

## MEMORANDUM

**Date:** 23 November 2023

**To:** Briar Belgrave

**From:** Lucy de Latour

### Proposed Te Tai o Poutini Plan – General district wide matters advice

1. We understand that as part of the hearing on the general district wide matters under the proposed Te Tai o Poutini Plan (**TTPP**), you have been asked to obtain a legal opinion regarding:
  - (a) TEMP-R1, and the support of Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio and Te Rūnanga o Ngāi Tahu (**Rūnanga**) to amend this rule to include a third party written approval requirement; and
  - (b) The use of AS/NZS 4282 in the lighting rules, and whether:
    - (i) By referencing the standards, they are incorporated (or simply cross-referenced); and
    - (ii) These references can be updated in future to refer to the current but also any amended future standards.
2. We understand that this opinion will be provided to the independent hearing panel as part of the reply to the general district wide hearing stream.

### Executive summary

3. There are a number of legal tests for permitted activities, one of which is that a rule must not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity. The amendment to TEMP-R1 proposed by the Rūnanga on its face does not appear to meet this test.
4. We have considered other case law regarding the assessment of cultural effects needing to be undertaken or informed by mana whenua, however, we consider that the rule as sought by the Rūnanga does reserve a discretion to determine whether the activity is permitted or not, and therefore does not meet the requirements for a valid permitted activity rule.
5. We acknowledge the potential benefits and pragmatism of such a rule in terms of enabling Rūnanga to consider whether there are cultural effects of a particular proposed activity in Sites and Areas of Significance to Māori (**SASM**) rather than always requiring a resource consent to be obtained. We note that it *may be possible* to formulate a rule that achieves a similar outcome while complying with the requirements for permitted activity rules (such as through a certification process) but any such rule would be novel and therefore at risk of challenge.
6. There is a specific process for the incorporation of documents by reference under the RMA, while the National Planning Standards recognise that in some cases documents may only need to be cross-referenced rather than incorporated in full. We consider that whether incorporation by reference is required needs to be assessed based on whether the material needs to be relied on as part of the TTPP. We have considered this specifically in light of the reference in LIGHT-R1.
7. We consider that the standard AS/NZS 4282 was intended to be incorporated by reference into the TTPP using the process in Schedule 1 of the RMA, as evidenced by the documents produced for consultation indicating this. Since the notification of the TTPP, the section 42A officer's recommended amendments to the TTPP now also propose to elevate this standard from being referenced in an advice note, to a standard.

8. A consequence of incorporation by reference is that future or updated versions of the standard can only be referred to within the TPPP through a plan change or variation process under Schedule 1 of the RMA. However, this does also protect against future unwanted changes to the standard being automatically incorporated, or it being deleted altogether.
9. If the Panel considers a cross-reference is more appropriate, then we consider this reference would need to be included only in an advice note, rather than a standard. If the Panel did seek to take this approach, it may also be worthwhile considering whether further wording could be added to the reference to the standard, to note that this reference also includes any future standards which amend, replace or supercede that particular standard (although noting the risks with this approach outlined above).
10. Our detailed advice follows.

#### **TEMP-R1 – proposed approval from Rūnanga**

11. The Rūnanga's evidence refers to the New Zealand Defence Force's submission that seeks an amendment to TEMP-R1 standard (4) to add in the clause that these activities cannot occur on SASM identified in Schedule 3 unless written approval from the relevant Poutini Ngāi Tahu rūnanga is provided to the relevant District Council at least ten working days prior to the activity commencing.<sup>1</sup>
12. The evidence on behalf of the Rūnanga is in support of this amendment, on the basis that it is consistent with the RMA and other approaches under the RMA to boundary activities.<sup>2</sup>
13. You have asked us to consider whether this proposed amendment is lawful, in the context of the legal requirements for permitted activity rules.
14. It is well established that in order to be properly classified as a permitted activity a rule must:
  - (a) Not reserve by subjective formulation a discretion to decide whether an activity is a permitted activity;<sup>3</sup>
  - (b) Be comprehensible to a reasonably informed, but not necessarily expert, person;<sup>4</sup> and
  - (c) Be sufficiently certain to be capable of objective ascertainment.<sup>5</sup>
15. It has been accepted by the Courts that not all rules can be expressed in measurable units and that a condition of a permitted activity rule is not as a matter of law automatically invalid simply because it calls for evaluation or requires an exercise of judgment. However, any condition on a permitted activity rule that requires certification needs to be capable of objective analysis.<sup>6</sup>
16. In this case, it is the first of those three criteria that is in question through the proposed rule. On its face, the proposed rule appears to provide a discretion to the Rūnanga to determine whether the activity is permitted or not, thereby reserving a discretion to a third party.
17. As referred to in *Twisted World*, not all rules (or effects) can be expressed in measurable units. This is particularly so in respect of cultural effects, where other case law has indicated that "persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them."<sup>7</sup> In this case, the objective

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<sup>1</sup> Statement of evidence of Philippa Lynch on behalf of the Rūnanga, dated 17 October 2023, at [65].

<sup>2</sup> Statement of evidence of Philippa Lynch on behalf of the Rūnanga, dated 17 October 2023, at [68].

<sup>3</sup> *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [63]. See also *Carter Holt Harvey Limited v Waikato Regional Council* EnvC Auckland A123/2008 at [116].

<sup>4</sup> *Re Application by Lower Hutt City Council* EnvC Wellington W046/2007, 31 May 2007 at [10].

<sup>5</sup> *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002, 8 July 2002 at [64]. See also *Carter Holt Harvey Limited v Waikato Regional Council* EnvC Auckland A123/2008 at [116].

<sup>6</sup> *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002 at [63].

<sup>7</sup> *SKP Inc v Auckland Council* [2018] NZEnvC 81, recently cited in *TEPS v Tauranga City Council* [2021] NZHC 1201.

ascertainment of whether there are any cultural effects can realistically only be provided or informed by mana whenua.

18. We have not identified any case law that specifically comments on rules such as that which is proposed (either in the positive or negative sense).
19. In our view, the way the rule is framed as sought by the Rūnanga means that it would reserve a discretion to a third party to determine whether it is complied with or not, therefore breaching the principles applicable to permitted activity rules set out above.
20. While we acknowledge the benefits of including such a rule (for example not imposing an additional resourcing burden on both applicants and the Rūnanga in having to unnecessarily prepare and respond to resource consent applications), we consider that such a rule (framed as suggested by the Rūnanga), would not meet the requirements of a permitted activity rule.
21. It may be possible to devise a rule that meets the requirements of a permitted activity rule but includes a certification element, for example the Rūnanga certifying that a particular activity did not have cultural effects, but such a rule would be novel and relatively untested (so there would be some risk of challenge to this approach).
22. For the above reasons, we consider that the rule as proposed by the Rūnanga does not meet the standards required of a permitted activity to be included within the TTPP.

#### **References to AS/NZS 4282 in the lighting rules**

23. The standards “AS/NZS 4282 Control of the Obtrusive Effects of Outdoor Lighting” are proposed to be included within the Light General District Wide Chapter of the TTPP, specifically within LIGHT – R1.
24. We have addressed the Hearing Panel’s questions in respect of the reference to these standards below.

#### *Whether the AS/NZS 4282 standards are incorporated by reference or are only a cross reference*

25. Schedule 1 of the RMA provides a specific procedure for the “incorporation of documents by reference”. Clause 30 provides that standards, requirements or recommended practices of international or national organisations or prescribed in any country or jurisdiction can be incorporated by reference into a planning document, as well as any other written material that deals with technical matters and is too large or impractical to include in the plan itself.
26. Material that is incorporated by reference has legal effect as part of the plan or proposed plan.<sup>8</sup> Local authorities are under an obligation to certify a correct copy of the material and to consult on the material prior to its incorporation.<sup>9</sup> If material is incorporated by reference, it can only be amended (and updated versions referred to) if a variation or approved change to the plan has been made through a Schedule 1 process.<sup>10</sup>
27. However, the National Planning Standards 2019 also include directions in respect of references or links to external material not incorporated by reference under Schedule 1. Mandatory Direction 7 under Direction 1 of these standards provides:

Unless otherwise directed in these planning standards, local authorities may use cross-references and links within the policy statement or plan. Any references or links to external material not incorporated by reference under RMA Schedule 1 Part 3 must be identified as not having legal effect beyond the scope provided for in the policy statement or plan.
28. Therefore, the National Planning Standards anticipate that there may be material cross-referenced within a plan that is not intended to be incorporated by reference.
29. In our view, the question of whether material is incorporated by reference or simply cross-referenced needs to be assessed based on whether the material needs to be relied on as part

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<sup>8</sup> RMA, Schedule 1, cl 30.

<sup>9</sup> RMA, Schedule 1, cls 32 and 34.

<sup>10</sup> RMA, Schedule 1, cl 31.

of the TTPP (for example, whether it forms part of a condition of a rule), or simply provides information.

30. For example, if a standard ultimately impacts on the activity status of a particular activity, or is required to have legal effect as part of the rule, it will be necessary to ensure the relevant standard is incorporated by reference. As a consequence, it would not be lawful to amend such a rule so that subsequent amendments to the relevant standard took legal effect without going through a Schedule 1 process. It appears that the majority of references to various New Zealand Standards within the TTPP are intended to have legal effect as part of the rule, and accordingly, should be treated as material incorporated by reference.
31. We have specifically considered this in the case of LIGHT-R1. The recommended amendments to provisions suggest elevating compliance with the AS/NZS 4282 standard when measuring light to a standard for all activities to comply with, rather than as an advice note as it was notified.
32. Although this is framed as a standard, it addresses how light must be measured (rather than introducing any particular reliance on limits set within that standard). Based on the drafting of the rules, non-compliance with this particular standard does not appear to impact the activity status of any activity.
33. However, we note that this standard was referenced in a list of material intended to be incorporated by reference and therefore consulted on under clause 34 of Schedule 1 as part of the TTPP consultation.<sup>11</sup> In our view, this inclusion, combined with the elevation of this standard from an advice note into a standard, means that the standard is incorporated by reference into the TTPP.

*Whether the current AS/NZS 4282 standards can be referred to and also any amended future standards*

34. On the basis of our conclusion above that the standard has been incorporated into the TTPP by reference, future versions of the standard are not automatically able to be referred to or adopted by the relevant councils – a plan change would be required to update the version of this standard, in accordance with clause 31 of the RMA.
35. While this does limit the ability to update the relevant versions of the standard, we note that it protects against the situation where the standard could be updated in terms that the relevant councils do not agree with, or simply deleted altogether with no replacement. If either of these matters occur, and the document is simply cross-referenced rather than incorporated by reference, it may leave the councils relying on a standard that they no longer support the use of, or the rules referencing a standard which no longer exists.
36. In this case, if incorporated by reference the standards will continue to apply, even if they cease to have effect externally from the TTPP.<sup>12</sup>
37. In the event that the Panel considers it preferable to instead cross-reference the standards, we consider amendments would need to be made to the provisions that referred only to the standards as part of an advice note, for example. If the Panel did seek to take this approach, it may also be worthwhile considering whether further wording could be added to the reference to the standard, to note that this reference also includes any future standards which amend, replace or supercede that particular standard (although noting the risks with this approach outlined above).

## **Conclusion**

38. We trust that our advice assists. Please let us know if you wish to discuss, or have any further questions.

## **Wynn Williams**

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<sup>11</sup> "Materials Incorporated by Reference into the TTPP" - <https://tpp.nz/wp-content/uploads/2022/04/Materials-Incorporated-by-Reference-into-Te-Tai-o-Poutini-Plan.docx>

<sup>12</sup> RMA, Schedule 1, clause 33.