

Before the Hearing Panel
Appointed by the Gore District Council

Under The Resource Management Act 1991 (**RMA**)
In the matter of Submissions on the Proposed Gore District Plan

Legal submissions of Counsel on behalf of Gore District Council

31 May 2024

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**anderson
lloyd.**

May it please the Hearing Panel:

Introduction

- 1 These legal submissions are made on behalf of the Gore District Council (**Council**) in relation to the Gore Proposed District Plan (**PDP**).
- 2 The purpose of these submissions is to assist the Hearing Panel (**Panel**) by setting out general matters relating to the PDP and the hearing process, and specific issues relevant to the first topic hearing – Hearing A.
- 3 These submissions address:
 - (a) The current regulatory environment;
 - (b) Matters relevant to the Panel's assessment, including:
 - (i) The statutory assessment;
 - (ii) Application of national direction;
 - (iii) Permissible scope of amendments;
 - (c) Submissions broadly supportive of PDP;
 - (d) Treatment of any defective submissions; and
 - (e) Clause 16, Schedule 1 RMA permissible minor changes.

Current regulatory environment

- 4 The Panel will be aware that there is some uncertainty around the current regulatory environment, with the new Government signalling upcoming changes to the RMA (including its potential replacement) and national direction. The resource management regulatory environment changes often, and councils are always operating in an environment of some regulatory uncertainty – particularly where higher-level national policy documents might require district plans to be reviewed or amended.
- 5 As a matter of law, the Council is required to follow the current version of all legislation and national direction, including national policy statements (NPSs), as they stand as at the present date. Any future changes to the RMA or national direction will need to go through the normal change processes (ie, adoption of new legislation by Parliament, including consideration at select committee; or the process set out in the RMA for issuing national direction). The Council cannot anticipate what the outcome of those processes will be, nor should the Plan attempt to anticipate

changes that may or may not come about. For now, including for this hearing 1, the Panel is required to consider submissions on the PDP within the current regulatory framework.

- 6 The plan development process is flexible enough to enable the panel to consider appropriate responses if there are changes to NPSS or the RMA that might come into effect during this proposed district plan hearing process. At the time that the commencement dates and the final form of legislative change and change to national direction become clear, the Panel will then need to consider what those changes might mean, if anything, for this district and the PDP at that time. If it becomes necessary for the Council to commence any new process to address new or amended direction, that planning function will be for the Council to consider separately, not the Panel.

Matters relevant to Panel's assessment

Statutory assessment to be undertaken by Panel

- 7 The statutory tests for changes to the Council's district plan are set out in the Environment Court case *Colonial Vineyard Ltd v Marlborough District Council*.¹ These tests have been applied and summarised in a number of subsequent decisions so are well settled. An excerpt from that case that addresses the full list of potentially relevant matters is set out in Annexure 1. The list in the *Colonial Vineyard* case does however require some updating to take account of amendments to the RMA since 2014, and the full list of relevant matters is set out below.
- 8 In this case, the PDP must:
 - (a) Be prepared in accordance with the Council's functions,² and assist the Council to carry out its functions;
 - (b) Be prepared in accordance with Part 2;³
 - (c) Give effect to:⁴

¹ *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [17].

² Section 74(1)(a).

³ Section 74(1)(b).

⁴ Section 75(3).

- (i) Any relevant national policy statement and/or operative regional policy statement; and
 - (ii) The National Planning Standards;
 - (d) Not be inconsistent with a water conservation order or a regional plan,⁵ or conflict with a provision in a national environmental standard;⁶
 - (e) State objectives,⁷ which have been evaluated by examining the extent to which they are the most appropriate way to achieve the purpose of the RMA;⁸ and
 - (f) State policies that implement objectives⁹ and rules (if any) that implement policies,¹⁰ each of which have been evaluated by examining whether they are the most appropriate way to achieve the objectives of the plan¹¹ by:
 - (i) Identifying other reasonably practicable options; and
 - (ii) Assessing the efficiency and effectiveness in achieving the objectives.
- 9 In evaluating policies and methods (including rules), you must take into account the following:¹²
- (a) The benefits and costs of the proposed policies and methods; and
 - (b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies or methods.
- 10 In making your decisions on submissions you must also:
- (a) Have regard to:

⁵ Section 75(4).

⁶ Section 44A.

⁷ Section 75(1)(a).

⁸ Section 32(1)(a).

⁹ Section 75(1)(b)

¹⁰ Section 75(1)(c).

¹¹ Section 32(1)(b).

¹² Section 32(1)(b).

- (i) Any relevant proposed regional policy statement, or proposed regional plan¹³ (in relation to a matter of regional significance, or where the regional council has primary responsibility);
 - (ii) Any management plans and strategies prepared under other legislation and relevant entries on the New Zealand Heritage List - Rārangi Kōrero to the extent that these matters have a bearing on the resource management issues of the district;¹⁴
 - (iii) The extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities;¹⁵
 - (iv) The Emissions Reduction Plan¹⁶ and the National Adaptation Plan;¹⁷
 - (v) In relation to rules, the actual and potential effects on the environment, including, in particular, any adverse effect;¹⁸
- (b) Take into account any relevant planning document recognised by an iwi authority and lodged with Council.¹⁹ and
 - (c) Disregard any effects of trade competition.²⁰
- 11 Your decision report must include a decision on the provisions and matters raised in all submissions on the PDP, and the reasons for accepting or rejecting all submissions.
- 12 The decision report must also include a further evaluation of the PDP in terms of section 32AA.²¹ To assist, each of the section 42A reports contain a section 32AA assessment of any changes being proposed in those reports.

¹³ Section 74(2)(a).

¹⁴ Section 74(2)(b).

¹⁵ Section 74(2)(c).

¹⁶ Section 74(2)(d).

¹⁷ Section 74(2)(e).

¹⁸ Section 76(3).

¹⁹ Section 74(2A).

²⁰ Section 74(3).

²¹ Schedule 1, clause 10.

Potential scope for giving effect to any new national policy statements

- 13 Where any new national policy statements are published, or any amendments to the existing statements are published after notification of the proposed district plan, the PDP will not have attempted to fully give effect to them. How any new direction is to be given effect to, will depend on their specific provisions and their specific commencement dates. Unless a direction is given to amend a plan without using a Schedule 1 process, a full Schedule 1 process will be required to fully give effect to any new NPS, including in relation to any timeframes set out in any new or amended instrument. There is no legal imperative to give effect to the NPSs fully through this plan review and a full section 32 evaluation of the PDP in relation to the NPSs has not been undertaken.
- 14 If changes to national direction occurs during the plan process, any changes to the PDP that might be made in line with that new national direction must be within the scope of submissions, and should not prejudice any persons who may not have had adequate notice and opportunity to submit on the changes. Giving effect to an NPS without sufficient basis in a submission or without sufficient notice to a potentially interested person, may prejudice persons who were not aware that these documents might be implemented in the PDP after notification.
- 15 Where a submission has raised a matter that is relevant to a new NPS direction, the Panel may consider it appropriate to make changes that better give effect to parts of the NPS. However, you should consider whether those changes still raise a risk of prejudice, or risk inconsistent implementation of the policy documents. Section 42A reports will consider submissions on this basis.

Scope of amendments to PDP

- 16 The Panel has broad scope to make amendments to the PDP. The Environment Court in *Motiti Rohe Moana Trust v Bay of Plenty Regional Council*²² (the Motiti case) said:²³

It is well established that on appeals about proposed planning instruments there is no presumption in favour of the planning authority's policies or the planning details of the instrument challenged or the authority's decisions on submissions: each aspect stands or falls on its own

²² *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* (2016) 19 ELRNZ 595.

²³ *Motiti*, at [45]

merits when tested by submissions and the challenge of alternatives or modification.

- 17 The above comments must however be applied against the requirement that all amendments can only be applied if they are within the scope of a submission.
- 18 The key principles for the Panel in considering whether an amendment is within the scope of submissions are helpfully summarised by the High Court in *Albany North Landowners v Auckland Council*²⁴ as follows:
- (a) A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change.²⁵
 - (b) To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution.²⁶
 - (c) The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic and workable fashion rather than from the perspective of legal nicety.²⁷
 - (d) The 'workable' approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.²⁸
 - (e) It is sufficient if the change to be made can fairly be said to be a foreseeable consequence of any changes directly proposed in the submission.²⁹
- 19 It is therefore submitted that the Panel has broad scope to make amendments to the PDP provided it is confident that they are a logical consequence of the matters raised in the full range of submissions, such

²⁴ *Albany North Landowners v Auckland Council* [2017] NZHC 138.

²⁵ *Albany North*, at [115], referring to *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

²⁶ *Albany North*, at [115].

²⁷ *Albany North*, at [115], referring to *Royal Forest and Bird Protection Society of New Zealand v Buller Coal Ltd* [2012] NZRMA 552.

²⁸ *Albany North*, at [115], referring to *Shaw v Selwyn District Council* [2001] 2 NZLR 277.

²⁹ *Albany North*, at [115], referring to *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556.

that they would not prejudice a potential further submitter who had elected not to make a further submission.

Submissions broadly supportive of the PDP

- 20 It was Council's view that there were three broad submissions made in support of the notified version of the plan provisions, which should be further notified in an addendum to the summary of submissions on 8 May 2024. Council considers these submissions have sufficient clarity to require a decision to be made on these submissions, where they were made in support of the form of the provisions of the plan that were notified, and therefore provide scope for the submitter to give submissions and evidence in support of the notified version of those provisions – particularly if these same provisions are opposed or amendments are sought by other submitters.

Defective submissions

- 21 The Panel will be required to address submissions that might be in some way defective. For example:
- (a) A submission might not be directly 'on' the subject matter of the PDP in terms of clause 6 of Schedule 1 of the RMA; or
 - (b) A further submission may seek to enlarge an original submission; or
 - (c) A further submitter may not have standing to make a further submission; or
 - (d) A submission or further submission may be incomplete.
- 22 We briefly address the law on these matters to assist the Panel in considering any issues that might arise throughout the course of the hearings.

Submissions not 'on' the PDP

- 23 Clause 6 of Schedule 1 provides that once a proposed plan is publicly notified, submissions may be made 'on' the plan:

6 Making of submissions under clause 5

(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

- 24 Whether a submission is 'on' a plan arises more frequently in the context of plan changes or variations than full plan reviews. Much of the law therefore relates to the two-limb test developed *Clearwater Resort Limited v Christchurch City Council* for that context.³⁰ The more appropriate approach for a full plan review is that taken by the Environment Court in the *Motiti* case, which said:

*...where the Council is fulfilling its statutory functions under s30 and ss66 and 67 of the Act, it must be open to a party to argue that the Council has failed to meet any of those obligations, or that these could be better met by altering the provisions of the plan.*³¹

- 25 It is submitted there is broad scope for submissions to be 'on' the PDP, given that the PDP is a full review of the resource management issues affecting the District. However, a submission that seeks that the plan address matters outside of the resource management functions of the Council under the RMA is unlikely to be within the framework of the plan, and therefore not 'on' the plan in terms of Schedule 1, clause 6.

Further submissions that enlarge original submissions

- 26 Clause 8(2) of Schedule 1 requires further submissions to be:

...limited to a matter in support or in opposition to the relevant submission made under clause 6 or 6A.

- 27 In other words, a further submission cannot enlarge the scope of an original submission – it can simply support or oppose the submission that has already been made. The rationale for that is that the submission and further submission process is designed to ensure there is full and widespread public knowledge of proposals to amend the PDP so that further submissions can be lodged in support or opposition to those proposals. To allow a further submission to expand the relief sought by an original submission would undermine that legislative intent because there would be no opportunity for a further submission on that expanded relief.³²

³⁰ *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

³¹ *Motiti*, at [43].

³² *Kitewaho Bush Reserve Company Ltd v Auckland Regional Council*, ENC Auckland A038/2003, citing *Hilder v Otago Regional Council* [1997] NZEnvC 361.

Standing to make further submissions

28 Clause 8(1) limits those who can make a further submission to:

(a) any person representing a relevant aspect of the public interest; and

(b) any person that has an interest in the proposed...plan greater than the interest that the general public has; and

(c) the local authority itself

29 The High Court in *Palmerston North City Council v Motor Machinists Ltd*³³ considered clause 8(2) to capture people directly affected by submissions. In relation to applications under s274 RMA, the same phrase has been held to identify people who have some advantage or disadvantage in relation to the submission, such as a right in property directly affected, that is not remote from the relief sought.³⁴

Options available to Panel for defective submissions

30 Section 41D sets out the circumstances in which a submission may be struck out, including that it is frivolous or vexatious, it discloses no reasonable case, it would be an abuse of process to allow the submission to be taken further, it is supported by evidence that purports to be independent expert evidence but is not, or contains offensive language. If a submission or part of a submission (or further submission) is defective for one of these reasons, the Panel may either:

(a) Strike out the submission or part of it (for example, because allowing a submission that is not "on" a plan change or a further submission that lacks standing would be an abuse of process); or

(b) Decline to consider the submission or part of it.

31 Striking out a submission has significant procedural ramifications insofar as it removes the right of a submitter to appeal the decision, including arguing there is scope by way of an appeal on the decision on the plan. A submitter can object to a strike out decision under section 357.

32 It is therefore submitted that the Panel should exercise caution in striking out a submission or further submission, and that it may be more appropriate

³³ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

³⁴ *Genera Ltd v Bay of Plenty Regional Council* [2018] NZEnvC 171.

to decline to consider the submission – for example, on the basis that it is out of scope or does not disclose a reasonable or relevant case.

Clause 16, Schedule 1, minor changes

- 33 The Council can make minor amendments to the PDP under clause 16(2) of Schedule 1 'to alter any information, where such an alteration is of minor effect, or may correct any minor errors'. Mr Heale will address these matters in his evidence as required.

Dated this 31st day of May 2024

A handwritten signature in black ink, appearing to be 'Shelley Chadwick', written over a horizontal line.

Shelley Chadwick
Counsel for the Gore District Council

Annexure 1

Excerpt from *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55

"1.4 What matters must be considered?"

[17] Since these proceedings concern a plan change we must first identify the legal matters in relation to which we must consider the evidence. In *Long Bay-Okura Great Park Society Incorporated v North South City Council*¹ the Environment Court listed a “relatively comprehensive summary of the mandatory requirements” for the RMA in its form before the Resource Management Amendment Act 2005. The court updated this list in the light of the 2005 Amendments in *High Country Rosehip Orchards Ltd v Mackenzie District Council* (“High Country Rosehip”)². We now amend the list given in those cases to reflect the major changes made by the Resource Management Amendment Act 2009. The different legal standards to be applied are emphasised, and we have underlined the changes and additions³ since *High Country Rosehip*⁴:

“A. General requirements

1. A district plan (change) should be designed to **accord with**⁵ — and assist the territorial authority to **carry out** — its functions⁶ so as to achieve the purpose of the Act⁷.
2. The district plan (change) must also be prepared **in accordance with** any regulation⁸ (there are none at present) and any direction given by the Minister for the Environment⁹.

¹ *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* Decision A78/2008 at para [34].

² *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387.

³ Some additions and changes of emphasis and/or grammar are not identified.

⁴ Noting also:

(a) that former A6 has been renumbered as A2 and all subsequent numbers in A have dropped down one;

(b) that the list in D has been expanded to cover fully the 2005 changes.

⁵ Section 74(1) of the Act.

⁶ As described in section 31 of the Act.

⁷ Sections 72 and 74(1) of the Act.

⁸ Section 74(1) of the Act.

⁹ Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.

3. When preparing its district plan (change) the territorial authority **must give effect** to¹⁰ any national policy statement or New Zealand Coastal Policy Statement¹¹.

4. When preparing its district plan (change) the territorial authority shall:

(a) have regard to any proposed regional policy statement¹²;

(b) give effect to any operative regional policy statement¹³.

5. In relation to regional plans:

(a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order¹⁴; and

(b) **must have regard to** any proposed regional plan on any matter of regional significance etc¹⁵.

6. When preparing its district plan (change) the territorial authority must also:

- **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations¹⁶ to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities¹⁷;

- **take into account** any relevant planning document recognised by an iwi authority¹⁸; and

¹⁰ Section 75(3) RMA.

¹¹ The reference to 'any regional policy statement' in the Rosehip list here has been deleted since it is included in (3) below which is a more logical place for it.

¹² Section 74(2)(a)(i) of the RMA.

¹³ Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

¹⁴ Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].

¹⁵ Section 74(2)(a)(ii) of the Act.

¹⁶ Section 74(2)(b) of the Act.

¹⁷ Section 74(2)(c) of the Act.

¹⁸ Section 74(2A) of the Act.

- not have regard to trade competition¹⁹ or the effects of trade competition;

7. The formal requirement that a district plan (change) must²⁰ also state its objectives, policies and the rules (if any) and may²¹ state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) **is to be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act²².

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

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies²³;

10. 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 method for achieving the objectives²⁴ of the district plan **taking into account**:

(i) the benefits and costs of the proposed policies and methods (including rules); and

(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods²⁵; and

(iii) 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 circumstances²⁶.

¹⁹ Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009.

²⁰ Section 75(1) of the Act.

²¹ Section 75(2) of the Act.

²² Section 74(1) and section 32(3)(a) of the Act.

²³ Section 75(1)(b) and (c) of the Act (also section 76(1)).

²⁴ Section 32(3)(b) of the Act.

²⁵ Section 32(4) of the RMA.

²⁶ Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment²⁷.

12. Rules have the force of regulations²⁸.

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive²⁹ than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land³⁰.

15. There must be no blanket rules about felling of trees³¹ in any urban environment³².

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal³³ the Environment Court must have regard to one additional matter — the decision of the territorial authority³⁴.”

²⁷ Section 76(3) of the Act.

²⁸ Section 76(2) RMA.

²⁹ Section 76(2A) RMA.

³⁰ Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009.

³¹ Section 76(4A) RMA as added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

³² Section 76(4B) RMA — this ‘Remuera rule’ was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

³³ Under section 290 and Clause 14 of the First Schedule to the Act.

³⁴ Section 290A RMA as added by the Resource Management Amendment Act 2005.