**BEFORE THE INDEPENDENT HEARINGS COMMISSIONERS**

**MAI I KĀ KAIKŌMIHANA MOTUHAKE**

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| **IN THE MATTER OF** | the Resource Management Act 1991 (RMA) |
| **AND** | |
| **IN THE MATTER OF** | the Proposed Te Tai o Poutini Plan |
| **AND** | |
| **IN THE MATTER OF** | Submissions and Further Submissions of Grey District Council on the Proposed Te Tai O Poutini Plan Chapter: Sites and Areas of Significance to Māori |

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**SUBMISSIONS ON BEHALF OF THE GREY DISTRICT COUNCIL**

**(SUBMITTER ID: S608 AND FURTHER SUBMITTER ID: FS1)**

**TOPIC: SITES AND AREAS OF SIGNIFICANCE TO MĀORI**

**Dated: 24 April 2024**

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**Presented for filing by:**
CORCORAN FRENCH
Solicitors
Level 1, 166 Moorhouse Avenue
PO Box 13001Christchurch

Telephone: 03-379 4660

Counsel Acting: Kristy Rusher
Email: kristy@cflaw.co.nz

**MAY IT PLEASE THE HEARINGS PANEL**

**Introduction**

1. These legal submissions are made on behalf of Grey District Council (GDC) in relation to the Sites and Areas of Significance to Māori (SASM) chapter of the proposed Te Tai o Poutini Plan (pTTPP).

2. Grey District Council (GDC) lodged submission number #608 and further submission number #1 opposing the introduction of this chapter without further consultation. GDC also opposed in part, the form in which the pTTPP provides for the regulatory framework to operate.

3. It is acknowledged Poutini Ngāi Tahu are kaitiaki and that the SASM chapter is central to assist Poutini Ngāi Tahu in the exercise of that responsibility.

4. The Grey District Council is also a landowner affected by the regulatory framework proposed in the pTTPP as it administers leased land and recreation and local purpose reserves in the Grey District.

5. The identification of a SASM in the pTTPP assists the GDC to carry out its regulatory responsibilities as a consent authority, but also has an impact on the GDC as a landowner.

6. GDC is therefore before this hearing panel both as an authority that administers the regulatory framework under the Resource Management Act 1991 (the Act) and also as a landowner that needs to comply with that regulatory framework.

7. The evidence of Mr McEnaney is provided in support of the Grey District Council position both as a regulatory authority and as a landowner.

**Background**

8. The Grey District Council (GDC) is one of the main regulatory bodies that will evaluate resource consent applications and enforce compliance with the pTTPP regulatory framework (including prosecutions).

9. The Grey District Council supports at a strategic level the structure of the pTTPP whereby land use that does not impact on a SASM is enabled.

10. However the GDC has some concerns with the definition of the spatial extent of SASMs and the particular provisions of the pTTPP which set expectations for physical access to SASM sites on private land.

11. The Grey District Council submission is that a further consultation process would resolve concerns as to the spatial extent of the SASMs mapped and to inform the provisions of the pTTPP.

12. In essence, GDC sought the deferral of the introduction of this chapter until that further consultation step had been completed seeking that the Hearings Panel:

> *"remove the overlay so that they can be further reviewed and reassessed. A framework is sought that will not impinge on the use of private property"* (emphasis added)

13. The submission was summarised in a way that suggested GDC did not support the inclusion of a SASM chapter in the pTTPP. The GDC's submission was misconstrued by the summary of submissions report and in some respects by the section 42A Report as well.

14. The implication in the summary of submissions issued was that GDC did not support the inclusion of SASMs in the pTTPP when in fact the GDC seeks to ensure that reasonable and considerate use of land is enabled by the pTTPP provisions.

15. Paramount to achieving an efficient and effective regulatory framework, is ensuring the spatial extent of the SASM overlays are identified precisely and accurately in the SASM maps. Inaccuracies will mean that resource consents will be required unnecessarily.

16. Out of concern that the SASM mapped areas contain anomalies and errors, the GDC sought that the plan development process included further and detailed consultation.

17. As that consultation did not occur in the plan development phase its submission has sought that the SASM chapter being inserted by way of a future independent plan change, stating that the SASM chapter should be included by way of:

> *"…a statutory process for identification, agreement with landowner, management incentives and insertion of new mapped areas and a plan change by way of Schedule 1 process." (emphasis added)*

18. The Hearings Panel is to provide (after an objective evaluation of evidence) for both the reasonable and respectful use of private land alongside recognising the relationship of Poutini Ngāi Tahu with SASM.

19. The spatial extent of the SASM overlays must be defined as the minimum area necessary. Defining a SASM with an additional "buffer" or contingency area will result in the requirement of obtaining a resource consent when there is no resource management purpose to require one.

20. The GDC is not satisfied that SASM areas have been identified with sufficient precision to ensure the pTTPP can be administered efficiently and effectively.

21. That is because in respect of private land, no site visits have informed the spatial definition of the SASM and there has been direct evidence of errors and anomalies in the documentary information used for the spatial data set casting doubt on its reliability. This is set out in the evidence of Mr McEnaney who describes the discovery of errors at a very late stage in the SASM chapter development[1].

22. GDC's submission was not advocating for the permanent removal of the SASM chapter or the exclusion of provision for SASM mapped areas in the pTTPP. Instead, it was requesting a delay in the SASM chapter's introduction until the

[1] At paragraph 30.

issues identified by the GDC could be resolved by further consultation between Council, Iwi and landowners. Detailed consultation with landowners (including site visits) was programmed for the Significant Natural Areas chapter and was highly successful earlier at resolving landowner concerns about the nature and extent of the SNA sites in the operative Grey District Plan.

23. GDC seeks to ensure that the regulatory framework aligns with the rule of law and that the pTTPP provides for the reasonable and considerate use of land, while protecting the relationship of Iwi to sites of particular significance and importance.

24. These submissions address the following matters:

    (a) Statutory and regulatory framework overview;

    (b) Consultation obligations;

    (c) Definition of spatial extent of SASM;

    (d) Objectives and Policies – Physical Access to SASMs;

    (e) Vires of permitted activities;

    (f) Conclusion

**Statutory and Regulatory Framework Overview**

25. It is uncontroversial in New Zealand's legal system that regulation should follow the rule of law, providing a regulatory framework that provides for responsible government of resources and guarding against arbitrary discretion determining a person's rights and responsibilities. The pTTPP has the status of a regulation within New Zealand's statutory scheme, and therefore its provisions must adhere to the rule of law.

26. Normative guidance is the central principle of the rule of law. It means encouraging compliance with the law by utilising a person's desire to exercise a their freedoms in a manner compatible with the statutory or legal purpose of that regulatory framework.

27. Fundamental to demonstrating that a regulatory framework meets the requirements of the rule of law, is that regulations are to be expressed clearly, that restrictions on rights are limited to the greatest degree possible to achieve a statutory purpose and that outcomes under that regulatory framework have a high degree of predictability and/or certainty.

28. By imposing a requirement to comply with particular conditions for permitted activity status for resource use within that spatially defined area (or otherwise obtain a resource consent) the SASM chapter operates as an exception to the ordinary legal position that a landowner is entitled to the peaceful enjoyment of their property to the fullest extent.

29. Certainty and accuracy of the spatial definition of a SASM area is essential in circumstances where usual freedoms are no longer to apply. For the pTTPP to provide normative guidance to land owners for the respectful and considerate

use of private land it is essential that the pTTPP is confirmed in a form that is accurate, clear, certain and predictable.

30. It is not possible for a private landowner to use their land in a respectful and considerate manner where there are uncertainties as to the location and/or spatial extent of the SASM and the significance of that area to Iwi is unknown or not communicated (such as through a consultation process).

31. The GDC supports the high-level framework of the SASM chapter in that the specific objectives, policies and rules framework apply to spatially defined SASM areas only. An exception to the usual position of freedom to use land is justifiable where it gives effect to the express statutory direction in section 6(e) of the Act to provide for "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga."

32. That provision sits alongside section 7(a) and 7(aa) of that Act being a further requirement for a decision maker to have regard to the exercise of stewardship and governance over natural and physical resources. Similarly, section 8 provides for achieving the purpose of the Act by taking into account the principles of the Te Tiriti o Waitangi (the Treaty of Waitangi).

33. GDC considers that an appropriate regulatory framework that provides that a resource consent is not required unless an activity has an impact on the cultural significance of that site is appropriate.

34. As is set out in the following submissions, the GDC is not satisfied that the SASM chapter provides for normative guidance for the use of land in a manner that is respectful and considerate of both landowners and Poutini Ngāi Tahu.

35. Firstly, there is a lack of certainty that the minimum spatial extent of the SASM has been applied. Secondly, in terms of the rights of landowners, the rules in the pTTPP SASM chapter reserve a discretion as regards whether an activity has "permitted activity status" or in fact requires a resource consent. That discretion is then reserved to a third party in the form of providing a certificate or written approval. The current form of the rules does not avoid the arbitrary use of a discretion and is therefore not sufficiently aligned with the rule of law. Thirdly, the objectives and policies provide for physical access to SASM sites for Ngāi Tahu.

36. GDC therefore maintains its submission that further consultation is required before the SASM chapter is introduced to the pTTPP and that different provisions are needed to ensure the pTTPP aligns with the rule of law and can be administered efficiently and effectively.

**Consultation Obligations**

37. The GDC request for further consultation throughout this pTTPP process has been ignored. The SASM chapter has not had the benefit of the detailed consultation that has occurred in the case of two chapters of the pTTPP for example,the Significant Natural Areas (SNA) chapter.

38. The GDC notes that landowners who are the subject of a SASM have been excluded from the consultation process that was used from the development of other proposed pTTPP chapters. The GDC considers that landowners that are

the subject of a SASM are, as a matter of natural justice, entitled to the same standard of consultation as has occurred with other plan chapters (e.g. SNA).

39. It is not correct in law to say a Council is under no obligation to carry out form of detailed "pre-consultation" for the purpose of the preparation of the district plan.

40. A proposed district plan prepared and approved for notification is the culmination of many earlier decisions made by a council.

41. The Local Government Act 2002 at section 76 together with section 78(1) and 82(3) makes it mandatory for a council to consider the views and preferences of any person likely to be affected by or have an interest in a matter.

42. Sections 76(5) and 79(3) of the Local Government Act 2002 also provide that consultation under the Local Government Act 2002 applies in parallel to the statutory process prescribed by Schedule 1 of the Resource Management Act 1991.

43. Therefore, consultation can be required for decisions that precede the notification of a district plan. Matters that have national significance under the Resource Management Act 1991 are of sufficient significance to warrant consultation in the same manner that was carried out for the SNA process.

44. If detailed consultation was considered appropriate in the instance of the SNA chapter, the same method of consultation should have occurred for the SASM chapter. The public interest factors that make consultation necessary for the SNA chapter also clearly exist for the content of the SASM chapter.

45. In fact, as stated by Michael McEnaney[2], the special characteristics of oral history and the errors and anomalies of the historic records make a detailed consultation process of particular importance for the SASM chapter.

46. Simply following the statutory procedure in Schedule 1 of the RMA does not cure a failure to carry out consultation with respect to decisions made under the Local Government Act 2002 at an earlier time. To meet the duty under section 76 of the Local Government Act 2002 the Council must still consider whether consultation and special consultation is necessary irrespective of the conduct of a Schedule 1 process.

47. Similarly, the procedure in Schedule 1 of the Resource Management Act 1991 does not exclude parallel consultation occurring in order to meet the requirements of the Local Government Act 2002.

48. The GDC highlights to the Hearings Panel that no site visits have occurred on private land to assist with the definition of the spatial extent of the SASM areas and that there are risks and limitations of the reliability of the data set used. This is a serious limitation to the information before the Hearings Panel as explained in the evidence of Mr McEnaney

49. The GDC brings to the Panel's attention that it has the power to direct that further detailed consultation is to occur and that the results from that

[2] at para 40

consultation are reported back for the purpose of assisting in its decision making[3].

**Definition of Spatial Extent of SASMs and Mapping**

50. The Hearings Panel is tasked with ensuring the regulatory framework of the pTTPP's SASM chapter achieves the respectful and considerate use of land.

51. The definition of the spatial extent of a SASM has particular significance and weight in the pTTPP provisions and provides a high degree of certainty by prescribing in which locations it is necessary to take particular care to manage and use resources in a respectful manner.

52. The GDC has genuine concerns, as set out in the evidence of Michael McEnaney, that the provisions of the pTTPP SASM chapter as currently drafted do not provide for the spatial definition of SASMs to the extent that the areas defined are accurate, and free from errors and anomalies.

53. This is not directed as a challenge to the "correctness" of the connection Iwi have with sites and areas of significance. Instead, it is highlighting to the Hearings Panel that the reliability of the data set to locate and define the spatial extent of the SASM areas is in question.

54. The Grey District Council is particularly conscious of the court of appeal's comments in *Raikes* v *Hastings District Council*[4]. In that case, the High Court had earlier considered the requirements of sections 6(e), 7 and 8 of the Act in determining the location and spatial extent of a site of significance to Māori. The Court of Appeal declined leave to appeal the High Court's findings stating that:

> *"it is, we think, self-evident that these provisions require decision-makers to have regard to, and provide for, connections between hapu and their ancestral lands of a cultural, spiritual and historical nature as well as other more tangible connections."*

55. A district plan regulatory framework is to provide for a relationship and connection to a site of significance whether or not there are physical traces or tangible artefacts remaining[5]. The spiritual element of kaitiakitaNgāi has been recognised in decisions of the Court of Appeal[6] and also the Supreme Court[7] and is applicable in the context of a decision on the pTTPP:

> *"A finding that the cultural, traditional and/or spiritual connections exist does not involve any finding about the "correctness" of any spiritual or metaphysical belief relevant to those connections. The susceptibility of the "correctness" in such belief to determination on the basis of evidence*

[3] The broad powers under section 37(2)(b) permit the panel (acting under delegated authority of the local authority) to request further information be provided, and this may include reports and/or evidence from a detailed consultation process.
[4] [2023] NZCA 264 at para 16.
[5] Ibid. at para 18.
[6] Trans-Tasman Resources Limited v Taranaki – Whanganui Conservation Board [2020] NZCA 86
[7] Trans-Tasman Resources Limited v Taranaki – Whanganui Conservation Board [2021] NZSC 127

> *is a red herring: it is the existence and significance of the belief that a court can, and must, consider"*[8](emphasis added)

56. The case law, such as *Raikes* above has made it clear that the existence and significance of a belief that underpins the identification of a SASM is a finding of fact for the decision maker applying the provisions of the Act.

57. The Environment Court in *Heybridge* v *Bay of Plenty Regional Council*[9] stated that the statutory obligation to provide for a relationship does not extend to providing for a mere belief, no matter how genuinely held. The existence of a fact is not established by an honest belief. The belief is to be supported by consistent and credible evidence[10].

58. In *Winstone Aggregates Ltd v Franklin DC*[11] the Environment Court stated:

> *"claims of waahi tapu must be objectively established, not merely asserted. There needs to be material of a prohibitive [sic probative] value which satisfies us on the balance of probabilities. We as a Court need to feel persuaded that the assertion is correct." (Text in brackets inserted to correct typographical error appearing in original judgment)*

59. This principle has been applied by the Environment Court who found that evidence of a general nature or asserting the presence of waahi tapu over a wide and undefined area is not necessarily probative of a claim that waahi tapu existed on a specific site[12].

60. The case law outlined above emphasises that the finding of fact of the location and spatial extent of a SASM is an exercise which must be undertaken with some care and in reliance on more than an assertion.

61. While providing for Iwi to enjoy a connection to SASM, it is also necessary to apply a spatial definition that avoids an unnecessary intrusion with respect to the exercise of private property rights. In balancing those interests, the Panel must therefore determine what is the minimum land area to give effect to the SASM (see paragraph 27 above).

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[8] At para 17, Raikes v Hastings District Council (2023) 24 ELRNZ 843

[9] Heybridge Developments Ltd v Bay of Plenty RC [2013] NZEnvC 269 at para 19. The Environment Court in that case held that the grant of a resource consent would not adversely affect the site of cultural significance due to the low probability of the actual burial site being disturbed as the cultural evidence was not precise as to the location of the burial site. That evidential finding of the Environment Court was subsequently appealed to the High Court in Pirirakau Inc Society v Bay of Plenty Regional Council [2014] NZHC 2544. In that appeal the High Court found that the Environment Court erred in its evaluation of the evidence and the weight it attributed to the evidence. The matter was referred back to the Environment Court for reconsideration, but it appears a decision of the Environment Court did not issue subsequently.

[11] EnvC Auckland A80/02 17 April 2002 at 251, which principle has also been applied by the High Court in Re: Edwards [2022] NZHC 2644 which concerned determining claims for customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011.

[12] Te Rohe Potae o Matangirau Trust v Northland Regional Council EnvC Whangarei A107/96 22 November 1996 and similarly in Takamore Trustees v Kapiti Coast DC [2003] NZRMA 433.

62. It also highlights that there is an expectation that the SASM areas are to be defined with some precision and to the least extent possible so to provide for that relationship in order to avoid the inclusion of land without a cultural connection. Precision and accuracy in defining a SASM within the pTTPP is critical to avoiding an unreasonable interference with the use of private property.

63. The GDC considers that defining the SASM area precisely cannot occur exclusively as a desktop exercise. It also considers that a SASM area cannot be defined to the full extent of a title boundary merely for the sake of convenience.

64. It has therefore, in the evidence of Mr McEnaney[13], highlighted the significant risk that the data set relied on to define the SASM areas as mapped includes anomalies and errors some of which may not yet have been discovered. The GDC is unaware of any review occurring of the remainder of the dataset to check its integrity following the discovery of other errors.

65. With a view to its future obligations as a regulatory authority to administer the pTTPP, The Grey District Council is highlighting to the Hearings Panel that issues likely remain with the reliability of the evidence to define the SASM areas given the late discovery of spatial mapping errors.

66. The GDC has been very clear in its position throughout the pTTPP development that the process undertaken to define SASM and to resolve mapping and spatial definition errors is paramount. The section 42A planner has acknowledged that these concerns have been raised[14] and that there have been wider concerns around the process used for the development of the SASM chapter.

67. As explained in the evidence of Michael McEnaney[15] errors were discovered at a late stage as regards the historical records relied on, as it was found those records contained misdescriptions or incomplete information. There were also errors discovered within the spatial mapping file that appeared to incorrectly locate the SASM.

68. This objection to the reliability of the dataset is not criticism of Iwi. The GDC simply highlights that Iwi's genuine request for recognition of a SASM may have been "lost in translation" in the transition between oral history, other historical information and the spatial data set used for SASM mapping.

69. Spatial data and historic records are unreliable if used in isolation as a data source. The value of oral evidence from Iwi as to their connection to the site is highly significant to land owners and to Council. That is the basis for the GDC seeking by way of submission that a further consultation exercise involving Iwi, relevant Councils and landowners is undertaken to avoid or cure issues as to accuracy and reliability of the mapping of the SASM and the defined spatial extent.

[13] at paras 32 - 35
[14] At paras 57 and 58, Section 42A report, undated.
[15] At paras 30-34

70. The possibility of a serious error affecting the integrity of the entirety of the spatial data set used to define the SASM sites cannot be excluded, unless further inquiry is undertaken.

71. By way of an example in its role as a landowner, GDC highlights that Aromahana/Cobden Island has been identified as SASM #218. The Council is entirely unaware of the connection and significance of that site for Iwi, not having any documents or other information provided to it. Iwi have not advised the reason for identifying this area as a SASM, and it is not a SASM site discussed in the evidence of Paul Charles Madgwick. The Council is unsure how to ensure SASM #218 is used in a respectful manner without that detailed background.

72. For SASM #218 the section 42A planner has noted that further consultation between Iwi and the Council would be of assistance at para 369 of the report, noting "reasons of natural justice". The GDC considers that this approach of further consultation should be made available to all landowners with a SASM overlay proposed for their land, to ensure that the best information possible is used to inform the precise identification of SASM as well as to reconcile errors and anomalies in the data relied on to date. That would be consistent with SASM #218 and also promote the interests of natural justice.

73. GDC acknowledges that the proposal to introduce M1 and M2 is a useful step, but considers that this does not cure the issues it has raised with the SASM mapped areas. Therefore, the GDC maintains its submission that further consultation should be undertaken before the SASM chapter is confirmed.

**Objectives and Policies – Physical Access to SASMs**

74. The Hearings Panel must also decide what controls and protection are included in a district plan to recognise and provide for the relationship between Māori and that site pursuant to section 6(e) of the Act.

75. Protection does not mean that activity must not occur, or that the site is to be somehow preserved as static in its existing form. In *Raikes*[16] the High Court recognised that there is a balancing exercise where the decision maker must determine how to provide for the significance of the site in the district plan without unreasonably restricting other activities.

76. The Court has recognised that in many instances, there will be some capacity for a SASM to absorb minor alterations brought about by small-scale earthworks and buildings[17]. Therefore, the Hearings Panel must determine by means of setting appropriate provisions, the extent to which the reasonable and considerate use of land must be managed by means of a resource consent.

77. That exercise requires the precise definition of the spatial extent of the SASM area. As well as requiring accuracy of mapping a SASM, the pTTPP's objectives and policies must balance the management and use of resources while providing for the requirements specified under the Act in sections 6(e), 7(a),(aa) and 8[18].

[16] At 46, Raikes v Hastings DC (2022) 24 ELRNZ 598
[17] Maungaharuru-Tangitu Trust v Hastings DC [2021] NZEnvC 98 at para 81
[18] Raikes v Hastings District Council [2022] NZHC 3075

78. A further factor for evaluation is whether the requirement to recognise and provide for a SASM appreciably limits the activities which are likely to be undertaken on the site and whether that is appropriate given the particular significance of that SASM.

79. The GDC has highlighted that the use of the word "access" in the pTTPP policies and objectives[19] does set an expectation that physical access and use of SASM land is to be made available to Poutini Ngāi Tahu by private land owners.

80. As stated in the evidence of Michael McEnaney, the use of the term "access" creates a conflict where the objectives and policies setting an expectation of resource use and management are different to the common law expectation for the freedom of use of land in private ownership (including the ability to exclude access).

81. The section 42A officer acknowledges that the intention of the plan is to ensure alienation with a SASM does not occur in the case of subdivision[20]. However, it is submitted the plan objectives and policies are not expressed in such a way that their application is limited to the instance of a subdivision.

82. This conflict between private property rights and the pTTPP objectives and policies is also acknowledged by Paul Charles Madgwick at paragraph 95 and in various parts of Appendix One to his evidence, where it is clarified that Iwi do not seek physical access to private land.

83. The GDC has submitted that the objectives and policies providing for "access" should be removed to avoid that policy framework conflicting with the reasonable expectations of ordinary use of private land.

84. Section 6(e) of the Act requires that a district plan provides for the relationship between SASM and Iwi however that does not require that physical access to private land is available.

85. Rather the Act anticipates that activities which have an impact on SASM are managed to ensure that the use is appropriate considering the significance of the site for Iwi. Objectives and policies which solely provide for physical access to private land in a generalised manner do not assist in the evaluation of how an activity may impact the significance of the site to Iwi.

86. GDC has proposed alternative objectives and policies to align the expectations of private landowners and the obligations under the Act to provide for the relationship of Māori to a SASM site.

87. The GDC's submission point appears to be capable of resolution by an adjustment to the terms of the policies and objectives in the manner set out in Appendix A to the evidence of Mr McEnaney.

88. It should be noted that while Iwi submit that low weight should be given to the evidence of Mr McEnaney's explanation of why further consultation would be beneficial, Iwi have not expressly objected to the substitution of the notified objectives and policies with those proposed by Mr McEnaney at his Appendix A.

[19] Paras 59 – 87, evidence of Michael McEnaney

[20] paragraphs 167 and 168 of the section 42A report.

**Rules - Vires of Permitted Activity Provisions**

89. The GDC highlights to the panel that the form and content of proposed rules 2, 3, 4, 5 and 6 in the pTTPP SASM chapter to define permitted activities, do not align well with the rule of law or the requirements of the Act.

90. It is acknowledged that the cultural assessment of a proposed activity is a highly relevant factor to any assessment of the actual and potential adverse effects of an activity undertaken within a SASM.

91. However, the structure of the plan rules provides for the assessment to occur by way of written approval or certification. The pTTPP provides for that approval/certification to determine whether or not an activity has permitted activity status. That rule structure and format does not conform to the rule of law or case law on Resource Consent conditions.

92. As currently proposed, the rules (as notified) require Poutini Ngāi Tahu to provide written approval or to have issued a certificate (rule amendment as proposed in the section 42A report) in order for an activity to have permitted activity status.

93. Those activities which are considered to have an acceptable cultural impact to Poutini Ngāi Tahu are approved/provided with a certificate, whereas activities that do not have approval/certificate are required to obtain a resource consent.

94. In the case of rules2, rule 3, rule 4, rule 5 and rule 6 of the SASM chapter, this approval/certification will operate as the step that will determine whether or not the activity has "permitted activity" status under the plan.

95. The proposed pTTPP rules format has the effect of delegating the Council's powers to a third party and relies on the exercise of a third party's discretion to qualify as an activity that does or does not require a resource consent.

96. In effect, the rules framework is operating in a manner that Poutini Ngāi Tahu differentiate which activities require resource consent and which do not by exercising an unfettered discretion.

97. The approval/certificate also has the effect of defining whether or not the enforcement provisions of the Act are engage, and whether a fine, prosecution or other enforcement action may be taken.

98. The rule of law proscribes that questions or matters of legal rights and liabilities should be resolved by the application of the law and not the exercise of an arbitrary discretion[21]. The series of rules that define the permitted activity status by means of a third party's exercise of discretion does not meet that necessary requirement of the rule of law. In *Twisted World Ltd v Wellington City Council*[22] the Environment Court confirmed that a district plan may not reserve a discretion by "subjective formulation" to determine whether an activity is a permitted activity under the plan or not[23].

[21] [Sir] Thomas Bingham, The Rule of Law (Penguin Global, 2010) at 48
[22] [2002] EnvC W024/2002
[23] At para 63 Ibid.

99. What is proposed in the pTTPP is substantively different in effect and context than the provision considered by the Environment Court in *Population and Public Health Unit of the Northland District Health Board v Northland District Council*[24]. The Court in that case confirmed a rule condition which required written confirmation by an affected person that they had been notified in advance of the activity occurring. This condition simply required the completion of an administrative step and did not require the exercise of a subjective discretion by a third party.

100. The nature of the two rules referred to by Counsel for Ngāi Tahu at paragraphs 3.8(a) and 3.8(b) of her submission of 16th April last can be distinguished from the present case. In the present case, the condition of the rule has the practical effect of delegating to a third party the discretion as to whether the activity requires resource consent or is otherwise a permitted activity.

101. The two rules referred to by Counsel at paragraphs 3.8(a) and 3.8(b) also have the criteria for the exercise of an affected person's approval constrained by expressed factors and standards. Therefore, it is clear on the face of the rules as to whether an activity will qualify as requiring a resource consent or not. The form of rules proposed to be included the pTTPP does not offer that same transparency and certainty and has clearly reserved a discretion to a third party.

102. Section 87BA of the RMA is a very limited form of permitted activity status which Parliament has sought to include in the Act as an express exemption. It can be differentiated from the proposed rule format in the pTTPP. Section 87BA of the Act requires Council to act as the regulator by making an express determination of that permitted activity status applying following the receipt of an affected party's approval.

103. That administrative step and evaluation by the Council as a regulatory authority is not provided for in the case of the pTTPP rules.

104. The legal opinion from Wynn Williams dated 23rd November 2023 referred to in the Ngāi Tahu Counsel's submissions states that it may be permissible to have a rule with a condition that relies on certification rather than approval. This view is not shared by GDC. Whether an approval or a certificate is specified in the content of the rule, the fundamental issue remains that a discretion has been reserved to a third party.

105. Therefore, the suggestion by the section 42A report writer to amend the rules to require a certificate instead of a written approval does not assist, because it will still result in the delegation of the decision as to whether an activity has "permitted activity status" to a third party. It also does not resolve the point that a discretion is reserved. Reserving a discretion is not in accordance with the rule of law and the effect of delegating to a third party displaces the Council as the regulatory authority contrary to the express terms of the Resource Management Act 1991.

106. The serious and punitive nature of compliance provisions for activities occurring without a resource consent means that there must be a strong adherence to the rule of law in setting out the manner in which an activity qualifies for "permitted

[24] [2021] NZEnvC 96

activity" status. That necessarily requires that the rule setting the terms of a permitted activity status is to be clear and certain on its face, and not subject to a reserved discretion.

**Conclusion**

107. The rule of law is the central principle of New Zealand regulatory framework. It is the foundation of the Resource Management Act and is fundamental to the management of resources under the pTTPP. The pTTPP has the status of a regulation within New Zealand's statutory scheme[25] and therefore its provisions must give effect to the Act in a manner that closely aligns with the rule of law.

108. The GDC proposes that much of that risk and uncertainty of SASMs can be cured by undertaking a more extensive consultation exercise which includes site visits and a more detailed reconciliation of the spatial extent of a SASM.

109. The Grey District Council considers that the objectives and policies of the pTTPP do not achieve that outcome because the parameters of the spatial extent of the SASM areas mapped have doubts as to their certainty.

110. The Grey District Council has made its views on this issue known on multiple occasions, finally making a submission on that point requesting the SASM chapter be removed from the pTTPP until such time as comprehensive consultation had been carried out and proposing that SASM are provided for by way of introducing the chapter through a separate plan change process.

111. The Council considers that the inaccuracies with the mapping of SASM spatial extent can be resolved by site specific consultation between Iwi, landowners and the GDC. Iwi similarly consider that the accuracy of the spatial extent of a SASM area is paramount[26]. Therefore the GDC requests that the Hearings Panel suspends the introduction of the SASM chapter due to the concerns it has outlined above, so that they can be introduced at a future date following the outcome of a detailed consultation process.

112. An alternative option available to the Hearings Panel is to exercise the powers available under section 37 of the Act to direct conferencing (which could include a further consultative process including site visits between Iwi, Council and Landowners). The Hearings Panel could then consider further evidence arising from the consultative process to assist it to determine the appropriate provisions including the spatial extent of a SASM area with full evidence before it.

113. The objectives, policies also raise issues as to the appropriateness of requiring physical access to a SASM site, in circumstances where the Act requires provision for a relationship with the SASM and in the face of Iwi's clear expression that physical access to private land is not desired.

114. The rules as proposed require the exercise of an unfettered discretion by a third party for an activity to qualify as a permitted activity. The panel is encouraged to make provision for the rules to adhere to the rule of law by defining a

[25] Section 76(2).

[26] Para 2.21, legal submissions of Poutini Ngāi Tahu dated 16 April 2024

permitted activity status to include consideration of Iwi interests without reserving a discretion to a third party.

115. For the reasons set out above, the GDC does not consider the pTTPP provisions are in a form that adheres to the rule of law and similarly the provisions do not achieve the purpose of section 6(e). In its relief sought, the GDC has therefore proposed that the SASM chapter is delayed in its introduction or that alternative provisions are included in the pTTPP.

DATED 24 April 2024

M Bell/K L Rusher

**APPENDIX A:**

The Grey District Council recommends the following changes to the SASM Chapter objectives and policies (based on the s42A recommended version of the objectives and policies):

**Sites and Areas of Significance to Māori - Objectives**

**SASM – O1** Sites and areas of significance to Māori are identified, recognised and managed, to ensure their long-term protection for future generations.

**SASM – O2** The relationship of Poutini Ngāi Tahu with sites and areas of significance to Māori is recognised and provided for and are involved in decision making that affects their values to provide for tino raNgāi tirataNgāi and kaitiakitaNgāi .

**SASM – O4** Develop partnership between the Council, landowners and taNgāi ta whenua in the management of sites and areas of significance.

**Sites and Areas of Significance to Māori - Policies**

**SASM – P1** Protect Poutini Ngāi Tahu cultural landscapes from adverse effects of inappropriate subdivision, use and development while enabling their values to be enhanced through ongoing Poutini Ngāi Tahu management.

**SASM – P2** Support land owners to manage, maintain and preserve sites and areas of significance to Māori by:

a. increasing awareness, understanding and appreciation within the community of the presence and importance of sites and areas of significance to Māori;

b. encouraging land owners to eNgāi ge with mana whenua to develop positive working relationships in regard to the on-going management and/or protection of sites and areas of significance to Māori;

c. providing assistance to land owners to preserve, maintain and enhance sites and areas of significance to Māori; and

d. through eNgāi gement, consultation and collaboration with mana whenua, promoting the use of mātauraNgāi Māori, tikaNgāi and kaitiakitaNgāi to manage, maintain, preserve and protect sites and areas of significance to Māori;

e. for identified SASM, or for silent SASM, seeking to establish an extent through eNgāi gement, consultation and collaboration with taNgāi ta whenua.

**SASM – P4** The Grey District Council supports the development of M1, which will assist in the implementation of the SASM. However, I rely on my comments made in respect of Objective 2 above and request that this policy is redrafted to remove reference to "access, use and maintain…"

**SASM – P8** The Grey District Council supports the wording proposed for this policy.

**SASM – P11 and SASM - P12** The Grey District Council seeks that the error in the section 42A report version of P12 is corrected.