EDS SUPPLEMENTARY SUBMISSIONS

09 MAY 2017

Question 1: Correct test of landscape & natural character identification

3 step test on words of s6(a) for natural character and s6(b) for landscapes:

1. Describe and delimit landscape.
2. Is it 'natural'?
   "Naturalness" is part of a continuum of meaning extending from a pristine landscape in which there is no human impact, to a landscape that is intensively developed: ***Mainpower NZ Ltd v Hurunui DC*** [2011] NZEnvC 384.
3. Is it 'outstanding'?
   Meaning: conspicuous, eminent, especially because of excellence, remarkable in: ***Wakatipu Environmental Defence Society v QLDC*** [2000] NZRMA 59 at [82].

   No invariable criteria. Depends on the specific characteristics of the natural landscape being considered: ***Maniototo Environmental Society v Central Otago DC*** C103/2009 at [206, [264].

Separate and prior process to management/planning consequences: ***MOW v Auckland Council*** [2017] NZCA 24 at [62]; [74].

Factors relevant to assessing and identifying natural character are in Pol 13(2). Factors relevant to assessing and identifying landscape are in Pol 15(c).

Mr Brown will provide detail as to undertaking of exercise in practice.

Question 2 – If there is an operative plan mapping ONLs etc is it lawful to identify ONLs not mapped?

Yes – plan maps are relevant but not determinative. Open to court to make finding of fact landscape is ONL: ***Unison Networks Ltd v Hastings DC*** HC Wellington Registry CIV 2007-485-896, 11 December 2007, Potter J[1] at [92].

Question 3 – Why should s32 be provided now/prior to Panel recommendations?

1. S32 report required under s360B(2)(d). The Minister must not make a recommendation unless the Minister "has prepared an evaluation report for the proposed regulations in accordance with s32 and had particular regard to that report when deciding whether to recommend the making of the regulations".

2. Section 360(2)(d) provides no specific guidance on when prior to issuing recommendations. It is noted that the s32 direction comes before the direction regarding process for providing

[1] Appeal of EC decision to grant consent for a 37 turbine wind farm on a feature known as Te Waka just south of the Titiokura Saddle. Question of law raised by Unison Networks was whether the EC erred in finding the area was an ONL when not mapped in recently operative plan: [3].

public adequate time and opportunity to comment on the proposed regulations and be provided with a report: s360B(3)(b).

3. Direction can be found in s32 itself.

4. Section 32(5) provides for timing as to availability of report for public inspection. That provision is directive: "must" make the report available at 1 of the 2 times stated. In context of a proposed regulation (a) and (b) are expressed in the alternative. S32 Report "must" be released on public notification (b) OR (a) as soon as practicable after the proposal is made.

5. Common sense reading of "after the proposal is made" means after release. Note - Wording does not say: "at the same time as the approved proposal..or the decision is publicly notified" as per s32AA(1)(d). If that was the intended timing s32 would say so.

   In fact – that was wording of provision prior to amendment. Decision-makers were only required to release of s32 report "before adopting any objective, policy, or other method". That wording has been changed. Case law on old provision and "on adopting" wording confirms the distinction*: On that basis we start from the position that the word "adopting" in section 32(1) in respect of a local authority's function described in subsection (2)(c) refers to the action of a local authority which, having heard and considered the submissions received on proposed objectives, policies and rules, decides to accept the proposed measure as worthy of being given effect under the Act (whether with or without amendments), rather than to withdraw or abandon the proposal; that it is the act by which the local authority changes the measure from a proposal to an effective planning instrument* ***Foodstuffs v DCC*** Decision W53/93.

6. Question then becomes when is "as soon as practicable" after the proposal is made.

7. Phrase recently considered by High Court in ***NZ Pork Industry Board v Min of Ag*** [2012] NZHC 888. judicial review proceedings of validity of import standards on pig meat at [117] *As always, "as soon as reasonably practicable" is to be read in its context and circumstances.* Relying on ***Malone v R*** [2010] NZCA 59 Court of Appeal Randers J*: The expression "as soon as practicable" means the formal procedure must be carried out as soon as it is feasible to do so in the circumstances. This involves issues of practicality.*

8. Here MPI statements show have information + required for public to assess. Note SC in NZKS highlighted importance of public participation to RMA. Already curtailed. Inconsistent with Act to curtail more.

Question 4 – whether Regulations inconsistent with Act

Proposed regulations are inconsistent with the Act per arguments in written submissions. In addition:

RD (limited discretionary) criteria do not give effect to the NZCPS

RD criteria do not implement a graduated scheme of protection and preservation in relation to biodiversity, natural character and ONL values. The RD criteria are entirely silent on these matters and cannot in consequence give effect to the NZCPS. At minimum the decision maker must be able to consider these matters when assessing a resource consent application and be capable of decline where adverse effects to these values cannot be avoided; alternatively avoided, remedied or mitigated, depending on the gravity of effect and sensitivity or importance of the values being protected. This gives effect to the avoidance and avoid remedy mitigate regime in NZCPS Policies 11, 13 & 15.

Alternative way to same means is under S360B(c)(iii):

The operative coastal plan does not give effect to the NZCPS: proposed amendments to a defective instrument (a) do not remedy failure to give effect; (b) make the position worse, by avoiding consideration of impacts on ONLs and Biodiversity (because this is excluded from the RD criteria).

It must be at least arguable (based on expert evidence) that Policies 11, 13 and 15 NZCPS are not given effect to and this is wrong forum (Regulation-making powers) to assess conflict in evidence; deprives community of remedies otherwise available (including merits appeal to Environment Court).

Regulations are not to be used to advantage a particular applicant: Part 7A RMA

Must be a reason that s360A RMA draws attention to Part 7A. Part 7A confirms that management of aquaculture activities under s360A is directed at generic management and not giving preference to individual applicants in relation to CMA.

Confirmed by ss165F "address the effects of occupation..to manage competition..". Allocation to a particular applicant does not constitute management of competition.

S165F also refers to "applications" generally and not individually. Note s165F(3) especially referring to activities or classes of activities.

S165G refers to a method of allocating space such as tender. In context it cannot refer to allocation to applicant itself. Proposed regulations breach of Part 7A by allocating space in the CMA instead of creating a method to allocate space.

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