Before Independent Hearing Commissioners
Wellington City Council

In the matter of **The Wellington City Proposed District Plan**

Reply (Legal Points)
Hearing Stream 1

14 April 2023

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Reply (Legal Points) Hearing Stream 1

1 "And/or"

1.1 This issue arose as part of my submission that what was required by the definition of "rapid transit service" was an impressionistic assessment of the service in terms of the four relative characteristics included in the definition, rather than a determination that the service met all four characteristics as a threshold across the entirety of the line. In that respect, when read in context the "and" may have a little more fluidity than is suggested by some submitters. I maintain that this is the correct position.

1.2 As part of making that point I noted that there are a number of cases where the word "and" has been interpreted by the courts as meaning "or" or "and/or" and vice versa. The Panel was interested to see some examples of this.

1.3 Naturally those cases tend to be where the courts determine that Parliament could not have meant "and" because the purpose of the section or legislation as a whole either is not furthered by the two or more joined concepts being treated conjunctively (ie, the ordinary conjunctive meaning of "and").

1.4 Burrows and Carter in *Statute Law in New Zealand* write (footnotes removed):[1]

> In a number of cases, too, "or" has been read as "and", or vice versa. Two cases make an interesting comparison. In *R v Oakes* [[1959] 2 QB 350], s 7 of the Official Secrets Act 1920 provided that an offence was committed by "any person who … aids or abets and does any act preparatory to the commission of an offence". The defendant, who had made arrangements to sell documents, was charged with doing a preparatory act. His defence that an offence was only committed by one who did a preparatory act and aided or abetted failed; "and" in this provision should be read as "or". In *R v Federal Steam Navigation Co* [[1974] 1 WLR 505] the Oil in Navigable Waters Act 1955 provided that if oil was discharged into navigable water from a vessel the "owner or master" of the vessel was guilty of an offence. The House of Lords held, by a majority, that to make sense of the provision both the owner and master must be read as being guilty of the offence. In both cases the "rectifying" construction arrived at avoided an otherwise absurd or unworkable result.

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[1] Burrows and Carter *Statute Law in New Zealand* (5ed, 2015) at p 316-7.

1.5 To be clear, I was not suggesting that this is a scenario where the correct interpretation of the definition requires "and" to be read as "or". It is simply that when interpreted in light of purpose and context, the impressionistic approach I have suggested reflects the use of relative words like "quick" and "reliable".

2 Analogy with approach to ONLs

2.1 Minute 11 poses this question:

> In discussions with counsel for Kāinga Ora, the Chair asked if the identification of a rapid transit service might be regarded as analogous to identification of an ONL, in respect of which, the Court of Appeal (in *Man O'War Station Limited v Auckland Council*) had indicated that the correct approach was to treat the identification of ONLs as a technical issue, from which planning consequences flow, rather than consider the planning consequences at the initial identification stage. Counsel for Kāinga Ora has filed a Memorandum on the subject. We request that counsel for the Council provide his view on the question, responding as appropriate to Counsel for Kāinga Ora's memorandum.

2.2 In Man O' War the Court of Appeal said:[2]

> [61] However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected. Although that was underlined in *King Salmon*, the Court was simply reflecting an important legislative requirement established when the Act was enacted. The same is true in respect of areas identified as having outstanding natural character in the coastal environment, in accordance with policies 13(1)(a) and 15(a)—(b) of the NZCPS.
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> [62] The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.

2.3 In other words, you cannot reason backwards from the consequences that will flow under the NZCPS from a coastal landscape being outstanding to decide whether to make an ONL classification. You must reason forwards from the inherent quality of the coastal landscape and, if it is classified as

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[2] *Man O' War Station Ltd v Auckland Council* [2017] NZCA 24.

an ONL, then determine what restrictions the NZCPS requires to be applied.

2.4 I consider that this analogy, as a process of reasoning, is apt as regards the determination of a rapid transit service. The process required by the NPS-UD, through s 77G of the RMA, is to make an assessment of the inherent qualities of the rapid transit service (ie, as to whether it is quick, reliable etc). If it is a rapid transit service, the NPS-UD dictates what planning consequences flow from that outcome.

2.5 Counsel for Kāinga Ora's memorandum addresses the question more in the context of whether the analogy fits walkable catchments. In that regard, for the reasons expressed in para 1.8 of the memorandum, Kāinga Ora's submission is that the analogy has little utility.

2.6 To some extent, I consider that the analogy retains some utility for considering walkable catchments, though this needs some qualification, and I consider that it poses a risk of distracting from the purpose of implementing the NPS-UD on its terms.

2.7 What is being analogised is a reasoning process. As such, I do not see the points mentioned at paragraph 1.8(a)-(f) as assisting to determine why the approach to ONLs may or may not be an appropriate analogy to walkable catchments. In particular, in my view areas within a walkable catchment do have a value ascribed to them by the NPS-UD, in that because of their proximity to rapid transit stops, or centres, they are appropriate locations for intensification, just as the value of an ONL makes it appropriate for general protection. Nor do I see it as relevant to the question of whether it is a good analogy that there is no definition of 'walkable catchment' requiring an approach to be developed. The same can be said of an ONL, as there is no RMA defiinition and the Environment Court has deveoped the *WESI* factors (referred to in *Man O' War*) as an approach to making the assessment.

2.8 The fundamental criterion for the delineation of a walkable catchment is the area's proximity to a centre or rapid transit stop. I agree that there appears to be consensus that the correct approach is to identify a walkable catchment starting point based on modelled distance/time and then to make tweaks, either to extend or retract, based on other factors.

2.9 In other words, the size and shape of the walkable catchment will reflect its inherent qualities and value, namely its appropriateness for intensification.

2.10 This is similar to how you draw the map to reflect the inherent quality of the ONL and where, at the margins, the landscape is no longer "outstanding".

2.11 The qualifications are:

(a) I agree with Kāinga Ora's point that in considering local conditions at the boundaries of the starting point this should have a forward looking perspective, so that, eg, poor lighting now may not necessarily justify tweaking a boundary when with development that issue would be expected to be improved.

(b) For the avoidance of doubt, I am not advocating for the Panel to consider "appropriateness for intensification" as a general criterion in determining the size and shape of walkable catchments. You could not decide, for example, to make a walkable catchment around a rapid transit stop only a 5-minute walkable catchment on the basis of local conditions (such as by adopting the argument of some submitters that the western suburbs are not "appropriate" for intensification), because for areas within that distance of a rapid transit stop their very proximity is what makes them appropriate for intensification. And it is only at the outer margins that in my submission some local condition may carry such weight as to override that fundamental concern. This is consistent with the approach that the Council officers have taken in proposing the walkable catchments that they have.

2.12 In summary, the analogy is helpful in guiding the Panel's approach to the rapid transit service issue. If the Johnsonville train line is a rapid transit service, certain planning consequences will follow within walkable catchments of the stops on the line. That does not mean that there is no debate to be had about the precise boundaries of the walkable catchments, just as there may be debates about the precise boundaries of an ONL. But this approach can only be taken so far and the focus should be on applying the NPS-UD directly.

3 Approach to Proposed RPS

3.1 The Panel asked for clarification about how to treat Proposed Change 1 to the Regional Policy Statement. Proposed Change 1 is the Regional Council's recently notified change to the RPS to give effect to the NPS-UD.

3.2 Section 74 of the RMA states that when preparing or changing a district plan a territorial authority shall have regard to any proposed regional policy statement, which I consider encompasses the proposed change. "Have regard to" is well established as meaning to give genuine attention and thought to the matter. and such weight as the tribunal considers appropriate. The Panel is entitled to conclude the matter is not of sufficient significance either alone or together with other matters to outweigh other considerations which it must take into account in accordance with its statutory function.[3]

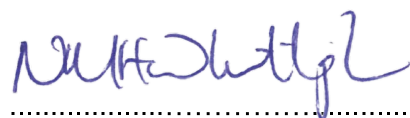
3.3 The obligation to have regard to the proposed RPS is in terms logically the same as the obligation when determining under s 104 whether to grant a resource consent. In that context there is a body of case law generally describing the way this should occur. The extent to which it is had regard to depends on:

(a) The degree to which the provisions have been tested;

(b) The extent to which the provisions are challenged or whether they are subject to appeal or not (more weight can be put on provisions about which there is no appeal);

(c) The extent to which the proposed provisions give effect to a higher order value or document (eg, an NPS or Part 2).

Date: 14 April 2023



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[3] See *New Zealand Transport Agency v Architectural Centre* [2015] NZHC 1991 at [59]-[61].