

Before the Hearing Panel
Appointed by the Gore District Council

Under The Resource Management Act 1991 (**RMA**)

In the matter of Submissions and hearings on the Proposed Gore District Plan

Legal submissions on behalf of Gore District Council for the McNab topic

Date: 29 November 2024

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May it please the Panel

- 1 These submissions relate to the McNab topic, for which specific directions were given by the panel in Minute 13. As the Panel is aware this topic concerns the specific proposals for the 99.4ha property at 10 McKinnon Road, and also O Te Ika Rama Marae (the Site).
- 2 In the notified plan the Site was originally zoned Rural Lifestyle Zone (approx. half) and General Rural (approx. half), with the current location of O Te Ika Rama Marae zoned Māori Purpose zone.
- 3 A much more bespoke zoning proposition has now been put forward by the submitter McNab Management Ltd (McNab), including a range of specific provisions and exceptions for this Site.
- 4 As the Panel noted in Minute 13, the McNab topic also concerns issues which are being considered in the context of the Rural Zone provisions, the Māori Purpose Zone provisions, and potentially also the Industrial Zone provisions. For the Council, it is particularly important that any specific provision made for the Site fits comfortably with the wider provisions in, and framework of, the Proposed District Plan.
- 5 The matters addressed in these submissions are:
 - (a) Case law relevant to scope;
 - (b) Case law relevant to errors in submissions;
 - (c) Analysis of the McNab submission in the light of the case law;
 - (d) Providing for Rural industry activities on the Site;
 - (e) The National Policy Statement for Highly Productive Land (**NPS-HPL**); and
 - (f) The Council presentation at the hearing.

Case law on scope

- 6 The Panel has already received legal submissions on case law relating to the scope of submissions and the corresponding scope of relief and/or decisions that may be made on submissions and plan provisions, provided by:
 - (a) Counsel for Gore District Council in it's submissions on Hearing Stream 1 at paragraphs 16-17;

- (b) Counsel for Hokonui Rūnanga Incorporated in its submissions on Hearing Stream 1 at paragraphs 19-28.
- 7 A further summary is provided in the submissions from counsel for McNab filed on 28 November 2024.
- 8 While these cases law summaries do not differ significantly, for the Council is submitted that the statement by the High Court in *Albany North Landowners v Auckland Council*¹ is most useful, including because:
- (a) It is concise and includes all of the relevant principles in one place;
- (b) The High Court in this case had received full legal submissions on scope issues, which are recorded in the judgment as having taken into account all of the case law referred to in the submissions of counsel for McNab;
- (c) The High Court was also considering scope issues in the context of a full plan review process, rather than scope issues in the context of a variation or plan change.
- 9 For ease of reference, the key principles from the *Albany North* case are repeated here:
- (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.²
- (b) To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution.³
- (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.⁴

¹

² *Albany North*, at [115], referring to *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

³ *Albany North*, at [115].

⁴ *Albany North*, at [115], referring to *Royal Forest and Bird Protection Society of New Zealand v Buller Coal Ltd* [2012] NZRMA 552.

- (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.⁵
 - (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.⁶
- 10 It is submitted that a further cautionary comment from a recent case *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council*, may also be helpful to keep in mind when considering the scope of a submission:⁷
- ...if forensic examination is needed to work out whether relief on appeal was fairly and reasonably raised, that would tend to signal a lack of scope.
- 11 In applying the principles from *Albany North*, it is submitted that the Panel should look closely at:
- (a) The specific provisions that the submission states it relates to;⁸
 - (b) The explanations and reasons given for making the submission and wanting the changes sought;
 - (c) The decisions specified as being sought in the submission; and
 - (d) The summary of submissions.⁹
- 12 If a plan provision has been specifically referred to in a submission, then there will be a clear link and good notice given that the submission is seeking changes to that provision.
- 13 Equally a clear statement of a decision being sought in respect of a provision or group of provisions or chapter (i.e. the 'relief' sought) is a key

⁵ *Albany North*, at [115], referring to *Shaw v Selwyn District Council* [2001] 2 NZLR 277.

⁶ *Albany North*, at [115], referring to *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556.

⁷ [2024] NZEnvC 255 para 33

⁸ A copy of the McNab submission is provided at Appendix E to the section 42A report

⁹ A copy of the relevant parts of the summary of the submissions on this topic is incorporated into Appendix E – recommendations on submissions, to the section 42A report

part of a submission, so is another direct route to identifying what a submitter wants to be changed in the proposed plan.

- 14 The parts of a submission that give explanations and reasons why a particular decision is sought may more commonly be used as interpretive tools for understanding what the submission is 'on' and what any relief might cover. It is submitted that this part of a submission may not always clearly provide scope for a particular decision by itself.
- 15 In reading the submissions, many members of the community and/or other submitters will look very closely at the relief sought in the submission in order to identify the range of potential outcomes and decisions that might result from that submission. The outcome of the submission should be expected to be somewhere that is fairly and reasonably within the boundaries of what the relevant provisions were in the notified version of the plan, and what changes are being asked for in the submission.
- 16 A summary of submissions is also an important reference document, as this may potentially be the main reference point for submitters who are looking to identify what submissions they would wish to make a further submission on.

Case law on errors in submissions

- 17 The issue of how to deal with an error in a submission has been considered in the High Court case *Healthlink v Christchurch International Airport*¹⁰ and more recently in *Progressive enterprises Ltd v Hastings District Council*¹¹ which adopted and applied the *Healthlink* approach. The relevant points made from these cases are:
 - (a) The RMA envisages a significant degree of public participation, which is particularly important in relation to a proposed District Plan;¹²
 - (b) The barrier for public participation should not be unreasonably high, so the test for considering the scope of a submission should be that of a reasonably informed reader, not someone with knowledge of planning matters well above the informed citizen;¹³

¹⁰ [2000] NZRMA 375, paras 33-36

¹¹ [2015] NZEnvC 187 paras 7-9, 14

¹² *Healthlink*, para 33

¹³ *Healthlink*, para 33

- (c) It cannot be for the reasonable reader to have to uncover the extent of a submission's error and the true intentions of the submitter;¹⁴
- (d) If an erroneous reference has the potential to mislead a reasonable non-expert as to the intent of a submission, then that error may be difficult to remedy;¹⁵ and
- (e) It is for the submitter to accurately defined what is sought by way of amendment or confirmation of what is in the notified proposed plan. The primary reason for that expectation is the integrity of the process of publishing the summary of submissions and thus providing an accurate basis for the rest of the Schedule 1 process.¹⁶

Analysis and application of case law

Scope of McNab submission

- 18 The specific provisions of the Proposed District Plan referred to in the initial section of the McNab submission are:
 - (a) The planning maps that relate to the Site;
 - (b) All general rural zone (GRUZ) provisions;
 - (c) All rural lifestyle zone (RLZ) provisions; and
 - (d) All Māori purpose special zone (MPZ) provisions.
- 19 The decisions requested were:
 - (a) To amend the zoning for the Site as shown in the submission plan; and
 - (b) To amend the GRUZ, RLZ and MPZ as set out in the schedule attached to the submission.
- 20 There is nothing in the above sections of the McNab submission which:
 - (a) Records that the submission is on, or requests relief on any LIZ provisions.

¹⁴ *Healthlink*, para 36

¹⁵ *Progressive*, para

¹⁶ *Progressive* para 14

- (b) Records that the submission is on, or requests relief on any subdivision provision (**SUB**).
 - (c) Records that the submission is on, or requests a new overlay provision in the nature of the Mahinga Kai overlay described in Ms McMillan's evidence.
- 21 As a result of the above, there is also nothing in the summary of submissions prepared by Council which indicates that there would be any potential change to the LIZ provisions, a subdivision provision, or the district wide overlay provisions, as a result of the McNab submission.
- 22 It is submitted that for the above reasons the Panel should be cautious in considering accepting the LIZ, SUB and overlay provision amendments proposed by McNab, which may potentially be outside the scope of the original submission.
- 23 In terms of the rezoning plan provided with the McNab submission, this clearly seeks an LIZ zoning over 10 hectares of land at the front portion of the Site. It does not indicate any wider LIZ or other urban zoning over the are of land which was originally proposed to be zoned rural in the notified plan.
- 24 The proposed LIZ area shown in the plan attached to Ms McMillan's evidence is much larger than was sought in the submission plan, and also extends up to new boundaries to the north and east of the Site. As a result of this, the Council has concerns that these changes may mean that insufficient notice has been provided through the McNab submission:
 - (a) To potentially interested adjoining landowners to the north and east of the site along the new 44 hectare LIZ boundary; and
 - (b) To submitters interested more generally in the supply of industrially zoned land in the District, including potentially the owners of land in the proposed new Gore South Industrial zone.
- 25 If the Panel agrees with these scope concerns, then it is submitted this may provide a basis that the rezoning arrangements shown in the plan at Appendix D to the section 42A report should be preferred.
- 26 It is submitted that the above issue does not arise to the same extent in relation to the more minor shifting of zone boundaries which are proposed in Ms McMillan's evidence for areas that are internal to the Site e.g. the changes in the MPZ, or RLZ boundaries at the interior of the Site. For Council these shifts carry much less potential impacts in terms of effects on

other potentially interested parties, and also relate to zones (i.e. GRUZ, RLZ, and MPZ), which the submission was specifically noted as being 'on'.

Error in submission plan

- 27 In the memorandum dated 25 June 2024 filed on behalf of McNab, counsel clarified that there was an error in the plan attached to McNab's original submission. The error was stated to be that McNab was not seeking any Mahinga Kai Special Purpose Zone as shown in the submission plan, but was instead seeking a riparian setback for water quality and mahinga kai activities through the underlying zone provisions.
- 28 The evidence circulated by McNab now proposes a Mahinga Kai overlay over parts of the area originally shown as the Mahinga Kai Special Purpose Zone. As recorded in the section 42A report, this overlay would potentially necessitate a district wide but also bespoke new provision for the Site. As detailed by Ms Woodbridge these proposals are difficult from a District Plan perspective, and it is submitted that the error in the submission compounds this difficulty for the Panel, as the error in the submission also means that the proposals were not sufficiently signalled or foreseeable for the wider community through the submission process.

Rural industry Precinct

- 29 The section 42A report confirms Council's agreement that there is sufficient support for a Rural Industry Precinct to be provided over the eastern half of the site, as shown in the plan at Appendix C to the section 42A report. The rebuttal evidence provided by McNab has also satisfied Ms Bennett and Ms Woodbridge that it may be appropriate to provide for the 10ha LIZ zone at the front of the site, as shown in the plan at Appendix D to the section 42A report.
- 30 The Council still does not however agree that the evidence provided by McNab supports an expansive new 44 hectare LIZ zone over the eastern side of this Site. Issues of scope have been noted above in relation to this aspect of the proposal, both in terms of the wider area of zoning and particularly also in relation to the proposed amendments to LIZ and SUB provisions to support the proposal. Ms Woodbridge has also expressed concerns about the change of character that would result from introducing this extent of an urban zoning on this site.¹⁷

¹⁷ Section 42A report, paras 90-95

- 31 Standing back and looking at McNab's LIZ proposals in the round, it is submitted that the various LIZ provision changes proposed by Ms McMillan in her evidence are too ad hoc and do not fit well with the wider framework of the proposed district plan. Ms Woodbridge will be able to speak to these issues in answer to questions from the Panel at the hearing. It appears that there are still a number of unresolved consequences that would flow on from the changes to the LIZ and SUB provisions that are proposed by Ms McMillan.¹⁸
- 32 It is also noted that the assessments in Mr Colgrave's evidence are focussed on the demand for land in the District for rural industry purposes. Any support from his evidence for urban zoned industrial land is potentially much less convincing. For example at section 4.3 of Mr Colgrave's report he notes the Council's previous economic assessments showing a need for new industrial land, but he does not then account for the new supply of Industrial zoned land which is proposed for Gore South and discussed during Hearing Stream 4a. It is submitted that the Colgrave report is of most use for the Panel in supporting further supplies of land for rural industry e.g. as shown in Appendix C and D to the section 42A report, and not the wider 44 hectares of new LIZ now sought.

NPS-HPL

- 33 The submissions made by counsel in legal submissions filed on behalf of McNab in relation to the NPS-HPL at paragraphs 6(b), 7, 51-52, are not accepted. It is submitted that any conjecture that the NPS-HPL may (or may not) apply to the Rural Industry Precinct beyond 2030 is not a factor that is particularly relevant for this Panel in making it's decisions for this Site. While the concern raised by McNab may be valid in a business risk sense; it might equally be speculated (possibly more realistically) that LUC-3 soils may be removed from the NPS-HPL in the revision of this national direction expected to be released in 2025.
- 34 It is submitted that the Panel is constrained to apply the RMA, current national direction and the existing spatial planning documents in the form they are at present. It is submitted that the comments at paragraphs 51-52 of the McNab legal submissions do not provide a robust reason for deciding to extend an urban zoning over all of the eastern side of the McNab site.

¹⁸ Refer also section 42A report, para 264

Presentation by Council at the hearing

- 35 The reporting officers have prepared a short addendum to the section 42A report to identify any previously identified matters which they consider have now been addressed. This addendum is attached to these submissions and Ms Bennett and Ms Woodbridge will also of course be available for questions at the hearing. Subject to the Panel's preferences the proposed speaking order is counsel for the Council, followed by Ms Bennett then Ms Woodbridge.

Dated this 29th day of November 2024



Shelley Chadwick
Counsel for the Gore District Council