Before the Far North District Council
Independent Hearing Panel

UNDER The Resource Management Act 1991 (RMA)

IN THE MATTER of the submissions and further submission made by Bentzen Farm Limited, Setar Thirty Six Limited, The Shooting Box Limited, Matauri Trustee Limited, P S Yates Family Trust, and Mataka Residents Association Incorporated on the Proposed Far North District Plan

AND

IN THE MATTER of Hearing Four: Natural Character, outstanding natural features and landscape, coastal environment, Ecosystems and indigenous biodiversity topics

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Legal Submissions on behalf of Bentzen Farm Limited, Setar Thirty Six Limited, the Shooting Box Limited, Matauri Trustee Limited, P S Yates Family Trust, and Mataka Residents Association Incorporated

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MAY IT PLEASE THE PANEL

INTRODUCTION

1. These legal submissions in respect of Hearing Four of the Proposed Far North District Plan (**PDP**) review are presented on behalf of Bentzen Farm Limited,[1] Setar Thirty Six Limited,[2] The Shooting Box Limited,[3] Matauri Trustee Limited,[4] P S Yates Family Trust,[5] and Mataka Station Residents Association Incorporated[6] (together "**the Submitters**").

2. The Submitters' landholdings are in coastal (or island) locations in the Bay of Islands (or to north of the Bay of Islands in the case of the Matauri Trustee Limited property at Opounui in Matauri Bay). The Submitters' properties are all zoned Rural Production under the PDP. The Submitters' properties are subject to various coastal or conservation overlays, namely natural character, outstanding natural features (**ONF**) and outstanding natural landscapes (**ONL**) and coastal environment (**CE**), over all or parts of the properties.

3. The Submitters' properties were introduced in the legal submissions and planning evidence on behalf of the Submitters for Hearing One and it is not proposed to repeat that material here.[7] In summary, the Submitters' properties all have a low density coastal, rural residential lifestyle component to their land use. These developments have been sensitively designed to be sympathetic of the natural environment with an emphasis on environmental conservation and restoration. While some of the properties include working farms, the properties are either not at all suitable for primary production or have limitations in this regard.

4. The Submitters' overall position is that while the PDP is generally supported, amendments are required to ensure that the PDP adequately provides for coastal rural-residential development and farming, including in the case of Ōmarino and Mataka, development that has already been approved.

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1 Submission 167, Further Submissions 066, 376 and 578.
2 Submission 168, Further Submissions 069 and 377.
3 Submission 187, Further Submissions 067, 383 and 579.
4 Submission 243, Further Submission 582.
5 Submission 333, Further Submission 068, 384 and 580.
6 Submission 230, Further Submission 143 and 581.
7 Full details of the submitters' properties were provided in the Hearing One legal submissions at [8]-[12] and Hearing One planning evidence of Mr Hall on behalf of the Submitters. Aerial photographs and maps of each property are contained in Appendix 3 of Mr Hall's Hearing One evidence.

5. The Submitters have raised a wide range of concerns regarding the approach taken by the Far North District Council (**Council**) with respect to the mapping and provisions of the various overlays in the notified PDP in their submissions and further submissions. That said, the Submitters consider that the changes recommended by the reporting officers in the Hearing Four s 42A Reports are a significant improvement on the notified version and will positively contribute to the overall workability of the PDP. The Submitters generally support the changes that have been recommended by the reporting officers, many of which were sought by the Submitters.

6. The Submitters' position is that further amendment to the PDP is required to establish an appropriate natural environments policy and rules framework and to ensure that:

   (a) The overlays are accurately mapped and correctly reflect the extent of the relevant environmental values.

   (b) There is certainty for developments that have already been authorised so they can continue to be implemented over the long term.

   (c) The unique attributes and values of natural character, natural features and landscapes and the coastal environment of the Far North district are properly recognised.

   (d) That the role of farming in the Far North district is properly balanced with the environmental matters to be addressed by the various overlays.

   (e) The provisions are workable and do not impose unnecessary restriction or a regulatory cost burden.

7. The amendments sought by the Submitters will better give effect to the sustainable management purpose of Part 2 of the Resource Management Act 1991 (**RMA**), the statutory tests for district plan making under the RMA, the applicable national policy guidance in the New Zealand Coastal Policy Statement (**NZCPS**) and the National Policy Statement Indigenous Biodiversity (**NPS IB**), the Northland Regional Policy Statement (**RPS**), and the 80 year vision for the district's environment as articulated in Far North 2100.[8]

[8] *Far North 2100 – An 80 Year Strategy for the District.*

EVIDENCE

8. The Submitters intend to call two witnesses in support of their Hearing Four case:

   (a) Mr John Goodwin, landscape architect:

      (i) Mr Goodwin's evidence proposes refinements to the proposed mapping of the natural character overlays to remove areas of high natural character on the Setar Thirty Six (Moturua Island), The Shooting Box, Yates Family and Matauri Trustee properties as shown outlined in green in Appendix 1 of Mr Goodwin's evidence.

      (ii) Mr Goodwin largely concurs with Ms Absolum (Council's consultant landscape expert for this hearing) as to which areas ought to be removed from the natural character overlays and the reasons for removing the identified areas. Essentially, both Mr Goodwin and Ms Absolum agree that the identified areas of lawn, grassland and minor scrub do not meet the criteria identifying natural character values in Appendix 1 of the RPS.

      (iii) Mr Goodwin's evidence also addresses vegetation management, height limits and design controls and assessment criteria relevant to appropriately managing landscape and visual effects.

   (b) Mr Peter Hall, planner:

      (i) Mr Hall's evidence sets out the specific amendments sought by the Submitters (in addition to those recommended by the reporting officers) to the overlay provisions in Attachment 2 to Mr Hall's evidence.

      (ii) His evidence also explains the planning rationale for the amendments sought by the Submitters.

MATTERS ADDRESSED IN LEGAL SUBMISSIONS

2. These legal submissions will address:

   (a) The use of overlays and special zones (as a preliminary matter).

   (b) The legal and policy framework for district plan making in relation the mapping and provisions of the overlays.

(c) The legal and policy reasons for amendments sought by the Submitters.

OVERLAYS AND SPECIAL ZONES

9. The Submitters request changes to the extent of the overlays and the provisions of the overlays at this Hearing Four. Mataka Station and Ōmarino / Bentzen have also lodged submissions seeking special zones to recognise the particular character and desired development outcomes for those properties.

10. The s 42A reports for Hearing Four include comments indicating that such special zones, and making distinctions for particular sites, even large ones such as Mataka Station and Ōmarino, are not favoured.[9]

11. Mataka Station and Ōmarino therefore wish to record their position on the relationship between overlays and special zones:

(a) Mataka Station and Ōmarino are large properties, the development, conservation and restoration of which has been comprehensively planned. Given the substantial investment involved in such development and environmental restoration, it will necessarily be implemented over a longer timeframe.

(b) For the strategic vision for these properties to be realised it is essential that development can proceed as planned and authorised. Existing and incoming landowners require certainty as to the overall form of development envisaged for these sites.

(c) Overlays that are designed to govern the types of development anticipated across the entire district are blunt instruments. They are highly unlikely to properly recognise the planned and desired outcomes that are sought to be enabled for the Submitter's properties and exceptions to these provisions may be warranted to improve environmental outcomes.

(d) A special purpose zone is a valuable planning mechanism for achieving this clarity as it clearly communicates what can and cannot be done on the land. There is significant value to these Submitters in having the relevant objectives, policies and rules pertaining to their sites contained in once place within the district plan as it gives existing and incoming landowners real

[9] Natural Features and Landscape s 42A Report at [62].

clarity as to what can be done on their land (and what their neighbours can do on their land).

(e) The notified version and the decisions version of the PDP (that will be issued after the Panel has considered all the submissions on the PDP) are the only two versions of the PDP that have legal status.

12. Mataka Station and potentially Ōmarino also intend to appear at the Special Purpose Zone hearing next year to seek special zones that will seek amendments to the *notified version* of the PDP (regardless of the direction that the overlays appear to be heading at this stage).

LEGISLATIVE FRAMEWORK

District plan making principles

13. The Overview Section 32 Report[10] provides detail of the relevant statutory considerations applicable to the PDP and has largely been adopted by the s 42A Reports. The Submitter's generally accept these summaries.

14. It is submitted that the most relevant statutory provisions and legal principles to the Submitters' case for Hearing Four are s 9, ss 30 to 32 and ss 72 to 77 of the RMA, which provide the legal framework for district plan making.

Functions and purpose

15. A territorial authority is required to prepare its district plan in accordance with its functions under s 31, the provisions of Part 2, its obligations under s 32 of the RMA, relevant national policy statements, national planning standards or regulations.[11]

16. The purpose of district plans is to assist territorial authorities to carry out their functions to achieve the purpose of the Act.[12] Relevant functions of territorial councils under s 31 of the RMA include achieving integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district and the maintenance of indigenous biodiversity.[13]

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10 Overview s 32 Report – May 2022, section [4].
11 RMA, s 74(1).
12 RMA, s 72.
13 RMA, s 31(1)(b)(iii).

Part 2 considerations

17. The sustainable management purpose in Part 2 requires territorial authorities to manage the use, development or protection of natural physical resources in a way or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while (amongst other things) avoiding remedying or mitigating any adverse effect of activities on the environment.

18. Under s 6 of the RMA the Council is required to "*recognise and provide for matters of national importance*". Under ss 6(a) - 6(c) these include:

    (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.

    (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.

    (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

19. The responsibilities under s 6 are to protect these environmental values from *inappropriate* subdivision, use and development. In that regard:

    (a) Section 6 of the RMA does not give primacy to preservation or protection and is not an absolute imperative overriding other objectives of the RMA.[14] It simply requires that provision must be made for preservation and protection as part of the concept of sustainable management. However, a particular planning document, such as the NZCPS, may give primacy to preservation or protection in particular circumstances.[15]

    (b) "Recognise and provide for" is not protection of the (things listed) in themselves, but insofar as they have a natural character.[16]

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14 *Trio Holdings v Marlborough District Council* [1997] NZRMA 97 (PT).

15 *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 (***King Salmon***) at [149].

16 *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70 [p18].

(c) What is "inappropriate" development for the purposes of 6(a) and 6(b) is determined by its effect on the characteristics and qualities of the values sought to be protected and it is possible for there to be "appropriate" development.[17]

(d) Although the preservation of natural character is in included in s 6 this does not contemplate the reinstatement of a degraded environment (as a matter of national importance – restoration and rehabilitation of natural character is relevant under policy 14 of the NZCPS).[18]

(e) The identification of a natural landscape as "*outstanding*" does not preclude further development. Rather, what is to be protected are those values that qualified the landscape as outstanding.[19]

20. In relation to the relevant landscape and natural character policies in the NZCPS (13(a) and 15(a))[20] areas which are "outstanding" receive the greatest protection. The requirement is to "avoid adverse effects" on outstanding areas. Areas that are not "outstanding" receive less protection. The requirement there is to avoid *significant* adverse effects *and avoid, remedy or mitigate other adverse effects*. In this context, "avoid" appears to mean "not allow" or "prevent the occurrence of".[21] The existence of minor or transitory effects can be acceptable in the context of a directive to avoid adverse effects.[22]

21. In relation to assessing environmental values, the Court of Appeal has held that the correct approach is to first ask whether the land has attributes sufficient to make it an outstanding landscape, which requires a factual assessment based on the inherent qualities of the landscape itself. Questions as to what restrictions apply to land identified as an outstanding natural landscape arise once the outstanding natural landscape has been identified.[23] A similar approach has been taken in relation to identifying significant ecological areas where that assessment is to be a factual one and other planning imperatives have no role to play.[24]

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17 *King Salmon* at [44].
18 *Auckland Volcanic Cones Soc Inc v Transit NZ Ltd* [2003] NZRMA 54 (EnvC).
19 *King Salmon* at [96].
20 New Zealand Coastal Policy Statement 2010 at [13]-[19].
21 *King Salmon* at [62].
22 King Salmon at [144]-[145].
23 *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24 (CA) at [62-63].
24 *Royal Forest and Bird Protection Soc of New Zealand Inc v Auckland Council* [2018] NZHC 1069

22. In relation to protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna, "significant" requires judgment as to those natural resources in a district which need to be protected.[25] Significance is not to be determined on a purely quantitative assessment but with an element of relativity.[26] The relevant evaluation criteria include representativeness, diversity and pattern, rarity factors, naturalness and intactness, viability, relationship between more and natural, vulnerability and management input required to maintain or enhance an areas significance.

23. Kaitiakitanga, the ethic of stewardship, the maintenance and enhancement of amenity values, the intrinsic values of ecosystems and the maintenance and enhancement of the quality of the environment are relevant matters that the Panel is required to have particular regard.[27]

Evaluation assessment

24. In relation to the Panel's ss 32 and s 32AA evaluation, while the focus of the Submitter's Hearing Four case is on the detail of rules and assessment criteria, the Submitters are seeking amendments to both the objectives and policies and the rules of the PDP so both limbs of the s 32 test are relevant, being:

    (a) The extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA under s 32 (1)(a); and

    (b) Whether the provisions in the proposal are the most appropriate way to achieve the objectives by identifying other reasonably practicable options for achieving the objectives, and assessing the efficiency and effectiveness of the provisions in achieving the objectives under s 32(1)(b).

25. In relation to assessing the efficiency and effectiveness of the provisions achieving the objectives, the Panel's ss 32 and s32AA evaluation must identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, quantify these benefits and costs if practical and assess the risk or acting or not acting if information is insufficient or uncertain.[28]

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25 Minister of Conservation v Western Bay of Plenty District Council EnvC A071/0.
26 *West Coast Regional Council v Friends of Shearer Swamp Inc* (2011) 16 ELRNZ 530(HC).
27 RMA, s 7(b) and (d).
28 RMA, s 32(2).

26. Section 32 requires a value judgment as to what on balance is the most appropriate when measured against the relevant objectives. "Appropriate" means suitable and does not need to be the superior method.[29] The tests in s 32 should be read in the context of Part 2 of the RMA, particularly the enabling provisions of s 5(2).[30]

27. The Environment Court has explained what is required in considering "the benefits and costs of the alternative" under s 32:[31]

> *First, section 32 RMA requires the local authority to assess whether each objective, policy or method provision is the most appropriate. "Most" is a comparative term: it requires that the provision in contention be evaluated against at least one alternative. Second, section 32(4)(b) requires the local authority to take into account the risk of acting … or not acting (e.g. reverting to the status quo). That requires comparing (at least) those alternatives. Third, section 32 is a procedural provision. It must be applied in accordance with the purpose and principles of Part 2 of the RMA. The principles include the requirement in section 7(b) RMA to have particular regard to the efficient use of the relevant natural and physical resources. … (Emphasis added)*

Contents of district plans

28. Section 75(3) requires that a district plan must give effect to a relevant national policy statement, and regional policy statements:

    (a) The Supreme Court's guidance is that "to give effect to" these higher order planning documents simply means "implement". This is a strong directive, creating a firm obligation on the part of those subject to it.[32]

    (b) Policy documents should be given effect to as a whole and where there are conflicts between directive policies within a document these should be resolved at the planning instrument level if possible.[33]

    (c) In addition, a territorial authority is required to have regard to any management plans and strategies prepared under other Acts[34] where these documents are relevant to the resource management issues of a district.[35]

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29 *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298(HC).
30 *Port Otago Ltd v Dunedin City* C004/02 at [27].
31 *Federated Farmers of New Zealand (Inc) v Mackenzie District Council* (No 11) [2017] NZEnvC 53 at [458].
32 *King Salmon* at [77].
33 *Port Otago Limited v Environmental Defence Society* [2023] NZSC 112 at [60] and [72].
34 RMA, s 74(2)(b)(i).
35 See for example *Kiwi Property Holdings Ltd v Christchurch City Council* [2012] NZEnvC 92.

(d) The Panel must identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms carry greater weight than those expressed in less directive terms.[36]

29. A district plan must not be inconsistent with a regional plan for any matter specified in s 30(1) of the RMA.[37]

30. In relation to Hearing Four matters, the PDP must give effect to the NZCPS, NPS IB, and the RPS and must not be inconsistent with Northland Regional Plan (**NRP**) in relation to the objectives policies and methods for maintaining indigenous biodiversity.[38]

REASONS FOR RELIEF SOUGHT

Extent of overlays

31. Applying the approach to ONL's in *Man O'War* set out above, correctly identifying the relevant environmental attributes and the geographical extent over which these attributes have values that qualify them as high or outstanding natural character or outstanding natural character is the fundamental starting point for the PDP's natural environment chapters. This is a factual assessment and, in most cases, will require technical expert evaluation to ground truth the extent of relevant environmental values. In relation to the Submitters' properties these are large properties with complex individual landscapes and area specific natural character values that vary across the properties, so it is particularly important that this factual assessment is carried out accurately.

32. This need for ground truthing is also reflected in the regional policy framework:

(a) In Northland the coastal environment, outstanding natural features, natural character and outstanding natural landscapes have been mapped at a regional level and are shown in the RPS maps.

(b) Although the RPS mapping was a structured exercise following a prescribed methodology to identify areas that met the criteria for each overlay in Appendix 1 of the RPS, any mapping at a regional level is necessarily high level.

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36 *King Salmon* at [129].

37 RMA, s 75(4). Section 30(1) relates to the functions of regional councils.

38 RMA s 30(1)(ga).

(c) This RPS mapping has formed the basis for the mapping in the notified version of the PDP.

(d) However, while mapping of overlays is addressed at a regional level, the RPS specifically contemplates that a more fine-grained analysis and site by site assessments against the Appendix 1 criteria will be required (and corresponding amendments to the overlays made) at the district plan level.[39]

(i) Policy 4.5.1 of the RPS provides that:

> *Where following further detailed assessment, an area in the Regional Policy Statement – Maps has been amended in accordance with Method 4.5.4, and the amended area is operative in the relevant district or regional plan, it shall supersede the relevant area in the Regional Policy Statement – Maps.*

(ii) Policy 4.5.2 records that:

> *…The maps of these areas identify where caution is required to ensure activities are appropriate. However, suitably qualified assessment at a site or property-specific level can be used to demonstrate lesser (or greater) sensitivity to particular subdivision, use and development proposals given the greater resolution provided.*

(iii) The explanation for policy 4.5.2 states:

> *This policy recognises that despite best endeavours, the maps may not always be accurate at individual property or site-scale. Therefore qualified site or property specific assessment at greater resolution and accuracy may be able to demonstrate that the values are not present or are of less (or more) significance than depicted on the maps or that a lesser (or greater) degree of sensitivity and / or caution is warranted in relation to specific proposals. However this does not equate to relitigation of the maps or a requirement to amend maps.*

33. In my submission, refining the overlays to better reflect the extent of environmental values on the ground as part of the PDP review:

[39] RPS, sections 4.5.

(a) Is consistent with the approach that recognising and providing for recognise and provide for matters of national importance is not protection of the (things listed) in themselves, but insofar as they have a natural character; and

(b) Will better give effect to the policies 13 and 15 of the NZCPS that require the identification of natural character and landscape values and the RPS (as required under s 75(3) of the RMA), which contemplates further fine grained assessment and ground truthing.

34. In that regard:

(a) Mr Goodwin's evidence proposes refinements to the proposed mapping of the natural character overlays to remove areas of high natural character on the Setar Thirty Six (Moturua Island), The Shooting Box, Yates Family and Matauri Trustee properties.

(b) Mr Goodwin largely concurs with Ms Absolum (Council's consultant landscape expert for this hearing) as to which areas ought to be removed from the natural character overlays and the reasons for removing the identified areas.

(c) Essentially, both Mr Goodwin and Ms Absolum agree that the identified areas of law, grassland and minor scrub on these properties do not meet the criteria for identifying natural character values in Appendix 1 of the RPS.

35. Setar Thirty Six, Shooting Box, Yates Family and Matauri Trustee ask that the natural character overlay be amended as shown outlined in green in Appendix 1 of Mr Goodwin's evidence.

Significant natural areas and NPS IB Plan change process

Giving effect to the NPS IB

36. The NPS IB came into effect on 4 August 2023. There are no transitional provisions in the RMA or the NPS IB that would prevent the NPS IB from applying to plans that were notified before the NPS IB came into effect. Accordingly, the Panel is required to give effect to the NPS IB in its decision making on the PDP (notwithstanding that Central government has signalled upcoming reform of the NPS IB).

37. In terms of what is required to give effect to the NPS IB at this time:

(a) The NPS IB is a new generation policy statement in the sense that it was promulgated in a post King Salmon environment. It does not contain policies that direct avoidance of certain effects but contains a suite of objectives and policies that provide guidance as to matters that require maintenance, recognition and protection.

(b) It is clear from the document itself that the NPS IB is to be implemented through a series of plan changes over the best part of a decade.[40] The NPS IB anticipates that councils will identify areas with significant indigenous biodiversity on a comparative district wide basis and that plan changes (and consultation with landowners) will follow to designate those areas as SNAs. This will require consideration of how to appropriately apply an effects management hierarchy (i.e. avoided where practicable, then minimised where practicable, then remedied where practicable) to different areas of indigenous biodiversity.

38. Based on the approach of the High Court in *Eden Epsom*[41] in relation to the NPS UD, it is submitted that the correct approach prior to the NPS IB plan changes being promulgated is for the Panel to recognise that the overall purpose of the NPS IB is to protect biodiversity and seek to give effect to the NPS IB where it can.

39. However, this should not pre-empt the planning processes clearly contemplated by the NPS IB. This is because doing so would risk creating SNAs without full comparative assessment of the district wide indigenous biodiversity values or consideration of how the NPS IB and the effects management hierarchy should apply. In my submission, pre-emption of those plan changes would be at odds with the case law discussed above that requires that the significance of natural areas should be determined with an element of relativity.

PDP voluntary approach to mapping

40. The notified version of the PDP proposed a "voluntary approach to mapping" of SNA's requiring landowners to demonstrate (through costly expert assessment) that areas of indigenous biodiversity are not an SNA or else they would be treated as such. The Submitters are strongly opposed to this approach and agree with the

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40 NPS IB, at [13.3].

41 *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948 confirms that the entire NPS needs to be given effect to notwithstanding that certain provisions state that they apply to "planning decisions".

analysis in the Indigenous Biodiversity Section 42A Report that the voluntary mapping approach would inappropriately:[42]

(a) Shift the costs of SNA assessments from Council to landowners.

(b) Put an onus on landowners to prove indigenous biodiversity on their land is not SNA through an expert ecological assessment (otherwise more stringent indigenous vegetation clearance rules apply).

(c) Creates uncertainty in the implementation of indigenous vegetation clearance rules that relate to (unmapped) SNAs.

(d) Provides no real incentive for landowners to schedule SNAs on their property as this means more restrictive policies and rules apply (so may perversely act as a disincentive in that respect).

(e) Require a case-by-case assessment of SNAs that is inconsistent with the NPS IB principles for mapping (partnership, transparency etc) and does not reflect best practice.

(f) Result in rework when the district-wide SNA mapping exercise is undertaken.

41. Further, in my submission the voluntary mapping approach, by making the default position restriction, would be contrary to the operation of s 9 of the RMA that allows the use of land unless there is a rule that restricts that use. The voluntary mapping approach would pre-empt the consultative process envisaged in the NPS IB that was designed to be fair to landowners and to ensure that the areas of SNAs are considered on a relative and comparative district wide basis.

42. In my submission a planning policy with such negative and costly outcomes cannot possibly meet the statutory tests under s 32 of the RMA of being the most appropriate, effective and efficient option.

43. The Submitters support the approach recommended by the s 42A report authors of removing the voluntary approach to mapping, removing all references to SNAs from the IB chapter, removing the definition of SNAs (and replacing these references and definition with working aligned to s 6(c) of the RMA)[43] and addressing the NPS

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42 Indigenous Biodiversity s 42A Report, at [65]-[66].

43 Indigenous Biodiversity s 42A Report, at [68].

IB mapping requirements through a future district wide mapping and plan change process.[44]

44. The Submitters say that the recommendations of the reporting officers are sufficient to give effect to the NPS IB (as required under s 75(3) of the RMA) at this stage and urge to Panel to adopt those recommendations.

Farming in the CEL and ONL

45. The notified PDP version of the PDF proposed requiring a non-complying resource consent for farming in the ONL and ONF[45] and in the CEL.[46] If there is a change to the character, intensity or scale of the farming activity then the rule would be triggered.

46. The Submitters are strongly opposed to that approach and support the s 42A report recommendation to make farming a permitted activity in the ONL, ONF and CE.

47. In terms of the requirements for plan making discussed above, it is submitted that there is a need to strike an appropriate balance between protection of natural landscape and features under s 6 of the RMA and ensuring that the plan provisions are appropriate, effective and efficient and give effect to the enabling component of the sustainable management purpose of the RMA as required under s 32 of the RMA. The Far North district is extensively rural and pastural and farming activities make a significant contribution to identified landscape values. It is submitted that, in this context, a rule that requires consent for farming activities would afford unwarranted primacy to protection of natural landscape and features, act as an unwarranted veto on an anticipated land use, would be costly and inefficient and contrary to s 32 of the RMA.

48. Such an approach would also be contrary to the sustainable management purpose of the RMA of enabling people and communities to provide for their social and economic wellbeing. Further, it would also be inconsistent with the Strategic Direction Chapter of the PDP (that recognises the importance of rural production activities to the district) and with and the Far North 2100 strategy document that recognises the very significant contribution that farming activities make to the economic prosperity of the district.

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44 Indigenous Biodiversity s 42A Report, at [51].
45 PDP, NFL-R6.
46 PDP, CE -R.

Objectives and policies for overlays

49. The language in the notified version of the PDP, and supported in the s42A Report, requires consideration of only the "*characteristics and qualities*" of the overlays.

50. As discussed above there is a considerable body of the case law on s 6 (in relation to natural character and landscape) and the NZCPS that makes it clear that s 6 of the RMA does not give primacy to preservation or protection and that it is the "*values*" of these areas that need to be identified and protected from the adverse effects of inappropriate subdivision, use and development.

51. In my submission, the use of these terms "*characteristics and qualities*" in the absence of a reference to "*values*" in this way would generate an undesirable level of uncertainty into the PDP. This is because there is a distinction between "*characteristics and qualities*", which involves a description of physical attributes and the values that are ascribed to it. Correspondingly, the effects of subdivision, use and development on a characteristic may be different from the effect on natural character and landscape values.

52. In this case it is submitted that:

    (a) Compliance with the district plan-making requirement in s 75 (3) of the RMA to "give effect" or implement the NZCPS requires the PDP to include references to "*the values*" of natural character and landscape.

    (b) The change recommended in the s 42A report and supported by Mr Hall of including "*and values*" to this phrase (and the change recommended by Mr Hall of strengthening this approach by including "and values" at the policy approach) are important to improve the workability of the PDP and provide certainty as to what needs to be assessed and reduce the opportunity for further (unnecessary) debate in the future.

Buildings and extensions in approved building platforms as a controlled activity

Activity status

53. The ability to construct buildings and extensions in approved building platforms as a controlled activity is an essential issue at Mataka Station and Ōmarino. Naturally, a purchaser buying a lot in a subdivision with an approved building platform has a legal expectation that they will be able to build on that lot. In addition, there are

strong benefits to controlled activity status in terms of incentivising quality development outcomes.

54. Fundamentally, the natural environment overlays are a mechanism designed to ensure that the adverse effects of "*inappropriate*" subdivision, land use and development. The converse of this is involves encouraging appropriate development. In my submission this requires environmental decision makers to:

    (a) recognise when a development approach achieves quality, economically, socially and environmentally sustainable development (which requires a broad assessment beyond the narrow lens of visible landscape and natural character);

    (b) understand the drivers of these desired outcomes; and

    (c) ensure that policy settings and plan provisions properly address these drivers to incentivise the desired outcomes.

55. The Submitter's properties have accomplished (and can continue to sustain) this level of quality development and it is important that the policy settings in the PDP support and incentivise these outcomes.

56. In terms of the drivers of these outcomes, restoration and conservation do not "just happen" and it is important that decision makers do not ignore the costs of achieving the desired outcomes, how these outcomes are funded (and who pays). Restrained and quality development plays an important role in funding these outcomes and can be an enduring source of conservation funding (including through changes in economic conditions).

57. Mataka Station and Ōmarino, in particular, provide for exceptional quality rural living development outcomes. These development outcomes and the degree of environmental conservation and restoration being undertaken can only be achieved by taking a stewardship approach over a long-time frame. Mataka Station, for example, has been a project spanning decades and there are still 17 lots that are yet to be built on.

58. Realistically, achieving such outcomes may go beyond the life of any particular district plan, which means that the PDP needs to properly recognise aspects of these projects that have already been consented.

59. Given that bringing these rural lifestyle development projects to fruition will necessarily take place over a longer term, Mataka Station and Ōmarino / Bentzen as well as incoming landowners need certainty that buildings can in fact be constructed on building platforms approved under existing subdivision consents (as well as subdivisions that have been completed but not yet built on) and that an application for this activity cannot be declined. Similarly, one of the value propositions for landowners at these properties is that there are caps on future development, which are designed to avoid development 'creep' over time that would alter the established character of the properties.

60. This certainty that building can occur (and where) and the spacious and exclusive character of the environment will be maintained is a key driver in the properties retaining their high value. The ability to fund the desired conservation outcomes is interdependent on is this value being maintained.

61. It follows that retaining this required level of certainty requires that buildings or extensions in approved building platforms need to be a controlled activity (and that buildings outside of approved building platforms are more rigorously assessed).

62. Further, the matters that are controlled need to reflect the level of landscape assessment and design that has gone into identifying and approving these building platforms in the first case. It is also important for landowners to have confidence that the scope and nature of any conditions will be reasonable and reflective of the level of prior assessment undertaken. This is achieved through controlled activity status as Council's power to impose conditions is restricted to the matters over which control is reserved.[47]

63. The Submitters support the amendments to provide for a residential unit on a defined building platform as a controlled activity and ask that the Panel make the amendments as set out in Mr Hall's evidence to:

    (a) improve the workability of NFL-R1 and CE – R1 by also applying it to minor residential units;

    (b) having a specified and limited suite of matters of control rather than a broad and open-ended assessment against policies; and

[47] RMA, s 87A(2)(b).

(c) to clarify that controlled activity status applies to defined building platforms approved as part of an existing subdivision consent and also to subdivisions that have been implemented but not yet built.[48]

Notification of controlled activities

64. The s 42A report authors appear to have accepted in principle that it is appropriate that notification of controlled activities is precluded but rely on s 95A(5)(b)(i) in relation to public notification and 95B(6)(b) in relation to limited notification (which make controlled activities non-notified by operation of law).

65. Given the prospect of (wholesale) legislative change the Submitters say this is insufficiently certain. The Submitters seek that the PDP is made clearer and more certain by including a rule that precludes notification of controlled activities.

Approach to buildings and extensions outside of approved building platforms

66. While the law is clear that what is "inappropriate" development for the purposes of 6(a) and 6(b) is determined by its effect on the characteristics and qualities of the values sought to be protected and it is possible for there to be "appropriate" development, the challenge is in having a suite of provisions that govern what can and cannot be done in overlays that do not act to veto development and allow only "appropriate" development.

67. In my submission that requires a nuanced approach that carefully considers the nature of each overlay, the values to be protected, the potential effects of development on those values and the appropriate planning response.

68. In relation to buildings and extensions outside of approved building platforms in overlay areas Mr Hall's evidence builds on the regime proposed in the s 42A Report to provide greater certainty as to the basis upon which development outside of approved building platforms will be assessed in each particular overlay, which exceeds the permitted size thresholds. In summary, the combined effect of the officer's and Mr Hall's amendments would be that buildings and extensions have the following activity statuses:[49]

(a) Controlled activity on a defined building platform in the CE, HNC, ONC, and ONF.

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48 See discussion in Mr Hall's statement of evidence at section [8].

49 Refer Statement of evidence of Mr Hall at section [9].

(b) Restricted discretionary activity in the CE, discretionary in a HNC and non-Complying in an ONL.

(c) Restricted discretionary activity in the ONL (inside the CE) where the entire site is included within an ONL (and the site does not include an existing residential unit) and restricted discretionary in an ONL outside the CE.

(d) Discretionary activity in an ONL where the entire site is not included in an ONL and where there is an existing residential unit on the site.

(e) Non-Complying Activity in an ONF.

69. The fundamental amendment proposed is to amend the default activity status within ONL's from non-complying to discretionary. This is to recognise that the nature of ONL's varies in the district (for example pasture, lived in or native vegetation) requires a case by case evaluation afforded by discretionary activity status, particularly given the robust policies that are proposed to guide such assessment

70. Mr Hall accepts that buildings and extensions outside of approved building platforms that are within ONF's should be non-complying given the very discrete nature of ONF's in the PDP and the proportionate effects that such development could have on small discrete features.

71. Mr Hall has also proposed an additional rule where if the whole site is within the CE and in an ONL, and site does not include an existing residential unit, then residential units should be a restricted discretionary. This is to create a presumption that a landowner should be able to build somewhere on the site and avoid issues of rendering the land incapable of reasonable use.

72. It is submitted that Mr Hall's proposed approach is appropriate because it:

(a) recognises that a greater degree of control is required in relation to development outside approved building platforms than within approved building platforms;

(b) is more consistent with case law that overlays are not intended to act as a veto on development but are a tool for avoiding adverse effects on identified environmental values; and

(c) is more consistent with s 32 of the RMA as it ensures that rules are the least restrictive required to give effect to the objectives and policies of the PDP

and the level of control and rules are proportionate to each environmental effect being managed.

Workability of overlay provisions

73. Mr Hall's planning proposes changes to a number of provisions related to indigenous vegetation clearance, earthworks, colour and materials rules, building height and provisions for maintenance of domestic gardens.

74. At issue here is having the right balance between enabling land use under the PD and the Council retaining control over activities at the resource consent stage. In my submission, the effects of these activities are well understood and capable of being managed up front by rules and assessment criteria in the PDP. The suite of provisions recommended by Mr Hall provide greater certainty about what can and cannot be done, and strike a better balance between flexibility and control, and are more consistent with applying s 32 of the RMA in accordance with Part 2 principle that requires that particular regard be given to the *efficient* use of the relevant natural and physical resources.

75. In relation to the maintenance of domestic gardens, the Submitters have made significant investments in curating gardens in the curtilages of residential dwellings (particularly at the Shooting Box and Yates Family properties). These gardens involve extensive native vegetation planting and have been designed to seamlessly integrate with surrounding natural character and landscape areas.

76. However, they remain domestic gardens and should not be treated as having natural character and landscape values. Landowners need know that they can undertake such planting using native plants around their houses to improve their amenity and enjoyment of their properties and be confident that they will be able to alter that planting in the future. Any alternative approach would have the perverse outcome of discouraging such native planting, which is not a desirable environmental outcome.

CONCLUSION AND OUTCOME SOUGHT

77. The Submitters say that the amendments sought will improve the clarity and coherency of the PDP and better fulfil the statutory district plan making requirements. The amendments sought provide the most appropriate way to achieve the purpose of the RMA for the reasons discussed above.

78. The Submitters ask the Panel to approve the amendments sought by the Submitters as set out in Attachment 2 to Mr Hall's evidence.

JL Beresford, Counsel for:
Bentzen Farm Limited
Setar Thirty Six Limited
The Shooting Box Limited
Matauri Trustee Limited
P S Yates Family Trust
Mataka Station Residents Association Incorporated