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Independent Review of the Kāpiti Coast Proposed District Plan

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EXECUTIVE SUMMARY

Background and Method

Kāpiti Coast District Council has sought “an independent planning expert and legal expert review” of the Kāpiti Coast Proposed District Plan (the PDP).

The Council’s objective, in commissioning the review, is stated as:

“ to determine whether the plan should continue to be progressed through the hearings process, significantly changed, be withdrawn or some other process followed in order to best achieve the [stated] goal.”

The Council’s stated goal is:

“ to have a District Plan that represents good practice, is comprehensible for users, is easily accessible and this is achieved fairly in the most cost effective way.”

Experienced planner Sylvia Allan, and QC and Barrister sole Richard Fowler were appointed as reviewers. The review has been led by Sylvia Allan while Richard Fowler provided advice on legal aspects. The report presents an agreed outcome from the review.

The review took place between December 2013 and March 2014. Delay in reporting resulted from a request that the reviewers consider the findings of the parallel review of the coastal erosion hazard assessment which underpins some of the PDP’s provisions.

The process followed in the review is set out in section 1.5 of the report, and involved review of a considerable range of written material, meetings and discussions with many people, and analysis and consideration of the contents of the PDP itself. Once a position was reached that neither the process nor the contents of the PDP in its current form were so flawed that the PDP needed to be abandoned, a range of alternative means of progressing with the plan were identified and evaluated.

The review has been taken at a relatively high level. Care has been taken not to address specific submissions. Inevitably, some conclusions have been drawn that are similar to some submissions, but the review process does not supplant the formal processes of consideration of and decision-making on submissions.

Plan Processes

Because of various community criticisms of the processes of development of the PDP, the review investigated the process. It found that many of the criticisms of the processes were justified, but the process shortcomings are not so significant that they should prevent proceeding with the PDP. The review finds it regrettable that more opportunities

for engagement with affected people were not provided. In particular, it appears that, as plan development proceeded, the processes came under increasing time pressure, to the extent that the intended Draft Plan stage was omitted entirely. The reviewers consider that the PDP would have benefited considerably from a stage which enabled comment on its draft format and contents.

Specific issues around the notification process and the further submission processes are commented on in the review report. While there are concerns, again they have not been found to pose insuperable problems.

A “Good Practice” Plan

Section 3 of the report sets out the requirements for district plans under the Resource Management Act and discusses what might comprise a “good practice” plan. There is no particular model for a good practice district plan, because such plans must reflect the circumstances of the district as well as addressing a range of statutory imperatives while seeking to promote the purpose of sustainable management of the district’s natural and physical resources. However, there are some expectations that should be readily demonstrated in a “good practice” plan.

A list of six aspects was developed against which the PDP could be evaluated.

Evaluating the PDP

After confirming that the process through which the PDP was developed falls short of good practice, section 4 of the report evaluates the PDP content in its current form. It makes the following observations (summarised):

- the PDPs **objectives** are comprehensive and adequately set out the intentions of the district plan for users. Wording needs to be improved in some places. The explanatory material requires thorough editing to reduce its length and better explain how the objectives are to be achieved.
- the content of the PDP adequately or more than adequately covers the **functions of a district plan** set out in the legislation. There is debate as to the PDP’s detailed provisions, as could be expected at this stage of the statutory process.
- the PDP makes provision for all the stated **matters of national importance** in the Resource Management Act, all the **National Policy Statements**, and addresses relevant aspects of the recently-operative **Regional Policy Statement**. Changes to the provisions can be expected as a result of decisions on submissions if the process proceeds.
- **plan organisation** is acceptable, although different from the operative District Plan and therefore unfamiliar. Opportunities should be sought to make necessary

improvements to a range of specific problems identified by the community and/or the reviewers.

- the PDP's **maps** are acceptable, although again should be improved through the process. Electronic versions on aerial photograph bases are needed for users.
- there are a large number of detailed issues with the wording and organisation of the **policies** and with the **rules**. However, the format adopted is acceptable.

The review has identified strengths in the PDP (see section 4.4 of the report) and aspects of particular difficulty (see section 4.5 of the report). Strengths include current relevance, including in relation to national and regional priorities, provision for the district's ongoing economic development, for additional housing development, for the interests of the district's tāngata whenua, and more technical aspects of expression such as cross-referencing and directly applicable policy. Aspects of particular difficulty relate largely to the details of the rules and some aspects of overlay mapping. Both the range of strengths and of weaknesses have mostly already been widely identified in the community.

At present, the PDP does not represent good practice, but it does not represent unacceptable practice. It could be substantially improved through the further statutory processes.

Where to from Here?

The Council has a "basket of tools" available to deal with the problems and shortcomings of the current PDP and to improve it. This includes assessing and making decisions on submissions but also the partial or complete withdrawal of problematical provisions, correcting errors, and undertaking variations to the provisions.

Four possible ways of progressing the PDP were identified and systematically evaluated in terms of advantages, disadvantages, risk, fairness and cost effectiveness as set out in section 6 of the report.

The options were:

- Option 1:** continue the PDP process as set out on the Council website (i.e. a rolling programme of hearings and decisions)
- Option 2:** withdraw the PDP and do nothing
- Option 3:** withdraw the PDP and recommence the review (i.e. treat the PDP as a draft)
- Option 4:** continue the PDP process, but modified so that the process efficiently addresses the plan as a whole, and drawing on the "basket of tools" available to the Council where improvements are needed that are beyond the scope of submissions.

Of the options, Option 4 is preferred. Option 4 requires a rigorous process of review, identification of aspects of the plan which cannot adequately be addressed by submissions, and a modified reporting and hearing process so that submitters can see how recommendations for change stack up across the whole plan. The process would also identify any parts of the PDP which need to be withdrawn and replaced through variations and parts which may be withdrawn and not replaced. A modification to the hearing approach and the involvement of an independent hearing chair and a commissioner is proposed, amongst other detailed proposals. It is recognised that there are risk, cost and contextual implications.

Reasons for choosing Option 4 include that the approach makes best use of the resources already expended in the planning process by the Council and the community, that it would probably be the most efficient and quickest of all the options, and that it is favoured by some significant parts of the community.

Coastal Hazard Provisions

Following review of the processes related to the coastal hazard provisions, and acknowledging the findings of the coastal erosion hazard assessment review, it is proposed that the mapped coastal hazard management areas and associated policies and rules should be withdrawn from the PDP.

However, reverting to the operative District Plan's provisions to address coastal hazards will be inadequate in terms of national and regional policy and so proposals are included in the report to proceed with further work. This work needs to update the science, as advised in the coastal erosion hazard assessment review, and should take into account other elements of likely coastal change. Once the potential problems are better understood, alternative responses to risks need to be explored before decisions are made, and a range of management alternatives need to be evaluated. Ongoing consultation will be required and the establishment of an advisory group is recommended.

Review Recommendations

The review concludes with the following recommendations:

1. The Council proceed with the PDP on the basis of a modified process of hearing and making decisions which includes all elements set out in section 5.5 of this report.
2. A detailed implementation plan including resourcing and timetable is developed to progress the PDP in accordance with recommendation 1. A communications plan to keep the community informed would be a necessary part of the implementation.

3. The Council undertake a detailed review of the rules of the PDP having legal effect and clarify these provisions as soon as possible.
4. The Council resolve to withdraw from the PDP the coastal hazard management areas on the plan maps along with the associated policy section and rules, and clarify the parts of the operative District Plan which provide stop-gap coverage relating to coastal hazards.
5. The Council develop an implementation plan to progress work on the coastal erosion hazard assessment, and other aspects of coastal hazard management. The implementation should build on the work already done and incorporate adequate and appropriate communications and consultations provisions, including a role for an advisory group as described in section 6.4 of this report.
6. At an appropriate time (or times) the Council proceeds with a variation (or variations) to include suitable and relevant policy, methods and rules in the PDP to address the district's coastal hazards in accordance with the NZCPS, the RPS and best practice.
7. The Council only withdraw the whole of the PDP if it is unable to resource the methods we recommend for proceeding through Option 4, or if it considers the residual risks identified in section 5.6 of this report are too high.

1 BACKGROUND

1.1 Brief and Scope

Kāpiti Coast District Council has sought “an independent planning expert and legal expert review” of the Kāpiti Coast Proposed District Plan (the PDP).

The Council’s objective, in commissioning the review, is stated as:

“ to determine whether the plan should continue to be progressed through the hearings process, significantly changed, be withdrawn or some other process followed in order to best achieve the [stated] goal.”

The Council’s stated goal is:

“ to have a District Plan that represents good practice, is comprehensible for users, is easily accessible and this is achieved fairly in the most cost effective way.”¹

The review is taking place against a background of strongly expressed concern in the community about many aspects of the PDP, and in particular in the context of a direct request to the Council to withdraw the PDP². As a result of this request, the Council resolved to delay the start of any hearings on the PDP to enable time for this review. It also resolved that pre-hearing meetings should be undertaken³.

1.2 Appointment as Reviewers

Sylvia Allan and Richard Fowler were appointed as reviewers on 22nd November 2013. Their brief CVs are provided as Appendix 1.

The review has been led by Sylvia Allan while Richard Fowler has provided advice on legal aspects. This report represents an agreed outcome from the review.

1.3 What the Review Does

The review provides an overview of the process which has resulted in the PDP and discusses any associated legal risks for future processes. It comments on the current state of the PDP in terms of the aspects set out in the Council’s goal. It provides a brief analysis of the options identified in the Terms of Reference and from the review, and the implications of following each of the options.

¹ Extracts from updated Terms of Reference for Independent Review of the Kāpiti Coast District Plan, 13th October 2013, provided to the reviewers on 15th November 2013.

² See updated Terms of Reference, *ibid.*

³ Council meeting of 3rd October 2013.

In doing this, as reviewers we have drawn on our extensive experience in resource management practice and law, as well as our working knowledge of the context of local government within which the Council must operate.

We have also drawn on a wide range of written information described below, and held extensive discussions with people who represent a wide range of interests, including those who assisted in developing the Plan and those who will be the eventual users of the PDP if it proceeds.

1.4 What the Review Does Not Do

The review is of necessity a high-level overview. It is undertaken within time and budget constraints, and the scope of the Terms of Reference. In particular, it does not comment or draw conclusions on the content of specific submissions on the PDP, as this would potentially interfere with statutory processes.

To the extent that it reaches conclusions that are parallel to concerns expressed in submissions on the PDP or subsequently, those conclusions have been reached on the basis of evaluative consideration of the substantive aspects of the review.

The review does not represent an exhaustive analysis of the PDP. Where specific comments are made on the content and style of parts of the PDP, these are intended as examples only and do not represent conclusions on the detail of the PDP. The examples are intended to highlight issues and point to areas where specific attention may be needed in the future.

Finally, the findings of the review are intended to help inform the Council's own decision as to the appropriate course to take on the PDP. The review does not attempt to supplant the Council's own decision – rather it will contribute to it. As well as the Council's own responsibilities under the Resource Management Act (the RMA), there are significant resourcing issues – both the past resourcing to get the PDP to its current state, and in terms of the future processes – which lie entirely with the Council.

1.5 Method

The method adopted for the review has included the following:

- reading and considering the following documents included in the Terms of Reference:
 - the PDP (including the Appendices and Section 32 report)
 - Section 42A reports to date
 - letter from Jim Ebenhoh to ratepayers and residents regarding notification of the PDP
 - summaries of submissions

- Joan Allin’s draft submission and evidence, dated 25th September 2013
- notes from the prehearing meetings held to date (19th and 23rd November, and 17th December 2013)
- reading and considering additional material including:
 - a range of material relating to plan development including public information on the Council’s website and notes from Council workshops⁴
 - the operative Kāpiti Coast District Plan (the operative District Plan)
 - a range of submissions
 - the small number of written statements provided by a range of people who offered that type of input into the review
 - some of the background reports to the PDP referenced on the Council’s website
 - a range of other district plans, as the basis for comparison, and the Wellington Regional Policy Statement
 - other advice to Councils, particularly advice on “second generation” plans, on the Ministry for the Environment’s Quality Planning website⁵
- meetings and discussions with a wide range of people involved in the current debate over the future of the PDP⁶.

Once these steps had been undertaken, the review basically proceeded along the following lines:

1. Firstly, matters around process to date were considered, including the Council’s reasons for embarking on a full plan review, rather than a rolling review as adopted by other territorial local authorities within the Wellington Region, the extent of advice sought, the opportunities for input by affected people, and legal risks arising from these processes.
2. Then the contents of the PDP were reviewed and considered in the light of RMA requirements and typical planning practice.
3. A brief assessment was then made of the range and scope of submissions⁷, as this helps determine the ability to modify the PDP within the present statutory process.

⁴ Provided to Julie Browne under the Local Government Official Information Act.

⁵ This website is a partnership between the New Zealand Planning Institute, the Resource Management Law Association, Local Government New Zealand, the New Zealand Institute of Surveyors and the Ministry for the Environment. It is a key source of information for resource management practitioners – www.qualityplanning.org.nz. Information on second generation plans is found at www.qualityplanning.org.nz/index.php/plan-steps/structuring-plans/a-possible-second-generation-plan-structures.

⁶ Many of these people were recommended by Council officers. Others were at their own request and others at the request of the reviewers. A full list is given in Appendix 3.

⁷ Relying primarily on the summary of submissions, but having reviewed a range of submissions in full.

4. The two reviewers then met to decide if there were any additional options (beyond those in the Terms of Reference) and to scope and evaluate the options available to the Council, and to consider the implications of the preferred option.
5. Finally, this report was prepared.

The report was initially provided in draft form and an opportunity was made available for people to comment on the draft, particularly to identify factual errors and to raise any matters of technical detail. A new appendix, Appendix 4, has been added to the report to record this process and identify where main changes have been made in finalising the report.

1.6 Report Structure

Aligning with the Terms of Reference and our methodology, the report is structured as follows:

- | | |
|-----------|---|
| Section 1 | Provides background and scene setting for the review |
| Section 2 | Explains and comments generally on the processes of the PDP to date |
| Section 3 | Provides an introduction to the RMA's requirements for a district plan and sets out a framework for a high-level evaluation of the current PDP and its contents (undertaken in section 4) |
| Section 4 | Discusses the PDP and its contents in terms of the Council's "good practice" goals |
| Section 5 | Identifies and evaluates options to proceed, identifies a preferred option, outlines how it might be progressed, and comments on some contextual matters |
| Section 6 | Specifically addresses matters associated with Chapter 4 of the PDP and the findings of the separate coastal erosion hazard assessment review |
| Section 7 | Sets out the findings of the review in summary, and makes recommendations as to future processes. |

Appendices provide brief CVs of the reviewers, specific areas of legal advice and a list of people who have assisted during the review process.

1.7 Coastal Review

As noted in the Terms of Reference, when the current review was commissioned the Council had also commenced a review of the science relating to the coastal erosion hazards component of the PDP. That review was conducted quite independently of the current review, commencing beforehand and with the report due at a later date.

However, at the Council's request, completion of this review was delayed so that it could incorporate comment and advice relating to the coastal erosion hazard assessment review. Because of the issue of timing, we proceeded with this review, deferring detailed consideration of the coastal hazard provisions until after the release of that review on 21st March 2014. A separate section, section 6, has been included in this report relating to the findings of the coastal erosion hazard review.

1.8 Kāpiti Coast District Context

The RMA and the functions and requirements set out within it, are firmly rooted in the environment⁸ of the area for which a plan is developed.

Kāpiti Coast District is not a particularly large local authority, but it has some geographical characteristics and issues which set it apart from other districts within the Wellington Region and which arguably could contribute to some complexity in its district plan. These characteristics, in no particular order, include:

- a long largely “soft” coast with attendant pressures for coastal development, but with coastal hazard risks which may be modified or exacerbated by climate change;
- urban growth pressures, as an overflow from other more intensively-developed urban areas in the region;
- duneland areas near the coast which have a range of significant values and which have been under considerable development pressure;
- economic and social infrastructure (including an employment base) which is somewhat underdeveloped for the size and needs of the population;
- transport infrastructure which has lagged until recently;
- expectations of future growth opportunities and pressures arising from major investment in transport infrastructure, and
- a complex topography and hydrological geography, including escarpments, steep rivers, wetlands and the coast, requiring management of development to mitigate risk and manage hazards.

Other characteristics such as the cultural, rural and forest components of the district are also distinctive but have similarities with other parts of the region.

Some of the District's social characteristics are regionally atypical, but realistically this is not likely to have major implications in terms of RMA considerations.

⁸ Environment, under the RMA, is interpreted in a holistic way to include ecosystems (which include people and communities), natural and physical resources, amenity values, and social, economic, aesthetic and cultural conditions.

1.9 Community Vision

The “working manual” for the Council, described as a “touchstone” and a basis for informing the district plan review, is the document entitled “Choosing Futures, The Community’s Vision for the Kāpiti Coast District, Community Outcomes”⁹. This community vision was first developed in 2003/04, and the document was reviewed in 2008/09 and reaffirmed by the Council in 2012¹⁰. This document has been noted, as it demonstrates a clear community vision over at least a decade. It also indicates parallel consultative processes to the early stages of the district plan review. It demonstrates that the Council and community has in mind a wide range of methods in achieving Council and community aspirations, other than the district plan itself¹¹.

⁹ www.kapiticoast.govt.nz/Documents/Downloads/community-outcomes/KCDC-Community-Outcomes.pdf

¹⁰ The document explains that a legislative change in 2010 to the Local Government Act 2002 which reduces the requirements for consultation on community outcomes.

¹¹ A criticism of the PDP from this review (discussed later) is that it lacks reference to other “methods” and appears to seek to be “all things to all people”.

2 THE PROPOSED DISTRICT PLAN - PROCESSES

2.1 Introduction

In this section we summarise and comment on the main process steps that the Council undertook in preparing the PDP.

This is not an essential part of the Terms of Reference within which we are engaged, other than the item referred to as *“Jim Ebenhoh’s letter to ratepayers and residents dated 29th November 2012, regarding notification of the plan”*.

In our discussions with submitters we have been appraised of a wide range of issues and concerns associated with process which go beyond the matter of the letter referred to above. Before evaluating the future options in terms of process we considered it important to understand whether there are legal or similar risks associated with the processes to date which could lead to a “technical knockout” of all or part of the PDP through judicial review or ultimate Environment Court decision. Any high risks identified in this process may influence our advice on the future preferred option and procedure.

We provide a summary of our understanding of the processes and time frame, and then comment on associated issues and risks.

2.2 Kāpiti Coast District Council’s Approach

The RMA provides options in undertaking a plan review. A plan review must be commenced for all provisions at least every 10 years¹², whether or not alterations are considered to be needed. The options available under the RMA to meet the statutory requirements can be described as a full review, a rolling review or a re-notification.

In this case, it appears that, while the Council initially determined not to undertake a full review¹³ that is what transpired¹⁴. The various reasons why a full review was undertaken are incorporated in the Introductory Report to the Section 32 Analysis Summary Reports.

¹² Section 79, RMA. A plan is inevitably made up of provisions of different “ages”, depending on plan changes. The situation in relation to the timing of review processes can become very complex. Section 79 was amended significantly after the Council had commenced its review in 2008 and increased the options available to a council in undertaking a review.

¹³ Recommendation in Report SP-10-875.

¹⁴ According to the FAQs on the Council website. Some interested people were however advised in 2010 that it would not be a full review, but focussed on provisions that are 10 years old and on areas of particular focus (e.g. letter to M Smith, 26th April 2010). At a Council district plan review workshop on 11th September 2012 the options for “ring fencing” provisions that had been the subject of recent plan changes and omitting them from the review were discussed. It was concluded on legal advice that it would be too difficult to achieve a partial review. Unfortunately, interested parties appear not to have been advised of this change in approach.

This acknowledges legislative changes¹⁵, new and revised National Policy Statements, the current state of the operative District Plan given the range of plan changes¹⁶, changes in the district itself, and what can be best described as changing awareness (of values, risks and expectations) as well as changing planning practice.

2.3 Pre-Notification Process and Timeline

The plan review process proceeded on the basis of a relatively well-developed plan and timetable¹⁷.

The process was commenced in 2008 and encompassed the following:

- Release of a District Plan Review Scoping Discussion Document and Summary providing information on “focus areas”, some monitoring information and setting out processes and an expected timeline for the review process and seeking feedback (March 2010)¹⁸.
- Specific studies were undertaken to help inform the Council about various aspects primarily relating to the focus areas. These are listed on the Council’s website, and are dated between 2007 and 2012¹⁹. It is also understood that draft chapters of the PDP were subject to a range of expert reviews.
- There were a range of community-based meetings in 2010, and consultation and liaison with a range of people and organisations²⁰.
- Seven discussion documents were released for consultation (November 2010). These give general indications of the thinking of the Council about various aspects of the plan, and seek feedback. Over 100 submissions, many comprehensive, were received and summarised²¹.
- There were a large number of Council workshops (seemingly in excess of 50 on almost a weekly basis) between June 2011 and November 2012, most of which are

¹⁵ Including the requirement to “give effect” to provisions of a Regional Policy Statement, and National Policy Statements.

¹⁶ From the website, the operative District Plan has been subject to more than 80 Plan Changes, approximately a quarter of which have been Private Plan Changes. While some have been very minor, others have been significant changes.

¹⁷ Council report SP-08-290. The plan review was to be notified in the second half of 2011.

¹⁸ www.Kapiticoast.govt.nz/Documents/Downloads/District-Plan-Review/Reports/2010/District-Plan-Review-Scoping-Document.pdf

¹⁹ www.Kapiticoast.govt.nz/Planning/District-Plan-Review/District-Plan-Review-Reports

²⁰ There is documentation of this in various reports to the Council. For example see www.Kapiticoast.govt.nz/Documents/Downloads/District-Plan-Review/Reports/2012/Proposed-District-Plan-for-Notification-SP-12-7111.pdf, and this has been confirmed by many of those contacted in the course of this review.

²¹ www.Kapiticoast.govt.nz/Documents/Downloads/District-Plan-Review/Reports/2011/Discussion-Documents-Summary-of-submissions.pdf

understood to have been open to the public²². These included presentation and discussion of topic areas and were the basis for ongoing policy formulation and development of plan provisions.

- A draft of the District Plan was apparently placed on the website for a short period (but without any updated maps) in September and October 2012. This was apparently not accompanied by any publicity and there seems to have been no specific opportunity for people to comment.
- Just prior to the notification of the PDP (September to November 2012) a series of seven articles was run in the Kāpiti Observer. These generally foreshadow the contents of the PDP under various topic headings and provide contact details. Two “special edition” Council Information Sheets “Kāpiti Update, Planning Kāpiti’s Future” were also published in September and October 2012, setting out similar information, with more detail on formal RMA processes.

The initial intended timetable commenced with the scoping discussion document in March 2010 and plan development was expected to proceed through investigations and consultation over the remainder of 2010, with a draft District Plan provided for consultation in early 2011 and notification of the PDP in late 2012.

Timetable revisions resulted in the later release of discussion documents than planned, a longer period of investigations, consultation and plan drafting, and the virtual omission of the intended draft District Plan consultation stage altogether.

2.4 Notification

The PDP was publicly notified on 29th November 2012, with a closing date for submissions of 1st March 2013.

Notice was served on residents and ratepayers. A controversial aspect has been the accompanying letter signed by the Sustainable Development Manager which was intended to provide some context for the PDP²³. We comment on the notification and the accompanying letter below.

2.5 Submissions and Further Submissions

The PDP was open for submissions for a period greater than the minimum 40 days required, and the closing date was extended to 2nd April 2013 for submissions relating to the coastal provisions²⁴.

²² Few people took the opportunity to attend these, and these would not be considered to be consultative processes. Most were held during working hours and therefore inconvenient for many.

²³ This is the letter from Jim Ebenhoh, referred to in the Terms of Reference.

²⁴ Council resolution, SP-13-801, 21st January 2013.

Submissions on non-coastal matters were summarised and notified for further submissions, as required. Due to errors, there were several further notifications of corrections to the summaries. The summary of submissions on the coastal provisions was on a delayed time frame. All further submissions were concluded by 18th July.

We comment on the process and summaries of submissions below.

2.6 Preparation for Hearings

The Council prepared a programme for hearings, including dividing up the PDP contents for preparation of RMA Section 42A reports²⁵. These reports provide background and recommendations on specific submissions. Those prepared to date relate to:

- general submissions
- the living environment.

They have been prepared by in-house staff and consultants and include additional information. These have been made available to submitters, but as hearings have not proceeded, the advice in the reports has not been tested.

2.7 Issues Arising from Processes

The following issues have been revised in relation to the processes. These have been identified in discussions with various parties as well as from our own review. We list what we consider to be the issues, and then comment on each in more detail:

- Was the Council justified in undertaking a full review, or would a rolling review have been more appropriate?
- Was there sufficient opportunity for public input?
- Did the Council undertake sufficient investigations to provide an adequate basis for all the changes?
- Is the lack of a Draft Plan step a “fatal flaw”?
- Was the notification process fatally flawed?
- Are the difficulties with the further submission process significant?

Richard Fowler has provided brief legal opinion on some of these matters, included in Appendix 2.

²⁵ These are reports prepared on the instigation of a local authority as background to hearings, for consideration at a hearing.

2.7.1 Justification for a Full Review

We consider that a comprehensive review of the operative District Plan was justified for the reasons set out in section 2.2 above. The operative District Plan, although frequently modified, has a number of practical shortcomings. Rolling reviews tend to rely on existing plan structures, and sometimes themselves require revisiting provisions more than once.

2.7.2 Opportunity for Public Input

There is no statutory requirement for public consultation when preparing a plan or plan review²⁶. However, it is normal and good practice to do so.

We are aware of numerous criticisms of the processes undertaken by the Council, including significant criticism of the lack of consultation at various stages during research for the plan and plan drafting. We have been advised of Council undertakings to engage on specific aspects of plan preparation, some dating back to 2007²⁷, a number of which were not followed up later in the plan review process. In addition, we have been made aware of examples of people in the District's communities making offers to assist with plan preparation, and opportunities for discussion on specific aspects being sought²⁸ which have appeared to be ignored or overlooked by the Council. While the experience of some people with the pre-notification processes is reported to have been highly negative²⁹, others have been very appreciative of the opportunities that were available for input.

With the exception of the coastal hazards provisions, discussed in more detail in section 6 of this report, our general view is that the consultation has been adequate in relation to the process overall, and better than that undertaken by some local authorities. The apparent lack of responsive feedback to some people through consultative processes has resulted in high levels of frustration and has meant that such people have needed to continue on into the formal submission process when, for some, this may have been able to be avoided.

There appear to have also been reduced opportunities for input as the plan drafting process proceeded, felt keenly by some of those with specific interests³⁰. In particular, the removal of the expected opportunity for people to comment on a draft of the new plan is a valid criticism. We consider that consultation on a draft would have been highly beneficial and would have contributed to a significantly improved PDP.

²⁶ Clause 3, 1st Schedule, RMA.

²⁷ Including provisions relating to coastal hazards.

²⁸ Including from people with specific relevant expertise.

²⁹ And we agree that the criticisms are fully justified.

³⁰ Such as those concerned about the extent of the K017 ecological site and aspects such as vegetation management and earthworks.

2.7.3 Adequacy of Research

We are aware of some criticism of the reports and information on which the PDP was based. The greatest criticism relates to the coastal erosion hazard studies and reporting, but there is a wide variety of criticisms ranging from reliance on aerial photos to determine areas of ecological values, to inadequate briefing and consideration relating to defining the “coastal environment”, to inadequate evaluation of infill housing opportunities throughout residential areas.

In terms of adequacy of information, we consider that, in general, the Council has obtained sufficient information to underpin its plan development process. The quality of the information has been tested through peer reviews in some areas. In a normal process of plan development, further testing would also take place through the submission processes. It is not unusual for a council to seek further detailed information as a result of submissions. This can contribute to ongoing policy development as well as to modifications in the detail of provisions.

We make further comment in section 6 on the coastal erosion hazard assessment review and related studies.

2.7.4 Lack of a Draft Plan

Although an unfortunate omission in an anticipated process, we do not consider the lack of the step of releasing a Draft Plan for formal comment to be a fatal flaw.

It is regarded as good practice to prepare and release a Draft Plan (or part of a plan in a rolling review) for a brief period of comment prior to formal public notification of the proposed plan³¹. This can identify drafting problems, disconnects and minor errors. It can also foreshadow aspects where further work is needed. However, it does not resolve all issues and can be costly in terms of time, and council and community resources. If not done well, it can add a further layer of community frustration and concern.

Most people were unaware of the brief release of a Draft Plan without updated maps. There was clearly no benefit in this process but it is unlikely that it caused interested people to disengage from later processes³².

2.7.5 Notification Process

There have been claims that the letter which accompanied the formal notification advice for the PDP was misleading in that it indicated that the provisions in residential and rural areas are generally “business as usual”. The words were, however, qualified and the letter actively indicated aspects where the PDP makes “more extensive changes”.

³¹ Sometimes this is to a limited group of users, and sometimes public.

³² See comment, Appendix 2.

We consider that the letter as a whole was well-intentioned, and did alert the community to main areas of change. The scope of this advice would have encouraged a higher level of engagement than had the letter not been sent.

The specific phrase was clearly unfortunate, but we consider a challenge to the PDP notification process on that basis would be unlikely to succeed³³. The letter is unlikely to be a fatal flaw.

2.7.6 Further Submission Process

The further submission process is a key and complex step of summarising submissions and notifying them for others to support or oppose³⁴. It is a step where a high level of discipline is required³⁵. It is not unusual for corrections to be made to a summary of submissions at a submitter's request, causing the need for further notification, as an inadequate summary can potentially lead to legal challenge much later in the process. As noted earlier, there were several stages of notification of corrections to the original summary.

In this case, complexity was also added by the Council's earlier decision to extend the time for submissions to be made on coastal provisions. This resulted in a second significant stage of notification of submissions for further submissions. While this decision of the Council (to extend the initial submission timeframe) was appropriate, it led to some confusion in relation to scope of further submissions, including some late further submissions. These aspects have been addressed in the first of the Section 42A reports, which reports that a delegated authority decision was made to accept all further submissions. This remedies a number of potential issues.

We are not aware of any specific outstanding matters arising from the claims of inadequacy of the submission and further submission process, although the further submission process clearly led to a high level of frustration for both the concerned submitters and those wishing to make further submissions.

A more significant issue in the summary of submissions, which has resonated in terms of those making further submissions, and in the first two Section 42A reports, is the lack of a unique identifier for each of the submission points. The need for a unique identifier is a fundamental essential step which relates to the organisation and ease of further submissions, and also to Council processes on reporting, decision-making and appeals. It is difficult to understand why such a simple requirement was overlooked in this case.

³³ See comment, Appendix 2.

³⁴ The ability for people to make further submissions was significantly reduced by a RMA change in 2009.

³⁵ Summaries must be comprehensive enough to alert those who wish to support or oppose the original submitter's point. However, a person considering lodging a further submission would always be expected to check the full submission. Summaries also largely set up the steps relating to hearings and decisions.

This is a matter which is not fatal for a continuing process, but one which would need to be remedied if the process is to continue, as discussed later.

2.8 Conclusion

Of the numerous aspects of concern relating to the processes of plan preparation, notification, submissions and further submissions, we have not identified any which are of such significant impact that they would, of necessity, lead to a decision to withdraw the PDP.

There are some residual legal risks which could be exercised by a concerned party at any time, although with the passing of time, that risk has diminished to the point where we do not consider the residual risk to be high.

Consultative processes relating to the coastal erosion hazard provisions are an exception to this general conclusion, as set out in section 6 of this report.

3 RMA CONTEXT

3.1 Introduction

The RMA leaves considerable leeway to local authorities to develop their own plans to suit the needs of the environment and in their communities. Inherent within the sustainable management purpose in Section 5 of the RMA is a focus on “people and communities”. Local authorities, who have the responsibility for preparing, administering and reviewing plans, have reasonable freedom within the confines of the RMA and with interpretive guidance from case law, to develop a plan format and contents that they consider to be appropriate.

Sections 72 to 77D in Part 5 of the RMA provide a statement of the purpose of district plans and set out a range of process and content requirements, including responsibilities, limitations and opportunities relating to rule-making.

Part 10 of the RMA contains requirements relating to subdivision, which are a significant area of district council responsibilities, and which are primarily governed by provisions in the district plan.

There are a range of other responsibilities for district planning spread around the RMA, and all plan provisions are to be developed within the context of the RMA’s purposes and principles in Part 2.

It is also noted that the RMA, through Section 9, seemingly intends district planning to be permissive in that, generally, activities are allowed unless prevented by a rule³⁶.

3.2 What a District Plan Must Include

Section 75 of the RMA sets out the contents of a district plan. Until 2005, district plans had to incorporate a wide range of matters, including the significant resource management issues for the district, the objectives, policies and methods to achieve the objectives and policies, which could include rules, monitoring procedures, and anticipated environmental outcomes.

The basic requirements for district plan contents have been reduced to statements of:

- objectives for the district
- policies to implement the objectives
- rules (if any) to implement the policies.

³⁶ Many district plans, including the operative Kāpiti Coast District Plan and the PDP reverse this presumption. Note also that, under Section 11 of the RMA, subdivision is not managed on this permissive presumption.

Section 75 also lists “optional” contents, many of which were previously required components of a plan.

The approach to plan preparation which applied under the former versions of Section 75 through the requirement for district plans to state issues now no longer applies. With it, a level of discipline in plan preparation has been lost³⁷. However, Section 32³⁸ has also been modified over the years, and provides disciplines of its own for plan contents.

The Section 32 report requirement sits outside the plan itself, but a Section 32 report must accompany notification of a proposed plan. Section 32 effectively provides a step-wise working method to test:

- the appropriateness of objectives in achieving the RMA’s purposes
- the appropriateness of policies, rules and methods (in terms of efficiency and effectiveness) in achieving the objectives, in comparison with other approaches.

In undertaking a Section 32 evaluation, benefits, costs and risks must be taken into account.

The contents of a proposed plan can only be modified within the scope of a submission as part of the ongoing plan development process. An accompanying Section 32 analysis must be re-evaluated and updated prior to making any changes as a result of submissions³⁹.

3.3 Good Practice

The Terms of Reference for this review seek a “good practice” approach to the plan.

It is not a straight-forward matter to define “good practice” for second generation plans⁴⁰. There has been a wide diversity of approach adopted by local authorities. A general desire for simplicity has accompanied a necessary increase in complexity due to the need to meet a much greater range of requirements than applied to first generation plans. In short, in addition to providing for the approach that the community may have indicated through whatever consultation processes may have occurred, district plans have to give

³⁷ In that plan contents were required to be underpinned by the identification of an issue, and objectives, policies and methods were directed at addressing the stated issues.

³⁸ Section 32 of the RMA is entitled “Requirements for preparing and publishing evaluation reports” and is a complex section of the statute which applies to all new or modified provisions of policy statements and plans.

³⁹ Section 32 was amended in 2013, and now includes requirements to take into account economic growth and employment opportunities “that are anticipated to be provided or reduced”. However, due to transitional provisions, the new requirements will only apply to aspects of the PDP which are subject to formal variation processes. This is explained in Appendix 2 to this report.

⁴⁰ Second generation plans are those that replace the first plans prepared under the RMA. Kāpiti’s first generation plan became operative in 1999.

effect to four National Policy Statements (NPSs)⁴¹, and the specified provisions of a Regional Policy Statement.

Since the preparation of first generation plans almost two decades ago, case law has evolved to provide specific guidance relating to, for example, how RMA Section 6 matters of national importance need to be provided for in plans and a range of good practice approaches in terms of enabling people and communities to provide for community wellbeing and means of managing adverse environmental effects.

The analysis and reconciliation of these major directives in a local setting can be a major intellectual challenge⁴² which is not always resolvable by consultation or collaboration. As district plans essentially deal with land, they affect property rights. At the same time they address and seek to provide some protection for what may be considered to be “the commons”⁴³. With such potentially conflicting imperatives, they are unlikely ever to satisfy all interests within a district.

At the same time rules have the force of regulations and must be clear and unambiguous, objectives and policies are open to legal testing and analysis and therefore must be expressed in a way that helps decision-makers, and there is a community expectation that a district plan is a “peoples’ document” and therefore should be simple and comprehensible.

Further challenges have come from a growing societal emphasis on risk management, and from an explosion of information about measurement of the natural world and the “receiving environment” for any activity. The ease of mapping through geographic information systems (GIS) has enabled policy and rules to be disconnected from specific land parcels, leading to the wide development of policy and rules which relate to specific areas usually identified as “overlays”.

There are however some generalisations that can help inform “good practice” in second generation plans. These include:

- a set of clearly-stated, relevant and robust objectives
- adequate coverage in terms of NPS, RPS and Section 6 matters
- transparency in NPS, RPS and Section 6 matters (i.e. relevant provisions are easy to find)
- a structure that is relatively straight-forward and aligned with legislative requirements
- policies that are straight-forward and readable, backed up with the bare minimum of explanatory material

⁴¹ Including the New Zealand Coastal Policy Statement, 2010.

⁴² Described by one person we met with as a “wicked problem” – a complex situation which is not readily resolvable.

⁴³ Aspects such as the modern concept of amenity values, ecological services and the components of the generic “reasonably foreseeable needs of future generations”.

- rules that are clear, certain, and readily capable of interpretation
- maps that are legible and clear, notwithstanding the increased amount of information on which a plan is based
- a clear flow of logic from objective to policy to rule
- no superfluous or inappropriate rules or other provisions
- identification of practical methods other than rules
- well-expressed definitions and useful cross-referencing
- a detailed framework for monitoring the effectiveness of provisions.

Components which are now regarded as inappropriate practice are:

- extensive contextual material about the RMA
- lengthy and turgid explanations of policy provisions
- overly complex rules, rules which are not clearly-related to a policy, rules which cannot stand up to a Section 32 evaluation⁴⁴, and rules which are likely to lead to unintended consequences.

The above listing has been developed from a review of the MfE's Quality Planning website, articles published in Planning Quarterly and by the Resource Management Law Association, and from the reviewers' own experiences with a wide range of first and second generation plans. It is notable that there is no single recommended style or structure for a plan amongst all the documentation reviewed.

Finally, in considering what comprises 'good practice' the inherent limitations of a district plan, in providing a framework within which environmental management takes place and social, economic and cultural activities occur, need to be recognised. Those preparing district plans cannot and should not expect the plan to be a blueprint for an ideal or utopian outcome – rather the plan is part of an ongoing process that enables beneficial changes and limits adverse effects.

3.4 Accessibility and Comprehensibility

Two other matters raised in the Terms of Reference are "*comprehensibility for users*" and "*easily accessible*" and require comment.

Given the numerous requirements of the RMA, and the need for the plan to stand up to legal challenge, it should not be expected that the plan should be an easy read. However, it should be able to be navigated with relative ease.

⁴⁴ Particularly in relation to other methods available to a council or community.

There are primarily three groups of users:

- Those who may wish to understand the general direction that the plan may be trying to take the district. For such people, the objectives and associated explanations are important, followed by the maps and accompanying keys (or legends). The anticipated environmental results may also be of interest.
- The second, much larger group, are those who wish to check the rules that apply to a site or area. For these people, the maps and accompanying keys and the rules are the most important. Some people rarely have to deal with rules, while others acquire a good working knowledge in using their land or advising others about development potential.
- The third group is usually professionals, who are involved in applying all parts of the plan.

In our opinion, comprehensibility and accessibility for users of a plan is achieved through clearly stated objectives, comprehensive mapping, clear chapter headings, well-expressed provisions, and an appropriate level of internal guidance (such as a clear explanation of any hierarchical elements, and adequate cross-referencing).

3.5 Conclusion

While there is no one approach to developing a plan and the ensuing contents, in a good practice plan at a high level we would look for:

- a clear statement of objectives
- RMA required coverage
- Section 6 RMA, NPS and RPS coverage
- logical organisation
- clear mapping
- well-expressed policy and rules.

We also acknowledge that good practice includes relevance to the environmental circumstances of the district. Relevant matters should be identifiable through the objectives⁴⁵.

This list can be used to assess the current state of the PDP, as we do in the next section.

⁴⁵ In the past, initially through the issues leading to the objectives.

4 FINDINGS ABOUT THE PDP

4.1 Approach

In the course of this review, we have spoken with the people listed in Appendix 3. The people spoken with have been well-informed⁴⁶, well prepared to discuss the issues relating to the review, and a number also provided written material. Most of those we spoke with have made submissions on the PDP. A few have not.

We approached the meetings on the basis of a free and frank discussion as a means of obtaining information, rather than through structured or semi-structured interview techniques⁴⁷. We encountered a wide range of opinions about the fundamental issue we have been asked to advise on – whether the current PDP should proceed or not. The input has been much appreciated and has assisted immeasurably with the review.

This section gives a flavour of the comments made, as well as providing our own high-level analysis of the PDP.

4.2 Process

The process steps undertaken in preparing the PDP have been outlined in section 2 of this report. Many of the comments and criticisms from people referred to shortcomings in process and we agree with most of the comments made.

The process began on the basis of a timetable that can only be described as unrealistic and punishing. That the task became larger than expected and the apparent speeding up of the process to meet the Council timetables towards the end has resulted in:

- loss of the opportunity to benefit from significant knowledge and skills in the community⁴⁸, particularly at the key stages of policy and rule drafting
- inadequate time for a check and edit of the PDP prior to its notification, let alone a comprehensive peer review
- widespread criticism and loss of Council credibility in the plan preparation process.

⁴⁶ Most people identified specific aspects or areas of interest, but some ranged across the whole plan. A small number of people appeared to have expectations of the PDP beyond the normal range of district planning matters, encroaching into matters more usually the subject of bylaws or codes of practice.

⁴⁷ Most meetings were 1 to 1.5 hours long. Some were with individuals and others with groups with common interest areas.

⁴⁸ Through the establishment of working groups, and reviews of drafts. It is acknowledged that some people were kept very well informed, and were able to contribute appropriately. In particular, the Tāngata Whenua District Plan Review Working Party (mandated by Te Whakaminenga o Kāpiti) was well-involved and appreciative of the process.

However, as the process has reached the stage that it has, we cannot take process issues any further. The process has not qualified as good practice, but we do not think it is fatal to the PDP in its current state.

4.3 Plan Content

The PDP attracted 777 submissions from organisations and individuals, and approximately 230 people and organisations made further submissions. Of the submissions, 347 related to coastal matters only – meaning that there are 430 submitters on the wider range of matters in the PDP, including some which also incorporated coastal matters.

Many of the submissions are very comprehensive. Several of the submitters spoken to expressed concern that given practical time and/or cost limitations, the many errors in the drafting and the complex and unfamiliar format meant that they may have missed some aspects which they would want to have submitted on.

We do not think that the number of submissions received is excessive, given that the PDP is a district-wide and completely new document and given the knowledgeable and engaged community. The large number of submissions on coastal provisions is unusual, endorsing the need for the Council’s recent review.

Submitters should, however, have not had to pick up the very large number of minor errors identified while also dealing with the significant issues to them in terms of plan structure and content.

We share many, but not all, of the criticisms that have been leveled at the PDP as a whole. We now provide comment under the “good practice” area headings in section 3.5 of this report.

4.3.1 The PDP’s Objectives

The PDP has 20 objectives. These are found in one place, Chapter 2 of the PDP, and are described as setting out “the direction the Council intends to take in relation to Resource Management issues on the Kāpiti Coast”. They can be seen as a progression of the “Choosing Futures” document (mentioned in section 1.8 of this report) into an RMA context generally in line with expectations for a good practice plan for a district. They are somewhat variable in the level of detail encompassed with some embedding considerable detail at this highest level of the PDP⁴⁹, while most provide more of a high-level

⁴⁹ This comment applies particularly to the approach to centres management. We consider that this is appropriate, given the various pressures on the district and current accepted planning approaches to centres-based planning.

framework. Some objectives require editing and improved expression and some fall slightly short of what could be expected⁵⁰.

Amongst the objectives are some that may be laudable, but it is not clear how, or to what extent, the district plan can or will deliver them. Such objectives include Objective 2.8, Strong Communities; Objective 2.12, Housing Choice and Affordability; and Objective 2.18 Open Spaces/Active Communities⁵¹. We also note Objective 2.15, Incentives. We do not have an issue with that objective per se, but with the attempt to codify it later in the PDP.

Each objective is accompanied by lengthy explanatory material. This requires comprehensive editing. Much of it is material which is self-evident and should be summarised. In other places concepts which may be unfamiliar to most people are left to the very end of the explanation – e.g. “finite carrying capacity” is mentioned in Objective 2.3 and only a partial explanation is given in the final paragraph of the explanation, five pages on.

However, we consider that a person reading Chapter 2 of the PDP would gain a general understanding of the intentions for the future of the district and how land use, development and protection are expected to occur.

4.3.2 RMA Required Coverage

As noted earlier, a district plan now needs only to contain objectives, policies and rules. These are included in the PDP, so the basic requirement is met.

There is also no doubt that the PDP was developed with the clear intention of assisting Kāpiti Coast District Council carry out its RMA Section 31 functions, including (paraphrased):

- the integrated management of the effects of the use, development or protection of land and associated natural and physical resources
- the control of the actual and potential effects of the use of land, including:
 - avoidance or mitigation of natural hazards
 - prevention or mitigation of adverse effects associated with hazardous substances
 - prevention or mitigation of adverse effects of the use, subdivision or development of contaminated land
 - the maintenance of indigenous biological diversity

⁵⁰ For example, while Objective 2.11 is entitled “Character and Amenity”, neither this nor any other objective generally embeds the RMA concept of “the protection and enhancement of amenity values” particularly in the district’s residential areas. There is wide use of the term “character”, and it is explained as being a composite of the amenity values of an area. It is not clear that this would stand up well if amenity-related rules were legally challenged.

⁵¹ These objectives are appropriate for the district, but the explanations should be qualified to acknowledge the limited ability of a district plan to achieve them. Other methods should be acknowledged.

- control of noise and mitigation of noise effects
- control of effects of activities on the surface of rivers or lakes.

The PDP’s coverage is adequate or more under these headings. The acceptability and appropriateness of the means by which these functions are proposed to be achieved through the PDP in its current form is clearly the subject of much community debate. Arguably the submission, hearing, decision and appeals processes are the means of having the debate.

4.3.3 Section 6 RMA, NPS and RPS Coverage

Section 6

Amongst the range of matters to be addressed in a district plan, matters of national importance must be “recognised and provided for”. Summarised, these are:

- the preservation of natural character of the coastal environment, wetlands, lakes and rivers and their margins and their protection from inappropriate subdivision, use and development
- protection of outstanding natural features and landscapes from inappropriate subdivision, use and development
- protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna
- the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers
- the relationship of Māori and their culture and traditions with ancestral lands, water, sites, waahi tapu and other taonga
- protection of historic heritage from inappropriate subdivision, use and development
- protection of recognised customary rights.

All matters of national importance are addressed within the objectives, policies and rules in the PDP.

As acknowledged under our comments on the PDP’s objectives, there can be debates about how the matters of national importance have been addressed. There are many claims that the PDP goes too far under some of these headings. There is however, considerable flexibility available in preparing a plan. It can be said that Section 6 sets out a basic high-level requirement, and that a community is free to exceed basic levels of protection, but it cannot ignore the stated Section 6 matters. The appropriateness of the provisions needs to be tested through the submission, hearings and appeals processes.

National Policy Statements

The PDP makes some provision for all of the extant NPSs:

- the New Zealand Coastal Policy Statement
- the NPS on Electricity Transmission
- the NPS for Renewable Electricity Generation
- the NPS on Freshwater Management.

These provisions are variously supported and opposed by submitters, but it is noted that the Department of Conservation and Transpower (closely associated with two of the four NPSs) have supported some relevant policy provisions as well as seeking minor changes and additional policy. We consider this to be an acceptable situation at this stage of the plan development process.

Regional Policy Statement

The Wellington Regional Policy Statement (RPS) became operative in 2013. It was in development throughout the period that the PDP was being prepared.

The RPS is not an easy document in itself, and it is noted that some of its concepts and wording were changed after the PDP was notified. An indication of whether or not the PDP gives effect to the RPS can be gained from the Greater Wellington Regional Council's own submission on the PDP. The submission identifies many areas where the PDP is considered to be consistent with the RPS, and other areas where it is acknowledged that the PDP gives effect to the RPS. There are relatively few aspects, and those are particularly in the parts of the submission relating to coastal provisions, where significant changes are sought by the organization with primary responsibility for the RPS.

Short of undertaking a very detailed analysis of provisions, and acknowledging that the resolution of submissions would lead to further changes, we conclude that the PDP represents acceptable practice in terms of giving effect to the RPS.

4.3.4 Plan Organisation

General Commentary

The organisation of the PDP has drawn considerable adverse comment – in particular that people must refer to numerous sections to find the policies and rules that may be relevant to a particular area.

There are many accepted ways of organising the material in district plans, including in second generation plans. In the past, the most common approach was a simple two-way segregation of material, expressed simplistically as follows:

- groups of objectives, policies and rules relating to land use zoning
- groups of objectives, policies and rules “district-wide” provisions (encompassing aspects such as noise, transport provisions, and subdivision).

The status of other provisions such as hazard provisions, historic heritage provisions and landscape provisions were allocated within either the zones or the district-wide provisions where they were considered to fit best⁵².

This simplistic model was not always able to be comprehensive enough, so there were often additional district-wide policy sections which explained the basis for the overall zoning approach, or the basis for protective provisions.

Such plan arrangements were not simple. Users however became familiar with them. For any activity it was necessary to look in various parts of a plan to ensure that an activity achieved all standards. Where consents were found to be needed, a range of policy provisions in different parts of the plan had to be addressed.

The approach which has gained currency in recent years is to aim for transparency in relation to RMA requirements. It is not uncommon for each RMA Section 6 matter to have a separate section or chapter in a plan with objectives, policies and associated rules. At the same time zones are frequently grouped so that, for example, business or residential zone provisions are found together with the differences in policy and rules between specific zones highlighted. Provisions which in the past may have been “district-wide” are often now expressed as standards or conditions for permitted or other status activities.

The risk of this approach is that rules in one part of the plan (e.g. associated with a zone) may be overridden by more restrictive rules relating to areas of particular value (overlay areas). Where an area has several identified values, several rules may sit alongside each other⁵³. The usual approach in such cases is that the plan instructs that the most restrictive rule applies. Where a consent is needed, all relevant policy applies.

This does mean that a user has to refer to many parts of a plan. For users, any plan needs to contain a level of guidance as to how a user can navigate their way through its provisions.

⁵² Sometimes as separate provisions within zones, sometimes as standards or conditions for permitted activities, or as freestanding rules amongst the district-wide provisions.

⁵³ This is an issue which is currently being grappled with within the proposed Auckland Unitary Plan.

A final point to be made is that improved information about the natural environment in particular, along with general planning practice (often supported on the basis of case law), and the application of GIS systems, has led to the use of many more “overlays”⁵⁴ than in the past. To accommodate these, plans seem more complex than in the past. However, they arguably also respond better to the RMA than in the past.

Order of the PDP

The PDP has moved significantly away from the format of the operative District Plan. That in itself is not necessarily negative. However, the skill with which the PDP has been compiled is not always evident as the policy and rules are often poorly-expressed⁵⁵. There appear to be numerous provisions that are unjustified and probably unsupportable when closely examined, and many that may be counter-productive or have unintended consequences⁵⁶.

Volume 1 comprises the main text of the PDP, with Volume 2 comprising appendices and Volume 3 being the plan maps.

The ordering of the PDP content in Volume 1 is odd, with Chapters 3 and 4 covering the natural environment and the coastal environment containing district-wide overlay-based provisions⁵⁷; Chapters 5 to 8 covering the living, working, rural and open-space environments being zone-based; Chapter 9 relating to natural hazards containing district-wide overlay-based provisions⁵⁸; Chapter 10 relating to historic heritage and being effectively district-wide⁵⁹; Chapter 11 relating to infrastructure (including transport and designations) which are also effectively district-wide provisions⁶⁰, and finally a small number of general district-wide provisions which are found in Chapter 12.

We consider that criticisms of the ordering of material are largely justifiable, and, if the PDP is to proceed, its broad schema does need to be looked at so that an eventual operative District Plan has a more logical flow.

⁵⁴ Invariably these are restrictive or protective and respond to RMA requirements or community aspirations.

⁵⁵ As identified by numerous submitters.

⁵⁶ Several people spoken to provided examples of unintended consequences of rules in the PDP. Amongst examples were people who are unable to continue pest control activities in areas of ecological value, as a consent is required to maintain tracks to traps. Other otherwise conservation-minded people advised they would now plant only exotic vegetation, as the vegetation rules apply to planted as well as naturally-occurring vegetation through a combination of the definition of “locally indigenous vegetation” and the rules in Chapter 3.

⁵⁷ Both Chapters 3 and 4 purport to protect natural coastal character.

⁵⁸ But not all, as some are in the coastal chapter.

⁵⁹ Including provisions relating to notable trees, which may more logically be in the natural environment chapter.

⁶⁰ But some infrastructure is limited by hazards or natural environment provisions and is therefore found in Chapters 3, 4 or 9.

We also consider that some of the grouping of material within chapters requires reconsideration⁶¹. We also have concerns about any need for a separate coastal chapter, where provisions appear to fall almost entirely and logically into the natural hazard or ecology, biodiversity and landscape areas⁶².

Internal Guidance

Chapter 1 of the PDP does contain information that alerts a reader to its potential complexity in Figure 1.1.

It is of concern that pages 1-1, in describing the contents of Chapters 3 through 12 indicate that, for example, provisions in the Rural Environment Chapter should not necessarily be assumed to be irrelevant for a proposed activity in the Living Environment. This is contrary to Figure 1.1 and should not occur.

The material elsewhere in the first part of Chapter 1 is helpful, as is the guidance on when consents are needed on pages 1-5 to 1-7. It would be useful for this section to include the provision found elsewhere in the PDP, that the most stringent applicable rule or standard applies.

Chapter 1 also includes the definitions which provide the basis for understanding of the rules and parts of the policy and explanatory material⁶³. While there are many problems with individual definitions, it is useful to have them at the front of the document. The actual definitions are fundamental to the workability of any plan. While in this case many require further work and clarification, they are not so inadequate as to be fatal to the future of the PDP.

There is use of schedules to chapters, which include lists of items referred to in rules and diagrams associated with rules. These are not noted in the contents pages, but should be for ease of navigation. The inclusion of this schedule material in Volume 1 is supported. In comparison, Volume 2 includes Appendices which are largely design guides or structure plans, cross-referenced from the chapters, as relevant, from Volume 1. This is also considered appropriate.

Overall, the internal guidance to people using the PDP is at an acceptable level, given the stage of the process. As with much of the PDP, it would benefit from a careful edit and could expect to be considerably improved if the process continues.

⁶¹ For example, “stray” policies that cross between “environments”, which need to be relocated (e.g., policy 5.6) or repeated where they apply in more than one environment (e.g. policy 5.8). Similar problems also occur in rules – e.g. why greywater requirements for residential buildings are included under network utilities in Chapter 11, rather than in the Chapter 5, Living Environment, provisions is far from clear.

⁶² And therefore could be split between Chapters 3 and 9, although we acknowledge that several second generation district plans do have separate coastal chapters

⁶³ Not a “dictionary” as explained on page 1-1.

4.3.5 Mapping

Depending on the matter of interest, plan maps are often the first thing a district plan user turns to. By inspecting plan maps a user should be able to ascertain the zoning of a parcel of land and any particular values or attributes that apply to the land.

The maps for the PDP are provided in Volume 3 on the basis of a conventional system of rural and urban maps provided at different scales. Unusually, the information is provided on four series each containing numerous layers, rather than the more conventional two⁶⁴, as follows:

- Series A – Plan Zones (showing zones and precincts)
- Series B – Plan Features (showing designations, heritage areas and sites, areas subject to noise-related provisions⁶⁵ and miscellaneous provisions)
- Series C – Natural Hazards (showing flood-related areas, fault-related areas, coastal hazard management areas, and areas of differing erosion susceptibility)
- Series D – Natural Features (showing a range of specific features, but also eco-domains).

Unfortunately, the maps have been presented with Series A and B and Series C and D in different parts of Volume 3 rather than consecutively. This does not aid comprehension.

There are additional maps in Volume 3 showing the Transport Network Hierarchy, the Freight Network Hierarchy and the areas associated with the Kāpiti Coast Airport Aerodrome Designation.

The maps provide a great deal of information. While we have been advised of errors in particular situations, the maps transparently provide information which in many other jurisdictions is not so available⁶⁶.

We would regard this mapping as generally good practice, subject to the following comments:

- The nature of some information (i.e. the information which cuts across cadastral boundaries) and the lack of ability to view the plan map layers on an electronic system, including an aerial photo base (as is the case for the operative District Plan), means that people have in many cases, struggled to understand how the identification of some plan aspects applies to their land⁶⁷. This is compounded by the many layers spread over the four maps in two different parts of Volume 3.

⁶⁴ As in the operative District Plan.

⁶⁵ Incorrectly headed "Airport".

⁶⁶ In particular, the mapped information on hazard exposure is very detailed (although its accuracy may be questioned and will no doubt be updated over time).

⁶⁷ It has been possible for people to view the layers on an aerial base at the Council offices, but while very helpful to some, this is not as efficient as it could be for either the Council or the users.

- Some of the information shown on the map base need not be shown that way. In particular, information that does not change the status of an activity through a plan rule need not be shown on the plan maps. For example, it is likely that layers such as the EcoDomains, the Coastal Environment, Priority Areas for Restoration, Landscape Character Areas and the Archaeological Alert Layer do not need to be shown at the scale of the plan maps and (if retained) would be better shown as small-scale maps alongside the policy that applies, or as advisory information in an Appendix in Volume 2 of the PDP.
- Amongst the miscellaneous provisions shown on map Series B is “Sensitive Natural Features”. There are problems with the definition and rules that apply to this composite category of feature (see Chapters 1 and 3 of the PDP) which need to be sorted out. Regardless of those issues, the inclusion of this layer on the plan maps appears to be a double-up of other information (specifically, notable trees are within this category as defined and are also shown on Series B and five of the seven other categories of “sensitive natural feature” are mapped in detail on map Series D. The remaining two defined types of “sensitive natural feature” are of such a nature that they cannot be mapped).
- We have already noted that some features may be “over-done” in the PDP, such as the high number of identified dominant ridgelines and the mapped extent of the coastal environment.
- It seems that some information may have been lost on the maps due to overlapping non-transparent layers of tone or colour through the GIS application. An example is the loss of many of the areas of high natural character in the coastal environment from Schedule 4.1 on plan map Series D (such as Kāpiti Island and several of the inland areas). These areas would not be considered as part of the PDP due to this mapping problem. It is not clear how widespread this type of problem may be.
- We are aware that some mapped material has not always been “ground truthed”⁶⁸. We regard this as highly desirable particularly for areas of ecological and heritage values. This will be an important aspect to be addressed in responding to submissions.

Should the PDP process continue, best practice plan mapping can now be expected to include electronically viewable access to all map layers over an up-to-date aerial photography base. This should be able to be achieved at least by the time of release of decisions on submissions.

⁶⁸ This is understood to be for a number of reasons, including access to properties and available time.

4.3.6 Policy and Rules

General

The general organisation of material within the PDP has been the subject of earlier comment. The key zone-related policies and rules are found within Chapter 5, Living Environment; Chapter 6, Working Environment; Chapter 7, Rural Environment, and Chapter 8, Open Space. We have no problem in general terms with the concept of organising the plan into broad-scale “environments” as provided in the PDP.

Each of these chapters has a scene-setting Introduction, a series of policies with explanatory material, a summary table of rules (which is specifically described as a guide and outside the plan⁶⁹), and the rules themselves. The rules are tabulated under their status (from permitted through to prohibited) with associated standards and policy references. The policy references include references to policies in other chapters. This general pattern is also found in the other chapters which deal with aspects such as coastal provisions, natural hazards and so on. Most of these chapters are broken into sub-sections, with either separate policy and composite rules, or separate policy followed by rules⁷⁰.

Policies

The policies are written in a way that is intended to provide justification and backing for the rules, and also to provide clear guidance to decision-makers when a consent is required. This replaces any need for the separate decision criteria which are common in many plans, and is a good aspect of the PDP.

Amongst the zone-related policies we have noted:

- some which in practice exceed the ability of a district plan to deliver – although the wording of these is often measured (using terminology such as “enabling”)
- some which are clearly misplaced – such as a policy for residential activities in the working environment which is found within the Living Environment chapter (Policy 5.6)
- some which may be contradictory in practice – such as the policy in residential areas to maximize sunlight access to dwellings (Policy 5.19) alongside the policy applying the CPTED Guidelines which seek to have living areas overlooking the street (Policy 5.14)
- poor organisation of policies – for example, it is unclear why there are a number of general residential amenity-related policies under the heading of Zone-specific

⁶⁹ Some of which helpfully cross-reference rules in other chapters, which in itself suggests a problem with comprehension in the grouping of some material in the PDP. There are some errors in this listing which needs a careful check, as people may come to rely on it.

⁷⁰ E.g. Chapter 9, the Hazards Chapter, has five separate sets of policy and rules.

provisions rather than under district-wide provisions in the Living Environment chapter. This may be explicable, but at present it is not

- some which are effectively based on methods other than rules, but which are problematic as the methods are not expressed in the PDP.

We are aware of considerable criticism of the number of policies and the extensive associated explanatory material. While MfE guidance on second generation plans seeks to reduce extensive wordiness and “padding” in explanations, explanatory material can also be helpful in policy interpretation. As a general comment, if the PDP proceeds, every opportunity should be taken to divest unnecessary explanatory material and streamline and clarify necessary explanations.

We do not think that the number of policies is a problem. Helpfully the rules cross-reference to specific policies. In practice this will limit the level of policy analysis needed for any application⁷¹. It should also be recognised that the policies in the PDP encompass what would be additional criteria for decisions in other plans.

It is probable that some policies are superfluous, and others require significant rewording. However, in general, and subject to a careful “reality check”, we consider they are an acceptable basis for managing the district’s future land use effects⁷².

Rules

The rules in each chapter are presented in consistent tabular form. The horizontal axis of the rules is clear and logical. It is ordered by activity status, with cells containing relevant standards and policy references. Where the status of the activity is controlled or restricted discretionary, the matters of control or discretion are clearly set out.

The vertical axis sets out activities from permitted through the accepted hierarchy of activity status to prohibited activities.

There are numerous detailed issues and problems in the rules which range from the descriptions of the activities to the wording of the accompanying standards, and the references to defined terms. These are the source of many submissions and further submissions and have not been subject to detailed analysis as part of this report. We are of the opinion that introducing more consistency in expression, removal and/or replacement of inappropriate, unjustified and unnecessary rules, and work on the definitions would contribute to a more workable plan. This could largely be achieved through the submission process if the plan proceeds. There is nothing inherently

⁷¹ Although some rules have as many as 20 referred policies, most have considerably fewer, and some policies referred to are effectively “nested” including more general as well as specific policies.

⁷² We have greater reservations about some of the special-purpose policy provisions, but our reservations can best be categorised as a generic concern that the PDP’s rules go too far and there is an absence of recognition of other methods to achieve policies.

problematic with the way the rules are presented in the PDP. The format is, if anything, better than that in the current operative District Plan.

4.4 What is Good about the PDP?

While the PDP has been subject to considerable criticism, it is important to note that we, and many of those spoken to, have identified positive aspects. These include:

- general tone of objectives
- serious, if over-enthusiastic, attention to key RMA and RPS “protection” aspects
- serious, if not always appropriate, attention to risk
- good cross-referencing of rules to policy⁷³, despite rules not always being justifiable in terms of the policy
- policy which is expressed in a way that is of direct assistance to decision-makers
- progress in terms of provision for the district’s economic development
- provision for residential growth and intensification, subject to management
- precinct-based planning, directed at maintaining or promoting areas of specific amenity or character, supported by design guidance
- accepted alignment with tāngata whenua concerns and interests.

It must be stressed that most of the matters identified above are subject to submissions and are by no means settled.

4.5 Aspects of Particular Difficulty

As well as a review of the order and structure of the chapters in the PDP, the following aspects have been brought to our attention as matters of difficulty. We endorse these matters as requiring specific consideration:

- Extent of and method by which some ecological overlays were determined (in particular K017 has caused major concern).
- Excessive and unclear controls for vegetation management⁷⁴ (including controls over maintenance and the ability to modify and/or remove species).
- Excessive and unclear controls over earthworks in the rural zones.
- Identification of a coastal environment area that, in practical terms, is too extensive⁷⁵.

⁷³ This is important when consents are being sought as it reduces the need for exhaustive policy analysis. It is acknowledged that, at present, there are some errors in individual policy references.

⁷⁴ While we acknowledge that some provisions were added to the operative District Plan as recently as 2011, the PDP appears to take them a step further. Aspects which contribute to incomprehensibility are rules which apply to all “locally indigenous vegetation”, which is defined as “vegetation which is located within the ecological domain within which it naturally occurs”. The rule on the surface applies to all types of vegetation as it is not limited to a list of species and would not be understood by most people, including those who must administer it.

- Unusual and potentially unjustifiable development control provisions in residential zones (e.g. controls over fencing, development limitations based on plot ratios in one zone).
- Attempted codification of environmental (or ecological) compensation⁷⁶.
- Out-of-date hazardous substances provisions.
- Overzealous identification of values – e.g. far too many identified ridgelines, application of ecodomain concepts (with inadequate descriptions) as the basis for rules.
- Absence of reference to methods other than rules, so that PDP rules are seen to bear the full burden of the ability to achieve objectives and policies.
- Concern at the implication of the archaeological alert area layer⁷⁷.
- Lack of a statement of anticipated environmental outcomes or any detail on monitoring methods.

Most or all of these matters are the subject of submissions.

As the PDP currently stands, we have concerns about the ability to administer, monitor and enforce it. This is because:

- some rules are incomprehensible
- there is a high level of intervention through rules (including controlled activities, and some standards that, if not achieved, would result in the need for discretionary consents where it is difficult to see what value the effort and cost of a consent process would add)
- the current complexity of some provisions appears likely to tie up very large amounts of staff time and involve considerable costs in legal and (probably) other expert advice.

At the same time, the PDP does not generally acknowledge the significant gains towards achieving objectives and alignment with policy that is undertaken by the community through stewardship and kaitiakitanga, and which is achieved through other methods

⁷⁵ With consequences in terms of application of policy through the NZCPS – for example into the district's commercial centres.

⁷⁶ This concept includes ecological and other offsets and compensation where the ability of an activity to avoid, remedy or mitigate adverse effects is considered insufficient. Case law and good practice is far from settled on the acceptability of such mechanisms in various circumstances. The PDP includes priority areas for restoration which attempt to provide a code for such concepts and which may better be removed from the plan, relying on policy and an informal indication of suitable areas for ecological enhancement.

⁷⁷ If interpreted as we understand tāngata whenua intended, this would trigger inclusion of a consent condition for an archaeological (or accidental) discovery protocol (see Policy 10.11) where appropriate. However, page 1-1 of the PDP suggests the more comprehensive and costly Historic Places Act formal authority process should be applied.

available to the Council such as education, advice, land purchase, etc, outside the regulatory regime⁷⁸.

The PDP is, however, a “work in progress” due to the statutory processes, and major modifications can still be made to address the problems.

4.6 Conclusion

It is unfortunate that the PDP was released for notification without the comprehensive check and review which would have been associated with release of a draft for comment. Even without a public draft, it appears the internal processes were too rushed to allow for a technical edit or any comprehensive review by those who will eventually administer the plan. This has placed an additional burden on those who made submissions. If the PDP process is to proceed, it will have consequences in the management of the ongoing processes.

Our review of the PDP shows that there are many and wide-ranging problems and issues in the detail of the PDP text and some in the maps. However, we consider that there is little that is fundamentally flawed in the general approach. While there are numerous issues, the PDP also has some strengths. The PDP contains too many drafting problems at present to be able to be described as good practice, but it is not unacceptable practice.

Our conclusion as to the state of the PDP at present is aligned with the views of many of those that we spoke to in the review. While there was a range of views, some saw considerable strengths in the approach, and in some parts of the PDP. There was widespread recognition of problems in the areas we have identified in section 4.5 above. While some people considered that the flaws in the PDP were unresolvable and that it should be withdrawn, others considered that the decision processes on submissions, if carefully carried out, would result in an effective plan for the district.

⁷⁸ People spoken to in the course of this review frequently spoke of the excellent work undertaken by the Council and Council officers outside the regulatory framework of the plan, particularly in the areas of ecological advice and support.

5 WHERE TO FROM HERE?

5.1 Introduction

The Terms of Reference requested us to advise on:

“ whether the plan should continue to be progressed through the hearing process, significantly changed, be withdrawn or some other process followed”

in order to achieve the Council’s goal. The Council’s goal is three-fold:

“ to have a District Plan that represents good practice, is comprehensive for users, and is easily accessible”

This goal is to be achieved:

“ fairly in the most cost effective way.”

The normal process of plan development from the current stage of the PDP⁷⁹ would be to organise hearings. The Council had reached that stage, but chose to put it on hold while the coastal erosion hazard assessment review and this review were carried out. The Council’s intention has been to divide the submissions into blocks for preparation of Section 42A reports and hearings, to carry out the hearing process progressively and to release decisions progressively. This would lead to progressive appeals.

For reasons outlined later, we agree with the critics of this process. We consider that, if undertaken as the Council proposed, the processes already in train would be unlikely to effectively and efficiently achieve the necessary changes to the PDP to achieve the Council’s goal to an extent that is realistic⁸⁰.

A council, in progressing a notified plan, has opportunities beyond making decisions on submissions. It can also:

- withdraw parts of the plan following notification⁸¹
- make amendments to alter information, where such an alteration is of minor effect, or may correct any minor errors⁸²

⁷⁹ I.e. where submissions and further submissions are “closed” and work has commenced on the hearing process.

⁸⁰ We have commented in Sections 3 and 4 of this report on the expectations and our analysis of the PDP in terms of the Council’s three-fold outcome goal.

⁸¹ This opportunity is available under Clause 8D of the First Schedule to the RMA. While the clause refers to the plan as a whole, case law has clarified that this also applies to parts of a plan – see legal advice in Appendix 2. Public notice must be given, including the reasons for withdrawal.

⁸² See Clause 16(2) of the First Schedule to the RMA. This opportunity should be used very sparingly in our view.

- vary the plan, using the RMA First Schedule process⁸³.

These opportunities can be considered as a “basket of tools”, sitting alongside the hearing and decision processes on existing submissions. Not only can the withdrawal provisions remove highly problematic parts of a proposed plan, but the variation process enables remedy of parts which have been withdrawn or omitted. Variations also allow alternative provisions to be tested through the process alongside existing provisions⁸⁴.

We also note that, as well as hearing processes to determine submissions, the RMA provides for a range of “dispute resolution” methods⁸⁵.

Also, for matters associated with designations it needs to be recognised that the requiring authority is the decision-maker, with the Council’s role limited to making recommendations following hearings only.

There is also the ability to address some of the issues we have identified (particularly lack of identification of methods other than rules, and lack of statements of anticipated environmental outcomes and a more detailed monitoring framework) through “companion documents” which would be technically outside the plan, but of assistance to the Council and others.

5.2 Submissions

Given the number, scope and content of submissions, in our opinion it would be possible to remedy many of the PDP’s obvious defects through the normal hearing and decision processes. These include submissions which seek clarifications and corrections to specific provisions.

There are many additional areas where submissions variously support or oppose policy directions and management provisions through rules. It is not our role to form any judgment on these matters: they demonstrate the range of interests and responses to an opportunity to comment on the PDPs provisions⁸⁶ and would normally be analysed and resolved through hearing and related processes.

In brief, we consider that the PDP would be able to be substantially improved due to the comprehensive, thorough and detailed effort the affected community has put into the submission process. The resolution of submissions through appropriate statutory

⁸³ This process is set out in Clauses 16A and 16B of the RMA. The variation process includes provision to merge with the proposed plan when the same procedural stage is reached. It also preserves existing submissions on the matter varied.

⁸⁴ Although this could be highly confusing, depending on how it is done.

⁸⁵ In Clause 8AA of the First Schedule, which can either replace hearings or refine matters prior to hearings. This includes meetings with submitters and mediation processes.

⁸⁶ In some cases these provisions are the same as, or similar to, provisions in the operative District Plan. In other cases they are new provisions.

processes would assist the achievement of the Council’s “good practice” goal for its operative District Plan.

5.3 The Operative District Plan

Before considering the options for the future of the PDP, we make brief comment on the operative District Plan. This is because an implication of withdrawing the PDP as a whole would be that the operative District Plan would remain in place. It could then be subject to future changes by way of further private or public plan changes. As noted earlier, the operative Kāpiti Coast District Plan became operative in 1999 and has been subject to many plan changes.

We consider the format of the operative District Plan to be outdated, and the content not to meet many current requirements of the RMA. For the reasons that the Council reached the position that it was necessary to undertake a full review, we would have concerns about reverting to this document. These concerns are taken into account in our discussion of the implications of options. In addition, the PDP has progressed the allocation of business and residential land and rationalized some zonings of the operative District Plan which, while not yet operative, would be difficult to reverse.

We do not consider that any option which involved modifications or changes to the operative District Plan would result in a “good practice” second generation district plan.

5.4 Identification and Analysis of Options

We have considered four possible options in this analysis of possible ways ahead. The options we have considered are described and evaluated in Table 1 below. We have considered the options in terms of advantages, disadvantages and risks. As the Council also seeks an outcome that can be achieved fairly and cost-effectively, we have also commented generally on those aspects on a comparative basis.

The analysis below does not specifically address the coastal erosion hazard provisions, but we return to them in the next section of this report.

Table 1: Analysis of Options

Option No. and Description	Analysis
<p>Option 1: continue PDP process as set out on Council website (i.e. rolling programme of hearings and decisions)</p>	<p>Advantages:</p> <ul style="list-style-type: none"> • continuation of process already under way • familiar process to people • potentially quickest (if timetable held to)

Option No. and Description	Analysis
	<ul style="list-style-type: none"> • no need for additional submissions, further submissions, etc. <p>Disadvantages:</p> <ul style="list-style-type: none"> • potential for confusion and inconsistencies in decisions due to progressively dealing with aspects • potential for confusion and inconsistencies in decisions due to different reporting personnel, and different hearing panels (can be limited by careful management) • may need to revisit some aspects (e.g. definitions) if all relevant parts of the PDP are not considered together • uncertainty that scope of submissions will address all problems with the current PDP • need for people to attend multiple hearings • potentially more appeals, as people protect their position in relation to later hearings/decisions. <p>Risks:</p> <ul style="list-style-type: none"> • potential for less than optimal outcomes (i.e. improvements to the PDP constrained by scope of submissions) • different hearing committees make different decisions, leading to inconsistent outcomes • would be seen as poor process by parts of the community and may increase risk of judicial review (at any time) • unnecessary complexity in disposing of multiple appeals • overall risk rating – High. <p>Fairness:</p> <ul style="list-style-type: none"> • fair to those in the process (but see risks). <p>Cost Effectiveness:</p> <ul style="list-style-type: none"> • average, but potentially some unnecessary cost associated with appeals and potentially less than good practice plan (i.e. need for future changes).
<p>Option 2: withdraw PDP and do nothing (await broader regional initiative such as a unitary plan). The</p>	<p>Advantages:</p> <ul style="list-style-type: none"> • provides a “clean slate” for a future review. <p>Disadvantages:</p> <ul style="list-style-type: none"> • duty to review/notify existing provisions that have

Option No. and Description	Analysis
<p>operative District Plan would continue, and private and public plan change processes recommence.</p>	<p>been in place for more than 10 years under Section 79 RMA remains, so the Council would be compelled to act or be in breach of its statutory responsibilities</p> <ul style="list-style-type: none"> • duty to give effect to various national and regional documents remains, so the Council would be compelled to act or be in breach of its statutory responsibilities • loss of benefit and ability to capitalize on planning studies done to date (they would become increasingly out of date) • disadvantages to a range of local sectors where the PDP has made enhanced provision (including businesses and housing sectors) • loss of credibility where the Council has been seen as committed to a policy approach which has been abandoned • loss of time and effort to participants in PDP processes to date (including submitters), felt most keenly by those who have supported parts of the PDP, with no redress • issues and disadvantages associated with prolonged application of current out-dated plan and potential for further complexity due particularly to private plan changes. <p>Risks</p> <ul style="list-style-type: none"> • statutory risks and costs associated with first two bullet-points identified under disadvantages above • slight risk of judicial review of decision to withdraw by those who support parts of the PDP • some loss of ability to capitalise on economic opportunities associated with national transport initiatives (due to delay) • loss of updated policy direction means potential for relatively random decision-making in relation to future private plan changes and consent applications • overall risk rating – High. <p>Fairness:</p> <ul style="list-style-type: none"> • potentially unfair to current participants who have invested time and effort in processes.

Option No. and Description	Analysis
	<p>Cost Effectiveness:</p> <ul style="list-style-type: none"> • average, but probably significant hidden and deferred costs.
<p>Option 3: withdraw PDP and recommence the review (i.e. regard the PDP as a draft)</p>	<p>Advantages:</p> <ul style="list-style-type: none"> • would “correct” the process by reverting to the process originally intended • would be able to address and correct many of the issues in the current PDP. <p>Disadvantages:</p> <ul style="list-style-type: none"> • delay in process while PDP rewritten, renotified, etc • additional step in reviewing and updating the information background on which the new PDP would be based (rather than just updating for submission and decision processes) • additional process for people who have already made submissions (particularly for those whose submissions were not resolved through the process) – associated time and cost. <p>Risks:</p> <ul style="list-style-type: none"> • moderate risk of judicial review by those who support parts of the PDP, or who consider the new process a waste of time and money (relying on e.g. local government restructuring) • some loss of ability to capitalise on economic opportunities associated with national transport initiatives (due to delay), but lower risk than Option 2 • overall risk rating – Moderate. <p>Fairness:</p> <ul style="list-style-type: none"> • potentially most fair option to wider community (allows additional participation). Unfair to those who have invested time and effort in submissions, including those whose issues are not resolved in a replacement PDP. <p>Cost Effectiveness:</p> <ul style="list-style-type: none"> • average to low (as partial duplication of process and loss of impetus).

Option No. and Description	Analysis
<p>Option 4: continue PDP process, but modified to address plan as a whole and using “basket of tools” – see section 5.1 of this report. (A more detailed description of requirements for this option is given in the next section)</p>	<p>Advantages:</p> <ul style="list-style-type: none"> • enables integrated review of whole plan, analysis and reporting on submissions, and detailed investigation of need for partial withdrawals and variations of PDP as a whole • takes advantage of the submissions already made, and the prehearings • potentially quickest way to progress most of the issues and plan content • makes best use of the investment made in the plan to date, including research and investigations • will clearly identify where needed changes exceed scope of submissions and provide basis for partial withdrawals and variations • enables efficiencies in hearing organisation and processes • reduces likelihood of inconsistent decision-making (compared with Option 1) • relies on work done to date and further advice as part of normal hearing and decision processes (rather than requiring new investigations) • submitters will see all of recommended modifications together, and may be able to minimise hearing appearances and time • aligned with wishes of some key groups (Iwi and some business interests) • where variations are undertaken, enables new participants to join while protecting efforts already made by existing submitters. <p>Disadvantages:</p> <ul style="list-style-type: none"> • relatively complex process requiring high level of skill and highly competent internal management and decision-making • requires a “breathing space” for internal review and completion of reporting processes (but can be done in parallel with on-going prehearing meetings) – slight loss of impetus in overall process (but much less than Option 3)

Option No. and Description	Analysis
	<ul style="list-style-type: none"> • high management requirements, including for hearings. <p>Risks:</p> <ul style="list-style-type: none"> • risks around capacity and capability of Council staff to undertake work in short timeframe to retain credibility • overall risk rating – Low. <p>Fairness:</p> <ul style="list-style-type: none"> • fair to those in the process, and enables new participants to join where variations are undertaken. <p>Cost Effectiveness:</p> <ul style="list-style-type: none"> • will require concentrated resourcing, but considered the most cost-effective.

A fifth potential option mentioned in the Terms of Reference is to make “significant changes” to the PDP. With the exception of parts of Chapter 4, the Coastal Environment Chapter, discussed in section 6 of this report, we do not think this is a necessary approach that should be embarked upon without the careful analysis which we suggest needs to be associated with Option 4. One problem with this option relates to risks of the Council being seen to be “picking off” issues⁸⁷. A further problem lies in the integrated nature of the PDP and the possibility of adding complexity and further inconsistencies by tackling just some of its parts.

The significantly different format of the PDP and the operative District Plan means that it is not easy to drop part of the PDP and create a significant new part based on the operative District Plan.

There is the ability under Option 4, if necessary, to introduce variations to address the most significant changes that are needed.

5.5 Preferred Option and How to Achieve It

We have concluded that Option 4 from Table 1 is the preferred option, although by a relatively narrow margin over Option 3. Option 2 would also have some merits, but may involve significant delay⁸⁸ and expose the Council and community to many risks in the meantime.

⁸⁷ Many parts of the PDP have attracted submissions in support as well as opposition, and these differing viewpoints are best worked out through normal plan processes.

⁸⁸ There is some discussion amongst the region’s councils about such an option, but no agreed process or timetable.

We envisage Option 4 being undertaken on the basis of a tightly-managed process with the following elements:

- a small tight, appropriately skilled and experienced, technical team reviewing the PDP contents and submissions. The team would need to involve planners with both plan administration and enforcement experience as well as policy experience. It should make progress on the basis of internal workshops and develop a “tracked change” version of the complete PDP, identifying and highlighting areas where submissions do not adequately resolve issues and where variations will be needed. It may identify areas where it is preferable to withdraw provisions (with or without subsequent variations) rather than make decisions on submissions.
- during this process, discussions with submitters and possibly further pre-hearing meetings would continue, further advice would be sought as necessary on aspects where considered necessary by the team, and preparation of reports on submissions would commence⁸⁹.
- as soon as possible, it will be necessary to give each submission point and associated further submission a unique number for ease of referencing during reporting, for decisions and for appeals.
- where areas are identified that justify a variation, these should be scoped⁹⁰, appropriate advice sought, consultation undertaken as appropriate⁹¹ and formal processes of notification and processing proceeded with as quickly as practicable without compromising the quality of the investigations or the adequacy of consultation.
- early engagement of hearing commissioner(s) who are able to commit to the whole of the hearing process. We consider that the optimum would be two independent hearing commissioners, one who would chair the whole process. The panel would be supplemented with one or two elected representatives, who may vary across the hearings⁹². Early engagement of an experienced hearing chair can help guide the application of the alternative resolution procedures available to

⁸⁹ We consider that the Section 42A reports prepared to date should largely be discarded (other than the first background report). This will in any case be necessary due to staff changes, and in the light of our recommendations relating to the need to specifically number submissions. We also have some reservations about the benefits of further prehearing meetings of the nature of those held so far, without specific proposals for changes “on the table”.

⁹⁰ A decision would need to be made as to whether to withdraw specific PDP provisions prior to proceeding with the variation process or not and how to align the issue with a “savings provision” in the operative District Plan, should the variation not be able to move quickly enough to merge with the PDP process prior to decisions and appeal resolution.

⁹¹ Where the PDPs shortcomings are sufficient to justify a significant variation, we suggest engagement with the affected community through an advisory group or similar direct method, as well as more traditional discussion documents and other consultation methods.

⁹² The purpose of this is two-fold – to provide local knowledge, but also so that elected representatives achieve some level of “buy-in” to the process and decisions.

the local authority⁹³, as well as assist in developing hearing approaches and timetables.

- all Section 42A reports and a tracked changed officer's recommended version of the complete PDP should be available to all a reasonable time (say six weeks) prior to commencement of hearings.
- further use of alternative resolution methods (prehearings, negotiations) following release of Section 42A reports, as appropriate.
- careful organisation of the hearing process around topics, but also allowing people to appear only once if they wish. While it is up to the panel to determine their own processes, we would encourage pre-circulation of evidence and pre-availability of any legal submissions, and a set time for presentations to reduce and streamline overall hearing time⁹⁴.
- release of all decisions and Section 32 updates at the same time⁹⁵. Consideration of a slightly extended time for lodging appeals⁹⁶.

We would expect the Council itself to receive regular briefings and to address any policy issues necessary prior to the commencement of hearings. This would particularly relate to withdrawals and variations.

If Option 4 is to be followed, there will be an urgent need to develop a detailed implementation plan, including an indicative timetable, and to ensure adequate resourcing. The implementation plan must be realistic, as it will be of significance to all the submitters. Methods for ongoing communication with the wider community over the process, as well as submitters, will be needed.

5.6 Remaining Risks

There are a number of risks associated with the preferred option – Option 4 in Table 1 – and processes we propose. These include:

- inability to obtain adequate and competent staff or consultant support to undertake the processes set out in section 5.5 of this report including expert and administrative support
- inability to obtain suitable hearing commissioner commitment to meet a developed timeframe

⁹³ RMA First Schedule, Clause 8AA.

⁹⁴ This has worked effectively in other jurisdictions – for example to the reviewers' knowledge, with the 1200 submissions on the Canterbury Regional Policy Statement Change No.1.

⁹⁵ Depending on the progress of any variations.

⁹⁶ This would need to be transacted with the Environment Court.

- actions of aggrieved parties to seek judicial review of a Council decision to follow the advice in this report, which could overturn the recommended process⁹⁷
- high risk of exceeding the stated timeframe of two years from notification of the PDP of all decisions completed and notified to submitters and to the public. A much lower risk of exceeding the four years from notification which is provided for by the maximum extension (doubling) under Section 37 of the RMA⁹⁸.

These risks need to be considered by the Council prior to making a decision on the process they choose to follow.

5.7 Cost Implications

The PDP as it stands represents a considerable community investment. We consider that our preferred option, Option 4, represents the best chance of salvaging and building positively on the significant investment the community has made to date. It provides a means of efficiently and effectively completing processes already embarked on, through research, submission and prehearing processes, in the least possible time⁹⁹ and before the need for significant new studies.

The actual costs of our preferred option are likely to be greater than continuing with Option 1, but there is a much lower associated cost-risk in, for example, resolving appeals, judicial reviews overturning the whole of the process, and the need for urgent plan changes after the PDP is operative.

We recognise that Option 2 may be seen as a low cost option by some. However, others have advised us of very high perceived costs in lost opportunities for economic development and growth in the short to medium term due to the PDP's deferment and the need for other processes to be undertaken to update the operative District Plan in the meantime.

Option 3 is probably the most costly option, as it is most likely to involve "the worst of the worst" in terms of direct cost to the Council and the community (in repeat participation from scratch)¹⁰⁰. If this option was chosen, the Council would no doubt be mindful of the

⁹⁷ This is a residual risk which will continue regardless of any process followed. Legal comment is provided in Appendix 2 on some of these circumstances, and we consider the risk of overturning our recommended process to be relatively low.

⁹⁸ See Appendix 2. There appears to be no penalty for such an extension if it were to happen. It would also be possible for the Council to further extend time limits under Section 37A(2)(b), but any further extension would be limited by considerations set out in Section 37A(1) including the general duty to avoid unreasonable delay and the interests of the community.

⁹⁹ Kāpiti's business community who we have discussed options with have emphasised the cost of delay including lost opportunities to capitalise on growth opportunities included in the PDP and associated with the major transport initiatives within the district.

¹⁰⁰ This would include application of the modified Section 32 analysis requirements, which came into effect in December 2013, across all parts of a new notified proposed district plan.

process inadequacies of the current PDP and would seek to involve a more measured and highly participatory process, which would involve considerable cost. As with Option 2, this option also involves potentially high costs associated with delay.

5.8 Other Contextual Considerations

There are three remaining contextual issues we must comment on, although they have not significantly influenced our investigation and analysis.

Firstly, at the time of writing the Wellington region is subject to considerable speculation about local government reorganisation. Proposals are at an early and undefined stage, although there is some chance they may be resolved within the current three-year term. Because of uncertainty, we have assumed that Kāpiti Coast District Council remains responsible for its district plan.

Secondly, Greater Wellington Regional Council is currently progressing with its review of its regional plans. At present, the regional plans contain some provisions that overlap with the PDP – specifically some earthworks and vegetation clearance provisions. We do not know what provisions are likely to appear in replacement regional planning documents, and draw no conclusions in that respect. Some thought does need to be given to this aspect in progressing with any of the possible options.

Thirdly, Section 32 of the RMA was modified on 3rd December 2013. The changes in this section do not apply to processes that are already in train, including the decisions on submissions on the PDP or any decisions to withdraw provisions. They will however apply to variations. The main changes are found in Section 32(2) and place specific emphasis on increases or reductions in opportunities for economic growth and employment.

5.9 Rules Having Legal Effect

A number of rules in the PDP already have legal effect. This status is provided for directly under Section 86A and 86B of the RMA and means that some rules “sit alongside” the provisions of the operative District Plan. In some circumstances they may trigger the need for additional consents in the interim period before the PDP becomes operative¹⁰¹.

Some, but not all, of the rules in this category are amongst the aspects of the PDP that we have identified in section 4.5 of this report as being aspects of particular difficulty. If Option 4 is followed, some of these rules would remain in their current state for a longer period than under the other options

¹⁰¹ This does not mean that the rules are operative. Rather, they provide an additional screening process for a limited range of activities in some specific circumstances.

We have undertaken a careful review of these RMA provisions since the draft report was released. Commentary is provided in Appendix 2. We have also undertaken a preliminary review of the list of such rules set out in Chapter 1.1 of Volume 1 of the PDP.

On inspection, it appears that the list of rules currently set out in the PDP as having immediate legal effect incorporates a number that technically do not have legal effect, despite their inclusion in the list¹⁰².

We consider that the Kāpiti Coast District Council should undertake a review of the content and scope of the rules listed as having immediate legal effect and:

- remove from the listing all those which cannot be justified in terms of Section 86B(3);
- confine those which are justified in limited situations, to those situations only¹⁰³; and
- provide advice online and in hard copies of the PDP, as to the applicability of remaining rules, as outlined in Appendix 2.

Once this is completed, the Council could also develop a package of advisory support for applicants, and waive processing costs in relation to consents granted under any of the remaining rules having legal effect, until submissions on them have been determined.

It would also be possible to undertake:

- an early variation to deal with the most problematic remaining rules
- withdrawal of a rule having legal effect. Sections 86B and 86C do not appear to provide a barrier to this.

However, such options are unlikely to be necessary if the earlier steps set out above are undertaken. Those options should be regarded as measures of last resort, given the integrated nature of the PDP.

5.10 Conclusion

In this section, several scenarios for the future of the PDP have been set out and analysed. With efficient, mature and careful progress under the process set out as Option 4 we consider there is a reasonable probability that the ensuing operative District Plan will qualify as good practice for a second generation district plan. With an exemplary

¹⁰² This may be for one of several reasons, including the limitations of RMA Section 86B(3) which restrict the range of rules with immediate legal effect to very specific circumstances, or where the operative District Plan provides equivalent protection, or where a rule is poorly worded and is not capable of reasonable interpretation. It is important to note that under RMA Section 86E, the list of rules with immediate effect, while included in the PDP does not form part of the PDP itself.

¹⁰³ For example, some rules which appear to apply across the district at present should be limited to only areas identified areas of significant indigenous vegetation.

process from now on, we consider there will be a good level of community buy-in despite the current level of disaffection.

Other options, in our view, will result in longer, equally or more complex, and potentially more costly processes with no certainty of a more acceptable outcome in the longer term.

High standards of management and advice will be a necessary contribution to the outcome the Council seeks to achieve. There are costs and risks associated with this, and this must be factored into the Council's overall decision on the next steps.

6 COASTAL ENVIRONMENT ISSUES

6.1 Background

Chapter 4 of the PDP is entitled Coastal Environment and contains:

- seven general policies relating to natural coastal character, amenity and public access, and natural coastal processes;
- eight policies relating to coastal hazard risk management; and
- a suite of rules which are intended to give effect to the policies.

There is also explanatory material and rules directed at the main policy areas. The plan maps identify the areas to which the rules apply.

As noted earlier, it is not unusual to have a Coastal Environment chapter in a plan. However, given the limited range of matters addressed, we have questioned whether this separate chapter is necessary or whether the matters covered would not fit more comfortably within Chapter 3, Natural Environment and Chapter 9, Hazards. That is for a later decision in the context of overall plan modifications.

It is the hazard component of this chapter that has led to widespread community concern and the Council's decision to establish an expert panel to review the science and assessments on which the hazard provisions have been based.

6.2 Issues around Availability of Information and Consultation

From a range of discussions, it is clear to us that the intended opportunities for people with coastal properties to be involved in developing assessment methodologies for coastal hazards, to receive the results of the work and to be involved in developing response options, were not provided prior to the notification of the PDP¹⁰⁴.

This problem was compounded by the 2010 Discussion Document "Natural Hazards and Managed Retreat" which did not mention studies which had already been scoped and undertaken. The Discussion Document focused only on managed retreat in the district's coastal localities and did not promote any method for consideration of options or variations in management responses in different parts of the district.

However, it is fair to say that, from the summary of submissions received on this Discussion Document, relatively little comment was received on the concept of managed retreat, and much of the comment that was received appears to be supportive of the concept.

¹⁰⁴ For example, letter dated 28th November 2007, sent to many affected people.

As with other parts of the PDP, it appears that the growing body of coastal studies became increasingly subject to time pressures, and there was no opportunity to undertake the type of consultation that the affected community expected.

In particular, we note that a report “Coastal Hazard Provisions”¹⁰⁵ was commissioned to develop a coastal planning framework. This is a relatively abstract and high-level report, but it does set out the Kāpiti Coast’s coastal planning context, management options, and the consultant’s analysis of options, including an RMA Section 32 analysis. This was completed in parallel with and prior to the completion of the Coastal Systems Ltd (CSL) Report in 2012¹⁰⁶.

There appears to have been no consultation on this report, and no detailed reconsideration or evaluation of the broad proposals and recommendations in the Coastal Hazard Provisions report in terms of the final CSL hazard lines – rather, the concepts were simplistically transferred into policy and rules and applied to the CSL hazard lines. There was no pause in process when the two reports were meshed, and no recognition of the other coastal hazard management methods promoted in the report.

The haste with which the final plan was assembled prior to notification as the PDP has compounded the issues which have concerned the community.

6.3 Review of Coastal Erosion Hazard Assessment

This review¹⁰⁷ concludes that *“the existing recommended hazard lines are not sufficiently robust for incorporation into the PDP”*. It proposes further detailed work to improve the understanding of coastal erosion hazards on the Kāpiti Coast and estuaries on the basis of a range of assumptions about sea level rise rates and the treatment of existing protection structures and management methods.

We endorse the general finding of this report, including the need for a range of adaptive responses to be considered and their quantitative and qualitative costs and benefits evaluated before finalising policy and rules and other methods for inclusion in the PDP. We would add that, in developing an adaptive approach to coastal hazards, consideration of the potential effects of coastal inundation, changes in floodable areas and ground water changes due to rising sea levels should be taken into account as well as the effects of erosion processes.

The approach promoted in the Review of Coastal Erosion Hazards Assessment along with our comments above are entirely in line with international best practice, and with Objective 5 and Policies 24 to 27 of the New Zealand Coastal Policy Statement 2010. It

¹⁰⁵ Prepared for KDCDC by Focus Resource Management Group, August 2011.

¹⁰⁶ “Kāpiti Coast Erosion Hazard Assessment 2012 Update”, CSL, 2012.

¹⁰⁷ Carley, J T, Komar, P D, Kench, P S and Davies, R B. “Coastal Erosion Hazard Assessment for the Kāpiti Coast: Review of the Science and Assessments Undertaken for the Proposed Kāpiti Coast District Plan 2012”, June 2014 (reference from Section 8.1).

will be important that the work to be progressed in Kāpiti is aligned with the regional risk management framework which we understand is also proposed to be developed in the near future¹⁰⁸. We also note that, due to the extent and complexity of the Kāpiti coastline, once further work is progressed on the science basis, policy development may need to be prioritised on areas most at risk with a more measured approach applied to areas of low or no risk.

6.4 The Way Ahead

On the basis of the findings of the coastal erosion hazard assessment review we consider that the Council should withdraw the coastal hazard management areas shown as the Map Series C of the PDP, along with the whole of the text under the heading 4.2 “Coastal Hazard Management Areas” including explanatory material and policies, as well as all rules which relate specifically to the mapped coastal hazard management areas. We propose this because, while the rules do not yet have legal effect, the policy does.

An explanatory “placeholder” needs to be inserted instead which clarifies which provisions of the operative District Plan will remain in place while a variation is prepared and processed to operative status to address the requirements of the NZCPS and the RPS. This would include natural hazards policy provisions (to the extent that they address coastal hazards management) and a range of mapped coastal and other building line restrictions and some of the operative District Plan’s rules such as rural setbacks and existing relocatable and related rules¹⁰⁹.

This should be done at an early stage in the implementation plan for progressing with the PDP. We consider that the Council should establish an advisory group to help it progress both the science advice, the problem definition and the policy development, including the consideration of alternative responses to the problems identified from the continued science advice. The advisory group should include representation of local people and businesses as well as agencies such as DoC and GWRC. The advisory group should work closely with the Council on all aspects, including advising on methods for engagement with affected people and other stakeholders at various stages of the processes.

Continued work on coastal hazards should be considered to be a high priority and not “parked”¹¹⁰. The current hazard lines in the operative District Plan are understood to largely date from the Kāpiti Borough District Scheme, which was made operative in

¹⁰⁸ Such a framework is currently under development in other regions, including Hawkes Bay which has similar coastal issues.

¹⁰⁹ This clarification can be done without change or variation and can sit outside the actual PDP content.

¹¹⁰ There is a general requirement in Section 55(2D) that provisions to give effect to national policy statements should be included in plans to give effect to provisions of NPSs as soon as practicable. The New Zealand Coastal Policy Statement 2010 contains policy relevant to the management of coastal natural hazard risk.

1981¹¹¹, with modifications around the Waikanae Estuary included at some time prior to 1995. While a necessary stop-gap, their extent is highly likely to be found to be inadequate as a basis for a variation to the PDP to meet national policy expectations and good practice. The default provision of setback lines elsewhere in the operative District Plan may prove sufficient in other areas, but require testing, and their purpose (which may be a multiple purpose) clarified.

6.5 Conclusion

The findings of the review of the Coastal Erosion Hazard Assessment set out in the report recently provided to the Council mean that the current hazard lines and associated policy and rules need to be withdrawn from the PDP.

We consider that the failings in process which have contributed to community concern about the inclusion of the coastal hazard lines and policy in the PDP are close to a fatal flaw in process terms, and would probably on their own justify our conclusion that the coastal hazard provisions be withdrawn from the PDP.

The provisions in the operative District Plan that manage coastal hazards need to be identified and endorsed as the Council's current statutory planning framework for the coastal area until a variation is developed and notified.

However, this is insufficient to meet national and regional policy requirements, and will be based on seriously outdated science, so the Council must proceed with work towards a variation while other work on the PDP is progressed.

A framework, timetable and budgetary allocation will be necessary. We strongly recommend the involvement of an advisory group in all steps of investigations, community engagement, and the development of policy and replacement plan provisions.

¹¹¹ It is understood that the indecision of these lines was strongly contested at the time, but the public and appeal processes in the end were considered satisfactory – pers com, Mike Weir and written material from Bill Pearson.

7 FINDINGS AND RECOMMENDATIONS

Our review has found that, despite some problems with processes of plan preparation resulting in considerable community concern, the PDP is not so poorly formulated and inadequate that it needs to be completely withdrawn.

There are numerous problems and issues with the current PDP. A large number of modifications will be needed before it can become operative or meet the “good practice” status that the Council seeks to achieve. The submissions on the PDP (including the further submissions) are comprehensive and in general terms appear to provide sufficient scope to make the necessary modifications. It needs to be acknowledged that the processes of decisions on submissions involve resolution of sometimes competing interests and often contentious views. Our review has remained at a high level, partly for this reason.

The PDP has strengths in some areas and is better targeted at current legislative requirements and practice than its predecessor, the district plan that became operative in 1999 and which has been progressively modified since. There is a level of community and business support for the PDP and a continuation of current processes.

Having considered a range of possible ways that the Council could proceed following this review, our preferred option is that the normal statutory PDP processes should be continued. We make this recommendation taking into account that the Council has a “basket of tools” which it can use to improve and enhance the PDP, where necessary, alongside making decisions on the submissions received. We have also built into our recommendations requirements for modifications to the intended processes of reporting and hearing submissions in order to overcome problems that may arise if a piecemeal process is adopted. This will be demanding for the Council, but reduces the risk of further inconsistencies arising through the hearing and decision process.

We were asked to specifically address and advise on issues arising from the coastal erosion hazard assessment review. The findings of that review add weight to our opinion that deficiencies in process and content would justify reconsideration of the coastal hazard provisions. Our opinion is that the PDP provisions for coastal hazard management should not proceed and should be withdrawn from the PDP. However, the stop-gap provisions of the current operative District Plan are inadequate, and the Council will need to proceed with the further studies recommended by the panel who have undertaken the coastal erosion hazard assessment review, including more detailed consideration of options. This work, and the ensuing policy development and plan provisions should involve adequate and appropriate consultation processes. An advisory group should be appointed at an early stage to assist with the progressing of work on this important aspect of the district plan and associated areas of Council responsibility.

We acknowledge the extensive assistance provided by the many people who have spent time with us discussing aspects of the review, and those who made comments on the draft report.

We recommend that:

1. The Council proceed with the PDP on the basis of a modified process of hearing and making decisions which includes all elements set out in section 5.5 of this report.
2. A detailed implementation plan including resourcing and timetable is developed to progress the PDP in accordance with recommendation 1. A communications plan to keep the community informed would be a necessary part of the implementation.
3. The Council undertake a detailed review of the rules of the PDP having legal effect and clarify these provisions as soon as possible.
4. The Council resolve to withdraw from the PDP the coastal hazard management areas on the plan maps along with the associated policy section and rules, and clarify the parts of the operative District Plan which provide stop-gap coverage relating to coastal hazards.
5. The Council develop an implementation plan to progress work on the coastal erosion hazard assessment, and other aspects of coastal hazard management. The implementation should build on the work already done and incorporate adequate and appropriate communications and consultations provisions, including a role for an advisory group as described in section 6.4 of this report.
6. At an appropriate time (or times) the Council proceeds with a variation (or variations) to include suitable and relevant policy, methods and rules in the PDP to address the district's coastal hazards in accordance with the NZCPS, the RPS and best practice.
7. The Council only withdraw the whole of the PDP if it is unable to resource the methods we recommend for proceeding through Option 4, or if it considers the residual risks identified in section 5.6 of this report are too high.

Appendix 1 – Brief CVs

Sylvia Allan

Sylvia has a Bachelor of Science (Honours) Degree in physical geography and geology from Canterbury University and a post-graduate Diploma in Town Planning from Auckland University. She is a Fellow of the New Zealand Planning Institute (NZPI) and a former Council member, Vice President and President of that professional body. Sylvia was awarded both the first Nancy Northcroft Planning Practice Award by NZPI, and an NZPI Distinguished Service Award.

Sylvia has more than 40 years experience as a planner in New Zealand and the United Kingdom, and parts of Asia, and is currently an independent planning consultant and Director of the firm Allan Planning and Research Ltd, based in Petone. Prior to that, for 12 years she was the national planning team leader for a large multi-discretionary firm, responsible for a planning team of up to 50 planners. She is experienced in most aspects of environmental planning including policy and plan development encompassing urban, rural and coastal areas. She works widely around New Zealand.

Throughout her extensive career Sylvia has worked with both the public and private sectors. She has provided planning advice to public agencies, community groups and individual businesses and is an expert in statutory planning including the requirements of the Resource Management Act. She is an experienced project manager and has been responsible for major environmental investigations and consultation processes. Sylvia has managed hearing and appeal processes through the Environment Court and Boards of Inquiry, and has provided expert evidence on many occasions on planning-related matters. She has acted as a Hearing Commissioner for a number of councils, including a nine-month period on a change to Environment Canterbury's regional policy statement.

Richard Fowler

Richard has a BA/LLB (Honours) from Victoria University and was admitted to the Bar in 1975. A former partner in DLA Phillips Fox, he currently practices as a Barrister sole from Chambers in The Terrace, Wellington. He is a Queen's Counsel.

Richard's career commenced with involvement in a broad range of civil and commercial litigation. While retaining breadth of litigation experience, he has increasingly specialised in local government and resource management legal practice. He has advised numerous local government agencies over the years and has frequently appeared at the Environment Court or higher Courts on resource management matters. As an accredited Hearing Commissioner he has chaired or otherwise been involved in excess of 300 decisions on resource consent applications and designations. He was appointed by Government to Chair Special Tribunals to determine Water Conservation Orders on the Buller and Gowan Rivers and the Kawerau and Nevis Rivers.

Richard is former President and Council Member of the Wellington District Law Society, and has been involved in numerous other roles associated with the New Zealand Law Society.

Appendix 2 – Legal Advice

19 June 2014

Sylvia Allan
Email: Auto

Dear Sylvia,

Kapiti Coast District Council: Proposed Plan – Legal Issues

I write to provide brief advice on several discrete issues that have arisen in the course of the review.

Misleading notification: the covering letter and the draft plan mismatch to old maps

1. Both of these errors were unfortunate. Indeed, if one way or another they came to the attention of the Court I would fully expect there to be some robust criticism.
2. Nonetheless, I do not consider that either of these “business as usual” type messages would enable a successful challenge to the notification steps, even in combination.
3. The draft plan mismatch to the maps was not part of the formal notification steps in any event, but only relevant to consultation. Even as consultation it is not a mandatory requirement.
4. The letter accompanying the formal notification to ratepayers was rather unfortunate and it cannot be denied that the letter accompanied part of the formal notification process. However, the comment was so general that it was more in danger of becoming rather meaningless vis-à-vis a whole new plan where the detail of a particular part or parts is the imperative for the scrutiny of any would-be submitter. I do not see how a vague and generic comment like that could possibly be causative in impugning the ordinary formal notification process.

Adequacy of summaries of submissions and utility for decisions

5. It is settled law that every submission needs to be fully addressed (in the sense that all requests for relief are addressed). While the old practice of providing a discrete reason in each case is not a legal requirement, it is still good practice and is recommended.

Timing of decisions: s.37 and s.37A

6. With reference to Schedule 1, clause 10(4) the stated time limits can be doubled pursuant to s.37. This is because the terms of s.37 apply to plan creation in the same way that they apply to applications for resource consents.

7. However, there is the ability to extend time even beyond that doubling. Section 38A(2)(b) provides an alternative:

“A time exceeding twice the maximum period specified in this Act if the applicant or requiring authority requests or agrees.”

8. The definition of “applicant” includes a local authority notifying a proposed District Plan (refer s.2 definition of “applicant” at (a)(ii) and s.39(1)(a)).

The ability to withdraw part or all of a proposed plan

9. In my view it is now reasonably clear that a local authority has the ability to withdraw part only of a proposed plan. In other words, it is not a situation where it is “all or nothing”. But there is a caveat or withdrawal of part only.
10. The position has not always been so clear cut. There have been two strands of authority in the Environment Court – one of which embraced the “all or nothing” approach to withdrawal and the other of which considered part withdrawal was possible. That seems to have been resolved by the High Court in *West Coast Regional Council v. Royal Forest and Bird Protection Society of NZ* [2007] NZRMA 21 (HC) which preferred the approach that part only of a plan could be withdrawn.
11. However, that case went on to add that part withdrawal would need to be confined to situations where the part that is withdrawn would not have the effect of varying the remaining unwithdrawn parts.

Council’s ability to seek further expert evidence

12. I am aware of the strand of thinking to which you refer in which it is suggested that there are limitations on Council’s ability to seek further expert advice beyond a certain point – i.e. a concept of “lock down”.
13. I do not consider that this is correct in law and suspect that this in fact is attributable to a misunderstanding of certain limitations that can arise late in the piece and to which I will refer.
14. First of all it is important to understand this on a time continuum.
15. After submissions have closed and after the s.42A Report has been made available, but before the hearing, I see no difficulty in Council’s obtaining further expert advice. Indeed, if the prehearing and hearing processes can be seen as an ongoing dynamic of policy development (as opposed to the hearing of an application for a Resource Consent) then one would expect a much more liberal approach to the introduction of further expert advice. The critical qualification is that any such advice that is obtained is also made available to all other parties who have made submissions. But if care is taken to ensure that that happens, I would be very surprised that any Court would impugn the obtaining of such further expert advice.
16. Further along the time continuum after the hearing has commenced, a little more care is required if there is a desire (presumably by the hearing panel) to obtain further expert advice. It may be that certain positions have been taken during the hearing on which other parties have made decisions as to the ambit of their own evidence (e.g. withdrawing certain parts of certain submissions or conceding particular points). But all that means is that some care should be taken. It still does not mean that there is a “lock down”. The most important qualification would be that if a hearing panel determined to seek further expert advice there would need to be careful consideration of two aspects:

- 16.1 That something was done to stop time running for the production of a decision (assuming the decision to obtain further expert advice comes after the hearing has been closed as opposed to during the hearing, in which case the hearing is likely to have been simply adjourned).
- 16.2 That all parties to the hearing get to view the further expert advice and to have an opportunity to respond to it if they wish.
17. So in summary I see no reason why there is any particular limitation on Council's ability to seek further expert advice post the close of submissions but prior to the hearing. And even after a hearing has commenced it is still possible to seek further expert advice, although careful consideration would need to be given to certain factors.

Section 32 requirements for decisions on the Proposed District Plan vis-à-vis s.32 requirements of any variations

18. Section 32 evaluations under the Proposed District Plan as notified are to be undertaken in accordance with s.32 as it existed before the 2013 Amendment Act by reason of s.68 of that Act inserting a new Schedule 12 clause 2 of which relates.
19. However, the "new" s.32 will apply to any variations.
20. That is because the 2013 amendments (Resource Management Amendment Act 2013) received royal assent on 3 September 2013 and s.70 of that Act (which introduced the changes to s.32 of the RMA) came into force three months after the date of royal assent – i.e. 3 December 2013.
21. The significance of this is that any variation will need to comply with the "new" s.32 considerations which place specific emphasis on increases or reductions in opportunities for economic growth or employment.

Addressing rules that fall within s.86B(3) that have immediate legal effect

22. Section 86B(3) sets out a narrow range of circumstances in which some rules in the Proposed District Plan have immediate legal effect.
23. The power of rescission referred to in s.86B(2)(c) only relates to a decision to defer the time at which a rule has legal effect under s.86B(1)(c). Hence the power of rescission in s.86B(2)(c) is of no utility in rescinding a rule under s.86B(3) that has immediate legal effect.
24. Thus the position with s.86D(3) rules is that they retain their immediate legal effect unless they are withdrawn or overtaken by a variation.
25. The statement at the beginning of the proposed plan that states which rules are of immediate legal effect is not part of the proposed plan itself by reason of s.86E. Amending that statement is therefore not subject to the requirements of Schedule 1 as is the case for the proposed plan.
26. It follows that to the extent that that statement may presently include some rules that, on closer analysis, do not fall within s.86B(3), that inclusion does not change their status, and does not render them of immediate legal effect simply because they have been so listed.
27. As a matter of practicality, it should be possible for the Council to resolve now under s.86E to make changes to, including removing provisions from, the list, and even though that would not be formally implemented until the plan becomes operative (when the list can in any case be removed from the plan), a notation could be entered on any counter or

working copies of the proposed plan drawing attention to the fact of Council resolution and possibly its fact if that contains additional clarification.

The degree to which submissions on the proposed district plan are 'saved' following a variation

28. Under clause 16B of the First Schedule, submissions that have been lodged in respect of a part of the proposed plan survive and are 'saved' following the notification of a variation affecting that part, whether the variation is in substitution for that part or otherwise.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R. Fowler', is written over a light blue circular stamp.

Richard Fowler QC

Appendix 3 – List of People Contacted in Connection with PDP Review

Meetings were held with the following individuals:

Joan Allin
Frank Boffa
Julie Browne
Anna Carter
Owen Cox
Robin Falconer
Egon Guttke
John Harding
John Hutchings
Barry Mansell
Margaret Niven
Richard Peterson
Quentin Poole
Jan Richmond
Jock Richmond
June Rowland
Robert Schofield
Allan Smith
Lynne Smith
Marian Smith
Phil Stroud
Don Wallace
Lynne Wallace
Michael Weir
Bryce Wilkinson
Hilary Wooding

Meetings or phone calls were held with the following representatives of groups or organisations:

Mary Barton – Chorus NZ Ltd
Louise Miles – “
Christopher Ruthe – Coastal Ratepayers United (CRU) Inc
Chris Hansen – Coastlands
Richard Mansell – “
Stephen Simpson – Delivering and Understanding the Natural Environment (DUNE)
Rhea Dasent – Federated Farmers of New Zealand
Max Lutz – Friends of Ōtaki River
Trevor Wylie – “
Joy Anderton – Friends of Te Hapua Dunes and Wetlands
Paul Crafar – “
John Gibsone – “
Mari Housiaux – “
Alastair McDougall – “

Courtenay Sanft – “
 John Stevenson – “
 Ferial Falconer – Friends of the Waikanae River
 Caroline Ammundsen – Greater Wellington Region Council
 Iain Dawe – “
 Jonathan Streat – “
 Neil Donnelly – Kāpiti Coast Airport Holdings Ltd
 Sue Simons – “
 Liz Koh – Kāpiti Coast Chamber of Commerce
 Paul Busing – Kāpiti Coast District Council Compliance Team
 Nick Fowler – “
 Diane Ammundsen – Chair of Regulatory Committee, Kāpiti Coast District Council
 Ross Church – Mayor, “
 Robyne Cranshaw – Kāpiti Coast District Council Policy Team
 Jim Ebenhoh – “
 James Kilbride – “
 Emily Thompson – “
 Wayne Gair – Kāpiti Coast District Council Resource Consents Team
 Andrew Guerin – “
 Matt Muspratt – “
 Monique Robertson – “
 Betty van Gaalen – Kāpiti Grey Power
 Rhys Phillips – Kotuku Parks Ltd
 Bryce Holmes – Land Matters
 Julian Kennemore – New Zealand Historic Places Trust
 John Maasen – North Ōtaki Beach Residents
 Bruce Bensemon – Nga Manu Trust
 Tony Ward – “
 Heather Dawson – Older Persons’ Council
 Jill Stansfield – “
 Simon Thomas – Reikorangi River and Bush Group
 Bill Carter – Tāngata Whenua District Plan Review Working Party
 Pataka Moore – “
 Kristie Parata – “
 Caleb Royal – “

Additional Written Material Was Received From:

Joan Allin
 Rhea Dasent – Federated Farmers of New Zealand
 Neil Donnelly – Kāpiti Landing
 Olivia Eaton – Department of Conservation
 John Harding
 Bryce Holmes – Land Matters
 Craig Mallet – Ministry for the Environment
 John Maassen – North Ōtaki Beach Residents

Jan Richmond

Alastair Seyb – Land and Infrastructure Management Ltd

Marian Smith

Gina Sweetman

Lynne and Don Wallace

Michael Weir

Appendix 4 – Comments on Draft Report

A draft version of this report was made available to the Council and the public from 2nd April 2014. An opportunity was made available for interested people to make comments relating to factual errors or matters of technical detail until 30th April 2014. Over that period, comments were received from the following people and organisations:

Individuals

Joan Allin
Frank Boffa
Julie Browne
Anna Carter
Denise Church and Michael Veneer
Owen Cox
Jim Ebenhoh
Ferial Falconer
Mari Housiaux
Alex Metcalfe
Chris Munn
Christopher Ruthe
Marian Smith
Mike Weir

Representatives of groups or organisations

Christine Foster – Bunnings Ltd
Chris Hansen – Coastlands Shoppingtown Ltd
Olivia Eaton – Department of Conservation
Mari Housiaux – Friends of Te Hapua Dunes and Wetlands
Jonathan Streat – Greater Wellington Regional Council
Betty van Gaalen – Kāpiti Grey Power
Michael Hall – Maypole Environmental Ltd
John Maassen – North Otaki Beach Residents Group

We thank people for taking the opportunity to comment. Some of the comments simply acknowledged the opportunity to make comments, some drew attention to matters of fact, some sought specific wording changes, and some expressed differences of opinion of those of the report's authors. A number of the submissions expressed agreement with details of the report's analysis, and the report's overall recommendations. We have read and considered all the matters brought to our attention. We have made a number of changes to the report as a result of comments received, the most significant of which are noted on the following page.

Page(s)	Change Made
v, 54	Rewording of Recommendation 3 relating to rules having legal effect.
4	Acknowledgement of “draft” stage of report and process.
7	Addition to footnote 14.
9	Addition to footnote 22.
10	New footnote 25 to explain what a Section 42A report is.
16	Minor wording changes to clarify Section 32, including new footnote 38 and modification to footnote 39.
29	New bullet-point in section 4.3.5 referring to the desirability of “ground truthing” mapped information.
37	Additional statement in section 5.3 clarifying that modifying the operative District Plan is not considered a realistic option.
37-42	Minor wording changes to Table 1.
45	Acknowledgement that time limits to complete the process can be more than doubled – see addition to footnote 98. Additional sentence and footnote regarding cost benefits of Option 4.
46-47	Significant rewording of section 5.9 relating to rules having legal effect.
51	New footnote 11o which clarifies the requirement of RMA Section 55(2D).
Appendix 2	Reissued with new section on rules having legal effect, plus clarifications regarding the Council’s ability to more than double the timeframe to complete decisions on submissions, applicability of new Section 32 requirements, and status of existing submissions following a variation.

We have also made a number of small further changes and corrected a number of typographical errors. None of the comments have resulted in a change to the tenor of our original report or the direction of our recommendations.

Finally, a number of comments received from submitters have sought the opportunity to be involved in prehearing consultation, and, where relevant, a range of alternative procedures, such as those set out in Clause 8AA of Schedule 1 to the RMA. Our report has noted the pre-hearing meetings held by the Council prior to this review being undertaken, and also endorses the alternative procedures (see section 5.5). We endorse those requests.