Before Independent Hearing Commissioners
Wellington City Council

I Mua Ngā Kaikōmihana Whakawā Motuhake
Te Kaunihera o Pōneke

In the matter of **The Wellington City Proposed District Plan**

Legal submissions on behalf of Wellington City Council

Minute 6: Allocation of Topics

8 February 2023

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Legal submissions on behalf of Wellington City Council

Minute 6: Allocation of Topics

1 Summary of submissions

1.1 Minute 6 identifies two issues that the Panel would like to be addressed:

(a) Whether the Panel has the power to hear submissions on provisions notified as falling within the ISPP under the 'normal' First Schedule process, and vice versa (or put another way, whether the Council's identification on the face of the PDP as notified, of the process each provision falls under, is conclusive);

(b) If it finds that it has the power, whether the Panel should exercise it in relation to the provisions put in issue by the parties.

1.2 I propose to answer these questions by discussing the process the Council has followed to date by way of chronology, followed by some of the legislative provisions governing the ISPP process and IPI content.

1.3 This morning the Panel released Minute 7. It appears that the Council and myself have been confused about the issues we were being asked to address. Nonetheless, in the course of addressing arguments on the particular provisions included within the IPI and wider plan respectively we have addressed the jurisdictional point as it is referred to in Minute 7. In the circumstances I have been instructed to lodge this memorandum "as is" and if it transpires that there are any additional matters the Panel would like to hear from me or Council officers on, that can be addressed at the hearing.

1.4 The Council answers the questions posed in Minute 6 in the following way:

(a) The Panel has the power to hear submissions on provisions notified as falling within the ISPP even where it considers that a provision ought to have been included in the other process. The Council's identification on the face of the PDP as notified is conclusive.

(b) Putting this another way, the Council does not consider that the Panel has a power to 'reallocate' provisions between the two processes.

(c) Even if it did have such a power, there is no need to exercise it in respect of the provisions referred to in the submitters' memoranda. To the contrary, the Council's 'allocation' decisions were correct and appropriate (except arguably in respect of two policies identified by Kāinga Ora).

(d) Accordingly, even if the Panel finds that it has such a power, there is no basis for its exercise in relation to the provisions put in issue by the parties.

2 District Plan Review

Chronology

2.1 Preparation to undertake a full District Plan Review started in 2017. The Council developed and tested four growth scenarios.

2.2 Between 2018 and 2021 the Council established a framework for progressing the District Plan Review, called Planning for Growth. Under this framework the Council consulted the public on the four growth scenarios and developed, consulted on, and finalised a Spatial Plan.

2.3 In November 2021, the Council started public consultation on a Draft District Plan. However, around two weeks prior, in October 2021, the bill that has since become the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) was announced.

2.4 The Amendment Act required certain territorial authorities to change their district plans to incorporate the MDRS into relevant residential zones and give effect to stated policies of the NPS-UD. To do this, tier 1 territorial authorities such as Wellington City Council had to notify an Intensification Planning Instrument or "IPI" by 20 August 2022. The Act sets out a bespoke process for IPIs to undertake called the Intensification Streamlined Planning Process or "ISPP".

2.5 Naturally, territorial authorities had district plans in different stages of development or status. For most tier 1 territorial authorities this meant progressing a plan change to their existing district plan. For at least one territorial authority, Porirua City Council, it required a variation to its proposed district plan which was then, as now, in its hearing stage. Alone, to my knowledge, among tier 1 territorial authorities, Wellington City Council had to determine how to progress its IPI alongside an underway full District Plan Review. At the time of the introduction of the new legislation, the Council was intending to notify its proposed district plan in 2022. This was, give or take, within the same timeframe as its IPI was required by the Amendment Act, but was of course an entirely new district plan covering content outside the scope of an IPI, as well as content that gave effect to the NPS-UD.

2.6 This left the Council having to grapple with a number of issues of efficiency. Essentially, would it be better to run its ISPP and remaining plan process entirely together, entirely separately, or by way of some middle ground that sought to provide relative ease for public engagement?

2.7 Initially, the Council sought in submissions on the Bill that it provide for the Council's entire proposed district plan to be progressed using the ISPP. This would been ideal from an efficiency perspective. As Mr McCutcheon notes in his supplementary evidence the Select Committee did not accede to that request.

2.8 Next, on 31 March 2022 Council officers sought the Council's approval to seek Ministerial approval to a streamlined planning process under s 80B of the RMA, designed so as to follow or mimic the course of the ISPP. If adopted, this would have meant that the Council's proposed district plan would proceed through an apparent single process from an engagement

perspective. It was not adopted by the Council, which resolved that the remainder of the proposed plan should proceed through the standard Schedule 1 process.

2.9 The Council then decided to notify the district plan in such a way as to reduce the work that the public would otherwise have to do to engage in two separate processes over two separate timeframes. Relevantly, the Council decided:

(a) To notify the IPI on the same day as the remainder of the proposed district plan;

(b) To produce one proposed district plan for notification with provisions labelled according to whether the provision formed part of the IPI, or part of the wider plan; and

(c) To appoint the same hearing commissioners to both the panel hearing submissions on the IPI and the panel hearing submissions on the remainder of the plan.

Relevant legislative provisions

2.10 A territorial authority must review district plan provisions at least every ten years (taken on an individual provision basis).[1] Whether or not the territorial authority considers that it requires alteration, it must publicly notify the provision or alteration under Parts 1, 4 or 5 of Schedule 1 of the RMA.[2] A territorial authority may conduct a full plan review at any time, and where it does so, whether or not it requires alteration, it must publicly notify the plan as if it were a proposed plan and in the manner set out in Parts 1, 4 or 5 of Schedule 1.[3]

2.11 Part 1 of Schedule 1 provides for the standard plan-making procedure including for the preparation of proposed plans and change of plans. Parts 4 and 5 of Schedule 1 are irrelevant for present purposes.[4]

2.12 A "plan" is defined in s 43AA of the RMA as a "regional plan or district plan" and a district plan means an operative plan approved by a territorial authority under Schedule 1 and includes all operative changes "whether arising from a review or otherwise". A "change" to a "plan" means a change proposed by a local authority to an [operative] plan under clause 2 of Schedule 1, including an IPI notified under s 80F(1) or (2).

2.13 Section 77G(3) of the RMA provides that when changing its district plan for the first time to incorporate the MDRS and to give effect to policy 3 or policy 5 in residential zones, as the case requires, and to meet its obligations in s 80F, a specified territorial authority (such as Wellington City Council) must use an IPI and the ISPP, and this is mirrored for urban non-residential zones by s 77N.

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1 RMA, s 79(1).

2 RMA, s 79(2) and (3).

3 RMA, s 79(4), (6) and (7).

4 Part 4 provides for the freshwater planning process, and Part 5 the Streamlined Planning Process which the Council rejected in favour of the standard Part 1 process for the remainder of the proposed plan.

2.14 Section 80E defines IPI as "a change to a district plan" with certain mandatory and discretionary content. This provision will be considered in detail further below. The ISPP is provided for in Part 6 of Schedule 1, but by and large the process is set out by express reference to the Part 1, Schedule 1 steps that make up the ISPP.[5] This includes cl 2(1) of Part 1, referred to in the definition of "change" in s 43AA, referred to above.

2.15 The Amendment Act did not provide a specified form for an IPI, nor did it amend the Resource Management (Forms Fees and Procedure) Regulations 2003 to provide for a new form of public notice. The usual forms apply to an IPI as they do to a plan change.

2.16 From these provisions can be distilled these propositions:

(a) A full district plan review resulting in a new proposed plan for a territory is implemented by notifying a change as defined in the RMA to the existing operative plan.

(b) An IPI is also a "change", with the only difference being that some of the Part 1, Schedule 1 steps do not apply to an IPI, such as clause 4 regarding designations.

(c) No provision precludes an IPI and a wider proposed plan or change, whether or not following a full plan review, from being included in the same document. Reinforcing this, s 43AAC relevantly defines proposed plan, unless the context requires otherwise, as a proposed plan, or a change to a plan notified under clause 5 of schedule 1, which has not become operative under clause 20, and expressly includes an IPI. In other words, a document may constitute both an IPI under s 80E and a plan change under s 43AA.

2.17 In this case that is what the Proposed Wellington District Plan is, with each provision notified expressly identifying by label whether it is part of the IPI to progress through the ISPP, or part of the wider plan change to progress through the full Schedule 1 process.

2.18 This is made clear in the Public Notice, which follows the correct form under the Forms Regulations, and distinguishes between decisions on the ISPP parts of the proposed plan which must be issued no later than November 2023 and the rest of the proposed plan which must be issued no later than July 2024.

3 Content allocation

3.1 Section 80E of the RMA provides:

> **80E Meaning of intensification planning instrument**
>
> (1) In this Act, **intensification planning instrument** or **IPI** means a change to a district plan or a variation to a proposed district plan—
>
> (a) that must—
>
> (i) incorporate the MDRS; and

[5] RMA, sch 1, cl 95(2).

(ii) give effect to,—

(A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or

(B) in the case of a tier 2 territorial authority to which regulations made under section 80I(1) apply, policy 5 of the NPS-UD; or

(C) in the case of a tier 3 territorial authority to which regulations made under section 80K(1) apply, policy 5 of the NPS-UD; and

(b) that may also amend or include the following provisions:

(i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T:

(ii) provisions to enable papakāinga housing in the district:

(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—

(A) the MDRS; or

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

(2) In subsection (1)(b)(iii), **related provisions** also includes provisions that relate to any of the following, without limitation:

(a) district-wide matters:

(b) earthworks:

(c) fencing:

(d) infrastructure:

(e) qualifying matters identified in accordance with section 77I or 77O:

(f) storm water management (including permeability and hydraulic neutrality):

(g) subdivision of land.

3.2 WIAL asserts that the Amendment Act spatially limits the use of an IPI to the urban environment, relying on ss 77G and 77N which prescribe where the MDRS policy 3 of the NPS-UD must be implemented. This is not entirely correct. Section 80E expressly permits the IPI to include district-wide matters, which by definition must include provisions applying in non-urban zones.

3.3 WIAL also asserts that for a provision to be a "related provision", it must "support or be consequential to achieving either of the two mandatory outcomes in section 80E(1)(a)". Again, that cannot be entirely correct. Section 80E(1)(b)(iii) provides that an IPI may amend or include related provisions, "*including* objectives, policies, rules, standards, and zones that support or are consequential on" the MDRS or policies 3, 4 and 5 of the

NPS-UD. "Related provisions" is accordingly wider than the stated objectives, policies, rules, standards and zones. This is reinforced by subsection (2), which seeks to define "related provisions" (and uses the statutory drafting technique of bolding the defined term) as "*also includ[ing]* provisions that relate to the listed matters, "*without limitation*". The matters then listed do not in and of themselves suggest that they might be limited to an urban or even residential environment.

3.4 Section 80E does not purport to contain an exhaustive of complete definition of "related provisions". It simply states what the term *includes*. To establish that a provision "relates to" another there simply needs to be a rational link. In context, the Council would accept that the related provision must support or be consequential on other provisions being included in the IPI in some way, but that is all.

3.5 The Council's broader approach to the interpretation of s 80E, based on the text, is also consistent with the purpose of the definition noted by the MHUD and MfE Departmental Report on the Amendment Bill[6] in the passage set out in Mr McCutcheon's supplementary evidence. Following that report the definition was broadened to the drafting eventually passed. The Select Committee Report said:[7]

> We consider that the scope of what could be included in an IPI is too narrow, and recommend broadening it. We propose an amendment to enable councils to amend or develop provisions that support or are consequential on the MDRS and NPS-UD. This *could include* objectives, policies, rules, standards, and zones. It could *also include* provisions that are used across a plan relating to subdivision, fences, earthworks, district-wide matters, infrastructure, qualifying matters, stormwater management (including permeability and hydraulic neutrality), provision of open space, and provision for additional community facilities and commercial services.

3.6 WIAL and other parties, notably Wellington's Character Charitable Trust, overstate the significance of the Council's decision not to fully use the discretionary category of s 80E. This is not a criticism – the same overstatement appears in Mr McCutcheon's s 42A report. But a closer review of the Council's decisions about allocation of topics shows that the Council did in fact rely on the discretionary aspect of s 80E to include some wider content in its IPI.

3.7 First, contrary to assertions of other parties, the Council did not elect or resolve to exercise its discretion by not including any matters in its IPI other than mandatory provisions.[8] To the contrary, it accepted Mr McCutcheon's recommendations to include several matters in the IPI

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6 Ministry of Housing and Urban Development and Ministry for the Environment *Departmental Report on the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill*. As an aside, I note that the reference to SNAs in that passage cannot be entirely accurate. For example, if the rule framework provided that presence of an SNA reduced the height or density, or changed the activity status of development on the site, that would fit within the mandatory category in s 80E and would follow the ISPP regardless of the appropriateness of appeal rights.

7 Report of the Environment Committee Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (83-1, December 2021) at p 7.

8 See the resolutions of the Planning and Environment Committee on 12 May 2022 (Minutes of Pūroro Āmua | Planning and Environment Committee - Thursday, 23 June 2022 (wellington.govt.nz)) and 23 June 2022 (Minutes of Pūroro Āmua | Planning and Environment Committee - Thursday, 23 June 2022 (wellington.govt.nz)).

which he expressed to fit (and which plainly do fit) in the discretionary category, most notably district wide provisions such as certain strategic directions, the three waters chapter, certain subdivision provisions, certain earthworks provisions, the wind chapter, certain appendices and schedules related to chapters progressing through the ISPP, and design guides.[9] These are all matters that the scope of an IPI was broadened to include through the legislative process on the recommendations in the Departmental and Select Committee Reports. On Mr McCutcheon's advice, the Council did not include other matters in its IPI that it perhaps could have, such as provisions relating to SNAs, notable trees and Sites and Areas of Significance to Māori whose thrust is to limit intensification where they are located by increasing the consent requirements and may therefore be thought to complement or support policy 4 of the NPS-UD. In saying that, I accept that policy 4 is not directly engaged because the specific provisions do not reduce building height or application of the MDRS.

3.8 In doing so the Council, as all territorial authorities were required to do, exercised a judgment based on the professional advice of its expert planners.

3.9 Mr McCutcheon's supplementary evidence clarifies paras 80-81 of his s 42A report.

3.10 His supplementary evidence also provides a factual and evidential explanation of why the various allocations challenged by submitters have been included in the IPI or Schedule 1 process respectively.

3.11 I make the following general comments, assuming for the sake of argument that the Panel has a 'reallocation' power, or the Council's determination as to the process is not conclusive:

(a) Such a power could only realistically arise where the issue is whether a particular provision fits within the 'mandatory' category. It would be entirely inappropriate for the Panel to revisit or revise the Council's exercise of discretion to include matters in the IPI through the discretionary category, or vice versa.

(b) It would be relatively more appropriate for the Panel to exercise the power in relation to provisions that fit within the mandatory category, but which through inadvertence or error were not included in the IPI.

(c) It would be relatively less appropriate to reallocate a provision said not to be within the mandatory category, but which could theoretically fit within the discretionary category, even if it is not entirely clear from the Council decision which category it was thought to fit within.

[9] See the agenda for the Planning and Environment Committee on 12 May 2022 (Agenda of Pūroro Āmua | Planning and Environment Committee - Thursday, 12 May 2022 (wellington.govt.nz))

Particular provisions

3.12 I do not intend to replicate the more detailed analysis that Mr McCutcheon has provided in his supplementary evidence. I simply emphasise the following:

(a) WIAL appears to accept that the provisions it seeks reallocation of fit within the discretionary category. That is correct, and, as indicated in Mr McCutcheon's supplementary evidence, this explains the basis for their inclusion in the IPI.

(b) Wellington's Character Charitable Trust is in error that the demolition/maintenance provisions are not supportive or consequential on the other character/heritage provisions. If no resource consent was required for demolition of a pre-1930s dwelling in a character area then there would be no justification for limiting the height and density in such areas. That is the rational link.

(c) I note too that the prospect that new qualifying matters, or extension of notified qualifying matters over a wider area was an issue acknowledged in the Select Committee Report. The Trust's concern that the pre-1930 demolition rule should apply to a wider area does not mean it should be included in the 'usual' process – in fact it confirms that its allocation to the IPI is appropriate.

(d) The proposed listing of heritage buildings, which in residential zones impacts on whether the MDRS may be implemented as a permitted activity (since a new build would require a resource consent) necessarily engages Policy 4 requiring inclusion in the IPI.

(e) Two policies identified by Kāinga Ora (MRZ-PREC01-P4 and MRZ-PREC02-P1) are related to rules included in the IPI, there is a good argument that they should have been included as well. But it is a fine line as to whether they were required to be included in the IPI through the mandatory category or whether, as policies, they fit within the discretionary category.

Conclusion

3.13 On the approach that the Council takes the question about the Panel's powers to 'reallocate' does not actually arise, except perhaps in respect of two policies not included in the IPI and, with respect, they are not significant.

3.14 Nonetheless, I turn to the question whether, if the Panel is of the view that any provisions have been wrongly included in one process or the other, it has the power to 'reallocate'. Is the Council's delineation "conclusive"?

4 The Panel's powers

4.1 Clause 96 of Schedule 1 requires the Council to establish an independent hearings panel to conduct a hearing of submissions on the IPI once it has been notified by the Council and for that purpose, to delegate the necessary functions, powers or duties to the panel.

4.2 This the Council has done. I understand that the Council's resolution appointing the Panel provides the Panel with "any necessary delegation to hear submissions and make recommendations to the Council on the Proposed District Plan".

4.3 Delegations are not construed like legislation. The modern approach is to construe them broadly and constructively, inferring ancillary or implicit powers where appropriate to make the delegation work.

4.4 Nonetheless, the delegation needs to be exercised for the purpose for which it was given. The Council has already made its decisions as to what would be progressed through the ISPP and what would be progressed through the 'usual' process. That decision was made prior to the delegation to hear submissions being made. A power to determine that a provision or set of provisions has been included in the IPI in error, or that a provision or set of provisions should have been, but was not, included in the IPI, is not one the panel *requires* to carry out its role. Nor could it be seen as implicit in the Council's delegation to the panel since, as I have noted above, the Council's decisions to allocate certain provisions to one process or the other were quite deliberate. In other words, it is not part of the Panel's function to revisit the allocation. To do effective sets the Panel up as a tribunal sitting in judicial review of a lawful decision made by the Council.[10]

4.5 The fact that the IPI and wider proposed plan have been included in the same "instrument" means that the question of 'reallocation' seems a simple step – a re-labelling of the provisions in question. But in reality the Panel would be revisiting the prior determination of the Council as to the scope of its IPI and scope of its wider plan change. While in one document, the content identified as being part of the IPI and following the ISPP, and the content identified as following the 'usual' process should be treated as distinct. As noted in Mr McCutcheon's evidence, they are set out in one document because they were drafted as an integrated plan, and keeping them in one document would make it easier for the public to engage with. The alternative would have required the public to engage with two documents simultaneously or sequentially, and to work out how the documents would later fit together themselves.

4.6 As a thought experiment, if you imagine that they were in separate documents, it would still be open to parties to submit that a certain provision had been included in the IPI in error on the basis that it does not fit within s 80E (or vice versa), but the response of the hypothetical panel would in my submission be more obvious. Such a panel would not decline to make recommendations on any IPI provisions that it considered not to fit within either s 80E because if that assessment was wrong, then there would be no recommendation that the Council could accept or not under cl 101(1) of Schedule 1. The appropriate course would be to record reservations about whether the relevant provision fits within s 80E, but nonetheless to make recommendations on the provision under cl 99.

4.7 Then, if any party considered that a particular provision was included in the IPI by legal error then it could judicially review the outcome at the conclusion of the process. The Council can consider at that time its

[10] In reference to the principle that a decision is lawful until declared otherwise by a court of competent jurisdiction.

response to such an application, including whether it takes any remedial steps by way of notifying a plan change.

4.8 The Council does not see that the position is any different simply because it has chosen, in light of the timing of its full plan review and the speedy introduction and passage of the Amendment Act, to include its IPI and wider proposed plan in one document.

4.9 The Wellington's Character Charitable Trust argues that the prospect of judicial review is an unsatisfactory outcome. The Council of course agrees with that, but does not accept that this characterisation enables the Panel to consider 'reallocation' at this stage in the process. Any party could have judicially reviewed the Council's decisions to allocate a provision to one or other process and they have had since at least August 2022 to do so, if not since June 2022 when the relevant Council decision was made. But that has not happened, and it would now be too late. The Court would dismiss such an application on the ground of delay given hearings are about to commence, on the basis of prematurity since it would be better to let the process play out and see whether any party does not like the outcome on the merits, and on the basis that there is no real detriment to following either process through, since both are plainly natural-justice-compliant.

4.10 In that regard, the Council does not accept the bald assertions of parties as to the significance of the "removal" of their "appeal rights" to the Environment Court. A significant experiential downside of the Part 1, Schedule 1 provision having merits appeals to the Environment Court is that often parties do not put their best foot forward at the Council stage, preferring, understandably, to save resources for the Environment Court stage. That tends to reduce the quality of Council decisions. But those appeal rights are a creature of statute, and by no means inalienable. It cannot seriously be suggested that the Panel the Council has put together is less able than an Environment Judge and two Environment Commissioners to make decisions on the proposed plan. The Council's panel necessarily has broader subject-matter expertise simply by dint of numbers. The absence of a merits appeal incentivises parties to put their best foot forward in evidence, which will also result in better quality decisions from the Panel than might otherwise have been the case.

4.11 Clause 99 provides that the recommendations made by the panel are not limited to being within the scope of submissions, but they do need to be related to a matter identified by the panel or any other person during the hearing. As noted above, the Panel can record any reservations it has as to the 'allocation' of provisions, but this should not prevent it from making substantive recommendations on the provisions for the Council's consideration.

5 Answers

5.1 Returning to the questions posed, the Council answers as follows:

(a) The Panel has the power to hear submissions on provisions notified as falling within the ISPP even where it considers that a provision ought to have been in the other process. The Council's identification on the face of the PDP as notified is conclusive.

(b) Putting this another way, the Council does not consider that the Panel has a power to 'reallocate' provisions between the two processes.

(c) Even if it did have such a power, there is no need to exercise it in respect of the provisions referred to in the submitters' memoranda. To the contrary, the Council's 'allocation' decisions were correct and appropriate (except perhaps in respect of two policies identified by Kāinga Ora).

(d) Accordingly, even if the Panel finds that it has such a power, there is no basis for its exercise in relation to the provisions put in issue by the parties.

Date: 8 February 2023

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