

Before the Marlborough District Council

IN THE MATTER of the Resource Management Act 1991

And

IN THE MATTER of the Proposed Marlborough
Environment Plan

**Interim Decision of the MEP Hearing Panel
as to Marlborough Lines Limited's submission point 232.34**

Dated this 10th day of October 2018

1. Background as to issue of interim decisions

- 1.1 The Proposed Marlborough Environment Plan ('PMEP') is a comprehensive plan, providing in the one document a regional policy statement, regional plan, regional coastal plan and district plan. Because of its comprehensive nature the Plan is designed to work as a whole. For that reason the Hearing Panel ('the Panel') does not wish to separate out any parts of the Plan from other parts by issuing interim decisions on any particular submission until all submissions have been heard on all aspects of the PMEP.
- 1.2 However, in very limited settings the subject matter of a particular submission point may be able to be regarded as entirely discrete from other subject matters in the PMEP.
- 1.3 The Panel has formed the view that submission point 232.34 of Marlborough Lines Limited ('MLL') is one such unusual situation. It is also one where there is a particular

important resource management reason, (as to process), why an interim decision should issue earlier rather than later.

- 1.4 That is because the submission point relates to an important regional utility, and the designation procedure required to be met can occur while the PMEP hearing process is still under way without there being any prejudice to any other party.

2. Background as to submission point 232.34

- 2.1 The property at 287 Hammerichs Road comprising Lot 1 DP 2323 contains an electricity substation owned and operated by MLL. In the current operative Wairau Awatere Resource Management Plan ('WARMP') the site is listed in Appendix B as number 168 as a designated utility, having been designated for that purpose by MLL in 2002.
- 2.2 In submission point 232.34, MLL requested that the site of its substation at 287 Hammerichs Road should be included as a designated utility site in the PMEP at Map 159.
- 2.3 In evidence on behalf of MLL at the hearing of the submissions on Utilities the consultant planners for MLL stated:

"The Section 42A Report at paragraph 263 states that the PMEP was notified without this designation, and accordingly it cannot be addressed as a submission point, but instead must go through a separate notice of requirement process.

This is incorrect. The site was designated in 2002 by Council (DES0006). It is listed in Appendix B of the WARMP. MLL noted the omission of the listing in the PMEP and raised it as a submission point to ensure this is corrected."

- 2.4 However, the crucial fact which was recorded in the Section 42A Report was that:

"...the response from MLL therefore did not include reference to this site..."

- 2.5 That statement was not disputed at the hearing by MLL.
- 2.6 In short, for reasons which remain unclear, MLL did not formally notify to Marlborough District Council ('MDC') its requirement that this site was to be designated as a utility in the PMEP as was required by sub-clause 4(4) in the First Schedule to the Resource Management Act 1991 ('RMA').
- 2.7 When the relevant provisions of the First Schedule are considered the uncertainty as to the reasons why that happened are not of any legal significance.

3. First Schedule Requirements

- 3.1 The First Schedule process for designations in a plan being prepared as a review are very clear and concise. (The quoted passages from clause 4 below will leave out irrelevant provisions which relate to the collaborative process for designations, designation processes for designations for which the territorial authority has responsibility, or withdrawals of designations.)
- 3.2 The balance relevant provisions of Clause 4 of the First Schedule provide:

4 Requirements to be inserted prior to notification of proposed district plans

- (1) This clause applies to a new district plan or review of a district plan under section 79(1).
- (1A) The territorial authority must give written notice to any requiring authority that has a designation that has not lapsed in the relevant part of the district plan.
- (1B) The purpose of the notice is to invite those requiring authorities to give written notice to the territorial authority stating whether the requiring authority requires the designation to be included, with or without modification, in the proposed plan.
- (1C) Subclause (1A) applies before the territorial authority—
- (a) notifies the district plan, change, or variation under clause 5; or
 - (b) ...; or
 - (c)
- (1D) The written notice must—
- (a) give the requiring authority at least 30 working days to respond; and
 - (b) state which planning process under this schedule it proposes to use or request; and
 - (c) specify the final date for the requiring authority to provide its written notice; and
 - (d)...
- (2) ...
- (2A)...
- (2B) ...
- (3) Where the requiring authority states that a designation is to be included in the proposed plan, with modifications, the requiring authority shall include in its

written notice the nature of the modifications, and the reasons for the modifications.

(4) **If the requiring authority fails to notify the territorial authority in accordance with subclause (1), no provision for the designation shall be included in the proposed plan.**

(5) A territorial authority shall include in its proposed plan provision for any designation it receives notice of under this clause, any existing heritage orders, and any requirements for designations and heritage orders to which sections 170 and 192 apply or any requirement to which clause 42 applies.

(6) ...
(7) ...
(8) ...
(9) ...
(10) ...

(Bold for emphasis inserted)

3.3 As can be seen from sub-clause 4(4) if a requiring authority fails to notify the territorial authority in accordance with subclause 1 the consequence is mandatory – *“no provision for the designation shall be included in the proposed plan.”*

3.4 The Panel has no option but to accept the advice of the Section 42A Report writer as being correct to reject the submission request made by MLL to now list 287 Hammerichs Road as a designated utility.

4. **Statutory Designation Procedures**

4.1 In terms of Section 168 RMA, a requiring authority such as MLL always has the power to designate for its works at any time – see the relevant provisions of Section 168 below:

168 Notice of requirement to territorial authority

(1) ...

(2) A requiring authority for the purposes approved under Section 167 may at any time give notice in the prescribed form to a territorial authority of its requirement for a designation—

(a) for a project or work; or

- (b) in respect of any land, water, subsoil, or airspace where a restriction is reasonably necessary for the safe or efficient functioning or operation of such a project or work.

(3) ...

(4) ...

(5) ...

- 4.2 The statutory scheme which applies to such designation notices is comprised in Subsection 169-175 RMA.
- 4.3 Those provisions involve a careful set of processes of potential submission to the territorial authority and for it to hold a hearing of such submissions. The territorial authority is then empowered to make recommendations to the requiring authority, for it to make a final decision on those recommendations. There are then rights of appeal to the Environment Court.
- 4.4 The outcome of these statutory provisions, therefore, is the creation of a series of procedural safeguards of considerable importance. The consequence then of the failure to give the statutorily required notice in respect of any designation at plan review stage is significant and cannot be overlooked – frustrating though that may seem to MLL.
- 4.5 By the same token the Panel has decided that it is relevant to take into account the following matters:
 - (a) The ability of MLL at any time to issue a notice of requirement for a designation under Section 168 RMA.
 - (b) The lack of any opposing submission to MLL's submission point 232.34 in respect of the PMEP.
 - (c) The reality of the fact of the existence of the substation.
 - (d) The fact that for some 16 years the site has been designated as a substation in the WARMP.
 - (e) The lack of any apparent implication for any other provision in the PMEP in respect of this site.
- 4.6 The Panel has decided it should now issue an interim decision on this submission point to enable MLL, if it so wishes, to embark on the notice of requirement procedure. The outcome of that process may well conclude at or around the time the PMEP becomes operative. The benefit of a decision being issued now is that at or around the time of the PMEP becoming operative the RMA treatment of this property should be complete one way or the other.

5. **Interim decision**

- 5.1 For the reasons set out above the request made in submission point 232.34 by MLL is rejected.

Dated in Blenheim this day of October 2018

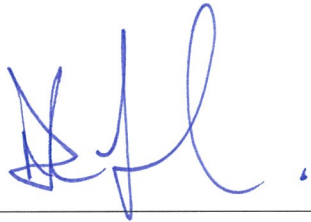


Commissioner T Hook

Chair of the MEP Hearing Panel



Commissioner R Crosby



Commissioner R Faulkner



Commissioner L Shenfield



Commissioner D Oddie



Commissioner J Arbuckle