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 Hearing Stream 11

5 September 2024

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Legal submissions on behalf of Wellington City Council Hearing Stream 11

1 Indigenous biodiversity

1.1 These submissions address legal issues relating to the Ecosystems and Indigenous Biodiversity chapter (ECO) of the PDP. I have been asked by Council officers to provide comments on the following matters:

(a) The way in which the NPS-IB interacts with:

(i) the NPS-UD; and

(ii) section 76(4A) of the RMA;

(b) Interpretation of the Resource Management (Freshwater and Other Matters) Amendment Bill; and

(c) Natural justice issues arising from the implementation of the NPS-IB in the PDP.

2 NPS-IB

2.1 The NPS-IB came into force on 4 August 2023. It applies to the terrestrial environment throughout Aotearoa New Zealand. Accordingly, the district plan must give effect to NPS-IB as required by s 75(3)(a) of the RMA.

2.2 To some extent, the notified PDP gives effect to the NPS-IB already.[1] A draft NPS-IB was being consulted on during drafting of the ECO and INF-ECO chapters. But the notified PDP does not fully given effect to the NPS-IB, including notably because of the decision not to include in the PDP SNAs on residentially zoned land. To the extent that submissions give scope to do so, s 75(3)(a) of the RMA requires the Council to give effect to it through this process.

2.3 The NPS-IB has a single objective: "to maintain indigenous biodiversity across Aotearoa New Zealand so that there is at least no overall loss in indigenous biodiversity after the commencement date" (clause 2.1). Clause 2.1 goes on to specify how that objective is to be achieved.

[1] See s 42A Report at [75]ff and [88]ff.

2.4 17 policies seek to implement that objective including most relevantly:

(a) **Policy 3**: A precautionary approach is adopted when considering adverse effects on indigenous biodiversity.

(b) **Policy 6**: Significant indigenous vegetation and significant habitats of indigenous fauna are identified as SNAs using a consistent approach.

(c) **Policy 7**: SNAs are protected by avoiding or managing adverse effects from new subdivision, use and development.

(d) **Policy 8**: The importance of maintaining indigenous biodiversity outside SNAs is recognised and provided for.

(e) **Policy 9**: Certain established activities are provided for within and outside SNAs.

2.5 Subpart 2 of the NPS-IB requires the Council to undertake a district-wide assessment of the land in its district to identify areas of significant indigenous vegetation or significant habitat of indigenous fauna that qualify as SNAs. The Council had already in substance undertaken this process (its "Backyard Taonga" project) and, other than in residential areas, the product of that process is included in the PDP. This is described in Mr McCutcheon's s 42A Report at [45]-[66].

2.6 Outside SNAs, indigenous biodiversity is still required to be protected from significant adverse effects. Clause 3.16 provides:

> **3.16 Indigenous biodiversity outside SNAs**
>
> (1) If a new subdivision, use, or development is outside an SNA and not on specified Māori land, any significant adverse effects of the new subdivision, use, or development on indigenous biodiversity outside the SNA must be managed by applying the effects management hierarchy.
>
> (2) All other adverse effects of any activities that may adversely affect indigenous biodiversity that is outside an SNA (other than indigenous biodiversity on specified Māori land (see clause 3.18)), must be managed to give effect to the objective and policies of this National Policy Statement.
>
> (3) Every local authority must make or change its policy statements and plans to be consistent with the requirements of this clause.

2.7 Accordingly, the district plan must contain a set of provisions to manage significant adverse effects on indigenous biodiversity outside of SNAs through an effects management hierarchy:

> **effects management hierarchy** means an approach to managing the adverse effects of an activity on indigenous biodiversity that requires that:
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> (a) adverse effects are avoided where practicable; then
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> (b) where adverse effects cannot be avoided, they are minimised where practicable; then
>
> (c) where adverse effects cannot be minimised, they are remedied where practicable; then
>
> (d) where more than minor residual adverse effects cannot be avoided, minimised, or remedied, biodiversity offsetting is provided where possible; then
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> (e) where biodiversity offsetting of more than minor residual adverse effects is not possible, biodiversity compensation is provided; then
>
> (f) if biodiversity compensation is not appropriate, the activity itself is avoided.

Relationship between the NPS-UD and NPS-IB

2.8 There is potential conflict between the NPS-UD and NPS-IB which must be reconciled in the ordinary way under the RMA (as per *King Salmon*, *Port Otago*, etc). The former contains strongly directive national policy supporting the creation of urban environments that enable all people and communities to provide for their social, economic and cultural well-being. Subject to qualifying matters, it provides a mandatory approach to building height and density in centres and within walkable catchments of centres. The Panel will be well familiar with these requirements.

2.9 The Council's decision not to impose SNAs on residentially zoned land reduces the scope for conflict to a large degree, but the plan must still give effect to clause 3.16 of the NPS-IB in a way that applies the effects management hierarchy, while achieving the requirements of the NPS-UD, and thereby promoting the sustainable management of natural and physical resources (s 5 of the RMA).

2.10 I do not consider that any provisions included to give effect to clause 3.16 will require a qualifying matter assessment for the same reason as Mr McCutcheon has explained – they do not modify a density standard.[2] Nonetheless, in determining how best to implement clause 3.16 of the NPS-IB with provisions applying to urban environments, the Panel will also have to consider the extent to which the provisions are balanced with NPS-UD objectives and policies relating to well-functioning urban environments.

Relationship between the NPS-IB and section 76(4A) of the RMA

2.11 Another significant constraint on how the NPS-IB can be given effect to comes from the RMA. Section 76(4A) of the RMA precludes blanket rules prohibiting or restricting the felling, trimming, damaging or removal of a tree or trees on a single urban environment allotment.[3] The only way such rules are permissible is if specific trees and allotments are described in the plan.

2.12 This constraint was something that the Ministry for the Environment was conscious of, but did not do much to address. The published section 32 analysis does not, so far as I can see, address the issue. Only the *Recommendations and decisions report on the NPS-IB* contained some discussion of the issue:[4]

> **Applicability of general provisions outside SNAs**
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> Sections 76(4A) to 76(4D) of the RMA prevents territorial authorities setting blanket tree protection rules in 'urban environment allotments'. Consequently, district plans can only set rules to protect trees in these areas if the trees and street addresses of legal descriptions of the properties are specifically identified in the plans. This means trees need to be mapped on a property-by-property basis – a resource-intensive and costly task. Therefore, these provisions would not apply to trees in urban areas unless the territorial authorities made specific rules that complied with sections 76(4A) to 76(4D) of the RMA.
>
> As noted earlier, we have recommended the outside SNA provisions apply only to significant adverse effects (that is, those applying to large areas and very significant stands of trees) and are likely to result in plan rules such as indigenous vegetation clearance rules. It was never the intent these provisions would provide blanket protection for trees in urban allotments.

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2 Section 42A Report at [68].

3 Defined in s 76(4C) as, in summary, an allotment within the meaning of s 218 of the RMA that is less than 4,000m2 in size, reticulated, and containing a building used for industrial, commercial, or residential purposes.

4 Draft NPSIB recommendations report (environment.govt.nz)

2.13 The final two sentences are contradictory. The first suggests that officials anticipated that clause 3.16 would be given effect to through indigenous vegetation clearance rules. But such rules usually include trees within the kind of vegetation they address.[5] The second suggests that it was never intended to give trees in urban environments blanket protection, but unless trees are to be separately listed it is unlawful to give them *any* protection.

2.14 The result is that either local authorities must now undertake substantial surveys of indigenous trees to enable them to be listed in a plan, or any indigenous vegetation clearance rule that applies in urban environments (and therefore to urban environment allotments) will have to carve out trees from its application. Mr McCutcheon has taken this into account in his recommendations on ECO-R4 in the s 42 Report at [371]-[403].

3 Resource Management (Freshwater and Other Matters) Amendment Bill

3.1 The Resource Management (Freshwater and Other Matters) Amendment Bill (**Bill**) makes several targeted amendments to the RMA. For present purposes the key amendment is the introduction of a new section 78 which modifies the obligations of local authorities under the NPS IB to assess and identify SNAs and include those SNAs in a proposed plan or plan change.

3.2 The Bill is currently before the Primary Production Select Committee. The Committee's website has no information on when it will report, or the timeframe by which we can expect the Bill to progress to a second reading. Clause 2 of the Bill currently provides that it will come into force on the day after it receives Royal assent.

3.3 Proposed new section 78 states:

> **78 Time-limited modifications to NPSIB 2023**
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> (1) For the purposes of this section, the 3-year period means the period that—
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> (a) commences on the date of commencement of the Resource Management (Freshwater and Other Matters) Amendment Act 2024; and

[5] For example, the Wellington District Plan 2000 defines "indigenous vegetation" as "any species or generic variants of plants found naturally in New Zealand".

(b) expires on the date that is 3 years after commencement.

(2) The following provisions of the NPSIB 2023 do not apply during the 3-year period:

(a) clause 2.2, Policy 6 (which requires a consistent approach in identifying significant indigenous vegetation and significant habitats of indigenous fauna as SNAs):

(b) clause 3.8(1), (6), and (8) (which requires a territorial authority to conduct assessments to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna that qualify as SNAs):

(c) clause 3.9(1) (which requires a territorial authority to notify a plan or plan change to include areas identified as qualifying as SNAs):

(d) clause 3.9(3) (which requires that a local authority must, when doing its 10-yearly plan review, assess its district in accordance with clause 3.8(1) and (2) to determine whether changes are needed).

(3) Clause 4.1 of the NPSIB 2023 (which requires a local authority to give effect to the NPSIB 2023 as soon as reasonably practicable)—

(a) does not apply during the 3-year period in relation to the provisions of the NPSIB 2023 specified in subsection (2); but

(b) continues to apply in relation to the other provisions of the NPSIB 2023.

(4) This section does not affect any function or requirement under other provisions of this Act relating to indigenous biological diversity, including in relation to areas of significant indigenous vegetation or significant habitats of indigenous fauna.

(5) However, an area of significant indigenous vegetation or significant habitat of indigenous fauna that, after commencement, is included in a policy statement, proposed policy statement, plan, proposed plan, or change is not to be treated as an SNA regardless of how it is described in that document.

(6) This section does not affect any SNAs that are included in a policy statement, proposed policy statement, plan, proposed plan, or change before commencement (see also clause 40 of Schedule 12).

(7) The Minister for the Environment may amend the NPSIB 2023 to make any changes that the Minister is satisfied are required as a result of the enactment of the Resource Management (Freshwater and Other Matters) Amendment Act 2024 to—

(a) remove an inconsistency or a potential inconsistency between the NPSIB 2023 and that Act; or

(b) clarify the relationship between the NPSIB 2023 and that Act.

(8) In this section,—

commencement means the commencement of the Resource Management (Freshwater and Other Matters) Amendment Act 2024

SNA means a significant natural area as defined in clause 1.6 of the NPSIB 2023.

(9) An amendment under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

(10) This section is repealed on the close of the date of expiry of the 3-year period.

3.4 The nub of section 78 is to postpone for three years from the date of commencement of the bill the NPS IB obligations to assess and identify SNAs and to notify a proposed plan or plan change to implement those SNAs. It does not preclude a council from choosing to do so; it only postpones the obligation to do so.

3.5 However, subclause (3) makes it clear that it is only those obligations (as specified in subclause (2)) that do not apply during the three-year period. Other obligations imposed on local authorities by the NPS IB continue to apply, most notably the obligation in clause 3.16 of the NPS IB (Indigenous biodiversity outside SNAs) to change a plan to be consistent with the requirements of that clause, which must be given effect to "as soon as reasonably practicable". And it is clear from subclause (4) that the postponement does not affect any section 6 function relating to indigenous biological diversity.

3.6 It is worth noting subclause (6) of the Bill. Proposed new section 78 does not affect an SNA that is included in a proposed plan before commencement of the Bill. Accordingly it does not apply to the SNAs included within the PDP. Nonetheless if the Bill were to come into force before the Council has made any decisions on recommendations from the Panel, it is possible that the Bill could become relevant. This would occur if the Panel were to recommend that any proposed SNAs be expanded beyond the notified scope or that any SNAs not included within the notified PDP should be adopted as relief sought in any submissions. That

is because the expansion area or new SNA would not have been included in the proposed plan or plan before commencement of the Bill.

3.7 Whether this is a matter for the Panel to be conscious of, as opposed to the Council when it makes decisions on the Panel's recommendations, will depend on when the Bill receives Royal assent (if it progresses at all).

3.8 Finally, for completeness, subclause (5) provides that an SNA included in a plan or proposed plan after commencement is not to be treated as an SNA regardless of how it is described in that document. There is an interpretive difficulty between subclauses (5) and (6). Subclause (6) provides that proposed new section 78 does not affect an SNA included in a proposed plan before commencement but subclause (5) appears to suggest that if a proposed plan containing an SNA became operative after commencement (ie, became a plan), the SNA would not be able to be treated as such.

3.9 Assuming that no changes are made to these subclauses at the Select Committee stage, I do not consider that this is how the two subclauses are to be read. Given that the purpose of proposed new section 78 is to *postpone* the obligation to assess, identify, and notify SNAs, rather than to *preclude* local authorities from doing so, I read subclause (5) as applying to a situation where a local authority chooses to assess, identify, and notify SNAs after commencement of proposed section 78. A local authority is permitted to do so, but the resulting SNAs could not be treated as such during the three-year period.

3.10 This approach is consistent with the interpretive bias against provisions having retrospective effect given that, by virtue of s 86B(3)(b) and (c) of the RMA, any SNAs already included in a proposed plan (ie, before commencement) have immediate legal effect. If, despite the clear terms of subclause (6), SNAs already included were not to be treated as such when the proposed plan became operative, that would necessarily amount to "affecting" them, which subclause (6) eschews doing.

4 Natural justice issues

4.1 The range of decisions available is circumscribed by the content of the notified version of a proposed plan and the scope of submissions made on it.

4.2 The rationale for this approach to determining the available content of plan changes or proposed plans is natural justice. It is not fair for changes to be made to a district plan that the public at large, let alone submitters, could not reasonably and fairly have foreseen from the notification version and submissions made on it.

4.3 In my opinion, in the vast majority of cases, assertions of a lack of natural justice can be answered by reference to applying the principles developed by the courts in relation to "scope" in cases such as *Clearwater*, *Motor Machinists*, and, as regards entire proposed plans, *Albany North Landowners*.[6]

4.4 However, I also consider that in some circumstances it may be appropriate to take into account process or natural justice concerns in formulating a recommendation on plan provisions even where proposed outcomes are technically within scope. That may be the case in part here, where the Director-General of Conservation, GWRC and Forest and Bird made submissions seeking alignment of the PDP with what was at that time a draft version of the NPS-IB. This provides conceptually very broad scope for amendments to the notified provisions of the PDP, but may have been difficult for members of the public to appreciate given the NPS-IB was in draft and any changes to its direction could not at the time have been knowable to submitters.

4.5 That said, I consider that there is a material difference between the possibility of recommending the imposition of SNAs on residential land and inclusion of a vegetation clearance rule in the form of ECO-R4 proposed by Mr McCutcheon. Proposed ECO-R4 is comparatively more enabling for landowners in general than imposition of residential SNAs would be for those specifically affected landowners. Mr McCutcheon has addressed this in this rebuttal evidence at [25].

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6 Respectively, *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290; and *Albany North Landowners v Auckland Council* [2017] NZHC 138.

4.6 Considered in the round, it is in my view available for the Panel to conclude that the natural justice factor weighs differently in relation to ECO-R4 than in relation to other matters such as the residential SNA issue. That is perhaps especially so given the thrust of the Bill which postpones the SNA requirement, but not the clause 3.16 requirement.

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