

Before the Hearing Commissioners appointed by Porirua City Council

In the matter of the Resource Management Act
1991

And

In the matter of a submission by Building Research
Association of New Zealand Inc. on
the Proposed Porirua City District
Plan, Special Zone (BRANZ)

SUPPLEMENTARY SUBMISSIONS OF COUNSEL FOR BRANZ

26 May 2022

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May it please the Panel:

Context

1. These further submissions are intended to assist the Panel with matters raised at the hearing of the BRANZ submission on 23 May and to support the supplementary evidence of Mr Coop.
2. Mr Coop refers the Panel to the SPZ BRANZ Strategic Objectives O1 and O2 which appear not to have attracted any submissions and can be considered settled:¹

SPZ-01: *The SPZ (BRANZ) provides for the operation and development of nationally important research wellbeing of the community*

SPZ-02: *to maintain predominant character and amenity values of large-scale campuses with tall buildings and large footprints, spacious and open environments and open car-parking areas.*

3. BRANZ understands that the SPZ BRANZ is the only proposed zone to cater specifically for a nationally important activity.
4. The SPZ BRANZ and SPZ Hospital are the only zones in the District to have objectives which provide for large-scale campuses with *tall buildings* and *large footprints*. These objectives are tempered by objectives to avoid, remedy or mitigate adverse effects such as SPZ-05 , but they share that objective with several other zones across the district such that this is a district-wide aspiration.
5. The adjacent Rural Zone does not include a strategic objective for large-scale campuses with tall buildings, but the permitted activity max height is the same for both that zone and the SPZ BRANZ at 10m. As Mr Coop points out:

A 10m building height...is only 1m more the 9m building height standard for houses with pitched roofs within the General Residential Zone that the Proposed District Plan states is for "*low rise built form*" (GRZ-P8).

Section 32 evaluation

6. The evaluation was recently described by the Court in *Royal Forest and Bird v Whakatane DC* as:²

The necessary evaluation of a proposed rule under s 32 of the Act involves an examination, to a level of detail that corresponds to the scale and significance of any anticipated effects, of whether the rule is the most appropriate way to achieve the objectives of the Plan by:

- (a) identifying other reasonably practicable options for achieving those objectives;

¹ BRANZ understands that it is the only submitter on the proposed SPZ BRANZ.

² *Royal Forest and Bird Society of NZ Inc v Whakatane DC* [2017] NZEnvC 051 at [43]

- (b) assessing the efficiency and effectiveness of the rule in *achieving* those objectives, including:
 - i) identifying, assessing and, if practicable, quantifying the benefits and costs of all the effects that are anticipated to be provided or reduced from the implementation of the rule; and
 - ii) assessing the risk of acting or not acting if there is uncertain or insufficient information; and
 - (c) summarising the reasons for deciding on that rule.
7. Achieving the objectives of the Plan is the key purpose of the evaluation.

Reasonably practicable

8. Neither *practicable* nor *reasonably practicable* are defined in the Act. The discussion in *Royal Forest and Bird v Whakatane DC*³ draws from other legislation and a body of caselaw⁴ and concludes that the process of identifying reasonably practicable options for achieving the objectives of the proposed District Plan can have regard to, among other things:⁵
- i) *The nature of the activity and its effects;*
 - ii) *The sensitivity of the environment to adverse effects generally and to the identified effects of the activity in particular;*
 - iii) *The likelihood of adverse effects occurring;*
 - iv) *The financial implications and other effects on the environment of the option compared to other options;*
 - v) *The current state of knowledge of the activity, its effects, the likelihood of adverse effects and the availability of suitable ways to avoid or mitigate those effects;*
 - vi) *The likelihood of success of the option; and*
 - vii) *An allowance of some tolerance in such considerations.*
9. Mr Coop refers to the 2021 decision in RC8091 LU00029/30. He opines that the consent conditions are a "blueprint" as to what is reasonably necessary and practicable to mitigate the effects of the two tall buildings.⁶ The inference that can be drawn from the way Mr Coop expresses this is that the consent decision and its conditions address most if not all the above criteria listed by the Court in *Royal Forest and Bird v Whakatane DC*.

³ *Supra*

⁴ "Practicable" has been held to mean "possible to be accomplished with known means or resources" and synonymous with "feasible," being more than merely a possibility and including consideration of the context of the proceeding, the costs involved and other matters of practical convenience.

⁵ *Supra* at [53]

⁶ Peter Coop Supplementary Evidence at paragraph 29.

Most appropriate

10. As to the approach to distilling what is *most appropriate*, the court in *Royal Forest and Bird v Whakatane DC* referred to and applied the observations of the court in the 2004 case of *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*:⁷

...that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation.
11. That passage touches on effectiveness and efficiency in that what is effective is that which meets the purpose of the Act and the objectives of the Plan. And what is efficient, being the less restrictive regime which still achieves relatively positive benefits for a cost that is relatively competitive and reasonable.
12. At [78] of its decision, the court in *Royal Forest and Bird v Whakatane DC* observed:

In our view the Act is not drafted on the basis that activities are only allowed where they are justified: rather, the Act proceeds on the basis that land use activities are only restricted where that is necessary
13. In this case, a blueprint exists for the kind of conditions deemed reasonably necessary to mitigate the adverse effects of two buildings in specific locations on the BRANZ campus up to 22.65m and 13.25m respectively, having considered likely effects on rural residential neighbours as raised by those neighbours.
14. The least restrictive regime proposed here would only apply to two specific types of structure in specific locations within the SPZ and not elsewhere. There is no need, therefore, for a belt and braces consenting process under s 104B when there is sufficient scope under a s 104A process to identify and impose conditions to mitigate any adverse effects arising.
15. Accordingly, if a proposal that implements the strategic objectives of the Plan can be said to be the least restrictive while having relatively positive benefits for comparable costs (monetary and otherwise), it can be said to be effective and efficient, and most appropriate.
16. Finally, BRANZ submits that there is no King Salmon-type contest as to *invalidity, incompleteness or uncertainty* in the relevant objects and policies as drafted which would warrant resort to Part 2 of the Act. The

⁷ *Supra* at [59]: *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C153/2004 at [56]

strategic objectives to provide a large scale campus with tall buildings to enable nationally important research could not be more clear.



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