

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

IN THE MATTER

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

IN THE MATTER

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

APPLICANT'S REPLY SUBMISSIONS

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Section 1 – Overview

- [1] This reply responds to matters arising from the hearing and introduces the refined provisions and updated plans that now form the PPC 28 request called 'V4 – PPC 28'.
- [2] V4 – PPC 28 is presented with these submissions in PDF and Word format.
- [3] Also filed with these submissions is reply evidence from the following witnesses for the Applicant:
 - (a) Tony Milne.
 - (b) Michael Parsonson.
 - (c) Stu Farrant.
 - (d) Dr Ben Robertson
 - (e) Josh Markham
 - (f) Mark Foley.
 - (g) Maurice Mills.
 - (h) Damien Velluppillai
 - (i) Mark Lile.
- [4] The reply evidence only replies to issues of significance that arose during the hearing.
- [5] The structure of the statements of evidence in reply follows the following format broadly:
 - (a) A summary of the oral replies to questions from the Commissioners by that witness where relevant;¹
 - (b) Response to STM and NCC witnesses; and

¹ Mark Foley provided a separate written statement to the panel of his oral presentation

- (c) An assessment of how the amended provisions in V4 – PPC 28 address the concerns arising from the hearing related to their discipline.

[6] Mr Lile captures that technical evidence in reply in the framing of the plan machinery in V4 – PPC 28.

[7] That total evidential ‘package’ in reply secures the integration of the planning and technical evidence.

[8] The amended STP will follow early next week as the relevant staff member at Tonkin + Taylor has had a bereavement.

Section 2 – Mana Whenua Context

Overview

[9] The main submitter opposition to PPC 28 concerned the proposed development in Kākā Valley and the potential adverse externalities of that aspect of PPC 28 on experiential and freshwater values.²

[10] The Kākā Valley component of PPC 28 directly concerns the interests of Ngāti Koata seeking to provide housing for tangata whenua within the Kākā Valley.

[11] It is useful to set out in more detail the law that is engaged by Ngāti Koata’s aspirations for PPC 28. That is necessary for the correct assessment of the PPC 28. The analysis also assists the Panel in applying an appropriate lens to assess the weight and significance of two central elements of STM’s case, i.e. the desirability of retaining the Kākā Valley’s openness values and the associated ‘community expectation’ that the Kākā Valley remains undeveloped.

[12] Ngāti Koata provided evidence in its private capacity as an applicant through its Chief Executive, Hemi Toia and separately through its iwi representatives as a submitter and supporter of the application. The separate

² “Externalities are those consequences, both beneficial and adverse, which flow from the use of the resources.” *Meridian Energy Ltd 1, Central Otago District Council* [2010] NZRMA 477 (HC) at [113], per Chisholm and Fogarty H.

submitter role underscored Ngāti Koata's status as tangata whenua and thus always having distinct obligations inherited from ancestors.

[13] Ngāti Koata's evidence had three dimensions presented by three different members of the iwi as follows:

- (a) Matthew Hippolite provided an explanation of the history of Ngāti Koata migration that included a long story of dispossession both in their North Island base at Kawhia harbour and later in Te Tau Ihu *post-* European settlement;
- (b) Melanie McGregor spoke on relationships with other iwi in Te Tau Ihu and on Ngāti Koata's role as kaitiaki with crucial rights and duties;
- (c) Kimiora McGregor gave a *cri de coeur* concerning the housing needs of young Māori families in Whakatū based on her experience of the housing market.

[14] Matthew Hippolite's korero on the dispossession of Whakatū iwi since European settlement relied on the oral transmission of iwi stories. These matters are also fully addressed in historical records.

[15] A helpful legal resource to understand the history of native land dispossession in Whakatū is case law on the Crown's failure to meet its fiduciary duties owed to Whakatū iwi as trustees of certain land. The leading case is the decision of the Supreme Court in *Proprietors of Wakatū v. Attorney-General*.³ That decision provides an instructive assessment by New Zealand's highest court of the grievous breaches by the Crown in preserving Māori tenths reserves. These breaches remain unresolved.

[16] While *Proprietors of Wakatū v. Attorney-General* is a dense judgment, respectfully, it is recommended reading for the Panel as authoritative record of one chapter of land dispossession.

³ *Proprietors of Whakatū v. Attorney-General* [2017] NZSC 17.

[17] It is a comparatively short historical journey (chronologically speaking) from the 19th Century events that are related in *Wakatu v. Attorney-General* to the present time where tangata whenua continue to experience difficulty securing land necessary to build homes in their home. That was powerfully related by Kimiora McGregor's evidence which was courageously delivered.

[18] That reality for tangata whenua points to structural deficiencies in the organising frameworks of society in Aotearoa. The Crown's and Parliament's response has been to pass laws to rectify that situation to fulfil Te Tiriti obligations. These social realities, therefore, explain the many provisions in both RMA, Part 2 and national policy that seek to recognise and provide for tangata whenua interests in all aspects of resource management decisions.⁴

[19] This section of the submissions focuses on the provisions of national policy in NPS-UD and NPS-UD that implement the requirements of RMA, Part 2, ss 6(e), 7(a) and s 8.

NPS-UD

[20] There are numerous provisions under NPS-UD concerning the importance of addressing the housing needs of Māori. They are powerful directions relevant to the assessment of PPC 28. The relevant provisions are set out below.

Objective 5: *Planning decisions relating to urban environments, and FDSs, take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).*

2.2 Policies

Policy 1: *Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:*

- (a) *have or enable a variety of homes that:*
 - (i) *meet the needs, in terms of type, price, and location, of different households; and*

⁴ For a general discussion of this point see Williams; "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" Waikato Law Review, vol 21, 2013.

- (ii) *enable Māori to express their cultural traditions and norms; and*

Policy 9: *Local authorities, in taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to urban environments, must:*

- (a) *involve hapū and iwi in the preparation of RMA planning documents and any FDSs by undertaking effective consultation that is early, meaningful and, as far as practicable, in accordance with tikanga Māori; and*
- (b) *when preparing RMA planning documents and FDSs, take into account the values and aspirations of hapū and iwi for urban development; and*
- (c) *provide opportunities in appropriate circumstances for Māori involvement in decision-making on resource consents, designations, heritage orders, and water conservation orders, including in relation to sites of significance to Māori and issues of cultural significance; and*
- (d) *operate in a way that is consistent with iwi participation legislation.*

3.2 Sufficient development capacity for housing

...

- (2) *In order to be sufficient to meet expected demand for housing, the development capacity must be:*
 - (a) *plan-enabled (see clause 3.4(1)); and*
 - (b) *infrastructure-ready (see clause 3.4(3)); and*
 - (c) *feasible and reasonably expected to be realised (see clause 3.26); and*

...

3.14 What FDSs are informed by

- (1) *Every FDS must be informed by the following:*

...

- (d) *Māori, and in particular tangata whenua, values and aspirations for urban development*

...

Housing

3.23 Analysis of housing market and impact of planning

...

- (2) *The analysis must include an assessment of how well the current and likely future demands for housing by Māori and different groups in the community (such as older people, renters, homeowners, low-income households, visitors, and seasonal workers) are met, including the demand for different types and forms of housing (such as for lower-cost housing, papakāinga, and seasonal worker or student accommodation).*

...

NPSFM 2020

[21] The Applicant's opening legal submissions extensively addressed the provisions of NPSFM. PPC 28 is intended to incorporate the principles of Te Mana o te Wai and provide agency to tangata whenua in the implementation PPC 28 on matters affecting freshwater resources. These provisions were welcomed by tangata whenua in their submissions. Notably, the arrangement of policy and cultural information requirements in PPC 28 addresses the principle of mana whakahaere, which is defined in this way at NPSFM, 1.3(4):

“Mana Whakahaere: the power, authority and obligations of tangata whenua to make decisions that maintain, protect, and sustain the health and well-being of and their relationship with freshwater”.

[22] As explained in Counsel's oral closing that duty and power are an important and distinct function of tangata whenua and are in the DNA of the provisions of PPC 28. It is a solid environmental 'insurance policy' that Ngāti Koata and other tangata whenua will be involved in decision-making affecting the freshwater resources to secure the ecosystem values of the Maitai awa and its tributaries from source to sea.

Section 3 – A hearing of two halves

[23] It is submitted that the hearing was a hearing of two halves.

[24] The first half was the Applicant expert team's coherent analysis of the Site's opportunities and constraints. The expert cohort, along with Ngāti Koata representatives, articulated a vision of sustainable management reflecting with the

synoptic statement of RMA, Part 2 credentials contained in the Applicant's opening submissions. Where appropriate, the experts made concessions on enhanced provisions of PPC 28 to better reflect the results envisioned by the Applicant.

[25] STM and some submitters then presented cases replete with contradictions. Examples of those contradictions are contained in Table 1 below.

STM or submitter argument	A point of contradiction
The Lower Maitai is a quiet and peaceful place.	The Lower Maitai is well-loved and busy. Particularly in summer and parking is an issue.
The open space and green corridor of the Maitai valley provide benefits that are essential for human health, including mental health.	Locating a new community nestled adjacent to (and with access to) the Maitai River corridor is a bad idea for mental health.
The open space and green corridor of the Maitai valley are special and valued and will be imperilled.	The open space corridor will be untouched and enhanced by deliberate design per Rough + Milne's Hand-up 2' page 12. There will be little change to experiential elements of being on a river margin.
The site locality is a gateway with a rural character.	The Lower Maitai is richly endowed with what the NPS-UD (2022) defines as <i>additional infrastructure</i> , including walkways, green space and recreation grounds. The NPS-UD treats <i>additional infrastructure</i> as social infrastructure contributing to a well-functioning urban environment.
The Site is a gateway landscape	The Site is self-contained, and no one passes through it.
The area has natural character requiring preservation.	Only the pasture areas will be developed. Meanwhile, those parts with natural character will be significantly sustained and enlarged under PPC 28.
The Applicant should have provided more information on erosion and sediment control but not to the standard of the GLEAM model (per Ms Gepp's oral submission).	Royal Forest & Bird was represented by Ms Gepp in <i>Li v. Auckland Council</i> [2018] NZEnv 87. Ms Gepp's position recorded at [25] was that even the GLEAM model provided a limited understanding of the worst-case sediment conditions.
The ability of proposed development to address contaminants <i>post</i> -construction ultimately depends on	All contemporary development that aims for superior environmental

good design and maintenance (Dali Suljic in answer to Commissioner Mark-Brown).	performance depends on good design and effective maintenance.
There is insufficient information on the feasibility of the management of contaminants (per Dali Suljic).	The resolution of the stormwater issues requires good design, and maintenance cannot be addressed at the Plan Change stage (per Dali Suljic).
Active transport modes are strategically important and should have been addressed as part of PPC 28 because suitable options will be challenging (Andrew James).	The design of active transport modes through public land cannot be delivered through PPC 28. The design requires a Council-led community engagement process to address many interests and needs beyond the requirements generated by PPC 28. Mr James supported the cycleway that Mr Bailey laid out (in detail), which Mr James described as “feasible” and desirable.
Kākā Valley is well-known and well-loved.	STM claims the reference to Kākā Valley in FDS-2019 was misleading because it is unknown. Note: the area was also shown in maps in the draft Strategy and bore the name of one of the region’s largest and most distinctive natural features, i.e. Kākā Hill.

[26] All the witnesses on the freshwater topic for STM and other submitters acknowledged the feasibility of appropriate measures to manage the effects of freshwater externalities. Notably, those experts’ focussed on uncertainties without engaging in the next step of identifying how uncertainties could be risk-managed through the plan machinery.

[27] The foundations of STM’s case rested on Ms Steven’s landscape evidence incorporating the ‘gateway’ concept and the so-called ‘community expectation’. That was supplemented by a curious ‘planning’ assessment by Ms McCabe relying on the technical report to the draft FDS 2022 strategy that PPC 28 was not needed now because of intensification modelled but not secured by current plan provisions. These aspects of STM’s case are addressed below.

[28] Mr Tony Stallard also claimed that the PPC 28 application was a pre-emptive manoeuvre that should be addressed as part of the review of the NRPM leading to a 2nd generation plan. The Applicant submits:

- (a) It was an important innovation of the RMA to remove the monopoly from local authorities to promote plan changes. The value of that mechanism to provide for additional housing supply is explicitly recognised in NPS-UD; and
- (b) Mr Stallard correctly observed that the NRMP review could be a 5 to 10-year process, which is hardly encouraging given the aims of the NPS-UD.

[29] The stand-out exception for Counsel to the mostly negative submissions was the submissions presented by Ms Corry. Ms Corry said to the Panel that if the plan change can be made to work and achieve the right outcomes, then “go for it”.

Section 4 – The STM Landscape and Planning Evidence

Landscape

[30] Ms Steven, on a number of occasions, referred to the Maitai Valley as the ‘Matai Valley’. That possibly indicated Ms Steven’s lack of familiarity with the area and her belated site visit.

[31] When questioned by Commissioner Hill about the practical significance arising from recognising elements of the Site’s landscape as part of the coastal environment, Ms Steven said that if the Panel accepted that assessment, then the consequence was a preservation ethic under the NZCPS 2010 irrespective of the strength of the natural character qualities. That analysis is plainly an incorrect interpretation of NZCPS 2010, Policy 13. Policy 13 has graduated requirements for effects management depending on the nature and quality of the natural character.

[32] When questioned by Commissioner Wratt about the open space value Mr Steven attached to the Kākā Valley, Ms Steven said that she was not referring to ‘open space spatial character’ given much of the area would remain undeveloped. Rather, Ms Steven said she was referring to the ‘open space value’. Self-

referentially, Ms Steven said that the ‘open space value’ corresponded to the absence of residential development. These values translated, according to Ms Steven, into subjective community responses such as an *awareness* of a change from urban to the rural ‘construct’ of which the open fields were markers.

[33] Ms Steven’s ‘gateway’ landscape concept conveniently emerged out of a singular interpretation of the NRPS. As explained in Counsel’s opening submissions (written and oral), the NRPS and NRMP use ‘gateways’ in a different sense, i.e., discrete viewsheds in urban areas to important regional features. In any event, the NRPS does not direct the preservation of ‘gateways’ as explained in the Applicant’s opening submissions.

[34] A confusing aspect of Ms Steven’s gateway analysis was that the Kākā Valley is self-evidently contained and to the side of the major road and river corridor entering into the upper Maitai Valley as the ‘destination’. Consequently, no one passes through the so-called gateway of the Kākā Valley. The Kākā Valley is only partially visible for a relatively short period in the distance between Jickell’s Bridge to Ralphine Way heading up the valley.

[35] Mr Girvan said that the landscape could be seen as a gateway, but because of the self-contained nature of the Kākā Valley, any of those attributes were not compromised. Mr Milne, on the other hand, treated the change as simply an adjustment given the other urban elements, such as community parks. The gateway is logically Kākā Hill as the dominant feature as one passes up the valley.

[36] The elaborate landscape units’ analysis by Ms Steven in Figure 1 of her visual attachments was her personal Euro-centric assessment of how the landscape can be deconstructed. It was unclear how that related to the experience of being in a ‘gateway’ landscape.

[37] It is noteworthy that Ms Steven’s open space analysis and the gateway concept had no resonance in the submissions of tangata whenua, which universally supported PPC 28. Instead, tangata whenua saw PPC 28 as itself a legal ‘gateway’ to enlivening cultural values and associations and, through sensitive development, providing an economic base for appropriate ecological restoration.

[38] Mr Girvan confirmed that the significant landscape Boffa Miskell identified in the 2014-2015 study was the Maitai River corridor that excluded the site. That also makes sense from an RMA, Part 2 perspective because RMA s 6(a) only seeks to preserve the natural character of *rivers and their margins*. There is little in RMA, Part 2, that would support a preservation or protection paradigm for values relating to the openness of rural areas. It is acknowledged that this might qualify as an amenity value for the purpose of RMA, s 7(c) but:

- (a) That hardly overrides the powerful Part 2 and NPS-UD provisions engaged in this case; and
- (b) The Panel must also consider the direction in NPS-UD Policy 6(b), which states:

Policy 6: *When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:*

...

- (b) *that the planned urban built form in those RMA planning documents may involve significant changes to an area and those changes:*
 - (i) *may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and*
 - (ii) *are not, of themselves, an adverse effect*

...

Planning

[39] Ms McCabe, when questioned about the application of Policy 1 in NPS-UD, could not identify any respect in which the application did not meet that policy. The policy states:

Policy 1: *Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:*

- (a) *have or enable a variety of homes that:*
 - (i) *meet the needs, in terms of type, price, and location, of different households; and*
 - (ii) *enable Māori to express their cultural traditions and norms; and*

- (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and*
- (c) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and*
- (d) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and*
- (e) support reductions in greenhouse gas emissions; and*
- (f) are resilient to the likely current and future effects of climate change”.*

[40] Nevertheless, Ms McCabe continued to have some reservations about the need for the development in light of anticipated supply in the draft FDS 2022 despite the Joint Conferencing Statement by the economic and demographic experts.

[41] Ms McCabe did not seem to appreciate that the thrust of the NPS-UD is to increase supply. Particularly where it makes a significant contribution to housing capacity because it is economics 101 that supply enhancement is a key aspect of achieving housing affordability and price stability.

[42] It is not the function of planners to control the timing of land release based on projections of the Council that are cannot be achieved under the current plan provisions. Nor did Ms McCabe have the expertise to make such a judgment.

[43] Ms McCabe’s approach was inconsistent with the requirement in NPS-UD to make decisions on evidence and analysis (NPS-UD, clause 3.11) and to monitor the success of increasing capacity following the indicators in clause 3.9(1). The best evidence available at the moment is the evidence of the economics and demographic experts that PPC 28’s significant supply of residential land will contribute to a well-functioning urban environment.

[44] The Panel is also reminded of the evidence of Doug McKee from Bayley’s that shows that construction costs for apartments (that would be required for intensification as an alternative) are approximately \$4,000 per m² more than a standard 600m² section with a stand-alone dwelling. Mr McKee provided valuable insight into the Nelsonians’ preference for a plot of land. A point echoed for tangata whenua by Mr Toia in his reply.

Section 5 – Community expectation, as STM conceives it is against the legal framework of the RMA and planning instruments made under it

[45] A significant plank of STM's case was its reliance on so-called 'community expectation'. The Applicant does not accept that the STM petition provides a reliable basis for STM to claim that it is speaking on behalf of the Nelson community.

[46] New Zealand is a representative democracy. The Council decided PPC 28 should be accepted and evaluated according to the requirements of the RMA and on the evidence. The Council did not call evidence about community expectation but relied on Mr Girvan for expert analysis of landscape values.

[47] For the reasons given by Mr Spittal, the petition is unreliable.

[48] Additionally, the anticipated environmental results in the NRPS in DH1.7 (following from Policies DH1.3.2 and DH1.4.1) are:

"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".

[49] The words *reasonable expectations* are crucial. The expectations must be shown to be rational and appropriate in light of the norms of the RMA and the instruments made under it. That is the rule of law that legitimises state control of private land resources.

[50] It is also important to note that the policy direction in DH1.3.2 is to *have regard to community expectations*. The weight to be attached to these matters is contextual and a matter of assessment based on the evidence.

[51] Other relevant expectations are acknowledged by the NRPS, including property rights. Under AB6 where the NRPS states:

"With ownership comes an expectation of the ability to reasonably develop and use private land. In a property owning democracy, reasonable rights and expectations of private owners are respected".

[52] Chapter 5 of the NRPS expressly recognises tangata whenua expectations as important and acknowledges the significance of Te Tiriti.

[53] Therefore, private property rights and Te Tiriti interests coalesce into a powerful constraining force (following the lights of the NRPS and, now, more relevantly for housing the NPS-UD) when assessing PPC 28. Especially when it is plain the adverse externalities are modest against the significant hedonic benefits of PPC 28, including housing, cultural reinforcement, access to additional social infrastructure and increased recreational opportunities within the Site's landscape and through connections to other parts of Nelson.

[54] Community expectation, as STM seeks to apply it, is nothing more than a sub-group of Nelson attempting to exercise political willpower to appropriate private interests and impose a protection ethic the fruits of which are social exclusion against the legal requirements of the RMA and instruments made under it.

Section 6 – FDS 2022

[55] The draft FDS 2022 appropriately recognises the PPC 28 Site as a location for additional residential land. That recognition must be, in part, the product of dialogue with tangata whenua because tangata whenua interests are expressly addressed and recognised in Section 4 of that document. The explicit acknowledgment of tangata whenua interests in the draft FDS 2022 follows the direction in NPS-UD, clause 3.14(d).

[56] The Applicant's position is that there are other provisions of RMA, Part 2 and NPS-UD that direct the Panel to attach the importance of addressing tangata whenua interests (and other community housing needs) as outlined in Section 1 of these submissions.

[57] When NCC finally adopts the FDS, it becomes only a matter of regard under NPS-UD clause 3.17(1), unlike other more directive policies in the NPS-UD that support PPC 28. In the unlikely event the Site is not identified in the final FDS 2022, then Ngāti Koata considers that that would be against RMA, Part 2, ss 6(e), 7(a) and 8, as well as those other provisions of NPS-UD recognising tangata whenua interests. That submission obtains great force in light of the historical patterns of dispossession outlined in Section 1 of these submissions.

[58] For that reason, the Applicant submits that the Panel should not wait for the final FDS 2022 to provide its recommendations. Further, for the reasons stated in these submissions' conclusion, it is desirable that the Panel proceed with reasonable speed to make recommendations.

[59] The development of the FDS 2022 was delegated to a special purpose joint committee of Tasman District and Nelson City Councils. The joint committee had a meeting on 27 July 2022 to consider the recommendations of its subcommittee. The agenda paper dated 27 July 2022 recommended item 8 on page 23 of the agenda, the retention of area N-106 (Maitai Bayview PPC 28). A copy of the agenda is **attached** with this submission. The joint committee approved that recommendation at its meeting on 27 July 2022. The matter now goes to the full Councils of both territorial authorities for confirmation.

Section 7 – The realignment of the Kākā Stream

[60] PPC 28's Structure Plan shows a realigned stream in its lower reaches but the Applicant does not seek in the provisions of PPC 28 direct support for that outcome. Accordingly, in V4 - PPC 28 all references to realignment have been removed.

[61] The provisions for restoration and enhancement of natural character including that of the Kākā Stream have been refined and reinforced. It remains the collective opinion of the Applicant's experts that this is best achieved by the realignment of the Kākā Stream. That is so without accounting for the significant urban design and housing benefits that will flow from the realignment. While these additional benefits are not the driver for the ecological assessments of the Applicant's experts, they support the desirability of the alignment shown in the Structure Plan.

[62] Ms Blakely, on the other hand, remained unconvinced that a realignment would be better than the existing alignment. It was not apparent Ms Blakely appreciated

- (a) The scale of change to river morphology required to accommodate stormwater flows even if the existing alignment of the Kaka Stream is unaltered.

- (b) That restoration of the Kākā Stream is practically achievable only if it occurs hand in glove with appropriate levels of development contemplated by PPC 28.

[63] The Structure Plan was designed to recognise the framework of the NPSFM 2020 and the expectation that any changes in bed morphology or alignment of a Kākā Stream must be consistent with the highest standards of restorative ecology. The Applicant is content that its technical evidence will support the alignment changes shown in the Structure Plan when a resource consent is sought. The Applicant acknowledges that it takes the risk associated with that.

Section 8 – Managing impacts on the Maitai catchment from sediment and contaminants

Friends of the Maitai

[64] The Applicant appreciated the evidence of the Friends of the Maitai. The Panel will note that on page 17 of the PPC 28 application, the Applicant acknowledges the contribution of the Friends of the Maitai and expresses the wish to work collaboratively with that group to ensure the best possible freshwater outcomes. That reflects Ngāti Koata’s ‘Ngā tikanga value’ - Me whakatau ma - roto i te korero – Resolution through conversation.⁵

[65] Dr Young acknowledged Mr Parsonson’s evidence that it was unlikely the sediment would affect the recreational values of Dennes Hole. His concern was with sediment ultimately ending up in the estuary and Tasman Bay.

[66] Dr Young accepted that the PPC 28 freshwater principles were appropriate but was uncertain about their effectiveness. In part, that arose from scale at which tools such as the Stormwater Management Plan were pitched.

[67] The Friends’ principal concern appeared to be about the effectiveness of implementation.

⁵ See also Draft FDS 2022 Section 4 “Twi and Hapu Values and aspirations”

[68] Dr Young and Mr Grey agreed that appropriate development was feasible and was looking to the Panel to ensure that the provisions secured a careful implementation of development.

Erosion and sediment control

[69] Mr Ridley implacably maintained the view that there was insufficient information on erosion and sediment control. He shifted from his original position about the need for modelling to an expectation of some form of land-use capability assessment that would identify areas where earthworks were prohibited. Mr Foley addresses that point in his reply evidence.

[70] It is submitted that Mr Ridley's idea that at a plan stage, one should identify areas where development is prohibited is unrealistic. To make a confident assessment that excludes any area from development beyond the sophisticated patterns of zoning and overlays in PPC 28, it would be necessary to undertake a detailed site-specific assessment more appropriate for a resource consent.

[71] In addition, using plan provisions to exclude areas is a clumsy tool compared with methods such as requiring geotechnical assessment at the time of development to identify areas that should be excluded from earthworks implemented by means of consent notices. That suits a more granular approach to the management of areas unsuitable for development and enables landowners to vary consent notices required if they can justify variation through the RMA process. Plan change exclusions lack that flexibility and therefore require unrealistically high levels of assessment before they can be justified under RMA s32. It becomes a self-fulfilling spiral of more and more information with increasingly granular analysis of issues that should be left to resolve at the design stage.

[72] Mr Ridley, when asked by Commissioner Mark-Brown about whether, in his opinion, the risks can be managed at the resource consent stage, pointed to his experience with the Waka Kotahi Warkworth project, where the exclusion of areas was a criterion for route choice for that major motorway. Mr Ridley's example is

problematic. Respectfully that answer shows a lack of understanding of different RMA processes. In particular:

- (a) The multi-criteria analysis for choosing a designation route is not the same as identifying areas where earthworks should be avoided in a plan change. The former forms part of an overall alternatives assessment of the desirability of the route, including the ability to engineer the route appropriately; and
- (b) A designation is well-known to be a hybrid planning tool. It has a combination of a plan and resource consent features because, the designation operates as an authority for the stated public works. It is not comparable to a plan change provision where separate resource consent processes are required.

Information requirements for freshwater-related matters

[73] This issue has been addressed in detail. It is not a ‘one size fits all’ requirement. The key is the scale of risk and the appropriateness of the plan machinery to manage that risk. Also see the supplementary legal submissions for the Applicant on MfE’s publication on RMA s 32 responding to the Council’s legal submissions.

[74] PPC 28 is a multiple ownership enterprise, and the final form of development will and can only be analysed when and if PPC 28 is approved. That is the only feasible way to coordinate multiple parties with diverse interests. Collaborative efforts of this type should be welcomed, and decision-makers should recognise and provide for the incremental steps necessary to advance these initiatives.

[75] The direction in NPS-UD to territorial authorities to be responsive to private plan changes has procedural implications. It should mean that unreasonable information requirements are not placed on private initiatives to open land for development. As long as the opportunities and constraints are adequately assessed and the feasibility established, the desirable environmental outcomes expressed in the plan provisions should set the parameters for resource consent discretion. The Panel is entitled to assume the provisions of PPC 28 will be appropriately

implemented. If the plan outcomes cannot be achieved, then the scale, rate or manner of development may have to change. That is the developer's risk.

Stormwater management

[76] Ms Purton helpfully provided a list of improvements PPC 28 and additional detail as to the information that should be contained in an STM.

[77] Mr Mills has updated and improved the Stormwater Management Plan even though the Applicant does not intend that document to be incorporated by reference in PPC 28. It is not incorporated by reference because the Applicant acknowledges that greater detail will be required at the commencement of development when a Stormwater Management Plan is required to secure an integrated catchment management regime. The current draft Stormwater Management Plan nevertheless remains a useful resource available to the Council to give an indication of the type of document that would inform the development process.

[78] The information requirements of Schedule X have been improved to narrate the information required within the Stormwater Management Plan (See X.13). These are permissible and anticipated plan provisions under RMA, s 75(2)(g) and (h), which reads:

“(b) any other information required for the purpose of the territorial authority’s functions, powers, and duties under this Act.”

[79] The Panel will also note the integrated catchment principles in V3-PPC 28 are now elevated to Policy in “RE6.3 Integrated Catchment Management Tools and Principles” with greater detail and more explicit requirements.

Section 9 – The Woolshed

[80] Mr Miller and Dr McEwan have different views about the significance of the values of the woolshed. The Applicant considers that Dr McEwan overstated the association of that building with Ralphine Richardson when the farm was leased for long periods and underwent continuous reconstruction.

[81] A significant issue is also the suitability of the woolshed for adaptive reuse. Under Dr McEwan's and Ms Sweetman's management approach, the outcome is

foreseeable. The Applicant, including Ngāti Koata will face an uphill battle to even use parts of the building elsewhere, such as in the community centre. If modest adaptive re-use was truly Dr McEwan's intended outcome, then she should have arranged for policy and assessment criteria should be offered that clearly indicated that. Rather, on her own initiative Dr McEwan undertook an assessment for scheduling purposes that would lead to protection framework difficult to overcome.

[82] It is also notable that Ngāti Koata's and tangata whenua heritage values were absent from Dr McEwan's fabric-centric assessment. Māori heritage values exist within the place and the whenua (rather than structures) of significance to Ngāti Koata. The definition of historic heritage in the RMA is broad and sufficient to capture those heritage values articulated by Ngāti Koata. The definition reads:

“historic heritage—

(a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:

(i) archaeological;

(ii) architectural;

(iii) cultural;

(iv) historic;

(v) scientific;

(vi) technological; and

(b) includes—

(i) historic sites, structures, places, and areas; and

(ii) archaeological sites; and

(iii) sites of significance to Māori, including wahi tapu; and

(iv) surroundings associated with the natural and physical resources”.

[83] The question that follows is why did Dr McEwan fail to analyse this tangata whenua heritage when the obvious resource management issue arising from PPC 28 is that protecting the woolshed would likely frustrate the appreciation of cultural and heritage values by Māori that led to tangata whenua involvement in the project.

The woolshed is within an area slated for higher density. Again, a blinkered approach.

[84] Mr Miller is a highly skilled building surveyor, and his opinion about the potential adaptive re-use of the building was powerful. It would be tragic for Ngāti Koata's interests to be frustrated by a structure that plainly is unsafe and at the end of its useful life.

[85] The provisions in PPC 28 that the Applicant offered in V3 – PPC 28 remain and are generous considering the evidence. These provisions have been refined to identify specifically the heritage fabric to which the standard applies (see V4 – PPC 28 ((X.10) page 22).

Section 10 – Scope and other issues arising from the hearing

Heritage

[86] The Applicant agrees with the Panel that the Council cannot piggyback on PPC 28 to schedule heritage resources.

Noise impacts

[87] Some submitters raised the issue of noise impacts from development which in turn raised the question of why a noise impact assessment was not provided in support of PPC 28. The Applicant's answers to those matters are:

- (a) The provisions of the NRPM will control noise emissions from residential use, and so the anticipated envelope of noise impacts can be extrapolated from those provisions. These are vanilla controls.
- (b) There is no evidence that the impacts are likely to be significant from residential use because there are no sensitive receiving locations near residentially zoned land in PPC 28 that could be potentially affected. For that reason the Council did not consider it necessary to require an acoustic assessment.
- (c) The existing environment is rurally zoned and has noise controls that provide for a productive environment.

- (d) Any construction noise will be controlled by the usual construction standards applied to the development of this type.

Ministry of Education request

[88] The summary of submissions records the Ministry of Education's submission point, S376.002, as follows:

"Ongoing consultation from the applicant regarding the timeframes for realising development of the site in order to plan for increased school rolls at Clifton Terrace School, Maitai School, Nelson Central School, Nelson College, and Nelson College for Girls and to ensure the adequate provision is made in the plan change to enable educational facilities within the plan change area".

[89] Conceptually the second component of that submission point arises from, and is reasonably connected to, the relief sought at [4.5] of the Statement of Primary Evidence of Karin Lepoutre dated 27 June 2022. The detailed provisions were not specified in the submission form as required by the prescribed form in regulations. Despite that, it would be unsafe to treat the Ministry of Education's request as outlined by Ms Lepoutre as beyond scope.

[90] It is submitted that the relief that the Ministry of Education seeks aims at a policy 'tail-wind' for the establishment of educational facilities (if required) on the Site. The Ministry of Education implements the provision of educational facilities by means of a designation. Therefore, the aim of the provisions recommended by Ms Lepoutre at [4.5] of her evidence is to support a future designation application using, in part, the statutory regard in RMA, s 171(1)(a)(iv).

[91] Ms Lepoutre's proposed provisions, provide the Ministry of Education a platform to argue that the NRMP supports a notice of requirement.

[92] The template that the Ministry of Education uses makes sense for greenfield residential generally, but the template approach needs to yield to the circumstances of each case. In this case, there are two circumstances of particular relevance, *viz*:

- (a) There is no evidence of a need for additional education facilities on the Site to meet the City's education needs and nor is there evidence the Site would be suitable to meet a wider catchment need.
- (b) The flat land in Kākā Valley is land in which Ngāti Koata has an interest. That raises the question whether, under RMA Part 2 and NPS-UD, it is appropriate to provide a 'tail-wind' for the Ministry as an agency of the Crown.

[93] On the second point in the paragraph above, it is submitted that for the reasons in Section 1 it would be contrary to the Te Tiriti principle of 'active protection' to give the Crown a policy 'tail-wind' for the acquisition of Ngāti Koata interests in land to be zoned residential. That obligation of 'active protection' obtains great force in light of the historical grievances outlined in the *Proprietors of Wakatū v. Attorney-General* in Section 1. Also, attached with these submissions is a decision of the Privy Council in the well-known case of *McGuire v. Hastings District Council*.⁶ That case concerns the performance of designating powers affecting tangata whenua interests. That decision strongly supports the Te Tiriti analysis above.

Scope for non-complying activity class for Kākā Hill

[94] PPC 28, as notified, proposed a prohibited activity class to preserve the significant ecological (terrestrial) values (SNA) identified on Kākā Hill by NCC as a part of the draft Nelson Plan. It also provided a high level of protection for the landscape values (backdrop and skyline area) and also a significant cultural resource to Ngāti Kuia.

[95] Ngāti Koata considers that the prohibited activity class unduly restricts opportunities for structures on the lower slopes to enable cultural practices and ecological restoration facilities.

[96] Several submissions from tangata whenua identified the significance of Kākā Hill. Ngāti Kuia through Te Runanga O Ngāti Kuia Trust identify Kākā Hill as significant for Ngāti Kuia Tupuna Te Whiro. Ngāti Kuia supported the

⁶ *McGuire v. Hastings District Council* [2002] 2 NZLR 577.

protection of Kākā Hill proposed by PPC 28. However, in the section entitled “The particular aspects of our Submission” the submission states:

“Potential for cultural values to be recognised at the subdivision stage; however, we are at wanting to have the opportunity to erect appropriate you and/or memorial for the tupuna, which may be at odds with the rules for a Conservation Zone. We wish to have the ability to appropriately acknowledge the significance of tupuna here.

[97] The reference to the Conservation Zone concerns Kākā Hill. The submission identifies types of structures that a prohibited activity rule would preclude. It is reasonable to interpret the submission as seeking some latitude to construct structures for cultural purposes.

[98] Ngāti Rārua also filed a submission and identified Kākā Hill as of significance to tangata whenua. In item 9 of the table accompanying the submission, Ngāti Rārua states:

“Ngāti Rārua supports the prohibition of buildings within the Kākā Hill backdrop and skyline area and the significant natural area to protect the values of these areas.”

[99] The creation of a non-complying activity class does not open a gateway for more than minor effects if the policy framework is structured to ensure that Kākā Hill is protected from more than minor effects.

[100] The type of culturally appropriate structures to facilitate connections to Kākā Hill that both Ngāti Kuia and Ngāti Koata contemplate must have minor landscape and natural character effects under the framework of V4 – PPC 28.

[101] Making modest provision for structures is a reasonable consequence of Ngāti Kuia’s submission, and hence there is scope for the changes in V4 – PPC 28 to create a non-complying activity class bedded in a very restrictive policy.

[102] The gifting of Kākā Hill to Ngāti Koata is a transformative and healing event that occurred well after the plan change to PPC 28 was notified. Ngāti Koata will need to reflect on their aspirations for managing that important natural feature and will consult with other tangata whenua. If more expansive provisions enabling more opportunities for land use are required to accommodate those aspirations, then the appropriate time to do so is through a later plan review process.

Scope for adding indicative road at Walters Bluff

[103] Mr English appeared before the Panel on 15 July 2022 in support of his submission and contended that the amendment to the Structure Plan showing Indicative Road to Walters Bluff was beyond the scope of the PPC -28. That Indicative Road was added following expert conferencing between the Applicant and Council experts on urban design and transport.

[104] Mr English is wrong on the question of scope. In particular:

- (a) David Jackson filed a submission under the heading “Decisions Sought” and stated at 1(b) *provide on the Structure Plan Indicative Road connection and position that connect to Walters Bluff and to Frenchay Drive.*
- (b) Lincoln and Christine McKenzie filed a submission stating *an exit down Walters Bluff Road may be useful.* That was a recommended response to their proposal to reduce large traffic volumes on the downstream roading network.
- (c) Mr Olorenshaw filed a submission that talked about a connection at Walters Bluff (clause 2.2) that would reduce traffic demand. This proposal was in the context of a request to have a locked gate at Ralphine Way.
- (d) The Waka Kotahi submission noted in various places that the Applicant’s TIA referred to a potential connection to Walters Bluff, but that was not shown in the Structure Plan. Waka Kotahi’s general request for relief sought analysis and amendments, *as discussed in this submission.*

Section 10 – V4 – PPC 28

[105] The provisions of V4 – PPC 28 provide, it is submitted clear and appropriate policy direction on sustainable environmental outcomes for the

protection, management and use of natural and physical resources on the Site. It does so by supplementing directive policy with methods such as:

- (a) Detailed information requirements to demonstrate the policy framework is achieved; and
- (b) Discretions and matters of control of sufficient scope to:
 - (i) Decline consent if the estimable policy requirements are not delivered by the application; and
 - (ii) Impose conditions to ensure the policy framework is achieved.

[106] The Applicant, of course, recognises the Panel can make further refinements as part of decision-making.

[107] The evidence provided at the hearing and this reply evidence provide a sure foundation for the evaluation of the refinements of the plan change encompassed in V4 – PPC 28.

[108] Also, Ms Sweetman was satisfied PPC 28 could be approved with the right framework. Mr Lile explains how Ms Sweetman’s ideas have percolated through the revision process.

[109] It is worth observing that the arrangement and design of plan provisions in a Schedule or Precinct will look different from provisions of wider scope in a planning instrument because the cascading provisions have a spatially confined lens where the policies and methods are co-extensive and co-located addressing the site specific opportunities and constraints in a package.

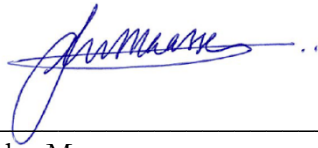
Section 11 – Conclusion

[110] The design of PPC 28 for greenfield development on the urban boundary of Nelson is without peer in the quality and thoroughness of its assessment and the detail of its provisions to secure sustainable outcomes.

[111] The needs that PPC 28 seek to address are pressing needs in the Nelson community.

[112] It is highly desirable that the Panel's recommendation, if possible, is provided in time for consideration by the current Nelson City Council rather than a new Council after the local body elections. The existing Council is best placed to make any final decision on the plan change, given its knowledge of the application and the process.

Dated 29 July 2022



John Maassen
Counsel for the Applicant