

BEFORE THE HEARING PANEL

Under	Resource Management Act 1991 (RMA)
In the matter	of an original submission on the Proposed Gore District Plan
Between	Southland Federated Farmers Submitter Number 126 Further Submitter Number 17
AND	Gore District Council Local Authority

**LEGAL SUBMISSIONS ON BEHALF OF FEDERATED FARMERS OF NEW
ZEALAND (INCORPORATED) – SOUTHLAND PROVINCE**



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LEGAL SUBMISSIONS OF FEDERATED FARMERS OF NEW ZEALAND (INCORPORATED) – SOUTHLAND PROVINCE

1. INTRODUCTION

- 1.1 These legal submissions are presented on behalf of Federated Farmers of New (Incorporated) – Southland Province's (**Southland Province**) in respect of Hearing Stream 8 – Sites and Areas of Significance to Māori (**SASMs**) chapter of the Proposed Gore District Plan (**PDP**).
- 1.2 The Southland Province made submissions and further submissions on the SASMs chapter of the PDP.¹
- 1.3 Evidence in support of the Southland Province's submissions has been lodged by Ms Rachel Thomas and Ms Bernadette Hunt.
- 1.4 The notified version of the PDP and the supporting Section 32 report created widespread confusion as to what the SASMs chapter sought to achieve and how it would achieve it. On review of the submissions, there was not a single submission that both understood and supported the chapter as notified.
- 1.5 A clear signal of how difficult the Gore District Council (**Council**) has made the issue of SASMs and the associated chapter is highlighted in the Section 32 report (while in respect to SASM-O1 could have applied to the entire chapter):²

Reasonableness: This **objective may cause higher costs, uncertainty, and risk for the wider community**, however this is considered acceptable in the context of Treaty Partnership and better embodying the intention of s 6(e) (emphasis added).

- 1.6 This statement illustrates precisely what the Southland Province's concerns are with the approach taken in relation to the PDP. These concerns also relate to the alternative relief that now is sought by the s42A report writer). The proposed alternative relief will introduce higher levels of uncertainty and risk for the wider community.

¹ Southland Federated Farmers made submission (#126) and further submissions (#17) on the PDP.

² [Section 32 report, Mana Whenua](#), page 48.

1.7 Southland Province submits that the PDP and in particular the SASMs chapter will impede the ability to perform primary production practices and prevent actions on farm that increase efficiency. The potential exists that innovation and investment on farms including land use change to less intensive uses will be restricted through the provisions in the chapter. The provisions in the SASMs chapter have the potential to discourage actions that will improve water quality such as detainment bunds and constructed wetlands as well as restraining the ability for farmers to exercise stewardship in a manner that allows the next generation to continue to farm.

1.8 Southland Province's submissions are structured as follows:

1.8.1 Summary of relief sought.

1.8.2 National Planning Standards.

1.8.3 Scope of alternative relief sought by the Council.

1.8.4 Relief sought.

2. SUMMARY OF RELIEF SOUGHT

2.1 The Southland Province seeks the withdrawal of the SAMS / Mana Whenua and NTCV chapters from the PDP process so that engagement with affected parties and an appropriate Schedule 1, RMA process is undertaken.

2.2 Alternatively, if the Hearings Panel does not support the relief outlined above, then the Southland Province seeks the following alternative relief. The provision of alternative relief should not be seen as a change of stance by the Southland Province whose primary relief sought is outlined in paragraph 2.1.

2.3 The alternative relief sought is:

2.3.1 amendments to the SASMs Chapter to give effect to the relief sought by the Southern Province in its submissions;

2.3.2 the mapping of 'known' sites of significance along with the inclusion of a corresponding definition of 'known site';

- 2.3.3 inclusion of a method within the SASMs chapter for future work policy related to the mapping of known sites with a traffic light system for consenting;
 - 2.3.4 the partial rejection of some amendments to the Mana Whenua Chapter; and
 - 2.3.5 the rejection of the inclusion of a proposed NTCV Chapter into the PDP.
- 2.4 Please refer to Ms Thomas and Ms Hunt's evidence for the reasons behind the alternative relief sought.

3. **SCOPE FOR ALTERNATIVE RELIEF PROPOSED BY COUNCIL**

- 3.1 The Council and Hokonui Rūnanga have previously summarised the principles of scope as they relate to the amended Mana Whenua and new NTCV chapters in their legal submissions. Their legal submissions set out the parties approach in respect of scope.³
- 3.2 The Southland Province does not agree with the conclusion reached by the Council and Hokonui Rūnanga that they have legal scope to make the changes they have proposed and to introduce the proposed alternative relief the parties are seeking.

Legal principles relating to scope

- 3.3 Following notification of a plan change, Schedule 1, clause 6 of the Resource Management Act 1991 (**RMA**) sets out that any person may make a submission 'on' a plan change. The legal framework in respect of scope of relief that can be sought through a submission is well established but requires application on a case by case basis.
- 3.4 The High Court held in *Palmerston North City Council v Motor Machinists Limited* that for a submission to be 'on' a plan change, a two-limbed test must be satisfied:

³ Gore District Council's legal submissions were dated 4 December 2024 and Hokonui Rūnanga's dated 3 December 2024.

- 3.4.1 First, the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the proposed plan change entails; and
- 3.4.2 the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.
- 3.5 In respect to the first limb of the test the High Court held in *Motor Machinist* that whether the submission falls within the ambit of the plan change may be examined by asking whether it raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular resource is altered by the plan change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the plan change. Some extensions to a plan change are not excluded if they are incidental or consequential extensions and do not require a substantial section 32 analysis.
- 3.6 The Environment Court decision in *Bluehaven Management Limited v Western Bay of Plenty District Council*,⁴ outlined its understanding of what the first limb test required:
- Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.⁵
- 3.7 In respect of the second limb test outlined in *Motor Machinists*, the High Court identified that the key risk to guard against is whether the reasonable interests of others might be overridden by a 'submissional

⁴ [2016] NZEnvC 191.

⁵ *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191at [39].

side-wind'. That is, a plan change is so altered by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission, which had not been directly notified to them.

- 3.8 The Environment Court in *Paterson Pitts Limited Partnership v Dunedin City Council*⁶ considered the leading authorities on scope and concluded:

Put simply, these cases establish the proposition that if a submission is not “on” a plan change or variation, the Council has no jurisdiction to consider it.⁷

- 3.9 The High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council*⁸ concluded that:

The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. ... It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.⁹

- 3.10 The Council proposes that the Hearing Panel rely on the principles set out in *Albany North Landowners v Auckland Council*.¹⁰ In this case the High Court concluded that:

...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. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. 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. It is sufficient

⁶ [2022] NZEnvC 234.

⁷ At [68].

⁸ (1994) 1B ELRNZ 150 (HC)

⁹ Ibid at 147.

¹⁰ [2017] NZHC 138.

if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.¹¹

- 3.11 While agreeing with the statement outlined above, it is submitted that the case can be distinguished from these proceedings. While the principle above from the *Albany North* case is mostly common-sense, the Independent Hearings Panel in *Albany North* was in a non-standard planning process that sat outside of the RMA. The statutory duties of the Panel were defined under the Local Government (Auckland Transitional Provisions) Act 2010 (**the Act**). The Act set out the process for the development of the first combined plan¹² for the Auckland Council which included the Hearings Panel being required to make its decisions under the Act. Appeal rights were also defined under the Act.¹³
- 3.12 For the case before us, the Hearings Panel is clearly making decisions within the provisions of the RMA and is bound by the process set out in Schedule 1, clause 10 of the RMA.
- 3.13 Issues concerning scope should be approached in a realistic workable fashion rather than from a perspective of legal nicety.¹⁴ Consequential relief may be granted as a matter of law, subject to considerations of fairness and the application of *Motor Mechanists*.¹⁵ However, this does not mean to say that submissions on lower order provisions in a plan can drive consequential changes further up the hierarchy of provisions in the same document, precisely because they are not usually reasonably foreseeable.¹⁶
- 3.14 In summary, for there to be scope to make an amendment to a plan change the two limb test set out in *Motor Machinists* must be achieved. Furthermore, any amendment made to a plan change following notification must be fairly and reasonably within a range of options between what was originally notified, and the relief requested in submissions.

¹¹ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

¹² Local Government (Auckland Transitional Provisions) Act 2010, Part 4.

¹³ *Ibid*, s155.

¹⁴ *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 407 (HC) at page 10

¹⁵ *Arthurs Point Outstanding Natural Landscape Society v Queenstown Lakes District Council* [2019] NZEnvC 150 at [69].

¹⁶ *Ibid*, at [69].

- 3.15 It is submitted that there is no jurisdiction for a Hearings Panel to make amendments to such an extent where those who are potentially affected have not had the opportunity to participate. The purpose of notifying a plan, along with the submissions and further submissions process, is to inform everyone about what is proposed and is done for procedural fairness so that all parties have the same opportunity to participate.
- 3.16 A recent High Court decision in *Southland Federated Farmers v Southland Regional Council*¹⁷ held that if an amendment to the notified plan is required to give effect to the Council's legislative obligations, but there was no scope to achieve that outcome, "the matter could only be remedied by directing the Council to prepare a change to the proposed Plan pursuant to s293 of the RMA."
- 3.17 Through the planning process, the Panel can only make amendments to the PDP to the extent that the Panel has jurisdiction (or scope) to do so. The principles relating to the Panel's jurisdiction to amend a proposed plan on appeal have been outlined above.
- 3.18 The Southland Province submits that the Hearing Panel should also consider how the lack of clarity and confusion that arose from the notified SASMs chapter has impacted the ability of parties to submit on the proposed alternative relief. The lack of clarity increases the likelihood that any further amendments will result in the plan ending up in a form which could not reasonably have been anticipated resulting in procedural unfairness.
- 3.19 To determine whether there is scope for the Hearing Panel to adopt the proposed alternative relief from the Council, it is a matter of determining whether the proposed amendments to the chapters would have been anticipated and reasonably and foreseeable raised through the submission points made by Hokonui Rūnanga.
- 3.20 It is submitted that the Council does not have the scope to make the proposed amendments to the Mana Whenua chapter as:

¹⁷ [2024] NZHC 726.

- 3.20.1 the submissions sought a variation of the PDP, not amendments to the notified PDP;
- 3.20.2 the chapter included no objectives, policies or methods and no submission was made to include them as relief sought (or the particular wording of the relief sought);
- 3.20.3 the submissions specifically refers to ‘sites of cultural significance’ which was not contained with the Mana Whenua chapter. It could not be anticipated that the relief would then result in amendments to the Mana Whenua chapter;
- 3.20.4 the submissions sought a more detailed description of the effects to be avoided in relation to Ngai Tahu values. This should be incorporated within the SASMs chapter; and
- 3.20.5 the notified version of the PDP included a SASMs chapter. No submitter has sought its deletion on the grounds that it has no relevance. It would not have been reasonably foreseeable to other submitters that after referring to the entire district as a “site of cultural significance” that the PDP would be amended on the grounds that there are “no sites of significance to Maori.”
- 3.21 The Southland Province submits that the Hearing Panel does not have jurisdiction to adopt the Council’s proposed alternative relief as it goes beyond what was raised in submissions.
- 3.22 For the reasons outlined in these legal submissions, the Southland Province also submits that the Council does not have scope to delete the SASMs chapter and replace it with the NTCV chapter.

4. **NATIONAL PLANNING STANDARDS 2019**

- 4.1 The National Planning Standards 2019 (**NPS 2019**) were developed to improve the efficiency and effectiveness of the planning system through the provision of nationally consistent structure, format, definitions and electronically functionality and accessibility (amongst other matters) for plans and policy statements under the RMA.¹⁸

¹⁸ National Planning Standards, section 1.

- 4.2 Under s75(3)(ba) of the RMA, a district plan must give effect to the NPS 2019. In respect of district plans, this means that the chapters and sections shown in black in the table must be included in the order shown in the table.¹⁹
- 4.3 The NPS 2019 does not allow for new chapters to be introduced into the district plan structure. Local authorities are allowed to add sections and subsections within chapters where needed to organise related provisions.
- 4.4 Under section 4 of the NPS 2019, the mandatory parts for a district plan structure are set out. It is noted that the chapters and sections that are grey in table 4 of the NPS-2019 must be included in the order shown.²⁰
- 4.5 A SASMs chapter should include all provisions related to SASMs in one place. This would include the identification of SASMs sites and areas so that relevant provisions for their protection can be included. It should also include earthwork provisions in respect of SASMs and/or archaeological sites relevant to this chapter. This is because the adverse effects being controlled relate more directly to the effects on the sites or areas than they do to the normal adverse effects of earthworks generally.²¹ Cross-referencing of the provisions in the SASMs chapter to relevant chapters should also occur to make the PDP easier to navigate.
- 4.6 So the actual issue is whether or not the Council wants a SASMs chapter under which the NTCV provisions could sit. Given that the PDP does not use SASMs overlays, it could be argued that the chapter is not needed. However, the NPS 2019 does not provide the Council with the ability not to have a SASMs chapter in its PDP. The decision the Council has is which of the two chapters – SASMs or Mana Whenua – should the NTCV be placed.
- 4.7 It is submitted to the Hearings Panel that the SASMs chapter is not able to be replaced with the proposed NTCV chapter as there no ability to do so under the NPS 2019 and no scope to do so. The proposal to remove the SASMs chapter would mean that the PDP would not give effect to the NPS 2019 and would not comply with s75 of the RMA.

¹⁹ NPS 2019, section 4, p14.

²⁰ Ibid.

²¹ [Guidance for District Plans Structure and Chapter Standards](#), page 8.

5. RELIEF SOUGHT

- 5.1 The relief sought is that the SASMs / NTCV and Mana Whenua chapters are withdrawn and a plan variation is notified that meets the requirements of Schedule1 of the RMA.
- 5.2 Any variation should include the district-wide mapping of sites of significance to Māori and consequential amendments to the entire PDP which would include the refinement of the application of cultural values and developing specific rules for SASMs which are located in the SASMs chapter.
- 5.3 Ms Thomas has outlined the alternative relief sought by the Southland Province. The inclusion of alternative relief by the Province should not be seen as agreement to the proposed alternative relief that is being sought by the Council.
- 5.4 In summary, the following alternative relief is sought if the Hearings Panel is unwilling to grant the relief outlined in paragraph [5.1] above.
 - 5.4.1 amendments to the SASMs Chapter to align with the Southern Province's relief sought in its submissions;
 - 5.4.2 the mapping of 'known' sites of significance along with the inclusion of a corresponding definition of 'known site';
 - 5.4.3 inclusion of a method within the SASMs chapter for future work policy relating to mapping known sites with a traffic light system for consenting;
 - 5.4.4 the partial rejection of some amendments to the Mana Whenua Chapter (as set out in Ms Thomas's evidence); and
 - 5.4.5 the rejection of the inclusion of a proposed NTCV Chapter.