BEFORE NELSON CITY COUNCIL

In the matter	of the Resource Management Act 1991
AND	
In the matter	of a private plan change request by CCKV Maitahi Development Co LP and Bayview Nelson Limited for a change to the Nelson Resource Management Plan (Plan Change 28) under Schedule 1 of the Act for rezoning of approximately 287 hectares of land located within Kākā Valley, along Botanical Hill and Malvern Hill on land at 7 Ralphine Way, Maitai Valley and Bayview Road as detailed within the application

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Legal submissions on behalf of the Nelson City Council

Date: 8 July 2022

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Introduction

1 Private Plan Change 28 (**PPC28**) is a private plan change[1] which seeks to rezone 287-hectares of land located within Kākā Valley, along Botanical Hill and Malvern Hill in the Maitai Valley area, from Rural and Rural-Higher Density Small Holdings to Residential (Higher, Standard and Lower Density Areas); Rural – Higher Density Small Holdings Area; Open Space Recreation and Suburban Commercial.

2 PPC28 was accepted by the Council on 23 September 2021 under clause 25 of the First Schedule to the Resource Management Act 1991 (**RMA**). It was not adopted by the Council.

3 These legal submissions address three issues:

3.1 The information required for a plan change (in particular, the relevance of effects),

3.2 The relevance of the Future Development Strategy 2022 (**FDS 2022**) and FDS 2019,

3.3 The impact of the Ombudsman's opinion in relation to the FDS 2019, and

4 The intention is that Council's legal counsel will not attend the hearing, unless the Panel wishes otherwise, on the basis the directions suggest that legal submissions will be pre-read. However, counsel is available if required to attend, or if further legal issues arise during the hearing which the Panel seeks input on.

[1] The applicant being CCKV Maitai Dev Co LP and Bayview Nelson Limited.

Information level required for a plan change (particularly in relation to effects)

5 Ms Sweetman's section 42A report identified that there was insufficient information in relation to a number of aspects, including potential flood risks,[2] earthworks,[3] the appropriateness of the non-notification clauses,[4]to confidently recommend to the Panel that PPC28 achieves all the necessary statutory tests contained in sections 74 and 75 of the RMA,[5] and to able to assess whether the objectives in PPC28 are the most appropriate means of achieving the purpose of the Act.[6]

6 Ms Sweetman's section 42A addendum states on page 21 that the adequacy of information recommendations from the original section 42A report remain unchanged.

7 Mr Maassen has observed in his analysis of the section 42A reports that a number of them address the sufficiency of the information.[7]

8 Mr Maassen's conclusion is that:[8]

> … 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.

9 In terms of the level of information required to be provided, Mr Maassen focusses on clause 22(2) of the First Schedule to the RMA, which is a requirement around the form of the private plan change request. It states that 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

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[2] Section 42A Report at [243].
[3] Section 42A Report at [602].
[4] Section 42A Report at [626].
[5] Section 42A Report at [646].
[6] Section 42A Report at [648].
[7] Applicant's legal analysis on section 42A reports, at [13].
[8] Applicant's legal analysis on section 42A reports, at [29].

actual or potential environmental effects anticipated from the implementation of the plan change[9].

10 Clause 23 of the First Schedule, which follows the clause Mr Maassen relies on, gives the Council the power to request further information where it is necessary to enable the Council to better understand the nature of the request in respect of the effect it will have on the environment and the ways in which any adverse effects may be mitigated. Accordingly, clause 22 is not the only provision relevant to information required for a plan change.

11 Mr Maassen submits that clause 22 shows there is a significant difference between a plan change and resource consent in terms of effects assessments,[10] and that it is beyond the scope of a plan change to address the effects of an activity. He says the function of a plan change assessment is to ensure that the regime is sufficient to deliver the policy outcomes.[11]

12 It is submitted that this omits to consider that the Panel must apply the 'plan change test' and determine what are the 'most appropriate' set of provisions for PPC28. Inevitably, this involves consideration of effects of the activities that are enabled by the plan change. For example, when making a rule, section 76(3) of the RMA requires the Panel to have regard to the actual or potential effects on the environment of activities.

13 In addition, how can the Panel determine whether a permitted activity status is the most appropriate activity status, if it cannot consider and understand the likely effects of that permitted activity (which will arise without the resource consent process referred to by Mr Maassen)?

14 Accordingly, while it is accepted that a resource consent will involve a more detailed assessment of the effects of a particular proposal seeking consent, it is submitted that it is not correct to say that is it beyond scope

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[9] Applicant's legal analysis on section 42A reports, at [21].

[10] Applicant's legal analysis on section 42A reports, at [23].

[11] Applicant's legal analysis on section 42A reports, at [25].

of a plan change to address the effects of an activity enabled by a plan change. Consideration of effects is part of the plan change test.

15 This test has been comprehensively summarised in *Colonial Vineyard v Marlborough District Council*,[12] *Cabra Rural Developments Ltd v Auckland Council*,[13] and more recently *Edens v Thames Coromandel District Council*.[14] The relevant components of that test are set out in Appendix A.

16 Effectively, it provides that when considering PPC28, the objectives are to be the 'most appropriate' (in the sense of suitable, but not necessarily the best or superior) way to achieve the purpose of the RMA. Policies are to implement the objectives (and are to be the most appropriate way to achieve the objectives), and the rules are to implement the policies. Each proposed policy, rule and method is to be examined as to whether it is the most appropriate method for achieving the objectives, having regard to their efficiency and effectiveness.

17 Accordingly, it is not accepted that consideration of effects is outside the scope of considerations on a plan change. In fact, it forms part of the assessment of whether the provisions are the 'most appropriate'.

Relevance of the Future Development Strategy 2022 and 2019

18 Section 75(3) of the RMA requires that the district plan must give effect to a national policy statement, the New Zealand Coastal Policy Statement, the national planning standards and a regional policy statement (and must not be inconsistent with a water conservation order or regional plan addressing matters in section 301(1) of the RMA). This does not include a Future Development Strategy, which is a separate

[12] *Colonial Vineyard v Marlborough District Council* [2014] NZEnvC 55 at [17], updating the summary from *Long Bay-Okura Great Park Society v North Shore City Council*, EnvC Auckland, 16/7/2008 A78/08 at [34].

[13] *Cabra Rural Developments Ltd v Auckland Council* [2018] NZEnvC 90 at [279].

[14] *Edens v Thames Coromandel District Council* [2020] NZEnvC 013, at [11].

strategy required by the National Policy Statement on Urban Development 2020 (**NPS-UD**).

19 Clause 3.17 of the NPS-UD sets out the effect of a FDS, which is that:

> (1) Every tier 1 and tier 2 local authority:
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> (a) ***must have regard to*** the relevant FDS ***when preparing or changing*** RMA planning documents; and
>
> (b) is strongly encouraged to use the relevant FDS to inform:
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> (i) long-term plans, and particularly infrastructure strategies; and
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> (ii) regional land transport plans prepared by a local authority under Part 2 of the Land Transport Management Act 2003; and
>
> (iii) any other relevant strategies and plans.

20 In other words, the Panel is required to have regard to any relevant FDS when making its decision on PPC28. This does not elevate the FDS to the level of the higher order documents, which must be given effect to, but rather, it makes the FDS a relevant consideration to be taken into account. At the time of the hearing for this private plan change, the relevant FDS is the FDS 2019. While there is a draft FDS 2022, which has concluded submissions and hearings, it is awaiting a final decision by the Nelson City and Tasman District Councils. As a draft, it has no status.

21 However, the relevant FDS to consider when determining PPC28 is that which exists at the time of the *decision* on PPC28.[15] Accordingly, there may be a timing issue with the adoption of the FDS 2022 and the decision on PPC28 (i.e, if the FDS 2022 is adopted before a decision on PPC28). This is raised now as it may result in the Panel needing to consider the FDS 2022, when it ultimately makes its decision on PPC28, depending on timing.

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[15] *Federated Farmers of New Zealand v Northland Regional Council* [2022] NZEnvC 16, at [32] and *Ireland v Auckland City Council & Ors* 8 NZTPA 96.

Ombudsman's decision on the FDS 2019

22 In her evidence, Ms McCabe for Save the Maitai Inc refers to an opinion by the Ombudsman regarding consultation on the FDS 2019 and she refers to part of the Ombudsman's conclusions in that opinion.[16] She attaches a copy of that to her evidence.

23 Ms McCabe is correct that the Ombudsman has issued an opinion in response to a complaint by Dr Stallard regarding consultation on the FDS 2019. That opinion concluded:

23.1 A member of the public reviewing the FDS 2019 consultation brochure would not have clearly understood that the Council proposed development should occur in areas of the Maitai Valley and therefore, the Council's administration of this aspect of the consultation process was unreasonable, but

23.2 The shortcomings were not enough to undermine the overall consultation process, or to find that the Council's overall approach to consultation was unreasonable, contrary to law, or contrary to the principles specified in the Council's Significance and Engagement Policy.

24 It is submitted that given there was no finding that the FDS was unreasonable, contrary to law, or contrary to the principles specified in the Council's Significance and Engagement Policy, the FDS 2019 remains a valid document, which should be considered by the decision makers (unless overtaken by the FDS 2022) and given such weight as the Panel considers appropriate.

[16] McCabe evidence, 27 June 2022, at [41] and [42].

25 As noted above, the requirement under the NPS-UD is to have regard to the FDS. 'Have regard to' has been judicially considered and its meaning is well defined:[17]

> By way of starting point, the High Court refers to *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* where Wylie J said:
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> > "We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function."
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> Similar observations are made by the Court of Appeal in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* and by the High Court in *Foodstuffs (South Island) Ltd v Christchurch City Council*. Provided that the court gives genuine attention and thought to the matters in question it is free to allocate weight as it sees fit but does not necessarily have to accept them.

Date: 8 July 2022

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Kerry Anderson / Kate Rogers
Counsel for Nelson City Council

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

Appendix A – plan change test from *Colonial Vineyard*

A. General requirements

1. A district plan (change) should be designed to accord with — and assist the territorial authority to carry out — its functions so as to achieve the purpose of the Act.

2. The district plan (change) must also be prepared in accordance with any regulation (there are none at present) and any direction given by the Minister for the Environment.

3. When preparing its district plan (change) the territorial authority must give effect to any national policy statement or New Zealand Coastal Policy Statement.

4. When preparing its district plan (change) the territorial authority shall:

(a) have regard to any proposed regional policy statement;

(b) give effect to any operative regional policy statement.

5. In relation to regional plans:

(a) the district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order; and

(b) must have regard to any proposed regional plan on any matter of regional significance etc.

6. When preparing its district plan (change) the territorial authority must also:

• have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities;

• take into account any relevant planning document recognised by an iwi authority; and

• not have regard to trade competition or the effects of trade competition;

7. The formal requirement is that a district plan (change) must also state its objectives, policies and the rules (if any) and may state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies;

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most

appropriate method for achieving the objectives of the district plan taking into account:

(i) the benefits and costs of the proposed policies and methods (including rules); and

(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods; and

(iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.

12. Rules have the force of regulations.

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land.

15. There must be no blanket rules about felling of trees in any urban environment.

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes.

F. (On Appeal)

17. On appeal the Environment Court must have regard to one additional matter — the decision of the territorial authority.