MEMORANDUM

BAY OF PLENTY REGIONAL COUNCIL TOI MOANA

To: Proposed Plan Change 9 Hearings Panel

From: Namouta Poutasi **Date:** 15 March 2018

Water Policy Manager

File Ref:

Subject: **Requirement to Provide Certainty**

1 Introduction

The Hearings Panel for Proposed Plan Change 9 has requested from Council further explanation of requirements for plans to provide "certainty" for consent applicants/the wider public.

2 Certainty in General Law

Under ss76(2) and 68(2) of the RMA[1] rules have the force and effect of a regulation (but are still subject to the Act). They must therefore conform to common law principles and conventions regarding validity and failure to do so could see the rule challenged: through submissions; during appeals against decisions on submissions; appeals on resource consents where the rule is the issue; declarations; or appeals against enforcement proceedings.

Challenges to rules may be on one or more of the following grounds:

- being ultra vires (i.e. either, outside the scope of the RMA or outside the powers given to councils under the RMA)
- unlawful reservation of discretion
- uncertainty
- unreasonableness.

A poorly written rule could be declared void (in whole or in part) by a court for uncertainty, though it must be treated as valid until a decision is made that invalidates it.

There is a great deal of publicly available material on the need for certainty in law. Justice Susan Glazebrook notes[2]:

Legislation binds all people and entities in New Zealand and everyone is assumed to know the law. As such legislation must be accessible to those it binds. Statutes must also be understandable and drafted with sufficient precision to allow people to order their affairs according to law and, importantly, to allow those who administer legislation to do so according to law.

The government has gone to significant lengths to make the law clear and more certain. For example, the Parliamentary Counsel Office's "Principles of Clear Drafting[3]" includes a preference

[1] Taken from http://www.qualityplanning.org.nz/index.php/plan-steps/writing-plans/writing-effective-and-enforceable-rules

[2] Address given at the Parliamentary Counsel Office, Wellington, on 4 September 2015

[3] http://www.pco.govt.nz/clear-drafting/

for simple sentences, positive framing rather than negative, using the active voice and gender-neutral language amongst many other guidelines. The NZ Law Commission has its own style guide including many of these same concepts.

3 Certainty and the RMA

It is generally considered good practice that planning documents should provide clarity and certainty – so that matters are readily understandable to plan users.
This is something that the Court often refers to in passing – for example *Invercargill Airport Ltd v Invercargill City Council* [2018] NZEnvC 9 at para 28:

"*Overall, the proposed changes are efficient and ensure that the requirements of Appendix VI are effective and provide greater certainty for Plan users and the consent authority and will better achieve the purpose of the Act."*

Specifically in relation to the rules in a plan – they have the force and effect of regulations (s68(2) and s76(2)RMA - relating to district rules and regional rules respectively) and there are a number of cases that specifically talk about the need for rules to be clear – if they are too vague or uncertain they may be found to be ultra vires for uncertainty. (See for example *Lovegrove v Waikato District Council* A106/09 (at paras 16-18); *Shotover Hamlet Investments v Queenstown Lakes District Council* W148/95 – note that these cases relate to district rules, rather than regional rules, but the same principles apply).

There are also a number of cases which refer to how rules should be interpreted (on their plain meaning and having regard to their immediate context), and where there is obscurity or ambiguity be referring to other sections of the plan and the objectives and policies of the plan itself (see for example the often cited passage from the Court of Appeal in *Powell v Dunedin City Council* – at para 35). These cases all lend towards the need for clarity and certainty when drafting planning provisions (particularly rules).

In addition, we note that Section 32 of the RMA tends to favour more certain provisions.

Section 32 requires council to consider (and prepare a report showing) the merits of planning provisions against a yardstick which includes the "efficiency and effectiveness" of the provision.

In Long *Bay-Okura Great Park Soc Inc v North Shore CC EnvC A078/08*, the Court set out that:

"each proposed policy or method (including each rule) is to be examined having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives of the district plan taking into account:

(a) the benefits and costs of the proposed policies and methods (including rules); and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods."

The MfE Section 32 Guidance document says benefits and costs might include[4]:

- *the type of cost or benefit (administrative, compliance costs or savings, charges, tangible or non-tangible costs/benefits)*
- *….*

Generally, provisions that are more difficult to interpret carry higher administrative and compliance costs will cost more and score worse in a Section 32 benefit costs analysis.

[4] Page 41: Ministry for the Environment. 2017. A guide to section 32 of the Resource Management Act: Incorporating changes as a result of the Resource Legislation Amendment Act 2017.

4 Conclusion

It is generally accepted good planning practice that planning documents should be drafted in a manner that is clear and unambiguous. In relation to rules, it is important given they have the effect of regulations, that they are certain to avoid the risk of challenge. The assessment under s32 also requires consideration of administrative and compliance costs, which could be higher for provisions which are more difficult to interpret.