

Before the Independent Hearing Panel
Appointed by the Mackenzie District Council

Under The Resource Management Act 1991 (**RMA**)
In the matter of proposed Plan Change 20 to the Mackenzie District Plan

Legal submissions of Counsel for Mackenzie District Council

22 November 2022

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May it please the Hearing Panel:

Introduction to Plan Change 20

- 1 Plan Change 20 (**PC20**) is part of Stage 1 in a series of rolling plan changes designed to review and update the Mackenzie District Plan. The Council has elected to review the District Plan in a staged manner by a series of plan changes. PC20 addresses the introductory chapter as well as strategic directions.
- 2 The intention over time is to work through this plan change programme to ultimately result in a new, fit for purpose District Plan that aligns with the national planning standards.
- 3 The consequence of this staged programme is that PC20 addresses the introduction and strategic directions. There is to be a series of other topic related plan changes that will follow in due course. This requires submitters and the Panel to have patience because when considering the strategic directions in PC20, the other chapters of the District Plan that will follow are not available yet for review to see how the strategic directions are implemented. This is an important consideration because parties will have further opportunity to address the provisions in topics and chapters of interest, including objectives, policies and rules when they are notified. It is intended that the subsequent chapters can be prepared and considered in light of the strategic directions.
- 4 This also has the consequence that all higher order documents cannot fully be "given effect to" via the strategic directions. The obligation is for the district plan as a whole to give effect to higher order documents, rather than each provision or each chapter needing to do so in a standalone fashion. Section 75(3) RMA requires:
 - (3) A district plan must give effect to -
 - (a) any national policy statement; and
 - (b) any New Zealand coastal policy statement; and
 - (c) a national planning standard; and
 - (d) any regional policy statement.
- 5 Therefore, there will be aspects of higher-order documents that need to be implemented via subsequent chapters when those are arrived at. While this gives rise to a degree of uncertainty when considering the strategic directions (in isolation), this is the inevitable trade off from managing a plan change programme in a staged manner, that is achievable, for the Mackenzie District Council.

- 6 This degree of uncertainty is reflected in some of the Submitters' submissions and evidence. Many have sought express provision for their interests in the strategic directions, while acknowledging further provisions will be needed in subsequent chapters (for example Heritage NZ, Meridian Energy Ltd, Genesis Energy Limited, Nova Energy Limited and Environment Canterbury).

Statutory assessment

- 7 The statutory tests for a plan change are as set out in *Colonial Vineyard Ltd v Marlborough District Council*, which have been applied and summarised in subsequent decisions.¹ The full list of potentially relevant matters is set out in **Annexure 1**. In this case any changes made by PC20 to the Mackenzie District Plan that focus on the objectives (not policies, methods and rules) must:
- (a) Accord with and assist Mackenzie District Council (**Council**) to carry out its functions (s 74(1) Resource Management Act 1991 (**RMA**));
 - (b) Ensure objectives accord with Part 2 of the RMA (s 74(1)(b) RMA);
 - (c) Give effect to any relevant national policy statement or operative regional policy statement, to the extent it is relevant in the strategic directions (noting that further plan changes on this are to follow) (s 75(3)(a) and (c) RMA); and
 - (d) Establish the most appropriate policies and methods (if any) for achieving the objectives, undertaking the assessment detailed in s32 RMA, taking into account the following:²
 - (i) the benefits and costs of the proposed policies and methods (if any); and
 - (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies or methods.
- 8 In making your decision, you must also:
- (a) have regard to:

¹ [2014] NZEnvC 55 at [17].

² Ibid at [17](C)(10)(i)-(iii).

- (i) any relevant proposed regional policy statement or plan, and management plans and strategies prepared under any other Acts (s74(2) RMA);
 - (ii) actual and potential effects on the environment, including, in particular, any adverse effect; and
 - (b) take into account:
 - (i) any relevant planning document recognised by an iwi authority and lodged with Council (s74(2A) RMA).
 - (c) You must disregard any effects of trade competition ((s74(3) RMA).
- 9 In making your decision, you must include a decision on the provisions and matters raised in submissions on PC20, and the reasons for accepting or rejecting submissions.³

The evidence

- 10 On behalf of Mackenzie District Council there has been evidence produced by:
- (a) Mr Aaron Hakkaart; and
 - (b) Mr Vivian Russell
- 11 The purpose of this evidence is to provide the Hearing Panel and Submitters with an overview of the structure and the programme for the district plan review.
- 12 Mr Russell has explained the involvement of mana whenua in the work to prepare the plan change that the Hearing Panel is to consider. This is an important aspect of the development of the plan for Mackenzie District Council. Council relies on the evidence of Mr Russell to explain this mana whenua involvement, and its significance.

Section 42A Report

- 13 Council relies on the expert evidence of the section 42A report authors Ms White and Ms Hall. The Council relies on the expertise of these planners to respond to the merits of submissions and evidence on the proposed provisions. Council adopts their views as its position.

³ Schedule 1, clause 10 of the RMA.

Legal Issues

Natural and Built Environment Bill

- 14 The Government has introduced a new Bill to Parliament named the Natural and Built Environment Bill. This Bill was introduced on 15 November 2022.
- 15 It is submitted that this Bill has no current legal effect and does not affect the relevant considerations in the RMA that the Hearing Panel needs to assess submissions on PC20 under. Because this is a Bill, it currently has no legal status as legislation and it will not do so until it is passed by Parliament and has received the Royal assent, making it a statute. The Bill does not, nor can it change the Resource Management Act at present. While this Bill is highly topical, and of interest to resource management practitioners, the Hearing Panel can in my submission put it to one side and not take it into account as part of this hearing process on PC20.

Application of the National Policy Statement for Urban Development

- 16 The National Policy Statement on Urban Development (**NPS-UD**) applies only to territorial authorities with all or part of an "urban environment" as defined in the NPS-UD. An "urban environment" must have, or be intended to have, a housing and labour market of at least 10,000 people.
- 17 The Panel has questioned whether this definition should include persons visiting temporarily during holiday periods. There is no suggestion within the definition of "urban environment" that transitory or temporary visitors during a holiday period should be counted towards the housing and labour market. To the contrary, I submit that the use of the term "housing and labour market" imports the meaning of permanence. A tourist staying for a handful of nights during a holiday period is not considered part of the housing or labour market as they do not take part in either of these markets.
- 18 No area within the Mackenzie District's territory is an urban environment with at least 10,000 people. The highest usually resident population is located in Twizel, at 1,455 people⁴. This is significantly lower than the threshold, and therefore does not meet the definition of "urban environment". It is my submission that the NPS-UD does not apply to the Mackenzie District and it should not be considered here.

⁴ 2018 Census data.

Meaning of "infrastructure"

- 19 The Hearing Panel has requested clarification of the types of infrastructure that would be captured under this definition with respect to the following:
- (a) Postal distribution centre;
 - (b) Farm drains;
 - (c) Domestic septic tanks; and
 - (d) Foot paths.
- 20 PC20 adopts the definition of "infrastructure" in s2 of the Resource Management Act 1991. This definition is as follows:

infrastructure means—

(a) pipelines that distribute or transmit natural or manufactured gas, petroleum, biofuel, or geothermal energy:

(b) a network for the purpose of telecommunication as defined in section 5 of the Telecommunications Act 2001:

(c) a network for the purpose of radiocommunication as defined in section 2(1) of the Radiocommunications Act 1989:

(d) facilities for the generation of electricity, lines used or intended to be used to convey electricity, and support structures for lines used or intended to be used to convey electricity, excluding facilities, lines, and support structures if a person—

(i) uses them in connection with the generation of electricity for the person's use; and

(ii) does not use them to generate any electricity for supply to any other person:

(e) a water supply distribution system, including a system for irrigation:

(f) a drainage or sewerage system:

(g) structures for transport on land by cycleways, rail, roads, walkways, or any other means:

(h) facilities for the loading or unloading of cargo or passengers transported on land by any means:

(i) an airport as defined in section 2 of the Airport Authorities Act 1966:

(j) a navigation installation as defined in section 2 of the Civil Aviation Act 1990:

(k) facilities for the loading or unloading of cargo or passengers carried by sea, including a port related commercial undertaking as defined in section 2(1) of the Port Companies Act 1988:

(l) anything described as a network utility operation in regulations made for the purposes of the definition of network utility operator in section 166

21 The meaning of "infrastructure" was considered by the Environment Court about whether a school falls within the definition.⁵ The Court observed that "infrastructure" as it is defined in the RMA includes a list of "*reticulated or network services or facilities associated with such reticulation or networks*".⁶ The Court also identified that that an infrastructure activity is one that normally serves, supports, or enables other activities "*rather than being undertaken as an end in itself*".⁷

22 With this in mind, it is submitted that a postal distribution centre, farm drain, and foot paths all fall within the definition of "infrastructure". They all form part of a reticulated or network service, and also fall within the definition of "infrastructure" in s2 RMA:

(a) postal distribution centres are captured in part (h), being "*facilities for the loading or unloading of cargo or passengers transported on land by any means*";

(b) farm drains are captured in part (f), being part of "*a drainage or sewerage system*"; and

(c) footpaths are captured in part (g), being "*structures for transport on land by cycleways, rail, roads, walkways, or any other means*".

23 It is submitted a site's septic tank does not fall within the proposed definition. This is because a septic tank is not part of a reticulated network or service, but is instead a standalone system. While it could be argued to be captured by part (f) of the definition of "infrastructure" (referring to sewerage systems), because there is no reticulation or network component to a septic

⁵ Tauranga City Council v Minister of Education, [2019] NZEnvC 32.

⁶ At [93].

⁷ Ibid.

tank, it is submitted the preferred interpretation is that a septic tank is not "infrastructure" for the purposes of the definition.

Conclusion

24 The Mackenzie District Council is pleased this stage of the process has been reached and looks forward to the Hearing Panel's decisions on PC20.

A handwritten signature in cursive script, appearing to read "M. Garbett", is positioned above a solid horizontal line.

Michael Garbett
Counsel for Mackenzie District Council

Annexure 1: excerpt from *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55

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*⁸ 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”)⁹. 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 additions¹⁰ since *High Country Rosehip*¹¹:

A. General requirements

1. A district plan (change) should be designed to **accord with**¹² — and assist the territorial authority to **carry out** — its functions¹³ so as to achieve the purpose of the Act¹⁴.
2. The district plan (change) must also be prepared **in accordance with** any regulation¹⁵ (there are none at present) and any direction given by the Minister for the Environment¹⁶.

⁸ *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

⁹ *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

¹⁰ Some additions and changes of emphasis and/or grammar are not identified.

¹¹ 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.

¹² Section 74(1) of the Act.

¹³ As described in section 31 of the Act.

¹⁴ Sections 72 and 74(1) of the Act.

¹⁵ Section 74(1) of the Act.

¹⁶ Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

3. When preparing its district plan (change) the territorial authority **must give effect** to¹⁷ any national policy statement or New Zealand Coastal Policy Statement¹⁸.
4. When preparing its district plan (change) the territorial authority shall:
 - (a) have regard to any proposed regional policy statement¹⁹;
 - (b) give effect to any operative regional policy statement²⁰.
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 order²¹; and
 - (b) **must have regard to** any proposed regional plan on any matter of regional significance etc²².
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 regulations²³ 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 authorities²⁴;

¹⁷ Section 75(3) RMA.

¹⁸ 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.

¹⁹ Section 74(2)(a)(i) of the RMA.

²⁰ Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

²¹ Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

²² Section 74(2)(a)(ii) of the Act.

²³ Section 74(2)(b) of the Act.

²⁴ Section 74(2)(c) of the Act.

- **take into account** any relevant planning document recognised by an iwi authority²⁵; and

- not have regard to trade competition²⁶ or the effects of trade competition;

7. The formal requirement that a district plan (change) must²⁷ also state its objectives, policies and the rules (if any) and may²⁸ 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 Act²⁹.

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 policies³⁰;

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 objectives³¹ 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 methods³²; and

²⁵ Section 74(2A) of the Act.

²⁶ Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.

²⁷ Section 75(1) of the Act.

²⁸ Section 75(2) of the Act.

²⁹ Section 74(1) and section 32(3)(a) of the Act.

³⁰ Section 75(1)(b) and (c) of the Act (also section 76(1)).

³¹ Section 32(3)(b) of the Act.

³² Section 32(4) of the RMA.

- (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 circumstances³³.

D. Rules

- 11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment³⁴.
- 12. Rules have the force of regulations³⁵.
- 13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive³⁶ than those under the Building Act 2004.
- 14. There are special provisions for rules about contaminated land³⁷.
- 15. There must be no blanket rules about felling of trees³⁸ in any urban environment³⁹.

E. Other statutes:

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

F. (On Appeal)

- 17. On appeal⁴⁰ the Environment Court must have regard to one additional matter — the decision of the territorial authority⁴¹.”

³³ Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.

³⁴ Section 76(3) of the Act.

³⁵ Section 76(2) RMA.

³⁶ Section 76(2A) RMA.

³⁷ Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.

³⁸ Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

³⁹ Section 76(4B) RMA — this ‘Remuera rule’ was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

⁴⁰ Under section 290 and Clause 14 of the First Schedule to the Act.

⁴¹ Section 290A RMA as added by the Resource Management Amendment Act 2005.