

**To:** Marlborough District Council  
**And to:** The submitters and further submitters

**In the matter of** the Resource Management Act 1991  
And  
**In the matter of** the Proposed Marlborough Environment Plan

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## Decision of the MEP Hearing Panel

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Commissioners: Trevor Hook (Chairperson)  
David Oddie  
Jamie Arbuckle  
Rawiri Faulkner  
Ron Crosby  
Shonagh Kenderdine


Hearing: Commenced on 20 November 2017 and completed on 29 April 2019

Date of Decision: 20 February 2020

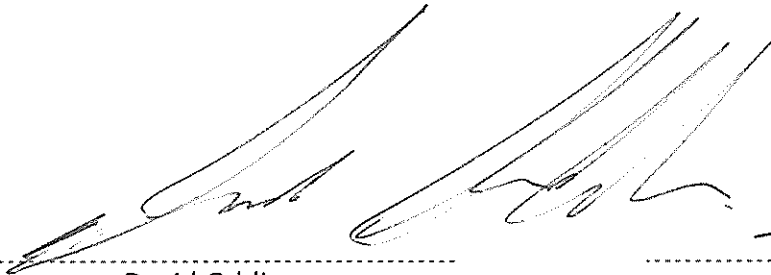
Decision was made under delegation (Minute D.15/16.133) from the Marlborough District Council:



Trevor Hook (Chairperson)



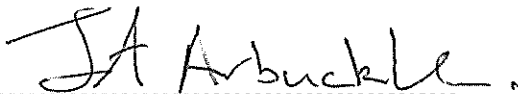
Rawiri Faulkner



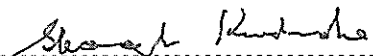
David Oddie



Ron Crosby



Jamie Arbuckle



Shonagh Kenderdine

Dated this 20 day of February, 2020

## **Introduction to Decisions**

### **Background Procedural Matters**

#### **1.0 Delegation**

- 1.1 At the meeting of the Regional Planning and Development Committee (now Planning, Finance and Community Committee) on 8 October 2015, the Committee delegated the power to the Hearing Panel to hear submissions and make decisions on the Proposed Marlborough Environment Plan (PMEP) (as per Minute D.15/16.133, ratified by minute C.15/16.166). Councillor Hook was also appointed as Chair of the hearings panel at this time.
- 1.2 At its meeting on 1 December 2016, the Planning, Finance and Community Committee resolved to appoint a hearings panel for the PMEP consisting of four councillors and three independent commissioners, one of whom would have experience in Mātauranga Māori (Minute number A.16/17.202, ratified by Minute number C.16/17.222.).
- 1.3 The four councillors appointed as commissioners were Councillors Hook, Oddie, Arbuckle and Shenfield.
- 1.4 The independent commissioners for the MEP hearings panel, Shonagh Kenderdine and Ron Crosby, were appointed by the Planning, Finance and Community Committee at its meeting on 23 March 2017 (A.16/17.e.51). That decision was ratified by the Council on 6 April 2017 (C.16/17.e.54). At its meeting on 29 June 2017, the Council appointed Rawiri Faulkner as commissioner with experience in Mātauranga Māori, to the PMEP hearings panel (Minute number C.16/17.467).

#### **2.0 Clauses 10 and 16 of the First Schedule**

- 2.1 Clause 10 of the First Schedule sets out that the Council and therefore the Panel (operating under delegation) must give a decision on the PMEP provisions and matters raised in submissions. Clause 10(2) stipulates that the decision is to include the reasons for accepting or rejecting the submissions, and for that purpose may group them according to the provisions or matters to which they relate, and may include consequential alterations and other relevant matters. Clause 10(3) confirms that a local authority is not required to give a decision that addresses each submission individually.

#### **3.0 Clause 16 of the First Schedule**

- 3.1 By Clause 16(2) of the First Schedule, the Council and therefore the Panel (operating under delegation) is empowered to make amendments to alter information, where the alteration is

of minor effect, and to correct minor errors. The Panel has taken the opportunity to make such changes where appropriate.

#### **4.0 Procedural Minutes**

- 4.1 Prior to the hearings commencing, the MEP Hearing Panel issued two minutes (Minutes 1 and 2) setting out the procedure for the hearings. Minute 1 set out the proposed procedure and requested feedback from submitters. After consideration of the feedback provided, the Panel made amendments where appropriate before confirming the procedure in Minute 2.
- 4.2 If submitters were unable to meet the specified procedures they were asked to set out their requests in writing. These requests were considered by the Panel each on its own merits and a minute issued setting out its decision. These minutes were recorded and distinguished by an alphanumeric, being Minute 3 and a sequential letter.
- 4.3 These initial procedural minutes included the setting of timeframes for the pre-circulation of evidence, legal submissions and restrictions on time available for speaking at hearing, among other aspects.
- 4.4 These constraints were necessary to allow for the efficient use of time and resources while maintaining submitters' ability to appropriately address their submission points for any given topic. Often discussions during the hearings between the Panel and submitters led to longer sessions occurring. These were productive and the Panel found that the clarification provided by the discussion contributed to their understanding of specific issues. This, however, would often affect timetabling of subsequent submitters and the Panel extend their appreciation to submitters for their patience while they explored these issues.
- 4.5 Due to the scale of the hearing process, the requirement for pre-circulation of evidence and legal submissions was found to be invaluable to the Panel as it enabled pre-reading of those materials. Questioning of submitters and their experts was highly beneficial to the understanding of the relief requested by submitters and pre-circulation provided a platform from which this could be achieved.
- 4.6 The Panel wish to commend submitters for their part in adhering to the procedures as set out in Minutes 1 and 2.
- 4.7 On 4 April 2018, the Panel issued another procedural minute, Minute 11. The need for this minute arose from several submitters seeking changes to PMEP provisions that fell outside the bounds of their original submission. Minute 11 addressed the increasing trend of 'scope creep' and requested submitters carefully consider the content of their evidence and/or

legal submissions to ensure no relief beyond the scope of the relief sought in a submission was being requested, prior to presenting to the Panel, as inclusion of such material unduly wasted time.

- 4.8 A final procedural minute, Minute 51, was issued on 11 March 2019 providing submitters an opportunity to identify any submission points that had not been previously subject of a hearing notice throughout the MEP hearing process. One request for a further appearance was received in response to this minute but it was not accepted as the matters identified had been the subject of earlier hearing notices.

## **5.0 Substantive Minutes**

- 5.1 Regularly during the PMEP hearing process, the Panel issued minutes to submitters and Section 42A report writers, and occasionally to Council staff or to other parties, to seek further information. This information typically sought to aid the Panel's understanding of the nature of the relief requested in evidence or to gain insight into the implications of granting the relief requested. A total of 56 minutes on substantive matters were issued over the course of the hearing process. The minutes and responses to the minutes were posted on the Council website in a timely fashion.

- 5.2 The information provided in response to these substantive minutes proved invaluable to the Panel's deliberations. The Panel thanks those that responded to the substantive minutes for their prompt response and the additional effort required post hearing to compile the information requested.

## **6.0 Conflicts of Interest**

- 6.1 During the hearing, there were 16 instances where a commissioner or commissioners declared an actual or perceived conflict of interest on matters raised in submissions.

- 6.2 In most instances, the Commissioners were aware of the potential conflict through the pre-circulated evidence and raised the issue at the beginning of the hearing of the relevant topic and again at the time of hearing from the relevant submitter.

- 6.3 In cases of clear conflict once a formal statement was made, the Commissioner stood down from their duties on that particular submission point.

- 6.4 In some cases it was not clear whether or not a perceived or actual conflict of interest arose. In these situations the commissioner or the chairperson would detail the issue and provide the affected submitter and/or further submitter an opportunity to respond. If the submitter had no issue with the situation that commissioner remained involved.

6.5 For each perceived or actual conflict of interest, the commissioner provided a statement outlining the issue. A record of these statements has been compiled which is attached as an appendix (Appendix 1) to this decision. At the commencement of each topic decision any relevant declaration of potential conflict is listed. Anybody interested can obtain the detail from the appendix.

## **7.0 Section 32**

7.1 Section 32 of the RMA directs a local authority making a proposed plan to carry out an evaluation, both before it is publicly notified, and before making a decision on submissions. The evaluation is to examine the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether, having regard to their efficiency and effectiveness, the policies, rules and other methods are the most appropriate for achieving the objectives. For the purpose of those examinations, the evaluation is to take into account the benefits and costs of policies, rules or other methods; and also the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules or other methods. The local authority is to publish a report summarising the evaluation and giving reasons.

7.2 The Panel notes that in compliance with Section 32, the Marlborough District Council carried out an evaluation of the PMEP before it was publicly notified, and published a sequence of reports summarising the results of the evaluation. The Panel's evaluation with respect to Section 32 is inherent within its consideration of the relief requested by submitters and its decision making process.

## **8.0 Section 42A Report**

8.1 The Panel had the benefit of a Section 42A report prepared for each topic. The reports addressed the points of relief requested in submissions on the PMEP provisions within each topic, evaluated the relief requested and provided recommendations to the Panel on whether to accept or reject the relief requested. The volume of documentation involved in the hearing and deliberation process for the PMEP has been immense. There were some 17,000 submission points from over 1300 submitters.

8.2 In accordance with procedural Minutes 1 and 2, this report was provided to submitters who wished to be heard at least 10 days prior to evidence falling due.

8.3 The report writer also attended the hearing, either in person or via Skype to present their Section 42A report to the Panel. The report writer was available to answer questions and

provide advice during the hearing. On hearing the evidence presented to the Panel in person or in writing, the report writer also prepared a Reply to Evidence. This set out whether their initial recommendations had changed after hearing the evidence and/or legal submissions and why.

- 8.4 The Panel is appreciative of the valuable input that the Section 42A report writers have made to the hearing process and the effort to provide both the Section 42A reports and the Rights of Reply in a timely fashion.

## **9.0 Hearing Structure**

- 9.1 It was evident to the Panel at an early stage that the combination of the extensive nature of the PMEP (being a regional policy statement, regional coastal plan, regional plan and district plan) and the large number of submitters would present a challenge to hearing evidence. The Panel decided to use a topic based approach to hearing submitters as this would allow all submitters on a topic to be heard at the same time. This decision was recorded in procedural Minutes 1 and 2. As it transpired, a topic-by-topic approach allowed the Panel to consider and evaluate the evidence efficiently and effectively. It also allowed the Panel to deliberate on the evidence as the hearing proceeded.

- 9.2 The Panel understood that topic-by-topic hearings meant that some submitters had to appear on more than one occasion in order to present their submissions on multiple topics (though in some cases they provided written submissions as an alternative to appearing in person due to financial restrictions or time constraints). The Panel would like to pass on their appreciation for the extra effort and expense that the submitters undertook to provide evidence on a topic-by-topic basis. Several submitters made requests to ease this burden, such as to be heard on matters out of turn, and the Panel accommodated this, where it could, to assist.

- 9.3 To keep its decision to a manageable size, the Panel has also taken a topic-by-topic approach to structuring the decision on the PMEP. A separate and distinct decision has been made on each topic heard. In the case of the “miscellaneous” topics heard on 29 April 2019, the decisions have been incorporated into the relevant earlier topic.

## **10.0 Panel attendance**

- 10.1 As can be expected with such a long process, there were times when not all panel members were able to attend to hear submissions on a given topic. Where this was the case, the panel

member did not take part in the deliberation process on that topic. Generally, health reasons were behind the absence.

- 10.2 However, of substantial note, was the departure of Commissioner Laressa Shenfield. In October 2018, Mrs Shenfield stood down from her role as a Councillor for the Marlborough District Council. However, the Council determined that Mrs Shenfield could continue as a commissioner to complete the deliberations only on those topics she had already heard (Minute Cncl-118-166). Mrs Shenfield subsequently advised the Panel that as she now lived in Australia she would be logistically unable to continue in the role. The Panel would like to thank Mrs Shenfield for her contribution to the process.

### **11.0 Submitter Appearances**

- 11.1 The submitters who appeared at the hearing to provide evidence to the Panel in support of their submissions at each hearing block are set out in Appendix 2.
- 11.2 The Panel wish to commend submitters on the constructive manner in which they conducted themselves. The provision of succinct evidence and legal submissions, combined with the efficient use of time afforded to them during their presentations, provided the Panel with more time to question and discuss the evidence and submissions with the submitter, their experts and/or their counsel. The Panel found that exchange particularly useful for testing the evidence and/or submissions.
- 11.3 In some cases, submitters did not attend the hearing but lodged legal submissions or written evidence instead. The parties who lodged legal submissions and/or evidence for each hearing block are identified in Appendix 3.

## **Decision**

### **12.0 Interim Decisions**

- 12.1 From the outset of hearings, the Panel agreed not to issue interim decisions unless the submissions met specific criteria. The criteria were restricted to matters with a limited setting, where a sustainable management purpose would be served and where a particular subject matter could be regarded as entirely discrete from other subject matter in the PMEP. In total, four interim decisions were issued during the hearing process. These are available on the Council website and where appropriate, are incorporated into the final decision document.



### 13.0 Structure of Decisions

- 13.1 It is important that the topic decision is read as a whole together with the tracked change version of the Plan. The decision on each topic contains the reasons for the Panel's decisions. These comprise either adoption of the reasoning and recommendations of the original Section 42A Report or the replies to evidence, or a specific reasoning by the Panel. (The only exception to that approach relates to the Noise section of the Nuisance topic where the reasoning and recommendations in the responses to Minutes 54 and 59 may have been adopted, rather than the reasoning and recommendations in the Section 42A Report or the Reply to Evidence report. The reasons for that difference in that topic are dealt with in detail at the commencement of the Noise section of the Nuisance topic decision. In respect of that topic the approach to understanding of the individual submission point decisions addressed in paragraphs 13.3 to 13.5 below should be adjusted accordingly to apply references to the Section 42A Report and/or Reply to Evidence in those paragraphs as being references to the responses to Minutes 54 & 59 for that Nuisance topic.)
- 13.2 The tracked change version of the relevant PMEP provisions forms an integral part of the decision. The source of the change in terms of the topic that the subject matter was dealt with is clearly identified in the track changes version of the plan. This records all amendments (additions and deletions) to the notified PMEP provisions made by the Panel.
- 13.3 Where the PMEP provisions **remain as notified**, it is because:
- a) The Panel has decided to retain the provision as notified for reasons set out in this decision; or
  - b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to retain the provision as notified as recommended in the Reply to Evidence; or
  - c) The Panel adopted the reasoning and recommendation of the Section 42A Report to retain the provision as notified in the original Section 42A report.
- 13.4 Where there is a **change to a provision** within the plan it is because:
- a) The Panel has amended a provision for reasons set out in this decision in response to a submission point which the Section 42A report writer(s) does not recommend in their reports; or
  - b) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the Reply to Evidence; or

- c) The Panel adopted the reasoning and recommendation of the Section 42A Report Writer to change the provision to that recommended in the original Section 42A report; or
- d) A consequential change has been necessary following on from a decision in either a), b) or c).

13.5 Where there is a **different recommendation** between the Section 42A Report and the Reply to Evidence (i.e., the recommendation by the Section 42A report writer(s) has changed as a result of hearing the evidence of submitters), unless the Panel decision specifically adopts the original report's reasoning and recommendations, the reasoning and recommendations in the (later) reply to evidence has been adopted and it must be taken to prevail.

13.6 There are limited circumstances where the Panel has taken the opportunity to give effect to national policy statements or implement national environmental standards. Where this occurs the relevant decision clearly sets out the nature of the change and the reason for the change.

13.7 Finally, there are limited circumstances where the Panel has decided that **alternative relief** is more appropriate than that requested by the submitters, but still within the scope of the relief sought. This is recorded in the Panel's decision.

#### **14.0 Topic Decision**

14.1 Each topic has a separate decision. Those topics are as follows:

- Topic 1: General
- Topic 2: Marlborough's Tangata Whenua Iwi
- Topic 3: Natural and Physical Resources
- Topic 4: Water Allocation and Use
- Topic 5: Natural Character
- Topic 5: Natural Character – Technical mapping
- Topic 5: Landscape
- Topic 6: Indigenous Biodiversity

Topic 7:	Public Access and Open Space
Topic 8:	Heritage Resources and Notable Trees
Topic 9:	Natural Hazards
Topic 10:	Urban Environments
Topic 11:	Coastal Environments
Topic 12 & 22:	Rural Environments, Woodlot Forestry, Conservation Planting and Carbon Sequestration Forestry
Topic 13:	Resource Quality (Air)
Topic 13:	Resource Quality (Water)
Topic 13 & 19:	Resource Quality (Soil) and Land Disturbance
Topic 14:	Waste and Discharges to Land
Topic 15:	Transportation and Signage
Topic 16:	Climate Change
Topic 16:	Energy
Topic 17:	Subdivision
Topic 18:	Nuisance Effects & Temporary Military Training
Topic 20:	Designations and Utilities
Topic 21:	Zoning and Definitions
Topic 22:	Commercial Forestry
Misc	Addressed in relevant topic decision

**15.0 Provision codes**

- 15.1 The MEP uses a system of codes to identify whether the notified provisions are RPS, regional plan, regional coastal plan and/or district plan provisions. The codes appear immediately prior to the statement of the relevant provision.
- 15.2 During the course of the hearings, the Panel considered the recommendations of report writers for new objectives, policies, methods and rules. We also heard evidence from submitters seeking new provisions.
- 15.3 The report writer/submitter did not always identify what code or codes should precede the provision. In these circumstances, and where the Panel has decided to add a new provision, a code has been inserted as a consequential change. In most cases, the relevant code or codes were relatively obvious. The codes appear in the tracked changes version of the Plan.

#### **16.0 Numbering changes**

- 16.1 All of the notified provisions of the Plan have a unique identifier (in the form of a provision number). In the Panel's opinion, this is a necessary aspect of any plan prepared under the RMA. It is essential that users of the Plan can reference any relevant provision.
- 16.2 The Panel's decisions can involve the addition of new provisions or the deletion of notified provisions. The provision numbers in the Plan run in sequence. Where addition or deletion does result from the Panel's decision, it obviously affects the sequence of numbers as a necessary consequence. The Panel has directed that these numbering changes are made as necessary as a consequential change created by the addition or deletion. Typically, this consequential change is not specifically addressed in the following Topic decision documents. This text records the Panel's directed approach to consequential numbering changes in order to avoid the need to repeat the decision in multiple locations.

#### **17.0 Third Party Documents**

- 17.1 A number of requests were made in submissions by outside third party organisations other than Council for their Codes, standards (either mandatory or non-mandatory), practice manuals or other controlling instruments to be included by specific standards requiring compliance with them. If that is done it means the Council would be incorporating those documents in the PMEPE.
- 17.2 In almost all those submissions the request made is for a standard to be inserted requiring 'compliance' with the whole document, and commonly those are complex, detailed or lengthy volumes. The Panel considered that for such an approach to pass the reasonable expectations of adequate public consultation would have required public notification of the

volume and its contents, so that submitters had the opportunity to respond. In most, if not all, cases that has not occurred, with the submission request itself being the first time the compliance request has been made. The Panel is most concerned that such a process of inserting what can be costly or onerous obligations is not appropriate.

17.3 Moreover, incorporation within the Plan carries with it the risk of loss of control of what then become statutory Plan provisions as such codes, standards, or practice manuals are commonly updated or amended by their own controlling organisation – which strictly would require a plan change process to be undertaken to comply with the RMA. How that process is to be managed with an outside organisation ‘owning’ or ‘controlling’ the base document raises real practical problems at law. For that reason, too, the Panel’s view has been that these sorts of documents should not be broadly incorporated without compelling reason.

17.4 Finally, in respect of third party documents of that nature which are made mandatory by other statutory provisions, the Panel was not persuaded that anything is added to an already existing statutory obligation of compliance by incorporation of those documents into the Plan, when they already have their own statutory effect.

17.5 For all of those reasons the approach preferred by the Panel, with few exceptions, has been to provide when expressly directed by the RMA for incorporation of National Policy Statement or National Environmental Standard provisions, but otherwise to adopt an information approach by way of a Method drawing attention to the existence of those third party documents.

## **18.0 Mapping Changes**

18.1 The Panel’s decision makes changes to the zoning maps and the overlay maps contained in Volume 4 of the PMEP. Volume 4 of the Plan has been updated to reflect these decisions.

18.2 A mapping comparison tool is also available via Council’s website so that any submitter can ascertain changes to any zoning map or overlay map as a result of the Panel’s decision on submissions.