IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Submissions and Further Submissions on the Proposed Wellington City District Plan

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Minute 31:

Hearing Stream 4 – City Outcomes Follow-up

Introduction

1. During the course of the Stream 4 hearing, the Hearing Panel became concerned about a number of aspects of the proposed City Outcomes Contributions provisions of the PDP, as notified and as recommended to be amended by Council reporting officers. These concerns relate to the legal soundness of some of the provisions.

2. The City Outcomes Contributions provisions are novel and relatively complex, and as notified, would apply across several urban zones. These provisions were opposed by a wide range of submitters, including development interests, community and special interest groups. As these are IPI provisions and thus not be able to be appealed, the Panel considered it essential to have our concerns independently reviewed.

3. Against that background, the Hearing Panel requested Mr James Winchester, Barrister, to provide it with an opinion focussing on two key questions about the City Outcomes Contributions provisions:

    - Is it legally valid to guarantee additional height through the IPI/PDP in return for providing outcomes that are not directly related to the effects of the additional height, noting that the effects of the height would be addressed under a separate building design resource consent process as well as meeting other plan standards (for example, wind, shading)?
    - Is it legally valid according to public law principles to require mandatory public notification for a proposed over/under height building to "discourage" applications seeking to avoid the COC Policy pathway, particularly when the mandatory notification pathway is for a restricted discretionary activity?

4. Mr Winchester's opinion is attached and speaks for itself.

5. Given the conclusions Mr Winchester has reached, it is appropriate that we give the Council the opportunity to respond in relation to those areas of Mr Winchester's advice where they disagree with the Reporting Officer's recommendations. We emphasise that this is not an opportunity to repeat arguments we have already heard, but rather to alert us to any additional considerations we might need to bear in mind before reaching our own view.

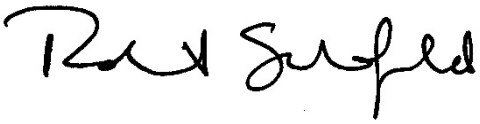
6. Furthermore, the Panel is interested in whether Mr Winchester's advice would alter any of the recommendations in respect of the City Outcomes Contributions.

7. We direct that the Council response to our requests be in hand not later than Wednesday 20 September 2023.

8. If any other party to the City Outcomes Contributions provisions wishes to challenge Mr Winchester's reasoning on any aspect of his opinion, they can provide submissions within the same timescale; that is to say, not later than Wednesday 20 September 2023.

9. Finally, we note that, in their written reply, the reporting officers have recommended removing the mandatory public notification requirements that were proposed at the time of the Hearing on the Centres' provisions and that were the subject of our second question, as above.

10. If you have any questions or concerns relating to this hearing, please contact our Hearings Co-ordinator at jaskirat.kaur@wcc.govt.nz.



Robert Schofield
For the Wellington City Proposed District Plan Hearings Panel on Stream 4

Dated: 11 August 2023

JAMES WINCHESTER
BARRISTER

8 August 2023

The Chair
Independent Hearing Panel
Wellington Proposed District Plan Hearings
c/- Wellington City Council
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For: Robert Schofield

Proposed Wellington District Plan and Intensification Planning Instrument – City Outcomes Contribution Policy

1. This advice relates to a request from the Independent Hearings Panel (**IHP**) conducting hearings on the Wellington City Proposed District Plan (**PDP**) and the Wellington City Intensification Planning Instrument (**IPI**) for advice on the validity of the approach in the City Outcomes Contribution Policy (**COC Policy**) and possible mandatory public notification of resource consent applications which do not give effect to the COC Policy.

Background issues and questions to be addressed

2. The Wellington City Council (**WCC**) has included the COC Policy and related provision in its notified IPI/PDP. The COC Policy applies to development in the City Centre Zone, the Metropolitan Centre Zone, Local Centre Zone, Neighbourhood Centre Zone and High Density Residential Zone.

3. The COC Policy adopts a relatively novel approach to enabling applications for higher buildings (beyond specified permitted height limits) to be sought by creating a points mechanism to assess public open space and amenity outcomes, sustainability and resilience outcomes, and assisted housing outcomes that might be volunteered by applicants.

4. WCC officers have, through supplementary evidence, advanced a modified version of the COC Policy and associated provisions, but there are complex underlying legal issues which are relevant to both the notified and modified provisions. In addition, WCC officers had recommended in their supplementary evidence that relevant rules make public notification of applications for over-height buildings mandatory if the applicant elected not to advance initiatives envisaged by and giving effect to the COC Policy.

5. The WCC approach has attracted criticism from a number of submitters. In turn, the IHP is concerned, in assessing submissions and making recommendations, to understand the validity of the approach in both the original and modified COC Policy and the related notification rule.

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6. WCC officers have, through their right of reply, withdrawn their recommendation for mandatory public notification of applications which would not give effect to the COC Policy[1]. Nevertheless, the IHP has sought advice on the validity of such a rule in any event and has sought that this advice address the following questions:

   a. Is it legally valid to guarantee additional height through the IPI/PDP in return for providing outcomes that are not directly related to the effects of the additional height, noting that the effects of the height would be addressed under a separate building design resource consent process as well as meeting other plan standards (for example, wind, shading)?

   b. Is it legally valid according to public law principles to require mandatory public notification for a proposed over/under height building to "discourage" applications seeking to avoid the COC Policy pathway, particularly when the mandatory notification pathway is for a restricted discretionary activity?

7. These questions and relevant legal principles relating to the issues are addressed in further detail below.

Summary of advice

8. The COC Policy approach is novel and incorporates a number of elements that are legally problematic. The recommendations in supplementary evidence from WCC officers create additional legal complexity compared to the notified version.

9. The outcomes sought by the COC Policy and related provisions are not a financial contribution, but are more in the nature of works and/or enhanced sustainability or public good outcomes.

10. While the COC policy and related provisions are highly directive, the policy is not a rule. In any event, it is now generally accepted that policies in planning documents prepared under the Resource Management Act 1991 (**RMA**) can be highly directive and essentially have regulatory effect.

11. While it will likely be a matter that is highly relevant to whether the provisions are justified on the merits, the absence of a clear link between the effects of additional height and the outcomes intended by the COC Policy is not fatal in terms of validity. There are examples of valid RMA provisions where there is no direct link between the effects under consideration and the outcomes being sought. An obvious example is financial contributions, where case law has made it clear that there does not need to be a clear nexus between the environmental effect of the activities for which contributions are taken and the level of contribution.

12. In addition, the RMA has a relatively broad statutory purpose and the subject matter of the COC Policy is not clearly beyond that purpose. Case law relied upon by WCC suggests that, in order for the provisions to be within WCC's functions under section 31 of the RMA, there should be a link between the effects of concern and the provisions which address those effects. It is however permissible to advance provisions which do not have a clear relationship between effects generated and the outcomes sought.

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[1] I have reviewed the WCC officers right of reply and legal submissions in reply, dated 4 August 2023, and there is only one new matter that I have been asked by the IHP to address, as identified later in this advice

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13. The COC Policy and related provisions are also not unlawful for the way in which they might duplicate or address legal requirements under other legislation.

14. The operation of the COC Policy and related provisions as recommended by WCC officers in supplementary evidence is, however, highly problematic from a certainty perspective, and could result in the reservation of unlawful discretions. Invalidity would be most likely to arise due to the significant uncertainty resulting from WCC officers' recommendations.

15. The purpose of public notification under the RMA is intended to result in an opportunity for further relevant information being elicited about the effects of the proposal, to ensure that adequate, reliable and/or relevant information concerning the effects of a proposal is available to the decision-maker. A mandatory notification rule does not serve that purpose.

16. A mandatory public notification rule for applications which did not "give effect to" the COC Policy would clearly be in breach of public law principles, to the extent it would have the purposes of discouraging a particular activity and/or encouraging applicants to pursue a particular policy pathway. This would essentially involve the imposition of a rule for an improper purpose and would therefore be unreasonable in a public law sense.

The COC Policy and related provisions

17. It is useful to examine how the COC Policy and related provisions are intended to operate before considering its validity. In the IPI/PDP as notified, using the City Centre Zone as an example, the COC Policy is CCZ-P11. It provides as follows:

> Require over and under height, large-scale residential, non-residential and comprehensive development in the City Centre Zone to deliver City Outcomes Contributions as detailed and scored in the Centres and Mixed Use Design Guide guideline G107, including through either:
>
> 1. Positively contributing to public space provision and the amenity of the site and surrounding area; and/or
> 2. Incorporating a level of building performance that leads to reduced carbon emissions and increased climate change resilience; and/or
> 3. Incorporating construction materials that increase the lifespan and resilience of the development and reduce ongoing maintenance costs; and/or
> 4. Incorporating assisted housing into the development; where this is provided, legal instruments are required to ensure that it remains assisted housing for at least 25 years; and/or
> 5. Enabling ease of access for people of all ages and mobility.

18. The Centres and Mixed Use Design Guide (**Design Guide**) referred to in the policy includes an assessment framework against five factors, which aim to incentivise "density done well" by giving density-related development concessions in return for publicly beneficial outcomes. The framework identifies the types of development that trigger consideration of the COC, including numeric thresholds to be satisfied and the outcomes sought in Tables 1 and 2.

19. Table 3 in the Design Guide then identifies the points that can be achieved by provision or adoption of various outcomes, that together count towards the identified thresholds. In essence, the more points that can be scored for beneficial outcomes, the greater the exceedance of the

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permitted height limits is able to be sought[2]. Table 3 identifies points that can be scored for certain factors which are capable of being objectively ascertained[3], whereas other factors[4] will score points based on the exercise of a discretionary and potentially subjective judgment by WCC in assessing an application.

20. Other than an assessment by the WCC Urban Design Panel (worth up to 10 points), none of the factors identified in Table 3 has an obvious relationship to the effects generated by an over-height building. In fact, most of the factors have no relationship at all with the environmental effects of an over-height building.

21. The COC Policy and the Design Guide for the calculation of the COC are then matters of discretion under rule CCZ-R19.2 and CCZ-20.2. Rules precluding public (and in some instances limited) notification are also provided for dependent upon the breach of relevant standards.

Modified provisions

22. WCC officers have, in supplementary evidence statements, proposed material changes to the COC Policy in the Central City Zone which seek to clarify its application. The COC Policy was not recommended to be materially changed in terms of its substance, but the framework around it and its intended application was quite different.

23. Material changes have been proposed by WCC officers to rules CCZ-R19 and R20. In addition, the assessment framework formerly included in the Design Guide is now proposed to be located in Appendix 16 to the IPI/PDP. Rules CCZ-R19 and R20 are proposed to be amended by the inclusion of a new sub-rule 3 which:

    a. explicitly links the maximum building heights in CCZ-S1 with the COC Policy by referring to them as City Outcome Contribution Height Thresholds and makes breach of those standards a restricted discretionary activity;
    b. makes the matters in the COC Policy a matter of discretion, along with the application of the Appendix 16 points assessment framework (formerly Table 3 in the Design Guide);
    c. changed the previous notification position by directing that an application that did not give effect to the COC Policy must be publicly notified.

24. It is primarily the modified position being advanced by WCC officers that the IHP has sought advice about, although some of the legal issues are common to both sets of provisions.

Effect of the COC Policy

25. While the COC Policy refers to a contribution, the outcomes that it seeks are not a financial contribution under the RMA[5]. Indeed, apart from the outcomes that involve matters such as provision of public open space, laneways, communal gardens and playgrounds, and provision of public amenities such as public toilets, most of the outcomes involved would be difficult to validly impose as conditions of resource consents unless they were volunteered by an applicant[6].

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2 A proposed development that exceeds the maximum height limit by 25-49% requires 30 points
3 For example, achievement of certain Green Star building standards scores an identified number of points
4 Points for provision of public toilets depend upon the quality, extent and level of amenity that each solution provides
5 Section 108(9) provides that a financial contribution is either money or land, or a combination of these
6 Although the existence of plan provisions requiring provision of city outcomes would provide a lawful foundation in terms of section 108AA(1) of the RMA

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26. The proposed operation and effect of the COC Policy is unusual. As notified, the COC Policy appeared to operate more as a discretionary matter to have regard to as part of a restricted discretionary activity application for over-height or under-height buildings. As a simplified explanation, it appears that the points to be accumulated through provision of identified City Outcomes would have been used to justify higher buildings, with the positive outcomes being given weight in an assessment exercise as against potential adverse amenity consequences of a higher building.

27. The position has changed considerably in terms of what has been recommended in the supplementary evidence of WCC officers. In my view, the suite of changes recommended mean that the operation of the COC Policy and associated provisions would be more in the nature of rules or standards.

28. While the accumulation of points calculated under Table 3 would not of itself change the permitted maximum heights for buildings specified in IPI/PDP standards, the points accumulated would appear to enable height exceedances up to various percentages which are *effectively* a permission. This is because the need to comply with maximum height limits standards has been proposed to be removed as a permitted activity standard, and the effects of the exceedance of height standards would not be a restricted discretionary matter.

29. In essence therefore, my understanding of what is recommended by WCC officers is that the effective permission of an over-height building will be determined by an assessment of the total number of City Outcomes Contribution points. The direct effects of an over-height building cannot be considered under the relevant provisions. The only matters proposed to be considered under relevant rules[7] are the matters in the COC Policy and the application and implementation of the City Outcomes Contribution in Table 3.

30. Notwithstanding this position, it would seem that design and amenity effects and considerations for a building might still be triggered depending upon whether other rules and standards apply, but it is not entirely clear whether they would extend to the effects of additional height.

31. The other factor to note was the recommended mandatory public notification of proposals which did not give effect to the COC Policy, as identified above.

Validity of COC Policy

32. There are a range of complex legal issues that arise with regard to the position recommended by WCC officers.

33. As such, while the focus of this advice is on the validity of the COC Policy, it is probably helpful to consider the recommended provisions as a package given the way in which WCC officers recommended changes to the structure and operation of the COC Policy.

Is the policy effectively a rule?

34. I have noted earlier that the COC Policy and associated provisions are now recommended by WCC officers to operate in a manner akin to a rule or standard. That of itself does not make the COC

[7] For example, rule CCZ-R19.3 and CCZ-R20.3

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Policy legally invalid. While it related to the contents of a regional policy statement, it has been held by the Court of Appeal in a relatively early RMA case that a policy in an RMA plan can be highly specific and may in reality have regulatory effect[8]. A policy is a course of action, and can be either flexible or inflexible, broad or narrow. It can include something highly specific and act as a direction about a course of action.

35. This legal principle has been followed and reinforced by the Supreme Court in the *Environmental Defence Society*[9] case. In my view, while a policy having a regulatory effect akin to a rule is not legally invalid in principle, the operation of the COC Policy and associated provisions could still be unlawful or invalid depending upon other legal factors (which I will discuss in further detail below).

Need for an effects-based rationale?

36. There are several cases where the validity of RMA provisions has been assessed based on whether they take an effects-based approach. In the case of the COC Policy, the underlying issue is whether it is valid to provide for additional height in return for providing outcomes that are not directly related to the effects of the additional height.

37. The purpose of a district plan is to assist territorial authorities to carry out their functions and achieve the purpose of the RMA[10]. Under section 74(1) of the RMA, the preparation and change of a PDP must be in accordance with several relevant statutory matters. Section 75 identifies the contents of district plans. There are no direct references to environmental effects in these provisions.

38. Section 76 relates to rules in a district plan, and section 76(1) provides that rules may be included by a territorial authority for the purpose of carrying out its functions and achieving objectives and policies of the plan. In addition, section 76(3) expressly provides:

> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

39. In addition, section 76(4) provides that a rule *may* make different provision for different classes of effect arising from an activity[11] and require a resource consent to be obtained for an activity causing adverse effects not covered by the plan[12]. While there is a requirement to have regard to the actual and potential effect of activities in making a rule, the statutory language is generally permissive and does not require there to be a link between the content of a rule or provision and the effects that it seeks to manage or promote[13].

40. It has been held by the High Court that there does not need to be a solely effects-based rationale in order for a provision in an RMA plan to be valid[14]. The requirement in section 76(3) does not

8 See *Auckland RC v North Shore CC* [1995] 3 NZLR 18 regarding the imposition of a rigid policy allowing for urban development only within metropolitan urban limits

9 *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593

10 Section 72 RMA

11 Section 76(4)(b)(ii)

12 Section 76(4)(e)

13 An example of a rule incentivising certain outcomes that I am aware of is the "bonus lot" rule in Taupō district, which allows for the subdivision of bonus allotments as a restricted discretionary activity in the Rural Environment, where identified parts of Significant Natural Areas are formally protected

14 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC)

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mean that a rule or provision must have an effects-based rationale. Provisions can be based on matters of policy provided they satisfy other legal requirements.

41. To the extent that the COC Policy and related provisions might be regarded as a form of compensation or offset for the effects of additional building height, I note that they could be argued to be within the contemplation of section 104(1)(ab) of the RMA as:

> any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity …

42. It will of course be relevant to the merits of a provision as to whether it will appropriately relate to or address the effects that are of concern[15]. The fact that provisions do not address the adverse effects generated by an activity subject to those provisions, and actually address different effects and outcomes, will likely be relevant to a section 32 assessment of efficiency and effectiveness.

43. Finally, in terms of relevant case law on the need for a nexus between a provision and its environmental effect, I note that (as a matter of legal principle) financial contribution provisions are not required to establish a relationship between effects and the level or subject matter of a contribution.

44. Section 108(10)(a) of the RMA does provide that a stated purpose of a financial contribution *may* be to ensure positive effects on the environment to offset any adverse effect[16]. In addition, the Environment Court has held that the purpose of financial contributions under the RMA is to compensate for remote effects where the exact degree of cause and effect is not known. Therefore the RMA enables contributions to be determined in accordance with the terms of the plan, to avoid having to assess, with impossible accuracy, proof of the causal relationship and scale of effects[17].

45. Accordingly, while financial contributions under the RMA are subject to quite a distinct regime and are not directly comparable to the COC Policy and related provisions, they support the principle that there is no requirement for there to be clear linkage between the subject matter of a provision and the effects that it addresses. I do not consider that the COC Policy and associated provisions are necessarily invalid on that basis.

Valid resource management purpose

46. Issues have been raised by submitters as to whether the COC policy is within WCC's statutory functions and serves a valid resource management purpose.

47. A useful High Court decision which considers this question is *Infinity Investments*[18] involving a proposed plan change regarding provision of affordable housing. I note this case has been relied upon by counsel for WCC as supporting the availability and lawfulness of the COC Policy and related provisions.

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15 *Horticulture New Zealand Ltd v Far North District Council* [2016] NZEnvC 47
16 *Prospectus Nominees v Queenstown Lakes DC* EnvC A123/99
17 *Wensley Developments Ltd v Queenstown Lakes DC* EnvC C133/04
18 *Infinity Investments Group Holdings Ltd v Queenstown Lakes District Council* [2011] NZRMA 321

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48. The *Infinity* case considered the question of whether it was lawful, at a threshold level, for the council to initiate a plan change which dealt with affordable housing. The Environment Court had held, following a preliminary issues hearing, that affordable housing fell within the scope of the RMA, that it was not prohibited by section 74(3), that the management of affordable housing in other legislation did not prevent the issue being addressed under the RMA, and that the proposed rules related to a resource management purpose.

49. The High Court considered these findings, which were all appealed, and held (to the extent relevant to the present circumstances):

a. the statutory purpose comprises two components arising from section 72 of the RMA, being the functions of territorial authorities under section 31 and the purpose of the RMA under Part 2;
b. in terms of section 31, the integrated management functions in subsection (1)(a) mean that there must be a link between the effects of use or development of the land and the objectives, policies, and methods that are established;
c. the affordable housing plan change was within the function under section 31(1)(a) as it concerned a perceived effect of future development of land in the district, and the requirement to provide affordable housing would only arise if the development is constructed and has an impact on the issue of affordable housing – meaning the requisite link existed between the effects and the instrument used to achieve integrated management;
d. similarly, under section 31(1)(b), the wide function of control of effects of use and development of land meant that if the use or development of land within the district pushed up land prices and/or impacted on affordable housing, then the council had the power to control the effects through its district plan (subject to provisions being justified on their merits);
e. in terms of Part 2 of the RMA, the language of section 5 is broad and the concept of social and economic wellbeing was wide enough to include affordable and/or community housing; and
f. the particular provisions of the Affordable Housing Act 2008 (which had been repealed by the time the matter was before the High Court) supported the interpretation that the affordable housing plan change was within the scope of the RMA, because of references within that legislation to the council's powers under the RMA.

50. The effect of the High Court decision in *Infinity* was that the affordable housing plan change was not unlawful in terms of dealing with the issue, and could be further considered on its merits.

51. I have reviewed legal submissions for WCC and some submitters which address the COC Policy and related provisions. Most of the legal submissions focus on the question of whether the COC Policy is justified on the merits, although the legal submissions for WCC, Kāinga Ora – Homes and Communities (**Kāinga Ora**), and Argosy Property No 1 Limited and others (**Argosy**) do address the *vires* issues.

52. In my view, the first issue to consider is whether the subject matter of the COC Policy deals with issues that might be within the scope of the RMA's statutory purpose. On their face, enhanced sustainability/accessibility of buildings (including meeting Lifemark or Green Star standards), provision of assisted housing, reduction in embodied carbon in buildings, seismic resilience, heritage restoration and enhanced public amenity are all matters which are likely within the scope of the RMA's broad statutory purpose.

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53. With reference to matters such as Lifemark and Green Star standards, I note that the Independent Hearing Panel for the Christchurch Replacement District Plan (**CRDP**) considered whether such standards should be adopted in relevant chapters of that planning document as rules or standards for new residential units[19]. The decisions of that Panel, while acknowledging the benefits for people and communities from better life stage and energy efficient design and construction[20], noted that the costs, risks and benefits of a regulatory approach had not been properly identified and declined to approve the rules.

54. Notably however, the CRDP Panel did approve policy support for non-regulatory approaches to encouraging promotion of low impact urban design elements, energy and water efficiency, and life-stage and adaptive design[21]. Whilst not determinative of the issue, in my view it illustrates that such subject matter can lawfully be within the scope of the RMA – the important issue being not the "what" but rather the "how" in terms of how a planning instrument seeks to address or regulate these things.

55. In terms of whether the matters addressed by the COC policy are within the WCC'S functions under section 31 of the RMA, I have understood the legal submissions for Argosy to suggest that, because the relevant provisions do not seek to manage the relevant effects of the use of land (ie. over-height buildings), the absence of a link between effects and the subject matter of the provisions means that the proposed regulation falls outside WCC's functions.

56. The legal submissions for WCC[22] assert that the position regarding the *vires* of the COC Policy is no different to the *Infinity* case, other than it is suggested that the promulgation of the NPS-UD makes the *vires* issue even clearer. This reasoning is not expanded upon, but I would observe that the High Court in the *Infinity* case did suggest that there should be a link between the effects of use or development of land and the subject matter of a provision in order for the subject matter to fall within the council's functions. It found in the *Infinity* case that the requirement to provide affordable housing would only arise if the development is constructed and has an impact on the issue of affordable housing, meaning the requisite link existed between the effects and the instrument used to achieve integrated management.

57. The WCC legal submissions do address the need for a causal link between the subject matter of the COC policy and related provisions and the effects that it seeks to address. The WCC submissions note that the link is not a complete or direct one between height and some of the adverse effects of higher, denser development that require amelioration[23].

58. The WCC legal submissions are difficult to follow and potentially contradictory on this point. They appear to say that there is no requirement for a direct link between the effects of higher development and the subject matter of the COC Policy on the one hand, but then justify the proposed COC Policy approach as being relevant and related to the amelioration of the higher level of adverse effects generated by over-height buildings. The WCC legal submissions do not identify which matters in the COC Policy ameliorate the effects of over-height buildings nor how they do it.

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19 See http://chchplan.ihp.govt.nz/wp-content/uploads/2015/03/Residential-Stage-1-decision.pdf
20 Ibid, at [36]
21 Ibid, see policy 14.1.4.2 at pages 130-131
22 Legal submissions on behalf of WCC, Hearing Stream 4, 20 June 2023 at para 3.3
23 Ibid at para 3.4

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59. I consider it to be clear that there is no direct link nor logical relationship between the effects of an over-height building and the matters addressed by the COC Policy. The COC Policy does not relate to nor ameliorate the effects of over-height (or under-height) building development[24]. The reality is that the COC Policy and related provisions are measures which appear to have the purpose of ensuring positive effects on the environment to compensate for certain adverse effects on the environment that will or may result from allowing the activity. They are not strictly an offset because they do not relate to the adverse effects which will be generated.

60. One further issue identified in the WCC officers right of reply that I have been asked to address relates to the preceding paragraph. The IHP posed a question during the hearing about whether a positive outcome or benefit volunteered by an applicant, but which was not identified in the COC policy, could be taken into account under the proposed framework. The right of reply addresses this issue[25] and suggests that it would be possible for such an additional benefit to be taken into account in accordance with section 104(1)(ab).

61. Given that the activity status for relevant applications would be restricted discretionary, an application would be considered in accordance with section 104C of the RMA. Unless a matter over which WCC had restricted discretion allowed for consideration of additional benefits or positive outcomes beyond those identified in the COC Policy, as a matter of law, I doubt whether those benefits could be considered or given weight. I do not agree that section 104(1) applies to supplement the clear statutory effect of section 104C[26].

62. Putting these matters to one side, as I have noted earlier with regard to the need for an effects-based rationale, while the way in which the COC Policy and related provisions has been advanced is novel and unusual, I do not consider that the subject matter is beyond the scope of the RMA's purpose nor WCC's statutory functions. It may however still be legally invalid for other reasons.

Duplication of other legal requirements

63. The legal submissions for Kāinga Ora identify that the inclusion of matters in the COC Policy, which duplicate processes already sufficiently provided for the in the Building Act 2004, is problematic and inappropriate. Relevant case law is identified in the legal submissions for Kāinga Ora regarding the relationship between the Building Act and RMA.

64. The criticisms by Kāinga Ora may well be correct but they do not identify that the inclusion of these matters in the COC Policy and related provisions is unlawful. While the WCC officer's recommendations about how the COC Policy and related provisions are framed changed materially from the IPI/PDP as notified, I do not understand that they would impose higher standards than the Building Act but rather would encourage or incentivise adoption of those standards by applicants.

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24 There is potentially a tenuous link, albeit for only some of the "outcomes", in terms of the occupants of large-scale buildings putting a strain on open space, toilets etc, however this would not apply to under-height buildings and nor are "large" footprint/GFA buildings proposed to be captured by this policy

25 See paras 110 – 114 of WCC right of reply

26 Ibid at para 112

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65. In my view, most of the issues raised by the submitters are directed to the lack of adequate justification for the COC Policy approach on the merits, rather than to the fundamental unlawfulness of the provisions.

Uncertainty and reservation of unlawful discretions?

66. There is however one problematic issue arising from the WCC recommended changes in supplementary evidence that could give rise to questions about uncertainty and validity. This relates to the possibility that the way WCC has recommended the provisions should operate may be void for uncertainty and/or reserve unlawful discretions.

67. In particular, the maximum building height standards at CCZ-S1 are proposed to be amended and labelled as City Outcomes Contribution Height Thresholds. In turn, it is proposed that rules CCZ-R19 (alterations and additions to buildings and structures) and CCZ-R20 (construction of buildings and structures) remove the need for compliance with CCZ-S1 as a permitted activity standard.

68. This would mean that it is entirely uncertain at what height an alteration or new building is permitted in the City Centre Zone. It could potentially mean that every building in the City Centre Zone requires a resource consent irrespective of its height, but it is not clear which rule would regulate that possible scenario.

69. Building heights are however proposed to be regulated through rules CCZ-R19.3 and CCZ-R20.3 in accordance with the COC Policy and related provisions, but only if the thresholds in CCZ-S1 are exceeded. The result of this approach is that the COC Policy and related provisions appear to leave a gap and material uncertainty as to how the package works if the thresholds are *not* exceeded.

70. One possible interpretation is that every alteration or new building in the City Centre Zone needs to be assessed under rules CCZ-R19.3 and CCZ-R20.3 as a restricted discretionary activity. If that is the case, then it is my opinion that the rule framework proposed would be of questionable validity due to the material uncertainty which is inherent in the drafting approach.

71. For example, in both rules CCZ-R19.3 and CCZ-R20.3, it would be very difficult (if not impossible) to objectively ascertain the "score" that an over-height building or alteration would achieve under the City Outcome Contribution table in Appendix 16. This would require the exercise of subjective judgment or discretion by WCC[27], quite apart from the fact that it may be difficult (if not impossible) in most instances for an applicant to provide WCC with sufficiently detailed information at the lodgement of its resource consent application for WCC to effectively assess Lifemark, Green Star or Home Star ratings and hence points.

72. This situation would then translate into uncertainty and/or the exercise of judgement or discretion by WCC about how many points are accrued and what percentage range the allowable additional height would fall into. A conclusion that a proposal does not "give effect to" the COC Policy CCZ-P11 would, in my view, be materially uncertain and potentially open to considerable debate. An assessment of failure to give effect to the COC Policy did however have a consequence, in that it was recommended by WCC officers to result in mandatory public notification of an application.

[27] For example with regard to heritage restoration, seismic resilience measures, reduction in embodied carbon, provision of communal gardens and playgrounds

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73. Interestingly, mandatory public notification appeared to be the only consequence of a WCC-assessed failure of a proposal to give effect to the COC Policy, because the activity status would remain restricted discretionary in any event. In that respect, there is no trigger - whether objectively ascertainable or otherwise - for an over-height or under-height building which fails to give effect to the COC Policy to be considered as discretionary or non-complying.

74. For these reasons, I have reservations as to whether the COC Policy and related provisions would be sufficiently certain in their interpretation and effect, in the form now recommended by WCC, to be valid.

Validity of mandatory public notification

75. The question posed by the IHP on this issue is framed around the validity of mandatory public notification based on public law principles.

76. I have assumed that the reason why the IHP's question has been framed in that way is because section 77D of the RMA expressly provides for a local authority to make a rule specifying the activities for which public notification is mandatory. If however such a proposed rule breaches public law principles, that could conceivably be a strong reason to not approve such a rule on the merits.

77. Relevant public law principles include the observance of fairness and natural justice, acting rationally and reasonably (and not arbitrarily or disproportionately), exercising powers for a proper purpose, taking into account relevant considerations and ignoring irrelevant considerations, being free of bias and conflicts of interest, following a correct process, and complying with legitimate expectations.

78. In terms of the mandatory notification rule, it is my view that issues of improper purpose and rationality/reasonableness will likely be the most relevant principles (bearing in mind that public law principles do have a high degree of overlap).

79. I note that the legal submissions on behalf of Argosy[28] and Foodstuffs North Island Limited[29] address the appropriateness of requiring public notification for the purpose of discouraging activities (in that case, at grade car-parking). It is understood that the WCC officer rationale for employing mandatory public notification was expressed in the relevant section 42A report as being for the purpose of discouraging carparking in the CCZ.

80. There is a significant body of case law which identifies that one of the key purposes of public notification is to ensure that an opportunity is available for adequate, reliable and/or relevant information concerning the effects of a proposal to be available to the decision-maker, so that a decision-maker is sufficiently and relevantly informed[30].

81. I consider that it would be in breach of public law principles for a local authority to seek a mandatory notification rule for the purposes of discouraging a particular activity and/or

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28 Legal submissions for Argosy and others, Hearing Stream 4, 20 June 2023 at [32] – [34]

29 29 Legal submissions for Foodstuffs North Island Ltd, 20 June 2023 at [25] – [28]

30 See for example *Ferrymead Retail Ltd v Christchurch CC* [2012] NZHC 358 and *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405

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encouraging applicants to pursue a particular policy pathway. This would essentially involve the imposition of a rule for an improper purpose and would therefore be unreasonable in a public law sense.

82. This is apposite to the circumstances identified earlier with regard to the COC Policy and associated provisions. In this instance, the consequence of failing to give effect to the COC Policy had been recommended to be public notification of an application. The purpose that such mandatory public notification would have served is difficult to identify in terms of the normal operation of RMA resource consent processes, because it is doubtful that it would result in further relevant information being elicited about the effects of the proposal (at least under the rule framework proposed, in that the application would remain a restricted discretionary activity irrespective of whether the COC Policy was "given effect to").

83. As such, it would appear that the use of a mandatory public notification rule with regard to the COC Policy would be either punitive (ie. in that an applicant had not volunteered enough public good "compensation" to score sufficient points to give effect to the COC Policy), or would act as a form of inducement for applicants to provide further positive measures so as to avoid the time, cost and public scrutiny of a fully-notified resource consent process.

84. Given also the high level of uncertainty and subjectivity in an assessment of whether the COC Policy would be "given effect to", a mandatory public notification rule would also raise fairness and rationality concerns.

85. I therefore consider it to be clear that the mandatory notification rule, as previously advanced by WCC officers with regard to the COC Policy, would infringe a number of public law principles.

Summary of position

86. While the factual and legal situation concerning this advice is highly complex, I trust that the advice above has addressed the IHP's questions such that no further elaboration is required at this point.

87. If you require any further advice or clarification on this matter, please let me know.

Yours sincerely

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