Before Independent Hearing Commissioners

In Wellington

Under	the Resource Management Act 1991 (the RMA)
In the matter of	submission by the New Zealand Transport Agency (Waka Kotahi) (submitter 370 further submitter 103) on the Proposed Wellington City Plan, Stream 2 – Residential zones and Character Areas

Legal submissions for Waka Kotahi New Zealand Transport Agency– Stream 2 – Residential zones and Character Areas

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大成 DENTONS KENSINGTON SWAN
18 Viaduct Harbour Avenue
Private Bag 92101
Auckland 1142

P +64 9 379 4196
F +64 9 309 4276
DX CP22001

Solicitor: Christina Sheard / Louise Espin
E christina.sheard@dentons.com / louise.espin@dentons.com

1 Introduction and scope of submissions

1.1 Waka Kotahi, NZ Transport Agency ('**Waka Kotahi**') lodged submissions[1] on the Proposed Wellington City Plan ('**PDP**') including submissions on the issues of Hearing Stream 2.

1.2 Waka Kotahi has filed two statements of evidence:

a Mike Scott – strategic planning; and

b Alastair Cribbens – accessibility.

1.3 These submissions address the following matters that are relevant to Mr Scott's evidence on 'character areas':

a Statutory objectives and functions of Waka Kotahi;

b The statutory context:

i The qualifying matters test;

ii The meaning of 'in light of the national significance of urban development';

iii The reference to 'amenity values' in policy 6 of the NPS-UD; and

c The Council's approach to character areas.

2 Waka Kotahi statutory objectives and functions

2.1 The Hearing Panel will be familiar with the statutory objectives and functions of Waka Kotahi. In summary, Waka Kotahi is a Crown entity with the purpose of delivering transport solutions for New Zealand. The key objectives, functions, powers, and responsibilities of Waka Kotahi are derived from the Land Transport Management Act 2003 ('**LTMA**'). Section 95(1) of the LTMA requires Waka Kotahi to:

a Contribute to an effective, efficient, and safe land transport system in the public interest; and

[1] Submission number 370 and further submitter 103 on the Proposed Wellington City Plan.

b Manage the state highway system, including planning, funding, design, supervision, construction, and maintenance and operations, in accordance with the LTMA and the Government Roading Powers Act 1989.

2.2 The focus of Waka Kotahi includes investment in:

a Public transport, local roads, pedestrian and cycle networks;

b The construction, maintenance and operation of the state highway network on behalf of the Government; and

c The integration of the transport network including with the rail network.

2.3 In performing its functions, Waka Kotahi must give effect to the Government Policy Statement on Land Transport 2021/22-2030/31 ('**GPS**'). The four strategic priorities of the GPS are safety, better travel options, climate change and improving freight connections. A key theme of the GPS is integrating land use, transport planning and delivery. There is also a focus on investment in "providing people with better travel options to access places for earning, learning, and participating in society." Section 96(1)(a) of the LTMA also requires Waka Kotahi to exhibit a sense of social and environmental responsibility when meeting its statutory obligations and undertaking its functions under the LTMA.

2.4 The Waka Kotahi focus on and commitment to greenhouse gas emissions reductions and environmental sustainability are set out in Arataki Our Plan for the Land Transport System 2021-2031 and Toitū Te Taiao Our Sustainability Action Plan.

3 The statutory context

3.1 The NPS-UD sits at the top of the RMA planning document hierarchy and provides national direction on urban development, as a matter of national significance. The NPS-UD includes objectives and policies requiring councils to enable greater intensification in areas that are well-suited to growth, such as in and around urban centres and rapid transit stops.

3.2 The NPS-UD must be given effect to by local authorities when amending planning documents, including regional and district plans.[2] To ensure those changes occur at faster rate than standard plan change processes would allow, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ('**HSAA**') introduced a streamlined planning process (the '**IPI process**').

[2] Sections 67(3) and 75(3) of the RMA.

The HSAA also introduced medium density residential standards that apply in every relevant residential zone within Tier 1 council areas.

3.3 The HSAA amendments are unusual in that they have introduced extremely prescriptive requirements as to the content of the intensification provisions. The Council's discretion to depart from those requirements is severely limited.

3.4 Section 77G of the HSAA contains a mandatory requirement to give effect to policy 3 and incorporate the MDRS in all 'relevant residential zones' (unless s77I applies). Policy 3 of the NPS-UD sets out requirements for intensification in centres and around rapid transit stops. Schedule 3A of the HSAA prescribes the MDRS standards that must be incorporated into district plans including specific objectives, policies and rules. Notably, the following objectives and policies must be included in district plans:

a Objective 1: "**well-functioning urban environments** that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future";

b Policy 2: requires "Tier 1, 2 and 3 local authorities at all times, provide at least sufficient development capacity to meet expected demand for housing and for business land over the short term, medium term and long term";

c Policy 3: "enable housing to be designed to **meet the day to day needs of residents**".

The qualifying matters test

3.5 Council may introduce 'qualifying matters' that make Policy 3 or the MDRS **less enabling of development** because the higher density would be 'inappropriate' in a certain area.[3] Section 77I contains a list of qualifying matters. Of the list, the matters in subsections (a) to (i) are very directive – they are specific matters such as matters of national importance under s6 of the RMA. Subsection (j) contains a much broader exemption which provides that a qualifying matter may relate to "**any other matter** that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied".

3.6 Qualifying matters covered by s77I(j) must satisfy the onerous requirements in s77L and require the Council to undertake a s32 evaluation report justifying why a lower level of development is appropriate in the area that is subject to the

[3] Section 77I.

qualifying matter. Under s77L, a matter is not a qualifying matter unless the s32 report also:

*(a) identifies the **characteristic** that makes the level of development inappropriate in the area;*

*(b) justifies **why that characteristic makes that level of development inappropriate in light of the national significance of urban development** and the objectives of the NPS-UD;*

(c) includes a site-specific analysis that –

(i) identifies the site to which the matter relates; and

(ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and

*(iii) **evaluates an appropriate range of options** to achieve the greatest heights and densities permitted by the MDRS or as provided for in Policy 3, while managing the specific characteristics.*

3.7 Section 77L effectively extends the 'standard' s32 requirements in the RMA to require an 'enhanced s32 evaluation'. Councils are required to not only identify the specific 'characteristic' that makes Policy 3 or the MDRS 'inappropriate' in an area, but also provide adequate justification "in light of the national significance of urban development and the objectives of the NPS-UD". A site specific analysis requiring the evaluation of an appropriate range of options is also required.

3.8 The term 'inappropriate' is not defined in the RMA but there is reference to 'inappropriate' in sections 6(a) and (b) in terms of "inappropriate subdivision, use and development". Therefore, caselaw applying to the meaning of 'inappropriate' in sections 6(a) and (b) provides some useful guidance in this context, and is clear that:

a The scope of what is 'inappropriate' is influenced by context, and is to be considered on a case by case basis, however it must be evaluated with the point of view of preserving the matters identified as being of national importance.[4]

[4] *Minister of Conservation v Kapiti Coast DC* (1993) 1B ELRNZ 234; [1994] NZRMA 385 (PT).

b What is 'inappropriate' should be interpreted in context, by reference to the resource that is sought to be protected[5] and that the attributes requiring protection must therefore be clearly identified in the relevant plan.[6]

3.9 The Supreme Court in *King Salmon* made it clear that the scope of the words 'appropriate' and 'inappropriate' is heavily affected by context, i.e. in the coastal environment, 'appropriate' would refer to the suitability for the needs of agriculture rather than some broader notion. The Court stated:[7]

> *We consider that where the term "inappropriate" is used in the context of protecting areas from inappropriate subdivision, use or development, the natural meaning is that "inappropriateness" should be assessed by reference to what it is that is sought to be protected.*

The meaning of 'in light of the national significance of urban development'

3.10 The words "in light of the national significance of urban development" in s77L(b) are clearly intended to remind the reader that urban development is of national significance, as reflected in the NPS-UD. The HSAA bill included commentary that in undertaking the s32 report, "accommodating the qualifying matter must be balanced against the national significance of urban development and the objectives of the NPS-UD".[8]

3.11 The wording of s77L(b) sets a high bar in terms of having to provide significant justification as to why any "other matter" should compromise the urban development objectives set out in the NPS-UD and the MDRS provisions.

3.12 Section 77L(c) is extremely directive. It requires a **site specific** analysis with particular details regarding site identification, evaluating the specific 'characteristic' to determine the geographic area where identification needs to be compatible, and to evaluate a range of options to try and achieve the greatest heights and densities permitted by the legislation. Qualifying matters should only be applied where absolutely necessary in order to ensure that the objectives and policies in the NPS-UD are not compromised.

Policy 6 of the NPS-UD – amenity values

[5] *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [101].
[6] *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 at [111].
[7] *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [100-101].
[8] HSAA Bill explanatory note.

3.13 Policy 6 of the NPS-UD is not specifically referenced in the HSAA amendments to the RMA. Councils are, however, required to give effect to the NPS-UD so all of its provisions are relevant to the IPI process.

3.14 Policy 6(b) contains a very clear direction that when making planning decisions that affect urban environments, decision makers must have particular regard to the fact that the 'planned urban built form' in RMA planning documents may involve significant changes to an area which may detract from the 'amenity values' appreciated by some people (and may improve amenity for others). Policy 6(b) directs that adverse impacts on amenity cannot be considered. However Policy 6(b) does not preclude Council from considering the positive amenity effects.

3.15 The RMA defines 'amenity values' as "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[9]

3.16 The caselaw on amenity values is clear that a broad approach should be taken. In *Phantom Outdoor Advertising Limited v Christchurch City Council* the Environment Court noted that:[10]

> *We do not understand the words "pleasantness, aesthetic coherence and cultural and recreational attributes" to be some form of combined absolute value which members of the public appreciate to a greater or lesser extent. In our view* ***the definition is embracing a wide range of elements and experiences****. Appreciation of amenity may change, depending on the audience. (emphasis added)*

4 Council's approach to character areas

4.1 As set out in Mr Scott's evidence, the PDP identifies a number of 'character areas' or Character Precincts as a qualifying matter. Mr Scott's evidence will show that:

a The 'character' values relied on by Council relate solely to changes in amenity values which cannot be considered an adverse effect in accordance with Policy 6 of the NPS-UD.

[9] RMA, s 2.
[10] *Phantom Outdoor Advertising Limited v Christchurch City Council* c090/01 at [18].

b Council has taken a very narrow approach to amenity values assessing only visual effects and prioritising this aspect over the broader set of amenity values that contribute to a well-functioning urban environment, including accessibility.

c Council has not undertaken an assessment of the 'appropriateness' of limiting development in the identified Character Precincts in light of the national significance of urban development. This would be an extremely difficult case to make given the very strong direction of the NPS-UD and MDRS, and its objective of achieving well-functioning urban environments.

d Council has failed to undertake a site specific analysis as required by s77L(c) in terms of looking at alternative options.

5 Concluding comments

5.1 It is submitted that a well-functioning urban environment would be better achieved by up-zoning the Character Precincts (where they are within the walkable catchments) and allowing more people, and the city itself, to benefit from the accessibility that such a location provides. Within a walkable catchment of the Wellington City Centre zone, the appropriate zone is High Density Residential. The notified extent of Character Precincts should instead be retained as overlays with the demolition controls removed.

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Christina Sheard
Counsel for Waka Kotahi New Zealand Transport Agency