

**BEFORE A HEARINGS PANEL
APPOINTED BY NELSON CITY COUNCIL**

IN THE MATTER

**of Private Plan Change 28 – Maitahi
Bayview**

AND IN THE MATTER

**of Cl 21 of the First Schedule of the
Resource Management Act 1991**

**OUTLINE OF OPENING LEGAL SUBMISSIONS OF COUNSEL FOR
SAVE THE MAITAI INC**

1. INTRODUCTION AND PRINCIPAL SUBMISSION

- 1.1 These submissions are made on behalf of Save the Maitai Inc (“STM”), a submitter¹ on the request for a private change to the Nelson Resource Management Plan (“NRMP”) to rezone approximately 267ha of land located within the Maitai and Kākā Valleys from Rural and Rural-Higher Density Small Holdings Area to provide for residential development (“PPC28”).
- 1.2 STM was set up as a not-for-profit organisation to provide a vehicle for the community to effectively voice its concerns about PPC28 and to take action to protect and preserve the valley’s tranquil rural character and open green space for current and future generations.
- 1.3 STM’s submission sought that PPC28 be declined. STM’s submission identified alternative relief constraining residential development to the Bayview side of the site and seeking additional information and a higher level of environmental management.²

¹ #367

² Paragraph 11 of STM’s submission.

1.4 Following extensive expert witness conferencing, provision of further information from the applicant, and the exchange of expert and lay evidence, STM's position that PPC28 should be declined has become firmer.

1.5 The primary reasons for this are:

- a. The Maitai Valley is fundamentally the wrong place for urban-type development. This site is critically important as a gateway³ and greenbelt⁴ between the urban area of Nelson City and the rural and recreational hinterland of the Valley. If PPC28 goes ahead that physical distinction will be lost. The rezoning will increase the likelihood of more intensive development in Kākā Valley, and the change of character will encourage further urbanisation of the wider Maitai Valley through subsequent plan changes.
- b. Nelson is a city with a strong sense of its own character. Community expectations are important, and are required to be considered⁵ when determining the extent and location of urban expansion. The clear community expectation since as early as 1914⁶ has been that the Maitai will be retained as a place for open space and recreation, and that urban development will not be provided for.⁷ PPC28 has aroused unprecedented public opposition in Nelson.⁸
- c. Preferencing intensification over urban expansion is a legitimate option that is supported by national and regional policy, particularly where there is no shortfall in short to medium term housing capacity and the ability to meet demand until 2051 and beyond if intensification proposals are implemented.
- d. While PPC28 lays claim to achieving good environmental outcomes, the Applicant has failed to demonstrate that these outcomes will be achieved

³ NRPS NA2.3.3.

⁴ NRMP Policy DO15.1.3.

⁵ NRPS Policy DH1.3.2 To have regard to community expectations when determining the extent and location of urban expansion.

⁶ Evidence of Rosey Duncan, paragraph 57.

⁷ Evidence of Aaron Stallard, paragraphs 37 and Appendix Item 14.

⁸ Over 13,000 people have signed a petition to keep the Maitai Valley rural. This is the biggest petition to Council in Nelson's history. 89% of submitters on PPC28 are in opposition.

with respect to effects on landscape and visual amenity, management of stormwater and catchment hydrology to protect waterbodies, and climate. As a result, the Applicant has not demonstrated that the site covered by PPC28 is appropriate for urban development. In some cases, this is due to a lack of information as to effects on the environment: despite PPC28 being within a sensitive receiving environment critical information is lacking to show that the effects of the plan change can be managed in a way that protects the environment.

- e. PPC28 does not give effect to the National Policy Statement on Urban Development 2020 (“NPSUD”), the National Policy Statement for Freshwater Management 2020 (“NPSFM”), or the Nelson Regional Policy Statement (“NRPS”). It also fails to implement the existing objectives and is inconsistent with the existing policies of the NRMP. These are things PPC28 must do to be confirmed. PPC28 cannot be confirmed as efficient and effective under s 32 RMA if its provisions are unlawful.
- f. If PPC28 is approved, amendments should be made to better manage its effects, and provisions specifying non-notification should be deleted.

1.6 Before addressing those matters, I wish to make a brief comment on the nature of public participation in RMA processes, and the Applicant’s approach to matters of process and submitters’ involvement. The RMA (still) has an inherently public participatory⁹ scheme. The Supreme Court has described the objectives of public participatory processes as being twofold:

- a. The first objective is the recognition and protection, as appropriate, of the particular rights and interests of those affected and more general public interests. A right to participate in decisions that affect a person's interests is an important legal and social right.¹⁰ An opportunity to be heard affords a person “dignity and respect”.¹¹

⁹ *Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17; [2005] 2 NZLR 597, 620 (NZSC).

¹⁰ M Taggart, “Administrative Law: *Discount Brands* in the Supreme Court” [2006] *New Zealand Law Review* 75, 76.

¹¹ M D Bayles, *Procedural Justice: Allocating to Individuals* (1989), cited in A O'Mara, 'Procedural fairness and public participation in planning' (2004) 21 *Environmental and Planning Law Journal* 62, 66.

- b. The second objective is the enhancement of the quality of decision-making. Participation may reduce 'error costs' as a member of the public may contribute important relevant information that otherwise would not come to the attention of the decision maker. Better substantive decision-making results as decision makers are more fully informed of the factors involved and the potential impacts of any decision made.¹²

1.7 There is of course an adversarial element to a contested plan change, and it is understandable that parties will not see eye to eye. However, it is concerning when this spills over into unfounded allegations of inappropriate motives on the part of a submitter group, or unfounded criticism of its experts' motives and independence.¹³ Submitter groups already face barriers when seeking to exercise their rights to participate in processes that affect them, and it is reasonable to expect they will be treated with respect.

Content of submissions

- 1.8 These submissions address:
- a. **Section 2:** Statutory requirements for plan changes
 - b. **Section 3:** Save the Maitai Key Issues
 - c. **Section 4:** Evidence to be presented by STM
 - d. **Section 5:** Conclusion and relief sought

2. STATUTORY REQUIREMENTS FOR PLAN CHANGES

2.1 STM agrees with the Applicant and the Council as to the relevant statutory provisions applicable to plan changes.¹⁴ However, important distinctions arise in relation to:

- a. The Applicant's view on sufficiency of information.

¹² *Westfield*, above n 9, at 615.

¹³ Applicant's submissions at [178] – [179]. The issues regarding attempts to arrange a site visit for Ms Steven have been covered previously and do not need to be repeated.

¹⁴ Applicant's submissions Section 6; Council submissions at 5 – 17 and s 42A report Section 5.

- b. The Applicant's submissions on the approach to directive planning instruments.
- c. The *Eden-Epsom* decision¹⁵ regarding the application of the NPSUD to private plan changes.
- d. Reconciliation of the NPSUD and the NPSFM.
- e. The Applicant's approach to anticipated future planning outcomes that are not yet secured (freshwater vs intensification).
- f. The weight to be given to the various planning instruments and their provisions.
- g. The relevance of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.
- h. Relevance of the Future Development Strategy 2019 ("FDS 2019").

2.2 Items a. to e. are addressed in this section. The weight to be given to planning instruments and their provisions is discussed with respect to particular instruments as they arise for consideration (and in Ms McCabe's evidence). The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 and the FDS 2019 are addressed at paragraphs 3.5 – 3.6 and 3.11 – 3.15 below.

Sufficiency of information

2.3 According to the Applicant, the level of information required depends on the relevance of the information in the private plan change request process. The Applicant suggests that there is no scope for an assessment of environmental effects of activities, only a 'conceptual discussion' of those effects which arise from the "implementation" of the plan change.¹⁶

2.4 The requirements for information in a plan change process are prescribed in:

- a. Clause 22 of Schedule 1 and by reference clauses 6 and 7.

¹⁵ *Eden Epsom Residential Protection Society Inc v Auckland Council* [2021] NZEnvC 082.

¹⁶ Applicant's legal analysis on the section 42A reports concerning the freshwater management topic, paragraphs 21-29.

- b. Clause 23 of Schedule 1.
 - c. The “plan change tests”.¹⁷
- 2.5 Under clause 22(1), information is required which explains the “purpose of, and reasons for”, the proposed plan change and contains an evaluation report analysing the appropriateness of the proposal’s objectives and provisions in accordance with s 32. Under clause 22(2), information is required which describes any “anticipated” environmental effects, taking into account clauses 6 and 7 of Schedule 4, in such detail as corresponds to the scale and significance of actual/potential environmental effects of the implementation of the proposed plan change.
- 2.6 Under Clause 23, Council may require further information necessary to enable the local authority to better understand:
- a. the nature of the request in respect of the effect it will have on the environment, including taking into account the provisions of Schedule 4; or
 - b. the ways in which any adverse effects may be mitigated; or
 - c. the benefits and costs, the efficiency and effectiveness, and any possible alternatives to the request; or
 - d. the nature of any consultation undertaken or required to be undertaken;
- if such information is “appropriate to the scale and significance of the actual or potential environmental effects anticipated from the implementation of the change or plan”.
- 2.7 The phrase “effects anticipated from the implementation of the change” encompasses not only what would be permitted as of right but also the effects of providing a pathway (through policies and rules) for activities to be authorised through subsequent consent decisions.
- 2.8 The Courts have held that:

¹⁷ As termed by counsel for the Council in her legal submissions at 12.

- a. This description of actual/potential effects is useful in considering whether the plan change is appropriate. After all, one should be assured that the rules are detailed enough to properly control activities and their adverse effects.¹⁸
- b. To this end, the decision making authority may consider it “helpful” to address the “environmental effects of hypothetical activities permitted on the site as of right under the District Plan” as a “way of assessing the significance of the effects of implementation of the proposal.”¹⁹
- c. And while one should not be too quick to focus on the “detail” of activities, a focus on the wider issues of whether the existing or proposed zoning are more appropriate for the site necessarily involves a consideration of ‘potential’ effects on the environment.²⁰
- d. In fact, when making a rule in a district plan, a territorial authority must “have regard to” the actual or potential effects on the environment of activities including, in particular, any adverse effect.²¹
- e. The level of information provided should be ‘sufficient’ to achieve the purposes noted above for which the information is provided. While “more fine grained information” might be provided in consent applications, “when a proposal is advanced by a party on the basis that various benefits will arise from it, the Court must have sufficient information before it to satisfy itself that is the case.”²² Further, hesitancy should be exercised where assertions are made as to the “low risk” of effects, when there is limited information known/provided about the effects.²³
- f. Whether what the Applicant envisages would transpire through the consenting process with a different landowner applicant is a

¹⁸ *Boon v Marlborough District Council* [1998] NZRMA305 at 316 and 320-321.

¹⁹ *St Lukes Group Ltd v The Auckland City Council* ENC Auckland A132/2001 at [269].

²⁰ *Wellington Harbour Landscape Protection Group Inc v Wellington City Council* [2010] NZEnvC 390 at [8] and [24].

²¹ Resource Management Act 1991, s 76(3). *Wellington Harbour Landscape Protection Group Inc v Wellington City Council*, above n 20, at [24]; *Pohutukawa Coast Community Assn v Auckland Council* [2013] NZEnvC 104 at [25].

²² *Li v Auckland Council* [2018] NZEnvC 87 at [696].

²³ *Boon v Marlborough District Council* [1998] NZRMA 305 at 320.

consideration that the Court cannot discount. “It is trite that plans must be framed so that outcomes sought are achieved irrespective of land ownership.”²⁴

- 2.9 The Court has noted that “it is bad resource management practice and contrary to the purpose of the Resource Management Act ... to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it.”²⁵
- 2.10 In another private plan change application the Court noted the “dearth of information” on matters including the location, scale and capacity of existing and new infrastructure to serve the plan area; and amenity effects of “the presence of vehicles on the roads” and other “indicia of domestication that came with housing development.”²⁶
- 2.11 Clearly there is no ‘one size fits all’ approach to the sufficiency of information. While ‘conceptual’ information may be sufficient in some cases, more detailed information may be required in others to demonstrate that actual/potential adverse effects can and will be effectively managed (or that positive effects are in fact likely to accrue). This includes information sufficient to satisfy the decision-maker that effects can be managed as claimed.
- 2.12 The level of information ‘sufficient’ to a particular context is well exemplified by Court’s in-depth consideration in *Li v Auckland Council* of effects of sedimentation arising from development in a sensitive environment. There, the Court considered detailed sediment yield modelling, and analysed potential effects on the environment, how these effects were consistent (or not) with objectives of the current plan, and whether the effects could be “adequately” addressed in the proposed plan.²⁷ There is a wide gulf between the level of information provided in support of PPC28 and that provided in *Li*:

²⁴ *Li*, above n 22, at [71].

²⁵ *Foreworld Developments Ltd v Napier City Council* ENC Wellington W8/2005, 2 February 2005 at [15]; more recently cited in *Norsbo Bulc Ltd v Auckland Council* [2017] NZEnvC 109 at [92].

²⁶ *Self Family Trust v Auckland Council* [2018] NZEnvC 49 at [209] and [254] supported by *Gock v Auckland Council* [2019] NZHC 276 at [152].

²⁷ *Li*, above n 22, at [38] and [75].

- a. The Court had the benefit of detailed sediment yield modelling using the GLEAMS sediment model, “a physically-based model developed for the continuous simulation of run-off and sediment losses from the site divided into unique combinations of land-cover, soil type and slope.”²⁸ The outputs from the modelling included mean annual sediment loads and run-off, as well as daily sediment loads for the earthworks and sub-catchment areas.²⁹
- b. Such detailed information enabled specific analysis of flow-on effects on stream morphology, including effects of channel erosion. Further modelling examined estuarine sedimentation, and associated marine effects.

2.13 Mr Parsonson, who is now giving evidence for the Applicant, was heavily involved in that aspect of the decision, questioning rainfall data used in the GLEAMS modelling,³⁰ and discussing its outputs.³¹ Further, Mr Parsonson recommended a number of specific amendments to the proposed plan provisions if the appeal was upheld, “to assist with more effective processing of resource consents and improved environmental outcome(s).”³² This included controls within the plan provisions to set exposed land limits for earthworks,³³ winter work restrictions³⁴ and a particular type of earthworks consent monitoring (especially of potential ecological effects) given the physical nature of the site and its location in the catchment.³⁵

2.14 The witnesses for STM have set out the matters where further information is necessary, as discussed in Part 3 below.

2.15 While not in agreement in every respect with regard to sufficiency of information, STM broadly agrees with the s 42A report and addendum that the Applicant has not provided sufficient information to enable PPC28 to be approved.

²⁸ At [38].

²⁹ At [43].

³⁰ At [48].

³¹ At [50].

³² At [66].

³³ At [67].

³⁴ At [69].

³⁵ At [69].

Approach to directive planning instruments

- 2.16 The Court’s decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*,³⁶ regarding the nature of the obligation to “give effect to” higher order planning instruments, will be well known to the Panel. In summary, the Court held that this simply means “implement” and that “it is a strong directive, creating a firm obligation on the part of those subject to it”.³⁷ Also that the language of relevant policies is significant. Various policies are not inevitably in conflict or pulling in different directions. Objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. Policies formulated along lines where matters are to be considered or recognised leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms. These differences matter. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it.³⁸
- 2.17 Counsel for the Applicant submits that:
- a. An approach that looks pragmatically at the environmental outcome is consistent with English case law on strategic planning; and
 - b. It is inappropriate to read policy in the NPSFM as absolutist rules and a recent case will address this issue.
- 2.18 To the extent that this seeks to imply that the Panel does not have to give effect to directive policy if it considers that this would be “absolutist” or that not giving effect to the policy would be more “pragmatic”, I submit this is incorrect:
- a. The English case relied on by Mr Maassan³⁹ is not relevant. It was a decision on a planning permission (i.e. a resource consent), not preparation of a planning instrument, in a context where decision-makers on planning permissions are only required to “have regard to”

³⁶ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

³⁷ At [77].

³⁸ At [126] – [129].

³⁹ *City and Country Branshill v Secretary of State* [2021] 1 WLR 576.

(not “give effect to”) national direction in the UK National Planning Policy Framework as a “material consideration”.⁴⁰

- b. The “recent case” that counsel cites⁴¹ is one on which a decision has not yet been issued by the Supreme Court. While Mr Maassan may be confident enough to predict the outcome of a decision that is still before the Supreme Court, I would not be so bold - and submit that the Panel would be safer to rely on existing Supreme Court authority.

The *Eden-Epsom* decision

2.19 In the *Eden-Epsom*⁴² decision the Environment Court made two key findings relating to the NPSUD:

- a. It found that a decision on the merits of a private plan change on appeal under clause 29(7) of Schedule 1 RMA is not a “planning decision” as defined in the NPSUD as the definition does not include a private plan change. Therefore, the NPSUD does not apply to such decisions (or, at least, some parts of it do not apply).
- b. It found that although some parts of the NPSUD refer to a plan change and not to a “planning decision”, the Court is not required to and will not give effect to those provisions at this time.

2.20 The Court’s second finding was based in particular on Policies 3 and 4 of the NPSUD and associated implementing clauses. Policy 3 requires achievement of certain minimum building heights and densities. Policy 3 must be read together with Policy 4, which allows departures from those minimum standards “only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area”. The Policy 4 qualifying matters are environmental constraints within which the intensification directed by Policy 3 is to be achieved. The associated implementing clauses in Part 3 Subpart 6 are framed as obligations on local authorities to undertake an identification and assessment process. That process had not yet been completed and so the Court’s reasoning was that until

⁴⁰ s 70 Town and Country Planning Act 1990 (“**TCPA**”); s 38(6) Planning and Compulsory Purchase Act 2004 (“**PCPA**”).

⁴¹ *Port Otago v Environmental Defence Society*, heard May 2022.

⁴² *Eden-Epsom*, above n 15.

the local authority has gone through the processes of identifying building heights and densities and qualifying matters that are envisaged by Policy 4 and supporting implementing clauses in Part 3 Subpart 6, Policy 3 could be implemented.

- 2.21 Ms McCabe referred to this decision during joint witness conferencing as it has obvious implications for the way in which the NPSUD is applied.
- 2.22 However, in May 2022 the definition of planning decision in the NPSUD was amended to include a reference to “a change to a plan requested under Part 2 of Schedule 1 of the Act” in the definition of planning decision. As the change was made without public notification, it is not well-known and I became aware of it only after Ms McCabe’s evidence had been filed. Accordingly:
- a. The first legal issue relating to the application of the NPSUD to private plan changes identified in the *Eden-Epsom* decision falls away. The second issues has limited relevance to a non-Tier 1 local authority.
 - b. The Panel should apply the version of the NPSUD called the “National Policy Statement on Urban Development 2020, updated May 2022”.⁴³

Reconciliation of NPSFM and NPSUD

- 2.23 Assessing PPC28 requires you to consider provisions of the NPSUD and the NPSFM, and to reconcile them. This reconciliation has been considered in detail in two planning decisions.
- 2.24 A Plimmerton Plan Change (PC18) sought “to rezone 384ha of rural land to provide for urban development as part of a package of housing opportunities intended to alleviate Porirua City's housing issues.”⁴⁴ The context was that the site contained a number of streams and wetlands, and at the bottom of the site was a QEII protected wetland, Taupō Swamp. The Panel discussed how the NPSUD and NPSFM should relate to each other, concluding that both had to be given effect to. The Panel held that while “neither the NPSUD nor the NPSFM is intended to prevail over the other, given the highly directive policies in the

⁴³ <https://environment.govt.nz/assets/publications/National-Policy-Statement-Urban-Development-2020-11May2022-v2.pdf>

⁴⁴ Final Report and Recommendations, 22 December 2022 at [2].

NPSFM "the NPSUD must be applied in such a way that the objective and policies of the NPS-FM are given effect."⁴⁵

2.25 The Panel, subject to its recommended amendments, also agreed with counsel that "it is possible for the more general directives in the NPSUD to be given effect to in a way that still allows for the more specific environmental protection directives in the NPSFM to be given effect to. That is reflective of the approach adopted in the latest version of PC18, in that it enables appropriate urban development, within limits."⁴⁶ The Panel went on to discuss what and where those limits should be.

2.26 In *Re Otago Regional Council*, the Court reached a similar conclusion. There, the Court held that the "NPSFM 2020 and NPSUD 2020 are to be read together and reconciled under the regional policy statement and the district plans."⁴⁷ The NPSFM 2020's "sole objective is directive", and provides a "detailed statement about Te Mana o te Wai"⁴⁸ ... "growth in development capacity does not outweigh (trump) Te Mana o te Wai. Te Mana o te Wai is the fundamental concept of freshwater management: any thinking to the converse would not give effect to either national policy statement."⁴⁹ So, while the territorial authorities in that case argued that "perfect alignment is likely to continue to be illusive", the Court considered that "with a focus firmly on NPSUD 2020, the Territorial Authorities have pursued policy goals through this plan change with insufficient regard being paid to the NPSFM 2020."⁵⁰

The Applicant's approach to anticipated future planning outcomes that are not yet secured

2.27 There are significant changes happening in the broader planning context in which PPC28 is being determined.

2.28 The NPSFM 2020 has signalled the need for a significant step up in the management of New Zealand's freshwater resources. This was accompanied by

⁴⁵ At [24] and [2.34].

⁴⁶ At [2.34].

⁴⁷ *Re Otago Regional Council* [2021] NZEnvC 164 at [369].

⁴⁸ At [352], [32] and [27].

⁴⁹ At [369].

⁵⁰ At [370].

a new freshwater planning process to speed up implementation of freshwater national direction in regional plans.

- 2.29 The s 42A report identifies that the NRMP does not yet give effect to the NPSFM, and that in the meantime any plan change must give effect to the NPSFM. The s 42A report concludes that the proposed provisions, the existing provisions of the NRMP and requirements of the NTLDM together may not be sufficient to address the effects of development especially the catchment-scale and cumulative effects, and also where existing controls (e.g. flood overlays) may not correctly reflect the future developed form, high intensity rainfall effects, erosion and flood extent.⁵¹
- 2.30 The Applicant's makes some preliminary points about the relationship between PPC28 and the NPSFM. Its position is that:
- a. PPC28 is not a freshwater planning instrument under the RMA because such an instrument must be initiated by Council.
 - b. PPC28 implements NPSFM 2020 to a degree appropriate to PPC28's scope and function.⁵²
- 2.31 On the more substantive issue of whether PPC28's effects are adequately managed, the Applicant anticipates that the NPSFM 2020 will be implemented by Council and will also be relevant to consents, and so appears to be saying that the Panel can be confident improvements to the NRPM will be made that will manage effects of PPC28 development adequately.
- 2.32 STM submits, on the preliminary points, that:
- a. Were PPC28 to involve a change to regional plan provisions relating to freshwater it would be a freshwater planning instrument. The assertion that a freshwater planning instrument must be initiated by Council is incorrect. A freshwater planning instrument includes a "change"⁵³ to a regional plan

⁵¹ S 42A report at 364.

⁵² Applicant's Legal Analysis on the Section 42A Reports concerning the Freshwater Management Topic at [30] and [33].

⁵³ Section 80A(2)(c)

(which includes a private plan change⁵⁴) that relates to freshwater. Section 80A expressly contemplates private freshwater planning instruments.⁵⁵ However, PPC28 does not seek to amend any regional planning provisions in the NRMP.⁵⁶

- b. It is not the role of PPC28 to implement all parts of the NPSFM, but PPC28 must give effect to the NPSFM to the extent that there is scope to do so. For the reasons discussed in Ms McCabe's evidence, STM submits that PPC28 does not give effect to the NPSFM.

2.33 On the substantive point, STM agrees with Council that the Panel must be confident that the PPC28 provisions will adequately control the effects of development, taking into account the existing NRMP provisions. The Panel can also have regard to the direction of travel that is directed by the NPSFM, but as the NPSFM does not delve into the detail of how earthworks, subdivision etc. should be managed to achieve its objectives and policies there can be no certainty as to how a future regional plan/freshwater planning instrument for Nelson will address those matters.

2.34 STM submits that a consistent approach is required to the outcomes of future plan changes addressing different topics (in particular, freshwater and intensification). STM has noted the lengths that the Applicant's submissions go to in discounting the potential for intensification to achieve housing capacity objectives, and its position that the comparison in terms of housing capacity must be with the status quo of "no provision for intensification in the current NRMP".⁵⁷ That status quo approach, in which it discounts the policy directives for intensification in the planning instruments that Council must implement (the

⁵⁴ Section 43AA, definition "change"

⁵⁵ Section 80A(6)(c).

⁵⁶ Section 42A report at 31.

⁵⁷ Paragraph 35: "very few 'runs on the board' have been achieved by meaningful changes to the NRMP to address the situation. That is true even on the Council's main initiative of enabling intensification"; paragraph 80: "Save the Maitai ... argue that the proper way for providing growth in Nelson is intensification and that there should be no further extension of the urban fabric. The Applicant submits that the outcome of these processes cannot be pre-empted and one cannot make reliable assumptions about potential yield from intensification. Any intensification plan change by NCC will need to go through its own process. The ultimate framework and its capacity to support urban growth is unknown"; paragraph [127]: the status quo is that there is no further intensification provided for in the NRMP. Therefore, in terms of the RPS the comparison is with the existing environment where no further provision has been made for intensification beyond the current NRMP (1996). See also [128] and [141].

RPS and NPSUD) in favour of an “existing environment” of no intensification, is the opposite of the Applicant’s position on future freshwater amendments (which it relies on to address the aspects of PPC28 development that are not adequately managed by the “status quo” NRMP provisions).

- 2.35 If the Applicant is entitled to rely on future NPSFM implementation by Council as providing part of the framework in which consents for PPC28 development will be assessed, the same approach should be taken with respect to future NPSUD implementation by Council to provide for housing capacity through intensification.

3. SAVE THE MAITAI KEY ISSUES

Maitai Valley should be protected for current and future generations

- 3.1 STM submits that the Maitai Valley is fundamentally the wrong place for urban-type development. The witnesses speaking on behalf of STM have described the importance of the valley for peaceful recreation and open space. The character of the Valley will inevitably change if residential development at an urban scale is introduced. Adverse changes to amenity will result from:
- a. Introduction of houses and built development into a currently undeveloped, open, space. This built development will be visible from the swimming holes and walking tracks within the Maitai.
 - b. The presence and noise of vehicles. This includes vehicles associated with the new urban development and may include traffic associated with the use of the connection to Bayview as an alternative for State Highway 6 traffic.
 - c. Increased stormwater discharges and changes to catchment hydrology that have not been demonstrated to be able to be managed in a way that protects the receiving environment, including well-loved swimming holes.
 - d. Noise from day-to-day living in a high density development.
 - e. Discharges to air from construction and from day-to-day living.

- 3.2 The NRPS and NRMP recognise the importance of amenity values, and the importance of differentiating between the urban area of Nelson City and the rural and recreational hinterland of the Valley:
- a. NRPS Objective NA1.2.1 is preservation or enhancement of amenity and conservation values. NRPS Policy NA2.3.3 is to avoid⁵⁸ development which detracts from the landscape and amenity values afforded by gateways between urban and rural areas and different landscape units. The entrance to the Valley, which this site is part of, is part of such a gateway.
 - b. NRMP Policy DO15.1.3 names three specific areas including Maitai Valley. It requires that adverse effects on existing rural character and amenity values should be avoided, remedied or mitigated in the Maitai Valley in order to maintain a greenbelt between existing built-up areas. The policy is flexible as to how it is achieved but directive in terms of outcome. The explanation⁵⁹ is that DO15.1.3 “reinforces the existing clear transition from rural to urban areas. This recognises the amenity values of these areas, especially the recreational and scenic value of areas relatively close to the urban area” and that “other objectives and policies encourage intensification of development in urban areas and limit development in the Rural, and Open Space and Recreation Zones. These policies supplement those provisions.” Anticipated environmental results are compact urban form, increased infill development and maintenance of amenity values.⁶⁰
- 3.3 PPC28 does not give effect to NRPS Objective NA1.2.1 or Policy NA2.3.3 and is inconsistent with NRPM Policy DO15.1.3.⁶¹
- 3.4 The first objective of the NPSUD is that New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.⁶² This includes having good accessibility to natural spaces and open

⁵⁸ Avoid means “prevent the occurrence of”: *King Salmon*.

⁵⁹ DO15.1.3.1.i.

⁶⁰ DO15e.

⁶¹ Evidence of Kelly McCabe at 75-78.

⁶² NPSUD Objective 1.

spaces.⁶³ STM evidence describes the importance of the natural and open spaces of the Maitai Valley, and how real people's and real communities' ability to provide for their wellbeing is affected by urbanisation of the Maitai Valley. The NPSUD requires that development capacity is met but does not require that places that are important to people's wellbeing are sacrificed to meet that goal.

3.5 If PPC28 is approved, the likelihood of more intensive development in Kākā Valley will increase. A change from rural to residential zoning has a number of flow-on regulatory effects. Amendments to the RMA made by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act override the discretion of specified territorial authorities on density planning for residential zones. Specified territorial authorities can include tier 2 authorities like Nelson where specified in regulations.⁶⁴ The overriding obligations are to:

- a. Have the medium density residential standards (MRDS) incorporated into every residential zone.⁶⁵ That requirement applies "irrespective of any inconsistent objective or policy in a regional policy statement".⁶⁶ The relevant density requirements may only be made more lenient than the medium density residential standards where one of a list of "qualifying matters" applies⁶⁷. The fact that a particular density was anticipated through the plan change that zoned the area residential would not be a reason to apply a more lenient standard.
- b. The MRDS specifies that:
 - i. It is a permitted activity to construct a building if it complies with specified density standards.⁶⁸
 - ii. Subdivision must be provided for as a controlled activity.⁶⁹

⁶³ Policy 2 NPSUD.

⁶⁴ Section 2 RMA, "specified territorial authority", clause b.

⁶⁵ Section 77G(1).

⁶⁶ Section 77G(8).

⁶⁷ Section 77I.

⁶⁸ Schedule 3A, clause 2.

⁶⁹ Schedule 3A, clause 3.

- iii. Notification is generally precluded.⁷⁰
 - iv. Density standards include that there must be “no more than 3 residential units per site” and setbacks are generally 1 or 1.5 m from boundaries.⁷¹
 - c. Include the objectives and policies set out in clause 6 of Schedule 3A. These include an objective of responding to the neighbourhood’s planned urban built character, including 3-storey buildings⁷², and policies of enabling a variety of housing types with a mix of densities, including 3-storey attached and detached dwellings, and low rise apartments;⁷³ and providing for developments not meeting permitted activity status, while encouraging high-quality developments.⁷⁴
 - d. Process applications for resource consent applying the objectives and policies of clause 6 of Schedule 3A instead of the provisions of the district plan (which cease to have effect in relation to consideration of the application). Any objectives or policies of a regional policy statement also do not apply to the consent authority’s consideration of the new application to the extent that they are inconsistent with the objective and policies in clause 6 of Schedule 3A.
- 3.6 The new RMA provisions distinguish between “residential zones” and “non-residential zones.” The matters set out above only apply to residential zones. In summary, once zoning is changed to residential, control over the density and height of urban development within the zone is largely lost and national residential density objectives take precedence.
- 3.7 The change of Valley character will also increase the potential for further urbanisation of the wider Maitai Valley through subsequent plan changes. This precedent effect is relevant to whether the plan change would implement the policies and objectives of the plan.⁷⁵ To be clear: this is not a submission that

⁷⁰ Schedule 3A, clause 5.

⁷¹ Part 2, density standards.

⁷² Objective 2.

⁷³ Policy 1.

⁷⁴ Policy 5.

⁷⁵ Peter Salmon (ed) *Salmon Environmental Law* (online ed, Thomson Reuters) at [RM74]; *Canterbury Fields Management Ltd v Waimakariri District Council* [2011] NZEnvC 199.

future urbanisation plan changes would have to be approved because of the precedent set by PPC28, but rather that once the Valley has become urban in nature and the gateway/greenbelt characteristics reduced, it will become harder to preserve its remaining open space and rural character from inevitable future urbanisation pressures.⁷⁶ In *Canterbury Fields* a plan change seeking to rezone a rural area for residential development was declined where the Court considered the rezoning would result in a great reduction in rural amenity and landscape character of the site that would “dilute... the rural setting”⁷⁷. Here it is the rural character and amenity values that would be adversely affected.

Community expectations – intensification of urban Nelson, protection of Maitai

- 3.8 Community expectations are required to be considered when determining the extent and location of urban expansion: NRPS Policy DH1.3.2. Community expectation is also important because of the reliance placed by Mr Milne on (what he says is) previous identification of PPC28 as a site that can absorb a relatively large amount of development⁷⁸, and which he relies upon to discount effects of loss of rural character:

[20] Development of the PPC28 site will result in a loss of some of its current rural character, and consequently some loss of rural outlook for those people residing adjacent to it, and for those viewing the site from adjacent roads and public places. This change, in itself, is not considered adverse because Kākā Valley has been identified as an area which can absorb change as long as the landscape values are maintained or enhanced (emphasis added)

- 3.9 The clear community expectation since as early as 1914⁷⁹ has been that the Maitai will be retained as a place for open space and recreation, and that urban development will not be provided for in the Valley:⁸⁰

⁷⁶ Discussed in *Canterbury Fields* at [96].

⁷⁷ At [96]-[98].

⁷⁸ Evidence of Tony Milne, Paragraph 3.

⁷⁹ Evidence of Rosey Duncan, paragraph 57.

⁸⁰ Evidence of Aaron Stallard, paragraphs 37 and Appendix Item 14.

- a. Ms Duncan describes the history of community advocacy for protection of Maitai Valley.
 - b. Mr Stallard describes more recent statutory processes to assess the community's expectations, starting with the 2006 Urban Growth Strategy where the decision was made by Council not to provide for any future residential zoning in the area, through to the most recent consultation on the draft 2022 Future Development Strategy, in which the vast majority of submitters who comment on Maitai Valley opposed residential development there.
- 3.10 The unprecedented public opposition that PPC28 has aroused is also apparent from the over 13,000 people who have signed a petition to keep the Maitai Valley rural, and the 89% of submitters in opposition to PPC28.
- 3.11 The one "outlier" from the otherwise consistent community position on urbanisation of Maitai Valley is the FDS 2019. As Mr Stallard explains, there were only 4 submissions on the proposal to rezone Kākā Valley for residential development. When it subsequently became apparent that this referred to an area within Maitai Valley, STM made a complaint to the Ombudsman about the consultation process. The Ombudsman partially upheld the complaint. He found that this aspect of the consultation was unreasonable, in that a member of the public reviewing the FDS 2019 consultation brochure would not have clearly understood that the Council proposed that development should occur in areas of the Maitai Valley because:
- a. There was no acknowledgement or indication that Kaka Valley or the Orchard Flats are located within the Maitai Valley. Their respective locations are not described in written text.
 - b. The graphical map depicted the entire Nelson-Tasman region and displayed all 64 proposed development areas. There were no annotations to assist the reader with orientation.
 - c. He was not satisfied that Nelsonians were sufficiently familiar with the names 'Kaka Valley' and 'Orchard Flats' for the absence of a location descriptor or annotated map to be inconsequential.

- 3.12 The Ombudsman did not consider that the shortcomings were enough to undermine the overall consultation process, because whilst few people (4) commented on the proposed development of the Kaka Valley, “a definite causal relationship between the consultation document and total submissions has not been established”. With respect to the Ombudsman, it is difficult to see how such a causal relationship could ever be established, given it would require proof that every person who did not submit did not do so because they did not understand that development should occur in the Maitai Valley. The most that can be said is that each consultation both pre- and post- the FDS 2019 that referenced Maitai Valley as a potential residential expansion area attracted a large number of submissions in opposition, where-as the FDS 2019 consultation attracted 4 submissions.
- 3.13 The NPSUD requires a local authority to have regard to “the relevant FDS” when preparing or changing RMA planning documents.⁸¹ FDS means the Future Development Strategy required by subpart 4 of Part 3 of the NPSUD.⁸² The FDS 2019 is not a Future Development strategy required by subpart 4 of Part 3 of the NPSUD:
- a. It was prepared under the National Policy Statement for Urban Development Capacity 2016, to meet the objectives and policies of that instrument.
 - b. At the time that the FDS 2019 was prepared, Nelson was classified as “medium growth” therefore preparation of a FDS was optional. The NPSUDC 2016 specified that the future development strategy could be incorporated into a non-statutory document that is not prepared under the Act, including documents and strategies prepared under other legislation.⁸³
 - c. The consultation process was only required to comply with Part 6 of the Local Government Act (“LGA”) or Schedule 1 of the RMA, and importantly was not required to comply with the new, more stringent consultation process required by the Part 3 of the NPSUD (the special consultative procedure

⁸¹ Clause 3.17(1).

⁸² Clause 1.4 Interpretation.

⁸³ NPSUDC 2016 Policy PC14.

under s 83 of the Local Government Act). The FDS 2019 was prepared under Part 6 of the LGA, but not using the special consultative procedure.⁸⁴

- d. Reflecting that “looser” approach to FDSs, there was no requirement under the NPSUDC 2016 to have regard to a FDS in considering a plan change or review.

3.14 Accordingly, the FDS 2019 is quite a different beast from a FDS prepared under the NPSUD. It would be inappropriate to take the NPSUD requirement to have regard to “a Future Development Strategy required by subpart 4 of Part 3 of the NPSUD” and apply that to a FDS that was developed under a different national instrument with different policies and procedures.

3.15 STM submits that the Panel:

- a. Is not required by the NPSUD to have regard to the FDS 2019.
- b. Is not prevented from having regard to the FDS 2019, as it can take it into account under s 74(2)(b)(i) as a management plans or strategy prepared under another Act (the LGA); but
- c. Should place no weight on the FDS 2019 on the basis of the consultation deficiencies relating specifically to the PPC28 site. At the very least, the FDS 2019 cannot be relied upon as representing the community’s expectations.

“Intensification not expansion” is supported by national and regional policy

3.16 Preferencing intensification over urban expansion is a legitimate option that is supported by national and regional policy, particularly where there is no shortfall in short to medium term housing capacity and the ability to meet demand until 2051 and beyond if intensification proposals are implemented.

3.17 The NRPS squarely identifies adverse effects on natural and physical resources as a result of urban expansion as an issue for the region.⁸⁵ In addition that:

⁸⁴ Nelson Tasman Future Development Strategy 2019 – Technical Report with Appendices.

⁸⁵ Issue DH1.1

- a. When considering the options for urban expansion it is necessary to assess the environmental effects of such expansion against identified minimum environmental standards.
 - b. Both the adverse and beneficial effects of intensification of existing development versus urban expansion into adjoining rural areas will need to be assessed.
 - c. The people of Nelson also have opinions in terms of what they value in their environment. Some assessment of these values is required to indicate whether they are compatible with continued urban growth.
- 3.18 Policy DH1.3.1 is to identify areas having features or values of significance and to ensure that these features or values are appropriately protected. This includes areas with high natural amenity value, or significant open space values such as greenbelt. It is submitted that there is ample evidence on which the Panel can conclude that the Maitai Valley has high natural amenity value and significant open space values (and it is identified as having greenbelt values in the TRMP). Accordingly PPC28 will fail to give effect to the TRPS if it does not “appropriately protect” those values.
- 3.19 Policy DH1.3.3 requires that “where urban expansion is considered to have greater net benefit than intensification” then the most appropriate form of urban development for Nelson can be provided for. This policy is clearly directing an approach that urban expansion is only to be provided for where it has a greater benefit than intensification. This policy expressly requires a comparison with the capacity for, and effects of, intensification.
- 3.20 The Policy DH1.3.3 assessment requires consideration of the costs and benefits of various options according to specified criteria. Those criteria expressly include matters relied on by STM in its lay and expert evidence, including:
- a. effects on landscape and amenity values that have significance regionally; and
 - b. effects on urban form and on the demarcation between urban and rural areas.
- 3.21 Mr Lile says that the provisions provided in DH1 provides a framework for the consideration of urban growth options. However, this involves disregarding the

first 10 words of the policy (the requirement to compare the benefits of urban expansion with the benefits of intensification). Mr Lile considers that part of Policy DH1.3.3 to be superseded by the current requirements of the NPSUD. The Applicant's legal submissions also critique that part of the policy, saying that DH 1.3.3 has an obvious flaw, in that in a greenfields plan change it is impossible to make a comparative assessment with intensification which is not the subject of the plan change.

- 3.22 STM submits that Policy DH1.3.3 in its entirety is an important policy that is directly relevant, and which PPC must give effect to. The Applicant's position does not withstand scrutiny:
- a. Mr Lile's opinion that part of DH1.3.3 has been "superseded" is not correct, and is not the correct legal approach to reconciling planning instruments. In *King Salmon* the Court identified three caveats to its "in principle" finding that higher order planning instruments must be given effect to. The first was where there was an issue as to the lawfulness of a planning instrument, the second is where the instrument does not "cover the field" and the third is if there is uncertainty in meaning.⁸⁶ If one of those caveats applies, it is acceptable to have reference to Part 2 (and by extension, to other instruments in the hierarchy: in this case, that involves looking beyond the NRPS to the NPSUD). The NPSUD provides for development capacity to be met through intensification or through greenfields development. That does not make the RPS approach of preferencing intensification over greenfields development unlawful. Consistent with the NPSUD, the RPS provides for urban development to occur, but particularises this, based on community expectations, to preference intensification. There is no lawful basis for ignoring the first part of DH1.3.3.
 - b. Why it is "impossible" to apply the first part of DH1.3.3 is not explained in the Applicant's legal submissions. Plan or policy provisions can, and often do, include a requirement to assess alternatives, either by expressly stating that an alternatives assessment is required or by requiring that the chosen option

⁸⁶ At [88].

is the best or only practicable alternative.⁸⁷ Policy DH1.3.3 is an example of this. While more common in policies applicable to resource consents, there is no legal barrier on including an alternatives requirement in a policy that applies to planning.

- c. It is apparent that the Applicant seeks to rely on the contribution to housing demand that PPC28 will provide, and policies that support that contribution, but does not wish to be constrained by the NRPS preference for intensification which counts against it.

3.23 The Applicant has not demonstrated that PPC28 will give effect to Policy DH1.3.3. The Housing and Business Capacity Assessment 2021, prepared in accordance with the NPSUD, states that Nelson has adequate housing supply enabled through the current planning framework to meet demand until 2039. This ‘pinch point’ could potentially extend out until beyond 2051, if the draft Whakamahere Whakatū Nelson Plan framework (which provides for additional intensification) is adopted.⁸⁸ Clearly there is capacity for intensification which PPC28 should have been considered against to determine if there would be a net benefit.

3.24 The Housing and Business Capacity Assessment also determined that if PPC28 is approved, demand will exceed supply in around 2043 instead of 2039. That is a four year gain in capacity, in exchange for loss of the Maitai Valley’s rural character.

3.25 One of the anticipated environmental results from implementation of the DH policies is a pleasant, functional and coherent urban area which provides for the reasonable expectations of the community while avoiding, remedying, or mitigating adverse effects on the environment.⁸⁹ By extending urbanisation up the Maitai Valley, PPC28 provides for the antithesis of a coherent urban area, and certainly does not provide for the reasonable expectations of the community.

⁸⁷ As discussed in *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 (in relation to a resource consent application) at [142]-[143].

⁸⁸ Section 42A report at pp 29.

⁸⁹ DH1.7.3.

3.26 Carbon emissions provide a further driver for preferencing intensification over greenfields expansion. Daily vehicle kilometres travelled per household from the PPC28 site are approximately 85% greater than from brownfield intensification within Nelson Centre.^{90 91} In assessing that impact, the Panel:

- a. Must consider whether PPC28 gives effect to the NPSFM Objective 8(a)⁹² and Policy 1(e).⁹³ Based on the Housing and Business Capacity Assessment, and given that housing capacity can be met through intensification, PPC28 fails to implement those provisions.
- b. Can have regard⁹⁴ to the Emissions Reduction Plan,⁹⁵ which targets a 20% reduction in light fleet vehicle kilometres travelled by 2035, through measures including improved urban form. PPC28 will increase vehicle kilometres travelled compared with meeting capacity through intensification.

Effects on the environment

3.27 While PPC28 lays claim to achieving good environmental outcomes, the Applicant has failed to demonstrate that these outcomes will be achieved with respect to effects on landscape and visual amenity, management of stormwater quality and quantity and catchment hydrology to protect waterbodies, and climate. As a result, the Applicant has not demonstrated that the site covered by PPC28 is appropriate for urban development. In some cases this is due to a lack of information as to effects on the environment. Despite PPC28 being within a sensitive receiving environment, critical information is lacking to show that the effects of the plan change can be managed in a way that protects the environment. In other cases, actual and potential effects have been understated.

⁹⁰ Evidence of Andrew James at [23].

⁹¹ Carbon emissions are also addressed in Mr Taylor's statement.

⁹² Objective 8: New Zealand's urban environments: (a) support reductions in greenhouse gas emissions.

⁹³ Policy 1: Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum: (e) support reductions in greenhouse gas emissions.

⁹⁴ Under s 74(2)(b)(i).

⁹⁵ A strategy prepared under the Climate Change Response Act 2002, s 57G.

Landscape and visual amenity

- 3.28 In Ms Steven's opinion, the Kākā Stream Valley as a whole is a Significant Landscape and Kākā Hill is a Significant Natural Feature. Overall there is a reasonable level of agreement between Ms Steven and Mr Milne regarding landscape values, although Ms Steven assigns a Moderate value for associative values. She places significant weight on the open rural character of the landscape, especially its skylines and ridgelines and its riparian areas with an overwhelming dominance of landform and vegetation as underlying the most important backdrop, greenbelt and gateway landscape values.
- 3.29 In terms of effects there is less common ground:
- a. Ms Steven assesses the magnitude of visual change as generally Moderate to High, compared to Mr Milne's Low to Moderate.
 - b. She considers it inevitable that the landscape character of the Site would change overall, from rural/rural living to one expressing a mix of urban and rural/open space character, and that the degree of change would be High.
 - c. She disagrees that the development that would be enabled is consistent with existing urban patterns.
 - d. She considers effects on natural character would be dichotomous with some areas increasing and others decreasing in natural character.
 - e. The conversion of open undeveloped hillsides and ridgeline/skyline to urban residential character would not sustain what is distinctive and important to Nelson.
 - f. The site is highly valued for its visual and open space amenity in close proximity to Nelson city. Ms Steven considers Mr Milne's assessment of no more than Low to Moderate degree of adverse effect despite the large scale transformation of open rural landscape to built-up urban landscape, including sensitive backdrop and skyline areas, to understate the extent of effects (her assessment being Moderate to High).

- g. There would be uncontrolled skyline effects caused by built form on the skyline and backdrop effects on sensitive upper slope areas despite some proposed controls in PPC28.
- h. There would be an adverse effect on the visual amenity of the seaward facing slopes to a High degree.
- i. The lower Maitai Valley is a gateway landscape. The proposed urban expansion would detract from this landscape and undermine its function.
- j. The western side of the Malvern Hills is part of the coastal environment in Ms Steven's opinion. The development enabled by PPC28 would not preserve the natural character of the ridge.

3.30 A significant distinction between Ms Steven and Mr Milne is the latter's starting premise that the site has been "tagged" for urban development, such that some level of urban development is anticipated. As discussed above, this is not a valid starting point.

3.31 The Applicant's legal submissions say that "there is a limit to which development on amenity landscapes should be restricted to prevent housing development. Such landscapes do not enjoy any specific recognition under RMA, Part 2". That is not correct. Amenity landscape values are a subset of "amenity values" under s 7(c). The Panel must have particular regard to the maintenance and enhancement of amenity values.

3.32 The Applicant's submission devotes several pages to criticising Ms Steven's evidence, which are addressed below:

- a. It is surprising that the Applicant criticises Ms Steven's conclusions "without the benefit of a proper site visit" when the Applicant had not provided access to the Site. In any event, Ms Steven did undertake a proper visit to the site's context which was adequate combined with the geographic analysis tools at her disposal as well as the extensive factual and analytical material provided by the applicant to form the basis for her assessments. Notably while Mr Milne's rebuttal evidence differs in terms of some conclusions, he records that he "certainly respects Ms Stevens position, and the full, and considered

landscape, visual amenity and natural character assessment and evidence that she has provided”.⁹⁶ Ms Steven has now been provided with the opportunity to enter the site at 3 pm on Sunday 17 July.

- b. Regarding associative values, the Applicant says that Ms Steven has relied on “assumed community values and needs”. In fact she has relied on the values embedded and expressed in the 2005 and 2015 Boffa Miskell Nelson landscape studies and in the NRMP and NRPS. The RMM landscape reports for PPC28 reiterate these values, affirming agreement as to their relevancy. Ms Steven considered the documented associative values at a finer scale in relation to the site in context during her field work and considers them to be valid.
- c. It is asserted that Ms Steven attaches landscape significance to the site that is not found in the existing NRMP provisions. Each of the Nelson landscape studies acknowledges the need to identify s 7(c) amenity landscapes, but to date there is no study that has been peer reviewed or tested through a planning process.
- d. It is true that Ms Steven has not undertaken a region-wide study in order to reach the view that the site has regionally significant landscape values, but she did not need to as she has relied on the region-wide study by Boffa Miskell which she agrees with (including not limiting the Maitai Valley amenity landscape to just the river). Mr Milne’s rebuttal says it is the “Maitai/Maitahi River” alone that is identified as a significant landscape in the Boffa Miskell Study.⁹⁷ However a river is not a landscape. The description of the unit is of a valley, with the river as a central feature. The values described relate to the valley and not just the river. Even if that were not the case, the Boffa Miskell study has not been peer reviewed or its landscapes adopted through a planning process, and it is therefore not determinative of the landscape values of the site.

⁹⁶ At [20].

⁹⁷ Rebuttal at 28.

- e. Ms Steven is criticised for – it is alleged – reaching a conclusion on the site’s capacity to absorb development ‘despite the evident need for housing’. The alleged need for housing (which can be met through intensification and is not needed in the short to medium term) is not relevant to a landscape assessment. In any event, Ms Steven does not say that. Her brief was to assess PPC28, not to address the capacity of the site to accommodate some alternative level of development. She has not reached the “fanciful” conclusion that there is no absorption capacity on the site.
- f. Ms Steven does not mention the site’s “bucolic”⁹⁸ pastoral state”. She has not expressed any negative views towards ecological restoration (ie returning the land to forest and shrubland) and has acknowledged on-going farming and plantation forestry as part of the baseline.
- g. The Applicant says “Ms Steven claims the so-called ‘gateway’ characteristics are highly valued by the community. That assertion is not supported by any credible analysis.” Ms Steven does not claim the gateway characteristics are highly valued by the community. She refers to gateway characteristics because they are highly prioritised in the NRPS policies (discussed above). Mr Milne did not refer to those gateway policies in primary evidence.
- h. The Applicant criticises Ms Steven for not undertaking an assessment of the views of tangata whenua. Ms Steven relied on tangata whenua values as already documented to incorporate those values into her assessment in several places (this can be ascertained by a simple word search of her evidence). However, the extent to which a housing development would “enable tangata whenua reasonable access to ancestral resources” is beyond the brief of a landscape assessment.

Coastal environment

- 3.33 Ms Steven’s opinion is that the western side of the Malvern Hills between the “bend” in the ridge near Walters Bluff and its north end is part of the Coastal

⁹⁸ Reading Mr Maassen’s submissions always provides the opportunity to learn a new word or two. In case the Panel members were unaware, as I was, “bucolic” means relating to the pleasant aspects of the countryside and country life.

Environment (“CE”), and that this is mainly because the inland boundary is typically determined to the first main ridgeline from the active coastal margin, within reason. Her opinion is entirely reasonable and orthodox.

- 3.34 The new NZILA Guidelines, Te Tangi a Te Manu, provide “pointers” in relation to the inland extent of the coastal environment, including that topographical features often provide a marker to the inland extent of the coastal environment (e.g. ridges) and that:

The leading ridgeline behind the coast has been used as a rule-of-thumb for the inland extent of the coastal environment. This may be sensible where there is an immediate relationship of ridge to coast but may not be relevant if the leading ridge is too far inland to define an environment in which coastal processes, influences or qualities are significant. In other places the inland boundary can be blurred, or indistinct, as coastal influence diminishes. Assessing the inland boundary is a matter of judgement taking all factors together.

- 3.35 Determination of the coastal environment inland line was considered in *Environmental Defence Society Inc v Thames-Coromandel District Council*.⁹⁹ The Court said:

[38] Counsel for the Council noted that the extent of the coastal environment can be difficult to determine and depends very much on the circumstances, citing dicta from several decisions. A rule of thumb can be discerned in the cases that the coastal environment extends from the landward boundary of the coastal marine area to the dominant ridgeline above that boundary. The potential fallacy in such a heuristic method of analysis was made clear in *Mainpower NZ Ltd v Hurunui District Council* where the Court said:

“[320] ... In other cases before the Environment Court a landward ridge has been adopted as a boundary to a coastal environment. However, where a dominant ridge may be a useful means to identify a coastal environment boundary, such a boundary should be relevant to the coastline and coastal environment. There is no necessity to identify a dominant ridge in each case, particularly one that may be kilometres away from the coast.”

[39] The position has not really advanced much beyond the observation of the Planning Tribunal in *Hay v Banks Peninsula District Council*:

“It is in our view a question of fact in each case what is or is not part of the coastal environment, or when land is within or without the ‘margin’ of a lake or river. It is one of those theoretically difficult questions which will usually yield to the facts and a liberal dose of common sense.”

- 3.36 Ms Steven’s line is farther coastward (encompasses less land) than the line from the 2005 Nelson landscape study which mapped the coastal environment as extending to the Kaka Hill ridge and covered all of the PPC28 site.

⁹⁹ *Environmental Defence Society Inc v Thames-Coromandel District Council* [2020] NZEnvC 1 at [38]-[39].

- 3.37 Her conclusion on where the line should lie is reasonable, and consistent with NZILA guidelines and case law. NZCPS Policy 15 applies to that part of the site that is within the coastal environment.

Natural character

- 3.38 The applicant criticises Ms Steven’s reference to natural character for areas outside the coast and river margins. Natural character is relevant:
- a. to the margins of rivers and streams, which as set out in *Te Tangi a Te Manu* and in case law¹⁰⁰ can be 20 – 50 m from the waterbody and sometimes more;
 - b. to wetlands, which have not been fully identified across the site;
 - c. to the coast; and
 - d. as a key attribute or characteristic conferring high amenity value, and therefore relevant to s 7(c).

Summary

- 3.39 For the reasons set out above, it is submitted that Ms Steven’s assessment of landscape, natural character and visual amenity effects should be preferred.

Stormwater and catchment hydrology; water sensitive design

- 3.40 There appears to be a large degree of agreement between STM’s witness Mr Suljic and the s 42A reporting officers Ms Purton, Mr Wilson and Dr Fisher with respect to the effects of PPC28 on stormwater quality and quantity, catchment hydrology and receiving waterbodies. Mr Suljic describes the overall effects of urban development on hydrology and water quality¹⁰¹:

The urbanisation and development of greenfield areas fundamentally change the site hydrology and the quality of stormwater runoff. In simple terms, urban pollutants are created, less water soaks into the ground, and water tends to run off in greater volumes, faster, and sometimes to different receiving points compared to pre-development conditions.

¹⁰⁰ *High Country Rosehip Orchards Limited and Others v Mackenzie District Council* [2011] NZEnvC 387.

¹⁰¹ At [25].

3.41 He considers that there is a high likelihood that the stormwater management framework proposed and relied upon by PPC28 is not adequate to protect the environmental values of the immediate and downstream receiving environments. He describes the potential impacts of measures that lead to a reduction in soil infiltration and rapid draining of subsurface water:

- a. cut to fill operations, particularly placement of engineered fill material, which reduces the soil infiltration capacity due to the level of soil compaction required to create stable developable land;
- b. creating impervious surfaces;
- c. installation of subsurface drainage systems (to control groundwater levels) and implementation of soil capping measures where necessary to achieve geotechnical stability;
- d. loss of key streams, tributaries, or natural overland flow paths that warrant retention and protection;

which cumulatively, can lead to impacts on the groundwater recharge of wetlands and streams.

3.42 He also describes the potential effects on water quality from:

- a. Runoff from 16.5 hectares of new roof. Even if inert materials are used, this will only reduce and not eliminate contaminants. Roof runoff also affects temperature and generation of microplastics; and
- b. Runoff from roads and hardstands: Schedule X is silent on the specifics around the implementation of detention for roads and hardstand areas or the level of treatment that will be achieved;

and notes that the key stormwater management requirements for PC28 are only required where practical or feasible, which places the risk on the environment if the requirements are deemed impractical or unfeasible.

3.43 In that context, the Applicant’s submission that ‘there is no evidence that stormwater management is a significant remaining issue between the experts’ is clearly incorrect.

3.44 The proposed stormwater management framework supporting PPC28 fails to demonstrate that its implementation through future resource consent stages can achieve a post-development balance in hydrology and adequate management of stormwater quality that will ensure the protection of streams from erosion, and the maintenance and enhancement of existing freshwater systems and values, including their amenity. As a result PPC28 does not give effect to the NPSFM.¹⁰²

Terrestrial ecology

3.45 STM has not produced expert evidence on terrestrial ecology, but Mr Haddon’s statement provides informed lay evidence on overlooked indigenous flora and fauna from his perspective as a neighbour to the PPC28 site who knows the area intimately. This includes a description of:

- a. Bird and lizard species that he has observed in Kākā Valley that the applicant’s witnesses have not identified.
- b. Potential for bat and *Powelliphanta* snails to be found within the site. PPC28 does not incorporate provisions relating to bats or snails being encountered during development.
- c. Indigenous plant species present in the area identified by Dr Robertson as “mixed mahoe-exotic scrub”, including large hard-to-miss species like mature titoki and large pukatea.

3.46 Council’s request for information¹⁰³ requested that PPC28 include east-west linkages (biodiversity corridors). If PPC28 is approved, STM agrees that those corridors should be provided.

Climate

¹⁰² Including the fundamental concept of Te Mana o Te Wai and Policies 7 and 3.24.

¹⁰³ 3 August 2021.

- 3.47 Effects on climate are discussed above with respect to the benefits of intensification over greenfields expansion.

Insufficient information

Wetlands

- 3.48 Mr Suljic and Ms McCaabe both consider that wetlands have not been adequately identified, with Mr Suljic noting that the SMP only recognises two wetlands, however he observed several areas of saturated beds with hydrophilic vegetation resembling a wetland environment onsite. The Applicant's legal submissions assert that there are some patches of *Juncus* but these do not meet the natural wetland definition in the Resource Management (National Environmental Standard for Freshwater) Regulations 2020 ("NESF"). There is no evidence to support this assertion.
- 3.49 Identification and protection of wetlands is necessary to give effect to NPSFM policies requiring no loss of wetland extent or values.¹⁰⁴ The Applicant seeks to rely on amendments to the National Environmental Standards for Freshwater (policy and definition) that are currently the subject of consultation. No weight can be placed on amendments that might be made to the NESF.

Earthworks

- 3.50 Plans and other details that demonstrate the anticipated location and extent of earthworks necessary to support the plan change outcomes ought to have been provided. This would have informed both the practicality of stormwater management and other functions of the PPC28 proposal. As set out above, in the *Li* case the Council had the benefit of detailed sediment yield modelling which was considered necessary to accurately assess the effects of the plan in a sensitive receiving environment.

Stormwater and hydrology

- 3.51 Mr. Suljic considers there to be insufficient information presented in the context of the understanding of the sensitivity of receiving environments, the existing site

¹⁰⁴ Policy 6 and 3.22.

hydrology and its relationship to ecology, geology, and topography. The SMP fails to demonstrate that those principles that are proposed and set out in Schedule X are in fact achievable. Mr. Suljic has particularly identified concerns around the ability to achieve hydraulic neutrality, protection of streams and waterways from the effects of erosion and other effects on values, including those downstream recreational uses. Issues with inadequate information on stormwater quality (treatment methods and standards that will be achieved) are also listed in his evidence.

Transport effects

- 3.52 Ms McCabe states that in her opinion the full scope of wider transport network deficiencies have not been identified through an evaluative Integrated Transport Assessment (“ITA”), and as a result PPC28 does not coordinate urban growth with the delivery of transport infrastructure, which does not align with the NPSUD. She provides the reasons why simply listing an ITA as an information requirement for future subdivision or development is not sufficient.¹⁰⁵ The Applicant submits that this was not raised as a requirement by Mr James. However, the point at which an ITA should be provided is a planning rather than a transport matter.
- 3.53 Ms McCabe considers that the applicant’s traffic assessment should have included an assessment of traffic from SH6 using the route through Bayview and Kākā Valley. The submission by Waka Kotahi stated that the Kākā Valley roading infrastructure could provide an alternative transport route should State Highway 6 be temporarily closed. Waka Kotahi also noted the long-term resilience issues that SH6 faces given its coastal location – suggesting this could become a regular or even permanent highway route. While Waka Kotahi has amended its relief, the potential for this outcome cannot be denied. There has been no assessment of the effects of the Kākā Valley roading infrastructure providing a connection from State Highway 6, and this is a significant deficiency. The effects of this traffic are simply unknown but will be cumulative with traffic from the Maitahi-Bayview site.

¹⁰⁵ McCabe evidence at 118 – 125.

- 3.54 The Transportation Hearing Report provided with the s 42A report says in relation to this issue:

Consultation between Waka Kotahi and the Applicant included discussions around the internal PPC28 road network providing a resilience route, should SH6 be temporarily blocked. This would be able to be managed accordingly as a temporary response.

I note the road design for the through-link site link illustrated on the Structure Plan will need engineering approval from Council at the time of resource consent, which provides an opportunity to consider its use as a SH6 temporary alternative route.

- 3.55 Council engineering approval is not the appropriate point to consider whether SH6 traffic should be funnelled into central Nelson via Maitai Valley Road and past Nelson Central School. The effects of this aspect of PPC28 should be assessed now.
- 3.56 Mr James sets out other transport-related information that should have been provided.

Noise

- 3.57 A noise assessment should have been prepared to quantify the noise effects arising from PPC28 (including vehicles), given the high level of amenity that is sought under the RPS – being, to maintain and enhance amenity values.

Housing affordability

- 3.58 STM submits that there has been insufficient information to demonstrate that PPC28 would assist with housing affordability. Mr. Lile has considered housing affordability in his evidence and he considers that greenfield land provides a more affordable option than a townhouse or apartment, to the majority of the housing sector – this is clearly beyond his expertise.

Amendments if PPC28 approved

- 3.59 STM considers that PPC28 should be refused, for the reasons set out above. However, if the Panel considers it appropriate to approve PPC28, it is submitted that the amendments recommended in STM's witnesses' evidence should be made.

- 3.60 These submissions address only one amendment, being the deletion of non-notification clauses. PPC28 proposes rules which enable resource consents for restricted discretionary activities to be considered without notification or service of notice.¹⁰⁶
- 3.61 General principles that can be distilled from case law as to the appropriateness of non-notification clauses are that:
- a. Non-notification clauses should not be supported where the change in activity status poses an unacceptable risk of more than minor adverse effects.¹⁰⁷
 - b. Further, where the issues relating to effects are “complex” or unclear, a “convincing supporting argument for non notification” will be difficult.¹⁰⁸
 - c. There must be a proper basis, or adequate consideration of sufficiently detailed evidence, supporting non-notification clauses to justify such a “derogation of public rights”.¹⁰⁹
 - d. Where the adverse effects of an activity cannot “readily be identified and are peculiar to the circumstances of the site”, notification should be provided for to “allow for potential adverse effects to be properly addressed”.¹¹⁰
- 3.62 The appropriateness of non-notification clauses is perhaps most thoroughly discussed in *Waterfront Watch Inc v Wellington City Council*, where a presumption of non-notification for applications for discretionary (restricted) resource consents in relation to waterfront developments was of concern.¹¹¹ There, the Council’s justification for the non-notification presumption was that the plan change variation process provided sufficient “opportunity for public participation in the development parameters”. The Council wished to “avoid ... the sort of extended

¹⁰⁶ Rule X.2 – Comprehensive Housing Development in the Residential Zone – Higher Density Area, Rule X.3 Subdivision, Rule X.4 Backdrop Area and Rule X.5 Skyline Area (Malvern Hills and Botanical Hill).

¹⁰⁷ *Eden-Epson Residential Protection Society Inc v Auckland Council* [2022] NZEnvC 60 at [193]; *Waitemata Infrastructure Ltd v Auckland City Council* ENC Auckland A55/2005, 31 March 2005 at [157] and [158]; Auckland Unitary Plan Independent Hearings Panel “Report to Auckland Council Overview of recommendations on the Proposed Auckland Unitary Plan” 22 July 2016 at pp 84.

¹⁰⁸ *Mausen Lawrie Consultants & Nicholls v Auckland Council* [2013] NZEnvC 109 at [184]; *South Epsom Planning Group Inc v Auckland Council* [2016] NZEnvC 140 at [211].

¹⁰⁹ *TKC Holdings Ltd v Western Bay of Plenty District Council* [2015] NZEnvC 100 at [77], [53] and [57].

¹¹⁰ *South Epsom Planning Group Inc v Auckland Council* [2016] NZEnvC 140 at [211].

¹¹¹ *Waterfront Watch Inc v Wellington City Council* [2012] NZEnvC 74 at [34].

and expensive litigation that has surrounded waterfront developments in the past.” Waterfront Watch argued that “public participation should not be dispensed with in such a special environment. Underlying its position is an unspoken but readily discernible view that the Council cannot be relied upon to *get it right*, and that only public opinion and action, litigious or otherwise, has averted poor planning and design outcomes on the waterfront in the past.”¹¹²

- 3.63 In determining the issue, the Court considered whether the non-notification presumption “accords with and assists the Council to achieve the purpose of the Act.” In terms of s 32, was the presumption appropriate?¹¹³
- 3.64 The Court noted first the benefits of the presumption of non-notification, namely the provision of greater certainty for developers that if the proposed building is within the parameters of the plan, it is likely to be given consent.¹¹⁴
- 3.65 However, a presumption of non-notification “removes the ability of the public to raise before decision-makers the issues about a defined project rather than a rather abstract set of dimensions. ... public participation [is] a cornerstone of the Act's processes which should not be dispensed with unless the reasons are clear and compelling. We do not think that is so here, at least in the form of the rules as proposed.”¹¹⁵
- 3.66 *Waitemata Infrastructure Ltd*¹¹⁶ is an older planning decision dealing with provisions of s 94D which have since been repealed. The Court agreed that on the evidence before it, it was “quite likely that developments exceeding the permitted activity limitation may have potential effects that are more than minor” and considered the issue to be “best left to the operation” of the RMA’s notification provisions.¹¹⁷
- 3.67 Similar concerns relating to uncertain effects were discussed by the independent hearings panel in considering the Proposed Auckland Unitary Plan (AUP). As summarised by Chris Simmons and Steve Mutch in *Proposed Auckland Unitary Plan*:

¹¹² At [132].

¹¹³ At [133].

¹¹⁴ At [133].

¹¹⁵ At [134].

¹¹⁶ *Waitemata Infrastructure Ltd v Auckland City Council*, above n 107.

¹¹⁷ At [157] and [158].

stock take,¹¹⁸ the Panel considered that non-notification clauses should only apply to controlled activities, because the PAUP contained a significant number of restricted discretionary activities, many of which have more than minor adverse effects on the environment, and a blanket non-notification rule would therefore not give effect to the purpose and principles of the RMA. The Panel's stance "would not preclude the Plan from specifying particular restricted discretionary activities that justify non-notification", but presumably, these should have less than minor effects.

- 3.68 The effects of subdivision and development within the PPC28 site are far from certain, and many potential effects are more than minor on people or the environment. Further, there are many effects that will require comprehensive management, where it is appropriate that affected people or those representing an aspect of the public interest should be able to provide input into how management occurs. For those reasons, it is submitted that should PPC28 be approved, the non-notification clauses should be deleted.

4. EVIDENCE TO BE PRESENTED

- 4.1 STM's witnesses are listed below:
- a. Dali Suljic - stormwater and water sensitive design
 - b. Andrew James - transportation
 - c. Anne Stevens - landscape, natural character, and amenity
 - d. Kelly McCabe – planning
- 4.2 Non-expert statements are also provided from Aaron Stallard, Jennifer Duncan, Astrid Sayer, Sophie Weenink, Dr Monika Clark–Grill, Peter Taylor, Anthony (Tony) Haddon, Rod Dixon and Annette Milligan ONZM.

5. CONCLUSION AND RELIEF SOUGHT

- 5.1 STM submits that PPC28 should be declined. The Maitai Valley is fundamentally the wrong place for urban-type development. The site is at the gateway to the

¹¹⁸ C Simmons and S Mutch "Proposed Auckland Unitary Plan: stock take" (2015) 11 *Resource Management Bulletin* 89; Auckland Unitary Plan Independent Hearings Panel, above n 107, at pp 84.

Valley and is part of a greenbelt that forms a boundary between urban Nelson and the highly valued, predominantly natural Maitai Valley. That distinction will be lost if PPC28 is approved.

- 5.2 Once the distinction is lost and the character of the Valley changes, it will be much harder to resist further urbanisation up the Valley.
- 5.3 Community expectations are that Maitai Valley will be retained as an open space, recreational area for current and future generations. Development of the Kākā Valley site to the density anticipated by its current zoning is consistent with community expectations.
- 5.4 There is no short to medium term lack of housing in Nelson. The trade-off, if PPC28 is approved, is that the point at which housing capacity becomes constrained is pushed out by four years. However, if intensification is allowed to run its course, there is ability to meet demand until 2051 and beyond. Preferencing intensification over urban expansion in those circumstances is a legitimate option that is supported by national and regional policy.
- 5.5 The Applicant has not demonstrated that the effects of PPC28 can be adequately managed in this sensitive receiving environment. The site has not been demonstrated to be appropriate for urban development.



S Gepp

Counsel for Save the Maitai Inc

12 July 2022