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Dear David

Earthworks provisions

1 Thank you for requesting legal advice in relation to the earthworks provisions in the proposed Waitaki District Plan (**PDP**).

2 We understand that Waitaki District Council (**Council**) applied for an exemption from the plan stop requirements so that certain provisions in the PDP could be retained. This application sought exemption for earthworks standard 1 (as it relates to the former General Rural Zone (**GRUZ**)) and earthworks standards 5-10.

3 On 3 December 2025 the Minister granted this exemption in full, meaning that these earthworks provisions could continue through the district planning process.

4 On 15 January 2026, pursuant to section 80Y of the Resource Management Act 1991 (**RMA**), Council formally withdrew those provisions that were not exempted by the Minister via a public notice on Council's website.

5 Following this withdrawal Council staff determined that it was preferable to retain some additional earthworks provisions in the PDP to enable the retained standards to function properly. These additional provisions retained and did not delete an objective, two policies and two additional rules. This position has been challenged and asserted to be invalid in evidence given by Federated Farmers to the Hearing Panel that is hearing submissions on the District Plan.

6 You have now requested advice on Council's ability to retain these provisions following the Minister's exemption and Council's subsequent withdrawal of the non-exempted provisions.

Advice

7 We have reviewed the current version of the PDP that is available on Council's website and note that some of the provisions Council resolved to withdraw still show as live in this version. This does not accurately reflect the withdrawal of these provisions in our view. Council staff should therefore update the PDP to correctly show the withdrawal of EW-O3, EW-P6, EW-P7, EW-R6.

8 We also note that Council has made changes to standards S7 and S8, which the exemption did apply to. We understand that these changes have been made to reflect the withdrawal of the overlays to which these standards applied. The exemption is permissive so there is no requirement to retain provisions for which an exemption has been granted. We do however consider that the changes to these standards should be recorded in a clause 16 decision. They remove further provisions that are now of no effect because they relate to the withdrawn overlays.

9 We have considered whether the Hearing Panel could make changes to the existing exempted standards to better enable these provisions to function properly. In our view this is a feasible approach as long as the changes are genuinely consequential to the existing provisions to make them function (and in scope of a submission). The key with any such changes to existing provisions to make them work is to ensure that they do not add in provisions that circumvent the Minister's exemption decision by re-introducing the substance of non-exempt provisions.

10 We have also considered whether it would be possible for Council to now seek a further exemption from the Minister to reinstate the remaining earthworks provisions that are necessary for the existing exempted provisions to function properly.

11 In our view a further exemption to reinstate these provisions is not easy at this stage. This is because Council has given public notice of the withdrawal of all provisions in the earthworks chapter aside from standard 1, and standards 5 – 10. The withdrawn provisions now no longer exist in the PDP.

12 We consider that the only option available to Council is to apply for a new exemption under section 80V(1)(a) of the RMA permitting it to notify a new planning instrument containing the provisions that were omitted from the original exemption.

13 If such an exemption is granted then Council would be able to notify the previously withdrawn provisions and proceed with usual RMA Schedule 1 planning processes. This is clearly cumbersome and time consuming (and probably confusing calling for fresh submissions on such provisions). While this is possible legally, it may be not worth it from a management point of view.

14 We have also considered whether Council could rely on a submission received on the PDP that supported the provisions that have been withdrawn and reinstate the provisions on the basis of that submission.

15 We do not think this approach is reasonably viable because it would effectively subvert the plan stop provisions. The PDP is now at a stage where provisions have either been withdrawn, or have been retained if they are subject to an exemption (either automatic or granted by the Minister). If Council could rely on submissions to reinstate withdrawn provisions then this would open the door for any withdrawn provision to be reinstated via this approach. In our view this cannot be correct and would be an approach contrary to what we have already argued (with almost full support of other parties) about the withdrawn overlays. We have argued the withdrawn overlays can also not come back in from a submission because that would subvert the plan stop legislation.

Reasoning

Provisions withdrawn

16 Under section 80Q(1) of the RMA a local authority must withdraw a proposed planning instrument (…) unless:

(a) an exemption applies under section 80U; or

(b) the local authority has applied for an exemption under section 80V; or

(c) the Minister directs against a withdrawal under section 80T.

17 Further 80Q(3) clarifies that:

> To avoid doubt, if an exemption applies only to part of a proposed planning instrument, the remaining parts of that instrument must be withdrawn in accordance with subsection (1).

18 As noted above, Council sought exemption for earthworks standards 1 (as it relates to the former GRUZ), and 5-10. The exemption granted by the Minister covered these earthworks provisions only. This means that Council was required to and did withdraw all non-exempted earthworks provisions.

19 Section 80Y of the RMA places a duty on local authorities to give public notice of the status of any proposed planning instrument.

20 Under subsection 80Y(2)(a) the notice must specify the whole or the part of a proposed planning instrument that has been withdrawn and the date of its withdrawal.

21 Council gave public notice pursuant to section 80Y of those parts of the PDP that were withdrawn as of 15 January 2026. This notice specified that the earthworks chapter had been withdrawn aside from those provisions exempted by the Minister.

22 Therefore from 15 January 2026 all earthworks provisions not covered by the exemption were formally withdrawn by decision of Council and ceased to exist. We do not consider Officers reasonably have the delegation or power to decide not to action that decision of Council. We consider Federated Farmers is raising a fair challenge that the public facing version of the Plan does not properly reflect the record of what is should show.

23 We therefore recommend the withdrawn provisions referred to above should now be shown as deleted in the exemptions version of the plan to correct this.

A new exemption application

24 Section 80V(1)(a) of the RMA permits councils to apply for an exemption from the prohibition against notifying a draft planning instrument in section 80P.

25 The Minister can grant that exemption where one or more of the criteria set out in section 80W are satisfied.

26 Section 80W(2)(b) provides for an exemption in circumstances where an exemption would rectify any provisions in a plan or policy statement that have had unintended consequences, are unworkable, or have led to inefficient outcomes.

27 We understand that Council's position is that the retention of the earthworks objective, policies, and rules is necessary to ensure that the retained exempted standards can operate effectively. Specifically:

(a) EW-O3, EW-P6 and EW-P7 were retained to provide the policy framework and guidance necessary for the interpretation and implementation of the retained rules and standards.

(b) EW-R6 -"Earthworks and land disturbance within the National Grid Yard" has been retained to operate as part of the Energy chapter and rules relating to the national grid yard. These rules in the Energy Chapter were identified in the exemption application and remain in effect.

(c) EW-R1 establishes the permitted earthworks activity status and links to the retained area threshold in EW-S1. Accordingly part of EW-R1 was retained to provide the relevant activity status and consenting pathway as part of the standard in EW-S1 is remaining. This is much

more directly related to the part of EW-S1 that remains and seems a necessary rule to keep live as part of EW-S1.

28 On the basis of this information, we consider that Council would be able to make a good case for an exemption under section 80W(2)(b), but this would need a fresh application.

29 Please let us know if we can be of further assistance on this matter.

Yours faithfully
Anderson Lloyd



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