

Before the Hearings Panel

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of the Proposed Far North District Plan, a proposed plan under Part 1 of Schedule 1 to the RMA

**MEMORANDUM OF COUNSEL FOR THE FAR NORTH DISTRICT COUNCIL IN
RELATION TO HEARING 15B**

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TO THE HEARINGS PANEL:

INTRODUCTION

1. The Proposed Far North District Plan (**PDP**) was publicly notified on 27 July 2022 and primary submissions closed on 21 October 2022. Further submissions closed on 4 September 2023.
2. Hearing 15B relates to rezoning requests for new Special Purpose Zones. The submission on behalf of Far North Holdings Limited (**FNHL**) seeks to rezone Opuā Marine Business Park, Colenzo Triangle and the Bay of Islands Marina to Mixed Use. It also requests a Bay of Islands Marina Development Area be applied to its landholdings at Opuā. The evidence in chief of Mr Sanson, FNHL's planner, describes the proposal as follows:

The purpose of applying the Mixed Use Zone to the Opuā Marine Business Park, Colenzo Triangle and the Bay of Islands Marina is to provide a base zone in terms of land use and subdivision rules. The Mixed Use Zone will apply until a Master Plan is embedded within the PDP as a Development Area. Following the completion of development within the Development Area, any other development will be subject to the Mixed Use Zone.

The Development Area sets out a process that establishes a consenting pathway for the Master Plan. Development would be in accordance with the development Area, and may be subject to approval from Council.

A Development Area is not a zone and will require a separate chapter in the PDP under Part 3 – Area Specific Matters. A Development Area spatially identifies and manages the Master Plan, which determines future land use and development.

Once development is complete the Development Area spatial layer is removed from the plan either through a trigger in the Development Area provisions or at a later plan change, in accordance with the National Planning Standards. Under the relief sought by the submitter, the underlying Mixed Use zone will then apply to the landholdings for any further land use or development.

3. We have previously provided general advice to Council officers (not specific to the FNHL submission) regarding the ability for the PDP to provide for approval of master plans or precinct plans by resource consent, in turn enabling more permissive development than would otherwise be provided for in the zone. That advice has been discussed with FNHL and we understand it has triggered a different approach.

4. We have been asked to put our previous advice into this memorandum so that the legal position, and the reasons for FNHL's change in approach, are understood by the Hearings Panel.

SUMMARY

Question

5. Is it lawful for the PDP to provide for approval of master plans or precinct plans by resource consent, in turn enabling more permissive development than would otherwise be provided for in the zone?

Answer

6. In our view, "no". Environment Court decisions reveal there are legal problems with this approach. These problems arise because a master plan or precinct plan is not an "activity" for the purposes of the RMA; and the activity status or treatment of an activity must be derived from the plan itself rather than a resource consent.
7. In summary, a district plan cannot:
- (a) Require resource consent for a plan about the *future use* of land, as opposed to the use of land in a manner that contravenes a rule;
 - (b) Determine activity status according to whether a master plan or precinct plan has been consented; or
 - (c) Include standards or rules that require compliance with a consented master plan or precinct plan.
8. It may be possible to provide for some form of comprehensive development consent, but the consent must authorise actual uses of the land e.g. the construction and use of roads, reserves and stormwater management areas.

REASONS

9. You have asked whether it is lawful for the PDP to provide for approval of master plans or precinct plans by resource consent, in turn enabling more permissive development than would otherwise be provided for in the zone. Under your example, master plans would be a discretionary activity and precinct plans would be restricted discretionary.
10. The Environment Court's decisions in *Re Auckland Council*¹ and *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*² are relevant to this question.
11. In short, there are legal problems with the approach above. These problems arise because a master plan or precinct plan is not an "activity" for the purposes of the RMA; and the activity status or treatment of an activity must be derived from the plan itself rather than a resource consent.
12. In *Queenstown Airport Corporation Limited v Queenstown Lakes District Council*, the Environment Court considered a proposed rule framework under which activities were prohibited until an outline development plan was approved by way of resource consent. If consent for an outline development plan was obtained, activities became permitted, controlled, restricted discretionary or discretionary activities.
13. The Court found that this approach was *ultra vires* s 77B of the RMA (now section 87A) because it required compliance with a resource consent which is not a standard, term or condition that is specified in the plan change. The Court accepted that "it cannot have been Parliament's intention that a consent process would prescribe the rules that are to apply to a consent granted for another activity".³ The Court stated:

¹ [2016] NZEnvC 56 (Interim Decision); and [2016] NZEnvC 65 (Final Decision).

² *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 93.

³ *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 93, at [160] and [183].

[183] We agree with Mr Bartlett that under s 87A (or correctly s 77B) the status of an activity derives from the Act and its subsidiary planning instruments and not from a resource consent. In summary we find rules 12.19.1.1 and 12.20.3.2-4 are *ultra vires* s 77B of the Act insofar as the rules require compliance with a resource consent which is not a standard, term or condition that is specified in the plan change.

14. In relation to the ability to require resource consent for a plan (as opposed to a physical activity), the Court in *Re Auckland Council*⁴ stated:

[152] During the hearing the Court raised concerns about the identity of the activities for which land use consent is required under the Unitary Plan. Auckland Council responded, submitting generally (and as far as it goes, correctly), that a resource consent can only be required for an activity and that “activity” means physical activity or dynamic use of land...

15. In its final decision, the Court stated:

[14] We are satisfied that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development of land is *intra vires* the Act. Provided that the consent expressly allows the consent holder to use land in a manner that contravenes a district rule (s 9(3)), the rule is *intra vires* the Act even though other resource consents will be required to authorise further development of the land.

[15] A district council's ability to make rules is constrained by ss 77 A and 87 A. If the consent does not authorise the consent holder to use land in a manner that contravenes a district rule, but instead purports to authorise a plan about the future use of land, such a rule would be *ultra vires* the Act. Ngati Whatua Orakei Rawa Ltd, supporting the second revision, captured the *vires* issue neatly in its submission that the revision helps remove the previous ambiguity that framework consents are planning tools observing “[a] framework consent is not something for which consent must be obtained of itself”.

16. In summary, a district plan cannot:

- (a) Require resource consent for a plan about the future use of land, as opposed to the use of land in a manner that contravenes a rule;
- (b) Determine activity status according to whether a master plan or precinct plan has been consented; or
- (c) Include standards or rules that require compliance with a consented master plan or precinct plan.

⁴ [2016] NZEnvC 56 (Interim Decision).

17. It may be possible to provide for some form of comprehensive development consent, but the consent must authorise actual uses of the land e.g. the construction and use of roads, reserves and stormwater management areas.

DATED at Auckland this 29th day of August 2025



M G Conway / T R Fischer