

**Before the Environment Court
I Mua I Te Kooti Taiao o Aotearoa**

Christchurch Registry

ENV CHC 2020 033

Under the Resource Management Act 1991
In the matter of an appeal under clause 14 of Schedule 1
Between **Friends of Nelson Haven and Tasman Bay Inc.**
Appellant
And **Marlborough District Council**
Respondent

**Memorandum by Friends of Nelson Haven and Tasman Bay Inc
for case management conference on 28 August 2020**

Dated 6 August 2020

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May it please the Court

1. This memorandum responds to paragraphs 55 to 63 of the Council's memorandum dated 31 July 2020. It is filed pursuant to paragraph [3](b) of the Court's minute dated 16 June 2020.
2. Contrary to what is said in the Council's memorandum, at the heart of Friends' appeal on natural character and landscape provisions of the MEP is the contention that the mapping exercise that has been undertaken on behalf of the Council lacks the necessary validity and reliability to ensure that important provisions of the NZCPS are given effect to. The mapping exercise is fundamental to a proper implementation of policies 13 and 15 of the NZCPS. It is clearly articulated as a requirement of those policies at policy 13(1)(c) and (d) and policy 15 (c) and (d). It also has support in policy 7(b).¹
3. Attached to this memorandum are the summary submissions presented by Friends at the hearing of their submission on natural character and landscape provisions on 2 February 2018 before the Hearing Panel. This was in support of expert evidence from Dr Steven, which was also presented. In summary, what was being sought was:
 - (i) a clear statement or definition of what constitutes natural character for the purposes of section 6(a) and policy 13;
 - (ii) a clear statement or definition of what constitutes a natural feature and a natural landscape for the purposes of section 6(b) and policy 15, together with a clear delineation between natural features on the one hand and natural landscapes on the other;
 - (iii) a more valid and reliable approach to mapping outstanding natural character in the coastal environment;
 - (iv) a clear explanation of the treatment of seascapes and a clear recognition that seascapes are a fundamental part of landscape assessment within the Marlborough region;
 - (v) a simpler, clearer and more community oriented approach to landscape assessment.
4. In an attempt to grapple with the uncertainties identified in the mapping exercise forming part of the notified plan, the Hearing Panel issued minute 9 dated 1 March

¹ See *King Salmon* at [70]

2018. This led to a further mapping exercise being introduced into the MEP, referred to as *nested landscapes*.² The map appears as a replacement of Map 2 of Appendix 1 and the schedule of values has been *reorganised* to correspond to these nested landscape areas, at the request of the Hearing Panel.³

5. This classification of the nested landscape areas was incorporated into the proposed plan after the hearing of submissions and without any opportunity for public input. There is only a very cursory description of what the nested landscapes are, or how the delineation has been carried out (a visual catchment approach). It is not known whether the Council asserts that these are landscapes for the purpose of section 6(b), or natural landscapes/seascapes for the purpose of policy 15, or what their overall purpose is.
6. Compounding this uncertainty is the fact that landscape maps in Volume 4 of the proposed plan have not been amended and still refer collectively to outstanding natural features and landscapes generically. While Appendix 1 refers to features within the nested landscape areas, it is not possible to understand how some natural features have been classified as outstanding while others have not been. As the Volume 4 maps contain no notations or place names, it is not easy, or even in some cases possible, to determine the location and extent of these features. The maps are also unclear as to the extent of any seascape incorporated into the generic maps, with some boundaries appearing to extend to mean high water springs, while other boundaries extend an indeterminate distance into the seascape.
7. Further, there is no attempt to identify whether natural features that have been identified are at greater or lesser threat from development and use than the landscapes which they appear to be part of, and what are the threats from uses and developments within either the mapped landscapes, or the scheduled landscape areas. Nor is it clear how the policy framework is intended to apply within the nested landscape areas. It smacks of a jumble of mixed approaches that lacks clarity, cannot readily be understood, and lacks appropriate public input. In pursuing these amendments through minutes 9 and 15, it is the Council that has stepped outside the schedule 1 process.
7. This last point is important because aesthetic quality is likely to be the predominant quality influencing whether a landscape deserves classification as outstanding for the Marlborough communities. This has not been mapped as part of the study that

² See response of James Bentley to minutes 8 and 9 dated 14 March 2018

³ Minute 15. The original Map 2 of Appendix 1 appears to have been incorporated as geographic collating tool to accompany Schedule 1 rather than as a landscape classification tool: see the 2015 study at page 106.

underpins the landscape maps for the MEP. Appreciation of landscapes is not simply a matter for expert analysis. This responds to the Council's statement that methodology is somehow irrelevant to the mapping exercise.⁴ The approach adopted by the Council through minutes 9 and 15 compounds this process of professional estrangement.

9. Friends' evidence for the appeal will comprise a critique of how the mapping exercise has fallen short of the statutory requirements; a clear statement of a reliable and valid process (able to be objectively verified) that can be adopted; and a case study of an area of the Marlborough Sounds that can be mapped using the methodology set out at paragraph 17 of the Council's decision on Topic 5 (landscape), which is not the approach taken in the studies the Council's mapping exercise relies on.
8. Further, there is an elephant in the room which is the missing aquaculture chapter. The council's memorandum at paragraph 70 refers to the need to deal with policy 11, 13 and 15 matters before planning for aquaculture. This is confusing and seems to negate the Council's overall combined planning exercise for the MEP under section 80 of the Act, as referred to at paragraph 22 of the memorandum. Nevertheless, the Council's natural character and landscape studies did take into account existing marine farms and so it is not readily apparent what has been achieved by removing the aquaculture chapter shortly before the proposed plan was notified. In any event, it is understood that notification of the aquaculture chapter is imminent and there now exists an opportunity to consider natural character and landscape provisions in conjunction with the aquaculture chapter.
9. Finally, the Council's memorandum makes reference to section 293 and makes the statement that resort should be had to section 293 *as a last resort*.⁵ The fundamental issue raised by the Friends' appeal is whether important provisions of the NZCPS are given effect to through the proposed MEP. Consideration of the provisions of section 293(3)-(5) are likely to be a central consideration for the Court in hearing this appeal.⁶



JC Ironside
Counsel for Friends of Nelson Haven and Tasman Bay Inc
6 August 2020

⁴ Council's memorandum at paragraph 61

⁵ Council's memorandum paragraph 63

⁶ And see the observations in *King Salmon* at [78]

In the matter of

**the proposed Marlborough Environment
Plan**

For the hearing on Chapter 6 – Natural
Character and Chapter 7 - Landscape

**Outline submissions to accompany evidence by Friends of
Nelson Haven and Tasman Bay Inc.**

Dated 2 February 2018

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Introduction

1. This outline of submissions is on behalf of Friends of Nelson Haven and Tasman Bay Inc. (**Friends**). It accompanies the expert evidence of Dr Michael Steven.
2. Friends is a well-established incorporated Society involved in coastal issues extending across Te Tau Ihu, including the Marlborough Sounds. As a Society, its members have taken a close interest in matters that have arisen for consideration and decision-making under the Marlborough Sounds Resource Management Plan. It does so now in relation to the proposed Marlborough Environment Plan (**MEP**).
3. At the heart of its submissions on the proposed MEP is the overriding concern to ensure that the plan provisions properly give effect to the purpose of the Act, including that environmental protection is a core element of sustainable management.¹ On natural character and landscape provisions, Friends say that the mapping exercise undertaken by the Council lacks the necessary validity and reliability to ensure that important provisions of the NZCPS² are given effect to. This imperils preservation of the natural character of the coastal environment and the protection of natural features and landscapes, and does not promote the sustainable management of natural and physical resources. A fundamental re-think is required.

(i) No clear statement of what is being investigated

4. Preservation of the natural character of the coastal environment and its protection from inappropriate subdivision, use and development is a matter of national importance. So too the protection of outstanding natural features and landscapes. When carrying out a strategic planning exercise of the kind contemplated by objective 2 and policy 7 of the NZCPS, it is necessary to ensure that there is a clear statement and understanding of what is being investigated. For the proposed MEP, there isn't. There is no clear statement or definition of what constitutes natural character. There is no clear statement or definition of what constitutes a natural feature or landscape. These are fundamental failings.

¹ See EDS v NZKS [2014] NZSC 38 at [24] per Arnold J

² New Zealand Coastal Policy Statement 2010, which came into effect on 3 December 2010

5. The problem is compounded by the use of other imprecise and undefined terms such as *perceived naturalness*, or references to imprecise and undefined values in Appendix 1 and 2 (*experiential, perceptual, sensory, associative*). The use of such terminology does not make plain what is being investigated. Dr Steven provides clear and straightforward definitions of both natural character and landscape that should be adopted to ensure that it is clear what is being investigated and mapped.

(ii) Natural character

6. Valid definitions matter because it is important to be clear that natural character is not the same as natural features and landscapes, or amenity values (policy 13 of the NZCPS says so). The heading to Appendix 2 is *Values contributing to high, very high and outstanding coastal natural character*. As Dr Steven states, natural character assessment is not a process concerned with the identification of natural character *values*.³ It is a descriptive process and does not require a separate evaluative stage. It requires the assessment of those characteristics that derive directly from the expression of natural elements, natural patterns and natural processes in the coastal environment. The same assessment can (and should) be used to assess the degree of natural character exhibited by a landscape or natural feature for section 6(b) purposes. There is general acceptance that this assessment can be carried out according to a 7-range scale, which Dr Steven has included in his evidence.⁴
7. For natural character, that is the beginning and end of the assessment. Introduction of the concept of *experiential values* introduces the concept of amenity values into a natural character assessment, something policy 13 warns against. While all assessments of natural character are based on a perception of the extent of natural and cultural influences in a particular environment, perception in this sense provides an empirical understanding of those influences based on observations. It does not involve a reaction to those influences, which is how *experiential values* is used in Appendix 2.
8. Policy 13 does refer to *experiential attributes*, but as Dr Steven explains the examples given are characteristics of natural elements, patterns and processes (the sounds and smell of the

³ Steven at 75.2

⁴ Steven at 75.4

sea, darkness of the night sky). They are able to be perceived (observed) but natural character is not increased or decreased by how we react to those attributes. The assessment of natural character by reference to *experiential values* leads to an incorrect understanding of policy 13 (and section 6(a)). The legal consequence is that on this aspect the proposed MEP has not been prepared in accordance with Part 2, and does not give effect to the NZCPS.⁵

(iii) Outstanding natural character

9. There is also much confusion about how areas of the coastal environment having outstanding natural character have been assessed and mapped. Despite there being general agreement about the 7-range scale for assessing natural character, the proposed MEP approach is to carry out a further assessment of areas of the coastal environment with either high, or very high natural character, and to assess whether those areas qualify as outstanding. This again is not valid and reliable. On this approach, an area assessed as having high natural character can also be classified as having outstanding natural character, while an area assessed as having very high natural character may not be. As Dr Steven observes, this is neither credible nor trustworthy.
10. The much simpler (and more understandable) approach is to reserve the assessment of outstanding natural character to those areas that are at the upper end of the very high range, according to the 7-range scale. This is a valid and reliable approach, leading to a more credible mapping exercise.

(iv) Landscapes include seascapes

11. There are two fundamental criticisms of the way in which seascapes within the Marlborough Sounds have been assessed for the purposes of the MEP. The first is that the MEP does not adopt a holistic approach to assessing landscapes and seascapes as an inseparable part of any landscape assessment. Seascapes are an integral part of all Marlborough Sounds landscapes.
12. The second is that the assessment of seascapes relies heavily on an assessment of the marine component of natural character.

⁵ See sections 61(1) and 62(3) for regional policy statement provisions; sections 66(1) and 67(3) for regional (coastal) plan provisions; and sections 74(1) and 75(3) for district plan provisions.

Again, the warning given in policy 13 that natural character is not the same as natural features and landscapes has not been heeded. Further, the natural character mapping exercise only covers areas that are within the range of high – very high and outstanding. An area with moderate natural character may nevertheless qualify as an outstanding natural landscape. The methodology adopted in the MEP is a flawed approach to the identification of seascapes as part of outstanding natural landscapes within the Marlborough Sounds.

(v) Absence of outstanding natural landscapes

13. This may explain in part why, with the exception of the Outer Sounds outstanding natural landscape, few other areas within the Sounds are accorded this classification. A further explanation may be because the mapping exercise is based on a study that looked at *landscape character units*, rather than landscapes. This in turn has led to identification of a series of outstanding natural features (principally headlands) within the inner parts of the Sounds, but no outstanding landscapes. That is not the task required under section 6(b), or policy 15 of the NZCPS. As Dr Steven observes, the failure to have clearly in mind what is being investigated has led to a flawed approach that is not in accordance with Part 2, and does not give effect to policy 15 of the NZCPS.

(vi) Bottom up approach

14. Exacerbating this flawed approach is the overlay method to assessing landscape values adopted in the landscape study that underpins the MEP maps. It is not based on a holistic assessment of landscapes *as perceived by people* and therefore fails to recognise coherent landscapes.⁶
15. This in turn has led to a relegation of the importance of aesthetic quality in identifying outstanding natural landscapes within the Marlborough Sounds. As Dr Steven observes, the aesthetic quality of the Sounds is likely to be the predominant quality influencing outstandingness for Marlborough communities. It was not mapped as part of the study that underpins the MEP. Dr Steven is right to ask, why not?

⁶ And see the discussion in *KPF Investments v MDC* [2014] NZ EnvC 152 at [47] to [52]

(vii) Concluding comments

16. The fundamental flaws in the manner in which coastal natural character, and outstanding natural features and landscapes have been defined, assessed, evaluated and mapped are such that this exercise needs to be started afresh. That is unfortunate, but it is better to confront the realities of an inadequate planning exercise now rather than later. The Council should be directed to re-assess the coastal natural character and landscape mapping exercise that it has undertaken, taking into account the observations and criticisms contained in Dr Steven's evidence. Nothing else will satisfy the Part 5 statutory requirements that must be met in order for planning instruments to be validly promulgated.
17. It was Council's intention when preparing the MEP for notification that it would also include aquaculture provisions. At a late stage, it was decided to withdraw the aquaculture provisions and to consult further on them. It remains Council's intention that the aquaculture provisions be included in a variation that will *catch up* with the MEP. The same approach should now be adopted in relation to the coastal natural character and landscape provisions.
18. It was always somewhat artificial (and inefficient) to try and settle the coastal natural character and landscape provisions independently of the aquaculture provisions. The opportunity now presents itself to reconsider that approach and to direct that they be considered in an integrated manner through a variation. After all, that is the purpose of having a plan that is a combined regional policy statement, regional (coastal) plan, and district plan.
19. The alternative of soldiering on with an inadequate plan provisions addressing matters of national importance risks leading to a further decade of contentious planning in Marlborough. That does not implement the strategic planning exercise contemplated by objective 2 and policy 7 of the NZCPS.



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2 February 2018