

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 2 (Overarching Issues, Overarching Objectives and Integrated Management topics)

Legal submissions on behalf of Wellington Regional Council – key terminology used and consideration policies in Hearing Stream 2

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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 2 of the hearings on Proposed Change 1 to the Regional Policy Statement (**Change 1**), scheduled to commence on 17 July 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 two legal issues arising in response to issues raised by submitters:
 - 3.1 Case law interpretations of key phrases including 'give effect to', 'have regard to', 'recognise and provide for' and 'take into account'; and
 - 3.2 The use of 'consideration policies' in the RPS.

KEY TERMS USED

- 4 The Panels will be familiar with commonly used terminology in the RMA and planning documents. For ease of reference, we set out some of the key terms and current case law interpretation approaches below, as relevant to Hearing Stream 2 provisions:
 - 4.1 A requirement to 'give effect to' something, is a requirement to implement it.¹ The RPS is required to give effect to National Policy Statements.² District and

¹ *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [77] (**King Salmon**).

² Section 62(3), RMA.

Regional Plans are required to give effect to the RPS.³ The implementation of such a directive will be affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a provision which is framed in a specific and unqualified way (ie, which creates an 'environmental bottom line') may, in a practical sense, be more prescriptive than a requirement to give effect to a provision which is worded at a higher level of abstraction.

4.2 When 'having regard to' something, a decision maker is required to give genuine attention and thought to the matter, but it is not necessary that the matter is accepted.⁴

4.3 When taking a matter into account, a decision maker is required to consider a factor, and weigh it up with other factors whilst retaining the ability to give it considerable, moderate, little, or no weight at all as considered appropriate.⁵

4.4 The direction to 'recognise' is a direct one, but the direction to 'recognise and provide for' is more directive. To recognise and provide for something requires the decision maker to both recognise a factor, and then make provision for the factor. Some action is required, as one does not 'provide for' a factor by considering and then discarding it.⁶

³ Section 67(3)(c), section 75(3)(c), RMA.

⁴ *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 123 at [51] - [52].

⁵ *Bleakley v Environmental Risk Management Authority* [2002] 3 NZLR 213 (HC), at [72].

⁶ *King Salmon* at [26].

CONSIDERATION POLICIES

- 5 Section 4.2 of the operative RPS is a section of the RPS titled 'Regulatory policies – matters to be considered'. Each of the policies in that section then have 'consideration' in the title (policies 35-60). The policies contain a range of directions to decision makers when considering resource consents, notices of requirement, or the change/variation of planning documents, as to matters to have particular regard to, or for matters to be recognised and provided for.
- 6 Change 1 proposes inclusion of 14 new 'consideration policies' within this section of the RPS, and amendments to other existing operative policies. These policies have been proposed in a format that fits within this existing part of the operative RPS and a consistent approach to drafting has been taken. These proposed amendments will largely be addressed in subsequent hearing streams. However, as policies IM.1, and IM.2 are within this hearing stream and the question of appropriateness of such policies is relevant.⁷ Both IM.1 and IM.2, as notified, included the directive to 'have particular regard to' the matters within that policy when considering notified resource consents, notices of requirements and regional and district plans.
- 7 The obligation on local authorities under the RMA in respect of their respective district and regional plans, is to give effect to (ie, implement) the RPS.⁸ In respect of the notified versions of policies IM.1 and IM.2, in order to implement those policies, it is clear the respective councils must have particular regard to certain matters when making decisions on plans. As set out above, this requires each of the local authorities to give genuine thought and attention to the matters. It is submitted that this level

⁷ Noting that neither of these policies directs the commencement of a plan change, or for a certain action to be undertaken within a specified timeframe.

⁸ Section 67(23)(c) and 75(3)(c), RMA.

of direction is entirely appropriate in an RPS and provides useful guidance to local authorities on how that policy direction is to be implemented. It is also consistent with existing national direction for example, the National Policy Statement on Urban Development (**NPS-UD**). For example:

7.1 Objective 5 directs that:

Planning decisions relating to urban environments, and FDSs, take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

7.2 Policy 6 directs that:

When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:...

8 'Planning decisions' are then defined within the NPS-UD as including, among other things, a decision on a regional plan (or proposed regional plan), a district plan (or proposed district plan), a resource consent, or designation.⁹ As with the RPS, when making plans local authorities need to 'give effect to' any relevant NPS¹⁰.

9 The obligation in respect of resource consent decision making and notice of requirement recommendations, is to have regard to any relevant provisions of the RPS for resource consenting decisions,¹¹ or have particular regard for notices of requirement.¹² Having express policy direction in the RPS to have particular regard to a range of matters does no more than explicitly reflect this requirement.

⁹ Clause 1.4 of the NPS-UD.

¹⁰ Section 66(3) and 75(3), RMA

¹¹ Section 104(1)(b)(v), RMA.

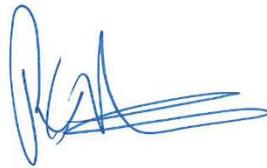
¹² Section 171(1)(a)(iii), RMA.

10 In respect of the provisions within this hearing stream, although Policy IM.1 and IM.2 contained the 'have particular regard to' direction when notified, the recommended amendments in response to submissions remove this direction. As recommended to be amended by the 42A report, the provisions now require the adoption of 'an integrated approach to the management of the region's natural and physical resources', and a direction to 'seek to achieve' the objectives and policies of the RPS in an equitable way. It is submitted that this is also appropriate policy direction for inclusion within an RPS in relation to notified consents, notices of requirements and regional and district plans.

CONCLUSION

11 Counsel for Wellington Regional Council will appear at the commencement of Hearing Stream 2 to speak to these submissions and are available to address any specific legal issues that arise in Hearing Stream 2.

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