

Before the Independent Hearings Panels

Under the Resource Management Act 1991

In the matter of submissions on proposed Plan Change 1 to the Regional Policy Statement for the Wellington Region

OPENING LEGAL SUBMISSIONS ON BEHALF OF PORIRUA CITY COUNCIL (S30)

Hearing Stream 1 (Overview and General Submissions)

13 June 2023



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May it please the Panel

1. Introduction

1.1 These submissions are filed on behalf of Porirua City Council (**PCC**), in advance of the first hearing on proposed Plan Change 1 (**Change 1**) to the Regional Policy Statement for the Wellington Region (**RPS**). They are intended to be introductory submissions only.

1.2 These submissions:

- (a) set out why PCC is involved in the Change 1 hearings;
- (b) outline PCC's intended approach to involvement in the hearings; and
- (c) raise legal issues concerning:
 - (i) the directiveness of the provisions within Change 1 (including the purported transfer of functions, and inclusion of a date by which PCC (and other territorial authorities) is to notify changes to its district plan); and
 - (ii) the clarity of drafting of provisions (including whether Change 1 intends to introduce a hierarchy the provisions).

2. Porirua City Council's interest in the Change 1 hearings

2.1 The RPS provides the overarching policy direction that guides the management of natural and physical resources across the Wellington region. As PCC is required to give effect to the RPS through its district

plan,¹ the RPS is an important part of the statutory planning framework that informs how PCC is to undertake its resource management functions and obligations under the Resource Management Act 1991 (**RMA**).

- 2.2** Consequently, PCC has a considerable interest in any change to the RPS. PCC's key interest in the Change 1 process is ensuring that the provisions are drafted in a way that will ensure PCC can continue to meet its statutory obligations.
- 2.3** PCC generally supports the intent of Change 1 and agrees that issues of climate change, freshwater management, biodiversity, natural hazards, and urban development are important resource management matters for the Wellington region. However, and as set out in its submission (dated 14 October 2022), PCC has several concerns with how the Regional Council proposes to address these issues through Change 1. These concerns will be further explained in PCC's evidence through the Change 1 hearing process.
- 2.4** In order to set the scene for several of PCC's concerns (and submission points), PCC has recently completed a full review of its district plan, and is now awaiting decisions from the independent hearings panel that was appointed to hear submissions on the plan review. That same panel will also be making recommendations to PCC on Variation 1 to the proposed Porirua District Plan, which was PCC's intensification planning instrument.
- 2.5** Through Variation 1, PCC incorporated the medium density residential standards, and gave effect to the National Policy Statement for Urban Development, within the proposed Porirua District Plan (and for an existing, albeit recently approved, Operative District Plan zone).
- 2.6** As PCC has only recently concluded its plan review process, it is motivated to ensure that the extent of change to its new district plan is as confined as possible, to avoid unnecessary inefficiencies.

1 Section 75(3), Resource Management Act 1991.

3. Porirua City Council's involvement in the hearings

- 3.1** In support of its submissions on hearing stream 1, PCC has filed planning evidence prepared by Mr Michael Rachlin. PCC intends to file further planning evidence on topics and specific provisions that are to be dealt with in future hearing streams.
- 3.2** For the remaining hearing streams, PCC is not yet in a position to advise which hearings it intends to participate in, as its submission points have not yet been allocated across the hearing streams. In accordance with the directions in Minute 1, PCC will advise of its intention to participate in advance of each hearing stream, and file further evidence as required.
- 3.3** PCC is also willing to take part in any conferencing directed by the Panels, and is happy to meet with the Regional Council team to discuss any aspect of its submission.

4. Legal issues relevant to hearing stream 1

- 4.1** These submissions set out the several legal issues that PCC wishes to raise with the Panels at this stage. More detailed submissions will be made in relation to the relief sought by PCC in later hearing streams.

Jurisdiction to require amendments to district plans

- 4.2** Change 1 proposed to include policies in the RPS that direct territorial authorities to amend their district plans, including by certain dates. As discussed by Mr Rachlin in his evidence², a number of these provisions direct PCC to notify changes to its district plan by 30 June 2025.

² Michael Rachlin Statement of Evidence, 13 June 2023, at paras 42 to 45.

- 4.3** While PCC accepts that a RPS can require territorial authorities to amend their district plans, it is respectfully submitted that there are limits to this power.
- 4.4** More specifically, in our submission a RPS cannot:
- (a) require a district plan to regulate matters that sit outside of the functions of a territorial authority in section 31 of the RMA (unless a regional council has transferred its powers in accordance with section 33 of the RMA); or
 - (b) specify a deadline or date by which amendments to a district plan must be made.
- 4.5** In both cases, it is submitted that such a requirement would inappropriately interfere with PCC’s statutory functions, obligations and decision-making role, or lead to potential confusion about which authority has responsibility for managing a relevant resource management issue.
- 4.6** In terms of PCC’s statutory functions, the purpose of a district plan is “to assist territorial authorities to carry out their [section 31] functions in order to achieve the purpose of the RMA”.³ PCC must prepare and amend its district plan in accordance with this purpose, and therefore will need to be satisfied that any amendments would assist it to carry out its section 31 functions.
- 4.7** As raised by Mr Rachlin, in a number of instances the Change 1 provisions appear to either: duplicate functions across both the regional and district councils, or appear to impose a purported transfer of functions.
- 4.8** While PCC acknowledges that there can be scope for overlapping functions between regional and district councils, this should be limited to

3 RMA, section 72.

where “each authority is acting within the terms of its respective legal functions under sections 30 and 31”.⁴ As outlined in Mr Rachlin’s evidence, and as will be elaborated on in later hearings as well, PCC is concerned that there are examples of overlap that are not justified or appropriate, which could in turn lead to the sort of confusion referenced above.

4.9 In relation to transfer, if the intention is that the Regional Council will hand functions to the district councils, PCC does not consider that the steps required by section 33 of the RMA have been properly carried out to date, including the need to reach agreement between the respective councils.⁵

4.10 With reference to the direction given within certain provisions that require PCC (and the other territorial authorities in the region) to notify plan changes by a specific date, PCC submits that this is also straying beyond the proper role (and powers) of the Regional Council.

4.11 There is authority on this matter, with the Courts previously commenting on its own ability to determine a provision or policy that would serve to fetter a council’s statutory discretion / role. For example:

(a) In *Awatea Residents’ Association Incorporated v Christchurch City Council*,⁶ the Court considered a policy that would (if approved) require a variation (but not by any specified date). The Court held that the relevant policy wording did not give rise to any legally enforceable duty, and went on to note (relevantly):⁷

... Quite simply, any decision to issue a variation would still be subject to the exercise of discretion by Council and it

⁴ *Telecom New Zealand Ltd v Environmental Protection for Children Trust*, C36/2000, 28 March 2003, at [15].

⁵ See for example PCC’s submissions on Polices 15 and, FW.3. PCC also has concerns about the potential for other policies, for example 41, 42, 44, IE.2 which purport to regulate regional council functions through district consents, plan change and notices of requirement.

⁶ *Awatea Residents’ Association Incorporated v Christchurch City Council* C78/2006.

⁷ At [23].

would not be appropriate for this Court to supplant the exercise of that discretion.

- (b) In a different context, but of the same effect, the Planning Tribunal in *Connet Properties Ltd v New Plymouth City Council*⁸ refused to impose a condition on a designation that would preclude any alteration to the relevant plan, noting:

That would be an attempt to fetter the council's statutory powers by a designation condition.

- (c) There is also the general principle discussed in *The Power Co Ltd v Gore District Council*, that while there is some potential for the Crown or public bodies (like the Regional Council) to fetter their future freedom of action "by contract or representation", that is not absolute. The question is whether the fettering, in whatever form, is:⁹

... incompatible with the public authority's statutory functions or involves the public authority renouncing "its birthright".

4.12 These authorities suggest that including in the RPS specific dates by which Council is required to notify a Schedule 1 plan change(s) would be incompatible with, and amount to a fettering of, Council's statutory functions under the RMA. The imposition of specific timeframes would also significantly interfere with the Council's decision-making functions and obligations under the Local Government Act 2002, which sets out extensive requirements and considerations in relation to planning, decision-making and accountability.

4.13 While PCC acknowledges that it may, at some point, have to amend its district plan to "give effect to" the RPS, it is not considered appropriate for the RPS to seek to tie PCC to certain dates, when neither the Regional

8 *Connet Properties Ltd v New Plymouth City Council* W26/88.
9 [1997] 1 NZLR 537, CA 267/95, Barker J, at page 18.

Council nor the Panels have oversight of PCC's own work programme, or insights into PCC's budget or resourcing capacity at any point in time.

- 4.14** Additionally, if a specific date were to be included in the RPS by which plan changes were to be notified, and the date was not met, there would be scope to raise the ability to have recourse to Part 2 on the basis that not all of the provisions of the RPS had been complied with.¹⁰ In our submission this issue could arise simply by not complying with the specified date, rather than on the basis of any critical analysis of the district plan provisions. This risk could present unintended consequences for the relevant territorial authorities, which at the least may result in the need for additional analysis to show why the district plan is considered to be complete, which would be avoided if a more benign approach to guiding implementation is adopted.
- 4.15** PCC wishes to raise these considerations at this early stage, so that the Panels are aware of the need to carefully consider the framing and appropriateness of the provisions of Change 1 that seek to require territorial authorities to amend their district plans.
- 4.16** Finally, PCC appreciates that hearing stream 1 is intended to address the high level structure of Change 1, and that the drafting of specific provisions will be considered during later hearing streams.

Hierarchy of objectives and clarity of drafting

- 4.17** As set out in the evidence of Mr Rachlin, PCC has concerns regarding its ability to fully give effect to the Change 1 through its district plan, as it has concerns about the clarity of drafting of a number of the provisions. Furthermore, it is uncertain whether there was an intention to create a hierarchy of objectives through Change 1.

¹⁰ *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

- 4.18** Change 1 proposes the insertion of new Objective A at the start of Chapter 3. This objective sits at the start of the Chapter, and before the topic-specific objectives.
- 4.19** Change 1 states that Objective A is “the overarching resource management objective”. However, aside from this statement, Change 1 does not explain the role or purpose of Objective A, or its relationship with the other Objectives in the RPS. It is therefore unclear whether the proposal is for Objective A to sit above the other objectives in the RPS’ internal hierarchy (which would raise a question of jurisdiction), or whether it is intended to be on the same footing as all other objectives. This raises an important interpretation issue for all users of the RPS, and for decision-makers that are required to give effect to the RPS in its district plan.
- 4.20** PCC will file planning evidence that addresses Objective A in hearing stream 2. However, at this stage, given the provision’s apparent centrality, there would be substantial benefit from the Regional Council clarifying in advance of hearing stream 2 what role Objective A is intended to have within the RPS, and relative to all other objectives.
- 4.21** Further, and as a general principle of good plan/policy drafting, it is submitted that clarity of meaning is critical to ensure provisions provide for effective implementation. This was emphasised by the Supreme Court in its discussion regarding the meaning of particular terms within an RMA context in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd.*¹¹
- 4.22** This need for clarity is particularly important where objectives and policies that seek to manage matters that may conflict with each other (for example urban development and freshwater management). In those instances PCC considers that there is a need for associated direction or a clear methodology that assists with reconciling tension. Again, this

11 [2014] 1 NZLR 593.

guidance is necessary to support successful implementation, including through district plans.

4.23 In its submission PCC identified a number of examples where the drafting of objectives or policies is unclear.¹² PCC will address these specific drafting concerns through the Change 1 hearing process, however it wishes to raise this now as an overarching matter for consideration by both the Hearing Panels.

Dated: 13 June 2023

A handwritten signature in blue ink, appearing to be 'KV' followed by a long horizontal stroke.

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¹² Refer to the specific drafting concerns set out in Appendix 1 to PCC's submission on Change 1.