

**IN THE HEARINGS COMMITTEE  
SELWYN DISTRICT COUNCIL**

**UNDER** the Resource Management Act 1991, schedule 1

**AND**

**IN THE MATTER OF** a submission and further submission on proposed Plan to  
the proposed Selwyn District Plan

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**LEGAL SUBMISSION  
ON BEHALF OF THE ROYAL FOREST AND BIRD PROTECTION SOCIETY  
OF NEW ZEALAND INC  
2 August 2021**

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**Royal Forest and Bird Protection Society of New Zealand Inc.**  
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## **May it please the Commissioners**

### **Introduction**

1. The Royal Forest & Bird Protection Society of New Zealand Inc. (“Forest & Bird”) made a submission and further submission on the proposed Selwyn District Plan (“Proposed Plan”). Forest & Bird requested to be heard on its submissions.
2. Forest & Bird further submitted in support of the Director-General of Conservation’s submission on the strategic directives in the proposed plan. Forest & Bird adopts the submission and evidence from Amelia Ching submitted on behalf of the Director-General of Conservation in regards to the Strategic Directions Chapter.<sup>1</sup>
3. The proposed plan raises significant issues for Forest & Bird concerning the protection of significant indigenous vegetation and significant habitats of indigenous fauna (“Significant Indigenous Biodiversity”) and maintenance of indigenous vegetation and habitats of indigenous fauna (“Indigenous Biodiversity”) in the Selwyn District. Forest & Bird submits that the proposed plan does not protect or maintain indigenous biodiversity in the Selwyn District because of the imperative of all chapters’ objectives and policies to be read and achieved in a manner consistent with the Strategic Directions objectives.<sup>2</sup> This approach to plan construction gives the proposed Strategic Directions Objectives primacy over other objectives and policies in the proposed plan. Forest & Bird submits that this approach to plan construction is not in accordance with the Resource Management Act 1991 (“the RMA”) and will create confusion for plan users.
4. Forest & Bird further submits that there is a gap in the Strategic Directions. The Strategic Directions are meant to identify key resource management issues facing the Selwyn District. Forest & Bird submit that the appropriate management of indigenous biodiversity is a key issue. In order to fill this gap Forest & Bird supports the relief to the Strategic Directions sought by the Director-General of Conservation in the evidence of Amelia Ching.<sup>3</sup> Forest & Bird consider that it is necessary to remove the

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<sup>1</sup> Amelia Ching on behalf of the Director-General of Conservation, Statement of Evidence, 26 July 2021,

<sup>2</sup> Proposed Plan, General Approach, HPW4 - Structure

<sup>3</sup> Amelia Ching, Statement of Evidence, 26 July 2021 at [60]

wording in the Strategic Directions-Overview that establishes the hierarchy to address Forest & Bird's concerns in relation to Director-General of Conservation's submission opposing all the Strategic Direction provisions.<sup>4</sup>

## **PROPOSED PLAN'S STRATEGIC DIRECTIONS**

5. Under the National Planning Standards 2019 ("the Standards"), chapter 7, cl 1(b) if the proposed plan includes objectives that are considered to be key strategic objectives for the district, they must be set out in the proposed plan under the heading Strategic Direction. The Standards, Chapter 7 sets out the basic format for including strategic directions within a proposed plan. The Proposed Plan, SD-Overview states that the Strategic Directions:

... sets out the overarching direction for the District Plan as expressed through Strategic Directions

These directions reflect those factors which are considered to be key to achieving the overall vision for the pattern and integration of land use within Selwyn District.

...

For the purposes of preparing, changing, interpreting, and implementing the District Plan, all other objectives and policies in all other chapters of this District Plan are to be read and achieved in a manner consistent with these Strategic Directions

There is no hierarchy between the stated Objectives i.e.' no one Strategic Objective has primacy over another Strategic Objective and the Strategic Objectives should be read as a whole ...

6. Forest & Bird submits that under the proposed wording above other chapter provisions, including the Ecosystem and Indigenous Biodiversity (EIB) provisions and other provisions for the natural environment, will have to be read and achieved in a manner consistent with the Strategic Directions as a whole. Forest & Bird submits the above wording is not compatible with the scheme of the RMA because the Strategic Directions do not give effect to higher order planning instruments that prioritise

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<sup>4</sup> Submitter: DPR-0427 – Submission Point 021, 128 - 138

protection of the natural environment (e.g., the New Zealand Coastal Policy Statement).

7. The Strategic Directions chapter must be in accordance with the Standards, must be consistent with the Selwyn District Council's ("Council") functions under the RMA, s31 and must not be inconsistent with Council's obligations under RMA, Part 2, including s6.
8. Section 6 sets out matters of national importance and the responsibilities for these "in achieving the purpose of the Act". The Council is required to recognise and provide for these matters whilst exercising its functions and powers under the RMA.

**Scope of National Planning Standards 2019, clause 7(1)(b)**

9. The purpose of the Standards is to "assist in achieving the purpose of the Act". This wording "to assist" makes it additional to and does not override RMA, Part 2, and s6 requirements in achieving the purpose of the RMA.
10. The scope and contents of the Standards is set out in RMA, s 58C. Standards must give effect to national policy statements, and be consistent with national environmental standards, regulations and water conservation orders. The Standards may also direct local authorities to use particular structures for their respective plans and include specific provisions in those plans.
11. RMA, s 58I requires the Council to give effect to the Standards and undertake actions required by the Standards.
12. The Council's functions are set out in RMA, s31. The Selwyn District Council is also required to prepare its proposed plan in accordance with the matters set out in RMA, s 74 and give effect to national policy statements, NZCPS, national planning standards; and any regional policy statement under s75(3).
13. There is nothing in RMA, ss 58B – 58J to suggest that the Standards supplant the Council's functions or obligation to construct its plan in accordance with ss 74, and

75. On the contrary, the purpose of the Standards is to assist with achieving the RMA's purpose and set out the requirements relating to structure, format or content. This means any provisions included in the Proposed Plan using the discretion under the Standards Chapter 7 cl 1. must accord with Part 2, s 31, s 74 and s 75.

14. There is nothing in RMA, s 75 or the Standards to suggest that there is a hierarchy amongst objectives that must or may be included in the proposed plan or that there is a requirement that they be assessed against each other. Standards, Chapter 7, cl 1(b) simply stipulates that objectives that address key strategic matters for the district and guide decision making at a strategic level, must be located under the strategic heading. The Standard does not require the inclusion of strategic objectives and does not suggest that they be any more than for the purpose of guiding decision making at a strategic level.
15. RMA, s 75 does require district plans to have objectives but there is no suggestion in s 75 as to a priority in objectives. Under s 75(2), a district plan may state significant resource management issues for the district. Forest & Bird submit that s 75's priorities lie with its directive requirements that a district plan must 'state', must 'give effect to' and must 'not be inconsistent with' certain matters under s 75(1), (3) and (4).
16. Reading the provisions found in other proposed plan chapters, including the EIB and Coastal Environment (CE) Chapters to be achieved consistent with the Strategic Direction objectives will result in reading down policy direction. This means chapter provisions, such as EIB and CE, that would otherwise<sup>5</sup> provide for s6(c) and give effect to the New Zealand Coastal Policy Statement ("NZCPS")<sup>6</sup> may not do so as a result of achieving the Strategic Direction.
17. The approach in the Proposed Plan which prioritizes an optional objectives providing guidance on a strategic matters for the district, over other objectives that give effect to higher order planning instruments does not sit well with the content requirements for plans. Nor does it fit with the section 32 considerations for plan provisions.

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<sup>5</sup> Subject to the relief sought in Forest & Bird's Submission on the Proposed Plan

<sup>6</sup> NZCPS, policy 11 includes directives to avoid and avoid significant adverse effects on indigenous biodiversity

18. RMA, s32 only requires that objectives are examined to the extent that they are the most appropriate way to achieve the purpose of the RMA and then to examine whether the provisions (e.g., policies) are the most appropriate mechanism to achieve the objectives.
19. The above legal requirements do not necessarily preclude a plan design that expresses relative priorities and relationships as between objectives and policies.<sup>7</sup> However, if such a design is expressed then those strategic objectives/policies must give effect to higher order planning documents including RMA, Part 2 in order for the council to fulfil its statutory obligations.
20. Forest & Bird submit that the proposed plan does not give effect to higher order planning documents or Part 2 of the RMA because other chapters (e.g., Ecosystems and Indigenous Biodiversity) have to be read to achieve and to be consistent with the Strategic Directions Objectives. The Strategic Objectives do not give effect to higher order documents, particularly in relation to the natural environment.<sup>8</sup>

## **APPROACH TO STRATEGIC DIRECTIONS IN OTHER PLANS**

### ***Approach on the Queenstown Lakes Proposed Plan***

21. The Environment Court in *Darby Planning Ltd Partnership v QLDC*<sup>9</sup> discussed what influence strategic objectives and policies should have in the formulation and interpretation of other proposed plan provisions; and the interpretation of the strategic directions chapter introduction in the decisions version of the proposed QLDC plan. The QLDC argued before the Court that the Strategic Objectives and policies were ‘over-arching’ and had ‘primacy’ over objectives/policies in the QLDC proposed plan.<sup>10</sup> Various parties opposed the QLDC’s position.

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<sup>7</sup> Minute of the Court, dated 22 February 2019, at [11] attached as annexure to *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133

<sup>8</sup> Amelia Ching, Statement of Evidence, at [38] and [51]

<sup>9</sup> *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133 at [64]

<sup>10</sup> *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133 at [66]

22. The Court was mindful that strategic objectives/policies, at least in regards to the QLDC's proposed plan, were intended to be overarching. However, the Court had earlier observed in its Minute<sup>11</sup>:

[8] The word 'over-arching' has always qualified 'strategic direction' (first sentence). Over-arching does not itself imply supervisory direction in that it can also sit with a less directive model. One ordinary meaning is "sitting over all" (as in an arch). That meaning suggests Chapter 3 'addresses' or 'touches on' the key strategic issues for the district but not necessarily that it does so in comprehensive detail. It is that meaning (rather than 'all-embracing') that we understand Chapter 3 attempts to achieve. That means it allows for Chapter 3 strategic objectives ('SOs') and strategic policies ('SPs') to interface, where intended, with other chapter objectives and policies.

23. With that in mind the Court went on to note, in light of the evidence, the indicative design intention of the QLDC proposed plan that:

... (b) similarly, the SOs and SPs are not to be treated either in isolation from relevant other chapter objectives and policies or as having inherent primacy in their relationship to other relevant chapter objectives and policies.

24. Ultimately the strategic directives section in the proposed QLDC proposed plan was amended following in the Minute of the Court, 22 February 2019 (attached as an annexure to *Darby Planning Ltd Partnership v QLDC*<sup>12</sup>) to read:

### **3.1B Interpretation and Application of this Chapter**

3.1B.4 For the purpose of plan implementation (including in the determination of resource consent applications and notices of requirement):

- a. the Strategic Objectives and Strategic Policies in this chapter may provide guidance on what the related objectives and policies in other chapters of the Plan are seeking to achieve in relation to the Strategic Issues;

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<sup>11</sup> Minute of the Court, dated 22 February 2019, attached as annexure to *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133

<sup>12</sup> *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133

**b. the relevant objectives and policies of the plan (including Strategic Objectives and Strategic Policies in this Chapter) are to be considered together and no fixed hierarchy exists between them.**

...

(Bold my emphasis)

25. The Environment Court considered that the above wording was the most appropriate for achieving the RMA's purpose.<sup>13</sup> Importantly the final version approved by the Environment Court did not include the concept of primacy or hierarchy for strategic objectives/policies which was advocated for by the QLDC.

***Approach in the New Plymouth Proposed Plan***

26. The New Plymouth District Council has recently promulgated a proposed plan which contains very similar language to that of the Proposed Plan for Selwyn. It uses the following phrase as well for interpretation of the Strategic Directions chapter:

All other objectives and policies in the District Plan are to be read and achieved in a manner consistent with the strategic objectives.

27. The Commissioners' Panel considering the New Plymouth proposed plan asked for submissions on a number of topics including: 'what is the lawful reach of objectives that may be included in the Strategic Directions': 'what is the scope of the Standards, chapter 7', and 'what does guide "guide decision making at a strategic level mean"<sup>14</sup>'.<sup>15</sup> After receiving legal submissions from other parties, the New Plymouth District Council filed its own submission.<sup>16</sup>

28. The New Plymouth District Council's preference was that the Strategic Objectives provide guidance on the New Plymouth Proposed Plan. The New Plymouth District Council did not consider it necessary to stipulate a hierarchy between objectives in the proposed plan and proposed the following amendments to the proposed plan:

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<sup>13</sup> *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133 at [193]

<sup>14</sup> This is the wording used in the Standards, Chapter 7, cl 1(b)

<sup>15</sup> Commissioner's Minute number 5 Considering the New Plymouth Proposed Plan, 8 July 2021

<sup>16</sup> New Plymouth District Council, Legal Submissions on the New Plymouth Proposed Plan, 30 July 2021, at [2.20]



All other objectives and policies in the District Plan are to be read and achieved in a manner consistent with the strategic objectives. **The strategic objectives are not repeated in the other chapters in the District Plan but are given effect to by policies within those relevant chapters.**

**For the purpose of plan development, including plan changes, the Strategic Objectives provide guidance on the key strategic or significant matters for the district that are relevant when developing District Plan provisions.**

**For the purpose of plan implementation (including in the determination of resource consent applications and notices of requirement), the Strategic Objectives provide guidance on what the related objectives and policies in other chapters of the Plan are seeking to achieve in relation to key strategic or significant matters for the district.**

(Bold and Underline amendments proposed by New Plymouth District Council 30 July 2021)

29. While Forest & Bird considered that the additional drafting put forward by the New Plymouth District Council go some way to supporting their argument that stipulating a hierarchy is unnecessary, it does not remove the wording which creates the issue of hierarchy. Forest & Bird does not consider that the amendments actually clarifies the intention of the Strategic Directions in the proposed plan for New Plymouth District. In Forest & Birds view not only is it unnecessary to stipulate a hierarchy it is also inappropriate to do this with respect Strategic Direction.
30. Forest & Bird submit that it is not appropriate to impose an hierarchy by directing how plan provisions are to be read in the Proposed Plan because there may be instances where the Strategic Objectives may not give effect to high order planning documents. The Strategic Objectives will need to be read alongside other relevant provisions to achieve the purpose of the RMA.
31. Further, it is not necessary to impose an hierarchy of objectives in order to guide the development of other chapter objectives and resource consent processes. So long as the intention of the Strategic Directions are clear this can be achieved without a statement as to hierarchy. The Strategic Objectives should be used as an overarching

guidance tool for the consideration of resource consents/notice of requirements if the other chapters objectives/policies do not provide clear direction in the decision making process but not as a higher order-planning regime.

#### **INTENDED APPROACH TO INTERPRETATION OF PROPOSED PLAN**

32. Forest & Bird submit that the intention of the Proposed Plan's Strategic Directives chapter is not clear between the s42A and s32 report. The s32 report purports to indicate that all other chapters in the proposed plan are subservient to the Strategic Directives Objectives/Policies. However, this does not come across in s42A report which indicates that the Strategic Directions address the key resource management issues.
33. The s42A Overview Report does not discuss expressly the Strategic Directions – Overview. The closest the s42A Overview report comes in discussing the intent of the Strategic Directions - Overview is:<sup>17</sup>

... the Strategic Objectives will direct decision making by expressing the outcomes to be achieved by the Proposed Plan in addressing the key resource management issues for the district. They set up the framework for the District Plan and are supported by the chapter level objectives...

34. The s32 analysis on the Proposed Plan explains that:<sup>18</sup>

The role of a strategic objective is to provide the overall context for the district plan, the overarching direction for other chapters through high level objectives that provide an integrated policy framework for the district as a whole, and sets the land use pattern of Selwyn.

These provisions should have primacy, and all other provisions should be expressed and achieved in a manner consistent with the strategic objectives, subject to RMA requirements. In other words, a clear hierarchy should exist between them and those that are chapter specific. Strategic objectives should identify and address district wide

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<sup>17</sup> Overview s42A Report at [8.7]

<sup>18</sup> Section 32 Strategic Objectives at [6.1]

sustainable management priorities, give overarching direction, and ensure their purpose achieves the outcomes sought by higher order planning documents.

For a matter to qualify as a priority and warrant a strategic objective, the matter must be strategically important for achieving integrated management and the purpose of the RMA, or to give effect to a National Policy Statement, the New Zealand Coastal Policy Statement, or the Canterbury Regional Policy Statement.

For the purposes of preparing, changing, interpreting and implementing the District Plan, all other objectives and policies in all other chapters of this District Plan are to be read and achieved in a manner consistent with the strategic objectives. Additionally, no hierarchy should be placed on the strategic objectives, and that they should all be read as a whole.

35. The s32 report then says that SD-DI-01 through to SD-MVQ-01 fulfil certain RMA, Part 2 requirements noting that SD-DI-01, SD-DI-03, SD-DI-04, SD-UDF-01, SD-IR-02 fulfil the requirements of s6(c). However, no detailed analysis was completed.
36. Forest & Bird does not see how the Strategic Directions fulfil Council's obligations under s6(c) let alone give effect to the New Zealand Coastal Policy Statement or the National Policy Statement on Freshwater when there is nothing in the objectives expressly protecting significant indigenous flora and the habitats of significant indigenous fauna; or aquatic ecosystems; or any mention of the concept of Te Mana o te Wai.<sup>19</sup>
37. Forest & Bird submit that the Strategic Directions should not have primacy but should, as in the s42A Overview report, identify and address the key resource management issues for the district.

**The management of indigenous biodiversity is a key resource management issue for the Selwyn District**

38. Forest & Bird submit that the Proposed Plan's strategic objectives, despite the Council's s32 Report, does not fulfil the requirements of s 6(c) and Councils functions

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<sup>19</sup> Amelia Ching, Statement of Evidence, at [51]

to maintain indigenous biodiversity under s31. Forest & Bird further submit that none of the Strategic objectives address how the Council will address indigenous biodiversity that is not identified as significant. Forest & Bird submits that the management of all indigenous biodiversity is a key resource management issue for the Selwyn District. This is key because of the extensive loss of indigenous biodiversity within the district and because of their acknowledgement in s6(c), s31, the New Zealand Coastal Policy Statement, the National Policy Statement on Freshwater Management 2020, and the Canterbury Regional Policy Statement. There is no express Strategic Direction for the management of significant indigenous biodiversity or other indigenous biodiversity. A general recognition for aspects significant to Selwyn's character under the proposed Strategic Directions is inadequate.

39. This gap was further addressed by the evidence of Amelia Ching.<sup>20</sup> Forest & Bird supports the relief sought by the Director-General of Conservation to fill this gap that is the Proposed Plan should include the following:

District Identity – Our Environment SD-DI-O4

~~Places, landscapes, and features which are significant to Selwyn's character, cultural heritage, or are of spiritual importance to Ngāi Tahu, are identified, recognised for their values, and protected for future generations.~~

Selwyn's natural environment is managed for future generations, including through:

- 1) identifying and protecting outstanding natural landscapes and features;
- 2) identifying and protecting areas of significant indigenous biodiversity;
- 3) maintaining indigenous biodiversity; and
- 4) preserving the natural character of the coastal environment.

### **Conclusion**

40. Forest & Bird submit that it is not appropriate for the Strategic Directives to have primacy over other chapters in the District Plan. This does not accord with the RMA. The Strategic Directions chapter should identify Selwyn's key resource management issues. Giving the Strategic Directions primacy or a higher order in a perceived hierarchy of plan provisions will lead to confusion by plan users.

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<sup>20</sup> Amelia Ching, Statement of Evidence, at [38] and [43]

41. Forest & Bird Submits that the Strategic Directions should only act as an overarching guidance tool for the development of objectives and for processing resource consents/notice of requirements. This approach better aligns with the RMA, the Standards and the recent approach on the QLDC Proposed Plan approved by the Environment Court in *Darby Planning Ltd Partnership v QLDC*<sup>21</sup>.
42. Forest & Bird submits that the inclusion of the relief sought by the Director-General of Conservation is appropriate by filling a gap in the strategic objectives concerning indigenous biodiversity. The relief also better meets the Council's obligations under ss 31 and 6(c) than the notified plan.<sup>22</sup>
43. Forest & Bird also submit that the wording in the Strategic Directions - Overview which establishes the hierarchy must be removed to give effect to the RMA, NZCPS and CRPS. This will enable Strategic Direction to be set out for key resource management matters while enabling all plan provisions, including the policies of other chapters to be read together in giving effect to higher order documents and achieving the purpose of the RMA.

Dated 2 August 2021



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<sup>21</sup> *Darby Planning Ltd Partnership v QLDC* [2019] NZEnvC 133

<sup>22</sup> Amelia Ching, Statement of Evidence, at [60]