated 25 July 2007 High Court Baragwanath J. para 122

- (a) the Minister of Conservation;
 - (b) iwi authorities of the region;
 - (c) the board of any foreshore and seabed reserve in the region⁷;
14. Clause 3 RMA requires in respect of a proposed RPS or regional plan that consultation occur with:
- “(a) the Minister for the Environment;
 - (b) those ministers of the Crown who may be so affected by the policy statement or plan; and
 - (c) local authorities who may be so affected; and
 - (d) the tangata whenua of the area who may be so affected, through iwi authorities....[; and]
 - (e) the board of any foreshore and seabed reserve in the area.”
15. Clause 3(2) makes it plain that consultation with any other person is optional.
16. Clause 3(4) states:
- “In consulting persons for the purposes of sub-clause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.”
17. Common law principles of consultation are summarized in *Friends of Turitea Reserve Society Incorporated v. Palmerston North City Council*⁸ at 113-114 as follows:
- “[113]The common law principles were pleaded in addition to the requirements of the Reserves Act and the Local Government Act. In *Port Louis Corporation v. Attorney-General of Mauritius* [1965] AC 1111, 1124 (PC) Lord Morris of Borth-y-Gest outlined the common law requirements of consultation:
- The [consultees] must know what is proposed: they must be given a reasonable ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think.
- That decision was followed in *Wellington International Airport Ltd v. Air New Zealand* [1993] 1 NZLR 671 (CA). A clear theme is that interested parties must be provided with relevant information so as to know what is proposed. In *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 at 167 Webster J stated:
- ...it must go without saying that to achieve consultation sufficient information must be supplied by the consulting party to enable it to tender helpful advice...By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the party consulted might have relevant information or advice to offer.

⁷ See clause 2(2) schedule 1

⁸ CIV-2006-454-879 dated 25 July 2007 High Court, Baragwanath J.

And in *Wellington International Airport Ltd v. Air New Zealand* McKay J said at 676 that:

For consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.

[114] In *Hamilton City v. Electricity Distribution Commission* [1972] NZLR 605, 643 Richmond J said that the purpose of consultation is to give consultees "a reasonable opportunity of stating their views". Professor Joseph argues in this *Consultation and Administrative Law in New Zealand* (2nd ed) that the decision-maker's duty to disclose relevant material to interested parties derives from *audi alteram partem*, saying (at 23.4.2):

All relevant information must be disclosed to allow interested parties an opportunity to controvert or to correct the material in issue...

It is a prima facie breach of procedural fairness for a decision-maker not to disclose all relevant evidential material, whether the material becomes available before, during or after the hearing."

18. Clause 3(4) RMA requires compliance with section 82 LGA 2002. Those requirements are to be met in a manner determined by the local authority. The relevant parts of section 82 are set out below:

"Principles of consultation

- (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
 - (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
 - (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
 - (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
 - (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
 - (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:
 - (f) that persons who present views to the local authority should be provided by the local authority with information concerning both the relevant decisions and the reasons for those decisions.

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.” [Emphasis added]

19. Bettina Anderson has provided a s.42A report outlining the consultation undertaken by HRC as part of the POP development process. On the basis of the response she has provided that it is considered the requirements of the RMA have been met or exceeded.

Section 32 Analysis

20. Some submitters challenge the sufficiency or adequacy of the Council's section 32 analysis.
21. For the reasons explained in paragraph 9 it is reasonable to expect a submitter in addition to raising the adequacy of the analysis to explain how objectives, policies and rules or other methods would be different if the 'correct analysis' was carried out.
22. Section 32 was amended by the Resource Management Act 2003. In addition, section 32A was inserted. The purpose of the Resource Management Amendment Act 2003 was to simplify the requirements of the Act (including section 32) and provide a more efficient and less costly process for Councils⁹. Section 32 and 32A state:

“[32 Consideration of alternatives, benefits, and costs

(1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—

- (a) the Minister, for a national policy statement or [[a national environmental standard]]; or
- (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
- (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1); or
- (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of the Schedule 1.

(2) A further evaluation must also be made by—

- (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
- (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

(3) An evaluation must examine—

⁹ See explanatory note to Resource Management Amendment Bill (no 2) 2003 and in particular general policy statement.

- (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
 - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
- [[(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.]]
- (4) For the purposes of [[the examinations referred to in subsections (3) and (3A)]], an evaluation must take into account—
 - (a) the benefits and costs of policies, rules, or other methods; and
 - (b) 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.
 - (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.
 - (6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.]

[32A Failure to carry out evaluation

- (1) A challenge to an objective, policy, rule, or other method on the ground that section 32 has not been complied with may be made only in a submission under Schedule 1 or a submission under section 49.
- (2) Subsection (1) does not preclude a person who is hearing a submission or an appeal on a proposed plan, proposed policy statement, change, or variation, or a submission on a national policy statement or New Zealand coastal policy statement, from taking into account the matters stated in section 32.]”

23. It was once fashionable to make submissions critiquing a local authority's section 32 analysis without proposing an alternative planning framework (eg: alternative objectives, policies or rules). It was hoped that that would provide a jurisdictional ‘king hit’. That is the antithesis of the constructive approach contemplated by the Act. In that regard the Court of Appeal said in *Kirkland v. Dunedin City Council*¹⁰:

“[17] If a step, such as the carrying out of a cost benefit analysis is omitted or seriously inadequate, the draft plan may be flawed in material aspects. Nevertheless it does not appear to us that Parliament was of the view that if a step were omitted it ought to follow that the local authority should be required to begin again. Rather it would seem that Parliament anticipated that the flaw which results would be corrected by addressing the merits of the plan by means of the submission and referral process. In

¹⁰ 6NZED 723

s32(3)² it was stipulated that someone who had a complaint about the local authority's s32 process must pursue that complaint "only" by way of submission to the local authority. That is directed, we think, not only to preventing such challenges after a plan has come into force (for example, the defense of a prosecution for non-compliance) but also while the final form of the plan is being settled. The mandatory use of a submission for this purpose provides an opportunity for the Council to reconsider its s32 processes, before making a decision whether or not to modify the plan. The Council will take into account criticisms made by a submitter of its processes."

24. Section 32A builds upon the *Kirkland* decision by making it plain:
 - (a) that challenges to compliance with s.32 must be made within the context of a submission of a proposed plan (ie: there cannot be an ancillary attack outside the submission process);
 - (b) any challenge regarding compliance with s.32 should not be stand alone but in the context of the challenge to an objective, policy or rule;
 - (c) the hearing of submissions enables account to be taken again of the requirements of s.32.
25. S.32 analysis is therefore prominent in the evaluation of planning provisions at three stages;
 - (a) prior to notification of a proposed plan;
 - (b) when submissions are heard and determined;
 - (c) in the determination of any appeals to the Environment Court (the role of s.32 is evident for example in the *Eldamos* methodology).
26. There is no yard stick for what is a sufficient s.32 analysis. The documentary record of the analysis need only be a summary.
27. Because of the wide definition of the environment and because the individual costs and implications from resource management controls will vary perspectives on the appropriate planning framework will differ.
28. It is intrinsic in any submission opposing the proposed plan that the submitter disagrees that either the objectives are the most appropriate means of achieving the purpose of the Act or the policies and rules are efficient and effective. This opposition is sometimes dressed up as an argument about the sufficiency of the s.32 analysis but is in reality an argument about the appropriate outcome.
29. It is not proposed to comment further on this issue, until the precise scope of arguments on this subject have been heard. It is however, appropriate to briefly comment on the relevance of economics in the context of an evaluation of plan changes including section 32.
30. Economic themes are present in the RMA. The Acts purpose enables economic wellbeing amongst other things while recognising the requirement to do so in a way that the other legs of environmental justice are not compromised, namely;

- (a) the needs of future generations (intergenerational equity¹¹);
 - (b) ecosystemic health and resilience¹².
31. Other RMA references that raise economic themes are:
- (a) the efficient use and development of natural and physical resources; and
 - (b) benefit/cost analysis.
32. RMA controls place restrictions on property rights and therefore involve economic costs. These are relevant matters for consideration¹³.
33. Costs are not limited to restrictions on property rights. Where the activity impacts on the environment beyond a landowners property there are 'externalities' or external costs borne by the community.
34. It is not necessary for a s.32 analysis to provide an all embracing economic analysis of costs and benefits. That is because there are matters that do not lend themselves to economic evaluation. The reference to benefits and costs is in s.32(4). S.32(4) states:
- "For the purposes of [[the examination referred to in subsections (3) and (3A)]], an evaluation must take into account-
- (a) the benefits and costs of policies, rules or other methods; and
 - (b) 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"
35. It is significant that s.32(4):
- (a) does not expressly require the benefits and costs to be assigned economic values (indeed most planning instruments promulgated at national or regional levels do not assign economic values to benefits and costs); and
 - (b) that the CB analysis is limited to policies, rules and other methods, not objectives. The objectives are set based on whether they are the most appropriate to achieve the purpose of the Act. This demands an holistic assessment beyond economics.
36. Examples of relevant matters that do not readily lend themselves to economic quantification include:
- (a) amenity values – section 7(c);
 - (b) cultural relationships of Maori to resources – section 6(e); and
 - (c) intrinsic values of ecosystems – section 7(d)¹⁴.

¹¹ S.5(2)(a) RMA

¹² S.5(2)(b) RMA

¹³ See Easton B *Is the Resource Management Act Sustainable?* (1998) 129 *Planning Quarterly* 5 and Judge Jackson *The Role of Economics in the RMA (or visa versa)*, *NZ Journal of Environmental Law*, Volume 3 page 17.

37. To a significant degree, the benefit and costs will be gauged by:
- (a) scientific analysis regarding the health and functioning of ecosystems;
 - (b) the science on the impact arising from activities on the health and functioning of ecosystems; and
 - (c) the science on the impact of controls on the effectiveness and efficiency of resource use.

Submissions by some TA's

38. Some TA's have in their submissions raised questions as to the compliance of POP with the requirements of the RMA. Their concerns partially relate to the amalgamation of the proposed RPS with proposed regional plans. It is noted that Palmerston North City Council (the TA with the greatest population in the region) expressly endorses the consolidation of the RPS and regional plans into a single document.
39. As an example I refer to the submission from Horowhenua District Council. The issues raised have been distilled into three propositions:

Issue 1

- (a) There are no objectives in Part II (the Regional Plan); and/or

Issue 2

- (b) Objectives and policies of the RPS are also intended to be objectives and policies of the RPS and that is not in conformity with the Act since the objectives and policies of an RPS have a different purpose to those for a regional plan; and/or

Issue 3

- (c) POP fails to make a clear distinction between the objectives and policies of the RPS and regional plan. A clear distinction between the objectives and policies of the RPS and that of the regional plans is required:
 - (i) so that people can perform the statutory functions (such as TA's) to give effect to a RPS; and
 - (ii) so that planners can evaluate resource consent applications before TA's precisely; and
 - (iii) to comply with the 'top down' approach required in the preparation of regional plans.
40. These 3 issues are described in the submission as issues going to jurisdiction. The term 'jurisdiction' is one that is out of favour in administrative law as it is often used imprecisely and often conflates distinct questions. We discern two discrete issues. The first is whether or

¹⁴ See for example Curran S *The Preservation of the Intrinsic: Ecosystem Valuation in New Zealand* NZ Journal of Environmental Law volume 9, page 51

not mandatory statutory requirements are met. The second question is whether they are met in a way which best enables HRC to meet its statutory obligations. Only the former question can be characterised as jurisdictional. The second is a normative question based in part on best planning practice.

Section 78A RMA

41. POP incorporates in a single document two different components:

- (a) the RPS (Part I); and
- (b) regional plans including regional coastal plan (Part II).

The combining of the components is intended to provide an easy to use document that avoids unnecessary duplication and repetition that is unfortunately prevalent in New Zealand.

42. Section 78A was introduced into the RMA by the 2003 Amendment Act. It provides:

“[78A Combined regional and district documents

- (1) A local authority may prepare a document that meets the requirements of 2 or more of the following:
 - (a) a regional policy statement:
 - (b) a regional plan:
 - (c) a district plan.
- (2) Subsection (1) is subject to sections 60, 64, 65, and 73.]”

43. Section 78A was introduced as part of a suite of amendments to reduce costs for local authorities and the community and make the RMA more efficient. A one stop shop achieves this. It is explicit statutory recognition that a range of regional planning instruments can be proposed and considered as part of a single project. S.78A is not simply an administrative provision authorising discrete documents to be contained in one place. That hardly needs Parliaments authorisation. S.78A plainly,:

- (a) authorises contemporaneous as opposed to sequential preparation of an RPS and other regional plans; and
- (b) the combination of a regional policy statement with regional plans so as to avoid undue prolixity or repetition.

Background

44. Regional planning instruments fall into two classes:

- (a) regional policy statements;
- (b) regional plans.

The former is a high level policy document addressing resource management issues of the region and can relate to natural and physical

resource management functions within the jurisdiction of both TA's and RC's. RPS's relate to a RC's regional policy direction function. Regional plans are documents solely relating to the carrying out of regional council regulatory functions as expressed in section 65(1). They are discrete planning instruments and are treated as such in POP.

45. Regional Council's throughout the country confront different regional issues. Some, because of the metropolitan characteristics of their region or because of high growth must provide specific direction regarding TA's functions. For example in relation to urban growth, infrastructure and land use (see section 31(ga)), regional transportation and hazards. In the Manawatu-Wanganui region issues relating to land use and integration between land use and infrastructure are not great. For that reason most of the major resource management issues identified in POP have some relationship to HRC's specific function as a regulatory authority. Exceptions to this general proposition include landscape and hazard management.
46. Because of the key environmental issues confronting the Manawatu-Wanganui region and the fact that many of these can often only be responded to in the context of regional council planning functions it is inevitable that:
 - (a) the contents of the RPS and in particular objectives and policies have considerable application to regional plans; and
 - (b) regional plans can conveniently refer back to the objectives and policies of the RPS without reiterating them (after all regional plans must give effect to the RPS (see s.67(3))).

Issue 1

47. HDC asserts there are no objectives in Part 2 of the regional plan.
48. As a statement of fact this assertion is wrong. Chapter 11 contains its own objective (objective 11-1). In part that objective relates back to the RPS but there is a degree of inevitability about that for the reasons specified above. The regional plan also has its own set of policies (see 11.2.3)
49. I consider that the suggestion there are no objectives and policies in the regional plan (and therefore the regional plan does not meet the requirements of the RMA) is not valid.

Issue 2

50. The second issue is whether or not the objectives of the RPS should be the same as the objectives and policies of the regional plan since they have a different statutory purpose.
51. The first point is that the RPS and regional plans do not have the same objectives and policies. The best that can be said is that a central objective of the regional plans is to achieve the objectives and policies of the RPS. That however is entirely consistent with the requirement that regional plan give effect to a RPS. That is the virtue of a combined document in that there is transparent vertical integration of instruments in the hierarchy.

52. It is also necessary to examine the statutory differences between an RPS and a regional plan in the context of regional resource management issues that touch upon or concern regulatory regional functions. As stated earlier much of the resource management issues of the Manawatu-Wanganui region can only be addressed through regional plans. A brief review of relevant provisions is set out below.

"59 Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region."

And section 62 says:

"62 Contents of regional policy statements

(1) A regional policy statement must state—

- (a) the significant resource management issues for the region; and
- (c) the objectives sought to be achieved by the statement; and
- (d) the policies for those issues and objectives and an explanation of those policies; and" 62 (1) a, c and d"

53. The purpose of a regional plan is set out in section 63. Section 63(1) reads:

"63 Purpose of regional plans

(1) The purpose of the preparation, implementation, and administration of regional plans is to assist a regional council to carry out any of its functions in order to achieve the purpose of this Act."

Compulsory components of regional plan include those specified in section 67(1). Section 67(1) quotes:

"67 Contents of regional plans

(1) A regional plan must state—

- (a) the objectives for the region; and
- (b) the policies to implement the objectives; and
- (c) the rules (if any) to implement the policies."

54. Both the RPS and regional plans therefore have a common purpose of integrated management of natural and physical resources to achieve the single purpose of the Act. It is therefore not surprising that the regional plans objectives and policies refer back to the objectives and policies of the RPS.

Issue 3

55. This is not a jurisdictional issue. It is a question of the efficacy of POP from a planning perspective. Examples of alleged inefficacy include:
- (a) TA's will have difficulty understanding how to give effect to the RPS in the review and preparation of district plans because there is no discrete RPS; and
 - (b) Planners will in their evaluation of resource consents sought from a TA have difficulty identifying the RPS components relevant to their evaluation; and
 - (c) There is difficulty recognising the 'top down' approach operating in Part II because there are unclear linkages between Part I and Part II of POP.
56. It is noted that again the objection is very general and theoretical and does not demonstrate examples of particular concern that might be addressed through the plan process. This suggests a tactical as opposed helpful approach.
57. The combination of the RPS and the regional plans assists in achieving vertical integration of planning instruments and therefore is consistent with the 'top down' approach.
58. The requirement for TA's to give effect to an RPS was introduced by the 2005 Amendment Act. Prior to that a district plan could not be inconsistent with an RPS. This change probably reflects the increasing need for regional councils to provide overall strategic direction on regional resource management issues including those touching TA's functions. This is particular evident in metropolitan areas such as Auckland. The policies in the Auckland RPS relating to metropolitan urban limits are specific and prescriptive in character¹⁵. The requirement to 'give effect to' an RPS places a higher burden on TA's to implement regional planning directions. The term 'give effect to' harks back to the Town and Country Planning Act¹⁶. Case law from that period indicates that the meaning of the words 'give effect to' will depend on the particular context and the degree of specificity of the document required to give effect to.
59. It has already been noted that there are not many parts of Part I POP relevant to TA's functions. To the extent there is information in Part I that is relevant our opinion is that POP contains within each relevant section a clear statement of the division of roles between RC's and TA's. Thus, for example in the natural hazards context there is within Part I detailed amplification of the implications of the objectives and policies for TA's and the expected consequences that will follow. It is considered that a reasonably competent planner involved in the preparation of plans for TA's within the region would not have any special difficulty in understanding the requirements on TA's (within their statutory functions) to give effect to the RPS.

¹⁵ See for example Court of Appeal decision in *Auckland Regional Council v. North Shore City Council* [1995] NZRMA 424

¹⁶ S.37(1) TCPA 1977 stated: "In formulation the policy and particular objectives and purposes required by section 36 of this Act to be included in a district scheme, the council shall give effect to those provisions of any regional planning scheme in force in respect of its district."

60. It is considered Andrea Bell's evidence provides a useful perspective from an experienced strategic planner.

Requirements of RMA and Evaluation Methodology

61. The sole purpose of the RMA and its informing principles are in Part 2 of the Act.
62. Part 3 sets out the presumptions. In the absence of regional plans for example, the use of water and the discharge of contaminants would be prohibited. The regional plans set a framework in which those activities are classified. Reading sections 14 and 15 helps to understand the context.
63. The One Plan include a regional policy statement (RPS) and a regional plan. Understanding the distinction between the two is important.
64. In relation to RPS, sections 59, 61 and 62 are relevant to understand the purpose and scope of an RPS. An RPS is (or can be) relevant to all significant resource management issues in the region. TA's in the region will from time to time have to review their district plans. In doing so, they must give effect to a RPS (section 75(3)).
65. In relation to regional plans sections 65, 66, 67 and 68 are particularly relevant. Section 69 and 70 sets some basic rules or bottom lines for water quality and discharges.
66. The Resource Management Act contemplates a hierarchy of planning instruments as follows:
- (a) Part 2 RMA;
 - (b) National Policy Statements;
 - (c) Regional Policy Statements;
 - (d) Regional Plans;
 - (e) District Plans.

Within each of those planning instruments there is hierarchy as follows:

- (i) objectives;
 - (ii) policies;
 - (iii) rules (where applicable);
67. This approach has been described as a 'top down' approach by the High Court in *Beach Road Preservation Society Inc v. Whangarei District Council* [2001] NZRMA 176:

"The Act works from the most general to the most particular and each document along the way is required to reflect those above it in the hierarchy. It is a top-down approach."

68. In accordance with the hierarchy approach, the rules are the regulatory methods that are to achieve (efficiently and effectively) the objectives of the relevant plan (see section 32(3)(b)RMA). As Jackson ECJ. said in *Shore v. Selwyn District Council* (C183/00, 26 October 2000):

“the rules should not dictate the objectives and policies, but rather the other way around”

69. *Eldamos Investments Ltd v. Gisborne District Council* [W047/2005] provides a helpful summary of the approach to determination of proposed policy provisions. It was decided in the district plan context. What is known as the *Eldamos* formulation at para 128 is a succinct statement of the questions or decision maker must examine to answer. The statement is as follows:

“A. An objective in a district plan is to be evaluated by the extent to which:

1. it is the most appropriate way to achieve the purpose of the Act (s32(3)(a)); and
2. it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72) ; and
3. it is in accordance with the provisions of Part 2 (s74(1)).

B. A policy, rule or other method in a district plan is to be evaluated by whether:

1. it is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and
2. it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72);
3. it is in accordance with the provisions of Part 2 (s74(1)); and
4. (if a rule) it achieves the objectives and policies of the plan (s76(1)(b)).”

70. In the context of regional plans that methodology can be reformulated as follows:

“A. An objective in a regional plan is to be evaluated by the extent to which:

1. it is the most appropriate way to achieve the purpose of the Act (s32(3)(a)); and
2. it assists the regional authority to carry out its functions in order to achieve the purpose of the Act (s66 and s30); and
3. it is in accordance with the provisions of Part 2 (s66(1)).

B. A policy, rule or other method in a regional plan is to be evaluated by whether:

1. it is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and

2. it assists the regional authority to carry out its functions in order to achieve the purpose of the Act (s66);
 3. it is in accordance with the provisions of Part 2 (s66(1)); and
 4. (if a rule) it achieves the objectives and policies of the plan (s32(3)(b))."
71. The *Eldamos* methodology has been recognised by the Court of Appeal in *Coromandel Watchdog of Hauraki Incorporated v. Chief Executive of the Ministry of Economic Development*¹⁷.

John Maassen
Dated 20th May 2008

¹⁷ [2007] NZCA 473