

## Appendix 5: Legal Advice

## Memo

**DATE:** 18 October 2021

**TO:** Vicki Barker and Justine Ashley

**FROM:** Paul Rogers

**CLIENT:** Selwyn District Council

**OUR MATTER:** 038777\426

**SUBJECT:** **PROPOSED DISTRICT PLAN (PDP) REVIEW-ENERGY AND INFRASTRUCTURE POLICY EI-P2 WEIGHING OF SAME AGAINST NFL-P1(E) AND NFL-P2(C)**

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### ISSUE

- 1 Submitter DPR-0101 – Chorus New Zealand Limited, Spark New Zealand Trading Ltd and Vodafone New Zealand Ltd through the evidence<sup>1</sup> of their resource management consultant, Mr Chris Horne opposes and alternatively seeks amendment to policy E1-P2.
- 2 The reason for the amendment is to deal with a “risk” that natural environments policies (NFL-P1 and NFL-P2) within the Natural Features and Landscapes chapter (NFL) which use the word *avoiding* will essentially negate policy E1-PS.
- 3 The submitter seeks amendment to policy E1-P2 to provide guidance on how to weigh this provision with and against other provisions, notably those in the NFL chapter of the PDP.
- 4 In detail the submitter proposes the following amendments detailed in bold and underlined to the PDP policy EI-P2:

*Minimise the adverse effects of important infrastructure, and renewable electricity generation on the physical and natural environment by:*

*3. limiting the presence and effects of development within Outstanding Natural Landscapes, Visual Amenity Landscapes, areas of significant indigenous vegetation and habitats of indigenous fauna, sites of historic heritage and site and areas of significance to Maori. **When applying the objectives and policies of other chapters in the District Plan in regard these environments, the following matters shall be taken into account and weighed with those other provisions:***

- a. **the project or work is recognised as important infrastructure;** and*
- b. **can demonstrate an operational or functional requirement for the location;** and*

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<sup>1</sup> Evidence Dated 8 September 2021 Paragraphs 28,32and 34.

*c. can demonstrate through site, route or method section the minimisation of effects on the environment; and*

*d. integrate design measures and management methods to mitigate adverse effects. ....*

5 The submitter in a supplementary paper dated 27 September 2021 proposed an additional solution which was to amend the preamble to policy NFL-P1 as follows.

6 *Recognise the values of the identified outstanding natural features and landscapes described in NFL-SCHED1 and protect those values from adverse effects, subject to a consideration to the extent important infrastructure may be appropriate under policies E1-P1 and E1-P2, by:.....*

7 Currently there are no specific provisions within the PDP detailing and explaining the relationship particularly where an overlap may arise between district wide chapters and those chapters which deal with more specific matters.

8 However there are notes to plan users that advise where a rule in another chapter is referenced the associated objectives and policies will also apply when assessing an application for a resource consent.

9 Other than the above, the approach, where there is an overlap is to rely on an interpretive approach where more weight is given to specific policies in a specific chapter over the more generic policies contained in a district wide chapter.

10 However that particular approach, may not take into account and or adequately provide for the interpretation of a policy in a district wide chapter that includes a direction to *avoid*. In other words the *avoiding* policies may prevail over the specific.

11 The additional complicating factor is that the status of the activity for the consideration of the "*Avoid policy*" may be more stringent than that required by the more specific policy provisions which may have a lower consenting threshold for certain types of activities.

## **SUMMARY – CONCLUSIONS**

12 We think amendments are required to the NFL policies to give effect to national policy statements in particular on renewable energy as well as regional policy statements providing for important infrastructure consistent with the EI chapter.

13 Amending the NFL policies to recognise both existing important infrastructure allowing its maintenance an upgrading while ensuring adverse effects are appropriately managed, and to provide for new important infrastructure, provided locational functional and operational needs are established would provide consistency with the Energy and Infrastructure (EI) chapter.

14 Ensuring the consenting status for upgrades and maintenance of existing infrastructure and establishment of new infrastructure in both chapters is consistent would help in preventing any *avoid* policies trumping the EI chapter.

15 The proposed amendments would assist in making the NFL chapter internally consistent and the overall plan clearer and easy to use.

## DISCUSSION

- 16 We do need to consider the PDP provisions to assist in determining whether the amendments that the submitter seeks are required and where within the PDP they should be located.
- 17 Essentially our focus is on determining if there are legal reasons to amend and if amendments would be helpful in making the plan clear and coherent and easy to use.
- 18 The natural features and landscapes chapter at Objective 1 essentially replicates s 6(b) RMA. The plan itself in Schedule 1 (NFL-SCHED1) identifies outstanding natural features and landscapes.
- 19 Under s 6(b) while priority is accorded to the protection of outstanding natural features and landscapes from inappropriate subdivision use and development much revolves around what is ultimately determined, in a resource consent context, as being inappropriate.
- 20 Case law has established that inappropriate has a wider meaning than unnecessary. However appropriateness will be considered on a case-by-case basis but must be judged and assessed from the point of view of preserving or protecting the matters identified as being of national importance.
- 21 Case law has also established that development becomes inappropriate when it diminishes in any significant way the outstanding natural landscape or the reasonable person's perception of it.
- 22 There are many decisions that consider the appropriateness or not of a development within an area identified by a district plan as containing an outstanding natural feature or landscape. Many of those cases involve consideration of windfarms, renewable energy.
- 23 Those decisions confirm that identification of a natural feature or landscape at a district or regional level as being outstanding in a plan, is not necessarily determinative of the issue. However it is obviously a highly relevant consideration.
- 24 A common thread running through the assessment of a development such as a wind farm, is to consider the question as to whether or not the siting of wind turbines would diminish the quality of the outstanding features and landscapes or diminish the experience of visitors to them.
- 25 Matters at issue revolve around the scale of the landscape in relation to the scale of the proposed development. In the case of an extensive landscape appreciation of landscape generally has been held to not be hindered by the establishment of a proposal such as a wind farm. This is so because the development can be accommodated within the landscape without diminishing the outstanding natural landscape or the reasonable person's perception of it in a significant way.
- 26 Many of the cases result in approval particularly in the instance of windfarms because the values protected by s 6(b) are provided for by conditions for management of the development that would protect any outstanding natural features, while accommodating the development that would in turn meet the purpose of the RMA.

- 27 NFL objective 2 is consistent with objective1 seeking maintenance and where possible enhancement of the visual amenity landscapes within the district.
- 28 The NFL policies though, by frequently using the word *avoiding* sends, we consider a much stronger message compared to the objectives. The objectives particularly objective1 allows for consideration of what is and isn't appropriate. However the policies particularly policy NFL-P1e. seek to prevent or defeat buildings and or structures that break the skyline.
- 29 Some of the NFL policies allow some consideration of the effects of development on the scheduled natural features and landscapes. For example NFL-P1a. suggests there are some parts of outstanding natural features and landscapes that are more appropriate or have a greater capacity to absorb change for limited subdivision use and development.
- 30 NFL policy b. possibly presents opportunity in that it might be possible to demonstrate that the use and development does not detract from extensive open views or does not detract from or damage unique landforms and landscape features.
- 31 The core point remains that there is a probable disconnect between the NFL policies utilising the word *avoiding* when set alongside the NFL objectives.
- 32 When a resource consent is required for buildings and structures in an outstanding natural landscape and visual amenity landscape the matters for control or discretion detailed in the PDP come into play. In particular NFL-MAT3.8. is relevant because it provides for consideration of the extent to which the proposal has functional needs or operational needs for its location. The same approach is taken for earthworks in a visual amenity landscape (NFL-MAT4.6).
- 33 So these evaluative matters are more in keeping with the thrust of the NFL objectives than that of the policies. However in the heat of a contested resource consent we could well imagine significant reliance would be placed on the word *avoiding* in the NFL policies so as to support a particular outcome.
- 34 Our other issue with the NFL policies not providing much in the way of recognition for important infrastructure is that argument arises that those policies may not give effect to higher order documents in particular National Planning Instruments as well as the Canterbury Regional Policy statement which both provide respectively for renewable energy and address and provide for regionally significant infrastructure.
- 35 We do not think it is necessary to consider the EI chapter in detail because its approach in relation to important infrastructure is much more enabling and gives effect to the NPS and CRPS.
- 36 The EI objectives and policies recognise and provide that important infrastructure will at times be located and operated in sensitive receiving environments. So management of adverse effects on the physical and natural environment are required as distinct from avoiding locating important infrastructure in sensitive receiving environments.

## ADVICE

- 37 We do think some amendment of the NFL chapter is required to ensure consistency with the EI chapter, and to ensure the NFL chapter gives effect to

National and Regional Policy Statements and to assist in making the NFL chapter internally consistent. By internally consistent we mean to bring the policies more into line both with the objectives and with the matters detailed for assessment for controlled and discretionary activities.

- 38 We consider the best place to make amendment is within the NFL chapter within its policies. The submitter within its 27 September 2021 memoranda suggests amendment to NFL-P1 within the opening paragraph with the intention of making policy 1 subject to a consideration to the extent important infrastructure may be appropriate under policies E1-P1 and E1-P2.
- 39 While we recognise the purpose of that amendment, for a person reading the plan such amendment may lack clarity. As well absent the presence of a resource consent context to enable consideration the submitter proposed amendment may be uncertain in meaning.
- 40 One useful outcome of this proposed amendment is that all of the policies that include the word *avoiding* are subject to the opening paragraph. While this leaves a limited ambiguity it does save need to amend each and every policy that contains the *avoiding* word.
- 41 Our preference would be to utilise the already existing approach contained within NFL-P1k. where existing infrastructure such as the Porters Ski and Recreation Area is recognised and its ongoing use and development is provided for while ensuring outstanding landscape values of the area are recognised and protected from inappropriate use and development.
- 42 Similar wording could be developed to recognise and provide for existing important infrastructure as well as for the development of future and/or new important infrastructure.
- 43 As well some of the wording already present within the EI chapter, such as a requirement to have a functional need or operational need to locate in a particular area could be included within the NFL policies while avoiding duplication. If such amendments were included it would dovetail more easily into the existing matters for assessment already contained within the NFL chapter.
- 44 As well so as to influence the interpretation of the policies that contain the word *avoiding* the amending policy could be prefaced with the words notwithstanding the above policies a., b. e.
- 45 Having a specific NFL policy response is we think to be preferred to amending the opening paragraph of NFL-P1 because it is clearer and as we said synchronises better with the matters for assessment in the NFL chapter.
- 46 The next matter that will need attention is to cross check consistency of the resource consenting status of establishing important infrastructure under the EI chapter with that of the NFL chapter, particularly where that important infrastructure is to be established within an outstanding natural landscape or close to or nearby an outstanding natural feature.
- 47 However we do recognise that the default position of the more stringent status would apply but synchronising the two within the PDP would assist clarity given the subject matter overlap.

- 48 We have not undertaken a cross check to determine if there is scope for such amendments but have assumed this to be the case.
- 49 Finally we do note within the EI chapter under the heading "Notes to Plan Users" note 3 records that where rule requirements from another chapter have been cross referenced within the EI chapter the relevant associated objectives and policies also apply when assessing an application for resource consent. To determine the status of an activity users of the plan are directed to that section of the plan entitled "How the Plan Works."
- 50 We did identify E1-R31 which relates to other renewable electricity generation and renewable electricity generation activities. This rule relates to all zones and provides that the establishment of a new, or expansion of existing renewable electricity generation or a renewable electricity generation activity not provided elsewhere is a discretionary activity.
- 51 Similarly E1-R35 provides that establishment of a new or expansion of existing important infrastructure, including network utility structures, where it is not been provided for elsewhere has a discretionary status. We are unclear about the resource consenting status for these activities under the NFL rules.
- 52 Rule E1-REQ12 provides for structures in special areas and in relation to the VAL and ONL overlay does link to NFL-R1. So ensuring all linkages are comprehensive and detailed will be important.

## **CONCLUSION**

- 53 We are happy to discuss and answer any questions you may have as well as provide any clarifications needed.