

Before the Independent Hearing Panel
Appointed by the Mackenzie District Council

Under

The Resource Management Act 1991 (**RMA**)

In the matter of

Proposed Plan Changes 28-30; Variation 1, 2 and 3 to Plan Change 26; Variation 1, 2 and 3 to Plan Change 27; Variation 1 & 2 to Plan Change 23 and the Designations Chapter of the Mackenzie District Plan

Legal Submissions of Counsel for Mackenzie District Council – PC28-30

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Overview

- 1 These legal submissions relate to Plan Changes 28-30 and related variations. These series of Plan Changes (and variations) comprise Stage 4 of the district plan review. Designations are also being considered as part of Stage 4.
- 2 Stage 4 represents the final stage of the district plan review being conducted by Mackenzie District Council (MDC) to develop a fit for purpose E Plan.
- 3 These legal submissions address the following topics which are considered to raise legal issues:
 - (a) s42A Officers' end of hearing reports.
 - (b) The statutory framework.
 - (c) Hydro electricity inundation flooding overlay.
 - (d) Flood and liquefaction mapping.
 - (e) Permitted activity rule proposed by Canterbury Regional Council to manage flooding on other properties.
 - (f) Te Kopi-o-Ōpihi / Burkes Pass Heritage Overlay.
 - (g) Heritage overlay for the Church of the Good Shepherd.
 - (h) NZ Agricultural Aviation Association (NZAAA) and Noise .
 - (i) Definition of Airport Activity – Submission by Director General of Conservation.
 - (j) Glentanner Special Purpose Zone (GSPZ) and rocket powered aircraft.
 - (k) Designations.

Section 42A Officers' end of hearing reports

- 4 In accordance with paragraph 12 of the Hearing Panel's Minute 1, Counsel has instructed the section 42A Officers to consider evidence of submitters, any issues raised or discussed at the hearing and incorporate any reply in a "reply report". This is to outline any amendments to the original recommendations, respond to any questions of the Hearing Panel raised at

the hearing and produce a final set of recommended provisions for the Hearing Panel to consider.

Statutory framework

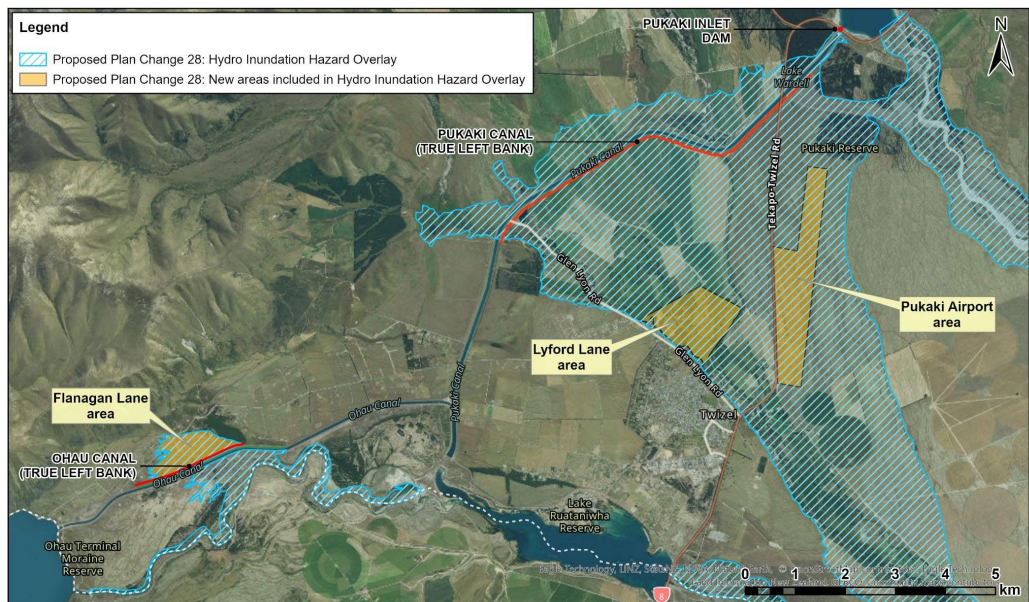
- 5 The section 42A Officers have set out and applied the relevant statutory framework in their section 42A reports. This is the same as has been relied on for previous stages of the district plan review. It is submitted this is the correct statutory framework and there have been no material changes since the last series of hearings.
- 6 It is submitted that the resource management reform indicated to be coming from the Government has not yet landed and PC28-30 should be considered under the relevant provisions identified by the s42A Officers under the Resource Management Act 1991.

PC28

Hydro Electricity Inundation Hazard Overlay

- 7 One key issue raised by submissions on PC28 is the Hydro Electricity Inundation Hazard Overlay. This overlay was established by PC13 and approved by the Environment Court in a consent order¹. When that plan change was carried out, jurisdiction only extended to what was then the Rural Zone (and what is now, following PC23, the General Rural Zone). This meant that the full extent of the hydro inundation overlay mapped by Damwatch was not established in the plan. Gaps existed over parts of the areas mapped by Damwatch. These gaps are at the Pūkaki Airport, Lyford Lane area and a small area near Flanagan Lane. These "gaps" are helpfully shown on the plan below from the evidence of Mr Veale for Meridian:

¹ Consent order Federated Farmers of NZ Inc v Mackenzie DC (ENV-2009-CHC-193) dated 11 May 2018, paragraphs 2 and 3 ordering changes to Section 7 Rural Zone and 13 Subdivision, Development and Financial Contributions and to insert a new Appendix being Annexure D the Hydro-Electricity Inundation Hazard Area Maps.



Proposed Plan Change 28 Hydro Inundation Hazard Overlay in relation to Pukaki Airport, Lyford Lane and Flanagan Lane areas

- 8 PC28 has filled in those gaps to apply the Hydro Inundation overlay to the remaining land that was identified by the Damwatch study that is potentially at risk of inundation.
- 9 The technical evidence of Damwatch has been produced by Meridian Energy Ltd. MDC have relied on this technical advice as identifying the extent of the potential risk in the event of a dam or canal breach. Based on this technical advice and evidence from Meridian, it is submitted it is appropriate to identify on the planning maps the full extent of these areas by overlay.
- 10 It is submitted that the Damwatch report and Meridian's evidence is advice and expert evidence from specialists in this field. MDC and the Hearing Panel should properly place significant weight on this advice and evidence. There is no specific contrary evidence (at the time of writing) that contests the justification for this overlay. This leads to the conclusion that this is an appropriate overlay to have in the district plan.

Flood and Liquefaction Overlay Mapping

- 11 The Fairlie and Districts Residents and Ratepayers Society have submitted seeking removal of the flood and liquefaction overlay mapping.
- 12 MDC consider this is unwise and support the position of Ms Justice to recommend retaining these overlays.

- 13 These overlays provide appropriate recognition of the natural hazard risks present on the identified properties. These issues are addressed in paragraphs 141 and 142 of the section 42A report of Ms Justice.
- 14 Both the flood mapping and liquefaction overlay maps have been produced by Environment Canterbury. The relevant technical reports are Appendices 1 and 5 to the section 32 materials to PC28.
- 15 It is submitted that identifying such hazard risk is a specialised and expert task. MDC have relied on the expertise of Canterbury Regional Council Officers to complete this specialised work. MDC have adopted the maps recommended.
- 16 It is submitted that these are appropriate evidence based overlays that serve an excellent purpose to identify areas of risk. These overlays enable appropriate provisions in the plan to be applied to these areas to manage risk where it may exist.
- 17 The submitters' proposal to delete these overlays does nothing to remove the actual risk. Rather this would just remove regulatory management of it, which MDC considers would be inappropriate.
- 18 It is submitted these overlays are appropriate, justified on the evidence and should be retained in the plan.

Permitted Activity Rule to Manage Flooding On Other Properties

- 19 Canterbury Regional Council has submitted on flood hazards and sought a new rule to ensure permitted structures do not worsen flooding on other properties.² This proposed rule has been refined by Ms Tutty in her evidence (addressed in paragraphs 69 – 81 and Appendix 1).
- 20 This is addressed in paragraphs 185 - 189 of the section 42A report of Ms Justice.
- 21 Ms Justice identifies that this relief would take the form of a permitted activity rule with a standard requiring that flooding will not be worsened (or increased) on another property through diversion or displacement of floodwaters. It is noted that for a number of reasons of merit, Ms Justice does not support this proposed rule.
- 22 This raises a legal issue too. Having a permitted activity standard that is tied to whether flood flows are diverted and made worse, or increased, on

² Submission 50.30 seeking a new rule NH-Rx to ensure earthworks, new buildings and structures are permitted where "Flooding will not be worsened on another property through the diversion or displacement of floodwaters."

adjoining properties is a challenging standard to apply objectively, easily and with certainty for MDC and the public. MDC need to assess applications for building consent for compliance to assess if a resource consent is triggered. MDC Officers also need to be able to advise people when a consent is required. The public (and any advisors) should be able to tell from the plan too if a proposed building or structure is permitted or needs a consent.

- 23 Implementation of the proposed rule is considered to be complex and potentially subjective. It is understood to predict if flood flows are displaced or made worse, to where and to what extent, likely relies on modelling to predict. Depending on how a flood flow is modelled, the model used or built, the inputs into a model, and interpreting its results - outputs may vary. The proposed rule does not provide any guidance on these parameters. Nor could modelling inputs or requirements easily be added to a this permitted rule for flood flows.
- 24 From a legal perspective this demonstrates that such a standard on a permitted activity is not capable of objective determination. It would likely involve experts producing a model, determining inputs to be able to verify whether flood flows from a particular structure do or do not make flood flows worse (and how worse) on the adjoining land. This would be a very difficult and expensive rule to monitor, enforce and comply with for both land owners and MDC.
- 25 It is submitted such a permitted standard is not capable of the certainty needed to be the trigger to change a permitted activity into one requiring a consent. This rule should not therefore be approved.
- 26 As Ms Justice points out this issue is currently already regulated by Canterbury Regional Council that has the technical specialists to work on flood flows and hydrology. The same expertise is not held by MDC.
- 27 From a statutory perspective because the regulation proposed is to squarely manage diversion of water this best and more directly fits Canterbury Regional Council's statutory functions under the Act. Section 30(1)(e) directly provides regional councils with the function to manage:

(e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
- 28 MDC as a district council would have to manage diversion of water under the more general functions to manage natural and physical resources, or to avoid natural hazards, under section 30(1)(a) or (b), which provide:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

...

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—

(i) the avoidance or mitigation of natural hazards; and

...

- 29 Ms Tutty makes the point at paragraph 79 of her evidence that MDC already has in play management of flooding risk in rules NH-R1, R2 and R3, and infers this proposed rule is no different. These rules (NH-R1, R2 and R3) focus on there being a flood assessment, buildings being located outside a high flood hazard area, floor levels complying with the minimum certified floor level, and activities not permanently raising the ground level. These existing matters are much more clearly objectively determined and do not require evaluation of whether a structure diverts or increases flood flows on other properties.

Te Kopi-o-Ōpihi / Burkes Pass Heritage Overlay

- 30 The section 42A report from Ms Spalding address the Te Kopi-o-Ōpihi / Burkes Pass Heritage Overlay. This is also addressed by Mr Knott in his response to submissions report dated 7 April 2025.
- 31 There is a decision needed from the Hearing Panel on the extent of this overlay to maintain the historic heritage values of Burkes Pass. This topic is addressed in paragraphs 168 - 201 of Ms Spalding's s42A report.
- 32 From MDC's perspective the development of this proposed overlay has been through an extensive public consultation process. There is high engagement from submitters on this issue with a range of views. A consultation version of the overlay was developed by MDC and set out in a July 2024 consultation report. This was consulted on with a range of feedback provided.
- 33 When it approved the Stage 4 Plan Changes for notification the Elected Members of Council preferred a reduced overlay which became the 5 November 2024 notified version.

- 34 These two versions of the overlay are set out in Figures 1 and 2, at paragraph 180 of Ms Spalding's report.
- 35 Mr Knott has provided a further assessment in response to the range of submissions in his report dated 7 April 2025 (Appendix 2 to the section 42A report). A key recommendation is that Mr Knott prefers the July 2024 "consultation version" boundaries for the heritage overlay (see page 8 of Mr Knott's report dated 7 April 2025).
- 36 In light of this specialist advice from Mr Knott, Ms Spalding also recommends in her section 42A report to adopt the "consultation version" of this overlay. This is recommended because this provides greater protection of heritage values than the notified version (see paragraph 184 of Ms Spalding's section 42A report).

MDC Elected Members' position on this differs to its' experts

- 37 This leaves MDC in an awkward position. This is one of those rare times where the Council's notified version of this overlay is not now preferred by its independent expert evidence. My instructions are that Elected Members of MDC strongly prefer the notified version, and request this is retained by the Hearing Panel. Key reasons include the position of Elected Members that:
- (a) The historic heritage overlay is intended to provide protection for historic heritage.
 - (b) The notified version places the overlay on sites that do contain historic heritage structures and this is an appropriate response to manage the values present.
 - (c) The consultation version of the overlay applies to a number of vacant sites. Elected Members consider it nonsense and unnecessary bureaucracy to add the heritage overlay over sites that are currently bare land because this may impede future use of this land.
 - (d) Elected Members considered these options before notifying the Plan Change and adopted the notified version of this overlay. Elected Members consider weight should be placed on this position.
- 38 This is a decision for the Hearing Panel to make in your independent decision-making role based on all the evidence and submissions before you.

Heritage Overlay for the Church of the Good Shepherd

- 39 Mr Knott has considered and responded to submissions relating to the heritage overlay for the Church of the Good Shepherd. His updated assessment is in Part 2 of his 7 April 2025 report. This concludes that the Church has high heritage significance. He recommends it remain on the schedule and that the space around the buildings and views of it within its surrounding environment be included in the heritage overlay.
- 40 In response to submissions, Mr Knott has recommended a change to the south western boundary of the heritage overlay. This is to enable the Church to establish some small public and/or staff facilities as a permitted activity in the vicinity of the Church. Mr Knott considers this alteration to be appropriate.
- 41 Again Ms Spalding has adopted Mr Knott's recommendation in terms of the overlay location.
- 42 It is submitted this amended location provides an appropriate solution to maintain the integrity of the overlay to identify and maintain the significant historic heritage values in this location. This can be achieved while enabling part of the land to the south west to be utilised in a manner that supports the public and staff that visit and utilise the site. MDC therefore support this alteration to the overlay boundary.

PC29 – NZ Agricultural Aviation Association (NZAAA) and Noise

- 43 NZAAA have submitted seeking a number of changes to the Noise section to address aircraft noise. Ms White has addressed these submission points in her s42A report at paragraphs 115 – 127. Ms White makes the point that the changes to the noise rules are likely to have been a fall-back position to preserve options, noting NZAAA had appealed the range of permitted aviation activities in PC23. Ms White recommended no change to the PC29 noise rules.
- 44 Counsel can advise the Hearing Panel that NZAAA did indeed appeal the provisions of PC23. That appeal has been resolved by agreement at Environment Court assisted mediation.
- 45 The parties are working on a consent memorandum and other documents to present to the Environment Court to implement the changes agreed to on PC23. In short it is understood this agreement has addressed the principal concerns of NZAAA, and the submitter has indicated to Ms White that they are not planning to attend the hearing.

PC30 – Definition of Airport Activity – Submission by Director General of Conservation (DOC)

- 46 DOC has submitted seeking to narrow the definition of "Airport Activity" to both limit it to certain purposes (rural, tourism and passenger) and also exclude rocket-powered aircraft.
- 47 Mr Boyes has addressed this issue in paragraphs 96 – 104 of his s42A report.
- 48 It is submitted in support of Mr Boyes view that the purposes for a flight proposed by DOC is very narrow and flawed. Further submitters have pointed out a wide range of normal flights including recreational, training, testing, survey, photography, and gliding. I submit a key "purpose" of search and rescue is also omitted. Attempting to establish in the plan a full list of the "purpose" of a flight serves no valid purpose, is not effects based and is not a reasonable or valid approach to such a rule.
- 49 It is submitted that the intended purpose should not be a requirement of the rule because it serves no useful RMA purpose.
- 50 It is noted that DOC have indicated they no longer plan to attend the hearing. It is understood the driving force behind this change sought by DOC has been resolved by the changes to the rocket powered aircraft flights discussed below.

PC30 – Glentanner Special Purpose Zone (GSPZ) and rocket powered aircraft

- 51 There is a novel issue raised by DOC and Forest and Bird related to the potential effects of rocket powered aircraft on Kakī / Black Stilt nesting.
- 52 Mr Boyes has addressed this in his s42A report (paragraphs 155- 170 in particular). This led Mr Boyes to seek and rely on the technical advice from Trudy Anderson from e3 Scientific.
- 53 Mr Boyes has recommended a restriction in the rules of the GSPZ to limit the potential effects of rocket powered aircraft launches on Kakī/Black Stilt nesting during the breeding season (GSPZ-R12). The breeding season extends from August through to December (inclusive). There is an error in the proposed rule amendment recommended in the section 42A report, which has been referenced in the withdrawal of the request to be heard received from the Director-General of Conservation (dated 30 April 2025). The rule should read "August through to December (inclusive)". Otherwise this restriction is based on the expert advice and is as follows:

GSPZ³⁹ Ecological Open Space	Activity Status: NC	
GSPZ⁴⁰ Airport Area	Activity Status: PER Where: 2. <u>The use of rocket powered aircraft during the Kākī / Black stilt breeding season, being December through to August through to December (inclusive), is restricted to no more than one launch in any 24-hour period taking place between the hours of 9:00am to 3:00pm.</u> ⁴¹	<u>Activity status when compliance is not achieved with R12.2: RDIS⁴²</u> <u>Matters of discretion are restricted to:</u> a. <u>The noise arising from rocket powered aircraft and any resulting disturbance to Kākī / Black stilt.</u> b. <u>Impacts of any disturbance on Kākī / Black stilt breeding success.</u> c. <u>The functional need and operational need for additional launches and/or launches to take place outside the prescribed times during the Kākī / Black stilt breeding season.</u> d. <u>The adequacy of any mitigation measures.</u> ⁴³

54 It is understood that this proposed restriction has found favour with all relevant parties with an interest in this issue, and it is hoped there is no dispute remaining over this recommendation (subject to the amendment above).

55 In any event I submit that this restriction faithfully follows the technical recommendation and is appropriate to put in place conditions to manage potential effects on the Kākī/Black Stilt.

Designations

56 Ms Blyth has assessed all the notices of requirement for proposed designations. The only matter I stress is the Hearing Panel's jurisdiction to:


- (a) make a recommendation to requiring authorities external to MDC, where there are submissions on a notice of requirement (section 171(2) RMA); and
- (b) make a decision on MDC's notices of requirement where there are submissions (section 168A(4) RMA).

57 This should be separated out in the Hearing Panel's decision report so it is clear which are recommendations made to external requiring authorities, that require them to make a decision in response.

58 Ms Blyth has summarised this in her s42A report as follows, which I support:

7. The conclusions reached and recommendations made in this report are not binding on the Hearing Panel. It is for the Hearing Panel to make recommendations to the Requiring Authorities that are external to the Council (under section 171(2)), and those Requiring Authorities then make a decision under section 172. For the Mackenzie District Council's notices of requirement, the Hearing Panel is to make a decision under section 168A(4). It should not be assumed that the Hearing Panel will reach the same conclusions having considered all the information in the submissions and the evidence to be brought before them, by the submitters.

Dated this 16th day of May 2025



Michael Garbett
Counsel for Mackenzie District Council