FNDC Proposed District Plan
Hearing 4: Natural Environment Values & Coastal Environment
Lay-Evidence Re Submission S-242

I refer to my submission S-242, in which, in summary and in part, I assert that Rule NFL-R1 and potentially Rule NFL-R3 contravene the intent of the RMA having regard to S.85 in that in the circumstances I describe it renders a Site incapable of reasonable use and places an unfair and unreasonable burden on the owner of such a Site as it removes the owner's right to construct a dwelling on such a Site.

The specific circumstances referred to are when the only practical location to construct a dwelling on a currently unoccupied Site is within both the Coastal Environment (CE) and Outstanding Natural Landscape (ONL) overlays, in which case compliance with PER-2 of NFL-R1 is not achievable and hence the activity of constructing a dwelling on the Site is designated as Non-Complying.

The relief I sought was to modify either the relevant overlay areas and/or the relevant rules to make constructing a dwelling on the land concerned either Permitted or Controlled as only those two activity classes preserve an owner's 'as of right' ability to construct a dwelling on such an unoccupied Site. My intent was to have such changes to the PDP apply to all Sites in the District confronted by this issue, and my Site should be considered as an example only, rather than as a special case. However, for reference the particular ONL that relates to my Site is ONL-17 "Mangonui Harbour Headlands" as described in NRC's Northland Regional Landscape Assessment Worksheet: nrc.govt.nz/media/mcag2l2r/mangonuiharbourheadlands.pdf).

The Natural Features and Landscapes S.42A report recommends rejecting my proposed relief and does not recommend any other relief to address my identified non-compliance with the intent of the RMA. In fact, it does not even address the contention that the PDP is at odds with the RMA in the circumstances described.

I provide the following evidence in support of my contention that a change in the PDP along the lines I have requested is necessary in order for the PDP to be compliant with the RMA.

RMA S.87A (5) in conjunction with S.104D stipulates, inter alia, that a consent authority may only grant consent to a Non-Complying activity if the consent authority is satisfied that the activity fully complies with all the requirements, conditions, permissions, objectives and policies of an operative District Plan and/or a PDP. The relevant objectives, policies and requirements in this case appear to be:

- '**Strategic Direction' SD-EP-O5:** *"The natural character of the coastal environment and outstanding natural features and landscapes are managed to ensure their long-term protection for future generations."*
- **Objective NFL-02:** *"Land use and subdivision in ONL and ONF is consistent with and does not compromise the characteristics and qualities of that landscape or feature."*
- **Policy NFL-P2:** *"Avoid adverse effects of land use and subdivision on the characteristics and qualities of ONL and ONF within the coastal environment."*

- **Rule NFL-R1:** *"New buildings or structures, and extensions or alterations to existing buildings or structures"* – when PER-2 compliance isn't achievable as the activity is the construction of a dwelling on CE+ONL land.
- **Rule NFL-R3:** *"Earthworks or indigenous vegetation clearance"* – in relation to earthworks reasonably necessary to construct a new dwelling on CE+ONL land and where such earthworks can not reasonably be expected to comply with items 1, 2 or 3 of the relevant Standard NFL-S3 (i.e. where such earthworks may exceed 50m2 or a cut/fill depth of 1m or not fully screen all exposed faces).

I do not oppose the above listed objectives and policy other than the policy does not allow for adverse effects which are only minor. The S.42A report (at para 255, p57) describes the NFL-P2 policy as a "*bottom line*" and (at para 256, p58) states that *"The policy direction inside the coastal environment is to avoid all adverse effects on ONL and ONF."* confirming that the intent of the policy is to prohibit any activity that would have any adverse effects whatsoever on CE+ONL land. I assert that the above listed rules as they relate to construction of a dwelling on CE+ONL land in combination with such an 'absolutist' policy overreach what the RMA intends to allow in a Plan or PDP.

My submission is addressed on pp14-16 of Appendix 3 of the S.42A Report (being a report by Landscape Architects 'Melean Absolum Limited' "MAL Report"). In that report MAL correctly notes that: *"The site comprises both grassed areas and a bush clad gully with native vegetation along the coastal edge."* It needs to be noted that the practical building site is the noted grassed paddock currently used for grazing cattle; not either the bush clad gully or the pohutukawa fringed coastal edge. MAL highlights aesthetic and other values of the Site as a whole and of the surrounding land on the eastern side of the Mangonui Harbour as also documented in the NRC worksheet re ONL-17 as referenced above. These values, which I do not dispute, centre on the location's naturalness, largely devoid of dwellings or other built structures visible from the western (town) side of the Mangonui Harbour. Consequently, MAL recommend rejecting my submission on the stated grounds that: *"... the provisions in the PDP which would apply as a result of the ONL overlay, will ensure that any development proposed on this highly visible site will be carefully considered by Council at the time of consenting."* While I have no issue with careful consideration of any consent application, the issue is that the Non-Complying designation combined with the unachievable hurdle of requiring no adverse impacts, not even of a minor scale, in conjunction with the RMA's strictures associated with decision making wrt Non-Complying activities, means the result of such consideration can be expected to be a refusal to consent in all such cases.

The S.42A report (pp91-92) essentially mimics the above MAL quote in justifying recommending against any change to the PDP. The S.42A report also notes (at para 256, p58) in justifying no change to Rule NFL-R1 for CE+ONL land that: *"This is a considerably stricter requirement than to avoid significant adverse effects. If an activity does not comply with the permitted activity threshold, there is a reasonable likelihood it will not be able to avoid adverse effects (and be inconsistent with the policy direction)."* This clearly implies the expectation that consent will not be granted for an activity that doesn't comply with PER-2 of NFL-R1 (such as building a dwelling on CE+ONL land) and/or relevant aspects of PER-3 of NFL-R3 (such as the reasonably necessary earthworks to facilitate building a dwelling on CE+ONL land).

It is clear from the S.42A report's endorsement of relevant parts of the MAL report that a FNDC planning officer acting with delegated consent authority powers, when considering a consent application to build a dwelling on CE+ONL land would be expected to conclude that such an activity would have at least some adverse effects on the visual amenity that is central to what the rule and its associated objectives and policies are clearly aimed at protecting. And as noted at para 256 of the S.42A report, any even minor adverse effects in relation to such a Non-Complying activity would be expected to result in a rejection of such a consent application on account of the strictures associated with such Non-Complying decision making as stipulated at S.87A (5) and 104D of the RMA. The FNDC would therefore be expected to refuse consent to construct a dwelling on such a Site. This can be expected to precipitate an appeal to the Environment Court which would can be expected to result in the Environment Court directing the FNDC to modify its PDP (or its Plan if the PDP had then become the operative Plan) per S.85 (3A) (a) (i) on account of the grounds stipulated in S. 85 (3B) being satisfied (i.e. that application of Rule NFL-R1 and possibly also NFL-R3 in such circumstance renders the Site incapable of reasonable use and places an unfair and unreasonable burden on the owner of the Site.)

The S.42A report suggests the issue is appropriately dealt with by the PDP requiring "careful consideration" of any consent application in such circumstances, presumably alluding to consideration of the design features of the proposed dwelling and its visual impact. But when contemplating a dwelling on such a highly visible site, no amount of environmentally sensitive design could be expected to entirely eliminate all visual impacts on the 'naturalness' of the location that the rule seeks to protect absolutely. Therefore, the strictures associated with considering consenting Non-Complying activities would be expected to result in a FNDC refusal to grant consent in such circumstances, notwithstanding that this would amount to an afront to a pivotal intention of the RMA (viz S.85 re rendering a Site incapable of reasonable use).

The issue is confounded by the absence of any design guidelines in the PDP by which a FNDC planner could objectively assess whether the design attributes and visualality of a proposed dwelling on such a location would, or would not, result in any adverse effects. In this case, being Non-Complying, any matters can be raised as reasons not to approve the application, although one assumes the intent of the rule based on its overlying objectives and policy would be to focus on adverse effects on the visual amenity of the area. Policy NFL-P8 item c does direct a planner considering such an application to consider inter alia: *"the location, scale and design of any proposed development"* ; but in the absence of any objective criteria that defines the scale of development and/or design attributes and degree of visual impact that are deemed to avoid adverse visual amenity effects, such consideration is not helpful.

The prescribed Standards NFL-S1 re maximum height and NFL-S2 re colours and materials are also not helpful as full compliance with those standards does not prevent the activity being designated as Non-Complying and they are not determinative as to whether the activity does or does not have any adverse visual amenity effects.

In the absence of any design guidelines as to how imposing a new dwelling on CE+ONL land might be construed as visually acceptable, a FNDC planner would be left to subjectively

assess whether the aesthetic implications of the proposed development would or would not have any adverse effects on the visual amenity of the area. Given the sensitivity of the location, the absolutist language of NFL-P2 and the non-compromising stipulations that apply to Non-Complying activities, the planner could not be expected to give the benefit of the doubt to the applicant such that a refusal to consent is to be expected.

The PDP and associated S42A report are rightfully concerned about protecting visually special land defined by the combination of CE & ONL overlays such as the Mangonui Harbour Headlands from inappropriate development. In principal I have no issue with such sentiment, however, by designating construction of any dwelling on a Site with such overlays as Non-Complying, and by indicating that any adverse impact on visual amenity in such circumstances should result in refusal to consent, an important principle of the RMA has been ignored re rendering land incapable of reasonable use. This submitter therefore respectfully requests the Hearing Panel to carefully consider the issues that arise in law and in equity from the matters raised by my submission and as further articulated above, and to recommend changes to the PDP accordingly.

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July 20th, 2024