

**BEFORE A HEARING PANEL CONSTITUTED BY
NELSON CITY COUNCIL**

IN THE MATTER

of an application by CCKV Maitahi Development Co LP and Bayview Nelson Limited for a plan change to the Nelson Resource Management Plan (Plan Change 28)

IN THE MATTER

of Part 5 and Schedule 1 of the Resource Management Act 1991

**APPLICANT'S LEGAL ANALYSIS ON THE SECTION 42A REPORTS
CONCERNING THE FRESHWATER MANAGEMENT TOPIC**

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Topic

- [1] This analysis aims to address two legal issues arising from the RMA s 42A reports on PPC 28 concerning the ‘freshwater topic. The ‘freshwater topic encompasses technical reports within four sub-disciplines affecting freshwater resources: stormwater and flood risk (Kate Purton), water sensitive design (David Wilson), water quality (Dr Paul Fisher) and erosion and sediment control (Mr Ridley).
- [2] The two legal issues are relevant to those assessments because, in some ways, these technical reports have an incomplete understanding of the legal and planning context and the suite of tools in PPC 28’s planning machinery and how that will (admittedly with refinement since the 42a reports) operate.
- [3] Specifically, this memorandum addresses the following:
 - (a) **Legal Issue 1** –calibrating the information requirements and level of design required for the PPC 28 regime.
 - (b) **Legal Issue 2** – the function of the PPC 28 and its relationship to the NPSFM.

Some preliminary points

- [4] Legal Issue 1 was debated with NCC before the application was accepted by resolution of the full Council of NCC. Ms Sweetman stated in her report for that meeting that the application for PPC 28 was sufficient to process and will with the further information supplied reasonably inform the public of the nature of the plan change and the consequences of PPC 28’s implementation.¹
- [5] Despite what some of NCC’s experts on the freshwater say in their reports, PPC 28 was undertaken in a multi-disciplinary way where many disciplines informed the creation of the Structure Plan and the architecture of the planning provisions. The Applicant’s evidence will reinforce that fact and

¹ NCC was also legally advised by Ms Anderson, DLA Piper, Wellington.

using refined planning machinery as a springboard the evidence will demonstrate an integrated approach to land use and development to achieve appropriate freshwater outcomes. Overall the PPC 28 refinements reduce the potential opportunity for an increase in the intensity of use ‘implied’ by zoning and enlarge the requirements for terrestrial indigenous revegetation through the development process.

- [6] Some of the s 42A reports have an incomplete understanding of how the Scheduling in the NRMP of structure plan areas works as a supplementary tool to the existing NRMP provisions. The Schedule approach has a family resemblance to ‘precincts’ in the AUP. These have worked adequately to accommodate extensions to Nelson’s urban fabric despite landscape challenges inevitably arising from Nelson’s distinctive terrain.
- [7] The refined provisions filed with the Applicant’s evidence (including plan provision changes, and amended structure plan, zoning maps, and overlays) are referred to as “Schedule X (V2, dated 15 June 2022)”.

Overarching comments on the section 42A reports on the freshwater topic

- [8] PPC 28 proposes the development of about 20% of the Kaka Valley sub-catchment as part of a fundamental shift in land use from pastoralism to residential development. The former use has degraded indigenous terrestrial and freshwater biodiversity values in familiar ways.
- [9] The recently undertaken higher resolution ecological assessment by the Applicant’s terrestrial ecologist (Ben Robertson) provides the basis for more detailed spatial resolution in an overlay of the structure plan to support refined plan change provisions to implement the already stated revegetation policy. That assessment with estimable policies and assessment criteria in the Schedule X (V2, dated 15 June 2022) aim at revegetation in the high-value locations. That will engender natural improvements in water quality. That is before taking into account the vesting of Kākā Hill and Ngāti Koata for indigenous revegetation according to mātauranga Māori.
- [10] Therefore:

- (a) Baseline data, while relevant, is not meaningful for the aims of PPC 28, which have always (as articulated by policy) been to improve the overall terrestrial and freshwater ecology of the Kākā Valley.
- (b) As a general statement, Dr Fisher is right that urbanisation can impact on a catchment's water quality. However, catchment impacts very much depend on:
 - (i) Baseline conditions;
 - (ii) The nature of any planned improvements in the catchment through ecological restoration programmes.
 - (iii) The plan requirements for development that provide for integrated catchment management outcomes.

Therefore, general observations of this nature disregarding the specific context and the PPC 28 machinery have limited value. Despite that Dr Fisher correctly accepts the opportunities for improved ecological outcomes and these are cemented into the 'Schedule X (V2, dated 15 June 2022)'.

[11] Ms Purton is correct that the Applicant should demonstrate the feasibility of flood hazard mitigation, although the plan change has much greater scope than the area potentially affected by flooding. Ms Purton is correct that the site has complexities. However, her assessment of potential risk is overstated because:

- (a) Much of the site will remain rural or open space and re-vegetated. With the notified zoning pattern, the development potential may have been over-estimated by Ms Purton.²
- (b) The Kākā Stream is a small water body, and catchment management solutions are commonplace in New Zealand on flood plains that

² See Table 1 in Mr Tony Milne's evidence for the Applicant for the summary of the spatial changes in 'PPC28 – V2 Plan Change Components'.

comfortably manage markedly more significant risks through common engineering solutions.

- [12] I understand that Tonkin & Taylor (who has custody of the Maitai catchment model) have refined the model to provide more detailed parameters based on the Kaka Valley contribution to flows in a sub-algorithm for the pre and post-development scenarios based on variable AEPs. That satisfies the outstanding flooding information request from the Joint Witness Statement.
- [13] A number of the s 42A reports address the sufficiency of information to assess freshwater outcomes. My review is that any conclusions about insufficient information sometimes arise from the following factors:
- (a) Professional experience applying particular tools such as GD.04 (Auck) and plan change specific situations that are extrapolated into general requirements not found in the RMA.
 - (b) A misunderstanding of the nature of information required for a plan change (this latter point is addressed as Legal Issue 1 below).
 - (c) Aspects of the notified PPC 28 structure plan and zoning maps that inadvertently and incorrectly implied low-density residential development were in prospect for the upper reaches of the Kākā Stream on the steeper land adjacent to the true right bank with attendant freshwater risks.
- [14] On point (a) above, it is noted that:
- (a) GD.04 is a guideline and is not framed as a specific standard or requirement for making a plan change. Indeed, it only requires a stormwater management plan, if required; and
 - (b) In addition, for the reasons explained in Legal Issue 1 below, there is ‘no one size fits’ all information requirement as some experts assume. Planning machinery comes in many types and has many forms. In private plan changes, applicant choices are made concerning the trade-offs between certainty and flexibility that are

addressed in various ways using planning tools such as objectives, policies, discretions and assessment criteria. The planning machinery affects the scope of the information required and in this case must be considered with the NRMP's provisions and other tools used by NCC to control development.

(c) Following (b), some experts do not get the balance right on the requisite information.

- [15] Despite the above, most s 42A freshwater technical witnesses have the insight that many of their concerns can be resolved later through the consenting process using suitable plan provisions. In many cases, therefore, the s 42A freshwater expert provides a helpful summary of additional items that might usefully be contained within the planning toolkit of PPC 28 to achieve desired outcomes.
- [16] Ms Sweetman has helpfully created an Appendix on provisions and Table 5 summarising the issues from the S 42A experts on the freshwater topic.
- [17] These have informed the 'Schedule X (V2, dated 15 June 2022)' where appropriate.
- [18] In addition, an integrated Stormwater Management Plan is produced with the Applicant's evidence. That is not a panacea for unreasonable demands for information on effects because it is necessarily at a higher level than design detail.
- [19] One of the risks that Ms Purton identifies is that because of the inter-related nature of the freshwater sub-topics, integrated development is imperative to manage cumulative adverse effects and avoid sub-optimal outcomes. I consider that insight valuable, and I recommend that the PPC 28 requires Stormwater Management Plan containing elements sometimes found in what is also called an Integrated Catchment Management Plan for the PPC28 site that is used to inform and evaluate applications that may come in incrementally. The risks of unintegrated development are somewhat lower considering the limited number of owners controlling the site.

However, the planning regime should be sufficiently robust whatever ownership changes occur.

- [20] As a reality check on information requirements, I note that vast areas of New Zealand's major cities are being rezoned for intensification, where the impacts on infrastructure and freshwater values are seldom evaluated. The assumption is that these matters will be addressed at the point of development or through infrastructure programmes. In contrast, PPC 28 provides for discretions and controls of such a scope and character that in combination with the direction of policy and assessment criteria, there can be a high level of confidence that optimal environmental outcomes will be achieved. That situation reveals a double standard applied to private plan changes compared with central or local government initiatives. Perhaps one reason that in the NPSUD 2020 central government has underscored that Councils must be *responsive* to private initiatives that increase urban capacity is that reality.

Legal Point 1 – the calibration of the information requirements and level of design required for the PPC 28 regime

- [21] The governing provision for information requirements for a private plan change is set out in RMA, Schedule 1, clause 22(2).

22 Form of request

...

- (1) *Where environmental effects are anticipated, the request shall describe those effects, taking into account [clauses 6 and 7](#) of Schedule 4, in such detail as corresponds with the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change, policy statement, or plan.*

- [22] The wording of this provision is important. Two particular elements require attention:

- (a) Clauses 6 and 7 of Schedule 4 are referenced but are only to be *taken into account*; and

- (b) The detail (as always) relates to the scale and significance anticipated *from the implementation of the plan change.*
- [23] Two points emerge from this. First, the information requirements are not a facsimile of the requirements for assessing the environmental effects of an activity. That is why the matters listed in clauses 6 and 4 of Schedule 4 are the only matters to consider. That points to the self-evident reality that there is a significant difference between a plan change and a resource consent. The effects of an application for an activity can be assessed with a higher degree of certainty than the plan change. Activities must be processed through resource consent within a planning regime of objectives, policies, discretions and assessment criteria.
- [24] Secondly, the phrase *implementation of the change* is significant in the following respects:
- (a) The word *implementation* refers to the operation of the planning machinery proposed; and
- (b) It is the implementation of the planning change, not the activities it authorises.
- [25] The purpose of objectives, policies and assessment criteria is to constrain the exercise of discretions. It is beyond the scope of a plan change to address the effects of the activity. The function of the plan change assessment is to ensure that the regime is sufficient to deliver the policy outcomes.
- [26] Ms Sweetman, in her s 42A report, addressed this issue of information sufficiency and is vexed by it. Ms Sweetman says at [9] the following:

“In my opinion, PPC 28, if approved, does more than change the zones that apply at the site. It enables the urban development of the land, which has a sensitive receiving environment with topographical constraints. Quite simply, in my view, the Panel needs to be assured that the rezoning is appropriate for urban development, and that the resultant effects of such development are able to be accommodated in that environment, or appropriately managed through the

planning framework. I appreciate that there is a fine line in this regard, as appropriate resource consents will still need to be obtained and these will be the subject to the NPRM. However, if it cannot be demonstrated at a conceptual level that the resultant effects can be appropriately managed and addressed, then the reasonings sought maybe considered not to be appropriate.”

- [27] An examination of this paragraph is warranted. Zoning is just a planning method to open an opportunity and does not gain greater significance beyond the planning regime in which it is embedded and from which it is derived following the cascade of provisions. The first point is that while PPC 28 does open the door for urban development any form of development must conform to the requirements for any resource consent, the outcomes of which are shaped by the policies and assessment criteria that the plan change specifies and the scope of the regulator’s discretion. The question is not whether the *resultant effects of such development can be accommodated in that environment* but whether the planning framework delivers outcomes that are appropriate for the environment. One cannot start with the assumption that the intended outcomes by the plan's provisions as amended will not be achieved through consenting. I accept that one must establish at a conceptual level that the resultant effects can be appropriately managed and addressed, but it is unclear what the term *resultant effects* means in that paragraph.
- [28] Following the above:
- (a) The freshwater technical s 42A reports often do not make reliable or explicit assumptions about the outcomes that would be achieved based on the planning regime specified; and
 - (b) The technical reports are not done at a conceptual level but seek much higher levels of design appropriate to a resource consent stage.
- [29] I accept the proposition that there is room for refinement and improvement in the PPC 28 provisions to provide greater certainty about the intended outcomes, especially in this freshwater context which is part of the

important Maitahi catchment. However, I resist the idea that the level of detail is necessary to descend below the conceptual level. Rather, the reliable assumption is that the outcomes intended PPC 28 will be achieved by the consenting regime.

Legal Point 2 – the function of the PPC 28 and its relationship to the NPSFM

- [30] PPC 28 is not a freshwater planning instrument under RMA s 80A. That must be initiated by NCC.

- [31] PPC 28 is principally designed to perform NCC's territorial functions under RMA s 31 but with some components relevant to regional functions. That recognises that NRMP is an integrated combined plan with freshwater management provisions in AP28.9. In practice these operate in an integrated way through development consenting using RMA s 91 where required.

- [32] The envelope of development opportunity through spatial controls and the planning regime of discretions, objectives, policies, and assessment criteria have been made with a close eye to:
 - (a) The requirements of the regional plan fully integrated within the NRMP and how these may be supplemented by policy and information requirements specific to the consenting of subdivision and development in the catchments affected by PPC 28;
 - (b) The NPSFM 2020 that will also will be made relevant under RMA, s 104 regional consents.
 - (c) Implementing the hierarchy of values in NPSFM 2020.

- [33] PPC 28 implements NPSFM 2020 to a degree appropriate to PPC 28's scope and function by:
 - (a) Formulation of the provisions in consultation with tangata whenua that also allow for further cultural evaluation in the consenting process.

- (b) Following the management approach in NPSFM 2020, clause 3.5 (ki uta ki tai) so that urban growth is co-ordinated with management of the sub-catchment recognising *the interactions between freshwater, land water bodies, ecosystems and receiving environments*.
- (c) Aiming for improvements in freshwater values implemented by a mix of measures including:
 - (i) Ecological enhancements at a catchment scale.
 - (ii) Esplanade requirements to support improvements in in-stream habitat and create ecological corridors of appropriate depth and complexity to support ecological persistence.
 - (iii) Directive policy and assessment criteria to ensure best practice is implemented to achieve appropriate water quantity and quality outcomes from construction and development.

[34] To the extent that any future regional consenting processes do not enable development in a configuration anticipated by PPC 28 then a plan change is not necessarily required. Any adjustment may well be comfortably within the ambit of any discretion exercised through RMA, s 104. In any event, strategic planning by NCC can be anticipated as part of implementing a range of national policy and ancillary refinement of the Kaka Valley catchment including consequential changes can be comfortably accommodated.

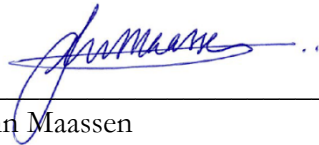
[35] The obvious reasons PPC 28 is not a freshwater planning instrument are the following:

- (a) That is performed by NCC as the regulator.
- (b) It would require a catchment approach well beyond the Kākā Valley sub-catchment.

- (c) Requires higher level of public engaging than is appropriate for building urban development capacity.

[36] Throughout the country development capacity is being enabled without new freshwater instruments. Practical planning must enable these increases in capacity in an appropriate way rather than freezing or stalling development until the long term freshwater programme in NPSFM is implemented by Councils.

Dated 15 June 2022



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