

**Before the Hearing Panel
At Wellington**

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

In the matter of Proposed Natural Resources Plan for the Wellington Region
(hearing stream 1)

**Introduction and legal overview on behalf of Wellington Regional Council:
Hearing stream 1**

Date: 22 May 2017



Solicitor on the record

Kerry Anderson

kerry.anderson@dlapiper.com

Contact Solicitor

Emma Manohar

emma.manohar@dlapiper.com

Tel +64 4 474 3255

Tel +64 4 918 3016

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

INTRODUCTION OF THE TEAM

- 1 First to introduce the Greater Wellington team here today:
 - 1.1 Kerry Anderson and Emma Manohar - legal counsel for GW.
 - 1.2 Section 42A report authors:
 - 1.2.1 Amber Carter who has written two 42A reports covering procedural matters, consultation and section 32 reports,
 - 1.2.2 Emily Greenberg who has also written two 42A reports addressing the overall policy framework,
 - 1.2.3 Pam Guest who wrote the 42A report on areas and sites with significant mana whenua values, and
 - 1.2.4 Paul Denton who addresses beneficial use and development.
 - 1.3 We then have the two advisers who have provided expert evidence:
 - 1.3.1 Mike Grace - Māori values and concepts.
 - 1.3.2 Alastair Smaill - absent from the hearing but opportunity to provide written questions and responses is available or alternatively, he is available to appear on Tuesday afternoon for questions.

FORMAT FOR COUNCIL TEAM PRESENTATION

- 2 The proposed format for the team's presentations is:
 - 2.1 Brief legal overview.

2.2 Summaries of the Part A reports, followed by Mike Grace giving a brief summary of his evidence and then the summaries of the balance of the 42A reports.

3 It is understood that you may have questions at any time throughout the presentations, which can be addressed as we go, but that the Council will also have a right of written reply for questions that need more fulsome consideration and formal written responses or that arise during submitter presentations.

SUMMARY OF KEY LEGAL TESTS

4 The legal submissions were pre-filed with the section 42A reports and addressed the relevant RMA tests and the anticipated key issues for Hearing One matters based on submissions received.

5 As submitters are not required to pre-file legal submissions, legal issues to be pursued are not yet fully understood and new issues may arise throughout the hearing. It was not considered appropriate to attempt to anticipate and address all potential legal arguments to be pursued by submitters and instead, if legal input is needed as a result of submitter presentations, this could be addressed at the same time as officer reply.

6 The focus of today's brief legal presentation is not to go through all of the issues raised in the pre-filed legal submissions, but rather, to focus on the plan change test. This is because it identifies the key matters you will need to determine as part of deciding whether the provisions meet that test, which is effectively whether the proposed provisions are the most appropriate ones.

7 The key parts of the test (which is set out in full in Appendix B to our filed submissions) require you to focus on:

7.1 The Council's functions and that the proposed Plan should be designed to assist the Council to carry out those functions, in order to achieve the purpose of the RMA.

7.2 The relevant provisions of national policy statements, the NZCPS and the RPS and what is required to give effect to those through the proposed Plan.

7.3 Whether:

7.3.1 each proposed objective is the most appropriate (but not necessarily the superior) way to achieve the purpose of the RMA; and

7.3.2 the policies, rules and other methods that implement those objectives are the most appropriate (in the sense of being suitable) to achieve the objectives taking into account:

(a) the benefits and costs of the proposed policies, rules and other methods;

(b) the risk of acting or not acting if there is uncertain or insufficient information on the subject matter; and

(c) relevant National Environmental Standards, if the proposed rule proposes a greater prohibition or restriction than the NES.

7.4 When making a rule, you also need to have regard to the actual or potential effects of activities on the environment.

7.5 Finally, when considering the provisions and their appropriateness, the provisions need to be considered holistically as opposed to being considered in isolation without that contextual framework.

8 We hope this provides a framework for the matters the RMA requires you to determine as part of deciding what provisions are the most appropriate.

Summary of *Turners & Growers v Far North District Council* [2017] NZHC

9 Since our written submissions were filed, in a decision of 24 April 2017 the High Court declined an appeal by Turners & Growers against the Environment Court's decision on a plan change regarding setback requirements in the Far North District Plan.

10 Of relevance to the Proposed Plan hearings are the paragraphs that address whether submissions are 'on' a plan change and those relating to the relevance of Part 2 when making decisions on proposed plan provisions. We address each issue in turn.

Scope of submissions

11 At paragraph [22] the Court confirmed that the following test from *Clearwater Resort Ltd v Christchurch City Council* remains the leading authority on whether a submission is 'on' a plan change:

1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

12 We consider that this reinforces the established legal test. The key issue in that case was the fact that the proposed plan change only affected a limited class of person whereas the relief sought by Turners & Growers involved a 'radical extension' which would affect a very large group persons.

The relevance of Part 2

13 The appeal primarily focused on the allegation by Turners & Growers that the Environment Court erred when it considered Part 2 of the RMA and the District Council's functions when assessing the proposed plan provisions.

14 Turners & Growers argued that following the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*

unless the relevant plan is invalid, incomplete or uncertain, or a higher level document has been promulgated since the relevant plan was made operative, there is no justification for going beyond the settled objectives of the relevant plan. It submitted that the Court should not have considered the Council's functions under section 31 or the purpose and principles under Part 2 of the RMA and that instead it simply needed to evaluate whether the proposed methods were the most appropriate for achieving the objectives of the plan as proposed to be amended.

15 This argument was strongly criticised by the High Court and was ultimately unsuccessful. The High Court sought to limit *King Salmon* to its specific facts in respect of the decision-maker seeking to rely on Part 2 to not give effect to a strong policy direction in a higher order planning document. Which, as the Supreme Court found in that case was an error as there was no invalidity, uncertainty or incomplete coverage of the relevant issue within the NZCPS.

16 In a general sense, the High Court considered that it was expressly contrary to section 74 of the RMA to not have regard to Part 2 and section 31 when considering the proposed district plan change. At paragraph [46] and [47] the High Court stated:

The Supreme Court did not suggest that Part 2 would be an irrelevant consideration in a case such as the present where decision-makers have choice. On the contrary, the Court said this:

Reflecting the open-textured nature of Part 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.

...

These objectives and policies leave considerable room for choice as to the methods or rules most appropriate to achieve them. It is an extraordinary proposition to suggest that Council, and the Environment Court on appeal, should disregard the purpose and principles of the Act when considering that choice. I reject this proposition.

17 This confirms the role of Part 2 in a plan change decision. As the High Court stated, it is an extraordinary proposition to suggest that Council, and

the Environment Court on appeal, should disregard the purpose and principles of the RMA when considering provisions. The Panel must consider Part 2, and the Council's functions under section 30, when considering whether the provisions of the Proposed Plan are the most appropriate.

Date: 22 May 2017



.....
Kerry Anderson / Emma Manohar
Counsel for Wellington Regional
Council