SUMMARY OF LEGAL SUBMISSIONS REGARDING HEARING D

INTRODUCTION

1 This summary of submissions is presented on behalf of Port Blakely Limited (**Port Blakely**).

2 My submissions are confined to the key issue raised by Port Blakely's submissions, regarding the relationship between the NES-CF and the RULES IN THE Proposed Plan which govern the effects of plantation forestry activities. The issue arises because Port Blakely considers these rules are more stringent than comparable rules in the NES-CF.

3 The case for Port Blakely is focussed on a narrow but important point regarding the Timaru District Council's (**Council**) Section 32 evaluation. Port Blakely considers that the Section 32 evaluation is deficient because it fails to demonstrate that the more stringent forestry rules in the Proposed Plan are necessary and justified in the context of the Timaru District. The Section 42A Report recognises the deficiency of the Section 32 evaluation and recommends the Proposed Plan be amended to make it clear to plan users that the NES-CF has precedence over the Proposed Plan rules in relation to plantation forestry operations. Port Blakely supports the Section 42A Report's suggested amendments to the Proposed Plan.

4 In addition, these submissions address the Bat Habitat Protection rules in the Proposed Plan. Port Blakely considers these rules do not align with expert advice about known bat behaviour and methods to identify bat habitat. Port Blakely proposed amendments to these rules to address this concern.

SUMMARY OF LEGAL SUBMISSIONS FOR PORT BLAKELY

Policy objective of the NES-CF

5 Here I quote directly from Ms Pearson's evidence, where she considers that[1]:

> *A key driver for the NES-PF was to address unwarranted variation across regions and districts in the management of plantation forestry under the RMA. This variation was creating significant operational and regulatory uncertainty for the forestry industry and leading to uncertain and inconsistent environmental outcomes.*

[1] Evidence of Melissa Pearson at paragraph 13.

6 This is reflected in the policy objective of the NES-PF, which is to[2]:

> *a) Maintain or improve the environmental outcomes associated with plantation forestry activities nationally; and*
>
> *b) Increase efficiency and certainty in the management of plantation forestry activities.*

The legal relationship between National Environmental Standards and District Rules

7 District Councils are tasked with a wide range of functions including the requirement to control the use of land in order to maintain indigenous biological diversity.[3] To undertake these functions the RMA provides that district councils may create district plans including district rules to implement district policies and objectives.[4] Such plans must be prepared by district councils in accordance with their obligations to prepare an evaluation report, otherwise known as the s32 Report, and councils must have particular regard to that report.[5]

8 The RMA also authorises the Governor-General, to make regulations known as national environmental standards.[6] In this case the nature of the NES-CF is such that there is considerable potential for duplication, overlap and conflict between the national standard and the Proposed Plan rules.

9 The relationship between national environmental standards and rules is governed by 43B RMA which (relevantly) provides that a rule that is more stringent than a national environmental standard will prevail over the standard, but only if the standard expressly says that a rule may be more stringent than it.[7]

10 The RMA also requires that where district councils propose more stringent rules, they must explain why such rules are necessary in the particular circumstances of their district. This requirement is founded in councils' duties under s32 of the RMA, specifically s32(4), which provides:

> *If the proposal will impose a greater or lesser prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in*

---

[2] *Ibid.*, at paragraph 12.
[3] RMA section 31(1)(b)(iii), and section 31(1)(e).
[4] RMA section 73(1) and section 75(1).
[5] RMA section 74(1)(d) and (e).
[6] Pursuant to section 43 RMA.
[7] RMA section 43B(1)(a).

> *that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.*

11 In summary, district rules that are more stringent than a national environmental standard are allowed, provided that such rules are expressly contemplated by the relevant standard and the district council has completed an evaluation report under s 32 RMA that explains why greater stringency is justified in the particular circumstances of the district.

12 This requirement imposes an important constraint on the power of district councils to promulgate rules that are more stringent than a national environmental standard and supports the hierarchy of planning instruments provided by the RMA.

Recent High Court decision

13 The recent High Court decision of *Rayonier New Zealand Ltd* v *Canterbury Regional Council* [8] explains how the above provisions apply in practice. The Court commented as follows regarding s32(4):

> *[135] A plain reading of s 32(4) ... establishes that there are two parts to it. The first defines when it is engaged and the second outlines what must be included in the evaluation report when it is engaged.*

14 The Court looks further into the meanings of s32(4):

> *[138] Importantly, the examination of whether a proposed restriction is justified must be considered in the circumstances of the region in which it is to have effect. This means that local factors, rather than matters generally of concern at a national level or of concern in other regions or districts, must be examined. In my view, this required the panel to be satisfied that there was good reason arising from the circumstances of the Canterbury region to impose greater restrictions on plantation forest activities... than those that appear in the NES-PF.*

15 The Court also comments on the requirement in s32(4) to give reasons and the degree of reasoning and analysis required:

---

[8] *Rayonier New Zealand Ltd* v *Canterbury Regional Council* [2024] NZHC 1478.

[145] ... the panel failed to address whether the stringency proposed was justified in respect of the sediment discharge rule as was required by s 32(4). There is no reference to any evidence justifying greater stringency in the Canterbury region and the absence of this is, in my view, fatal...

16 The importance of evidence, reasoning and analysis to justify a departure from the NES-CF is discussed in the following paragraphs of the High Court decision:

[166] ... it is important to recognise that the s 32(4) requirement for stringency creates an exception to the general hierarchy attached to statutory planning documents, namely that national standards take precedence over regional rules. It is also important to recognise the background to the NES-PF which was promulgated to avoid forestry companies, such as the appellants, having to deal with different rules about the same topics throughout New Zealand.

[168] The fact that the stringency assessment is a departure from the normal rules regarding the hierarchy of statutory planning documents means that, in my view, greater care is required to be taken by a decision-maker when assessing stringency and a more careful reasoning process is required than that which was undertaken by the panel in this case. To use the Court of Appeal's phrasing in Belgiorno-Nettis, the "ambit" of the panel's duty to give reasons was necessarily widened.

[170] I have briefly considered what degree of reasoning and analysis would have been required in this case. In my view, at the very least, there should have been evidence directly relevant to the Canterbury situation, explaining why the nation-wide approach set out in the NES-PF was not sufficient to address the harm sought to be prevented by the proposed sediment discharge rules in PC7. There should have been evidence comparing the NES-PF provisions with the proposed rules. Then, if a departure from the NES-PF was in the panel's view justified, reasons as to why a different approach should be taken ought to have been set out.

17 The *Rayonier* decision deals with the management of forestry within the Canterbury region. However, the reasoning and approach is equally applicable to the rules regulating forestry in the Proposed Plan.

Comparison between Proposed Plan Forestry Rules and the NES-CF

18 Ms Pearson's evidence includes a detailed analysis of the Proposed Plan provisions, whether the provisions have been sufficiently justified by the relevant Section 32 report, consideration of the Section 42A officer's assessment and how this relates to the relief requested by Port Blakely.[9]

19 In summary, Ms Pearson makes the key point that the Proposed Plan fails to properly align with the NES-CF. This failure has resulted in provisions where[10]:

(a) There is no jurisdiction for the provision to be more stringent than the NES-CF;

(b) The Section 32 evaluation did not carry out a proper s32(4) analysis;

(c) A proper assessment as required by s32(1)(b) was not carried out, in that no consideration of why the Proposed Plan provisions were a more efficient and effective way to achieve the outcomes sought by Regulation 6 of the NES-CF, as compared to the equivalent provision in the NES-CF.

20 It is noteworthy that the Section 42A Report reaches the same or similar conclusion as Ms Pearson and recommends amendment to the Proposed Plan to address this problem.[11]

<u>Conclusion</u>

21 Port Blakely supports the Section 42A officer recommendations as they address the concerns raised by Ms Pearson, are consistent with the High Court decision in *Rayonier* and achieve the outcomes sought by Port Blakely's Submissions.

---

[9] Evidence of Melissa Pearson, at paragraphs 35 – 80.
[10] *Ibid.*, at paragraph 32.
[11] *Ibid.*, at paragraph 45. See also evidence of Melissa Pearson, at paragraph 51, 74 and 80.

BAT ROOST PROTECTION RULES IN THE PROPOSED PLAN

Rules in the Proposed Plan

22 The evidence of Zachary Robinson includes a detailed analysis of the Proposed Plan ECO-R4 rule.[12]

23 In summary, Mr Robinson considers the requirement for an ecologist to carry out a specialist assessment of the tree in question as a matter of discretion is unnecessary, is not aligned with the Department of Conservation Bat Roost Protocols (**DoC Protocols**), and will result in unintended consequences where tree removal will not be notified to minimise costs.[13]

Section 42A Report

24 The Section 42A Report recommends amending the matters of discretion in ECO-R4 to include the use of Automatic Bat Monitors, and to allow for trees that potentially provide bat habitat to be assessed by someone who is suitably qualified and experienced in identifying bat habitat.[14]

25 Mr Robinson supports the Section 42A officer recommendations as they align with the DoC Protocols and with the most current information regarding long-tailed bat habitat.[15]

26 More recently, the s42A summary statement, at paragraph 10(c) recommends amending ECO-R4 so that it does not refer to Automatic Bat Monitors as previously recommended. The Reporting Officer relies upon the evidence of Mr Waugh in support of her conclusions.

27 Mr Robinson has had the chance to review s42A summary statement and the evidence of Mr Waugh and supports the issue raised by Mr Waugh. Furthermore, Mr Robinson suggests the following amendment to ECO-R4 in line with Mr Waugh's approach:

28 Current wording:

---

[12] Evidence of Zac Robinson, at paragraphs 40-55.
[13] *Ibid.*, at paragraph 45.
[14] Section 42A Report at paragraph 7.10.14 and 7.10.19.
[15] Evidence of Zac Robinson, at paragraphs 51, 53 and 55.

Whether, upon specialist assessment by a suitably qualified and experienced expert, or demonstrated through use of an Automatic Bat Monitor, the tree/s proposed to be removed is habitat for long-tailed bats...

29 Suggested amendment (underlined text & **bold**):

*Whether, upon specialist assessment by a suitably qualified and experienced expert, **and supported** through use of an Automatic Bat Monitor, the tree/s proposed to be removed is habitat for long-tailed bats...*

CONCLUSION

30 The primacy of national environmental standards can only be departed from in limited circumstances, and only where such departure is supported by a robust s32 assessment. Section 32(4) performs an important function in the statutory scheme of the RMA by constraining the circumstances when local rules may prevail over national environmental standards. In this way, the primacy of the national instrument is not undermined by unjustified local rules. Overall, there is no merit in making district rules that prevail over the NES-CF without proper justification, because doing so results in inconsistency between the districts and regions of New Zealand, which is one of the problems that the NES-CF was designed to overcome.

Dated: 12 November 2024

Shona Walter

Counsel for Port Blakely Limited