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

SUPPLEMENTARY LEGAL SUBMISSIONS FOR THE APPLICANT IN RESPONSE TO THE COUNCIL'S SUBMISSIONS DATED 8 JULY 2022

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MAY IT PLEASE THE PANEL

[1] These are supplementary legal submissions in response to the submissions for the Council dated 8 July 2022 by Ms Anderson.

[2] Concerning Ms Anderson's critique of Counsel's analysis of information requirements for a plan change, Ms Anderson's submissions do not address the specific issues identified in that analysis. They are a weak analysis of the relevance of RMA, s 32.

[3] Ms Anderson's submissions provide one concrete example of her argument at [13] by postulating a rhetorical question:

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

[4] Counsel agrees that if there is a permitted activity in a plan change, then an appropriate level of information is required as to the effects of that authorisation.

[5] However, Counsel's analysis was about information requirements touching on the Freshwater Topic concerning PPC 28. Particularly, information concerning risks associated with stormwater and erosion and sediment control. PPC 28 has never proposed that activities creating freshwater risks would be permitted activities. Instead, as explained by Mr Lile, all of the activities potentially causing the effects are captured by the relevant policies and rules in the NRMP and further constrained by the suite of provisions of Schedule X.

[6] Counsel rejects the argument that Ms Anderson makes that RMA s 32 does not entirely support the Applicant's analysis.

[7] The starting point is that a plan change requires risk analysis that (after considering the significant opportunities and constraints) has an eye to developing the right planning machinery for evaluating engineering

solutions yet to be devised in detail. That is not true for a resource consent which only has risk analysis allowing for uncertainties from the prediction of a proposed solution.

[8] The unique character of risk analysis in plan change assessments was articulated as long ago as 2008 by Jackson ECJ in *Long Bay-Okura Great Park Society Incorporated v. Auckland Regional Council.*[1] In particular, the Panel is referred to [45-46] of that decision.

[9] The *Long Bay* decision then proceeded to evaluate the planning machinery to ascertain whether the risks identified following the opportunities and constraints analysis are adequately managed by the planning provisions and Structure Plan. The Court made an interim decision directing alterations to optimise the plan change.[2]

[10] For completeness, the idea of risk is found in RMA, s 32(2)(c), which states:

> *An assessment under subsection (1)(b)(ii) must—…*
>
> *(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.*

The Panel will note that the risk of *acting* and *not acting* must be assessed.

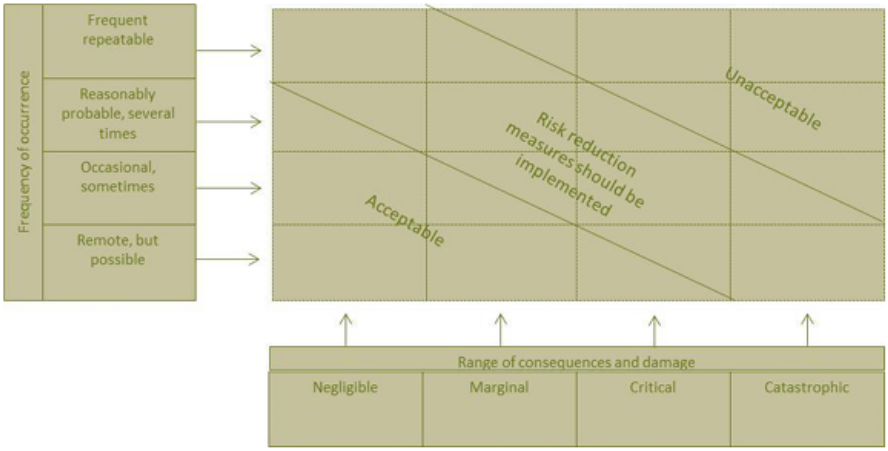
[11] The Ministry for the Environment Guidelines on RMA, s 32, developed a methodology (adding to *Long Bay*) following the change to RMA, s 32 in 2017.[3]

[12] The MfE Guide in Figure 4 provides a conceptual framework for assessing risk based on the frequency of occurrence and potential impact. See Figure 4 below.[4]

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[1] *Long Bay-Okura Great Park Society Incorporated v. Auckland Regional Council* Decision No. A078/2008.
[2] Ibid at [707]
[3] Ministry for the Environment. 2017. *A Guide to Section 32 of the Resource Management Act: Incorporating changes as a result of the Resource Legislation Amendment Act 2017*. Wellington: Ministry for the Environment.
[4] Ibid at p 46.

Figure 4: Assessing response to risk assessment



[13] Then, in describing different approaches to managing identified risk, Table 9 of the MfE Guide contains the following:

Table 9: Different approaches for managing risk

Step	Approach
Building flexibility into policies and rules to allow for managing risks	This could mean setting an activity status for certain activities that allow for further assessment of risk at consent stage.
Building an adaptive management approach[47] to accommodating new development or use	This may, for example, mean adopting the proposal, but setting certain thresholds and building in regular policy reviews, while more scientific research is being undertaken.
Setting up a policy framework to deal with risk at a lower level of decision-making	For example, a national policy statement could defer to a regional policy statement, a regional policy statement to a regional plan, or a district plan rule to a consent application. This acknowledges that better knowledge may be present in subsequent processes where more in-depth analysis may be undertaken.
Apply the precautionary principle if there is risk of serious or irreversible damage	This would be to either act or not act depending on the proposal even if uncertainty is present, or amend the proposal so that it avoids serious or irreversible damage.

[14] Table 9 shows that when addressing RMA, s 32, it is a legitimate approach to build policies and rules to manage those risks.

[15] Therefore, for example, concerning the erosion and sediment control issue, Mr Parsonson has analysed the magnitude of risk (being temporary and potentially appreciably impactful) and satisfied himself the risks are managed appropriately through the planning machinery. He considers Mr Ridley's information expectations are misplaced.

[16] For the reasons above, Counsel considers that Ms Anderson's analysis is wrong and that RMA s32 confirms Counsel's analysis of information requirements for the relevant issues in PPC 28.

[17] Ms Anderson's analysis is also inconsistent with the Council's practice because, as Mr Parsonson notes, he has been involved in several plan changes in nelson where the Council did not require modelling of the type proposed by Mr Ridley.

[18] Concerning Ms Anderson's analysis at [32] onwards under the heading "Ombudsman's Decision on the FDS 2019", Counsel agrees with the analysis that Ms McCabe has no justification for relying on the Ombudsman report to disregard FDS 2019.

[19] Concerning Ms Anderson's analysis of the *Relevance of the Future Development Strategy 2022 and 2019* at [18-21], it is submitted that the FDS 2019 was produced under NPS-UDC and now qualifies as a relevant statutory regard for the reasons given by Ms Anderson.

[20] It is submitted. However, [21] of Mr Anderson's analysis is incorrect that the Panel may have to consider the finalised FDS 2022 if it is released after the close hearing without the parties' views because:

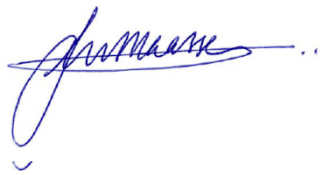
(a) RMA ss 74 and 75 do not provide for evaluating instruments not in existence at the time the hearing is held, which is the first performative step of the reasoning process; and

(b) It would be against the rule of law and justice to consider instruments unavailable to the parties before the hearing. In this respect, the Supreme Court's direction to read statutes consistent with the New Zealand Bill of Rights on justice requirements is pertinent.[5]

[21] Additionally, the principal function of the FDS 2022 is how to perform the function in NPS-UD 3.13, which is to support the integration of planning decisions with infrastructure planning and funding decisions. Therefore, it is intended to inform the LTP process. It does not become particularly relevant to the assessment under the Resource Management Act.

[5] See for example, *R v Hansen* [2007] NZSC 7

Dated 10 July 2022.



John Maassen
Counsel for the Applicant