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## **SUBMISSION ON PLAN CHANGE 3 TO THE WHAKATANE DISTRICT PLAN**

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- The Society wishes to be heard. If others make a similar submission, the Society will consider presenting a joint case with them at a hearing.
- There is no advantage in trade competition to be gained through this submission; and the Society is not directly affected by any trade competition or the effects of trade competition.

### Introduction

This submission was prepared by the Eastern Bay of Plenty Branch, on behalf of the Society. Forest & Bird is the voice for nature in our community and New Zealand's leading independent conservation organisation. Climate safety is at the heart of all our conservation work and central to everything we do. We also have a new focus on developing a sustainable green economy.

### The Forest and Bird Submission

This plan change is primarily to introduce Controlled and Restricted Discretionary criteria that were not included in the proposed plan as made operative.

There are three main areas where the plan change falls short:

1. Specificity in terms of what "sustainability" measures are anticipated.
2. Landscaping criteria.
3. Exemptions for esplanade reserves and strips.

### 1. Sustainability and Climate Change

1.1 The specific provisions of the proposal that this submission relates to are 5.4.8.1 (a) xiii; 5.4.7.1 (a) xii. The wording used in the plan change is:

xii. *the degree to which the building incorporates elements that promote sustainability including but not limited to energy efficiency and water conservation.*

### Reasons

1.2 In considering this plan change in the context of the council's climate change agenda, it comes up short. This Plan Change is the first test of a statutory document against the Council's recently introduced Climate Change Principles, Strategy and Action Plans.

- Principle 1 is "We Will Act Now". Principles 2, 4 and 6 are also relevant.
- The Short Term Organisational Adaptation strategy is "Will make sound planning decisions in consideration of the likely effects of climate change".
- Under Leadership and Collaboration, Goal 1 is "Align the Council's culture, key documents and decisions with our Climate Change Principles".
- Under Land Use and the Built Environment, Outcome 1 is "1. Land use activities are resilient to anticipated climate change impacts" and Goal 2 is "Enhance resilience through land use decisions" and Goal 4 is "Promote a built environment which is resilient to climate change impacts".

- Several other Action Plans e.g. Energy and Transport also contain relevant goals, outcomes and actions.

### 1.3 Specificity in terms of what “sustainability” measures are anticipated:

- (i) Solar hot water heating and onsite rainwater storage for outdoor use should be required. These services should be standard in all new builds.
- (ii) This is vague and gives no indication of what “sustainability” is intended or sought.
- (iii) The wording of this criterion is also dissimilar in its grammatical structure to those for amenity and landscaping in the same plan section.

#### Decision sought

- Reword 5.4.7.1.(a) xii. ~~the degree to which the building~~ incorporations of elements that ~~promote sustainability~~ including but are not limited to, energy efficiency (insulation, building orientation and layout, movement activated lighting, use of solar hot water heating) and water conservation (storage of rainwater for outdoor use, rain gardens and location of hot water cylinders close to use).<sup>1</sup>
- This wording would be replicated through the other similar new criteria i.e. 5.4.8.1, and also apply to public buildings (7.3.3.1 places of assembly), and business buildings e.g. 5.4.9.1 Large Scale Retail, 5.4.10.1 Mixed Use, Business Centre, Commercial, Large Format Retail; 6.4.5.1 Light Industrial, 5.3.1.1 (Activity 45).

## 2. Landscaping

### 2.1 The specific provisions of the proposal that this submission relates to are

- 5.4.10.1, 4.5.1.c, 5.4.12.1.b (Restricted Discretionary) include a landscaping cross-reference to 3.7.1. It is not clear why 5.4.9.1(d) and 7.4.7.1 (b) do not reference 3.7.1.
- 7.4.10.1 includes different wording:  
b. *the visual quality, visual absorption and visibility of the proposal in the context of the surrounding natural environment;*  
Whilst this activity is car parking in the Rural Plains and Rural Foothills, and not all the criteria in 3.1.7 will apply, in some cases many of them will.
- Controlled activities 7.3.3.1.m and 7.3.4.1.m refer simply to “*landscaping*” but 7.3.1.f refers to “*landscaping and planting*”.
- 6.4.5.1.c refers to *landscaping and on-site amenity as outlined in Rule 3.7.1;*  
But 7.4.7.1.b simply refers to *landscaping and on-site amenity*.

#### Reasons

2.2 There is inconsistency in wording of landscaping criteria which could result in incomplete assessments of effects.

#### Decision sought

Add a cross reference to 3.7.1 to 5.4.9.1(d), 7.4.7.1 (b), and 7.4.10.1.

Use the phrase “*landscaping and planting*” for the Controlled Activities

Refer to “*landscaping and on-site amenity as outlined in Rule 3.7.1*” in 7. 4.7.1.b

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<sup>1</sup> The Society is not advocating at this point for photovoltaic energy in residential buildings because the battery technology is still evolving and their use requires a degree of self-management that cannot reasonably be expected in the current context.

### 3. Esplanade Reserve/Strip Waivers

3.1 The specific provision of the proposal that this submission relates to is 12.8.6.1.

Reasons

3.2 While the inclusion of *g. the criteria listed in Rule 12.7.1*, enables a wide consideration of subdivision applications, where any such application for a waiver/reduction of an esplanade reserve/strip must also be considered within the context of the purposes of those instruments under the Act:

3.3 s229 Purposes of esplanade reserves and esplanade strips

*An esplanade reserve or an esplanade strip has 1 or more of the following purposes:*

*(a) to contribute to the protection of conservation values by, in particular,—*

- (i) maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or*
- (ii) maintaining or enhancing water quality; or*
- (iii) maintaining or enhancing aquatic habitats; or*
- (iv) protecting the natural values associated with the esplanade reserve or esplanade strip; or*
- (v) mitigating natural hazards; or*

*(b) to enable public access to or along any sea, river, or lake; or*

*(c) to enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values.*

3.4 Also relevant is RPS Policy MN6B:

*Restrict public access to and along the coast, lakes and rivers **only where necessary to:***

*(a) Protect public health or safety, including a consideration of existing or reasonably foreseeable conflict between uses; or*

*(b) Protect dunes, estuaries, areas of sensitive indigenous vegetation and/or habitats of indigenous fauna;*

*or*

*(c) Protect threatened indigenous species in the coastal environment; or*

*(d) Protect historic heritage and Māori cultural values and activities; or*

*(e) Provide for temporary activities, activities for defence purposes or special events within the coastal environment; or*

*(f) Provide a level of security consistent with the purpose of a resource consent; or*

*(g) Achieve one or more of the objectives of this Policy Statement; or*

*(h) Recognise other exceptional circumstances that are sufficient to justify a restriction.*

***Before imposing a restriction on public access consider:***

- (i) The potential adverse effects of uncontrolled access; and*
- (ii) Where practicable, **the provision of alternative access to the public free of charge at all times.***

*Explanation*

*.... A requirement for an esplanade reserve or strip that would provide public access to or along these areas shall not be waived **unless there are exceptional circumstances that mean provision of an esplanade reserve or strip would not be in the public interest.** ....[our emphasis]*

3.5 S229 and RPS Policy MN6B are very clear in the intent of esplanade reserves and that they should not be departed from except in clearly specified circumstances.

3.6 The criteria in 12.8.6.1 do not adequately reflect the Act, RPS or even the objectives and policies of the plan:

*Objective Sub4*

*Manage acquisition of esplanade reserves, esplanade strips and/or access strips to achieve public access to, recreational use of, and conservation of coast, rivers, and lakes and their margins and habitat values.*

*Policy 4*

*To waive or modify the esplanade reserve or esplanade strip **only** where the purpose of the esplanade protection cannot be met or it is unreasonable to impose the esplanade reserve or esplanade strip, or the purpose is being met by some other means. [our emphasis]*

*Obj Sub 5*

*Maintenance and enhancement of safe public access in appropriate locations to and along the coast, lakes and rivers including developing a continuous functional network.*

*Policy 1 To provide, as far as practicable, safe public access to and along the coast, lakes and rivers.*

*Policy 2 To ensure public access is restricted only where necessary;*

*a. to protect areas of significant indigenous vegetation and/or significant habitats of indigenous fauna;*

*b. to protect cultural and heritage values;*

*c. to protect public health or safety;*

*d. to ensure a level of security consistent with the purpose of a resource consent or designation;*

*e. to ensure there is no inherent conflict between the public gaining access to an area and the principle reason for acquiring a reserve, esplanade reserve or esplanade strip; or*

*f. in other exceptional circumstances sufficient to justify the restriction notwithstanding the national importance of maintaining that access.*

*Policy 3*

*To control the number, location and the design of public accessways to the coast, lakes or rivers in sensitive locations to ensure access does not in itself create adverse effects that are more than minor.*

### 3.7 Discussion

Sub4 Policy 4 is an apt summary: where the purpose cannot be or is unreasonable to impose, or the purpose is achieved by other means. The criteria only address the last of these.

Obj Sub 5 seeks the development of a continuous network. This is not addressed, and a frequent approach from applicants is that there is no adjoining reserve/strip so there is no reason to provide one. This is a fatuous and circular argument which, if implemented, would result in few, or no reserves or strips.

Although Obj Sub5 Policy 2 more or less follows the RPS Policy MN6B, the criteria fall short.

3.8 This plan change has not recognised that changes to the RMA in 2017 s120 (1A) (b) removed the right of appeal on subdivision applications unless they were non-complying activities.

Forest and Bird considers that waivers or reductions of esplanade reserves/strips are matters of national importance, are of considerable public interest, and should be publicly notified. There is no way a consent authority can be aware of public interest in access to an esplanade reserve or strip unless the public are consulted. The Society seeks that waivers or reductions of esplanade reserves/strips are publicly notified. These matters have recently been traversed in consideration of the Opotiki District Plan, and were settled by Consent Order<sup>2</sup>.

#### Decision sought

Either amend the Activity Status of Esplanade reserve/strip waivers to Non-complying, or make this rule subject to public notification under which s 95A (8)(a) applies.

Amend 12.8.6 Esplanade Reserve or Strip Waivers as follows:

12.8.6.1 Council shall restrict its discretion to;

a. whether the watercourse is an artificial watercourse;

b. whether protection of the riparian area is more appropriately achieved by an alternative protection

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<sup>2</sup> Relevant extracts from the consent order are attached in the Appendix below.

mechanism;

~~e. whether there are any conservation or public access benefits to be gained;~~

c. Whether public access is impractical due to topography and/or alternative free and practical public access is available or provided;

ca. the public's use of the land both existing and potentially in the future;<sup>3</sup>

cb. whether there are no conservation values to be protected and restoration and rehabilitation are not practicable;

d. whether the subdivision is a boundary adjustment only;

e. whether the land is already protected under a QEII Trust Covenant, protective covenant under the Reserves or Conservation Act, marginal strip under the Conservation Act, or the land is already protected for conservation purposes by a Land Improvement Agreement with the Bay of Plenty Regional Council or New Zealand Forests Accord; and appropriate alternative provision has been made for public access to land along the water body concerned.

f. whether for reasons of public safety and/or security, an esplanade reserve would be inappropriate and security cannot be assured by some other means; For example, where there are Defence lands, existing public road reserve, sensitive machinery, network utilities or works. Where appropriate, alternative access to deviate around the facility and maintain a continuous public access route in the vicinity may be required.

g. Rule 12.7.1.1(a-v)

#### 4. Miscellaneous

The specific provision of the proposal that this submission relates to is 5.4.10.2:

Council shall have regard to:

a. *whether the use of the community facility will be in conflict with the business activities on neighbouring sites and elsewhere in Mixed Use, Business Centre, Commercial and Large Format Zones;*

#### Reasons

This provision does not recognise that there are **residential** activities in the Mixed Use Zone. Is the phrase "business activities" intended to specifically exclude consideration of residential activity in the MUZ? The zone statement 3.1.11 states "*The amenity of existing residential activities are provided for...*"

#### Decision sought

Clarify this provision by including consideration of conflicts with residential use.

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<sup>3</sup> There may not be any current access because there is no continuous network of esplanade reserves or strips near the location although there may be potential for this to occur in the future.

**IN THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

IN THE MATTER of the Resource Management Act 1991 (**the Act**)

AND of appeals under Clause 14 of the First Schedule to the Act

BETWEEN ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

(ENV-2018-AKL-000106)

BAY OF PLENTY REGIONAL COUNCIL

(ENV-2018-AKL-000108)

Appellants

AND ŌPŌTIKI DISTRICT COUNCIL

Respondent

Environment Judge D A Kirkpatrick sitting alone under s 279 of the Act

IN CHAMBERS at Auckland

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**CONSENT ORDER**

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[A] Under s 279(1)(b) of the Resource Management Act 1991, the Environment Court, by consent, orders that:

- (1) the appeals are allowed in part subject to the amendments set out in this order.





- [6] Forest and Bird sought restrictions on public access to esplanade reserves and strips to make it consistent with the relevant Regional Policy Statement. It also sought amendments to the rules to make applications for waivers and reductions

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of esplanade reserves or strips non-complying in order to ensure that these could be publicly notified as well as amendments to ensure consistency with the Regional Policy Statement.

### **The agreement reached**

- (d) Amend Rules 15.10.1.5 and 15.10.1.6 to make applications involving a proposed reduction in width or waiver of an esplanade reserve or strip non complying activities so as to allow them to be publicly notified where appropriate, to require that both existing and future public use be considered in the context of reductions, and to amend the circumstances in which a reserve/strip may be waived so as to be consistent with Policy MN 6B of the Regional Policy Statement.

10. Amend Rule 15.10.1.5 in Chapter 15 of the proposed Plan as follows:

A reduction in the width required for an esplanade reserve or esplanade strip shall be considered as a Non-Complying Activity. The following matters will be considered to ensure that where the reduction in width of the esplanade reserve or strip would not adversely affect:

1. Conservation values including, ecological characteristics of the land, water quality, and **habitats** of flora and fauna.
2. The **natural character** of the area.
3. The ability to obtain **access** to and along the river bank or coastal foreshore.
4. The public's recreational use of the land, both existing and potentially in the future.

Explanation: There may not be any current access because esplanade reserves or strips do not form a continuous network, although there may be potential for this to occur in the future.

5. The ability to avoid or mitigate natural hazards.

11. Amend Rule 15.10.1.6 in Chapter 15 of the proposed Plan as follows:

An application for subdivision requesting a waiver of the requirement for an esplanade reserve or esplanade strip shall be considered as a Non-Complying Discretionary Activity, unless the status of the subdivision is non-complying, in which case the more restrictive status shall apply. The requirement for an esplanade reserve or esplanade strip may not be required waived in the following circumstances:

1. Where the subdivision involves a boundary adjustment; or
2. ~~Where the security of private property may be compromised.~~
3. To provide a level of security consistent with the purpose of a resource consent; or



4. Where the safety of people may be compromised; or
5. ~~Where no environmental or public benefit is to be gained.~~
6. Where public access is impractical due to topography and/or alternative free and practical public access is available or provided;  
or
7. Where there are no conservation values to be protected and restoration and rehabilitation are not practicable.

