

Before the Proposed Natural Resources Plan Hearing Panel

In the matter of the Resource Management Act 1991

And

In the matter of **Wellington City Council's** submission on Greater
Wellington Regional Council's Proposed Natural Resources
Plan

Statement of evidence of Maciej (Mitch) Wiktor Lewandowski

Hearing 1

Plan framework, associated objectives and policies

Date: 5 May 2017

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Introduction

1 My name is Maciej Lewandowski. I am a Principal Advisor within the District Plan team at the Wellington City Council (**the Council or WCC**). I have 15 years professional experience working as a planner.

Qualifications and experience

2 I hold a Bachelor of Resource Studies from Lincoln University, majoring in Policy and Planning, and a Master of Resource and Environmental Planning with Honours, from Massey University. I am a Full Member of the New Zealand Planning Institute.

3 I have been employed in my current role with the Council since June 2014. In that role, I am part of a team responsible for the maintenance and review of the Wellington City District Plan (**District Plan**). I have also led the Council's implementation of the Wellington Housing Accord, and have been involved in a range of strategic planning initiatives outside of the Resource Management Act (**RMA or the Act**) process.

4 Additionally I have prepared, or contributed to the preparation of, a range of submissions from the Council pertaining to a number of legislative amendments such as the recently enacted Resource Legislation Amendment Bill, Productivity Commission inquiries, and most recently on the National Policy Statement on Urban Development Capacity (**NPS-UDC**). I continue to lead the Council's response to the NPS-UDC, and in that capacity I am working with the other territorial authorities in the region in seeking to prepare a consistent response to the NPS-UDC.

5 Before my current role I was employed by Urban Perspectives Ltd as a Resource Management Consultant from 2013 – 2014. Prior to this, I was employed by the Upper Hutt City Council as District Plan Manager and held a variety of other roles in both the district plan policy and resource consenting teams.

6 Accordingly, I have a wide breadth of experience in both resource consenting and district plan policy under the Act.

Code of conduct

7 I have read the Code of Conduct for Expert Witnesses in the Environment Court Practice Note. I agree to comply with this Code. The evidence in my statement is within my area of expertise, except where I state that I am relying on the evidence of another person. I have not omitted to consider material facts known to me that might alter or detract from the opinions I expressed.

8 I am authorised to give this evidence on behalf of the Council.

Involvement in the Proposed Natural Resources Plan

9 I was not the author of the Council’s submission on the Proposed Natural Resources Plan (**PNRP**). I am however familiar with the submission and the process of its development. I have attended one pre-hearing meeting related to the PNRP related to Schedule E¹.

10 In preparing my evidence, I have considered the following:

10.1 The PNRP as notified

10.2 The Council’s submission

10.3 The Greater Wellington Regional Council (**GWRC**) officers’ s42A reports to the Panel and related appendices, by:

10.3.1 Ms Amber Carter – Introduction and Procedural Matters

¹ Schedule E: Sites with significant historic heritage values.

- 10.3.2 Ms Emily Greenberg – Overall policy framework of the proposed plan – Parts A and B
- 10.3.3 Mr Paul Denton – Beneficial use and development
- 10.3.4 Ms Pam Guest – Areas and sites with significant mana whenua values
- 10.4 The section 32 report: Beneficial use and development
- 10.5 The relevant provisions of:
 - 10.5.1 The operative Regional Policy Statement for the Wellington Region
 - 10.5.2 The Resource Management Act 1991
- 10.6 Legal submissions on behalf of Wellington Regional Council prepared for Hearing 1 by DLA Piper.

Executive Summary

- 11 The key concern throughout the Council’s submission is that the PNRP does not sufficiently take into account the urban areas of the region. This concern relates to Hearing 1 as well as the forthcoming hearings. I share that view.
- 12 I accept that the PNRP must maintain a primary focus on the natural environment. The concern remains however that the PNRP implements a ‘one-size-fits-all’ approach that is then applied to urban environments, and that there is insufficient recognition of the urban environment and urban issues in the PNRP thereby not sufficiently giving effect to the NPS-UDC.
- 13 I do not believe that the overall PNRP framework accords with the functions of GWRC, in particular section 30(1)(gb).

Scope of Evidence

- 14 The PNRP hearings are being held on a topic basis. This statement of evidence is therefore targeted to the scope of the provisions identified as relevant to Hearing 1.
- 15 However given the introductory nature of this hearing and the inclusion of plan-wide matters that need to be addressed ‘in the round’, I have addressed some matters that span multiple hearing topics. These matters will need to be returned to in more detail under their particular hearing stream.
- 16 Invariably, it is not always possible to discretely separate individual plan provisions given the degree of interrelatedness created in resource management plans. These dependencies are referenced where needed.
- 17 This highlights the importance of this particular hearing, perhaps more so than future hearings. The Panel’s decisions on this topic matter will set the framework for the remaining hearings and the structure of the PNRP. This has particular relevance to the Council’s submission on matters such as the overall policy framework and providing greater recognition of the existing urban environment.
- 18 It also highlights that the relief sought by the Council can be addressed at different hearing streams. For instance, the Council has sought an amendment to the definition of Regionally Significant Infrastructure or in the alternative changes to objectives and policies that recognise and provide for the importance of Council assets where a future resource consent may need to be sought for works in the Coastal Marine Area (CMA)².
- 19 A further example is the change sought to the structure of the PNRP in terms of the use of the term ‘avoid’ in policies, often coupled with the use of a non-complying activity status (NCA). In my opinion, it will be

² WCC Submission, Para 3.2.1 – 3.2.2, p.7

difficult for the Panel to rely on addressing these matters on a topic basis without first considering the entire PNRP and its overall approach.

- 20 A critical issue for the Panel will be appropriately giving effect to the NPS-UDC, the NPS for Freshwater Management and balancing the requirements of these in order to achieve the purpose of the Act.
- 21 The legal submissions on behalf of GWRC correctly outline the requirements of the NPS-UDC and that no policies direct amendments to the PNRP. However, a number of policies³ in the NPS-UDC are applicable and have relevance to the nature of the Council's submission regarding appropriate recognition of the urban environment and urban development activities. It is my view that these NPS policies need to be considered in making decisions on submissions, and the future impact of the PNRP provisions as currently drafted.
- 22 The sections of WCC's submission, as relevant to Hearing 1, are the following:
- Entire Plan – various
 - Definitions:
 - Regionally Significant Infrastructure
 - Policy P4 Minimising adverse effects
 - Section 4.2 Beneficial Use and Development
 - Sites of Significance to Mana Whenua (Rules 161 and 162; Policies 44 and 45)

³ Policies PA3 and PA4 for instance.

Overview of WCC Submission

- 23 The WCC submission raises a number of issues that have an effect across the entire plan. Some of WCC's submission points, such as plan drafting and the definition of regionally significant infrastructure are addressed in this hearing. Others such as the approach to climate change adaptation may well have relevance plan-wide but will need to be addressed in a future hearing.
- 24 WCC has been involved in the PNRP since its inception. It prepared a submission on the draft Plan and met with GWRC staff on multiple occasions throughout the PNRP development process. WCC consistently expressed concerns about the way in which the PNRP approached existing urban areas and provided for activities that would ordinarily be expected in an urban environment.
- 25 That concern remains. WCC's concern about the 'one size fits all' approach to some activities throughout the PNRP is unchanged. This approach does not recognise the location of the activity or the different environments across the region. In particular, WCC has concerns about the use of NCA status for activities that are necessary for urban development. This will have significant implications for the ongoing maintenance and upgrade of WCC's infrastructure, and the establishment of any new infrastructure. WCC is concerned that the current drafting will hinder projects that are necessary to manage future growth, improve resilience, and will impact on the efficient operation of the urban environment.
- 26 Furthermore, in many instances the policy framework requires that adverse effects or particular locations be 'avoided'. In isolation or coupled with a NCA status it will be very challenging for WCC to establish those activities that are necessary to achieve economic growth objectives, resilience objectives and recreational objectives for the City and the wider Region.

- 27 The Supreme Court’s decision on the EDS v NZ King Salmon⁴ (**King Salmon**) case provides firm direction on the implications of the use of ‘avoid’ in resource management plans and policy statements – that is that all adverse effects must be avoided.
- 28 I am of the view that the threshold adopted by the PNRP is too high where:
- 28.1 activities are a prerequisite for urban growth
- 28.2 are responses to resilience issues such as the protection of valuable infrastructure adjacent to the CMA
- 28.3 adverse effects on habitats and ecosystems can be expected, but might not be able to be completely avoided.
- 29 In terms of these structural issues, the decisions sought by the Council through its submission were:
- 29.1 Review the use of the non-complying activity status where activities, structures and infrastructure are an expected part of the environment and in areas that have been identified by territorial authorities as urban development areas.
- 29.2 Remove the use of ‘avoid’ in the policies.
- 29.3 Any other changes necessary to address WCC’s concerns.

Section 42A Reports

- 30 There are three principal section 42A reports prepared for the first hearing. I have structured my commentary on the relevant aspects of the Council’s submission under the heading of each relevant report.

⁴ Environmental Defence Society v The New Zealand King Salmon Co Ltd [2014] NZSC 38

Preliminary comments

- 31 A core aspect of the Councils submission that is relevant to the first hearing relates to the structure and drafting of the PNRP. Specifically, the Council has sought changes to the policy framework of the PNRP and its relationship to the activity statuses utilised for some rules.
- 32 These are foundational matters and go to the heart of the approach that the PNRP adopts in its structure and policy framework. The matters are also inter-related. The Council's submission itself addresses the matters under the heading of "Non Complying Activity status **and** Policy approach to 'avoid adverse effects'" (my emphasis).
- 33 The Council's submission sought to present these matters as a whole given they are interrelated. Despite this inter-relationship, the matters have been split out into two separate s42A reports.
- 34 These matters take on a heightened importance given the aforementioned decision of the Supreme Court in King Salmon. Plan drafting is increasingly becoming paramount and previous reliance on an overall broad judgment approach is less appropriate where plans are written in less ambiguous terms. In reviewing the Overall Framework report, I was unable to find reference to the King Salmon decision or indeed a consideration of the relationship between the policy framework and rules as raised in the Council submission.

Overall policy framework

The use of 'avoid' in policies

- 35 On the basis of the preceding comments, the relevant matter for this report is the use of 'avoid' or the creation of an unduly high threshold in policies. The s42A report does not provide a clear explanation of the reporting officers position on this matter. The sole reference in the report is in the decisions on submissions appendix where Ms Greenberg recommends that the matter be addressed in each respective s42A report.

- 36 The response provided effectively ‘kicks for touch’ any overarching response to individual report authors. This ignores the issue at hand – the approach of the overall Plan to such matters.
- 37 There are a number of examples where the use of avoid arises, or where in my opinion the policy framework creates unduly high barriers for resource consent. This creates uncertainty and increased compliance costs, including:
- 37.1 In respect of sites located within Schedule C – Sites of significance to Mana Whenua – which is discussed further below.
- 37.2 In respect of sites in Schedules F (to be addressed at a latter hearing), Policy 41 creates a presumption of avoidance.
- 37.3 Policy 139 and the related resource management framework related to seawalls (noting the relationship in this policy to Regionally Significant Infrastructure discussed below) creates a presumption of inappropriateness.
- 38 These matters speak more broadly to the uniformity of treatment the PNRP adopts to varying environments across the region. In my view, the PNRP cannot apply such uniformity without creating significant compliance costs or barriers to the ordinary operation of urban areas.
- 39 The Council’s submission has addressed this uniformity by seeking changes to appropriately recognise the requirements of urban areas within a broader natural environment context. This supports, for instance, the requirements of the NPS-UDC such as Policy PA4 and the benefits of urban development. The PNRP in my view fails to appropriately recognise these matters. A review of the objectives of the PNRP reveals no objective that could reasonably be said to recognise the existence, let alone functioning, of the urban areas of the region.

40 Accordingly I am of the view that the approach of the PNRP requires reconsideration and amendment in line with the relief sought by the Council's submission.

Policy P4 – Minimising adverse effects

41 Policy 4 explains the approach of the PNRP to minimisation.

42 The Council sought an amendment to the policy by inserting 'reasonably' before practicable as a qualifier, and the words 'giving consideration to' before the list of factors that are to be considered. It also sought that matter (b) be deleted from the Policy.

43 Including the term 'giving consideration to' will have the effect of providing a degree of flexibility in consideration of the matters and not requiring that all matters must be implemented. This is important in terms of matter (b) on the subsequent list. For all intents and purposes this appears to be a second grab at avoidance (under the guise of mitigation) where an activity occurs within a Scheduled area.

44 As noted in the Council's submission, matter (b) is overly onerous. It further queried whether the term 'away from' suggested a need for separation that was greater than simply 'outside of'. Ms Greenberg has not addressed this matter in her report.

45 I concur with the Council submission. Policy 4 is onerous. The amendments proposed by the Council will provide for the operational flexibility that is required for the ordinary implementation of urban activities.

Beneficial use and development

The use of Non-Complying activity status

46 The second arm of the Council's submission relating to plan structure concerned the use of NCA status for activities which, in the Council's view, are a usual part of its operations or requirements in an urban area.

- 47 As noted above, this matter has been de-coupled from concerns around the policy structure and the use of ‘avoid’ in policies as presented in the Council’s submission. It has instead been grouped into the s42A report prepared by Mr Denton.
- 48 The officer’s recommendation is to reject the relief sought by the Council and refers to Issue 4 of the s42A report. A review of Issue 4 reveals no discussion of this submission.
- 49 Again, it is not clear what consideration has been given to the Council’s submission and the reasons for rejecting the relief sought by the Council. There is also no indication of the view of GWRC officers on this submission point.
- 50 I am of the view that the use of a discretionary activity status for the matters of interest to the Council⁵ will sufficiently achieve the objectives of GWRC.
- 51 The issue arising in terms of the use of an NCA status is section 104D of the Act. In my view, the nature of the policy framework will likely mean that the objectives and policies gateway test will be challenging to pass. Accordingly I am supportive of the view expressed in the Council submission, that coupled with a reconsideration of relevant policies, the use of NCA status be reconsidered.

Regionally significant infrastructure

- 52 WCC is concerned that the definition of ‘*regionally significant infrastructure*’ does not include local roads or associated infrastructure (seawalls). WCC has a significant amount of important infrastructure in areas adjoining the CMA. WCC needs to be able to maintain and replace this infrastructure without unreasonable controls being placed on

⁵ These matters relate to works necessary for the ongoing operation of infrastructure assets, the development of new assets, and resilience matters for instance.

its statutory responsibilities under both the Resource Management and Local Government Acts.

53 Many of WCC's roads are located close to the coast and their maintenance and upgrade will require work within the CMA. It is important that the maintenance and upgrade of the road asset is appropriately provided for. The continued operation of the road network is critical to the safe and efficient movement of people and goods.

54 As currently drafted, the PNRP will increase the regulatory burden to WCC, significantly increasing the cost of providing infrastructure, structures and activities in the CMA. As a result, it will create uncertainty. This will impact on WCC's ability to continue to provide and operate infrastructure and recreational facilities in the CMA.

55 The Council's submission sought an amendment to the definition of regionally significant infrastructure (**RSI**) to include local roads. This submission point continues the theme of the Council's submission of seeking appropriate recognition of urban areas and infrastructure within the PNRP, in order to balance the overall theme of the PNRP and what are in my view overly onerous requirements in the policy framework.

56 Mr Denton recommends against approving the relief sought by the Council. His rationale for the recommendation being:

56.1 The PNRP definition of RSI is based on the RPS definition of RSI and the PNRP must give effect to the RPS definition by virtue of section 67(3) of the Act.

56.2 The definition of RSI includes the Strategic Transport Network (separately defined) which relies on roads identified in the Regional Land Transport Plan 2015.

56.3 That city and district councils can address local networks in their own plans.

- 57 Mr Denton is correct that the PNRP must give effect to the RPS. It is incorrect to suggest that the PNRP must mirror the RPS. The definition of RSI in the RPS was created for the RPS. It was not created with a view to the provisions of the PNRP as currently drafted and with the effect that they will have in practice.
- 58 Mr Denton is correct in noting the inclusion of the Strategic Transport Network as a component of the definition of RSI. However, this inclusion does little to overcome the Council's concern as to appropriate recognition of its own roading network such as the southern coastal route.
- 59 Local plans can and do address local roading issues. Local plans cannot however include provisions in them that will overcome barriers in the policy framework of the PNRP.
- 60 The purpose of the amendment sought by the Council, and related to the discussion above relating to the policy framework of the PNRP, is to establish touchstones within the PNRP that are supportive of the Council's activities and upon which reliance can be placed in future resource consent applications. That requirement remains and I am supportive of the relief sought.
- 61 I note in conclusion, and mirroring my introductory comments, that there are alternative ways for the relief sought by Council to be achieved such as through amendments to objectives and policies. The Council has sought such alternative relief. That is not to denigrate from the change sought to the definition, rather it highlights that in this hearing I am only able to address the matters of relevance to it. It does appear however that Mr Denton has recommended against the alternative relief sought by Council though there hasn't been any analysis in his section 42A report to support that recommendation.

Beneficial use and development – New Policy

- 62 The Council sought that a new policy be included (or similar relief) in section 4.2 of the PNRP. This policy would recognise the contribution of

existing urban areas, growth areas and infrastructure, and provide for their ongoing use and development.

- 63 The submission point continues the theme of the Council's submission in seeking greater recognition of the urban environment and the beneficial aspects of development that are required for the functioning of an urban area. This is particularly so in the context set out above regarding the overall structure and approach of the PNRP and the requirements of the NPS-UDC.
- 64 A number of parties through further submissions supported this submission point. Again, I have not been able to find any reference or discussion of this submission point in the s42A report prepared beyond a note in the appendix recommending that the relief sought by the Council be rejected. I am therefore unclear on what basis this recommendation has been made and what, if any, analysis was made of this submission point.
- 65 I accept that the PNRP is a natural resources plan and its focus is rightly on natural resources and values. The PNRP cannot however be deaf to urban matters given the strong interrelationships that the urban areas of the region have with the natural environment. In a Wellington City context, this is particularly so for coastal matters. Further, urban development over time will encroach into areas previously not urbanised. A plan that does not recognise this relationship will not achieve integrated management of natural and physical resources in the region⁶. Further, it will impose increased costs and barriers to matters that are a usual part of urban development.
- 66 It is right that the PNRP requires such issues to be examined through a resource consent process. My concern is that the threshold such activities will be required to meet is too high and that there is not sufficient balance in the policy framework to recognise the beneficial

⁶ Section 30(1)(a) Resource Management Act 1991

aspects of urban development against the natural environment bias that in my view is present in the PNRP.

67 Accordingly, in my opinion the relief sought in the Council's submission remains relevant and would provide a suitable counter-balance that addresses (at least in part and without prejudice to the other matters set out in this evidence) the recognition of urban issues that is at the heart of the Council's submission.

Policy 8 – Beneficial Activities

68 The Council submitted in support of this policy and its submission has been recommended to be accepted. Mr Denton has recommended minor changes to the policy resulting from other submissions and I am comfortable with those recommended amendments.

Areas and sites with significant mana whenua values

69 WCC is supportive of the identification of Sites of Significance to Mana Whenua. However, a number of the sites are adjacent to WCC's urban coastline, and are within highly modified urban environments.

70 As drafted, activities that would otherwise be permitted (e.g. temporary activities or replacement structures) become restricted discretionary activities. New structures and additions and alterations to existing structures within sites of significance to mana whenua become non-complying activities.

71 Policy P44 requires that sites with significant mana whenua values shall be 'protected and/or restored'. Policy P45 then outlines a cascade for addressing adverse effects beginning with avoidance, through remedying and ending with mitigation. This then has a relationship with Policy P4 addressed at paragraphs 41-45 above. As noted by Ms Guest at her paragraph 157, "essentially the final clause of Policy P45 makes it clear that activities that will have a more than minor adverse effect on significant mana whenua values identified in Schedule C sites should not go ahead."

72 The Council understands and supports the need to consider effects on mana whenua values, and wherever possible the protection of sites of significance. However, the Council submission with which I concur considers that NCA status is inappropriate, given the highly modified urban environment in which some sites (such as Te Aro Pā) are located. A discretionary activity status is considered to be more appropriate as it still provides the ability to consider the effects of the activity on a case-by-case basis.

73 The Council sought the following decision in its submission:

73.1 Change the activity status of new structures, additions or alterations to structures in the Te Aro Pā (Site of Significance to Mana Whenua identified in Schedule C) and any other site of significance to Mana Whenua within the urban area, from non-complying activities to discretionary unrestricted activities (Rules 161 and 162).

73.2 Clarify how a policy framework of ‘protect and restore’ will work within a modified /artificial urban environment.

73.3 Amend the policy (or include a new policy) to recognise that some sites of significance to Mana Whenua are within a modified/artificial urban environment.

74 In her s42A report, Ms Guest comments on these matters at paragraphs 158 and 159 under the heading of Policy 45. I can find no specific reference to the Council’s submission on Policy 44 in terms of clarification of its application in a modified environment.

75 She recommends rejecting the relief sought by the Council. She notes at paragraph 158 of her s42A report that the Council:

“[r]equests an amendment to or new policy to recognise that the degree of restoration or protection of a site needs to be in the context of the degree of existing development, particularly if it is an urban environment.”

- 76 She then notes that in her view it is irrelevant if a Schedule C site is within an urban or rural area. I agree that whether the site is within an urban or rural area is irrelevant. What is relevant is the extent to which an area is modified and/or artificial which is what the Council's submission has noted.
- 77 The Council has not sought changes as paraphrased by Ms Guest above. It has sought an amendment or new policy to recognise that some sites are within a modified/artificial urban environment. It makes no judgement about the degree of restoration of protection required as suggested by Ms Guest. Rather it notes that a policy framework that might apply to, for instance, Oterongo Bay is not equally applicable to the Te Aro pā or identified areas around the south coast such as 'Tapu te Ranga – Owhiro – Haewai' that are modified and where the Council has infrastructure such as built development, boat ramps etc.
- 78 The Council additionally sought clarification of how a requirement to protect and restore would operate within a modified/artificial urban environment. I have not been able to find any specific discussion of this point. Ms Guest appears to rely on RPS provisions (Objective 16 and Policies 23 and 24) and the resulting approach of Policy 45 universally.
- 79 I note that the explanation to Policy 24 of the RPS states that "Policy 24 is not intended to prevent change, but rather to ensure that change is carefully considered and is appropriate in relation to the biodiversity values identified in Policy 23."
- 80 Nothing in the RPS directs the use of a NCA status. In my view, there is little that will be achieved by a NCA status that couldn't be achieved with a discretionary activity status. Yet from the perspective of operating infrastructure in and adjacent to these areas and further developing such infrastructure, coupled with the requirements of Policy P45 I consider the use of a NCA status to be overly onerous.
- 81 A change as sought by Council to recognise that some areas are in a modified/artificial environment (noting that there will inevitably be similar instances in the jurisdiction of other territorial authorities)

coupled with a Discretionary activity status, would in my view overcome these concerns.

82 The changes sought are of course linked to Rules 161 and 162. These matters are beyond the scope of Hearing 1 making it difficult to assess any changes in an integrated manner.

Resource Management Act 1991

83 The overall RMA framework relevant to the Panel's assessment has been addressed by others and I do not intend to repeat it here.

84 The PNRP must ultimately accord with Part 2 of the Act, give effect to relevant national policy statements, and give effect to GWRC's functions under the Act which includes the strategic integration of infrastructure with land use⁷.

85 For the reasons outlined in my evidence I am of the view that:

85.1 the PNRP does not sufficiently recognise the urban environment including the relevant requirements of the NPS-UDC

85.2 the PNRP does not achieve the section (30(1)(gb) function as efficiently and effectively as it might.

Conclusion

86 My conclusions are set out in the Executive Summary.

⁷ Resource Management Act 1991 section 30(1)(gb)

Date: 5 May 2017

A handwritten signature in blue ink, consisting of stylized, cursive letters that appear to be 'ML' followed by a horizontal line and a period.

.....
Maciej Lewandowski