

**BEFORE THE INDEPENDENT HEARING COMMISSIONERS  
FOR THE PROPOSED TE TAI O POUTINI PLAN**

**UNDER** the Resource Management Act 1991 (RMA)

**IN THE MATTER** of the Proposed Te Tai o Poutini Plan

**AND**

**IN THE MATTER** of Introduction / Whole Plan, Strategic Direction Hearings

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**OPENING LEGAL SUBMISSIONS ON BEHALF OF TE TAI O POUTINI PLAN  
COMMITTEE**

**13 October 2023**

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## **MAY IT PLEASE THE HEARING PANEL**

### **Introduction**

- 1 These legal submissions are made on behalf of the Te Tai o Poutini Plan Committee (**TTPP Committee**) in respect of the submissions and further submissions made on the Introduction and Strategic Direction chapters in the proposed Te Tai o Poutini Plan (**TTPP**).
- 2 The notified TTPP represents over 5 years of work towards streamlining the work of local councils on the West Coast. The formal reorganisation scheme which the TTPP has been prepared under took effect in 2019.
- 3 This hearing, being the first hearing of submissions on the TTPP, represents an important milestone for the TTPP Committee as it works towards putting in place a combined district plan for the Buller, Grey and Westland District Councils.
- 4 The differing interests and aspirations for the future district planning framework for the West Coast are acknowledged. This hearing, along with the future hearing streams, presents the opportunity for those affected by future planning decisions on the West Coast to have their say, and enable their evidence and views to be considered by the Independent Hearing Panel (**IHP or Panel**), appointed by the TTPP Committee to hear the submissions and make recommendations on them. Given the complexity of the issues, and the various and sometimes divergent views and interests, that burden should not be underestimated.
- 5 These legal submissions have been structured to:
  - (a) Outline the background to the TTPP Committee;
  - (b) Provide an overview of the legal framework for making decisions on the TTPP;
  - (c) Outline the principles in respect of the scope to make changes to the TTPP;
  - (d) Outline how the TTPP should address new national policy statements that have come into legal effect since the TTPP was prepared and notified; and
  - (e) Address the relevance of the Natural and Built Environment Act 2023.

- 6 These submissions do not seek to address specific issues relating to any of the submissions on either the Introduction or Strategic Direction chapters in the TTPP. If the IHP has any specific legal questions arising from the submissions (or the cases presented by the submitters in support of submissions), then we would welcome an opportunity to address those for the Panel.

### **Background to the TTPP Committee and the combined district plan for the West Coast**

- 7 The TTPP has been in development for some time, and is the product of a local government reorganisation for the West Coast councils that was originally sought in 2015.<sup>1</sup>
- 8 Following community engagement and assessment by the Local Government Commission, it was determined that amalgamation of the West Coast councils was not desirable. Instead, the preferred option for reorganisation was the transfer of district plan preparation and approval responsibilities from the Buller, Grey and Westland District Councils to the West Coast Regional Council.
- 9 This transfer of powers was given effect to in an Order in Council on 5 November 2018 (**Final Proposal Order**).<sup>2</sup> The Order in Council provided for:
- (a) All councils continuing in existence as constituted;<sup>3</sup>
  - (b) The obligations of Buller, Grey and Westland District Councils under section 73 and Schedule 1 of the Resource Management Act 1991 (**RMA**) for the preparation, notification, adoption, periodic amendment and review of the district plan, to be transferred to the West Coast Regional Council;<sup>4</sup>
  - (c) The transferred obligations to be met by the preparation of a combined district plan for the Buller, Grey and Westland Districts;

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<sup>1</sup> Local Government Commission “2019: West Coast reorganisation” (date unknown) Local Government Commission [www.lgc.govt.nz](http://www.lgc.govt.nz)

<sup>2</sup> “Local Government Reorganisation (West Coast Region) Final Proposal Order 2018” (5 November 2018) (**Final Proposal Order**). <https://gazette.govt.nz/notice/id/2018-go5585>

<sup>3</sup> Final Proposal Order, cl 5.

<sup>4</sup> Final Proposal Order, cl 6.

- (d) Establishment of a permanent joint committee between the four West Coast councils, Te Rūnanga o Ngati Waewae and Te Rūnanga o Makaawhio, to which the West Coast Regional Council **must** delegate the district plan obligations transferred to it under the Order in Council;
- (e) The purpose and terms of reference of that joint committee are to:
- (i) Prepare and notify the proposed combined West Coast district plan (combined district plan);
  - (ii) Hear and consider (including through subcommittees as necessary and appropriate) all submissions received on the proposed combined district plan;
  - (iii) Adopt a final combined district plan;
  - (iv) Monitor implementation of the final combined district plan and the need for amendments; and
  - (v) Undertake amendments and reviews of the final combined district plan, or ensure these are undertaken, as required.
- 10 On 17 June 2019, the second Order in Council (**Reorganisation Order**) was signed, giving effect to the combined West Coast district plan proposal.<sup>5</sup> This order repeats many of the provisions of the Final Proposal Order, but also provides for the establishment of the TTPP Committee (being the permanent joint committee referred to in the Final Proposal Order).
- 11 The Reorganisation Order provides that when conducting the business of the TTPP Committee, the TTPP Committee may appoint subcommittees, including to hear and consider submissions received on the draft combined district plan.<sup>6</sup>
- 12 The TTPP Committee is entitled under the Reorganisation Order to appoint, to any subcommittee, a person who is not a member of a local authority, if in the opinion of the Committee, that person has the skills, attributes or knowledge that will assist the work of the subcommittee.<sup>7</sup>

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<sup>5</sup> "Local Government Reorganisation Scheme (West Coast Region) Order 2018" (17 June 2019) (**Reorganisation Order**). <https://gazette.govt.nz/notice/id/2019-go2872>

<sup>6</sup> Reorganisation Order, cl 10(1).

<sup>7</sup> Reorganisation Order, cl 10(3).

- 13 The TTPP Committee has met regularly since its establishment, to progress the preparation and drafting of a combined district plan, in accordance with its purpose under the Reorganisation Order.
- 14 The development of the new district plan began in around 2019, with community engagement (and consultation under clause 3 of Schedule 1 of the RMA) occurring between 2019 and 2021. An exposure draft of the proposed TTPP was released in January 2022, with further engagement on natural hazards provisions occurring from April 2022.
- 15 The Te Tai o Poutini Plan was then notified (in accordance with clause 5 of Schedule 1 of the RMA) on 14 July 2022. The TTPP Committee provided for a longer submission period than required under the RMA, with submissions scheduled to close on 30 September 2022. This submission deadline was subsequently extended until 11 November 2022.
- 16 534 submissions were lodged on the TTPP, amounting to over 15,000 individual submission points.
- 17 The summary of submissions was published in April 2023, with further submissions closing in June 2023. 230 further submissions were received.
- 18 Since June, the project team has been working to assess the submissions and provide recommendations in the form of section 42A reports. The hearings have been separated on a topic-by-topic basis, with the section 42A report for each hearing being prepared on a sequential basis.
- 19 The IHP has been delegated the power to hear submissions and make recommendations on the TTPP to the TTPP Committee, which will then make the decisions on submissions on the TTPP under clause 10 of Schedule 1 of the RMA.

#### **Legal framework for making decisions on the TTPP**

- 20 The Panel's power to make a recommendation to the TTPP Committee sits within a framework established under the RMA. These submissions outline the key parts of the RMA that form the legal foundation for those recommendations.

- 21 The TTPP is a combined district plan which, under section 80 of the RMA, must be prepared in accordance with the relevant requirements for district plans under the RMA.<sup>8</sup> A combined district plan must also clearly identify which local authority is responsible for observing, and enforcing the observance of, each provision of the TTPP.<sup>9</sup>
- 22 The legal framework for a district plan is set out in sections 72 to 77 of the RMA. A summary of district plan requirements (including the requirements of evaluation reports under section 32) was set out by the Environment Court in *Colonial Vineyard Ltd v Marlborough District Council*.<sup>10</sup>
- 23 An updated summary of district plan requirements that incorporates amendments that have been made to the relevant RMA provisions since *Colonial Vineyard*, and requirements for a combined district plan under section 80 of the RMA, is set out in **Appendix 1** to these submissions.
- 24 As the Panel will be familiar with the plan process, I do not propose to take the Panel through each of the requirements. However, I have addressed the requirement to give effect to new national policy statements since the TTPP was notified further below.

### **Scope to make changes**

- 25 Clause 10 of Schedule 1 of the RMA provides for the making of decisions on provisions and matters raised in submissions. In giving recommendations on the provisions of the TTPP and any matters raised in submissions, the Panel must be satisfied that there is scope to make any such amendments to TTPP. In doing so, the Panel must consider whether:
- (a) submissions received are “on” the TTPP; and, if so,
  - (b) any amendments are within the scope of a submissions such that the Panel has jurisdiction to recommend amendments.

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<sup>8</sup> RMA, s 80(6A).

<sup>9</sup> RMA, s 80(8)(c).

<sup>10</sup> *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17].

*Whether a submission is “on” a proposed plan*

- 26 Schedule 1 of the RMA requires that submissions be “on” the proposed plan.<sup>11</sup>
- 27 The Courts have endorsed a bipartite approach when considering whether a submission is “on” a proposed plan change:<sup>12</sup>
- (a) First, the submission must reasonably fall within the ambit of the proposed change by addressing a change to the status quo advanced by the proposed change.
  - (b) Secondly, the decision-maker should consider whether there is a real risk that persons potentially affected by the changes sought in a submission have been denied an effective opportunity to participate in the decision-making process.
- 28 The High Court decision in *Albany North Landowners v Auckland Council* related to appeals on the proposed Auckland Unitary Plan (**PAUP**) which was a full plan review. The High Court considered that in the context of the proposed Auckland Unitary Plan, presumptively the plan addressed every aspect of the status quo in planning terms, and the “scope for a coherent submission being “on” the PAUP ... was therefore very wide”.<sup>13</sup>
- 29 Given the TTPP is a full proposed combined district plan, in the sense that it is not a proposed change or variation to an existing district plan, the scope for a submission to be “on” the TTPP is wide. However, it is submitted that there may be circumstances where a submission is not “on” the TTPP, in particular where a submission does not relate to a relevant resource management matter addressed by the TTPP.

*Within the scope of a submission*

- 30 Any amendments proposed before the Panel must also be within the scope of a submission. The orthodox test for whether an amendment is within the scope of a submission was outlined by the High Court in

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<sup>11</sup> RMA, Sch 1, cl 6(1).

<sup>12</sup> *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003

<sup>13</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [129].

*Countdown Properties (Northlands) Ltd v Dunedin City Council* as follows:<sup>14</sup>

The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. ... It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

- 31 The High Court in *Albany North Landowners v Auckland Council* confirmed that the reasonably foreseen logical consequence test conforms to the orthodox “reasonably and fairly raised” test laid down in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.<sup>15</sup>
- 32 In *Re an application by Vivid Holdings Ltd*, the Environment Court refined the test in *Countdown Properties (Northlands) Ltd v Dunedin City Council* and identified that any decision of the Council must be:<sup>16</sup>
- (a) fairly and reasonably within the general scope of:
    - (i) an original submission; or
    - (ii) the proposed plan as notified; or
    - (iii) somewhere in between.
- 33 Issues of scope should be approached in a realistic workable fashion rather than from a perspective of legal nicety.<sup>17</sup>
- 34 However, there is no jurisdiction for the TTPP Committee to make amendments to such an extent where those who are potentially affected have not had the opportunity to participate.<sup>18</sup> This would not achieve procedural fairness. The purpose of notifying a plan and the submissions and further submissions process is to inform everyone about what is proposed “otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness”.<sup>19</sup>

### **Newly introduced national policy statements**

- 35 A district plan must give effect to any national policy statements.<sup>20</sup>

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<sup>14</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 41.

<sup>15</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

<sup>16</sup> *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC) at [19].

<sup>17</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 408 (HC) at 10; *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] and [59].

<sup>18</sup> *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

<sup>19</sup> *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].

<sup>20</sup> RMA, s 75(3)(a).



- 36 Some national policy statements have come into force since the TTPP was publicly notified on 14 July 2022. These include:
- (a) The National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**) which came into force on 17 October 2022;
  - (b) The National Policy Statement for Indigenous Biodiversity (**NPS-IB**) which came into force on 4 August 2023; and
  - (c) The National Policy Statement for Greenhouse Gas Emissions from Industrial Process Heat 2023, however, this applies to regional council functions and is, accordingly, not directly relevant to the TTPP.
- 37 It is acknowledged that the question of how the TTPP gives effect to both the NPS-HPL and the NPS-IB is likely to be more relevant to other hearing streams, such as the ecosystems and indigenous biodiversity and rural zone chapters. The following is intended to provide an overview insofar that these matters are relevant to the strategic directions chapter of the TTPP.
- 38 The NPS-HPL and the NPS-IB both include a part on the timing of the implementation of the newly introduced national policy statements:
- (a) the NPS-HPL provides that:
    - (i) “[e]very local authority must give effect to this National Policy Statement on and from the commencement date”; and
    - (ii) “[e]very territorial authority must notify changes to objectives, policies, and rules in its district plan to give effect to this National Policy Statement ... as soon as practicable, but no later than 2 years after maps of highly productive land in the relevant regional policy statement become operative.”<sup>21</sup> and
  - (b) the NPS-IB provides that:<sup>22</sup>
    - (i) “[e]very local authority must give effect to this National Policy Statement as soon as reasonably practicable”; and
    - (ii) “[l]ocal authorities must publicly notify any changes to their policy statements and plans that are necessary to give effect

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<sup>21</sup> NPS-HPL, clause 4.1.

<sup>22</sup> NPS-IB, clause 4.1.

to this National Policy Statement within eight years after the commencement” which is 17 October 2030.<sup>23</sup>

- 39 Accordingly, in respect of the NPS-HPL, it must be given effect to from 17 October 2022. In terms of the NPS-IB, it must be given effect to as soon as reasonably practicable.
- 40 Overall, it is submitted that the TTPP does not need to give full effect to the NPS-HPL or the NPS-IB, but rather the TTPP must give effect to the NPS-HPL and NPS-IB to the extent possible as provided for within the scope of the TTPP and the submissions on the TTPP (and in the case of the NPS-IB, to the extent it is reasonably practicable).
- 41 The situation with respect to the introduction of a new national policy statement ‘mid-process’ is not new, and has occurred before with previous iterations of the National Policy Statement for Freshwater Management (**NPS-FM**).
- 42 Different approaches have been adopted by the Courts when a new NPS-FM has been introduced ‘mid-process’. The approaches of the Courts have differed:
- (a) In *Hawke’s Bay and Eastern Fish and Game Council v Hawke’s Bay Regional Council* the High Court considered the question of which freshwater policy statement ought to be given effect to, following an appeal and the referral of a provision back to the decision-maker for reconsideration (in this case a Board of Inquiry), when the NPS-FM 2014 would be operative at the time of reconsideration but the decision on all other provisions gave effect to the 2011 iteration. The High Court held that the NPS-FM 2014 was the national policy statement to give effect to on reconsideration and that approach best reflected the requirements of section 67(3)(a) of the RMA.<sup>24</sup>

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<sup>23</sup> We note that clause 4.2 of the NPS-IB provides that local authorities must publicly notify any plan or change necessary to give effect to subpart 2 of Part 3 (significant natural areas) and clause 3.24 (information requirements) within five years after the commencement date which is 17 October 2027.

<sup>24</sup> *Hawke’s Bay and Eastern Fish and Game Council v Hawke’s Bay Regional Council* [2014] NZHC 3191, 18 ELRNZ 348 at [183] and [184]. A similar approach was adopted in *Ngati Kahungunu Iwi Incorporated v Hawke’s Bay Regional Council* [2015] NZEnvC 50, (2015) 18 ELRNZ 565 at [16].

(b) By contrast, in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, the High Court held that on appeal, the Environment Court was not obliged to give effect to the NPS-FM 2011 which had come into effect since the relevant regional plan had been notified. Contributing factors in this case to the NPSFM 2011 not being applicable included that the plan change had progressed significantly, and the Court was mindful that the Environment Court’s jurisdiction is confined by the scope of appeals, submissions and further submissions.<sup>25</sup> The High Court also noted that the Environment Court does not sit in an executive plan making role. The Environment Court’s rationale for not considering the evidence it had before it on the relevance of the new national policy statement (which was upheld by the High Court on appeal) was that the new national policy statement “only came into force long after the POP [being the Proposed One Plan] was well advanced”.<sup>26</sup>

43 More recently and in the specific context of the NPS-HPL, the Environment Court in *Wakatipu Equities Ltd v Queenstown Lakes District Council*<sup>27</sup> in determining an appeal on the proposed Queenstown Lakes District Plan, which was notified prior to the NPS-HPL coming into force, considered whether the NPS-HPL needed to be given effect to. The Environment Court stated that:<sup>28</sup>

[d]istrict plans must give effect to the NPS-HPL as a national policy statement (s75(3)). Legislation, including both s75(3) RMA and the NPS-HPL, applies “to circumstances as they arise” (s11 Legislation Act 2019 ‘LA’).

Therefore, the court must satisfy itself that any relief pursued in Topic 31 appeals concerning land in LUC 1, 2 or 3 would not compromise the requirement that the PDP gives effect to the NPS-HPL.

44 In addition, the Environment Court in *Drinnan v Sewlyn District Council*<sup>29</sup> in making its decision on an appeal to the proposed Selwyn District Plan,

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<sup>25</sup> *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492, (2013) 17 ELRNZ 652 at [98] to [102].

<sup>26</sup> *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at [5-189].

<sup>27</sup> *Wakatipu Equities Ltd v Queenstown Lakes District Council* [2023] NZEnvC 188.

<sup>28</sup> *Wakatipu Equities Ltd v Queenstown Lakes District Council* [2023] NZEnvC 188 at [5] and [6].

<sup>29</sup> *Drinnan v Sewlyn District Council* [2023] NZEnvC 180.

also notified before the NPS-HPL came into force, sought to give effect to the NPS-HPL.

- 45 In our submission, the approach taken by the High Court in *Hawke's Bay and Eastern Fish and Game Council v Hawke's Bay Regional Council* and the Environment Court in *Wakatipu Equities Ltd v Queenstown Lakes District Council* ought to be followed here. In the case of the TTPP:
- (a) The TTPP is far less advanced than the relevant plan in *Horticulture New Zealand v Manawatu-Wanganui Regional Council*, having only progressed through the notification and submissions stages to date and can be distinguished on that basis.
  - (b) In addition, the Panel is not jurisdictionally confined (as the Environment Court in the *Horticulture New Zealand* case) and is charged with making recommendations to the TTPP Committee, which does sit in an executive plan-making role;
  - (c) Giving effect to the NPS-IB and the NPS-HPL to the extent possible reflects the requirement of section 75(3) of the RMA, but is also more consistent with the purpose of the RMA, being to promote the sustainable management of natural and physical resources.
- 46 Accordingly, to the extent that there is scope to do so, this Panel should strive to give effect to the NPS-IB and the NPS-HPL. In saying that, it is important to acknowledge that both NPSs are the first of their kind and introduce many new aspects in respect of indigenous biodiversity and highly productive land. In addition, both NPSs include certain implementation steps that must be followed which are set out in the policy statements. The TTPP Committee accepts that unless and until certain implementation steps have been followed, the NPS-IB and the NPS-HPL cannot be fully given effect to.
- 47 Further, the ability to give effect to the NPS-IB and the NPS-HPL is confined by the extent that there is scope within submissions, and scope within the TTPP itself.
- 48 It is submitted that submitters should highlight the provisions of the NPS-IB and the NPS-HPL relevant to the changes that they seek to the

TTPP, and to illustrate the extent to which their relief gives effect to the new NPSs (where relevant).

- 49 Ultimately, the Panel is required to give effect to the NPS-IB to the extent reasonably practicable, and the NPS-HPL from commencement, which in terms of the current TTPP process is confined by the scope within submissions and within the TTPP itself.

### **New environmental legislation**

- 50 The Natural and Built Environment Act 2023 (**NBEA**) was given royal assent on 23 August 2023 and a number of the provisions of the NBEA have already come into force.
- 51 For completeness, these submissions briefly address the relevance of the NBEA to the TTPP process.
- 52 The TTPP must continue to be heard under the RMA. There are a number of steps that must occur before the first planning process can begin under the NBEA,<sup>30</sup> these steps have not yet occurred. In addition, the transitional provisions of the NBEA do not make any changes to the TTPP planning process that has already commenced under the RMA.
- 53 It is only on a region's NBEA date (which is the date that the decisions version of the first plan for a region is treated as operative under the NBEA) that RMA instruments, which includes the TTPP, and Parts 3 and 5 (which include local authority planning functions) cease to apply.<sup>31</sup>

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<sup>30</sup> NBEA, sch 1, cl 6 and sch 6, cl 2.

<sup>31</sup> NBEA, sch 1, cl 5.

**Conclusion**

54 The TTPP Committee thanks the Panel for the opportunity to provide these submissions. Counsel is happy to address any legal questions that the Panel may have arising from the Introductory or Strategic Direction chapters of the TTPP.

Dated this 13<sup>th</sup> day of October 2023



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## Appendix 1 – Legal framework for a district plan

### A. General requirements

- 1 A district plan must be designed to *accord with*<sup>32</sup> – and assist the territorial authority to carry out – its functions<sup>33</sup> so as to achieve the purpose of the Act.<sup>34</sup>
- 2 A proposed district plan must be prepared in accordance with any applicable Mana Whakahono a Rohe,<sup>35</sup> which in relation to the TTPP includes the West Coast Regional Council’s Mana Whakahono ā Rohe agreement with Poutini Ngāi Tahu, Paetae Kotahitanga ki Te Tai Poutini – Partnership Protocol.
- 3 The district plan must also be prepared *in accordance* with any regulation<sup>36</sup> and any direction given by the Minister for the Environment.<sup>37</sup>
- 4 When preparing its district plan the territorial authority *must give effect to*<sup>38</sup> any national policy statement, any New Zealand coastal policy statement, and any national planning standards. Give effect to is a strong direction. It means implement.<sup>39</sup>
- 5 When *preparing* its district plan the territorial authority shall:
  - (a) *have regard to* any proposed regional policy statement;<sup>40</sup> and
  - (b) *give effect to* any operative regional policy statement.<sup>41</sup>
- 6 In relation to regional plans and water conservation orders:
  - (a) the district plan must *not be inconsistent* with an operative regional plan for any matter specified in section 30(1), which in relation to the TTPP includes the Regional Land and Water Plan, the

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<sup>32</sup> RMA, s 74(1).

<sup>33</sup> As described in s 31 of the RMA.

<sup>34</sup> RMA, ss 72 and 74(1)(a) and (b).

<sup>35</sup> RMA, s 73 and sch 1, cl 1A.

<sup>36</sup> RMA, s 74(1)(f).

<sup>37</sup> RMA, s 74(1)(c).

<sup>38</sup> RMA, s 75(3)(a),(b) and (ba).

<sup>39</sup> *Environmental Defence Society Inc v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC) at [77].

<sup>40</sup> RMA, s 74(2)(a)(i).

<sup>41</sup> RMA, s 75(3)(c).

Regional Air Quality Plan, and the Regional Coastal Plan for the West Coast;<sup>42</sup> and

- (b) the district plan must *not be inconsistent* with a water conservation order, which in relation to the TTPP, includes the Water Conservation (Buller River) Order 2001 and the National Water Conservation (Grey River) Order 1991;<sup>43</sup> and
- (c) the territorial authority *must have regard* to any proposed regional plan on any matter of regional significance or for which the regional council has primary responsibility under Part 4.<sup>44</sup>

7 When preparing its district plan the territorial authority must also:

- (a) *have regard to*:<sup>45</sup>
  - (i) any relevant management plans and strategies under other Acts,<sup>46</sup> to any relevant entry in the Historic Places Register/Rārangi Kōrero,<sup>47</sup> and to various fisheries regulations,<sup>48</sup> to the extent that their content has a bearing on resource management issues of the district; and
  - (ii) the extent to which the district plan needs to be consistent with plans or proposed plans of adjacent territorial authorities.<sup>49</sup> The adjacent territorial authorities include the Tasman, Hurunui, Selwyn, Ashburton, Mackenzie, Waitaki, Queenstown-Lakes, and Southland District Councils; and
- (b) *take into account* any relevant planning document recognised by an iwi authority to the extent that its content has a bearing on the

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<sup>42</sup> RMA, s 75(4)(b).

<sup>43</sup> RMA, s 75(4)(a).

<sup>44</sup> RMA, s 74(2)(a)(ii).

<sup>45</sup> Section 74 of the RMA now also includes the requirement under sections 74(d) and (e) to have regard to any emissions reduction plan and any national adaptation plan. However, section 74(d) and (e) were only inserted on 30 November 2022 after the TTPP was publicly notified on 14 July 2022 by the Resource Management Amendment Act 2020. In accordance with schedule 12, clause 26, of the RMA the TTPP must be determined as if these amendments had not been enacted.

<sup>46</sup> RMA, s 74(2)(b)(i).

<sup>47</sup> RMA, s 74(2)(b)(iia).

<sup>48</sup> RMA, s 74(2)(b)(iii).

<sup>49</sup> RMA, s 74(2)(c).



resource management issues of the district.<sup>50</sup> The following iwi management plans are relevant to the TTPP:

- (i) Pounamu Management Plans prepared by both Ngāti Mahaki ki Makaawhio and Ngāti Waewae; and
  - (ii) Te Mahaere Whakahaere o Te Tāwhiri a Te Makō: Lake Māhinapua Management Plan; and
- (c) not have regard to trade competition or the effects of trade competition.<sup>51</sup>

8 “Have regard to” requires the decision-maker to give genuine attention and thought to the matter.<sup>52</sup>

9 “Take into account” requires that the decision-maker must address the matter and record it has been addressed in the decision; but the weight of the matter is for the decision-makers’ judgment in light of the evidence.<sup>53</sup>

10 A district plan must<sup>54</sup> also state its objectives, policies and the rules (if any) and may state other matters.<sup>55</sup>

**B. Objectives [the section 32 test for objectives]**

11 Each proposed objective in a district plan is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.<sup>56</sup> The proposed provisions of the TTPP must be examined in accordance with section 32 as to whether they are the most appropriate way to achieve the objectives of the proposal, being the TTPP.<sup>57</sup>

12 The term “most appropriate” does not mean the superior method, but means the “most suitable”.<sup>58</sup>

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<sup>50</sup> RMA, s 74(2A).

<sup>51</sup> RMA, s 74(3).

<sup>52</sup> *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

<sup>53</sup> *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 (HC) at [70].

<sup>54</sup> RMA, s 75(1).

<sup>55</sup> RMA, s 75(2).

<sup>56</sup> RMA, ss 74(1) and 32(1)(a).

<sup>57</sup> RMA, s 32(1)(b).

<sup>58</sup> *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [45].

**C. Policies and methods (including rules) [the section 32 test for policies and rules]**

- 13 The policies are to implement the objectives, and the rules (if any) are to implement the policies.<sup>59</sup>
- 14 Section 32 requires a value judgment as to what, on balance, is the most appropriate (i.e., most suitable) provision when measured against the relevant objectives. We submit this means the objectives of the TTPP as a whole without giving primacy to one objective.<sup>60</sup>
- 15 Specifically, 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 (i.e., suitable) method for achieving the objectives<sup>61</sup> of the district plan taking into account:
- (a) the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the proposed provisions;<sup>62</sup> and
  - (b) if practicable, quantify the benefits and costs;<sup>63</sup> and
  - (c) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions;<sup>64</sup> and
- 16 In addition, 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 circumstances.<sup>65</sup>

**D. Rules**

- 17 In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment including, in particular, any adverse effect.<sup>66</sup>

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<sup>59</sup> RMA, s 75(1)(b)-(c) and s 76(1).

<sup>60</sup> *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 at [46].

<sup>61</sup> RMA, s 32(1)(b).

<sup>62</sup> RMA, s 32(2)(a).

<sup>63</sup> RMA, s 32(2)(b).

<sup>64</sup> RMA, s 32(2)(c).

<sup>65</sup> RMA, s 32(4).

<sup>66</sup> RMA, s 76(3).

- 18 Rules have the force of regulations.<sup>67</sup>
- 19 Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive<sup>68</sup> than those under the Building Act 2004.
- 20 There are special provisions for rules about contaminated land.<sup>69</sup>
- 21 There must be no blanket rules about felling of trees<sup>70</sup> in any urban environment.<sup>71</sup>

**E. Other statutes**

- 22 Finally, territorial authorities may be required to comply with other statutes.<sup>72</sup>

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<sup>67</sup> RMA, s 76(2)

<sup>68</sup> RMA, s 76(2A).

<sup>69</sup> RMA, s 76(5).

<sup>70</sup> RMA, s 76(4A).

<sup>71</sup> RMA, s 76(4B).

<sup>72</sup> *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17].