

Thursday, 1 February 2024

*Te Hui o Te Kaunihera ā-Rohe o Heretaunga*  
**Hastings District Council**  
**Council Meeting**

*Kaupapataka*

# Attachments

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*Te Rā Hui:*  
Meeting date: **Thursday, 1 February 2024**

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*Te Wā:*  
Time: **1.00pm**

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*Te Wāhi:*  
Venue: **Council Chamber  
Ground Floor  
Civic Administration Building  
Lyndon Road East  
Hastings**

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ITEM	SUBJECT	PAGE
<b>6.</b>	<b>PROPOSED PLAN CHANGE 6- CATEGORY 3 LIFESTYLE SUBDIVISION PROVISIONS FOR DISPLACED OWNERS</b>	
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## Proposed Plan Change 6 – Category 3 Landowner Subdivision Provisions

### Chapter 30.1 Subdivision and Land Development

Insert new Objective and Policies

<b><u>OBJECTIVE</u></b> <b><u>SLD07</u></b>	<i><u>To enable limited lifestyle subdivision for Cyclone Gabrielle affected landowners to provide a permanent housing option where the ability to undertake residential activity has been permanently surrendered.</u></i>
<b><u>POLICY</u></b> <b><u>SLDP22</u></b>	<u>Allow the creation of residential lifestyle lots in the Rural and Rural Residential Zones to replace residential uses no longer available to landowners as a result of Cyclone Gabrielle and the classification of land by Hawke's Bay Regional Council as Category 3.</u>
<b><u>POLICY</u></b> <b><u>SLDP23</u></b>	<u>Limit the ability to undertake Cyclone-Gabrielle related lifestyle subdivision to the provision of permanent housing within an affected landowner's community of interest.</u>

#### Explanation

Cyclone Gabrielle resulted in significant damage to many properties in the Hastings District. The Hawke's Bay Regional Council subsequently carried out a classification process which saw some land identified as Category 3, meaning "Future severe weather event risk cannot be sufficiently mitigated. In some cases some current land uses may remain acceptable, while for others there is an intolerable risk of injury or death".

The Council adopted a Category 3 Voluntary Buy-Out Policy which has an overarching objective of removal of risk-to-life associated with people living on Category 3 land. As part of a voluntary buy-out agreement, landowners either sell their land or agree to no longer carry out residential activity on Category 3 land.

The special lifestyle subdivision option is specifically to provide an opportunity for those landowners whose residential property rights have been removed as a result of accepting a Voluntary Buy-Out offer to remain living close to the property from which they have been displaced, within their community, to support and enable their recovery process.

The provisions will ensure that the scale of development is appropriately limited to achieving that outcome.

Section 30.1.5 Rules

Insert new rule SLD7A

<b>SLD7A</b>	<b><u>Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses</u></b>	<b>C</b>
	<p><u>Subdivisions to create lifestyle lots in the Rural Zone and Rural Residential Zone which comply with all relevant Subdivision Site and General Site Performance Standards and Terms specified in 30.1.7.</u></p> <p><u>Note, compliance with 30.1.6 is not required.</u></p>	

Insert new Rule SLD16A

<b>SLD16A</b>	<b><u>Subdivision of lifestyle sites in Rural and Rural Residential Zones to replace Category 3 residential uses not meeting General Site standards and terms in 30.1.7</u></b>	<b>RDNN</b>
	<p><u>Subdivisions to create lifestyle lots in the Rural Zone and Rural Residential Zone which comply with 30.1.7.AA(1), (2), (3) and (5) but do not comply with 30.1.7.AA(4) or one or more General Site Performance Standards and Terms in 30.1.7 not specifically listed.</u></p>	

Section 30.1.7 General Site Performance Standards and Terms

Insert new performance standard 30.1.7AA

**30.1.7AA**      **SUBDIVISION OF RESIDENTIAL LIFESTYLE LOTS FOR DISPLACED  
CATEGORY 3 LANDOWNERS**

1. Any application under this rule shall be accompanied by:
  - (a) an unconditional agreement with the Council under the Category 3 Voluntary Buy-Out Policy for a property purchase or relocation offer which includes the permanent removal of the ability to use the Category 3 land for residential purposes; and
  - (b) a statement by the Category 3 landowner which confirms the new lot is intended for use by the landowner for permanent housing.
2. An application under this rule must be made within 2 years of entering the Agreement above.
3. The new lot shall not be located within an identified natural hazard area or on Category 3 Land. Coastal Environment / ONL/Wahi Taonga
4. The new lot shall be within the identified Community of Interest area of the site that is being replaced.
5. The new lot shall be a minimum of 2,500m<sup>2</sup>.

Section 30.1.8 Assessment Criteria

Insert new Assessment Criteria 27.

**27.**      **Category 3 Replacement Lifestyle Subdivision**

In addition to the General Assessment Criteria in 30.1.8.1, Council will have regard to the following matters for any subdivision associated with the creation of lifestyle lots as replacement for sites affected by the Category 3 buy- out process.

- a. Whether the proposed subdivision achieves the purpose of enabling the development of housing in the Hastings district that is necessary or desirable to provide permanent housing for people displaced by Cyclone Gabrielle.
- b. The proposed legal instrument for ensuring that the creation of the lifestyle lot is for permanent housing for displaced Category 3 landowners;

- c. Consideration of any special circumstances around the inability to meet the 2 year sunset clause provisions;
- d. Consideration of whether the proposed site can reasonably be considered to be within the “community of interest” of the Category 3 affected property to ensure that the objective of allowing people to remain in their community can be achieved.

Chapter 33.1 Definitions

Insert new definitions

**Community of Interest** means an area not further than 5 kilometres from the closest boundary of the relevant Category 3 land.

**Category 3 Land** means land which has been identified by and confirmed as Category 3 land by Hawke’s Bay Regional Council (being land affected by Cyclone Gabrielle).

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*Partially Operative Hastings District Plan*  
**Proposed Plan Change 6:  
Category 3 Landowner  
Subdivision Provisions**

**Section 32 Summary Evaluation  
Report**

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**Prepared  
by:**

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Rowan Wallis  
**Hastings District Council**

**Reviewed  
by:**

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Environmental Policy,  
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**Date:  
File Ref:  
Status:**

Draft



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## 1 Introduction

### 1.1 Purpose of this Report

This report presents the summary evaluation of proposed Plan Change 6 to the Partially Operative Hastings District Plan in accordance with Section 32 of the Resource Management Act 1991 (RMA).

Proposed Plan Change 6 is part of the Cyclone Gabrielle recovery programme and aims to provide assistance to those landowners whose properties have been identified as Category 3 as a result of the flood.

This report is required to accompany proposed Plan Change 6 at the time of public notification under Schedule 1 of the RMA.

### 1.2 Outline of Proposed Plan Change 6 to the Partially Operative Hastings District Plan

On 14<sup>th</sup> February 2023 Cyclone Gabrielle followed a path down the east coast of the north island resulting in devastating flooding for the Tairāwhiti and Hawke's Bay regions. There were a significant number of people forced from their homes and as a result the Government's three risk categories were to be applied to flood and landslide affected properties. The three categories were:

- a. Low Risk – Repair to previous state is all that is required to manage future severe weather event risk. This means that once any flood protection near the property is repaired, the home can be rebuilt at the same site.
- b. Managed Risk – Community or property-level interventions will manage future severe weather event risk. This could include the raising of nearby stop banks, improving drainage or raising the property.
- c. High Risk – Areas in the high risk category are not safe to live in because of the unacceptable risk of future flooding and loss of life. Homes in these areas should not be rebuilt on their current sites.

In the months since the cyclone, Hawke's Bay Regional Council has identified which communities are safe to return to and which ones are unable to have measures put in place to mitigate against future flooding and risk to life.

Those properties where residential activity has been assessed as having an unacceptable risk-to-life have been labelled Category 3. There are four main areas of the district affected by such categorization, being Tangoio and Esk Valley and parts of the Dartmoor and Rissington valleys and a small area of Pakowhai.

The plan change has been informed by a survey distributed to affected Category 3 land owners which aimed to ascertain the level of need for permanent housing and the likelihood of them utilising the provisions if they were to be put in place. The response has been positive with 62 percent of respondents saying that they still had no permanent housing solution nearly a year down the track. In addition, there were also some respondents who had found permanent housing elsewhere but would return to the community if there were given a pathway through the proposed plan change.

Of the 62 percent of people who did not have a permanent housing solution 76% of them signaled that they would be likely to utilise the provisions proposed under the Proposed Plan change.

The Proposed Plan Change amends the provisions of the Subdivision section of the District Plan (Sections 30.1), to ensure that the opportunity is provided to affected landowners to remain in their community and also allow them to live in close proximity

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to category 3 land that remains in their ownership. The barriers to the displaced landowners achieving replacement lifestyle sites in the current district plan provisions relate to the performance standards for the creation of lifestyle lots in the Rural and Rural Residential zones.

In summary, the proposed plan change involves:

- i) Establishing objectives and policies for the displaced Category 3 property owners that are clearly linked to the aims of the Severe Weather Emergency Recovery (Resource Management - Streamlined Planning Process) Order in Council 2023.
- ii) Allowing Category 3 landowners to subdivide a lifestyle site in the Rural or Rural Residential zones that may not meet the performance standards for lifestyle lots.
- iii) A new set of performance standards for the category 3 landowners who are subdividing a new site to ensure that they meet the criteria.

## 2 Section 32 Evaluation Requirements

Clause 5(1) of Schedule 1 of the RMA, requires preparation of an evaluation report for any proposed plan (including any proposed variation to a proposed plan) in accordance with section 32, and for Council to have particular regard to that report when deciding whether to proceed with the statement or plan.

Section 32 evaluations effectively 'tell the story' of what is proposed and the reasoning behind it. The Section 32 evaluation aims to communicate the thinking behind the proposal to the community and to decision-makers. The evaluation also provides a record for future reference of the process, including the methods, technical studies, and consultation that underpin it, including the assumptions and risks.<sup>1</sup>

An evaluation report would normally be required to examine both:

- the extent to which the objectives of the proposal are the most appropriate way to achieve the purpose of the RMA (s32(1)(a)); and
- whether the provisions in the proposal are the most appropriate way in which to achieve the objectives in terms of their efficiency and effectiveness by identifying other reasonably practicable options for achieving the objectives; assessing the efficiency and effectiveness of the provisions in achieving the objectives; and summarizing the reasons for deciding on the provisions (s32(1)(b)).

The evaluation report must contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal (s32(1)(c)).

However Plan Change 6 is being processed under the Severe Weather Emergency Recovery(Resource Management – Streamlined Planning Process) Order 2023 (SPP Order) and this order removes some of the Evaluation Report requirements under Section 32 of the Act. In particular there is no requirement to assess the efficiency and effectiveness of the provisions in achieving the objectives, or identify and assessing the benefits and costs and the risk of acting or not acting.

For the examination of the objectives of the proposal under Section 32(1)(a) "objectives" means "the purpose of enabling the development of housing or papakainga in the relevant authority's region or district that is necessary to provide permanent housing for people displaced by a severe weather event." (see SPP Order, cl 6(5)).

The evaluation must also consider whether the provisions are the most appropriate way to achieve the objective, by identifying other reasonably practicable options for achieving the objective and by summarising the reasons for deciding on the provisions.

The following evaluation fulfils Council's statutory obligations under the SPP Order, in accordance with section 32, for Proposed Plan Change 6 to the Proposed Plan.

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<sup>1</sup> Ministry for the Environment. 2014. *A guide to section 32 of the Resource Management Act: Incorporating changes as a result of the Resource Management Amendment Act 2013*. Wellington: Ministry for the Environment.

### 3 Examination of Extent to Which the Objectives Meet the Purpose of the Act

Section 32(1) of the Resource Management Act requires an evaluation of the extent to which the objectives of the Plan Change are the most appropriate way of to achieve the purpose of the Act. Under the SPP Order, the meaning of objectives has been altered to read

*“the purpose of enabling the development of housing or papakāinga in the relevant local authority’s region or district that is necessary or desirable to provide permanent housing for people displaced by a severe weather event.”*

#### 3.1 Part 2 (Purpose & Principles) of the RMA

The proposed objective of the plan change which is to enable the development of housing or papakāinga necessary or desirable to provide permanent housing for people displaced by a severe weather event aligns closely with the purpose of the RMA, which is *‘the sustainable management of natural and physical resources’*.

Section 5 of the RMA defines ‘sustainable management’ as:

*“managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, while:*

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;*
- (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.”*

Proposed Plan Change 6 directly relates to section 5 in that it is associated with the management of land that is affected by a significant natural hazard and where residential activities could pose a serious risk seeks to life. The plan change aims to protect the health and safety of the landowners whose properties have been identified as Category 3 meaning that they can no longer be considered as a safe for residential purposes. It helps to provide for the social, economic and cultural wellbeing of the directly affected landowners by providing an option for them to relocate to a safer environment that remains within their community of interest area.

There is one matter of national importance under section 6 of the Act that the proposed plan change will assist in meeting and that is section 6(h) The management of significant risks from natural hazards.

Section 7 identifies other matters requiring particular regard in achieving the purpose of the Act. The matter of particular relevance for the proposed plan change is:

- b) the efficient use and development of natural and physical resources; ...*

The purpose of Plan Change 6 is to assist in providing permanent housing options to Category 3 affected property owners as they navigate the buy-out process. The plan change is designed to assist landowners to remain in their community of interest which will be especially helpful to those who are retaining areas of land affected by Category 3 status and need to live in relatively close proximity to better manage the land for primary production purposes. This will assist in the more efficient use of the affected land.

The ability to undertake subdivision under the plan change will be conditional on the surrender of a residential right on the affected property in order to obtain an additional

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right on a new property that is safe from natural hazards. This is considered to be an efficient use of the physical land resource, as it avoids excessive fragmentation of the land resource, as subdivision for new residential activity will only be authorized where residential activity is surrendered elsewhere in the same area.

The functions of the District Council in section 31 of the RMA also provide a clear mandate for addressing the integrated management of natural and physical resources in a District Plan.

In particular:

***“(1) (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—  
(i) the avoidance or mitigation of natural hazards.***

***(2) the methods used to carry out any functions under subsection (1) may include the control of subdivision.”***

Proposed Plan Change 6 expressly seeks to provide an alternative permanent housing solution for Category 3 landowners to avoid the flooding hazard where it has been identified that mitigation is not practicable.

Given the particular areas that have been identified as Category 3, which are predominantly Rural Zoned, the subdivision of a lifestyle block is the mechanism which can be of most benefit to the affected owners who wish to remain in their community of interest.

## 4 Background – Current status of Subdivision of Lifestyle lots in the Rural and Rural Residential zones

### 4.1 Rural Zone

The land within the district that is affected by the Category 3 status is for the most part within the Rural Zone. The only exception to this is an area of Pakowhai, between the boundaries of the Napier and Hastings urban areas. The Pakowhai area is zoned Plains Production. It is not intended to include Plains Production zone within the Plan Change as there are a greater number of housing options for the affected landowners at Pakowhai and the land is classed as Category 1 or 2 under the National Policy Statement – Highly Productive Land. However, there is a pathway option for them through the Rural Residential zone at Ōmarunui which is within their community of interest.

The creation of lifestyle sites in the Rural Zone is provided for in the district plan but the following performance standards are applied;

- One site every three years
- 20ha (net) minimum balance area
- 4000m<sup>2</sup> (net) minimum site area
- 2.5ha (net) maximum site area

There is also the ability to create Residential Farm Parks with the following performance standards;

- 60 ha minimum parent site in the Rural Zone
- 92% of parent site of amalgamated sites as minimum balance area
- 2500m<sup>2</sup> as minimum site size
- One common accessway or road to a single access point to a public road.
- The area of the parent site shall be contained within one continuous perimeter boundary.

The standards applied to lifestyle sites within the Rural Zone are designed to limit the number of such sites to ensure that the productive potential of the rural land resource is not diminished. The restrictive approach to lifestyle subdivision is expected to be an obstacle to Category 3 landowners who wish to remain in the community from which they have been displaced. The intent of Plan Change 6 is that it be made easier for Category 3 landowners to not have to meet one or more of these performance standards in order to find a site within their community.

### 4.2 Rural Residential Zones

The Rural Residential zones are generally located within convenient commuting distances of Hastings and Napier and provide for those people who seek to live in a semi-rural environment while remaining close to urban areas for employment and education and recreation activities. The rural residential land resource is usually located on elevated sites that rise above the Heretaunga Plains. The Esk and Dartmoor Valleys are the only Category 3 identified land areas that have rural residential zones within close proximity.

The rules for the subdivision of lifestyle sites within the Rural Residential zone are quite straightforward. There is a minimum site size requirement of 0.8 ha with an average lot size of 1ha. There are a set of general site performance standards that are

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applied to the creation of the lots and the while the proposed plan change may allow for a reduction in the minimum site size, it is not intended that it would waive the need to comply with the general site performance standards such as building platforms, water and wastewater supply etc.

There is also the ability to create Residential Farm Parks with the following performance standards;

- 20 ha minimum parent site in the Rural Zone
- 75% of parent site of amalgamated sites as minimum balance area
- 2500m<sup>2</sup> as minimum site size
- One common accessway or road to a single access point to a public road.
- The area of the parent site shall be contained within one continuous perimeter boundary.

The standards applied to residential farm parks are designed to limit the number of such sites to ensure that the effects on the character and amenity of the rural residential zone are maintained. This is expected to be an obstacle to Category 3 landowners who wish to remain in the community from which they have been displaced. The intent of Plan Change 6 is that it be made easier for Category 3 landowners to not have to meet one or more of these performance standards in order to find a site within their community.



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## 5 Engagement Process & Results

Engagement on Plan Change 6 has been limited to those directly affected by the proposal as the plan change is only for the benefit of those landowners whose houses have been classified as Category 3.

### 5.1 Specific engagement with key stakeholders

Engagement with the Category 3 affected landowners has been ongoing by Council since the Cyclone Gabrielle event. The feedback from the community connectors and those also engaging with the affected landowners on the residential buy-out process have anecdotally advised that there are a number of people who wish to stay in their community but are unable to find sites on which to relocate. In order to properly ascertain the validity of these reports engagement with the affected landowners was undertaken by means of a survey to ascertain how many of them are yet to find a permanent housing solution and of those who hadn't, how many of them would be interested in the intent behind Plan Change 6 and wished to remain in the community from which they have been displaced.

The survey was sent out to those landowners whose house has been identified as Category 3. Those property owners whose land was Category 3 but the dwelling was in Category 1 or 2 were excluded from the survey. This is consistent with the purpose of the plan change, aligned with the intent of the SPP Order, which is to enable housing that is necessary or desirable to provide permanent house for people displaced by a severe weather event.

### 5.2 What the engagement told us

The feedback received from survey recipients was that 62.5% of them had not yet managed to find a permanent housing solution. Of that number 76% of the respondents said that they would be interested in taking advantage of a plan change that would enable them to subdivide on another site. 81% of those same respondents said that they would rather stay in the community rather than move further away.

In the general comments section of the survey a number of people had indicated that they would like to relocate their existing houses to a new site and the speed of the plan change and cost of the subdivision were also raised as issues to be considered.

An invitation to engage was also sent to the Post Settlement Governance Entities.

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## 6 Examination of Matters for Consideration

### 6.1 Regional Policy Statement (RPS) Considerations

The RPS has objectives and policies for the territorial authorities to consider during preparation of any variation or plan change for development of land within the Region. This plan change is not concerned with urban development per se nor does it impact on any water or ground water resource. It is largely a natural hazard issue and the RPS recognises the susceptibility of the region to flooding and other natural hazards and the potential for these to adversely impact on people's safety, property, and economic livelihood. The RPS recognises that natural hazards are a regionally significant issue that must be recognised in the consideration of the sustainable development of resources.

These are:

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*OBJ 31 The avoidance or mitigation of the adverse effects of natural hazards*

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The RPS recognises that to be truly effective flood protection works must be undertaken in conjunction with land use planning. Plan Change 6 is working with landowners through the voluntary buy out process to provide an avenue for landowners on Category 3 affected land to participate in the buy-out process which involves giving up their residential activity, while having greater certainty that they can move to a lifestyle site on a property free from the flood hazard. This is giving effect to the Regional Policy Statement.

### 6.2 Conclusion as to Appropriateness of the Plan Change

The above assessment confirms that Plan Change 6 will bring forward options to enable Category 3 landowners to make decisions for permanent housing solutions. The provision is to be limited to landowners affected by Cyclone Gabrielle who have voluntarily given up their residential activity on Category 3 land, to ensure that health and safety of the community can be managed in a sustainable manner.

## 7 Appropriateness of Proposed Plan Change 6 in Achieving the Purpose of the RMA

### 7.1 Is the Proposal the Most Appropriate Way to Achieve the Purpose of the RMA?

As outlined in section 2 of this report, the first part of this evaluation is whether the objectives of the proposal are the most appropriate way to achieve the purpose of the Resource Management Act. The objectives of the proposal are:

***Enabling the development of housing or papakāinga in the relevant local authority's region or district that is necessary or desirable to provide permanent housing for people displaced by a severe weather event***

The assessments above in section 3 to 6 of this report, demonstrate the following:

1. The proposal will assist in providing a further option for displaced land owners who wish to remain in the community from which they have been displaced.
2. The proposal will provide greater certainty for land owners on what options are available to them when they are considering the voluntary buy out arrangements on their property.
3. The proposal will provide a further option to those landowners who may wish to relocate their existing home to a new site within their community that is safe from the flood hazard.
4. The proposal amends the Proposed Plan in a way that will ensure the sustainable management of the Rural and Rural Residential zones by ensuring that the plan change is limited only to those whose homes were directly affected by the Category 3 classification, while providing for the health and safety of the community.
5. The results of the stakeholder engagement process during preparation of proposed Plan Change 6 suggests general overall acceptance and a level of support for the proposal.

The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources. This is the premise of Plan Change 6. It is not sustainable to promote residential activity within those areas of the district that have been identified as Category 3. The plan change will provide a further option for those landowners involved in the voluntary buy out process and allow them to provide for their permanent housing needs. The plan change applies within the community of interest of those affected properties thereby maintaining the social, economic, and cultural wellbeing of those communities. The provisions of the plan change can only be applied to those directly affected landowners and this will reduce the scale of development thereby safeguarding the life-supporting capacity of air, water, soil and ecosystems; and avoid, remedy or mitigate adverse effects on the environment.

**The proposal is confirmed as representing the most appropriate way to achieve the purpose of the RMA.**

## 7.2 Are the Provisions the Most Appropriate Way to Achieve the objectives of the Proposal?

The following evaluation examines whether the provisions in the proposal are the most appropriate way in which to achieve the objectives of the proposal as set down in the SPP Order.

Case law on s32 has interpreted 'most appropriate' to mean "suitable, but not necessarily superior"<sup>2</sup>. Therefore, the most appropriate option does not need to be the most optimal or best option, but must demonstrate that it will meet the objectives in an efficient and effective way.

The Order in Council provides for a reduction in the extent of the evaluation of the provisions proposed under plan change 6 due to the urgent need to provide permanent housing for people displaced by Cyclone Gabrielle. The evaluation must provide a level of detail that is appropriate to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation proposal. The focus of this evaluation is on the reasonably practicable options for achieving the objectives and the reasons for deciding on the provisions.

This evaluation will assess the following aspects of the Plan Change:

- The options for providing permanent housing solutions for those landowners whose dwellings have been included in the Category 3 classification.
- The exclusion from the Plan Change of the option of undertaking lifestyle subdivision in the Plains Production Zone due to high soil values, which has the effect of severely limiting the Category 3 properties at Pakowhai from benefitting from the plan change.
- The provision of a performance standard requiring the new site to be within the community of interest of the affected site.
- Options on a sunset clause for the application of the provisions.
- The reasons for the provisions

The assessment is at a level of detail that corresponds to the scale and significance of the effects anticipated from implementation of the proposal and having regard to the urgent need to provide permanent housing for people displaced by Cyclone Gabrielle (see SPP Order, cl 6(3), amending s 32(1)(c) RMA).

Much of the background and assessment in the preceding sections of this report contributes to the overall evaluation of the specifics of this proposal.

## 7.3 Permanent housing solutions for displaced Category 3 landowners.

Options are:

1. **Do Nothing** – this option would involve the landowners making their own arrangements in the market place to find alternative housing solutions;
2. **Rezone additional land for rural lifestyle purposes within close proximity to each of the communities affected by Category 3 classification.** – this option involves identifying areas of the land adjacent to Tangoio, Esk, Dartmoor, Rissington and Aropaoanui Valleys and rezoning them to a rural residential zone;
3. **Allow displaced landowners who have voluntarily given up a residential activity on a Category 3 site to create a lifestyle site within the Rural or**

**Rural Residential Zones that may not meet the subdivision standards on size or frequency of lifestyle site creation.** - this option allows for the displaced land owners to find another site in their community of interest where subdivision may not currently be anticipated by the District Plan due to not being able to meet the performance standards.

#### 7.4 The exclusion of the Plains Production Zone from the Plan Change

Options are:

1. **Do Nothing** – this option would involve retaining the current subdivision standards for the creation of additional sites in the Plains Production zone, which would mean Pakowhai landowners would be limited in the extent to which they could make use of the plan change.
2. **Allow the Category 3 affected land owners at Pakowhai to create a site within the Plains Production zone outside of the Category 3 classification** - this option would provide a pathway for affected Pakowhai residents for the subdivision of a rural lifestyle site to allow them to remain within their community of interest; or
3. **Provide for Category 3 affected land owners at Pakowhai to create a site within the Rural or Rural Residential zones as for the more remote Category 3 affected land owners** - this option involves not defining a community of interest area for affected Pakowhai landowners or making it much wider to encompass the nearest Rural and Rural residential zones.

#### 7.5 Identifying community of interest for Category 3 affected land owners

Options are:

1. **Do Nothing** – this option would not limit the lifestyle subdivision under the plan change to any particular area; or
2. **Leave it up to individually affected landowners to decide the extent of what they consider as “their community”**. this option involves not setting a boundary on what constitutes each of the displaced land owners community of interest but leaving it up to them to provide justification.
3. **Establish a defined “community of interest area” in each of the Category 3 affected areas**. This option would establish a distance from the property where the residential activity would be voluntarily surrendered and any new site would need to be located within that defined area.

#### 7.6 Options on a sunset clause for the take up of the plan change provisions

Options are:

1. **Do nothing** - this option would involve not setting any time limits on the when applications under the plan change would need to be lodged; or
2. **Establish a timeframe within which any application to create a replacement lifestyle site for a Category 3 affected dwelling would need to be lodged** – This option closes off the time within which an application must be lodged to take advantage of Plan Change 6.

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### 7.7 The need to link the creation of the new site to the former site being bought out or where agreement is reached for relocation

Options are;

1. **Do nothing** - this option involves not including any performance standard to ensure that new site provides a permanent housing solution for a displaced Category 3 landowner as set out in the SPP Order.
2. **Require evidence that the site being subdivided and purchased is for the purpose of meeting the permanent housing need of a Category 3 affected landowner.**



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### 7.8 Evaluation of Options

**Table 1: Issue: Providing a permanent housing solution for Displaced Category 3 landowners:**

	<b>OPTION 1: STATUS QUO Landowners to find their own replacement housing.</b>	<b>OPTION 2: Rezone additional land for Lifestyle purposes within close proximity to each of the Category 3 communities.</b>	<b>OPTION 3: Allow for the creation of lifestyle sites in the Rural and Rural Residential zones to replace Category 3 residential uses.</b>
<b>Option Analysis for Achieving the Objectives:</b>	<p>The objective identified under the SPP Order is to “enable the development of housing or papakāinga in the relevant local authority’s region or district that is necessary or desirable to provide for permanent housing for people displaced by a severe weather event.</p> <p>The category 3 landowners have been under considerable pressure and Council has provided them with support in the form of community connectors. The feedback received is that they need options available to them to consider.</p> <p>The survey that was conducted with the Category 3 landowners identified that there were still a number of them that were yet to find permanent replacement housing and this reinforces that landowners would benefit from options that would facilitate the development of additional sites within proximity of the category 3 affected land areas.</p>	<p>This option involves rezoning land within the community of interest area of the category 3 affected land for rural residential purposes.</p> <p>While this option would prove effective in achieving the objective of providing for permanent housing options it is something of a blunt instrument as we do not know what the level of uptake is likely to be and therefore it difficult to ascertain what area of land might need to be rezoned. It would not be possible to limit the use of the newly zoned areas to those displaced by the Cyclone and therefore the SPP Order process would realistically not be available. This would mean any plan change process would be expected to take much longer and the outcomes less certain.</p> <p>It is therefore not considered an efficient option and could result in other people benefitting from a rezoning that is intended to meet the needs of displaced landowners.</p> <p>The rezoning of further rural residential land is best considered through the Future Development Strategy which takes a co-ordinated approach to development, rather than providing additional land that may not be required and may not be in the desired location.</p>	<p>Option 3 relies on landowners to identify themselves where they would like to live and provides an easier pathway for the creation of a lifestyle site in either a rural or rural residential zone. They would need to reach agreement with the landowner of the parent site for the creation of the new site and provide a statement that confirms that the new site is intended for use by the Category 3 affected landowner for permanent housing.</p> <p>In return the site performance standards do not need to be met as long as a minimum site size of 2500m2 can be achieved.</p> <p>This bespoke solution only creates sites as they are needed and will not result in the creation of sites that are surplus to demand. This is a more efficient option than Option 2.</p>



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**Table 2: Issue: Consideration of applying Plan Change to Plains Production Zone (relevant to Category 3 Properties at Pakowhai)**

	<b>OPTION 1: Retaining current subdivision provisions for Plains Production zone (limiting utility for Pakowhai)</b>	<b>OPTION 2: Allow the Category 3 affected landowners at Pakowhai to create a site within the Plains Production Zone outside of the Category 3 classification</b>	<b>OPTION 3: Provide for Category 3 affected landowners at Pakowhai to create a site within the Rural or Rural-Residential Zones not limited by the 'community of interest' requirement.</b>
<b>Option Analysis for Achieving the Objectives:</b>	<p>This option would see the Plan change apply to the Rural and Rural Residential Zones only, with the 'community of interest' defined as being a 5 km distance from the relevant Category 3 property. It would not apply to the Plains Production Zone, which is the predominant zoning in and around Pakowhai Category 3 areas.</p> <p>The Pakowhai area of the district is located within the Plains Production Zone and has some of the most highly productive soils in the district.</p> <p>The district plan has strict objectives, policies and rules which seek to limit the subdivision of lifestyle sites within the Plains Production Zone. The subdivision of an existing dwelling can be achieved as long as the remaining area is a complying site and that it is amalgamated within an adjoining property. Subdivision would not meet the objectives of the National Policy Statement on Highly Productive Land, (NPS-HPL) which is to protect highly productive land for use in land-based primary production and Clause 3.7 requires territorial authorities to avoid the rezoning of highly productive land as rural lifestyle sites and to avoid subdivision except as provided in the NPS. This option is consistent with higher order objectives and policies of the District Plan around protection of the Plains resource, the objectives and policies applying to the PPZ and with the NPS-HPL.</p> <p>This option does not enable a lifestyle subdivision pathway for Category 3 landowners in Pakowhai, although there is a Rural Residential Zone area at Omaranui Road which is within the 5 km community of interest area for Pakowhai.</p> <p>The need for a replacement housing pathway is considered less critical for Pakowhai as it is in close proximity to the Hastings and Napier urban areas and there are a larger number of housing options available within that general area.</p>	<p>Option 2 would specifically allow for the creation of lifestyle sites in the PPZ that would not meet the minimum site standards.</p> <p>This option would not be consistent with the objectives and policies of the District Plan, including those applying to the Plains Production Zone nor would it meet the objective or policies of the NPS-HPL.</p> <p>Avoiding the creation of additional sites on highly productive land is a primary objective both at the national and local levels.</p> <p>It is not considered necessary that lifestyle subdivision opportunities be provided for in the Plains Production Zone when there are other options that are available that avoid the subdivision of highly productive land and are within the Pakowhai area community of interest.</p>	<p>This option would allow for affected Pakowhai Category 3 landowners to create lifestyle sites within the Rural or Rural Residential areas of the district which are further away from their current land.</p> <p>While this option would in theory help to provide for permanent housing needs it would not meet one of the outcomes sought for the plan change which is to allow people to remain in their community of interest. Community of interest has been defined for the purposes of the Plan Change as "an area of land not further than 5km from the closest boundary of the relevant category 3 land".</p> <p>In order to retain flexibility for Pakowhai landowners (and other Category 3 owners), while still focusing on enabling owners to stay within their community of interest, it is recommended that an application for a site outside the 'community of interest' be a Restricted Discretionary Non-Notified activity. This would allow for owners to seek a lifestyle subdivision which is not necessarily within the 5 km defined area, but with which they still identify.</p>
<b>BENEFITS of preferred option</b>			<p>The benefits of this option;</p> <ul style="list-style-type: none"> <li>Avoids lifestyle development on highly productive land in accordance with Clause 3.7 of the NPS-HPL.</li> </ul>

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	<b>OPTION 1:</b> Retaining current subdivision provisions for Plains Production zone (limiting utility for Pakowhai)	<b>OPTION 2:</b> Allow the Category 3 affected landowners at Pakowhai to create a site within the Plains Production Zone outside of the Category 3 classification	<b>OPTION 3:</b> Provide for Category 3 affected landowners at Pakowhai to create a site within the Rural or Rural-Residential Zones not limited by the 'community of interest' requirement.
			<ul style="list-style-type: none"> <li>Provides options for the Category 3 affected landowners in the Pakowhai community to meet their permanent housing needs.</li> </ul>

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**Table 3: Identifying community of Interest for Category 3 Land Owners**

	<b>OPTION 1: Do Nothing – i.e. do not identify a ‘community of interest’ area</b>	<b>OPTION 2: Leave it up to each of the affected Category 3 communities to decide the extent of their community of interest.</b>	<b>OPTION 3: Establish a defined “community of interest area” in each of the Category 3 affected areas.</b>
<b>Option Analysis for Achieving the Objectives:</b>	<p>One of the Council’s aims for the plan change was to allow people displaced by Cyclone Gabrielle to remain living in their “community of interest”.</p> <p>The survey that was undertaken with Category 3 landowners identified that of the 62 % of respondents who did not have a permanent housing solution, 81% of them had indicated that they wished to remain in their community.</p> <p>Not imposing a requirement that the new site be within a community of interest will not achieve the outcome sought and may result in unanticipated effects associated with new lifestyle subdivision which has no connection to the Category 3 areas.</p>	<p>Option 2 would leave it up to each of the Category 3 communities to decide what the community of interest area was for their individual communities. This would require considerable consultation and is likely to result in a variety of ideas of how community should be measured.</p> <p>It is likely that this option would result in less certainty and also variations on the extent of the area and the appropriateness of boundaries and how they might be measured.</p> <p>This would not be consistent with the urgent need to provide pathways for Category 3 landowners.</p>	<p>This option establishes a set distance from the affected dwelling for the community of interest. A 5km radius from the affected property has been proposed as a reasonable extent for what could be the extent of the community. This was the same extent that was used during the Covid lockdown in 2020 as being within your community.</p> <p>The distance would provide sufficient scope for affected landowners to seek out a new site for a permanent replacement dwelling.</p> <p>This option provides a greater level of certainty for landowners and also gives greater clarity for the processing of any subdivision applications</p> <p>It is recommended that it will be possible for people to apply for new sites which are slightly beyond that 5km distance as a restricted discretionary activity, such that the individual circumstances of specific proposals can be considered.</p>
<b>BENEFITS of preferred option</b>			<p>Option 3 provides certainty for landowners and the Council in assessing subdivision consent applications. It is a more equitable approach for any of the landowners with the radius applying from the Category 3 affected property.</p>

**Table 4: Establishing a Sunset Clause for the Take Up of the Plan Change Provisions**

	<b>OPTION 1: Do Nothing</b>	<b>OPTION 2: Establish a timeframe within which an application for a replacement site would need to be lodged.</b>
<b>Option Analysis for Achieving the Objectives:</b>	<p>The objective identified under the SPP Order is to “enable the development of housing or papakainga in the relevant local authority’s region or district that is necessary or desirable to provide for permanent housing for people displaced by a severe weather event.</p> <p>Leaving the timeframe for the lodging of a subdivision consent under the plan change open could lead to the inability to meet the objectives of the set out under the SPP Order as it would not convey the necessary sense of urgency. The objective is set around providing for permanent housing and the streamlining process aims to achieve permanent housing in the quickest possible time.</p>	<p>Option 2 establishes a rule whereby a subdivision application must be made within 2 years of entering into an unconditional buy out agreement.</p> <p>This option will ensure that the process of finding permanent replacement housing will continue in an efficient manner thereby meeting the objective of the Order in Council.</p> <p>It is considered that a date of two years from entering into an unconditional buy out agreement will provide sufficient time for category 3 affected landowners to find a replacement site, enter into a purchase agreement, and make an application to Council.</p>

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	<b>OPTION 1: Do Nothing</b>	<b>OPTION 2: Establish a timeframe within which an application for a replacement site would need to be lodged.</b>
	If the application period is left open this could lead to many of the displaced property owners still seeking permanent housing replacement many years down the track and could not be considered an efficient or effective outcome from the Plan Change. This is particularly bearing in mind the standard 5 years lapse period plus 3 years to lodge the survey plan could result in subdivisions undertaken under this rule not being available for housing for over a decade.	This option is considered more efficient and effective in achieving the objective of providing for permanent housing for displaced Category 3 landowners.
<b>BENEFITS of preferred option</b>		It is an efficient option as ensure continuity post the buy out agreement to achieve permanent replacement housing.



## 8 Summary of Reasons for Deciding on Provisions & Conclusion

Plan Change 6 has been drafted for the purpose of providing options for landowners who reach agreement with Council under the Category 3 Voluntary Buy-out Policy. The Plan Change is drafted to assist them by providing a further option for finding a replacement lifestyle site within their community of interest.

The Plan Change is to be processed under the SPP Order. Under this Order, modifications to the Section 32 Evaluation Report have been provided for. This is to contain a level of detail that is reasonable in the circumstances having regard to the:

- scale and significance of the environmental economic social and cultural effects that are anticipated from the implementation of the proposal and
- the urgent need to provide permanent housing for people displaced by a severe weather event.

The provisions that have been adopted under the plan change have been carefully considered to ensure that they are directly applicable only to those Category 3 landowners who have reached agreement under the voluntary buy out provisions as this is the category of persons who have been 'displaced' by Cyclone Gabrielle. It is noted there are others who were displaced at the time of the Cyclone, however from a planning perspective, such displacement is not permanent. Limiting the plan change to the stated class of persons will ensure that the environmental, economic, social, and cultural effects associated with additional lifestyle subdivision are minimised.

The particular provisions adopted are;

1. Provision for the subdivision of a lifestyle site with a minimum size of 2500m<sup>2</sup> within the Rural and Rural Residential Zones for displaced category 3 landowners

Reason: For the most part, the Category 3 land is located within the Rural zone with the exception of Pakowhai where the land is zoned Plains Production. The intent of the plan change is to provide a pathway to establishing replacement permanent housing for the affected Category 3 landowners. The Rural and Rural Residential zones provide for lifestyle development but have standards and terms to which limit the size of the lifestyle sites and the frequency with which they can be created. This is to maintain the primary production role of the Rural zones and the amenity values of the Rural Residential zone. The plan change will provide more flexibility around these standards but the 2500m<sup>2</sup> minimum has been imposed, particularly to ensure that on-site wastewater disposal can be achieved. .

2. Requirement that an application must be accompanied by an unconditional agreement with the Council under the Voluntary Buy out policy.

Reason: This standard is required to ensure that the rights granted under the plan change are only available to those landowners who are voluntarily giving up a residential activity where their house has been classified as Category 3. This will reduce the scale of environmental effects resulting from additional lifestyle sites that may not meet the minimum site size performance standards.

3. A statement by the Category 3 landowner which confirms the new lot is intended for use by the landowner for permanent housing.

Reason: This performance standard will ensure that the plan change will meet the objective of the SPP Order which is to provide permanent housing for those landowners displaced by the severe weather event (Cyclone Gabrielle). It is not intended to apply more widely than the purpose of the Order, for instance to enable a subdivision of a bare lot for sale to a person who was not affected by the Cyclone.

4. An application must be made within 2 years of entering the Voluntary Buyout agreement.

Reason: The performance standard will encourage continuity of the recovery process to ensure that permanent housing is achieved for the affected landowners as quickly as possible.

5. The new lot shall be within the identified community of interest area of the site that is being replaced.

Reason: Many affected landowners have said that they wish to remain in their community and this performance standard will ensure that the outcome sought through the plan change is met.

This section 32 summary evaluation confirms the following:

1. That there is an identified need for options to meet permanent housing requirements for Category 3 landowners involved in the Voluntary Buy out process.
2. That the provisions of the proposed plan change will ensure that the number of lifestyle sites created will match the demand and that as a result the environment effects will be kept to a minimum.
3. That meeting the housing needs of affected Category 3 landowners can be achieved without adversely impacting on the land based primary production activities of the Rural and Plains Production zones (in particular, noting that setback requirements from boundaries will still be required to be met, which assists in addressing reverse sensitivity concerns).
4. That the proposed amendments are appropriate in meeting the objective of the Severe Weather Emergency Recovery (Resource Management- Streamlined Planning Process) Order 2023.
5. That provisions of the plan change will assist in maintaining the social and economic wellbeing of the affected communities and sustaining these communities in the long term.

Therefore, adoption of proposed Plan Change 6 to the Partially Operative Hastings District Plan is appropriate in terms of section 32 of the RMA and in achieving the objectives of the proposal and the purpose of the Resource Management Act.

**BEFORE HEARING COMMISSIONERS  
IN HASTINGS | TAUPŌ-NUI-A-TIA**

**UNDER THE** Resource Management Act 1991 (“Act”)

**IN THE MATTER OF** an application for a resource consent for residential development of 55 and 57 Brookvale Road, Havelock North (“Application”)

**BETWEEN** **ODERINGS NURSERIES CHCH LIMITED**

Applicant

**AND** **THE HEARING PANEL**

A Panel with delegated authority to hear and determine the Application

**MEMORANDUM OF 20 DECEMBER 2023  
ON BEHALF OF THE APPLICANT**

*Hearing Panel:* Kitt Littlejohn (Chair), Commissioner George Lyons, Councillors Marcus Buddo, Wendy Schollum, and Alwyn CorbanSmith.

**MAY IT PLEASE THE PANEL / COUNCIL:**

**Audience**

1. I have addressed this memorandum to both the Panel and the Council more generally, as I understand that it may be considered by the Council independently from the Panel; but that it may also be put before the Panel and/ or its Chair as well. I am comfortable with the Panel and/ or its Chair receiving it for comment outside of it being formally lodged with the Panel, as well.

**Introduction**

2. I am the project manager for the Applicant in respect of this Application. I previously led the Applicant’s application for referral under the Fast Track legislation, in 2022, which was for a proposal very similar to that being advanced under the current application. The Minister refused to refer the proposal, on the basis that was more appropriate for the project to go through standard consenting processes under the RMA.
3. I have maintained my role as project manager through the current Application process, although much of the day to day engagement with Council (and others) has been through Mr Gray, the Applicant’s independent planning expert. As project manager, I will be leading the Applicant’s case at the hearing.



4. On 19 December 2023, the Applicant was given notice of the members of the Panel appointed to hear and determine its Application.
5. The purpose of this memorandum is to raise, as sensitively as possible, a potential issue with the appointment of Mr Littlejohn as Chair, given my past (and, to some extent, ongoing) involvement for a client that has adversely affected (and may continue to adversely affect) Mr Littlejohn's interests. The issue is raised in fairness to the Applicant, and as quickly as possible, as the last thing they want if the issue were not to be raised, to wonder if there was anything adverse in the Panel's process or decision that might have been influenced by these separate interactions.
6. For my part, I have confidence that Mr Littlejohn would bear me no ill-will, and, even if he did, that this would not influence his approach to this Application. In other words, this is not an issue of bias, but of the risk of perception – particularly by the client – of apparent bias. I have raised it accordingly, as swiftly as possible, as I felt I had a duty to do so.

#### Apparent bias – principles

7. In *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)*, the Supreme Court set out the test for when a decision will be tainted by apparent bias as follows:<sup>1</sup>

The crucial question ... is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased.

8. This test has two main steps:<sup>2</sup>
  - (a) first, identifying what it is said might have lead (in this case) a Panel or one of its members to decide an application other than on its merits; and
  - (a) second, establishing the logical connection between that matter and the feared deviation from the course of deciding the application on its merits.
9. A perception of a lack of impartiality can arise from a range of circumstances and the courts have recognised that it is neither possible nor desirable to seek to create a complete list of disqualifiers. In *Muir v Commissioner of Inland Revenue*, however, Hammond J observed that for there to be no apparent bias:<sup>3</sup>

... there should not reasonably be room for a perception that the Judge will decide the case on anything but the evidence in front of him or her.
10. Even a perception of bias may be sufficient to damage the credibility of a hearing, a decision or a hearings panel. For example, in *Barefoot v Auckland City Council* EnvC Auckland A160/06, 15 December 2006, the Environment Court held at [21]:

<sup>1</sup> *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 (*Saxmere*) at [37] per Tipping J.

<sup>2</sup> *Saxmere* at [4] per Blanchard J.

<sup>3</sup> *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [64]

We are not suggesting that actual bias was present in this case, but public perceptions of bias can only decrease public confidence in the Council's decisions, and increase the prospects of appeals to this Court.

11. Perhaps as more relevant for decision-making at Council-level in RMA processes, as summarised in the "Making Good Decisions" materials:

There should be no possibility or even perception that anyone hearing and deciding an issue is biased.

12. The Chair's Re-certification Course Book as part of the extended Making Good Decisions programme also says this:

Perception of bias is the important issue. If there is any public perception that you have a pre-stated view or opinion that may be relevant to the matter at issue – whether or not you are going to be able to set your beliefs aside – then you should stand down.

13. While the last reference focuses on pre-stated views, it is equally applicable to a perception of bias grounded on other reasons.

14. The approaches could be put, more colloquially, as follows: "if there is any doubt, then a Panel member should step aside".

**The first step – the circumstances**

15. Mr Littlejohn is a director and/ or shareholder of various entities associated with the development of the Kennedy Point Marina, now branded as the Waiheke Marina. From a current search of the Companies office titles, these interests are:

- (a) Kennedy Point Marina Development Limited (Director and Shareholder);
- (b) Kennedy Point Boatharbour Limited (Director and Shareholder);
- (c) Mair & Associates Maritime Developments Limited (Director and Shareholder);
- (d) Waiheke Marina Holdings Limited (Director and Shareholder); and
- (e) Waiheke Marina Limited (Director).

16. Mr Littlejohn's shareholdings are generally 25% in each of the companies that he is a shareholder of (and in one instance 33.3%), sometimes jointly with two others (which might suggest that is it a trust arrangement).

17. The Waiheke Marina development has been very controversial, with some members of the local community (including through an incorporated society, SKP Incorporated) and a representative entity of mana whenua (the Ngāti Paoa Trust Board) in particular opposing the Waiheke Marina through multiple court actions.

18. When I was practising as a lawyer, I was engaged by SKP Incorporated in late 2018 to file an application for rehearing of the Environment Court proceedings that approved consents for the Waiheke Marina. That was

the start of various proceedings, including appeal proceedings in the High Court, applications for judicial review, enforcement, and even applications for leave to the Supreme Court. During this saga, I also became engaged by the Ngāti Paoa Trust Board, and led a number of the proceedings for them.

19. For present purposes, it is also notable that I cross examined Mr Littlejohn during the course of one of those proceedings, which is a highly unusual occurrence, at least in the Resource Management field (ie for a lawyer to cross examine another lawyer).
20. When construction of the Marina commenced (notwithstanding the ongoing litigation), some members of Ngāti Paoa, including some with affiliations to the Ngāti Paoa Trust Board, commenced an occupation at Kennedy Bay Point in protest. It would be fair to say that that protest was not always peaceful.
21. The Ngāti Paoa Trust Board is also still awaiting a decision of the Court of Appeal on whether or not the grant of consent to the Marina by the Environment Court was lawful. While I am not directly involved in those proceedings, I maintain a strong relationship with the Trust Board and continue to advise it, including on the Marina matter and their involvement with it.
22. In other words, there is a long period where I acted directly against the interests of companies that Mr Littlejohn is both a director and shareholder, and I continue to have a close association with an Iwi Authority that has still has current proceedings against Mr Littlejohn. I understand that some of the litigation, at least for a period, created uncertainty for the Marina project and delayed it (as well as obviously costing the Marina companies significant costs in respect of the various proceedings).

**Step 2 – the logical connection**

23. While I am not practising as a lawyer, I will be leading the presentation for the Applicant at the hearing, as project manager. I will be making representations, putting the Applicant’s case forward, and no doubt engaging with the Panel and its Chair on key matters of concern to them (in addition to their questions of witnesses).
24. In circumstances where there is a long history where I have acted against the interests of companies that Mr Littlejohn is both a director and (at least now) is a shareholder, and will now be advocating for an Applicant before Mr Littlejohn in a role as decision-maker, the question is:
 

... whether a fair-minded, impartial, and properly informed observer could reasonably think that Mr Littlejohn might be unconsciously bias against me (to the detriment of the Applicant) and/or to the Applicant because of its decision to contract me as its project manager.
25. As an example, might such a fair-minded, impartial, and properly informed observer reasonably think that:
  - (a) Mr Littlejohn might give my representations and answers to questions from the Panel less weight, because of an unconscious bias?

(b) Mr Littlejohn might view the Applicant's case more dimly, unconsciously, because of its association with me?

26. The Applicant – having tested the issue with others – does consider this would be the case. Certainly, there is a case to be made that a fair-minded impartial, and properly informed observer might think:

As Mr Gardner Hopkins (while acting for clients) has caused Mr Littlejohn (while acting as a Director and/or shareholder) personal costs and loss, his representations, and therefore his client's case, may be more likely to be viewed unfavourably by Mr Littlejohn (acting in a decision making-role) than if that situation had not occurred (unconsciously, rather than deliberately).

**Forward progress**

27. I have stopped at this point short of seeking a formal recusal, but have essentially laid out the basis for it.

28. This was for two reasons. The first is that there may be some response from Mr Littlejohn that may assuage the Applicant's concerns, and avoid having to make a formal application. The second is that Mr Littlejohn may have been unaware of my involvement when accepting appointment as Chairperson, and, with notice of that position, might now step aside without any formal application needing to be made.

29. In addition, following discussions with Ms Sanders as to how to best raise this issue, she advised to outline the matter to Democratic Support so that it could be considered independently, as well. I have addressed the "audience" for this memorandum at paragraph [1] above.

30. Finally, I note that the Applicant has considered obtaining alternative representation for the hearing, but does not wish to incur the significant additional cost of that, suspects that would be difficult in the time available, and does not wish to lose my background in the project.

31. The Applicant appreciates consideration of this difficult issue.

**22 December 2023  
James Gardner-Hopkins  
Project Manager for the Applicant**



**IN THE MATTER** of the Resource Management Act 1991 (**RMA**)

**AND**

**IN THE MATTER** of application RMA20230145 (**Application**) to the Hastings District Council by Oderings Nurseries Chch Limited (**Applicant**) at 55 and 57 Brookvale Road, Havelock North.

**MINUTE OF THE CHAIR OF THE HEARING PANEL**

1. Pursuant to sections 34 and 34A of the RMA, Hastings District Council (**Council**) has appointed a Hearing Panel consisting of five hearing commissioners, with Kitt Littlejohn appointed as Chair. The Hearing Panel's function is to hear and determine the application and to deal with any procedural matters.
2. On 22 December 2023, Mr James Gardner-Hopkins, Project Manager for the Applicant filed a Memorandum setting out circumstances considered to give rise to an issue of perceived bias by me as the appointed Chair of the Panel.
3. The circumstances giving rise to the allegation of bias are set out in the Memorandum. In summary, they relate to past litigation involving a company of which I was a director and shareholder, and an entity opposing the actions of that company which was represented by Mr Gardner-Hopkins (as its counsel) when he used to be a practicing lawyer. Although the litigation advanced by Mr Gardner-Hopkins' client was unsuccessful and ultimately futile, the concern is that the costs and delay associated with that litigation might give rise to some sort of grudge by me towards Mr Gardner-Hopkins personally, which might influence my approach to the Applicant's proposal in this case.
4. For his part, at paragraph 6 of his Memorandum, Mr Gardner-Hopkins eschews this proposition noting:

*..., I have confidence that Mr Littlejohn would bear me no ill-will, and, even if he did, that this would not influence his approach to this Application. In other words, this is not an issue of bias, but of the risk of perception – particularly by the client – of apparent bias.*
5. Notably, this is not a case where I have any prior association with or knowledge of the Applicant company that Mr Garner-Hopkins is now representing, albeit (apparently) as a "project manager", Mr Gardner-Hopkins being unable to practice as a lawyer after being suspended from legal practice for reasons that do not need to be traversed here. Although that conduct of itself might be considered ethically questionable by some, bringing the legal profession into disrepute as it does, it is not immediately relevant to the issue at hand; namely, that Mr Gardner-Hopkins' client perceives that I would not hear and determine its application fairly because of Mr Gardner-Hopkins' prior litigation involving a company associated with me.

6. In the result, the Memorandum requests that I either provide an explanation to assuage the Applicant's concerns with respect to this perceived bias, or step aside, appreciating the issue at hand.
7. I confirm that I have no grudge against Mr Garder-Hopkins personally, but apart from making that statement have no other information I can provide to alleviate his client's concern. In those circumstances, I agree that the appropriate course is for me to step aside as chair of the Panel, essentially at the Applicant's request.
8. I understand that new arrangements will need to be made for the hearing of the Application once a new and experienced chair can be appointed by the Council.



**K R M Littlejohn**  
Independent Commissioner  
15 January 2023