BUDDLE FINDLAY
NEW ZEALAND LAWYERS

21 April 2016

**To**
Matt Heale and Jason Jones

**From**
Julia White
David Allen

**By Email**
Jason@rmgroup.co.nz
Matt.heale@ncc.govt.nz

Dear Jason

**NELSON AIR QUALITY PLAN - REVIEW OF SUBMISSIONS**

1. Thank you for your request for legal advice on various matters arising from submissions on the Nelson City Council ("**Council**") Proposed Plan Change A3 to the Nelson Air Quality Plan ("**PC3**").

2. In summary, our opinion on each question is that:

**Question 1: Submissions seeking to change airshed boundaries**

(a) Submissions 76 and 94, to the extent that they seek to change the boundaries of the airsheds, are beyond the scope of PC3 and the Council has no jurisdiction to consider them.

**Question 2: Submission on the authorisation process**

(b) While the proposal to permit certain small-scale ultra-low emission burning appliances ("**ULEBs**") is fundamentally sound, submission 63 raises a valid concern about the lack of a definition of real-life testing. We propose a drafting solution to address this issue, together with other drafting suggestions to improve the clarity of the proposed rule framework for ULEB authorisation.

**Question 3: Submissions on the certification process**

(c) We consider that the certification process for up to 1,000 ULEBs in Airshed B2 and up to 600 ULEBs in Airshed C clearly meet the tests for assessing the legality of certification conditions and permitted activity status. We consider that the objective criteria for allocating (and then certifying) ULEBs in Airsheds A and B1, and in Airsheds B2 and C in exceedance of these established levels, could be made more explicit and suggest drafting to that effect.

**Question 4: Enabling 1600 ULEBS as a permitted activity**

(d) With the drafting changes recommended in response to questions 2 and 3, we consider that the proposal is clear and meets the requirements for permitted activity status. Enabling up to 1,000 ULEBs in Airshed B2 and up to 600 ULEBs in Airshed C is supported by the Environet 2015 Update Report. We do not see any issue with the allocation of a finite resource through a permitted activity rule (rather than a resource consent process).

**Question 5: Adequacy of section 32 assessment**

(e) The section 32 assessment complies with the requirements of section 32. However, it could be more robust through the inclusion of three further matters, namely:

(i) quantification of the health cost saving of the proposal:

(ii) description of the anticipated economic growth and employment opportunities of the proposal; and

(iii) assessment of the proposed provisions against the purpose of the proposal.

In addition, the section 32AA report will need to assess additional drafting recommendations contained in this advice, if accepted.

**Question 6: Admissibility of further submissions**

(f) Many of the original submissions were quite wide-ranging in scope, and all further submissions either support or oppose submissions already made. All further submissions can therefore be accepted by the Council.

**QUESTION 1: SUBMISSIONS SEEKING TO CHANGE AIRSHED BOUNDARIES**

*Please review submissions 76 and 94. These submissions seek that the plan change be amended to alter the 4 existing Urban Airshed boundaries. Please provide an opinion on whether this relief is within the scope of PC3.*

**Legal test for whether relief is within the scope of a plan change**

3. The question of whether relief, in the form of a requested amendment to a provision in a notified plan change, is within the scope of the plan change raises the issue of whether the submission is *"on"* the plan change, because there is no jurisdiction to grant relief sought in a submission that is not *"on"* a plan change.[1]

4. Once PC3 was notified, various persons were able to make a submission on it to the Council.[2] In order for the Council to have jurisdiction to grant the relief sought in a submission, the submission must have been *"on"* PC3.

5. In the context of plan changes and variations, two decisions of the High Court have explained, in similar (but slightly different) terms, the legal test for whether a submission is *"on"* a plan change or variation.

6. In *Clearwater*,[3] the High Court held that a submission is *"on"* a plan change or variation if:

(a) it is addressed to the extent to which the variation changes the pre-existing status quo; and

(b) those likely to be affected by or interested in the relief have an opportunity to participate in the process to consider the submission.

[1] Another related legal principle is that a local authority, in deciding on the provisions of a plan and the matters raised in submissions, can make amendments to the provisions (as they were notified) that an informed and reasonable member of the public, having studied all the submissions, should have appreciated that the local authority might make had those submissions been accepted.
[2] Clause 6 of Schedule 1 to the Resource Management Act 1991 ("**RMA**").
[3] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 (confirmed in *Protect Pauanui Inc v Thames Coromandel District Council* [2013] NZHC 1944 at [58]).

7. In *Motor Machinists*,[4] the High Court held that in order for a submission to be considered *"on"* a plan change, and therefore within scope, it must:

   (a) *"reasonably be said to fall within the ambit of the plan change"*; and

   (b) if allowed, not deny persons directly or potentially directly affected by the additional changes proposed in the submission an effective opportunity to respond to those additional changes as part of the plan change process.

8. In *Motor Machinists* a submission seeking that the submitter's land be rezoned was held to be outside the scope of a plan change proposing to rezone a **different** area of land, because it failed the first limb of the test. The High Court cited the Environment Court in *Halswater* as follows:[5]

   > *"[63] Ultimately, the Environment Court in Halswater said:*
   >
   > *A submission on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning is not contemplated by a plan change.*
   >
   > *[64] In Halswater there was no suggestion in the plan change that there was to be rezoning of any land. As a result members of the public might have decided they did not need to become involved in the plan change process, because of its relatively narrow effects […]*
   >
   > *[65] It followed in that case that the appellant's proposal for "spot rezoning" was not "on" the plan change. The remedy available to the appellants in that case was to persuade the council to promote a further variation of the plan change, or to seek a private plan change of their own."*

9. The legal principles expressed in *Clearwater* and *Motor Machinists* align with policy considerations relating to plan changes where there are concerns to:

   (a) prevent submissions on issues that have already been determined (or will be determined) in developing the balance of the existing or proposed plan; and

   (b) provide for procedural fairness.[6]

**Submissions 76 and 94**

10. We agree with your analysis that submissions 76 and 94 seek to alter the airshed boundaries, amongst other things. Submission 76 requests a reconsideration of the existing airshed boundaries as follows:

    > *"…all air sheds should be allowed ULEB's - this should be included in the plan or rezone some of the areas as the air zones as they exist do not represent the geographic area well."*

11. Submission 94 raises various issues, two of which relate to the existing airshed boundaries as follows:

    > *"We suggest a major flaw with the Plan Change is that the portion of Airshed C which is north of Wakapuaka Cemetery has never had an air pollution problem and should never have been part of Airshed C. No other 'clean' airshed in the country has a ban on log burners.*

[4] *Palmerston North CC v Motor Machinists Ltd* [2013] NZHC 1290 at [91].
[5] Ibid, at [63]-[65].
[6] See *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59, at [55]: "*One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in procedural unfairness*."

> *Airshed B1 actually has 62% higher pollution levels than Airshed A, when looked at on an annual basis. It is this total annual pollution that the Parliamentary Commissioner for the Environment is concerned about and says we should be moving towards regulating.*
>
> *The people who need log burners most (those in fuel poverty) and the most unlikely to be able to afford the extra $3000 for a ULEB. The Council should not be instituting* [sic] *policies that exacerbate fuel poverty inequality. Those in fuel poverty often have a way of obtaining free firewood."*

**Scope of PC3**

12. The boundaries of the airsheds are not sought to be changed by PC3.[7] Rather, PC3's purpose is to introduce discrete changes to enable certain wood burning appliances for domestic heating, as explained in the section 32 report as follows: [8]

> *"[…] the Council has identified an opportunity to initiate a discrete plan change to remove some unnecessary restriction by making the AQP more enabling of certain wood burning appliances for domestic heating. This opportunity is expressly anticipated in the operative Plan, which acknowledges that advances in low-emission wood burning technology could pave the way for the Plan to be more enabling, whilst also achieving other policy aims for improving ambient air quality and managing particulate matter emissions."*

13. PC3 also anticipates a more comprehensive review to follow as part of the new Unitary Plan process, as described in the following terms in the section 32 report:[9]

> *"The Plan has been operative for seven years, and during that period the City's air quality has improved markedly. In this respect, the objectives, policies and methods in the Plan have been effective in addressing the City's resource management issues for air quality. Given the level of improvement achieved, some of the Plan's provisions are now partially redundant or unnecessarily restrictive. The Council is in the process of undertaking a full review of the AQP and all of its other RMA Plans presently, with the aim of producing a new Unitary Plan in the near future. This review will enable an opportunity for a comprehensive examination of the Plan's provisions, including those which are outdated."*

14. PC3 also envisages a Behaviour Change Programme to be implemented by the Council.

**Conclusion on Question 1**

15. In our opinion submissions 76 and 94, to the extent that they seek to change the boundaries of the airsheds, are beyond the scope of PC3 and the Council has no jurisdiction to consider them.

16. The facts here are analogous to the *Halswater* case where a submitter seeks to change a planning boundary which is not within the scope of a plan change. There would be real questions of procedural fairness (to other submitters or potential submitters) if the Council proceeded to consider the boundaries of airsheds in the context of a plan change which did not bring those boundaries into question. As explained above, the scope of PC3 should be viewed in its broader plan change context where a more comprehensive examination of the Plan's provisions will be undertaken following PC3.

[7] As noted in the definition of "Airshed" (A2-6A) those boundaries are set by the *Gazette* notice under the National Environmental Standard for Air Quality.
[8] Section 32 report, p 2.
[9] Section 32 report, p 2.

17. For completeness, we note that other submitters take a subtly different approach by challenging the effect of the allocation of the 'pollutable resource' through the increased use of ULEBs. For example, submission 92 (Ministry of Education) reads:

> *"Whilst the MoE acknowledges that the air quality and modelling information provided in the section 32A report indicates that there is "room" in Airhseds B2 and C for the addition of 1600 ULEBs, the MoE is concerned that the use of the capacity in the airshed by ULEBs will result in less "room" being available for school heating systems. This could result in requirements for school heating systems becoming stricter, making it more expensive and difficult for schools to heat their schools and renew their resource consents."*

18. In a similar vein, submission 66 (Southpine Limited) reads:[10]

> *"Under the plan change Council can allocate capacity to residential users but industry that might want to use some of that "available capacity" achieved are shut out."*

19. In contrast to the above submissions we consider that there is arguably scope to consider these industry submissions as they are "on" the effect of PC3, by challenging the allocation of the resource implemented through this plan change.

**QUESTION 2: SUBMISSION ON THE AUTHORISATION PROCESS**

*Please review submission 63. The submission seeks a definition of 'real life testing' for the purposes of ULEB certification, and challenges the vires of the proposed plan change approach to ULEB authorisation (which relies upon a Council list to demonstrate appliances which have been authorised). Please provide an opinion on whether the plan change approach is intra vires, and consider amendments that may be required (if any)? If there are any other scope or vires issues arising from your review of the submission, please advise accordingly.*

**Submission 63**

20. As your question reflects, submission 63's principal concerns are about the authorisation process for ULEBs. Submission 63 states:

> *"I'm concerned that ULEBs are permitted activities. Council should follow a similar system to Christchurch, where approval is granted through the resource consent process.*
>
> *The Canterbury Air Quality Plan sets out what ULEBs must achieve, and this is missing from Nelson's Plan Change. Also missing is information about how ULEBs will be tested. Emissions could be higher than modelled for the Plan Change. I could not find a definition for 'real-life'.*
>
> *The Council is giving itself carte blanche to make decisions under Appendix AQ2B. The Council intends to make decisions about this without the public having any input or right to object. It would not be possible for a member of the public to know when or if ULEBs will be allowed into Airsheds A and B1 (where I live), and if so, how many. I consider this is wrong, against the expressed aims of the Council and, I would have thought, against the law."*

21. PC3 proposes, in summary, to permit authorised ULEBs which meet the requirements of permitted activity rule AQr.26A.[11] Authorised ULEBs are on the Council's 'List of authorised small-scale ultra-

[11] Applications can be made for non-complying activity resource consent for ULEBs in Airshed A or B1, or for ULEBs in excess of the 1,600 permitted in Airsheds B2 and C.
[11] Applications can be made for non-complying activity resource consent for ULEBs in Airshed A or B1, or for ULEBs in excess of the 1,600 permitted in Airsheds B2 and C.

low emission burning appliances'.[12] Other appliances may be added to the list through real-life testing authorisation processes, being *Environment Canterbury's Canterbury Method 1 for testing of ultra-low emission wood burners (Revision 1.5, January 2015)* ("**Method 1**") or another real-life testing method. In addition to being authorised, permitted ULEBs must be certified in accordance with the requirements set out in AQ2B (certification is discussed in the following section).

**Legal principles for permitted activities and certification process**

22. In this section we set out the legal principles which apply when assessing the validity of:

    (a) permitted activity rules; and

    (b) certification conditions.

23. We consider that the legal principles which have been developed for assessing certification conditions apply equally to the authorisation process proposed by PC3, as both engage the same concerns regarding certainty and delegation of a Council's decision-making power.

24. For a permitted activity rule to be valid:[13]

    (a) there must be no unlawful delegation of the Council's decision-making power; and

    (b) the rule must be sufficiently certain so as to avoid invalidity.

25. In the case of a permitted activity rule, certification needs to be capable of objective analysis. In *Twisted World Limited v Wellington City Council*,[14] the Environment Court noted that permitted activities *"fall for objective ascertainment"*. In that case, the relevant district plan specified that signs were permitted activities if they complied with specified standards (relating to such matters as illumination, size and location).

26. In *Carter Holt Harvey Limited v Waikato Regional Council*,[15] proposed rules managed existing and new nitrogen leaching activities either as permitted activities with standards,[16] or as controlled activities that determine landowner nitrogen discharge allowances. The Environment Court considered whether a permitted activity rule may be appropriate in a situation where expert analysis was required to determine the appropriate nitrogen discharge allowance for a farm. The Court described the permitted activity rule (drafted by expert planners in caucusing) as *"a very complex rule"* because it set out detailed processes and information requirements in order to calculate the appropriate nitrogen discharge allowance for a farm and in order to determine compliance with a nitrogen management plan.

27. The Court observed that the processes involved could *"require a reasonably high level of expert involvement and a consistent approach"*. While the Court accepted that some of the terms in the rule could be defined objectively, *"the interpretation of others involves input of site specific expert*

[12] As referred to in Appendix AQ2B.2.
[13] *Countdown Properties Limited v Dunedin City Council* (1994) NZRMA 145 at 173, applying *A R & M C McLeod Holdings Limited v Countdown Properties Limited* (1990) 14 NZTPA 362.
[14] *Twisted World Limited v Wellington City Council* EnvC Wellington W024/2002 at [63].
[15] *Carter Holt Harvey Limited v Waikato Regional Council* EnvC Auckland A123/2008.
[16] Rules 3.10.5.1 Permitted Activity Rule - Low Nitrogen Leaching Farming Activities and 3.10.5.2 Permitted Activity Rule - Nitrogen Leaching Non-Farming Activities .

*analysis and judgement that cannot be adequately specified in a permitted activity rule"*. Ultimately, the Court concluded that:[17]

> *"Although the same procedure is to be followed throughout the catchment, the application to each property requires discretion to recognise site specific variations. We find that overall the task required of any rule to implement Policy 3(b), in particular, is too complex and requires considerable expert technical input such that it is inappropriate as a permitted activity."*

28. A condition on a resource consent may provide for certification provided that there is no unlawful delegation of the Council's decision-making power. The leading authority in this area is the Court of Appeal's decision in *Turner v Allison.*[18] In that case, Richmond J found that certification conditions were valid because the task of the expert who was to undertake the certification task was *"to set a standard using her own skill and judgment"*, and acting as a 'certifier' in this manner was different to acting as an arbitrator.[19]

29. In its decision in *Re Canterbury Cricket,*[20] the Environment Court cited *Turner v Allison* and observed that *"[w]hile a condition of consent may leave the certifying of detail to another person (typically a Council officer) using that person's skill and experience, the court cannot delegate the making of substantive decisions"*.

**Recent application of certification principles: Christchurch Replacement District Plan, Natural hazards decision**

30. The decision of the Independent Hearings Panel in the Christchurch Replacement District Plan, Natural Hazards chapter[21] ("***Natural Hazards Decision***") is a recent example of the application of these principles. In that decision, the Panel supported the above caselaw. It approved a permitted activity certification process which assessed the state of the land on which activities would take place and, in particular, whether that land would be subject to an Annual Individual Fatality Risk less than the $10^{-4}$ threshold.

31. Although that assessment involved judgment and uncertainty, the Panel found that several aspects of the process of certification narrowed the scope of subjectivity and/or bias in the exercise of that judgment, namely: [22]

> *"(a) an application for certification would need to include a report of either a Chartered Professional Engineer with experience in geotechnical engineering or a Professional Engineering Geologist (IPENZ registered) providing an AIFR calculation;*
>
> *(b) the calculation would have to be according to the specified methodology (in respect of which the Crown and the Council have recommended refinements, as we address shortly);*
>
> *(c) the report would be subject to Council-commissioned peer review, by an independent expert with equivalent professional qualifications (in respect of which the Crown and the Council have recommended refinements, as we address shortly), and that peer review would need to concur with the calculation method and the calculated AIFR for the identified land in order that certification be given."*

[17] Ibid, at [144].
[18] *Turner v Allison* [1970] NZLR 833 (CA).
[19] Ibid, at 856.
[20] *Re Canterbury Cricket* [2013] NZEnvC 184 at [126].
[21] Decision 6 of the Independent Hearings Panel: Natural Hazards (Part), dated 17 July 2015.
[22] Ibid, at [280].

32. Accordingly the Panel found that the certification process satisfied the legal requirements for certification conditions and permitted activity status discussed above.

**Assessment of proposed authorisation process against legal principles**

33. We do not consider that there are any fundamental issues with the approach proposed in PC3 as described in paragraph 21 above. In particular, it is clear that once a ULEB is authorised it is inserted into the Council's list of authorised appliances[23] so a member of the public can readily ascertain whether a ULEB is authorised.

34. For any ULEB which is not yet on the list, there are clear emissions and efficiency criteria which must be met, which must be real-life tested. One testing method is Method 1, which has been designed by ECan to test the particular circumstances of ULEBs: [24]

> *"The testing of ultra-low emission burners needs to address variations in the amount of $PM_{10}$ that occur as a result of fuel quality and operation. So the current standard [NZS 4012/ 4013] is not fit for purpose in this situation. […]The Canterbury Method 1 is a new approach to the testing of wood burners which redefines the test approach in a way that is more consistent with achieving air quality outcomes. To this end it is intended that it will be more fit for purpose:"*

35. We understand that future improvements to Method 1, and other real-life testing methods, are yet to be developed and are desirable as technology and understanding evolves. We therefore appreciate that the Council wishes to enable innovation and future alternatives to real-life testing methods other than Method 1. However, we consider that submission 63 raises a valid concern about the lack of a definition of 'real-life testing'. In our opinion, PC3 could be made clearer by expressing the processes and constraints under which Council officers may, and may not, approve alternative testing methods and amend the list of authorised appliances. On the current drafting there is a risk of criticism of an open-ended discretion to a Council officer. The reader can only ascertain that Method 1 is an accepted means of real-life testing from the footnote on page 9 of the "Proposed Plan Amendments" document,[25] and there is no guidance on what other means of real-life testing might be acceptable to Council. Applying the caselaw, clearer guidelines or principles could be expected for how authorisation is to be determined.

36. From discussions with you, we understand that:

(a) Method 1 is an accepted method of real-life testing;

(b) the Council seeks to encourage innovation by enabling alternatives to Method 1 to be used. Alternatives could be developed by members of the public, local authorities or government agencies (eg, a company, Environment Canterbury or the Ministry for the Environment); and

(c) the key elements of real-life testing are set out on ECan's website.[26]

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[23] Appendix AQ2B, clause AQ2B.2.
[24] ULEB Canterbury Method 1 Information Sheet.
[25] This states: "*An example of a real life testing methodology is Environment Canterbury's Canterbury Method 1 for testing of ultra-low emission wood burners (Revision 1.5, January 2015)*".
[26] http://ecan.govt.nz/advice/your-air/Pages/uleb.aspx

37. The Proposed Canterbury Air Regional Plan, on which (from discussions with you) we understand this Plan is based, does not set out the requirements for real-life testing. Rather, the ECan website notes:

> *"Currently there are two options to test an ultra-low emission burner - the Canterbury Method 1 (Version 1.5) or another proposed real life test method. Environment Canterbury will consider alternative tests so long as they represent real life operating conditions including start up and wood as it would be typically available from a local firewood merchant (hardwood/softwood/ unseasoned)".*

38. We agree with the ECan approach which includes the Council retaining discretion to approve alternative testing methods, and information being made available as to what real-life testing means. However, in our opinion having this information only available on a website does not avoid arguments that the Plan is, on its face, uncertain or involves an unlawful delegation of Council powers. To satisfy the above legal requirements we consider that the following two elements should be incorporated into the Plan:

(a) the Council retains discretion to approve alternative methods of real-life testing; and

(b) the key requirements for a method to be an acceptable 'real-life testing' method are stipulated.

**Proposed drafting solution for addressing real-life testing issue**

39. We set out below a potential drafting solution which achieves the Council's policy aims of encouraging innovation as discussed above. We have also tried to minimise the litigation risk, as much as possible, by narrowing the scope of subjectivity when deciding whether to approve alternative testing methods. Not only must the appliance be shown to meet the emissions and efficiency standards but there are basic elements of real-life testing that must be met. However, we acknowledge that a degree of uncertainty remains. We understand that item (c)(ii) is as clear as it can be on current information, but if your technical experts are aware of any further defining details, that could usefully be incorporated into the definition. Alternatively, as you are aware a plan change could follow once an alternative method is approved.

40. Our suggested changes to the notified text are shown in strikethrough and underlined text below. The drafting is intended to align with the current drafting style in the Plan.[27]

> ***A2-76 Small-scale ultra-low emission burning appliance***
>
> *means any small-scale solid fuel burning appliance that <u>has been shown, following the authorisation process in Appendix AQ2B.1 and AQ2B.2, to</u>~~can~~ meet either of the following emissions and efficiency standards under real-life testing:*
>
> *(a) 38 milligrams per megajoule; or*
>
> *(b) no more than 0.5 grams of total suspended particulate per kilogram of fuel burned and a thermal efficiency of 65% or greater.*
>
> *For the purposes of this definition:*

[27] An alternative to incorporating these requirements in the definition would be to include them in the permitted activity table rule.

> (c) *"real-life testing":*
>
> (i) *means Canterbury Method 1 for testing of ultra-low emission wood burners (Revision 1.5, January 2015); and*
>
> (ii) *includes any other testing method approved in writing by Council which represents real life operating conditions, including start up and wood as it would be typically available from a local firewood merchant, such as hardwood, softwood or unseasoned wood;*
>
> (d) *the appliances on the Council's 'List of Authorised small-scale ultra-low emission burning appliances' described in Appendix AQ2B satisfy the above emissions and efficiency standards for real-life testing; and*
>
> (e) *ultra-low emission burning appliances do not include:*
>
> (i) *small-scale pellet burning appliances, which are authorised under Appendix AQ2A; and*
>
> (ii) *small scale solid fuel burning appliances, which are authorised under Appendix AQ2.*

41. For added certainty the Council could post any approved alternative testing method on its website. However, we understand from discussions with you that the Council is reluctant to do so in case intellectual property constraints prevent the Council from doing so. We have therefore referred to "in writing" so it is clear whether the Council has approved a testing method.

42. We consider that with the above amendment to the definition of ULEBs there will be no need for the footnote on page 9 of the "Proposed Plan Amendments" document. However, if a footnote was still considered helpful, it could instead refer the reader to the definition of ULEBs, which would include reference to Method 1 as well as alternative testing methods.

**Other comments on the rule for ULEBs**

43. We have also considered rule AQr.26A, which establishes the activity status for ULEBs. Our comments on potential drafting (intended to improve certainty of the rule) are as follows:

(a) The reference should be to 'in' buildings, as follows:

> *AQr.26A Ultra low emission burning appliances (Urban Area) in new buildings, or in existing buildings*

(b) The text "*is permitted if*" could be aligned with the margin in rule AQr.26A to clarify that items a) and b) are intended to modify the whole rule, not just item ii).

**QUESTION 3: SUBMISSIONS ON THE CERTIFICATION PROCESS**

*Related to the previous point, submissions 63, 65 and 66 have challenged the vires of the certification process described in Appendix AQ2B of the plan change. Please review these submissions and the proposed certification process and provide an opinion on whether the approach is intra vires. Please consider amendments to the plan change that may be required (if any).*

**Submissions 63, 65 and 66**

44. Submission 63 is discussed above. Submissions 65[28] and 66[29] accept that analysis has been done supporting 1,000 ULEBs in Airshed B2 and 600 ULEBs in Airshed C. Their main concern is with the certification process for Airshed A and B1, as set out below:

> *"3. Reference to Appendix AQ2B identifies it as being in a number of parts (.1, .2, 3.1, 3.2, 3.3, 3.4) and the Permitted Activity rule requires compliance with the requirements of that Appendix (AQr26A.1(ii)(a)(i)). It is clearly apparent from the structure of the Appendix that a number of discretions are reserved to the Council, for example:*
>
> *(i) Reference to "real life testing conditions",*
>
> *(ii) A certification process "associated with updated monitoring and modelling after 2015".*
>
> *It appears that for Airshed B2 an analysis has been done - enabling only 1,000 ULEBs and in Airshed C an analysis has been done allowing only 600 ULEBs, but in Airshed A (Hospital and Washington Valley) and Airshed B1 (Tahunanui), ULEBs appear to be able to be installed "based on an examination of the relationship between winter-time PM10 concentrations and meteorological conditions in Nelson", including a step 5:*
>
> > *"To assess the ability for additional burner numbers by considering the extent of capacity available, having regard to:*
> >
> > - *the Council's inventory of certified burners installed (and therefore the number that may still be certified/installed under the current allocation);*
> > - *the impact of meteorological conditions on concentrations (including Airshed dispersion); and*
> > - *real life emission factors and fuel use for new small-scale ultra-low emission burning appliance installations".*
>
> *4. It follows that Council could make that assessment and "open up" available capacity for additional burners in Airshed A without going through a public process.*
>
> *5. It is well established that a Council may not reserve to itself a discretion to finally decide whether any activity is "a Permitted Activity" (or note) - the question is whether a rule is sufficiently certain to be understandable and functional. In the case of the rule relating to Airshed A and Airshed B1 Council has reserved to itself a discretion to allow for additional burner numbers having regard to certain matters, there is no certainty, the situation is at best "fluid" and therefore the rule is ultra vires.*
>
> *6. Even if the rule was found not to be ultra vires (reliant as it is on a judgment being made on the final two bullet-points of step 5 for Airsheds A and B1) it provides in effect a priority for "spare capacity" to ULEBs as distinct (or better put, in preference to) industry already existing in the Zone - thereby constraining the resource.*
>
> *7. Under the Plan Change Council can allocate capacity to residential users but industry that might want to use some of that "available capacity" achieved are shut out.*
>
> *8. Even if capacity was available, industry must go through a public consent process, but ULEBs get allocated through a "internal process" which is neither public, transparent or open to challenge, thereby giving preference to residential activity over industrial.*
>
> *9. It seems illogical that the Council should have done a certification process (permitted appliances in Airsheds B2 and C (AQ2B.3.3)) thereby giving certainty, but have not done the same for Airshed B1 and A.*
>
> *10. It seems the Council has adopted what could be termed a "short cut" process with a priority given to residential users. For Airsheds A and B1 (where the Airsheds are either at or over capacity) all applications for ULEBs should be as for industrial uses WHEREBY*

[28] Eurocell Wood Products Limited.
[29] Southpine Limited.

*either a Non-Complying Activity or Discretionary Activity application is required to go through the public planning process."*

**Analysis of certification process for up to 1,000 ULEBs Airshed B2 and up to 600 ULEBs in Airshed C**

45. We consider that the certification process for up to 1,000 ULEBs Airshed B2 and up to 600 ULEBs in Airshed C is clear, as set out in Appendix AQ2B.3.3 (with duration and administration requirements set out in Appendix AQ2B.3.5). However, we consider that the following drafting amendments could be made to AQ2B.3.3 to clarify that the cap assessment is made when the application is received, applying the established RMA principle of first-in-first-served:

> *The Council will issue a BAC ~~provided that the~~ if:*
>
> *(a) the small-scale ultra-low emission burning appliance is located ~~on a site~~ in Airshed B2 or Airshed C,; and ~~the following limits are not exceeded (from the date that Plan Change A3 was made operative)~~:*
>
> *(b) when an application for a BAC is received by Council:*
>
> *(i) if the application is for an appliance ~~(a)~~in Airshed B2, no more than 1,000 appliances ~~shall be certified~~ hold a BAC in that airshed; or*
>
> *(ii) if the application is for an appliance ~~(b)~~in Airshed C, no more than 600 appliances ~~shall be certified~~ hold a BAC in that airshed.*

**Analysis of certification process for ULEBs in Airsheds A and B1, and B2 and C where AQ2B.3.3 does not apply**

46. PC3 sets out a five-step methodology for determining whether ULEBs can be allocated (and then certified):

(a) in Airshed A or B1; and

(b) in Airshed B2 or C, beyond the caps set out in AQ2B.3.3 above,

with concentrations remaining within, or improving on, NES levels.

47. The methodology takes a precautionary approach because additional ULEBs in Airsheds A and B1, and beyond the AQ2B.3.3 caps, are not supported by the current monitoring data.[30] As the *Natural Hazards Decision* demonstrates a certification process can be complicated, and involve judgment and uncertainty, but such a process can be legally valid if there are clear parameters around such judgments, which can be objectively expressed.

48. The parameters for the certification process are set out in the 'method' section, steps 1-5, for Airsheds A and B1, and B2 and C where the AQ2B.3.3 caps do not apply. We consider that steps 1-4 are sufficiently clear, but as previously discussed, are concerned that step 5 involves a large degree of subjective judgment, with no objective criteria against which the application can be assessed. From discussions with you we understand that the emissions thresholds which must be

[30] Page 18 section 32 report.

met are those set out in Policy A5-1.3 and Policy A5-1.4. This accords with the requirement that regional rules implement the Plan's policies.[31]

49. We therefore suggest a potential redrafting for step 5 which reflects the objective elements implicit in the assessment of whether ULEBs can be certified in Airsheds A and B1, and in Airsheds B2 and C in exceedance of the existing caps, as set out below. Please note that we suggest replacing "*the impact of meteorological conditions on concentrations (including airshed dispersion)"* with reference to steps 1-3, to clarify how step 5 relates to the previous steps.

> **"*Step 5*:** ~~*Assess the ability for additional burner numbers by considering the extent of capacity available,*~~ *Issue a BAC if the targets in Policy A5-1.3 and Policy A5-1.4 can be met.*
>
> *In determining whether these targets can be met, the Council must consider* ~~*having regard to*~~*:*
>
> *(a)* the ~~*impact of*~~ *worst case meteorological conditions established under steps 1-3;* ~~*on concentrations (including airshed dispersion); and*~~
>
> *(b)* *the capacity for compliance with the NES established under step 4;*
>
> *(c)* *the number of ULEBs in the Council's inventory of certified appliances* ~~*burners installed*~~ *(and therefore the number that may still be certified/installed under the current allocation); and*
>
> *(d)* *real life emission factors and fuel use for new small-scale ultra-low emission burning appliance installations."*

50. Although step 5 is clear on its face, an example could be inserted following step 5, to demonstrate how a Council officer would apply it. Any explanation requires technical expertise so we have not proposed a potential drafting option.

51. We understand that further monitoring needs to be carried out for Airshed C before ULEBs can be allocated within this airshed. The last sentence could be amended to reflect the intention that once the monitoring information is gathered "*the methodology will follow the approach described for Airshed A…."*.

52. Since the preparation of our drafting suggestions in this advice we understand that the planning and air science advice is that:

    (a) the Airsheds A and B1 targets should change to the 'Acceptable' category value; and

    (b) the Airsheds B2 and C targets should change to the trend line in Table 1 established under step 4 of the methodology for Airshed B2.

53. We have reviewed the subsequent section 42A drafting (which incorporates our drafting suggestions) and have no issue with it.

**QUESTION 4: ENABLING 1600 ULEBs AS A PERMITTED ACTIVITY**

*In considering the vires of the proposed plan change methods, please also have regard to the enabling of 1600 ULEBs as a permitted activity. Does this approach (compared to allocation via a resource consent process) give rise to any legality issues?*

54. We do not see any issue with the allocation of a finite resource through a permitted activity rule (rather than a resource consent process). Every regional council must, if appropriate, establish

[31] RMA, section 67(1)(c).

rules in a regional plan to allocate the capacity of air or water to assimilate a discharge of a contaminant,[32] with the regional plan recording how it has allocated that resource.[33]

55. The regional council has discretion as to what activity status it confers for the allocation of a resource (such as permitted activity status) as long as:

(a) the statutory criteria are met (eg, the rule is supported by appropriate section 32 analysis and the regional council has regard to the effect of the environment of the activities[34]); and

(b) the permitted activity rule meets common law requirements for a permitted activity rule (as set out above).

56. There are numerous examples of allocation, especially of water - one is the allocation of water under the Waikato Regional Plan as a permitted activity.[35]

57. With the drafting changes recommended in response to questions 2 and 3, we consider that the proposal is clear and meets the statutory and common law requirements for permitted activity rules.[36] Enabling 1,000 ULEBs in Airshed B2 and 600 ULEBs in Airshed C is supported by the Environet 2015 Update Report, as explained in the section 32 report.[37]

**QUESTION 5: ADEQUACY OF SECTION 32 REPORT**

*As part of your consideration of Submissions 65 and 66, please also address the view expressed in those submissions that the s32 Report is inadequate and/or fails to meet the requirements of the Act, including recommendations on specific matters to be addressed or revisited (if any).*

**RMA requirements for section 32 report**

58. Submissions 65 and 66 simply assert: "*The section 32 analysis (to the extent that it exists at all) is inadequate and the requirements of the Act in that regard are not met.*"

59. Under section 32 of the RMA, the evaluation report prepared in support of the provisions must identify and assess the benefits and costs of the provisions, including opportunities for economic growth and employment.[38] If practicable, these benefits and costs should be quantified.[39] The risk of acting or not acting should also be addressed if there is uncertain or insufficient information.[40] The section 32 report must contain a level of detail that corresponds to the scale and significance of

[32] Section 30(1)(fa)(iv) RMA.
[33] Section 67(5) RMA.
[34] Section 68(3) RMA.
[35] For example, Rules 3.3.4.13-3.3.4.15 of Waikato Regional Plan, Variation No. 6 (operative 10 April 2012) permit various water takes as permitted activities. In the Environment Court decision *Carter Holt Harvey Limited v Waikato Regional Council* [2011] NZEnvC 380 determining Variation 6 the Court commented, in relation to the permitted activity status for water permit transfers (para [456]): "*We are satisfied that in the interests of efficiency, it is appropriate to have rules enabling the transfer of water permits. We are also satisfied that the Council has struck an appropriate balance by enabling transfers, either by way of permitted or restricted discretionary activity status, but at the same time ensuring that any potential adverse effects on the Waikato River are avoided, remedied or mitigated*."
[36] We note that permitted activity status is expressly queried by submission 63.1, as set out above.
[37] Section 32 report, p 25 and p 18 "*A key finding of the report was that on degradation in air quality and continuation of projected downward trends could be achieved in Airsheds B2 and C by allowing up to 1000 ULEB installations in Airshed B2 and 600 ULEB installations in Airshed C, provided than an enhanced behaviour change programme targeting a 10% reduction in PM10 is advanced concurrently*".
[38] RMA, section 32(2)(a).
[39] RMA, section 32(2)(b).
[40] RMA, section 32(2)(c).

the environmental, economic, social and cultural effects that are anticipated from the implementation of the proposal.[41]

**Assessment of section 32 assessment against RMA requirements**

60. In our opinion, the section 32 assessment meets the section 32 requirements. However, it could be made more robust with the addition of the three matters explained below. If you agree, these matters can be covered in evidence or updated officer reports. It is well established that the section 32 analysis is an ongoing process, assisting (in this case) the development of a regional plan up until a decision is issued on the plan.[42]

61. First, the RMA requires that the benefits and costs of implementing the provisions be specified. The section 32 report mentions that the enhanced behaviour change is the only scenario that is expected to yield a health cost saving (benefit).[43] In our opinion, it would be clearer to reflect that the behaviour change alone was not modelled, rather it was modelled as a scenario that also included limited ULEBs. This is scenario Sc[6](2b) in the Market Economics report,[44] which has been quantified as a health benefit of $10.5m, $1.8m, and $2.2m at various airsheds, set out at tables 3-1, 3-3 and 3-4. As the health cost saving has been quantified in the Market Economics Report, it should be specified in the section 32 report.

62. Secondly, we consider that information should be provided on the potential economic growth and employment opportunities that may arise from implementing the provisions.[45] The Market Economics Report does not factor in, as a benefit, the economic growth and employment opportunities that may arise from implementing the provisions. Rather, only the direct costs (to homeowners and Council) have been factored in that report.[46] We understand, from discussion with you, that the author of the Economics Report will be asked to describe such opportunities. If concrete data is not practicable to obtain, then economic growth and employment opportunities need only be described at a high level as section 32 only requires that the benefits and costs must only be quantified 'if practicable'.

63. Thirdly, we note that the section 32 report must:

> "*(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and*
>
> *(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
>
> *(i) identifying other reasonably practicable options for achieving the objectives; and*
>
> *(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
>
> *(iii) summarising the reasons for deciding on the provisions".*

[41] RMA, section 32(1)(c).
[42] *Kirkland v Dunedin City Council* [2002] 1 NZLR 184 (Court of Appeal) at [17], [18] and [23].
[43] Section 32 report, p 19 and 29.
[44] The scenario is mislabelled as "behaviour change" in the Economics Report. However, this scenario appears to involve behaviour change plus limited ULEBs.
[45] For example, section 2.3.2 of the section 32 report could expand on the 'economic considerations'.
[46] Economics Report, p 11.

64. "*Objectives*" are defined in section 32(6) as:

> "*(a) for a proposal that contains or states objectives, those objectives:*
> *(b) for all other proposals, the purpose of the proposal*."

65. The section 32 report clearly assesses the objective of the proposal against the purpose of the RMA, and the provisions in the proposal against the policies and objective of the Plan.[47] In addition to that assessment, given that the proposal does not contain or state objectives, we consider that the provisions should be assessed against the purpose of the proposal, which is clearly expressed in the section 32 report as a "*discrete plan change to remove some unnecessary restriction by making the AQP more enabling of certain wood burning appliances for domestic heating.*"[48] The purpose of the proposal also includes the Behaviour Change Programme which is, in terms of section 67(2)(c) RMA, a method, other than rules, for implementing the policies of the region.[49]

66. Also, we consider that the section 32 assessment[50] could be more explicit as to how the objectives of the proposal are the most appropriate way to achieve the purpose of the RMA.

67. When assessing the objective of the proposal against the purpose of the RMA, and whether the provisions are the most appropriate way to achieve the purpose of the proposal and the purpose of the existing objectives in the plan, we consider that the Council can, and should, take into account the modelled 10% reduction in $PM_{10}$ as, as noted above, the Behaviour Change Programme is an 'other method' which can be included in the Plan.

68. For completeness we note that, if you agree with the additional drafting changes to the proposal recommended in our advice, the section 32AA report will need to identify and assess those changes.[51]

**QUESTION 6: ADMISSIBILITY OF FURTHER SUBMISSIONS**

*Please review the further submissions and advise if any are outside scope or do not meet the requirements for further submissions in clause 8 of Schedule 1 (RMA).*

**Legal principles when assessing admissibility of further submissions**

69. The persons who can make a further submission are:

(a) any person representing a relevant aspect of the public interest;

(b) any person who has an interest in the Plan greater than the general public has; and

(c) the Council.[52]

70. A further submission must be "*limited to a matter in support of or in opposition to the relevant submission made under clause 6*."[53] Further submissions may only be made in support of, or opposition to, submissions already made. For this reason a further submission cannot extend the

[47] See, for example, section 3.3, p 33 section 32 report.
[48] Section 32 report, p 2.
[49] Section 32 report, p 2 explains that the Behaviour Change Programme will be implemented by the Council to improve the burning practice of all persons using solid fuel appliances for domestic heating. It will include targeted education and engagement with solid fuel users, and enhanced monitoring and enforcement regimes (amongst others.
[50] See the last paragraph in section 3.4 of the section 32 report.
[51] If changes are made to the provisions since the section 32 report, then under section 32AA, the Council must ensure a further evaluation is undertaken that accords with the requirements of section 32.
[52] RMA, clause 8(1) Schedule 1.
[53] RMA, clause 8(2) of Schedule 1.

scope of the original submission and can only seek allowance or disallowance in whole or part of the original submission.[54] When a further submission is out of scope, it must be rejected in order for the Council to uphold the legislative intent of Schedule 1, clause 8 of the RMA.[55]

**Assessment of further submissions**

71. We have considered all further submissions against the original submissions commented on. Many of the original submissions were quite wide-ranging in scope, and all further submissions either support or oppose submissions already made. All further submissions can therefore be accepted by the Council.

Yours sincerely

**Julia White**
Senior Associate

Direct dial: +64-4-498 7331
Mobile: 64 21 682 993
Email: julia.white@buddlefindlay.com

[54] *Offenberger v Masterton District Council* W053/96 (PT).
[55] *Telecom NZ Ltd v Waikato District Council* EnvC A074/97.