

## **Before the Independent Hearings Panels**

**In the matter** of the Resource Management Act 1991 (**RMA**)

**And**

**In the matter of** Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

**And**

**In the matter of** Hearing Stream 3 (Climate Change)

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### **Legal submissions on behalf of Wellington Regional Council – Hearing Stream 3**

**Date:** 22 August 2023

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Solicitor on the Record  
Contact solicitor

Kerry Anderson  
Emma Manohar

kerry.anderson@dlapiper.com  
emma.manohar@dlapiper.com

+64 4 474 3255  
+64 4 918 3016

Level 4, 20 Customhouse Quay, Wellington 6011  
PO Box 2791, Wellington 6140  
Tel +64 4 472 6289

## MAY IT PLEASE THE PANEL:

### INTRODUCTION

- 1 These legal submissions on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 3 (Climate Change) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**). The hearings are scheduled to commence on 28 August 2023.
  
- 2 The legal framework and plan change tests that apply to Change 1 were set out in our submissions of 8 June 2023, for Hearing Stream 1. That framework and those tests apply equally to this hearing stream.
  
- 3 These submissions address three legal issues arising in response to issues raised by submitters:
  - 3.1 the meaning of 'promote', 'reduce' and 'practicable';
  
  - 3.2 the validity of proposed Policy CC.2 which directs territorial authorities to amend their district plans; and
  
  - 3.3 why territorial authorities should not be excluded from the non-regulatory Policy 65.
  
- 4 The legal submissions for Hearing Stream 2 dated 23 June 2023 addressed the general issues raised through the use of 'consideration' policies. Those submissions equally apply to issues raised by submitters in this hearing stream and are not repeated. In summary, the Council's position remains that the consideration policies are appropriate and do not represent either duplication or extension beyond the role of the RPS.
  
- 5 The legal submissions in reply for Hearing Stream 2, dated 28 July 2023 addressed the relevance of the Emissions Reduction Plan and National Adaptation Plan under the RMA. Those

submissions equally apply to issues raised by submitters in this hearing stream and are not repeated.

- 6 GWRC has filed 7 section 42A reports for this topic:
  - 6.1 Climate Change General - Jerome Wyeth
  - 6.2 Agricultural Emissions - Jerome Wyeth
  - 6.3 Climate Resilience and Nature Based Solutions – Pam Guest
  - 6.4 Energy Waste and Industry – Jerome Wyeth
  - 6.5 Natural Hazards – Iain Dawe and James Beban
  - 6.6 Transport – Louise Allwood
  
- 7 GWRC has also filed technical evidence from Gijbertus Jacobus (Jake) Roos in respect of greenhouse gas emissions reduction targets and plans (evidence in chief and reply), Stuart Farrant in respect of nature-based solutions and Duncan Tindall in respect of technical transport planning matters (evidence in chief and reply). The following reply evidence has also been filed by the section 42A report authors:
  - 7.1 Climate Change General - Jerome Wyeth
  - 7.2 Agricultural Emissions - Jerome Wyeth
  - 7.3 Climate Resilience and Nature Based Solutions – Pam Guest
  - 7.4 Energy Waste and Industry – Jerome Wyeth
  - 7.5 Natural Hazards – Dr Iain Dawe and James Beban

## KEY TERMS USED

8 The Panels will be familiar with commonly used terminology in the RMA and planning documents. We set out some of the key terms and current case law interpretation approaches in our legal submissions for Hearing Stream 2, dated 23 June 2023. Those terms are not repeated here. However, as relevant to Hearing Stream 3 provisions, the following additional key terms and case law interpretation approaches are relevant:

8.1 'Promote' requires positive steps to be taken, but not necessarily achievement of an outcome. 'Promote' is not as directive as the verb 'enable'.<sup>1</sup> The Supreme Court has considered the use of the word 'promote' in section 5 of the RMA and stated:<sup>2</sup>

The use of the word “promote” reflects the RMA’s forward looking and management focus. While the use of “promote” may indicate that the RMA seeks to foster or further the implementation of sustainable management of natural and physical resources rather than requiring its achievement in every instance, the obligation of those who perform functions under the RMA to comply with the statutory objective is clear.

8.2 'Reduce' has its dictionary definition of 'make or become smaller or less'.<sup>3</sup> There is no case law to suggest a departure from this definition is appropriate or required.

8.3 Whether a measure is or is not 'practicable' is one which requires a value judgment in light of all the facts. There

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<sup>1</sup> *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948, at [121].

<sup>2</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [21].

<sup>3</sup> The New Zealand Oxford Dictionary.

is no 'bright line' test and what is, and what is not, considered to be practicable will depend on a case-by-case analysis. The Supreme Court in *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*, has said:<sup>4</sup> :

"Practicable" is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

## **PROPOSED POLICY CC.2**

- 9 In respect of proposed Policy CC.2, KCDC has raised concerns through its submission that it has no legal authority under the RMA to manage discharges to air and that as a result, the policy is invalid. Proposed Policy CC.2 is set out below:

Policy CC.2: Travel demand management plans – district plans

By 30 June 2025, district plans shall include objectives, policies and rules that require subdivision, use and development consent applicants to provide travel demand management plans to minimise reliance on private vehicles and maximise use of public transport and active modes for all new subdivision, use and development over a specified development threshold where there is a

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<sup>4</sup> [2017] NZSC 199 at [35].

potential for a more than minor increase in private vehicles and/or freight travel movements and associated increase in greenhouse gas emissions.

### **Explanation**

Location suitable development thresholds triggering a consent requirement for a travel demand management plan are to be developed by territorial authorities and should apply to residential, education, office, industrial, community, entertainment and other land use activities that could generate private vehicle trips and freight travel. Development thresholds should specify the trigger level (for example, number of dwellings, number of people accommodated or gross floor area) where the travel demand management plan requirement applies

10 Contrary to the concern raised, the policy is not directing the district councils to regulate air discharges. It is a direction to regulate land use in a way that minimises reliance on private vehicles and maximises public transport. The trigger is where there is a more than minor increase in private vehicles and/or freight travel movements and associated increase in greenhouse gas emissions.

11 Section 31(1) of the RMA is clear that territorial authorities have the function of:

the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

12 Section 7 of the RMA requires territorial authorities to have particular regard to the effects of climate change, and in accordance with section 74(2)(b)(i) of the RMA (and going forward section 74(2)(d) and (e)) territorial authorities are required to have regard to any Emissions Reduction Plan or National Adaptation Plan made in accordance with the Climate Change Response Act 2002, when making or changing a district plan.

- 13 Objective 8 of the National Policy Statement on Urban Development (**NPS-UD**) requires that New Zealand's urban environments support reductions in greenhouse gas emissions. Policy 1 of the NPS-UD then requires that:

Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:

...

(e) support reductions in greenhouse gas emissions

- 14 'Planning decisions' includes decisions on district plans and proposed district plans.

- 15 In other words, the higher order direction, which territorial authorities are already required to give effect to through their district plans, requires action to be taken to support reduction in greenhouse gas emissions. Policy CC.2 provides regional policy direction as to one part of this support, through minimising reliance on private vehicles and maximising public transport as part of new subdivision, use and development of land over a certain threshold (which is to be set by the territorial authorities). One of the environmental outcomes of successful implementation of the policy is a reduction in the increases of greenhouse gas emissions from increased private vehicles use. It is submitted that this is an appropriate direction to include in a regional policy statement.

## **POLICY P65**

- 16 Policy 65 is an existing policy that is being amended by Change 1. As amended by the Energy Waste and Industry section 42A report, and reply evidence of Mr Wyeth it is as follows:

Policy 65: ~~Supporting and encouraging~~ Promoting efficient use and conservation of resources – non-regulatory

~~To promote~~ Support and encourage conservation and efficient use of resources by:

- (a) applying the 5 Rs (~~3R~~Reduceing, Reuseing, Recycleing, Recover, ~~recycling~~ and Residual waste management);
- (b) reducing organic waste at source from households and commercial premises;
- (c) increasing the diversion of wastewater sludge from wastewater treatment plants before deposition to municipal landfills;
- (d) requiring efficient municipal landfill gas systems;
- (e) increasing the proportion of energy generated and used from renewable sources;
- (~~ef~~) using water and energy efficiently; and
- (~~efg~~) conserving water and energy.

**Explanation:** Policy 65 supports and encourages ~~promotes~~ the efficient use of resources to reduce emissions. The policy endorses the waste hierarchy and also promotes similar principles for efficient water and energy use.

- 17 There are a number of submissions on this Policy. These are addressed in the Energy Waste and Industry section 42A report (Part 3.10). Of those submissions, only one is opposed to the Policy, being HCC. HCC has submitted seeking that this Policy (or any non-regulatory policy) not apply to territorial authorities. The reason for this is not clear from the submissions and no further evidence or submissions have been filed by HCC. Chapter 4.4 of the RPS sets out non-regulatory policies. It states (on page 143) that they are policies that outline non-regulatory actions required to help achieve the objectives of the RPS.
- 18 There is no legal basis to exclude the non-regulatory policies from applying to territorial authorities. They apply equally to territorial authorities and other resource users.



**CONCLUSION**

19 Counsel for Wellington Regional Council will appear at the commencement of Hearing Stream 3 to speak to these submissions and are available to address any specific legal issues that arise in Hearing Stream 3.

**Date:** 22 August 2023



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K M Anderson / E L Manohar / K H Rogers  
Counsel for Wellington Regional Council