BEFORE HEARING COMMISSIONERS
FOR THE MANAWATŪ-WHANGANUI REGIONAL COUNCIL

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ
MO TE KAUNIHERA Ā ROHE O MANAWATŪ-WHANGANUI

IN THE MATTER of the Resource Management Act 1991 ("**the Act**")

AND

IN THE MATTER of the hearing of Submissions and Further Submissions on Proposed Plan Change 3 (Urban Form & Development) to the Manawatū-Whanganui Regional Plan (Horizons One Plan)

LEGAL SUBMISSIONS TO ASSIST THE HEARING PANEL

Dated: 2 February 2024

CR Law
Cooper Rapley Lawyers
227-231 Broadway Avenue
PO Box 1945
Palmerston North
DX PP80001

N Jessen
06 353 5210
njessen@crlaw.co.nz

MAY IT PLEASE THE COMMISSIONERS:

A. INTRODUCTION

[1] These submissions are provided to supplement the s 42A report of the reporting officer Leana Shirley.

[2] Noting the experience and expertise of those sitting on this hearing panel in relation to the evaluation of Council initiated plan changes, counsel has assumed that a summary of the relevant legislative and evaluative provisions for plan changes is not necessary.

[3] Instead, these submissions target issues raised by submissions where the reporting officer has identified that legal analysis would be useful. In particular, the specific issues that have been highlighted as requiring consideration in these submissions relate to the following topics:

(a) The 'scope' of the plan change in the sense of determining what submissions can be considered 'on' the plan change for the purposes of cl 6 of Schedule 1 of the RMA.

(b) As a consequence of (a), what submissions can be considered on the plan change, and what submissions are considered to be out of scope as a result?

(c) What is the extent of the hearing panel's obligation to give effect to other National Policy statements, including the National Policy Statement for High Productive Land, in preparing this plan change?

(d) What does the term 'minimise' mean, in the context that it is proposed to be used in this plan change?

[4] These submissions do not account for any legal arguments that may be given in legal submissions on behalf of submitters. Counsel has not read other parties' legal submissions, and proposes that should there be any questions arising, that these be addressed at the hearing.

B. QUESTION 1 – WHAT IS THE SCOPE OF THE PLAN CHANGE?

[5] The issue of scope here encompasses two related questions, being whether:

(a) A particular submission is "*on*" PC3; and/or

(b) Any changes made to PC3 from notification are within the ambit of submissions.

[6] Questions of scope address both legality and fairness.[1] An unlawful expansion of the scope of a plan change post-notification may result in persons affected by the new provisions being deprived of the right to be heard, having not submitted on the plan change in its original form.

[7] The question of whether a particular submission is "*on*" a plan change has been discussed by the Courts, most notably in *Palmerston North City Council v Motor Machinists Ltd*. In that case, the High Court affirmed the 'bipartite' *Clearwater* test:[2]

(a) First, a submission can only fairly be regarded as "*on*" a plan change "*if it is addressed to the extent to which the [plan change] changes the pre-existing status quo*".[3] In other words, the scope of a plan change is the extent to which it alters the planning regime from its existing state to something else – the distance by which the proverbial goalposts are moved, and a submission is "*on*" the plan change if it addresses the extent of that movement.

(b) Second, "*if the effect of regarding a submission as 'on' a [plan change] would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected*", that will be a "*powerful consideration*" against finding that the submission was truly "*on*" the plan change.[4]

[8] Before turning to specific submissions, the 'extent to which the plan change alters the status quo' should be defined.

[9] PC3 is a relatively discrete and subject-specific plan change. It primarily seeks to give effect to the NPS-UD. Its ambit, and therefore the scope for submissions, is limited. As noted in the s 32 report, as notified PC3 only proposes to introduce new provisions to the RPS to give effect to the NPSUD.[5] The s 32 repot goes on to state:

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1 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [91].
2 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [91].
3 At [54].
4 At [55].
5 Section 32 Evaluation Report, section 2.

> [PC3] is limited to what is required to give immediate effect to the NPSUD and where there are matters relating to urban growth (directly or indirectly) already addressed in the RPS provisions, these have been preserved pending further, substantive review.

[10] PC3 inserts new issues, objectives, policies, and methods into the One Plan, and makes few other changes to operative plan provisions.[6] The content of the new provisions closely reflects the provisions of the NPS-UD relevant at the regional level. Naturally, urban development engages matters addressed in other chapters of the regional policy statement portion of the One Plan. However, as the objectives and policies of other chapters of the One Plan have not been altered, scope is restricted to 'paring back' the proposed provisions to ensure alignment with the remainder of the plan.

[11] As such, the 'extent to which PC3 alters the status quo' is essentially restricted to the content of the new provisions – little else about the One Plan is altered, and thus most submissions requesting changes to the operative One Plan provisions more broadly are likely to be out of scope.

C. QUESTION 2 – WHICH SUBMISSIONS ARE OUTSIDE OF SCOPE?

[12] Noting the above, several submissions do not address the extent to which PC3 alters the status quo, and are therefore not "*on*" PC3. These include:

(a) Fish and Game: S5 – The bulk of Fish & Game's submission focuses on aligning PC3 with the NPSFM, which is not the intention of this plan change.

The preparation of a freshwater planning instrument to give effect to the NPSFM is already underway as part of a work programme called Oranga Wai. This will require the reevaluating many of the provisions of the One Plan, potentially including the PC3 provisions. The implementation provisions of the NPSFM (and in particular the consultation provisions) are also directive – it would not be appropriate to pre-empt compliance with those provisions of the NPSFM by making ad-hoc changes to PC3 at this stage.

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[6] Notable exceptions are Issue IFD-I1, Objective UFD-O1, Policy UFD-P1 and Principal Reason UFD-PR1, which are largely replaced.

(b) Horowhenua District Council (**HDC**): S7 – HDC seeks the inclusion of a 5th 'big issue' for the region, being 'well-functioning urban environments/sustainable growth'.[7]

No changes to the 'big four' issues in the One Plan were notified with PC3. The 'big four' issues were selected at an early stage of development for the One Plan, following consultation and input from the Council's science teams. They guide the overall environmental direction of the One Plan.

The inclusion of a further 'big issue' would require the reassessment of all the significant resource management issues for the region to determine whether broader reprioritisation of the Council's planning direction is appropriate, which is plainly outside the scope of this plan change. It would also be an "*appreciabl[e] amend[ment] [to the One Plan] without real opportunity for participation by those potentially affected*".

[13] Other submissions address issues which are outside the scope of RMA plan making generally:

(a) Philip Lake: S18 – The increased provision of public transport is not a matter able to be directly addressed as part of the regional policy statement.

[14] Counsel submits that the elements of these submissions highlighted above ought to be rejected, as they are not "*on*" PC3.

D. QUESTION 3 – HOW SHOULD THE HEARING PANEL GIVE EFFECT TO OTHER NATIONAL POLICY STATEMENTS IN THIS PROCESS, AND IN PARTICULAR THE NPS-HPL?

[15] Besides questions of scope, there are issues in this plan change as to what is required in order for the Regional Policy Statement to "*give effect to a National Policy Statement*" which it must do in order to comply with the direction at s 62(2) RMA.

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7 These 'big issues' are the 'significant resource management issues for the region', in the terms of s 62(1)(a) of the RMA.

[16] As noted above, PC3 is described by the Council as a change to the regional policy statement to meet the requirements of the NPS-UD,[8] and is called the "*urban development plan change*" on the Council's website.

[17] This narrow focus is consistent with the Council carrying out the direction contained in the NPS-UD at cl 4.1 that *"…Every tier 1, 2, and 3 local authority must amend its regional policy statement or district plan to give effect to the provisions of this National Policy Statement as soon as practicable."* A plan change prepared and notified by October 2022 achieves that.

[18] Despite the apparent view that PC3 could leave aside 'other matters relating to urban growth', there is a legal requirement under s 62(2) RMA that a regional policy statement "must give effect to a national policy statement", which (if the word "a" is read as "any") includes other national policy with overlapping issues arising from the development of urban environments, such as the protection of highly productive land through the NPS-HPL.

[19] Here, the challenging issue lies in how to interpret and apply the requirement to "*give effect to a national policy statement*" where the Council has set out on the express basis that it was only intending to give effect to a single national policy statement, the NPS-UD, but there are other NPSs with overlapping issues.

[20] The positions of various submitters give rise to questions as to whether PC3 should be subject to further amendment to ensure that its provisions 'give effect' to various 'other' national policy statements including the following:

(a) The NPS-HPL, which came into force on 17 October 2022, which was also the same day that PC3 was notified;

(b) The NPS-FM 2020, which came into force on 3 September 2020;

(c) The NPS-ET, which came into force on 13 March 2008.

[21] In these submissions, we analyse the issue with a primary focus on the NPS-HPL. Ms Shirley's s 42A report describes the outcome of a pre-hearing meeting where planners for various parties agreed on limited changes to provisions to better align them with the NPS-HPL, even though PC3 was not prepared to give effect to it. Specifically, it was agreed that existing references in the Regional

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8 https://www.horizons.govt.nz/publications-feedback/one-plan-reviews-changes/urban-development-plan-change

Policy Statement to "versatile soils" that are used in the context of urban growth and subdivision, should be changed so they refer to "highly productive land" as defined in the NPS-HPL instead. The prevailing view at the time was that this change was needed to address an 'inconsistency' between PC3 and the NPS-HPL. The Council says that this alignment will happen through other work streams in the future.

[22] While the submitter Horowhenua District Council now expresses disagreement with the change from 'versatile soils' (as outlined in its evidence), Ms Shirley maintains her opinion[9] that her recommended changes are appropriate and necessary. HDC's concern, in summary, is that making a minor change to these provisions, without fully aligning it to the relevant policies of the NPS-HPL, could send a misleading signal. HDC prefers deferring this issue to a future plan change process to avoid potential confusion, maintaining a clean slate for the time being.

[23] At the other end of the spectrum, the provisions could (in theory) be taken further, with targeted changes to bring PC3 even further into line with the NPS-HPL, reconciling those provisions of the Regional Policy Statement relating to the expansion and development of urban areas with the provisions of the NPS-HPL. For example, and subject to any determinations as to 'scope', UFD-O2, UFD-O3, UFD-P4, and UFD-P6 could all be amended in such a way as to align to reconcile these provisions with the policy direction of the NPS-HPL as it relates to urban expansion, subdivision, and development.

[24] It is submitted that these issues can largely be resolved by a close reading of the provisions in each NPS in question – in particular, their implementation provisions. However, it is worthwhile to traverse some of the appropriate case law principles first.

[25] As observed in *Re Otago Regional Council*, national policy statements may have different focuses, but this should not lead to a false dichotomy. There, the Environment Court held that the NPS-FM and NPS-UD provisions should be read together and reconciled under the regional policy statement and regional plan.[10] The question then, is whether there is any reason that this should not be done here?

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9 As expressed in her Rebuttal Evidence.
10 *Re Otago Regional Council* [2021] NZEnvC 164

[26] To answer this question, it is helpful to examine the authorities, beginning with the Supreme Court's decision in *Environmental Defence Society Inc v the New Zealand King Salmon Company Limited*. In relation to the directive to give effect to a national policy statement, the Court held that "*give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it*."[11] Importantly for present purposes, the Supreme Court clarified that "…*the implementation of such a directive will be affected by what it relates to, that is, what must be given effect to*."[12]

[27] In dealing with a question as to whether the Environment Court was required to 'give effect' to the NPS-FM 2011 in the One Plan development process (in circumstances where the NPS-FM 2011 took force after appeals had commenced), the High Court in *Horticulture New Zealand v Manawatu-Wanganui Regional Council* held that: [13]

> …the Council (and the Court) was not obliged then to attempt to give effect to the NPSFM in the course of the appellate process. The NPSFM contains its own implementation timetable, including a series of default steps where it is impracticable to complete implementation of the policy fully by the end of 2014. I accept this is such a case. As the implementation guide associated with the NPSFM notes, "*implementing the NPSFM will take time, will involve new approaches, and will not necessarily be achieved in one step*".

[28] While PC3 is analogous to the *Horticulture New Zealand* case (as PC3 was prepared and notified before it could have given effect to the NPS-HPL), it is important to observe from the reasoning above that Kós J reached his view only after considering the terms and expressions within the NPS-FM 2011, including the expectations expressed around its timing.

[29] More recently, the High Court in *Southern Cross Healthcare* considered the question as to whether a private plan change to the Auckland Unitary Plan needed to give effect to the NPS-UD.[14] Auckland Council opposed, arguing that it was not required to give effect to the NPS-UD in that plan change for various

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11 *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [77].

12 Ibid, at [80].

13 *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 at [100].

14 *Southern Cross Healthcare Ltd v Eden-Epsom Residential Protection Society Inc* [2023] NZHC 948.

reasons including that the Council was separately progressing NPS-UD workstreams.

[30] Whereas the Environment Court had determined that it "*should not pre-judge, let alone pre-empt, the Schedule 1 processes yet to be undertaken by the Council in implementation of the NPS-UD…*".[15] The High Court approached the issue by beginning with consideration of what the provisions of the NPS-UD required, including the specific timing requirements of the NPS-UD.[16] The High Court determined that the NPS-UD's requirement to amend planning documents "…*to give effect to the provisions of this national policy statement as soon as practicable*", meant that it should be done, with the Court considering that it was 'practicable' for the Court to amend the district plan to give effect to it.

[31] In PC3, with the question being how the Council should implement the NPS-HPL, the starting point is its timing provision which provides that:

> **4.1 When this National Policy Statement takes effect**
>
> (1) Every local authority must give effect to this National Policy Statement on and from the commencement date (noting that, until an operative regional policy statement contains the maps of highly productive land required by clause 3.5(1), highly productive land in the region must be taken to have the meaning in clause 3.5(7)).

[32] Accordingly, this is a national policy statement which must be given effect to now.

[33] As to how it should be given effect to, according to its provisions (and working backwards), implementation provisions 3.6 to 3.13 apply specifically to territorial authorities, and may be disregarded. Further, implementation provisions 3.4 and 3.5 may also be disregarded, as those are specifically excluded by the timing clause, and by the specifications of those provisions as to how and when they must be implemented, which is to say, 'not here'.

[34] Implementation clause 3.3 of the NPS-HPL sits as a barrier to further changes to PC3 provisions. This clause explicitly requires that, in implementing the NPS-HPL through regional policy statements, regional plans, and district plans, local

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15 *Eden-Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 82 at [30].

16 At [75]-[82].

authorities must actively involve tangata whenua. The directive emphasises specificity by requiring involvement in the context of giving effect to the NPS-HPL. Consequently, consultation carried out under a plan change designed to implement the NPS-UD cannot not serve as a substitute, as the requirement relates to direct and explicit consultation on a plan change specifically intended to give effect to the NPS-HPL. As discussed above, PC3 is explicitly not that plan change.

[35] In summary, the Council is obligated to implement the NPS-HPL. However, the current PC3 provisions create a challenge as urban expansion measures, intended to align with the NPS-UD, do not adequately reconcile with NPS-HPL requirements. The primary obstacle preventing a more comprehensive implementation of the NPS-HPL lies in its directive that any changes must actively involve tangata whenua, as stipulated in implementation clause 3.3. This directive cannot be addressed through PC3 at this stage. Here, and consistent with the approach in *Southern Cross Healthcare*, *Horticulture New Zealand*, and *King Salmon*, it is close examination of the clauses and requirements of the NPS-HPL that provides the answer as to what is required to give effect to it in this process.

[36] Importantly, the inability to complete a reconciliation with the NPS-HPL within PC3 does not render it a failure. The Council will give effect to the NPS-HPL, recognising its current applicability, as supported by Ms Shirley's evidence. It is noted that the requirements of s 62(2) are of general application, such that it remains a requirement even though it cannot happen here. This highlights the validity of Ms Shirley's approach, limiting amendments to those which address inconsistencies only and refraining from contravening the direction of NPS-HPL clause 3.3.

[37] Finally, and in contrast, as noted above at [12](a), the NPSFM has a prescriptive and directive implementation process in the form of the NOF. It would be inappropriate to circumvent those provisions, which are being considered through the Oranga Wai process, despite the requirement of cl 4.1(1) of the NPSFM to do so "*as soon as reasonably practicable*". Put another way, it is not practicable to implement the NPSFM until the Oranga Wai process is complete.

E. QUESTION 4 – WHAT DOES "MINIMISE" MEAN?

[38] Fonterra's evidence contends that the use of the term "*minimise*" in UFD-P8(1)(a) should include the qualifier "as far as reasonably practicable" to ensure

that it is not interpreted as meaning "*to the lowest extent possible*" and that it recognises "*other design drivers*".

[39] On the other hand, Ms Shirley's opinion is that "*minimise*", without any qualifier, is sufficient to communicate the intent of UFD-P8(1)(a) and that the proposed qualifier would diminish the intended clarity of the policy. That is, to minimise contributions to climate change through urban design, form, and infrastructure. Ms Shirley says that the word "*minimise*" given its natural meaning 'to reduce to the lowest level possible' is appropriate in the context of UFD-P8(1)(a) without further qualification.

[40] As to what "*minimise*" means, the dictionary definition is similar to Ms Shirley's interpretation: "*to reduce something to the smallest possible amount, extent, or degree*".[17]

[41] In *Aratiatia Livestock Ltd v Southland Regional Council*, the Court accepted a definition that "*minimise*" meant "*to reduce to the smallest amount reasonably practicable*". However, it must be observed that this definition was approved without reasons, on an undisputed basis. While it is consistent with the terminology requested by Fonterra, it is inconsistent with the dictionary definition of the term "*minimise*" on its own.

[42] Here, the issue is not between two competing definitions of "*minimise*", rather, it is a question of whether "*minimise*", given its normal meaning intended by Ms Shirley, should be modified by the subsequent words "*as far as practicable*". Assuming Ms Shirley's definition of 'minimise', Fonterra is seeking the equivalent of this phrasing: "reduce to the lowest level possible, as far as reasonably practicable."

[43] As to the words "*reasonably practicable*", the High Court (in an appeal relating to the Sale and Supply of Alcohol Act 2012) considered the meaning of the phrase, stating:[18]

> Inherent in the concept of "reasonably practicable" is the notion of proportionality; the benefit to be obtained must be weighed against the sacrifices obtained in securing the benefit. Such a weighing exercise is able to engage various issues, including expenditure, time

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17 Oxford English Dictionary "minimise" <https://www.oed.com/search/dictionary/?scope=Entries&q=minimise>

18 *Christchurch Medical Officer of Health v J & G Vaudrey Ltd* [2015] NZHC 2749 at [83].

involved, difficulty and inconvenience, as balanced against the desired objective.

[44] It is apparent that this modification would create a juxtaposition with the effect of expanding and weakening the requirement to 'minimise', in order to import a weighting exercise that 'recognises other design drivers'.

[45] Ultimately, it is also important to evaluate the respective planning opinions in the context of UFD-P8(1)(a) to consider which approach is the most appropriate.

Dated: 2 February 2024

N Jessen
Counsel for Manawatū-Whanganui Regional Council