

Before the Independent Hearing Panel at Westport

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*under:* the Resource Management Act 1991

*in the matter of:* submissions and further submissions in relation to the  
Proposed Te Tai o Poutini Plan

**Topic:** Rural Zone

*and:* **Radio New Zealand Limited**  
*Submitter 476*

Reply/Further legal submissions for Radio New Zealand Limited

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Dated: 25 September 2024

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## REPLY/FURTHER LEGAL SUBMISSIONS FOR RADIO NEW ZEALAND LIMITED

### Introduction

- 1 These further legal submissions are provided on behalf of Radio New Zealand Limited (*RNZ*) for the Hearings on Te Tai o Poutini Plan provisions (*Proposed Plan*). *RNZ* operates an AM radio transmission facility at Cape Foulwind (*RNZ's Facility*) and is a submitter (S476) and further submitter (S141) on the Proposed Plan.
- 2 The purpose of these further legal submissions is to respond to matters raised by the Panel at the hearing on Rural Zones on 29 July 2024, and to assist the Panel in preparing its decision. We acknowledge the delay in providing these submissions. The extra time was needed for correspondence with the S42A Officer on this issue to reach an agreed position to present to the Panel. The Officer has now reviewed *RNZ's* submissions in draft and provided draft provisions that *RNZ* supports.
- 3 In particular, the Panel asked for legal advice on whether the S42A Officer's preferred approach of an overlay is within the scope of the changes sought in *RNZ's* submission. Determining scope is always a question of degree based on the details proposed change and content of submissions. Our view is that an overlay and associated rule, on the terms set out below, *is within the scope* of *RNZ's* submission.

### Background

- 4 *RNZ's* chief concern is safety risks from athermal radiation absorbed by tall structures near *RNZ's* Facility.<sup>1</sup> To address this risk *RNZ's* submission sought that the following wording be added to each of the Rural Zones<sup>2</sup> sections as an advice note, and to the Open Space and Recreation Zones as a standard:

*If any proposed structure within 1,000m of Radio New Zealand's Facilities at Cape Foulwind would be taller than 18m, the safety risks of electromagnetic coupling must be considered and addressed effectively. RNZ should be considered an affected person for the purposes of any consent application.*

- 5 *RNZ's* submission also stated immediately before each submission point that:

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<sup>1</sup> The risks of EMR and the reasons for the relief sought are set out in the evidence of Mr Steve White.

<sup>2</sup> Rural Zone, General Rural Zone, Rural Lifestyle Zone and Settlement Zone and its Precincts (excluding the Franz Josef area).

*RNZ is happy to consider alternative wording or rules structures that achieve similar outcomes. (emphasis added)*

- 6 The S42A Officer and Panel indicated using an overlay and rule to ensure the safety risks are addressed could have advantages over advice notes in Rural Zones and changes to the Open Zone standards. An overlay has the benefit of not requiring amendments or additions to multiple rules, would more clearly set out the geographic area, and would apply to all activities.

#### **Case law on scope**

- 7 Caselaw on whether relief sought is within scope of a submission is relatively settled across multiple decisions. *Re Otago Regional Council*<sup>3</sup> provides a useful summary of key authorities and processes addressing whether relief sought is within the scope of original submissions. In that case, the Court said:

*It is not unusual for relief to be amended in response to evidence called by other parties and its testing during a hearing. Even so, any proposed amendments must remain within the general scope of the notified plan change or the original submissions on the plan change or somewhere in between.*<sup>4</sup>

*...the question about whether the submission is on or about the plan change will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. It is important to keep in mind that the court cannot permit the plan change to be appreciably changed without a real opportunity for participation by those who are potentially affected.*<sup>5</sup>

- 8 The High Court case of *Albany North Landowners v Auckland Council*,<sup>6</sup> summarised the approved 'orthodox' scope test as whether an amendment was *reasonably and fairly* raised in the course of submissions on a plan change. This question needs to be approached in a realistic workable fashion, including taking into account the whole package of relief detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.<sup>7</sup> It is sufficient if the changes made can fairly be said to be '*foreseeable consequences of any changes directly proposed*'.<sup>8</sup>

<sup>3</sup> *Re Otago Regional Council* [2021] NZEnvC 164.

<sup>4</sup> *Re Otago Regional Council* [2021] NZEnvC 164 Annexure 2, at [16].

<sup>5</sup> *Re Otago Regional Council* [2021] NZEnvC 164, Annexure 2, at [21].

<sup>6</sup> *Albany North Landowners v Auckland Council* [2016] NZHC 138.

<sup>7</sup> *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115].

<sup>8</sup> *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115].

- 9 RNZ's original submission clearly signalled that RNZ suggested, or would support, alternative approaches that would address RNZ's concern. It would be difficult for a party to sustain an argument that it was not foreseeable that the Proposed Plan process could result in a binding rule when RNZ's submission explicitly stated that RNZ was happy to consider "rules structures that achieve similar outcomes". This is particularly true of the submission on the Open Space Zone which sought a change to a standard.
- 10 However, the scope of any changes to be made is limited by the reference to 'similar outcomes' in RNZ's submission, where 'similar outcomes' should be interpreted as methods achieving the outcomes RNZ sought. This means that an overlay applying:
- within 1000m of RNZ's Facility; and
  - to structures 18m or taller;
- would be *within* scope of RNZ's submission as it reflects the physical limits within which RNZ sought that controls apply.
- 11 Similarly, any associated rules and supporting provisions would be within scope to the extent those rules impose requirements (or advice notes) to the effect that:
- structures 18m or taller within 1000m require assessment for electromagnetic coupling safety risks; and
  - RNZ should be notified and/or consulted about that risk and assessment.
- 12 There are other points relevant to the Panel's wider consideration on scope that indicate an overlay and rule are unlikely to present any issues, including:
- 12.1 The Te Tai o Poutini Plan is a full plan review which provides a wider scope for introducing new provisions and changes than a more limited plan change process.
- 12.2 The 18m height limit is relatively high for the type of activities likely to be undertaken in Rural and Open Space Zones and is unlikely to apply to many developments.
- 12.3 The proposed overlay will not restrict or limit development, but only require EMR issues to be addressed as a matter of safety.
- 12.4 There were no further submissions on RNZ's submission, potentially indicating a relative lack of concern with the controls sought and potential additional requirements.

It is difficult to see any basis reasonable basis a party would object to the provisions which will apply to a limited set of activities, and will improve the safety of those activities.

### **Proposed rural provisions**

- 12 RNZ does not have any strong preference for the structure or specific drafting for a such a rule, other than any provisions should be compatible with the currently proposed structure and format of the Proposed Plan. The S42A Officer has provided RNZ draft provisions for the Rural Zones that include an overarching overlay and:
- A new Rural Zone policy addressing the overlay;
  - New permitted activity standards for activities that don't already have height limits; and
  - New matters of discretion for restricted discretionary activities.
- 13 These draft provisions are sensible, within the scope of RNZ's submission as being 'alternative wording or rules structures' and would be expected to have the intended effect of altering the Council and proposed developers to the risk.
- 14 RNZ further suggests an advice note could be added to the Rural Zones provisions in an appropriate place or places to make clear that RNZ is available to assist with technical and risk management measures:
- Advice note:** The primary risk in the [Westport Radio Mast EM Overlay] arises from the potential for tall structures to absorb radio-wave energy from Radio New Zealand's AM transmission station at Cape Foulwind. Radio New Zealand can provide technical advice on the risk to specific proposed structures as well as advice on steps to minimise and reduce risks.*
- ### **Application to Open Space Zone**
- 15 RNZ notes its memorandum to the Panel on the Open Space and Recreation Zones hearing accepted the S42A Officer's recommendation for a more limited notification requirement in the Open Space Zone.
- 16 Given the proposed use of an overlay RNZ records that its position on appropriate provisions in the Open Space Zone has now changed. If the Panel considers an overlay should apply, then RNZ considers it preferable that there be a clear benefit in taking a consistent approach across different zones. This would mean the proposed overlay would and equivalent rules should apply in *both* the Open Space Zone and Rural Zones, within 1,000m of RNZ's Facility. RNZ would support the same or similar approach to that proposed by the

S42A Officer for the Rural Zones to also apply to the Open Space Zones.

**Lower height limits**

17 The Panel also asked if lower height limits should apply closer to the transmitter. RNZ's technical staff have advised that within 250m an 'ideal' graduated set of height limits for structures would be:

- 5m height within 100m of the mast;
- 7m height within 150m of the mast; and
- 10m height from 200-250m.

18 RNZ did not pursue the above limits based on the assessment of its technical and property experts that the relative degree of risk from structures within this area is very low, and specific District Plan controls are not necessary.

19 Most of the area within 250m is zoned Open Space where more restrictive provisions apply. Further, this area is administered by the Department of Conservation. RNZ has a good working relationship with the Department of Conservation and the prospect of taller structures being built within 250m, without consideration of potential risks from RNZ's Facility, is very low. RNZ's lease area extends out to around 100m, so RNZ has direct control over structures in this area.

20 The fact remains that height restrictions lower than 18m would be outside the scope of RNZ's submission. However, in response to the Panel's inquiry, as a practical matter it seems unlikely there would be any practical adverse effects or objections to lower height limits within 250m given:

- The purpose of the changes would be to improve safety.
- Any higher development or construction in this area is highly unlikely.

21 RNZ is happy to correspond further with the S42A Officer and/or provide more information to the Panel if that would assist, but notes it considers the provisions provided by the S42A Officer provide good protection.

**Conclusion**

22 For the reasons set out above, using an overlay and rule to ensure safety risks from RNZ's Facility are addressed would be *within scope* (on the basis set out above) as such an outcome was reasonably foreseeable based on RNZ's submission on this plan change. RNZ supports the provisions for the Rural Zones provided by in draft by

the S42A Officer and seeks that equivalent provisions are also applied in the Open Space and Recreation Zone.

- 23 Any persons taking issue with this outcome would have been alert to this outcome and had the opportunity to participate through the submission and further submission process. The relief sought in RNZ's submission has not appreciably changed and no person could reasonably be said to have lost the opportunity to participate as a result of the changes.

25 September 2024

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