

**Before the Environment Court  
At Wellington  
I Mua I te Kōti Taiao  
Te Whanganui-a-Tara Rohe**

**ENV-2019-346-103**

**Under** Clause 14, Schedule 1 of the Resource Management Act  
1991

**In the matter of** appeals on the Proposed Natural Resources Plan

**Between** Various

**Appellants**

**ENV-2019-000103, 105-133**

**And** **Wellington Regional Council**

**Respondent**

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**Memorandum of counsel on behalf of Wellington Regional Council in  
response to 22 June 2020 Minute**

**Date:** 3 July 2020

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50-64 Customhouse Quay, Wellington 6011  
PO Box 2791, Wellington 6140  
DX SP20002, Wellington  
Tel +64 4 472 6289  
Fax +64 4 472 7429

Solicitor on the record  
Contact solicitor

Kerry Anderson  
Emma Manohar

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

Tel +64 4 474 3255  
Tel +64 4 918 3016

**MAY IT PLEASE THE COURT:**

- 1 The purpose of this memorandum of counsel is to respond to the Minute of the Environment Court dated 22 June 2020.
- 2 In that Minute, the Court directed that the Wellington Regional Council (**Council**) file a memorandum including:
  - 2.1 A general summary of positions on appeal points in terms of mediation, resolution and those that require hearing time.
  - 2.2 Case management requirements for appeal points that require hearing time.
  - 2.3 Priorities for and approach to future mediation. This should include possible approaches to achieving a focus on identifying the issues that parties still wish to pursue through mediation and if not resolved, require hearing time.
  - 2.4 A proposed efficient timetable for mediation of outstanding appeal points for consideration by the Environment Court, with the aim of as far as practicable by the end of 2020 completing mediation, identifying and either resolving issues or referring matters to the Court for hearing.

**Summary of position on appeal points**

- 3 The Council identified 47 topics within the 30 appeals filed in these proceedings. These are the topics that formed the basis of the initial mediation timetable discussed at the pre-hearing conference in December 2019.
- 4 Over 20 of these topics have been mediated at least once. By the end of July (being the end of the current mediation schedule) all of the issues within Topics 1 to 22 will have been discussed in mediation or resolved prior to mediation. Notably, these topics include the parts of the Proposed Plan that address the coastal environment, regionally

significant infrastructure, outstanding natural character and landscapes, historic heritage and mana whenua. These are significant parts of the Proposed Plan.

- 5 Of those 22 topics, the majority of the issues have been resolved or are in the process of being resolved. Often, resolution in principle has been reached but that resolution has been made conditional to resolution of other topics. In relation to matters outstanding from those mediations, the Council and other parties are providing further proposals or information and are working through trying to finalise and resolve those issues outside of formal mediation.
- 6 Multiple draft consent orders are currently being drafted with the expectation that these will be filed in July and August. A number have already been filed and approved by the Court.
- 7 Significant work has gone into resolving appeal points within these first 22 topics by all of the parties including over lockdown through a new form of mediation technology. The Council wishes to record its gratitude to all parties for continuing to engage in the process over the lockdown period and also to record the significant successes in mediation to date. It also wishes to thank the Court and the Commissioner, for encouraging this to occur.

### **Case management requirements**

- 8 At this point, the Council is hopeful that all outstanding matters from the first 22 Topics can be resolved. It wishes to continue with mediation in good faith with those parties and it considers that the nature of those discussions means that those topics may be resolvable. The Council does not want to pre-empt these further discussions, but notes the following topics may not be able to be resolved:

8.1 Driving on beaches at Titahi Bay (Topic 13, Issue 2).

- 8.2 General conditions relating to fish passage and inanga spawning in the coastal management, wetlands and beds of lakes and rivers parts of the Proposed Plan.
- 8.3 Some elements of the Regionally Significant Infrastructure provisions.
- 8.4 The natural hazard policies, noting significant progress was made at mediation on 30 June 2020.
- 9 The Council suggests that it update the Court by mid-August (ie, following completion of the current mediation schedule) as to whether any of these topics above have not settled and need hearing time.
- 10 Given the progress made to date on the appeals, the Council considers there are no topics that it is currently appropriate to schedule timetabling towards a hearing.

#### **Approach to future mediation**

- 11 To date, the mediation process has involved the Council circulating summary statements at least 3 days prior to mediation. Significant work goes into the summary statements, including pre-engagement with parties to see if matters can be settled offline or refined prior to Court-assisted mediation.
- 12 The summary statements break the mediation topics into issues and identify which provisions and appeal points are relevant to each issue. They involve the Council distilling the various appeal points (which is particularly difficult where the appellants have not been clear as to what relief is actually sought) and section 274 parties' positions on each topic, providing background on the reason for the decision and providing an updated Council position on those appeal points, often suggesting a proposed way forward. The feedback the Council has received is that these summary statements are very useful and they have been providing a roadmap of issues for discussion at the mediations.

13 The Council considers that this continues to be an effective and efficient approach. However, it could be more focussed and efficient. The Council has found that parties attending mediation, or immediately prior to mediation, are:

13.1 Withdrawing or amending appeal points based on a more recent review of either the summary statement or the Proposed Plan itself. At times, the work done in preparing the summary statement is wasted given the decision to withdraw at a late stage.

13.2 Not providing position statements or alternative proposals in response to the Council's summary statement, or if they are provided, they are very late in the piece without enough time for the Council or other parties to appropriately consider. Often, appellants have attended mediation with significantly altered relief from that covered in the appeal.

14 Ultimately this had led to mediation days which have focussed on sorting on what issues are still live or trying to understand a new proposal brought to the mediation, rather than focussing on the issues which are still in contention. It has also led to days of mediation being vacated early on the day, due to there no longer being live issues. While this still results in resolution and narrowing of issues, mediation time is not used as effectively as it could be and new topics cannot be substituted at short notice.

15 As set out in the following section, the Council's proposed way forward is based on a process being put in place to require the parties to provide clarification ahead of time as to what relief they seek or continue to pursue, and what that relief looks like in terms of specific drafting. This will save Council time, but also mediation time and limit wasted mediation time where possible. Specifically, the Council considers that it would be helpful if parties could specify:

15.1 which relief they are still pursuing (and what they are not);  
and

- 15.2 where parties have not specified the precise relief sought in terms of amendments for the plan or wish to offer an amended relief sought, to do so by a nominated date.
- 16 In order for this information to be most useful, it needs to be provided by topic (these have been set out since the December pre-hearing conference) and in advance of summary statements being circulated.
- 17 The Council has set out in **Appendix 1** a table specifying each topic and what provisions are covered by each topic. This table is an updated version of the same table filed with the Court at the pre-hearing conference. Tracked changes and comments identify the various changes to appeals, and therefore parties.

#### **Proposed mediation timetable to December 2020**

- 18 The Council continues to consider mediation appropriate, beneficial and effective. However, as noted above, further efficiencies could be realised. Further, while mediation was able to progress remotely, due to the willingness of the Court and all parties to do so, mediations were conducted on sub issues within topics as opposed to on the topics as a whole. This naturally resulted in some delays.
- 19 The Proposed Plan is a significant and complex planning document. The Council's five previously operative regional plans, including the regional coastal plan, have been combined into one new plan. As mediation has progressed, it has become evident that the initial mediation timetable proposed by the Council was overly optimistic. Even without COVID-19, further mediation was going to be required in hindsight.
- 20 In light of the Court's request for mediation to be completed this year, the Council has prepared a timetable for on-going mediation. This timetable sees all remaining appeal topics being mediated prior to mid-December 2020. While this is significantly longer than the initial mediation timetable (which saw mediations run from March to the end of June 2020) the Council considers the time is required.

- 21 The Council also considers it beneficial to the Court and the parties to foreshadow, if not schedule, mediation to completion now. This will enable parties to plan accordingly and allocate resourcing where considered most appropriate through this process.
- 22 The general approach taken by the Council when preparing the proposed mediation timetable is:
- 22.1 Mediation on Tuesdays, Wednesdays and Fridays. This differs from the initial schedule where mediations occurred Tuesday to Friday. This is a result of Mondays being kept free at the Commissioner's request to enable travel to occur, and the Regional Council's unavailability to mediate on Thursdays. The Council has also found Mondays and Thursdays crucial for keeping all the mediation workstreams in terms of summary statements, outcome statements and actions and consent order documentation progressing.
- 22.2 Suggesting mediation via Microsoft Teams on the Fridays, rather than face to face mediation, so that if parties have to travel for Tuesday/Wednesday sessions, they do not have a 'dead' day in Wellington on the Thursday.
- 22.3 No break weeks, other than one week in August due to the Commissioner's availability and one week in October to acknowledge the school holidays. Again, this is a change from the initial schedule, which was programmed on a two weeks on, one week off basis. The removal of break weeks is required due to the unavailability of Mondays and Thursdays and the need to conclude mediation by December this year.
- 22.4 Carefully assessing the likely time required for each Topic, taking into account previous experience, initial engagement with parties and expert input. This time allocation has also been arrived at based on the expectation that parties will provide the clarification sought above. It is acknowledged that topics related to water allocation and water quality take

up the majority of the time scheduled. This is a significant resource management issue for the region and Council submits that appropriate time allowances should be made.

22.5 Entire topics have been scheduled as opposed to scheduling specific issues within those topics. This enables the parties and the Council to agree ahead of time what order to hear the issues in, determine what issues are still live and the retention of scope to discuss all relevant issues at once, as opposed to revisiting related issues in later scheduled sessions. This is consistent with the approach in the initial mediation timetable.

22.6 Acknowledgment of Federated Farmers' request to schedule relevant mediation ahead of October to enable 'on farm' commitments to be met. This has resulted in the topics related to stock access and riparian margins, and vegetation clearance being shifted to sit between water allocation and water quality.

22.7 In order to accommodate Council resourcing, starting with Topics 45 and 36 in the week commencing 3 August 2020, then moving to Topic 23 in the week commencing 17 August 2020.

23 The Council's proposed mediation timetable to complete all Topics is attached as **Appendix 2**. The timetable includes topic number references but does not list all relevant provisions or parties. This information can be found in Appendix 1.

### **Proposed way forward**

24 The Council requests that the Court direct appellants involved in mediation topics as set out in the proposed Schedule in Appendix 2 from 19 August 2020 until December to provide the information by a specified date. The section 274 parties can then, in response, confirm whether they remain interested in the appeal/relief and what their position is. These dates need to be a reasonable time in advance of the

mediation topic so that can be addressed in the Council's summary statements.

25 Given that the Council's proposed timetable commences on 4 August 2020 it is considered unachievable for the direction to relate to mediations scheduled that week.

26 For the 19 August to end of September mediations, Council suggests:

26.1 31 July for the appellants to file confirmation of their live issues and specific relief sought or amended relief they are now seeking.

26.2 7 August for section 274 parties to advise on their position regarding the appellant's position.

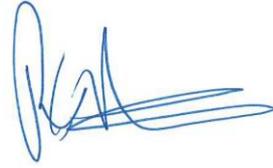
27 For the mediations from October -December, the Council suggests:

27.1 28 August for the appellants to file confirmation of their live issues and specific relief sought or amended relief they are now seeking.

27.2 4 September for section 274 parties to advise on their position regarding the appellant's position.

28 The Council also considers that it would assist if the Court issued a direction requiring that each appellant attending mediation file a position statement in response to the Council's summary statement at least 24 hours prior to mediation including whether there is any relief that the appellant no longer wishes to pursue or if the appellant agrees with the updated Council position. This has been a voluntary part of the process to date.

**Date:** 3 July 2020



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Kerry M Anderson/ Emma L  
Manohar/ Kate H Rogers  
Counsel for Wellington Regional  
Council