



Nathan Geard
Policy Planning Manager
Hutt City Council
LOWER HUTT
By Email

7 September 2026

Dear Nathan

Proposed district plan advice – natural hazards chapter – questions from panel

1. You have forwarded Minute 15 of the Proposed District Plan Hearing Panel dated 27 August 2026. This Minute contains a number of directions arising from the hearing of submissions on hearing stream 5 – natural hazards.
2. Paragraphs 26-28 of the Minute raises three legal issues:

26. Firstly, we request Mr Quinn to provide legal advice on the Environment Court findings and direction from case law on providing for the reasonable use of land through plan provisions and the relevance of any specific activity status of proposed rules.

27. Secondly, we request Mr Quinn to provide legal advice on whether controlled activity status under rule NH-R5 is required to enable the reasonable use of land affected by this rule.

28. Thirdly, we request Mr Quinn to provide his legal view on whether explanatory text and 'how the plan works' content is sufficient, given its legal weight, to exclude specific chapters from applying to specific activities. An example of this is the NH explanatory text stating that the natural hazard rules do not apply to the national grid, yet the natural hazard rules themselves do not provide any exclusions for the national grid.

3. The legal advice sought on these three matters is relevant to other directions in Minute 15 that requires conferencing and consideration of issues by experts and Council planners. I did not attend those parts of the hearing where the evidence of submitters was presented. My primary focus of this advice is accordingly on the specific questions above.

Section 85 and the reasonable use of land – caselaw guidance

4. The question in paragraph 26 of the Minute does not expressly refer to section 85 of the Resource Management Act 1991 (**RMA**). However, paragraph 23 of the Minute clarifies that the legal advice sought relates to section 85, and likewise the reference to controlled activity status in the second question is relevant to this assessment of reasonable use.

5. Before addressing the caselaw, it is important to set out the relevant parts of section 85 of the RMA:

85 Environment Court may give directions in respect of land subject to controls

- (1) *An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.*
- (2) *Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds—*
 - (a) *in a submission made under [Schedule 1](#) in respect of a proposed plan or change to a plan; or*
 - (b) *in an application to change a plan made under [clause 21](#) of Schedule 1.*
- (3) *Subsection (3A) applies in the following cases:*
 - (a) *on an application to the Environment Court to change a plan under [clause 21](#) of Schedule 1:*
 - (b) *on an appeal to the Environment Court in relation to a provision of a proposed plan or change to a plan.*
- (3A) *The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—*
 - (a) *in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:*
 - (i) *modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court:*
 - (ii) *acquire all or part of the estate or interest in the land under the [Public Works Act 1981](#), as long as—*
 - (A) *the person with an estate or interest in the land or part of it agrees; and*
 - (B) *the requirements of subsection (3D) are met;*

...
- (3B) *The grounds are that the provision or proposed provision of a plan or proposed plan—*
 - (a) *makes any land incapable of reasonable use; and*
 - (b) *places an unfair and unreasonable burden on any person who has an interest in the land.*
- (3C) *Before exercising its jurisdiction under subsection (3A), the Environment Court must have regard to—*
 - (a) *[Part 3](#) (including the effect of [section 9\(3\)](#)); and*
 - (b) *the effect of subsection (1) of this section.*

...

- (4) *Any direction given or report made under subsection (3A) has effect under this Act as if it were made or given under [clause 15](#) of Schedule 1.*
- (5) *Nothing in subsections (3) to (3D) limits the powers of the Environment Court under [clause 15](#) of Schedule 1 on an appeal under [clause 14](#) of that schedule.*
- (6) *In this section,—*
provision of a plan or proposed plan *does not include a designation or a heritage order or a requirement for a designation or a heritage order*
reasonable use, *in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant.*

6. It is important to highlight that the process in section 85(3)-(5) above relates to an application and powers of the Environment Court. The hearing panel does not have the power or delegation to require the Council to acquire land under those specific subsections. Likewise, the test in section 85(3B) relating to placing ‘an unfair and unreasonable burden on any person who has an interest in the land’ is only relevant to an application to the Environment Court. On this basis, only those aspects of the caselaw relevant to the panel’s powers under section 85(2) regarding addressing submissions that assert that PDP provisions render land ‘incapable of reasonable use’ should be considered.
7. In essence, section 85(2) enables submissions to be made by those with an interest in land (generally landowners) for determination of the hearing panel to challenge a proposed plan provision on the basis that it renders their interest in the land incapable of reasonable use. The relevant focus on the caselaw is accordingly what guidance is provided on what constitutes reasonable use, against the background of the inclusive definition of that phrase in section 85(6).
8. I have not reviewed all submissions to determine whether any submitters that section 85(2) applies to have sought to challenge a PDP provision under this section. However, to answer the question by the panel, I have focused the case law search below on that phrase (rather than the broader tests and process under section 85(3)-(5)). Rather than referencing every case that refers to ‘incapable of reasonable use’ under this section, I focus below only on those cases that may provide some assistance or direction.
9. *Steven v Christchurch City Council* [1998] NZRMA 289 was one of the first Environment Court cases to consider section 85 in detail. It related to a property that contained a large (and largely uninhabitable) building that was included in a list of protected heritage buildings. The case confirms that the assessment of reasonable use is an objective assessment of the applicant’s circumstances. While much of the decision deals with the test of placing an unfair or unreasonable burden on a landowner (which is not relevant to the panel here), the case notes the following on an assessment of incapable of reasonable use:

- a. There was a large building on the property, with the only options for the owner being renovation or demolition.
 - b. The Council had no power to require the owner to renovate the house to a 'livable' standard.
 - c. There were no other choices for the owner in this case, as the building was in the middle of the property and no other use could be made of the land. As a result, the heritage listing imposed an 'all or nothing' quality to the owner's options.
 - d. The Court found that in the circumstances the listing rendered the land incapable of reasonable use.
10. *Golf (2012) Limited v Thames-Coromandel District Council* [2019] NZEnvC 112 was a decision of Judge Kirkpatrick that considered the caselaw under section 85 in some detail. The case related to the appropriateness of open space zoning over privately owned land (which was occupied by a golf course). The Court referred to a list of matters referred to in the *Steven* case, however those factors are more relevant to the Court process under section 85((3)-(5). In terms of the test of incapable of reasonable use, the following points were noted by reference to earlier decisions:
- a. *Fore World Developments Ltd v Napier City Council* involved plan provisions relating to the effects of coastal erosion, particularly a Coastal Hazard Zone' on the appellant's land. The appellant's planner's evidence was that there was no credible use of the land under the proposed provisions. The Court concluded that residential use was not prevented, and stated:

[122]... The choice of an appropriate zoning is driven by a matrix of factors in which such things as location, servicing ability and the nature of the surrounding area may be as influential as the quality of the land itself. Nor does the landowner's wish to use the land in a way that maximises its value make that use alone reasonable, and others unreasonable.

[123] Put another way, although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use...

...

[125] Reasonable use is not synonymous with optimum financial return
 - b. *Gordon v Auckland Council* [2012] NZEnvC 7 was another case referenced where the headland was the site of a pa which was scheduled as a category A item of historic heritage. The landowners sought to be able to build a house on the headland and argued that restricting the use of land to grazing of light animals and incidental maintenance rendered it incapable of reasonable use. The Court noted that the actual use of the land had been limited to light grazing and that such farming activity was not financially viable even to the level of being self-sustaining. Even so, the Court also noted that unrestricted development of the headland could potentially

cause significant effects on the archaeological values of the immediate environment. The Court held that the restriction on the use of the headland did not render the whole landholding incapable of reasonable use, given certain concessionary possibilities for the development of the balance of the land.

- c. The Court further noted that these cases tend to indicate that the Court's evaluation of a case against this test must be based on all the evidence and assessed on the merits, with a focus on the public interest. The ultimate determination was that open space zoning for the golf course land was upheld and relief under section 85 was not granted.
11. *Redmond Retail Limited v Ashburton District Council* [2021] HZHC 2887 is a High Court appeal from the Environment Court that dismissed a section 85 application. The case considered whether a protected heritage listing of the building made the land incapable of reasonable use. One of the considerations in this case was that the building was earthquake prone, with expensive requirements being imposed by the Building Act. The Court concluded that this was a non-RMA/district plan requirement that did not make the land incapable of reasonable use under the RMA. In dismissing the appeal, the High Court was satisfied that the Environment Court had considered a wide range of considerations in reaching a conclusion that the land was capable of reasonable use. It further noted:

[58] Overall, however, I consider a granular assessment of reasonable uses of the land by reference to the objectives and policies of the District Plan, and matters of discretion to which a decision-maker must have regard when determining a consent application, is unrealistic in the present context. In determining whether the provision of a plan makes any land incapable of reasonable use, the Environment Court cannot speculate about the form a future application for resource consent may take, or its content.

12. *Zant v Central Hawkes Bay District Council* [2024] NZEnvC 267 involved a challenge by a landowner to zoning of natural features on their land through the district plan. The Environment Court noted that the relief available in section 85 is available in limited circumstances where restrictions on land render it incapable of reasonable use. It went on to state:

[59] The evidential burden for establishing a s 85 claim is on the owner. In this case the Council submitted that the appellants have not provided any evidence which supports a claim that the ONF-7 notation precludes reasonable use. For example, the appellants have never given evidence of an activity they would like to undertake within ONF-7 that is precluded by the PDP as a result of rules attaching to ONF-7. Even if there was such an activity, the Council submitted that its potential effects on the environment would need to be demonstrated to not be significant in order to be relevant to whether it was a reasonable use.

[60] *In addition, it submitted that it is also important that what constitutes “reasonable use” is assessed from the perspective of the public interest. In Hastings v Auckland City Council, the Court held:*

... the test to be inferred from section 85 is not whether the proposed zoning is unreasonable to the owner (a question of the owner’s private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest). The implication is that a provision that renders an interest in land incapable of reasonable use may not serve that purpose. But the focus is on the public interest, not the private property rights.

...

[62] *In their submissions the Zants relied, among others, on a paper prepared by the New Zealand Treasury on “Property Rights and Environmental Policy: A New Zealand Perspective”. They say it supports their position on the inherent unlawfulness of identifying part of their land as ONF-7, raising the issue of compensation for lost use of land. They submitted:*

This paper is very applicable for this case. It very much describes property rights, the different categories thereof, and even details these rights in the current scenario of the attempted RMA takings by district plans.

[63] *The Council, in reply, noted that section 6.1 of the Paper acknowledges: The main vehicle for adjusting property rights in New Zealand is the Resource Management Act 1991 (RMA) through the preparation of ... district plans, and their application by ...territorial authorities to requests for consent to build on or otherwise use land.*

These ...plans, and the way they are applied act to constrain, enforce and modify property rights in land. Those modifications are not compensable. ...the RMA explicitly states that plan provisions are not deemed to have taken or injuriously affected interests in land unless the Act explicitly says so... This is effectively parliament contracting out, through statute, from the application of a takings approach to land use regulation.

[64] *We accept the Council’s submissions on this matter. We find that scheduling part of the Zants’ land is not a ‘land grab’, nor does it constitute an unreasonable fetter on their rights. It is an appropriate response to the work undertaken to identify outstanding natural features and landscapes in the district.*

13. While each of the cases above relates to a different scenario, they demonstrate that reaching a conclusion that land is incapable of reasonable use is a high bar and is only available in limited circumstances. The landowner must produce a strong case, and it requires an assessment of all the circumstances. Most of the case examples conclude that the test was not satisfied.

Relevance of activity classification to the reasonable use assessment

14. The second question in the Minute refers to the controlled activity status under rule NH-R5. The issue raised is whether this activity status is required to enable the reasonable use of land affected by this rule.
15. It is noted that the section 85 case law assessment of reasonable use (as addressed in answer to question 1) contains only limited reference to activity classification. It is only one of a number of factors to consider in all the circumstances. I have therefore considered the context of this question specifically in regard to rule NH-R5, in order to further understand the significance of activity classification.
16. Rule NH-R5 relates to new buildings and structures within the fault location area. In particular, it provides for the following activity:

New buildings and structures and the conversion of existing buildings for activities potentially sensitive to natural hazards and activities most sensitive to natural hazards within the poorly constrained or the uncertain constrained areas of the Fault Location Area

17. Activities covered by this rule have a controlled activity status where the building is being constructed on an existing vacant site, with restricted discretionary status where compliance with that controlled rule cannot be achieved.
18. It is understood that the proposed controlled activity status is not disputed by any submitter. There was however one submission that addresses the matters of control:
 - a. Paragraph 17 of the evidence of Ms Wheatley for the Wellington Regional Council notes that a vacant lot is the only circumstance where controlled activity status applies. The evidence considers this to be reasonable. It then comments on the matters of control.
 - b. The rebuttal evidence of Mr Davis addresses this point at para 6.23 and 6.24. As part of the justification for the controlled activity status of the rule, he references the Council's 'duty to provide for the reasonable use of land despite knowing that buildings will be at risk.' He also does not agree to the proposed changes to the matters of control.
19. It is understood that the question posed by the panel arises in response to these matters of evidence. That is consistent with the conferencing directed to occur between Ms Wheatley and Mr Davis. I therefore consider below whether controlled activity status is required to provide for the reasonable use of land. In completing this analysis, I note that this questions does not arise in response to a landowner claiming that the controlled activity rule makes the land incapable of reasonable use, but rather the context is the Council justifying why the rule structure was drafted with a controlled

activity rule (ie. in order to avoid such a potential challenge or submission from affected landowners).

20. As will be familiar to the panel, controlled activity status is defined in section 87A(2) of the RMA to mean that consent must be granted (subject to conditions being imposed within those matters of control). This activity status is accordingly fundamentally different to higher activity classifications, where resource consent can potentially be declined. The relevant implication of activity classification for section 85 purposes is that it would be much more difficult for a landowner to assert that their land is incapable of reasonable use under the PDP if a use simply requires a controlled activity consent that must be granted by the Council.
21. As noted above, the caselaw reference to activity status in the context of the section 85 'incapable of reasonable use' test is limited. That is to be expected, as the challenge to plan provisions are only made by landowners when a higher activity classification is imposed. I have not found any additional case law references to bring to your attention. However, I agree with Mr Davis that the controlled activity status in the PDP version as notified would make it difficult for any landowner to assert that a rule of this nature could render land incapable of reasonable use. It would need to be at least a discretionary restricted activity for such an assertion to be credibly made. That would then require consideration of all of the other factors addressed in the caselaw above, in order to assess whether the provisions would be one of the limited circumstances where a landowner was left with a property that is incapable of reasonable use as a result of the PDP.
22. Controlled activity classification for NH-R5 is not vital (of itself) to ensure that land is capable of reasonable use. However, that activity classification is one way for Council to ensure that submissions in reliance on section 85 have no strength. It is possible that section 85 based submissions could have been made in opposition to the PDP in the absence of that controlled activity rule. I accordingly understand and support the policy position outlined by Mr Davis.

Exclusion of specific chapters from applying to specific activities

23. This question relates to the structure and method used by the PDP to confirm when certain rules do, and do not, have application. The particular concern is whether the rules in each chapter of the PDP need to set out the exclusions, rather than relying on the explanatory text in the 'How the Plan Works' content near the start of the PDP.
24. To provide context for this question, I provide a brief outline of the approach taken in the PDP to these matters. I then address any relevant interpretation caselaw to assist the panel's consideration of this matter.
25. The PDP has a section near the start that is headed 'How the Plan Works'. This section explains the structure of the plan, the format of chapters, the classes of activities,

coding and abbreviations, how to use the plan, how to identify provisions relevant to an activity, notification, information to be submitted with consent applications and the legal effect of rules.

26. The most significant part of the ‘How the Plan Works’ section for the legal question posed by the panel is the section dealing with ‘identifying provisions that are relevant to your activity’. In particular, I note the following statements from that section:

Whether provisions in District-Wide Matters chapters apply to an activity is covered in the introduction to each relevant chapters. Some chapters apply to any activity covered by the chapter, in addition to provisions in the relevant zone. You will need to consult these chapters if your activity includes anything covered by the chapter:

- *Transport*
- *Three Waters*
- *Contaminated Land*
- *Hazardous Substances*
- *Natural Hazards (although most of this chapter is only relevant to activities within certain overlays)*
- *Public Access*
- *Subdivision*
- *Activities on the Surface of Water*
- *Earthworks*
- *Financial Contributions*
- *Light*
- *Noise*
- *Papakāinga*
- *Signs*
- *Wind*

Other chapters only apply to overlays or other spatially identified areas. You will need to consult these chapters if your activity is within one of the chapter’s overlays or other spatial areas:

- *Historical Heritage*
- *Notable Trees*
- *Sites and Areas of Significance to Māori*
- *Natural Character*
- *Natural Features and Landscapes*
- *Coastal Environment*
- *Protection of Infrastructure*

...

Finally, some chapters provide an all-in-one framework for specific activities that overrides provisions in zones. Other district-wide chapters will be relevant, but if

covered by one of these chapters, you will not need to refer to the zone unless a district-wide chapter directs you to:

- *Renewable Electricity Generation*
- *Infrastructure*
- *Temporary Activities*

27. I particularly note the statement in the last paragraph above that relates to the chapters for renewable electricity generation, infrastructure and temporary activities. It expressly states that the 'all-in-one framework' for the specific activities covered by those chapters 'overrides provisions in zones'. In my view, the intention and effect of this statement is clear. It confirms what rules apply in these circumstances. It is worded in an over-arching manner in order to avoid the need to repeat that same statement and detail in each chapter/rule of the PDP ie. the same approach/formula is to apply throughout PDP.

28. The question raised by the panel is essentially whether this approach and formula in the PDP is sufficient to adequately achieve this outcome (in the absence of any other cross referencing or similar statements repeated in each chapter of the PDP).

29. The structure of the PDP adopts the district plan structure standard in the National Planning Standards. In particular, the heading for how the plan works and the various sub-headings at the start of the plan in those standards is consistent with how the PDP is structured. Section 6 of the national planning standards states that the following two matters must be located in this part of the plan:

b. the steps plan users should take to determine if an activity is provided for by the policy statement or plan

c. how resource consent applications subject to multiple zones or chapters are treated

30. In my view, the approach that the Council has adopted in the PDP is accordingly consistent with the national planning standards structure. However, to further consider this issue I have had regard to the submissions and evidence that have raised this topic. My understanding is that it has been raised by the following:

- a. Transpower submissions 504.61, 65 and 89a - these submissions seek changes to the introductions to reference provisions in the Infrastructure chapter, on the basis that 'the CE Chapter includes no definitive statement as to relationship with other chapters including the INF chapter' and that the change sought 'provides clarity for plan users and will assist with plan interpretation and application'.
- b. Michael Rachlin submission 232.13 – seeks a note to make it clear that the rules only apply to activities undertaken in that part of the site located within an Overlay. This is also sought to avoid confusion and aid plan administration.

- c. The evidence of Philip Brown on behalf of the oil companies at paragraphs 8.3-8.6 also seeks an explanatory note that clarifies when an overlay-specific rule takes precedence over the underlying flood hazard rule.
31. The response to these matters from Council officers is contained in the section 42A report at paragraphs 258-265, 605-609 and 794-797. In essence, officers generally oppose the proposed additional provisions sought in submissions on the basis:
- a. The 'How the plan works' section of the PDP provides the detail of how the plan works structurally, including when the Infrastructure provisions apply. This is also repeated in the Infrastructure chapter.
 - b. It would lengthen the PDP to repeat this material in each zone and district wide chapter. In particular, similar statements would then need to be added to various parts of the PDP for consistency. That would create a significant burden at this stage of the process.
 - c. The overuse of cross references has been reduced in the PDP.
 - d. Proposed notes are redundant if they simply repeat the analysis from the 'How the plan works' section
32. As long as the existing provisions of the PDP are effective at achieving the intended purpose, I agree with the concern raised by Council officers that changes made in isolation in response to particular submissions that effectively add cross references to how the plan works would then have wider implications for the structure of the PDP as a whole. It would potentially require changes to many provisions in the PDP. I have considered the issues raised in the submissions in this context.
33. For comparison purposes I have considered the structure and approach to this issue in the Wellington City 2024 District Plan. That plan has a similar 'How the plan works' chapter. I note the following statement in that plan:

Please note that there may be rules and standards in more than one chapter that apply to a proposed activity. The underlying zone rules will apply to most activities along with general district wide rules such as [noise](#) or [earthworks](#). The [Subdivision](#) and [Temporary Activities](#) chapters generally operate as standalone chapters containing all relevant objectives, policies, rules and standards relating to those activities, unless otherwise specifically identified in those chapters. If you are undertaking any activities relating to [temporary activities](#) or subdivide your property, please start by looking at those chapters after you have looked at the planning maps to determine what zone your activity or property is in and whether any overlays, precincts, features and/or designations apply. Unless otherwise specified in the introduction or in the chapter, the rules in the [Temporary](#)

Activities and Subdivision chapters are the only rules that apply to the listed activities.

34. Of note from this statement is that the temporary activities and subdivision chapters are the only rules applicable to the listed activities. In other words, the effect of this sentence is that those rules apply to the exclusion of the rules in the underlying zone. There is accordingly some similarity to how the Hutt City PDP has approached this issue in terms of structure of the PDP.
35. In my experience, most applicants and/or their planners will engage with Council officers to ensure that it is understood or agreed what rules apply to particular activities. An understanding or practice then develops for frequent plan users. Seldom are there disagreements between planners on the fundamental question of what rules apply. The Environment Court requires planner caucusing to address any such disagreement. The effect of this approach is that agreement between parties means that there is very little relevant caselaw on how plans are structured on this topic.
36. In *Pierau v Auckland Council* [2017] ENVC 90 at [23] it is noted ‘...for the assessment under s 104(1)(b), it is only the provisions that are relevant to the site itself which are to be considered, namely the zone provisions, and any higher level provisions of relevance.’ It is therefore common in any resource consent assessment that judgment needs to be applied to determine which plan provisions are relevant and those which are not. If they are relevant, where the relevant plan intends for a provision not to apply, it can include a statement that expressly addresses that.
37. The Environment Court considered rules and the relationship between rules found in the applicable zone and the rules found in overlays within the Auckland Unitary Plan, and which would apply or trump the other in respect of a particular site, in *Auckland Council v Budden* [2017] NZEnvC 209 at [59] and [75]-[78]. The key finding was that, in the absence of a directive in the plan, both sets of rules would need to be applied. The Court considered all relevant provisions and explanatory text in context. The Court's conclusion was that unless there was express direction to the contrary in the plan, both set of provisions would apply. A Practice Note issued by the Council that had a different planning interpretation was found to be invalid.
38. It is common that notes in a plan will assist both the plan user and the decision maker as to relevant provisions to have regard to when making a decision on a resource consent application. The question is whether the direction in the ‘How the Plan Works’ section of the PDP is sufficient to provide this direction.
39. While a cross referencing note of the nature sought in submissions is legally possible, in my view it is not strictly necessary as a result of the PDP structure and directives at the start of the PDP in the ‘How the Plan Works’ section. In my view the directive as to the relevant applicable rules is clear. I am also mindful of the problem with starting the exercise of inserting cross references in response to submissions eg.to reference the

Infrastructure chapter. That would then give rise to the need to insert extensive additional cross references into the PDP in order to avoid confusion where some cross references exist and others don't. The inconsistency of cross referencing can sometimes be more problematic than having none. This is against the background that in my view the direction in the 'How the Plan Works' section is legally sufficient to be clear as to what provisions are to apply. I do not consider that the PDP suffers the lack of direction that existed in the *Budden* situation.

40. I am happy to expand on any of these matters further.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S. Quinn', with a horizontal line extending to the right.

Stephen Quinn

Barrister