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 3

5 May 2023

Counsel
Nick Whittington
Hawkestone Chambers
PO Box 12091, Thorndon,
Wellington 6144
+64 21 861 814
nick.whittington@hawkestone.co.nz

Legal submissions on behalf of Wellington City Council Hearing Stream 3

1 Issues addressed

1.1 These submissions address:

(a) the impact of the recent Environment Court decision *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*[1] on the approach to listing of new heritage items through the IPI.

(b) the legal framework relating to restrictions imposed on use of property (such as a heritage listing) and considering private impacts.

1.2 *Waikanae Land Company* is, with respect, wrongly decided, or alternatively it is distinguishable. Either way, the decision does not preclude the Panel from considering proposed new heritage items as qualifying matters notified as part of the Council's IPI.

1.3 The principle of statutory interpretation that Parliament does not intend to take private property without compensation does not apply to the mere imposition of a control or restriction on use such as occurs through a heritage listing in a district plan. The Panel only needs to apply the statutory tests in ss 32 and 77J of the RMA.

2 Recent Environment Court decision

2.1 In *Waikanae Land Company* the Environment Court was asked to determine whether to grant subdivision and land use consents by way of direct referral. The application site was within the General Residential Zone of the Kāpiti Coast District Council's Operative District Plan. The Court identified that the application turned on whether the application site was wāhi tapu, being part of Karewarewa urupā. This question arose because the Council had included the site as a new wāhi tapu area in its IPI, notified as required in August 2022. It was identified in the IPI as a qualifying matter justifying provisions less enabling of development than the MDRS or policy 3 (as applicable) would otherwise require.

[1] [2023] NZEnvC 56 (**EC Decision**).

2.2 It appears to have been common ground that the new listing ostensibly protected historic heritage, and therefore had immediate legal effect for the purposes of the application. It did not change the activity status (which was non-complying), but triggered consideration of additional policies relating to protection of historic heritage.

2.3 It was also common ground that the practical effect of the inclusion of the site as a qualifying matter was that the density standards in the MDRS would not apply to the site.[2] The Court identified that a further effect of the new listing was that:[3]

(a) Activities that were previously permitted activities were now restricted discretionary activities. This included land disturbance or earthworks in relation to gardening, cultivation, and planting or removing trees, and fencing not on the perimeter of the land.

(b) Activities that were previously permitted activities were now non-complying activities. This included undertaking earthworks to lay driveways, cabling, or building foundations, building a residential dwelling, and installing fenceposts other than on the perimeter of the land.

2.4 The consent applicant's position was that the Council had no statutory power to list the site through the IPI process, and that the appropriate way to do it was through a Part 1, Schedule 1 process. It is this argument which makes the case potentially relevant to the Wellington City Council's IPI, since the same argument is made in relation to the new proposed heritage listing of 28 Robieson Street by Dr Keir and Ms Cutten. If correct it would mean that the Council could not list any new heritage sites (as relevant to this hearing stream), or any other less enabling provisions based on new qualifying matters including those based on, for example, natural hazards. Stated in those terms the outcome the Court reached is in and of itself surprising.

Court's reasoning

2.5 The Court started by noting that whether a power to include a new heritage site as part of the IPI process was a matter of statutory

2 EC Decision, at [14].
3 EC Decision, at [17].

interpretation. "In undertaking that interpretation we consider that the draconian consequences of listing the Site in the Schedule on WLC's existing development rights … when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose."[4]

2.6 This is a rather ambiguous statement. If by it the Court meant simply to paraphrase s 10 of the Legislation Act 2019 ("The meaning of legislation must be ascertained from its text and in the light of its purpose and its context"), then it is not entirely correctly done so, but no significant issue arises from that. If, however, the Court meant to suggest that the "draconian consequences" required a strict or narrow interpretation to be adopted then, with respect, it is wrong.

2.7 First, as I have previously noted,[5] the consequences are not "draconian". Second, the strict or narrow approach to statutory interpretation previously taken in respect of, for example, revenue or criminal statutes based on the consequences that result from the law's application is no longer considered appropriate.[6] Third, any difference from the developer's rights under the Operative Plan is irrelevant – the appropriate comparison is to the rights it would have under the MDRS.

2.8 Next, the Court considered the purpose of the Resource Management (Enabling Housing and Other Matters) Amendment Act, saying on the one hand that the provisions gave territorial authorities very wide powers, but on the other that they were not open ended and were confined to the matters identified in relevant provisions.[7] The Court identified the following points:

(a) On its face, the consequence of s 77I (Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones) is to require qualifying matters introduced through the IPI process to relate to the standards

4 EC Decision, at [21].
5 Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, dated 8 February 2023 at [4.10].
6 *Karpavicius v R* [2002] UKPC 59; [2004] 1 NZLR 156.
7 EC Decision, at [22]-[23].

identified in the definition and cls 10-18 of Schedule 3A and to make those standards less enabling.[8]

(b) While s 80E(2)'s reference to "without limitation" appeared unlimited, that was only because related provisions could extend beyond the matters identified in s 80E(2)(a)-(g).[9] Those matters were inherently limited by the qualification in s 80E(1)(b)(iii) that related provisions must "support or be consequential on" the MDRS or policies 3, 4 or 5 as applicable.[10]

2.9 The Court was not satisfied that inclusion of the site as wāhi tapu supported or was consequential on the MDRS.[11] A necessary corollary of that conclusion is that the Court believed or understood that the listing of the site as wāhi tapu, and the inclusion in the IPI of provisions less enabling than the MDRS would otherwise require, was through s 80E(1)(b).

2.10 The Court then said:[12]

> Changing the status of activities which are permitted on the Site [ie, those listed above at para [2.3] relating to earthworks and fencing] goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.

2.11 It concluded that "amending the District Plan in the manner which the Council has purported to do is ultra vires."[13]

Errors in the Court's reasoning

2.12 With respect, the Court's reasoning is in error.

2.13 The first issue is the Court's assumption that the new wāhi tapu listing was included in the IPI under the authority of s 80E(1)(b) – in other words, as a "related provision".

---

8 EC Decision, at [25].
9 EC Decision, at [27].
10 EC Decision, at [28]-[29]. As is covered in earlier submissions, the Council does not accept this, but the point is not significant in this hearing stream. See Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, dated 8 February 2023.
11 EC Decision, at [30].
12 EC Decision, at [31].
13 EC Decision, at [32].

2.14 Section 77G(3) of the RMA provides "When changing its district plan for the first time to incorporate the MDRS and to give effect to policy 3 or policy 5, as the case requires, and to meet its obligations in section 80F, a specified territorial authority must use an IPI and the ISPP." Unpacking this:

(a) "Incorporating the MDRS" in that subsection reflects s 77G(1) which requires the MDRS to be incorporated into every relevant residential zone.

(b) Section 77G(4) authorises the creation of new residential zones or amendment of existing residential zones.

(c) The MDRS does not simply mean the density standards in cls 10-18 of Schedule 3A as the Court appears later to have assumed. It means the requirements, conditions, and permissions set out in Schedule 3A.[14] This includes, for example, providing for new buildings meeting the density standards as a permitted activity.[15]

(d) As well, giving effect to policy 3 or policy 5 reflects s 77G(2) which requires giving effect to policy 3 or 5 in every residential zone in an urban environment.[16]

2.15 As the Court notes, there is an "element of flexibility" in the form of qualifying matters.[17] Section 77G(6) provides that a territorial authority may make the MDRS or policy 3 less enabling of development than provided for in if authorised under s 77I. Section 77I provides that "A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate [a qualifying matter]. Qualifying matters are also referred to, importantly, in policy 4 of the NPS-UD which provides that:

> … district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.

---

14 RMA, s 2.
15 RMA, Schedule 3A, cl 2.
16 And in each urban non-residential zone within the authority's urban environment – see s 77N(2).
17 EC Decision, at [13].

2.16 Incorporating the MDRS, and giving effect to policy 3 of the NPS-UD (where appropriate) are therefore fundamental purposes of an IPI. This is reflected in the section which defines the scope of an IPI, s 80E. It relevantly says:

> **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
>
> (ii) give effect to,—
>
> (A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or
>
> …
>
> (b) that may also amend or include the following provisions:
>
> …
>
> (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.

2.17 As has previously been covered,[18] there is a mandatory category (s 80E(1)(a)) and a discretionary category (s 80E(1)(b)). The mandatory category is for provisions which:

(a) Incorporate the MDRS (which, as noted, means incorporating the MDRS into every relevant residential zone, including any new zones proposed under s 77G(4));

(b) Give effect to policy 3 of the NPS-UD (including in both residential and non-residential zones of the territorial authority's urban environment); or

(c) Give effect to policy 4 of the NPS-UD (relating to qualifying matters).

2.18 It follows from this analysis that where a territorial authority provides for lower heights or densities than those that would otherwise be required by the MDRS or policy 3, it must do so through its IPI. Accordingly, when Kāpiti Coast District Council sought to avoid the application of the application of the MDRS to the relevant site in reliance on historic heritage, it was obliged to do so through its IPI.

2.19 How it chose to do so is not significant because s 80E is not prescriptive about how the territorial authority designs its provisions, whether by providing alternative rule frameworks, overlays or precincts, or by listing specific properties in appendices, schedules., or by identification on planning maps by lines, shading, hatching etc The Court appears to have treated the listing in the relevant Appendix as being a "related" matter when the listing was what enabled the alternative rule framework (ie, less enabling height and density standards, including the activity status for new buildings) to apply to the site. But just because s 80E(2) lists matters that may be related provisions does not mean that the same types of matters (eg, district wide matters) may not also be included in an IPI through s 80E(1)(a),.

2.20 I do not know the reasoning process by which the Council, when determining to notify its IPI, decided to include the listing. That was not covered in the Court's judgment. It is possible that Councillors did not

[18] Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, dated 8 February 2023.

turn their collective mind to that matter in the same way that the Wellington City Council did.[19] Regardless, it is far more likely that the listing was included in the IPI in reliance on s 80E(1)(a) and therefore that the Court's assumption was wrong.

2.21 Next, I do not agree that territorial authorities are only permitted to rely on qualifying matters to alter building heights and density standards. It is perhaps possible to reach that conclusion reading policy 4 in a vacuum, but s 77G(6) provides that provisions may be "less enabling of development" if authorised by s 77I, and s 77I refers to making "the MDRS and the relevant building height or density requirements under policy 3 less enabling of development".

2.22 Nor do I agree with how the Court then applied its reasoning in concluding that matters relating to earthworks and fencing could not be included in an IPI. The Court said that such provisions well beyond just making the MDRS and relevant building height or density requirements less enabling. Even accepting for the sake of argument that fencing and earthworks provisions do not give effect to policy 4 in and of themselves, they can be said to support or be consequential on policy 4 (or the provisions which give effect to it).

2.23 This was clearly the view of the Select Committee in reporting back to Parliament on the Bill. In addressing the scope of an IPI, the Select Committee Report said (emphasis added):[20]

> 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.

---

19 I do not say this as a criticism. KCDC was notifying a discrete plan change. WCC was notifying an entire plan following review and had to consider content allocation between pathways. 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)).

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

2.24 This point is relevant because, as I noted in earlier submissions,[21] the Wellington City Council has included provisions which support or are consequential on policy 4 in its IPI, including 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. By the same token, it chose not to 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, even though they do not limit permitted heights and densities directly.

Basis for distinguishing outcome

2.25 Even if it transpires that, for whatever reason, the Kāpiti Coast District Council listed the wāhi tapu site in is IPI as a related provision, this would amount to a clear basis for distinguishing the Environment Court's provision.

2.26 That is because the Wellington City Council included its heritage provisions, including those enabling lower building heights and densities for heritage items, and all existing and new listed heritage items (necessarily relying on policy 4), in its IPI in reliance on s 80E(1)(a).[22]

Other relevant matters

2.27 I have reviewed legal submissions lodged by the Porirua City Council and Kāpiti Coast District Council on the issue raised by this decision, both of which suggest that it has been wrongly decided. Rather than seeking to repeat the points they make, I attach those submissions in an Appendix.

2.28 I agree in general terms with the points made in these submissions. I also note that the Kāpiti submissions record that the decision has been appealed to the High Court.

---

21 Legal submissions on behalf of Wellington City Council Minute 6: Allocation of Topics, dated 8 February 2023 at [3.7].

22 See Adam McCutcheon "Officer response to memorandums on allocation of topics to the ISPP", evidence dated 8 February 2023 at [46]-[48]; and Appendix 2 to that evidence, being the Report "Proposed District Plan: Confirmation of Plan Content Pathways" dated 12 May 2022, at [21]-[23].

3 Heritage listing as a taking of property requiring compensation

3.1 Dr Keir and Ms Cutten have provided in support of their evidence a paper by economists Lewis Evans, Neil Quigley and Kevin Counsell titled "Protection of Private Property Rights and Just Compensation: An Economic Analysis of the Most Fundamental Human Right Not Provided in New Zealand".

3.2 The authors are not giving evidence, but no issue is taken with that. Nonetheless, the extent to which the authors' views can be taken into account is questionable given the purpose of the paper is to argue that there should be fewer restrictions on property rights imposed by, among other things, the RMA, and that just compensation should result in the event of confiscation of property rights. The paper does not purport to accurately portray New Zealand law in this area.[23]

3.3 There is a limited common law right not to be deprived of property without compensation.[24] The common law right manifests itself in a principle of statutory interpretation – it is presumed that Parliament did not intend to take private property without compensation.[25] That principle only applies where there is a taking of property.[26] It does not apply to the mere imposition of a control or restriction on use, such as what occurs when a dwelling is listed in a district plan as a heritage item. Accordingly, if an exercise in statutory interpretation results in a control or limitation on the exercise of property rights, that is simply a consequence which necessarily follows and a price that individuals have to meet for the notional benefits society as a whole derives from the legislative goal. Section 6(f) of the RMA is fundamentally a provision aimed at advancing a public good – recognition and protection of historic heritage – at the expense of private interests.

3.4 This is not to say that the private impacts are not a matter to be considered in weighing up whether to recommend new heritage listings

---

23 I note that Dr Keir and Ms Cutten have not put the paper in evidence "to dispute that listing sites as heritage can occur under the RMA, but to provide evidence on the effects and costs of listing homes against the will of homeowners for both those involved and broader society".

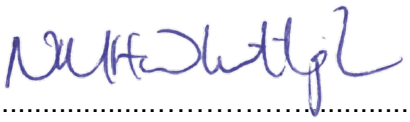
24 *New Zealand Council of Licensed Firearms Owners v Minister of Police* [2020] NZHC 1456 at [46] and [51].

25 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 116, [2007] 2 NZLR 149 at [45]; Burrows and Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 337–338.

26 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 116, [2007] 2 NZLR 149 at [46] and [51]; *New Zealand Council of Licensed Firearms Owners v Minister of Police* [2020] NZHC 1456 at [51].

under ss 32 and 77J, only that there is no basis for the argument that listing amounts to an expropriation of property rights without compensation (or requiring compensation) or that "the bar should be a high one" as Dr Keir and Ms Cutten suggest. The statutory tests are the statutory tests. And of course, s 85 provides an avenue should the effects render use unreasonable.

Date: 5 May 2023



.....

Nick Whittington
Counsel for the Wellington City Council

Appendix

PCC and KCDC Submissions

BEFORE AN INDEPENDENT HEARINGS PANEL OF PORIRUA CITY COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (the **Act**)
	AND
IN THE MATTER	of hearing of submissions and further submissions on the Proposed District Plan (**PDP**), Variation 1 to the PDP, and Proposed Plan Change 19 to the Porirua District Plan

REPLY LEGAL SUBMISSIONS ON BEHALF OF PORIRUA CITY COUNCIL

28 April 2023

Simpson Grierson
Barristers & Solicitors

M G Wakefield / K E Viskovic / E S Neilson
Telephone: +64-4-499 4599
Email: mike.wakefield@simpsongrierson.com
katherine.viskovic@simpsongrierson.com
elizabeth.neilson@simpsongrierson.com
Private Bag 2402
Wellington

CONTENTS

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These reply submissions are made on behalf of Porirua City Council (**Council**) in respect of Hearing Stream 7.

1.2 At the conclusion of the first day of hearing for Hearing Stream 7, the Panel provided the Council with a list of "Interim Questions". Council responded to the legal questions on 22 March 2023, and we do not repeat those responses here.

1.3 These submissions address:

(a) Recommendations vs Decisions on Submissions concerning provisions in both the PDP and IPI;
(b) Walkable Catchments;
(c) Shading;
(d) Northern Growth Development Area;
(e) Qualifying Matters vs Overlays;
(f) Design Guides; and
(g) A recent Environment Court decision regarding the IPI provisions.

1.4 The Council's opening legal submissions included a table that set out submission points on the IPI that are considered to be beyond the scope of the IPI. We have updated that table to include references to the particular submission point, and attach it as **Appendix 1.**

1.5 In response to matters raised during the hearing, the Council section 42A reporting officers are recommending further amendments to the proposed District Plan (**PDP**) and intensification planning instrument (**IPI**) provisions. The proposed amendments to the PDP and IPI now supported by Council are set out in the reply evidence of Mr Rachlin and Mr Smeaton.

2. RECOMMENDATIONS VS DECISIONS ON SUBMISSIONS CONCERNING PROVISIONS IN BOTH THE PDP AND IPI

2.1 The Panel's decision-making powers in relation to the PDP, and recommendation-making powers in relation to the IPI, were addressed from paragraph [4.11] of Council's opening legal submissions

2.2 During the hearing, the Panel asked how it should treat provisions that are subject to submissions made on both the PDP and the IPI. We understand that the Panel is seeking guidance on whether it should be making a "decision" on those provisions under the Schedule 1 process (in keeping with its delegations from the Council), or a "recommendation" in terms of the ISPP.

2.3 In summary, it is submitted that the Panel should satisfy both requirements by making recommendations on the provisions that are subject to IPI submissions, and equivalent decisions on related PDP submissions. In effect, this will complete all statutory functions conferred on the Panel through one recommendation (which also serves as a decision on PDP submissions), but with the IPI process being the later-in-time process, as it requires a subsequent decision from the Council.

2.4 In recommending this approach we note that:

(a) The IPI is a variation of the PDP,[1] rather than its own separate instrument. As a result, the applicable provisions of the RMA apply, including those referenced in clause 95 of Schedule 1.

(b) While clause 95 does not specifically refer to clause 16B, there is no other express statement or implicit suggestion that it does not apply and deem PDP submissions to be on the IPI, and there are good procedural reasons for the view that it is engaged.

(c) Although, Council's IPI is not a "variation" initiated under clause 16A, it has the same effect and is described in the same terms as a standard (clause 16A) "variation". The only point of distinction is the process that must be followed, with the Council's IPI required to use the ISPP.

(d) Where provisions form part of an IPI, the decision-making on those provisions must be in accordance with the ISPP. The decision-

1 As required by clause 33 of Part 5 to Schedule 12 of the RMA.

making requirements are, for all intents and purposes, the same as between the PDP and IPI. As a result, it is submitted to be open to the Panel to make a recommendation on an IPI submission (and provision), while also making a companion (and equivalent) decision under Schedule 1.

(e) The consequence of the ISPP however, is that the eventual decision-maker on the provisions will be the Council. This will mean that the IPI decision will become the later-in-time, and replace any PDP decisions made by the Panel.

(f) As discussed in our opening submissions, we observed that PDP submissions should not be treated as having lost their appeal rights. For natural justice reasons, we consider that appeal rights would still attach to PDP submissions, but that the extent to which any relief can be sought on appeal will likely be limited by the eventual Council decisions on the IPI.

(g) The fact that the IPI decisions will become the later-in-time decisions also brings into question the extent to which any relief can validly be sought through PDP appeals under Schedule 1. This is because the IPI decisions will replace any made under Schedule 1, and the ISPP removes the ability to lodge a merits appeal. Ultimately, these issues will be for Council to resolve, if any PDP appeals are filed on provisions subject to IPI decisions.

3. WALKABLE CATCHMENTS

3.1 Council's approach to the matter of "walkable catchments" (in the context of Policy 3(c) of the NPS-UD) was addressed in our opening submissions, and also discussed during the hearing with Mr Rachlin (who drafted the relevant section of the section 42A report) and Mr Mike Bricker (who explained the GIS mapping approach taken to identifying "walkable catchments").

3.2 Mr Rachlin also explained Council's approach to walkable catchments in the Overarching section 42A report.[2] The Overarching section 42A report explains the planning analysis that was undertaken to identify the spatial layer methods

2 Refer to paragraph 527.

that would most appropriately implement the urban intensification requirements of Policy 3 of the NPS-UD, and the MDRS across Porirua. The methodology for identifying and mapping the spatial layers is set out in Appendix H to the s32 evaluation report.[3] Key elements of this methodology included:

(a) Defining an 800m walkable catchment from the Metropolitan Centre Zone (MCZ), train stations and Local Centre Zone;

(b) Identifying key physical resources; supermarket, primary school, and local park; and

(c) Undertaking a detailed review to define and refine zone/precinct boundaries based on a number of principles, including equal treatment on both sides of the street and Zone boundary to follow cadastral boundaries at mid-block and/or at streets, and other public rights of way/walkways.

3.3 Mr Rachlin has provided further explanation as to Council's approach in his Right of Reply, particularly in relation to Pukerua Bay.[4]

3.4 The phrase "walkable catchment" is not defined in the NPS-UD. The phrase comprises two words, both of which are capable of being separately defined. It is the pulling together of these two words into one phrase, without any companion definition in the NPS-UD, that gives rise to interpretation issues. Because of this, and as discussed in opening submissions and with the Panel during the hearing, Council has approached the interpretation of the term within the broader context of the NPS-UD.

3.5 In taking this approach, Council has considered the established principles for plan interpretation that were recently summarised by the Environment Court in *Saville v Queenstown Lakes District* Council.[5] The key principles to glean from the authorities are:

3 Section 32 Evaluation Report Part B: Urban Intensification – MDRS and NPS-UD Policy 3.
4 See from paragraph 77 of Mr Rachlin's Reply Evidence.
5 These principles were summarised recently by the Environment Court in *Saville v Queenstown Lakes District Council* [2019] NZEnvC 90 at [16].

(a) The well-established test is to ask what the plain and ordinary meaning of the words used are, and what an ordinary, reasonable member of the public examining the provision would take from the rule.[6]

(b) It is now settled that interpretation also involves a contextual and purposive approach. The Court of Appeal has held that "*while it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum*." [7]

(c) This purposive approach is particularly important where there is ambiguity or uncertainty in the wording of the provisions. Interpreting a rule by rigid adherence to the wording itself would not be consistent with the requirements of the Interpretation Act 1999.[8]

(d) Relevant factors to consider when undertaking a contextual interpretation include the purpose of the provision, the context and scheme of the plan, the history of the plan, the purpose and scheme of the RMA and any other permissible guides to meaning (including common law principles of statutory interpretation).[9]

(e) Plan interpretation should also avoid creating injustice, absurdity, anomaly or contradiction.[10]

3.6 In using the phrase "walkable catchment", it is submitted that the NPS-UD is requiring the assessment and identification of what is "walkable", relative to a "catchment". In this way, it is the word *catchment* that gives the policy direction some meaning, as without a relevant catchment there would be no utility in providing for increased building heights.

3.7 In effect, the Council's approach has been to apply a real-world, human lens to the term catchment, and consider whether any urban area is of a nature that provides sufficient services and opportunities to warrant intensification in the manner directed by Policy 3.

3.8 On this point, we observe that the drafting of Policy 3(c), and the criteria set out in those subclauses, carries with it an implicit assumption that the "rapid

---

6 *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).
7 Ibid, at [35].
8 Ibid.
9 *Brownlee v Christchurch City Council* [2001] NZRMA 539 at para [25].
10 *Waimairi County Council v Hogan* [1978] 2 NZLR 587, 590 (CA). This principle has been adopted in many cases under the RMA, including for example *Brownlee* (above n.9).

transit stops" are within an urban environment that contains relevant urban catchments.

3.9 At this time Pukerua Bay is an isolated node of residential development within the wider Porirua urban environment, that happens to be served by a train station connecting Porirua with the Kapiti coast. If Pukerua Bay Station was intended to be the sort of transit stop captured by Policy 3(c), then it is submitted that the end result would be urban growth dictated by the presence of that criteria alone, when the relevant local authorities may have no intention of providing for intensification in that location.

3.10 It is submitted that there is nothing strained about Council's interpretation, or approach to applying Policy 3. The Council's statutory functions under section 31 of the RMA require it to establish and implement objectives and methods to achieve integrated management of the effects of the use and development of land. Without any relevant community services and opportunities, there would be tension with the requirement to enable people and communities to provide for their social, economic and cultural well-being (in terms of section 5, RMA).

3.11 The Council's approach is submitted to align with the broader outcomes that the NPS-UD is seeking to achieve. For example, Policies 3 and 4 should not be read and applied in a vacuum, with Policy 3(c) to be read in light of the outcome it is trying to achieve.

3.12 The counter factual assists to explain the consequence of the alternative interpretation. If, for example, distance (walkability) was the critical factor, then the phrase could have referred to "walkable distance" or "walking distance", or another identified metric (e.g. within 800 metres of a rapid transit stop). This could then be satisfied by enabling 6 storeys within a certain distance of all "existing rapid transit stops", but to no end if there is no intention to deliver any growth in those locations (by way of supporting infrastructure and community services). All that this would achieve would be to allow landowners to build in these locations, potentially creating isolated nodes of development without any real-world services.

3.13 When considered against the surrounding policy context and purpose of the NPS-UD, achieving this policy direction in that way would be meaningless, as there would be no potential to achieve a well-functioning urban environment.

3.14 Instead, in our submission the NPS-UD (properly interpreted) requires that local authorities first determine whether there is a catchment relative to the matters in Policy 3(c)(i) to (iii), and if there is, then determine what is walkable relative to that catchment. The Council agrees that if this exercise is undertaken in a manner that is strategic, and integrated with existing and planned infrastructure and services, it would assist in achieving well-functioning urban environments, and the sustainable management purpose of the RMA.

4. SHADING

4.1 Various submitters have challenged the Council's evaluation of shading as a relevant qualifying matter for certain residential sites.

4.2 Shading was evaluated as a qualifying matter in accordance with section 77I(j) of the RMA (i.e. it was assessed by Council as falling within the "catch all"/other qualifying matter category). It is submitted that the analysis undertaken by the Council satisfies the evidential and process requirements of both sections 77J and 77L, and that the inclusion of shading as a qualifying matter has been sufficiently justified.

4.3 For completeness, Mr Rachlin, in his response to Panel questions (dated 23 March 2023), provided a table showing the section 77L(3) and 77J evaluation undertaken in his Section 32 Evaluation Report for the matter of shading. In addition to the analysis provided in the Section 32 report, section 7.18 of the Overarching section 42A report provides further discussion on this issue.

4.4 Mr Rachlin has also addressed this matter in his Right of Reply, noting that the proposed shading control was evaluated and implemented to address a concern that adverse shading effects created by tall buildings will be detrimental to achieving a healthy built environment. Mr Rachlin has explained that including shading controls as a qualifying matter is considered necessary to give effect to Objective 1 to the NPS-UD.

4.5 This approach and evaluation was informed by Mr McIndoe's evidence for the Council, particularly in his "Urban Design Memo 20" dated 9 June 2022. In

response to evidence provided by submitters, Mr Rachlin states in his Reply Evidence:

> *In my opinion, while Kāinga Ora oppose the use of shading related height controls in Porirua, the comments from Ms Williams recognise that shading can be a health and wellbeing matter, and that other controls in addition to height in relation to boundary standards may be necessary.*

4.6 The Council continues to support the inclusion of shading as a qualifying matter on health and well-being grounds.

4.7 While shading is a matter that can be considered through the MDRS, the proposed additional shading controls included in Council's IPI have been specifically considered in the context of particular sites. The shading controls imposed have been included to respond to significant shading effects on south-facing slopes. The sites to which the controls apply were considered through a GIS modelling exercise and then tested using the Council's 3D model of Porirua, as demonstrated to the Hearing Panel by Mr Bricker.[11] In some instances the existing built form (which is typically 1 or 2 stories) is already creating considerable shading effects, which would be exacerbated should taller development be enabled.

4.8 The Council's position is that this proposed qualifying matter should not be considered as being in the nature of an amenity control, as its inclusion is to manage potential health effects on neighbouring dwellings down slope of the sites to which the controls are proposed to apply. We note that Ms Williams, for Kāinga Ora, referenced a paper in her evidence, to which Mr McIndoe responded to in his "Response to interim questions from the Hearing Panel" dated 16 March 2023. That paper noted the benefits of daylight/sunlight as follows:

> *Health associations noted included positive association with vision and sleep quality, and reduction of depression, myopia, eyestrain, ADHD (attention-deficit/hyperactivity disorder) prevalence, and SAD (seasonal affective disorder) depressions.*

11 This was discussed with the Panel during the hearing.

4.9 As it is reasonable to conclude that a lack of sunlight would not provide those positive benefits, Council considers that the inclusion of the shading qualifying matter responds to the sustainable management purpose of the RMA. This is because the control assists to enable people and communities to provide for their health, and assist the Council to achieve a well- functioning urban environment in accordance with Objective 1 of the NPS-UD.

5. NORTHERN GROWTH DEVELOPMENT AREA (NGDA)

5.1 In Council's Response to the Interim Questions from the Panel (dated 22 March 2023) we addressed the legality of rezoning the NGDA through the Council's IPI.[12]

5.2 As a brief recap, Variation 1 proposes to rezone the NGDA and includes a structure plan comprising:

(a) Medium density residential;
(b) Neighbourhood centre; and
(c) Rural lifestyle.

5.3 Given the limits on the scope of an IPI,[13] a query was raised during the hearing about the ability to include the Rural Lifestyle Zone within the NGDA.

5.4 In response, because the proposed Rural Lifestyle Zone within the NGDA was proposed to be re-zoned as Rural Lifestyle in the PDP, Council does not consider that re-zoning that part of the NGDA forms part of the Council's IPI.

5.5 It is submitted that the inclusion of the NGDA structure plan is within the scope of the IPI, as the structure plan supports the implementation of the MDRS for the NGDA. The structure plan is designed to achieve a more comprehensive and integrated approach to the planning and development of the NGDA, which is both related to, and supports, the implementation of the MDRS for this area.

12 Refer to the discussion beginning at [13].
13 Refer to section 3 of our Opening Submissions.

6. QUALIFYING MATTERS VS OVERLAYS

6.1 Greater Wellington Regional Council (**GWRC**) has raised concerns about the approach the Council has taken to the coastal hazard overlay. We understand that GWRC supports the coastal hazard overlay (including the provisions that attach to the overlay), but considers that it should have been identified as a "qualifying matter".

6.2 Our opening legal submissions addressed the Council's approach to overlays and qualifying matters, and noted that while some of the overlays (including the coastal hazard overlay) relate to matters that can be "qualifying matters", where they are not used to directly modify the MDRS (or height or density of urban form requirements), they have not been applied as qualifying matters.[14]

6.3 As supported by the section 32 analysis undertaken for the PDP[15], the continued use of those overlays, and the notified PDP frameworks that will apply to each overlay, is considered to be the most appropriate way to manage those environmental matters. This is because the overlays were developed to provide for comprehensive management of certain matters across the district, rather than simply providing for a site or area specific amendment to a density provision.

6.4 The Council maintains that this approach is appropriate, as the relevant matters cannot simply be managed or addressed by altering density standards. The inclusion of the coastal hazard overlay is submitted to align with Objective 8 and Policy 1(f) of the NPS-UD, as it will assist in ensuring resilience to climate change and enabling achievement of a well-functioning urban environment.

7. DESIGN GUIDES

7.1 In its submissions on both the PDP and IPI, Kāinga Ora has sought the following relief in respect of the proposed design guides:[16]

14 i.e. some of these provisions relate to matters listed in 77I(a)-(j) and 77O(a)-(j).
15 Section 32 Evaluation Report - Part A Overview to s32 Evaluation for Variation 1 and Plan Change 19.
16 The Council proposes inclusion of the following design guides: Residential Design Guide, Metropolitan Centre Zone Design Guide, Mixed Use Zone Design Guide, Large Fromat Retail Zone Design Guide and Local Centre Zone Design Guide.

(a) The deletion of the design guides and their replacement with amended design policies which incorporate the design guide objectives; and

(b) The removal of the design guides from within the District Plan, so that they are treated as a non-statutory tool outside of the District Plan.

7.2 Mr McIndoe addressed these submission points in his statement of evidence dated 8 February 2023. He concluded that that statutory design guides are more effective and efficient than advisory guides, or a list of outcomes and assessment criteria included in the District Plan.

7.3 Mr McIndoe provided the following reasons for this position:

(a) The intentions of design guides are better understood by developers and their designers than the alternative, which would be simple, high-level lists of objectives, outcomes or assessment criteria.

(b) Design guides are effective because they give guidance for interpretation and therefore certainty on the quality of outcomes expected while, contrary to the Kāinga Ora submission, also allowing flexibility on what those outcomes are.

(c) Kāinga Ora's proposed approach to identify outcomes in the form of policies, without related guidelines, explanation and illustrations, would lead to greater brevity within the plan provisions but less clarity. It would be open to wide, multiple and potentially inconsistent interpretations of what is meant by each outcome or objective.

(d) The alternative approach of using advisory (non-statutory) design guides as requested by Kāinga Ora is not effective at an implementation level, because they are not required to be applied, or if they are referred to, they are given little or no weight.

7.4 Mr McIndoe has observed that Kainga Ora has not provided any evidence to substantiate their contentions that design guides are not clear and easy to follow.

7.5 Mr Rachlin has provided further explanation of Council's approach in his Right of Reply, particularly as to the wording of RESZ-P10.[17]

7.6 In preferring the evidence of Mr McIndoe and Mr Rachlin over that presented for Kainga Ora, it is submitted that the inclusion of Design Guides in the PDP is important to ensure certainty as to the quality of outcomes, both in terms of interpreting the relevant provisions, and implementation.

7.7 The plan-making process itself gives parties the opportunity to test the content of the proposed design guides. It is submitted that relying on guidance that sits outside of the plan would not provide the same degree of certainty, or rigour, as they would not (as a matter of law) be provisions that engage with section 104, and could be subject to change over time without needing to work through formal process requirements.

7.8 It is submitted that including the design guides in the PDP will provide greater certainty for plan users, will result in more consistent outcomes and is the most appropriate method for achieving the objectives of the PDP.

8. RECENT ENVIRONMENT COURT DECISION REGARDING THE IPI PROVISIONS OF THE RMA

8.1 Following the adjournment of Hearing Stream 7, the *Waikanae Land Company v Kāpiti Coast District Council* [2023] NZEnvC 056 decision (**Decision**) was issued, which relates to the impact of aspects of Kāpiti Coast District Council's (**KCDC**) IPI (**PC2**) on a resource consent application that has been direct referred to the Court.

8.2 While the Council has not proposed to include any new "qualifying matters" in the same way as KCDC for specific heritage / cultural items, the Decision remains relevant in that it considers the interpretation of the IPI-related provisions of the RMA, and *vires* of certain decisions by KCDC. It is also relevant in the event that the Panel intends to recommend the inclusion of any new qualifying matters, beyond what has been proposed by Council.

17 The Section 32 Evaluation Report Part B: Urban intensification – MDRS and NPS-UD Policy 3 assessed this matter of Kainga Ora's approach as compared to the PDP approach to achieving urban design outcomes. Appendix D to that section 32 deals with the topic of urban design and design guides.

8.3 The Court found that KCDC acted unlawfully by proposing to list the Kārewarewa urupā within Schedule 9 of the operative District Plan, which is entitled "Sites and Areas of Significance to Māori" (**wāhi tapu listing**).

8.4 While the Decision does not provide any detailed analysis as to how it formed the view that the proposed new wāhi tapu listing was *ultra vires*, it made the following general findings on the IPI provisions:

(a) Territorial authorities' powers in the IPI process are confined to the matters identified in a number of relevant provisions.[18] Those provisions identify and limit the matters that may be the subject of the MDRS requirements.[19]

(b) "Qualifying matters" introduced through the IPI process relate to the standards identified in the definition of the MDRS, and the matters set out in clauses 10-18 of Schedule 3A, and are allowed to make those standards less enabling.[20]

(c) On its face section 80E is very wide (presumably with reference to the amendments that can be made to planning documents using an IPI). However, there is a limitation in the matters that fall within the "related matters category".[21]

(d) Section 80E(1)(b)(iii)(B) was not considered to be relevant as the wāhi tapu listing was only able to be included in the IPI if it was consequential on the MDRS.[22]

(e) As the wāhi tapu listing precludes operation of the MDRS on the site entirely, and as the MDRS sets out to impose more permissive standards, it was found that the listing neither supported nor was consequential to the implementation of the MDRS.[23]

(f) By proposing to include the wāhi tapu listing, PC2 "disenables" or removes the rights which presently exist in respect of the site (as the

18 See paragraph [23].
19 See paragraph [24].
20 See paragraph [25].
21 See paragraph [27]-[28].
22 See paragraph [29].
23 See paragraph [30].

activity status of residential development was changed from permitted to either restricted discretionary or non-complying).[24]

Discussion

8.5 We agree with some aspects of the Court's findings, in particular that there are limitations on the matters that can be included within an IPI.[25] However, we respectfully disagree with the Court's findings as to the limitations on the provisions that can be included in an IPI as a "qualifying matter" or "related provision" under section 80E(2).

8.6 More specifically, we disagree with the interpretation taken by the Court, which in our view approaches the concepts of a "qualifying matter" and "related provision" too narrowly.

8.7 The implication of the Court's interpretation, is that a matter / provision can only be included in an IPI (as either a related provision or qualifying matter) if it directly relates to the mandatory outcomes. In other words, the matter / provision would need to directly amend the MDRS, or how the plan implements policy 3 of the NPS-UD, and would not be allowed if it were intended to regulate a relevant resource management matter in a comprehensive or integrated way (as is the orthodox planning approach).

How does this impact on Council's IPI*?*

8.8 It is submitted that the Council's approach to qualifying matters is in keeping with the Court's decision. That approach is set out in the Overarching Section 32 report, which states:[26]

> …only where a rule or standard is proposing to amend or modify the MDRS, or the height or density of urban form requirements set out in policy 3, is it applied as a qualifying matter for the purposes of sections 77I and 77O. Provisions in the PDP which meet this criteria are listed in Table 1 below:

8.9 As discussed earlier in these submissions, the Council has also relied on overlays to manage other relevant resource management issues, but has not

24 See paragraph [31].
25 Refer to our Opening Submissions that address the scope of an IPI (in particular seciton 3).
26 Available here: https://storage.googleapis.com/pcc-wagtail-media/documents/Section_32_Evaluation_Report_-_Part_A_-_Overview_to_s32_Evaluation.pdf

treated them as “qualifying matters” as they do not directly amend the MDRS or height / density rules or standards.

8.10 Table 1 to the Overarching Section 32 report provides a list of qualifying matters in the notified PDP (2020) that either amend the MDRS and/or the building height and density requirements relative to policy 3. Table 1 identifies the PDP rules/standards, density standards that are amended, and which RMA qualifying matter provision has been relied on by Council. Table 2 then sets out the new qualifying matters introduced by Variation 1 that are considered necessary to make the MDRS and the relevant building height or density requirements under Policy 3 less enabling of development.

8.11 In our view, this approach is consistent with the Decision, in that Councils approach has been to only rely on qualifying matters where they are used to amend the MDRS or make the building heights or densities (re Policy 3) less enabling. For example, SNA’s have only been treated as qualifying matters where it was considered (and evaluated as) appropriate to amend the starting point for subdivision – see for example SUB-R12 in the PDP or SUBPFZ-R2 and SUBPFZ-R3 in PC19.

8.12 In other cases, for example where SNAs (and their associated provisions) apply to control other matters, such as the clearance of vegetation, or consent for risk-sensitive activities, to the extent required they have been treated as a “related provision” in terms of section 80E(1)(b)(iii).

Is the Decision binding on PCC?

8.13 As a matter of strict legal principle, a decision of the Environment Court is only binding in respect of a particular case. It is therefore not binding on the Panel’s consideration of Council’s IPI.

8.14 In this instance, the Decision was considered in the context of a live resource consent application and a different IPI. The Decision addressed the interpretation of certain provisions of the RMA, against a factual context that would see a more stringent activity status triggered for a live resource consent application. That factual context is unique, and cannot be replicated for the Council’s IPI. We also note that the Court’s role differs from the wider statutory

functions engaged for the Panel, which serves to further distinguish the context surrounding the Decision from Council's IPI.

8.15 We also note that the Decision has been appealed to the High Court by KCDC.

The alternative interpretation preferred by Council

Qualifying matters

8.16 As set out in our opening submissions, section 80E prescribes what an IPI *must* include, and what it *may* include. No other uses of the IPI are permissible.[27]

8.17 The RMA defines the MDRS as "the requirements, conditions and permissions set out in Schedule 3A".[28] One of the requirements in Schedule 3A is the incorporation of a set of objectives and policies,[29] including Policy 2:[30]

> Apply the MDRS across all relevant residential zones in the district plan **except in circumstances where a qualifying matter is relevant** (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga).
>
> **[Our emphasis added]**

8.18 The concept of a "qualifying matters" was introduced into the RMA by the Amendment Act. However, the concept already appeared in the NPS-UD, and many of the matters that are now listed in section 77I as qualifying matters are already part of the RMA framework, for example matters of national importance under section 6.

8.19 In relation to the MDRS, and policy 3 of the NPSUD, section 77I prescribes what "qualifying matters" are.[31] It reads:

27 Section 87G.
28 Section 2.
29 Clause 6.
30 Clause 6(2)(b).
31 In relation to Policy 3, section 77I essentially overrides the NPS-UD's definition of qualifying matters (at 3.32).

> **77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**
>
> A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
>
> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:
>
> (b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:
>
> (c) a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:
>
> (d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:
>
> (e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:
>
> (f) open space provided for public use, but only in relation to land that is open space:
>
> (g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:
>
> (h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:
>
> (i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:
>
> (j) 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.

8.20 It is submitted that the plain wording of section 77I, and in particular the words "that are present", clarifies that a qualifying matter does not already need to be included in a district plan to be relevant. Instead, if a territorial authority (when evaluating its approach to implementing the MDRS / Policy 3) identifies that one of the listed matters "are present", section 77I permits it to identify it as a qualifying matter, and make the MDRS / Policy 3 requirements less enabling as a consequence.

8.21 It follows that, in our submission, section 77I does not start with a presumption that all possible qualifying matters already exist in a district plan. This position is supported by the framing of subsection 77I(j), which provides for qualifying matters relative to "*any other matter* that makes higher density, as provided for by the MDRS or policy 3, inappropriate". As this subsection is framed against the MDRS and Policy 3 requirements that an IPI is required to implement, it

must follow that there is scope to include new qualifying matters that are required to respond to issues created by those mandatory requirements.

8.22 In relation to the evaluation of qualifying matters, the RMA draws a distinction between "existing qualifying matters", for which a lesser level of justification is required (section 77K), and the evaluation of other qualifying matters (section 77J). The distinction between existing and new qualifying matters is submitted to support our alternative interpretation.

8.23 Finally, section 77G sets out the general duty to incorporate the MDRS. Of particular relevance subsection (6) provides as follows:

> (6) A specified territorial authority may make the [MDRS] or policy 3 less enabling of development than provided for in that schedule or by policy 3, if authorised to do so under section 77I.

8.24 This provision again does not link the power to make the MDRS / Policy 3 "less enabling" to only existing qualifying matters.

"Related provisions"

8.25 As already addressed above, as opposed to amending the density provisions that give effect to the mandatory outcomes, Council considered that areas within the flood overlay areas and SNAs should be managed in accordance with the regimes proposed for management of these matters within the PDP.

8.26 This is considered to represent a more comprehensive and integrated approach to the management of these matters of national importance, which better aligns with the RMA. Council considers that section 80E enables this to occur through the ability to notify "related provisions" as part of an IPI and that this is necessary to achieve the purpose of the Act. Also relevant are objectives 1 and 8 from the NPS-UD, as is the mandatory objective 1 from the Amendment Act, because those objectives must also be given effect to through the IPI. Put another way, it is not only policy 3, or the MDRS density standards that need to be considered in relation to "related provisions", but these other outcomes that the Council is directed to give effect to.

8.27 Section 80E(2) provides that "related provisions" not only include provisions that <u>are</u> qualifying matters, but provisions that more broadly "relate to" the listed matters, including qualifying matters.

8.28 To be a *related* provision, section 80E(1)(b)(iii) states that the provision must support or be "consequential on" the implementation of the mandatory outcomes. The RMA does not define "consequential on", but as discussed in our opening submissions, it is submitted that an amendment will qualify as "consequential on" if it follows from, or is required because of the Council's obligation to incorporate the MDRS.

8.29 While it has not been contested through the hearing process, it is submitted that the inclusion of the SNA and the additional flood overlays is consequential for the following reasons:

(a) Council was required by the RMA, as amended, to give effect to the mandatory outcomes and did so by rezoning the residential areas as medium and high density residential (which incorporate the requirements of the mandatory outcomes). It is also proposing to "live zone" the NGDA to satisfy its statutory obligations.

(b) As part of implementing these mandatory outcomes, Council was required to consider the appropriate level of development, and whether or not the MDRS needed to be made less enabling for various reasons. This included a requirement to complete a section 32 evaluation.

(c) That section 32 evaluation required the Council to examine whether the provisions in the IPI are the most appropriate way to achieve the objectives of the PDP, which include:

> *ECO-O1 Significant Natural Areas*[32]
>
> *The identified values of Significant Natural Areas are protected from inappropriate subdivision, use and development and, where appropriate, restored.*
>
> *NH-O1 Risk from natural hazards*

32 ECO-P1 requires the identification and listing of significant natural areas where particular criteria are met. For the reasons set out in the section 32 report, the additional SNAs are considered to meet the values and criteria. *ECO-P1 Identification of Significant Natural Areas Identify and list within SCHED7 - Significant Natural Areas areas with significant indigenous biodiversity values in accordance with the criteria in Policy 23 of the Regional Policy Statement.*

Subdivision, use and development in the Natural Hazard Overlay do not significantly increase the risk to life or property and do not reduce the ability for communities to recover from a natural hazard event.

NH-O2 Planned mitigation works

There is reduced risk to life and property from flood hazards through planned mitigation works.

(d) As set out in the section 32 reports identified in paragraph 8.8 above, the Council determined that it was appropriate to rely on certain overlays to manage particular matters, as related matters.

(e) For completeness, and in relation to SNAs and flood overlay areas specifically, the Council had a statutory obligation to protect them and manage land use to respond to the SNA / hazard risk in a manner consistent with section 6(c) and (h). Were Council to fail to do so, it would result in it being unable to satisfy the requirements of sections 31 and 32, in relation to its IPI.

Dated: 28 April 2023

Mike Wakefield, Katherine Viskovic, Elizabeth Neilson
Counsel for Porirua City Council

Appendix 1 – Updated scope table

APPENDIX 1 – REVIEW OF PARTICULAR SUBMISSION POINTS RAISING SCOPE ISSUES IN RELATION TO THE IPI

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
	Fire and Emergency New Zealand (Submitter #58)		
		VARIATION 1	
OS58.22 OS58.23 OS58.24 OS58.25 OS58.26	Submissions on Noise chapter, including request for new definition (in Interpretation section) for "*Temporary Emergency Services Training Activity*"	The requested new definition is related to the submission that seeks that a new rule should be included in the Noise Chapter – which seeks to permit noise from Temporary Emergency Services Training (in all zones). The reasoning provided in the submission on the Noise chapter is that "*Due to urban growth, population changes and commitments to response times, FENZ may need to locate anywhere within the urban and rural environment*". The issue is that FENZ has sought that the new permitted rule apply to all zones – rather than only those zones that are amended by Variation 1. For example, as noted in the quote above, the submission states that "FENZ may need to be located anywhere within the urban **and rural** environment " The rural environment is not subject to Variation 1 or PC19, and therefore any submissions seeking amendments to the rural environment (or zones) are not "on" the Variation. Further, FENZ has sought new objectives and policies for the Noise Chapter, which is a General District-Wide Matter. If accepted, these objectives and policies would apply across the entire district. To the extent that they relate to non-urban environments, these changes are also not "on" Variation 1. The submission point could be considered to be within scope in relation to the application of the proposed provisions to urban environments, if it can be shown that the submission is a related provision for the purposes of section 80E.	The new definition could be within scope – on the basis that it will only be implemented in the urban environment. The relief seeking a new rule is able to be treated as "on" Variation 1 in so far as it applies to zones subject to Variation 1 – i.e. urban zones. It is not "on" the variation to amend or include rules in the rural zones. The proposed objective and policy cannot apply across the entire district – it is beyond the scope of Variation 1 to allow new district wide noise provisions. This submission point may be valid to the extent it applies

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
			to urban environments only.
OS58.7 OS58.10	HH-R6, HH-R9	While the submission supports these provisions, the rules are not subject to Variation 1, and nor are the policies which the rules refer to. The submissions are therefore not "on" the plan change. We note that even if they were, as no changes are sought they do not provide any scope for amendment.	Submission is beyond the scope of Variation.
OS58.16 OS58.17 OS58.18 OS58.19 OS58.20	SUB-R10, SUB-R11, SUB-R12, SUB-R13, SUB-R14	While the submission supports these provisions, the rules are not subject to Variation 1. The submission is therefore not "on" the plan change. We note that these rules do not directly or consequentially relate to implementation of any of the mandatory outcomes.	Submission is beyond the scope of Variation.
OS58.92	GIZ-S6	This standard is referred to in GIZ-R3, which Variation 1 does not amend. It is therefore arguable that there is no proposal to amend the "status quo" through Variation 1, with the submission not "on" the plan change. However, given that Variation 1 amends the GIZ chapter to remove density standards from land use activities, and the connection that this standard has with that amendment, it is arguable that the submission is within scope.	On balance, the submission could be argued to be within scope.
		PC19	
OS58.100 OS58.101	New objective and policy	This submission seeks a new objective and policy to essentially provide for infrastructure. It is arguable that this relates to the housing intensification enabled by PC19, however given the targeted nature of the amendments proposed by PC19 we consider that unless FENZ can	Submission beyond scope.

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
		clearly explain the relationship between the proposed objective and policy and the implementation of the mandatory outcomes, this submission point should be considered as beyond scope.	
OS58.105 OS58.106	New objective and policy	It is not clear to us how the proposed new objective and policy support, or consequential on, achieving the mandatory outcomes or otherwise related to the PC19 proposals.	Submission points beyond scope.
OS58.98 OS58.103 OS58.104 OS58.107 OS58.109 OS58.110 OS58.111 OS58.112 OS58.113 OS58.114 OS58.115 OS58.116 OS58.117 OS58.118 OS58.120 OS58.121 OS58.122	PFZ-01 PA_{PFZ}-P1 and PA_{PFZ}-P3 PA_{PFZ}-R1, R2, R5, R6, R7, and R-10. PA_{PFZ}-R8, 9, 11, 12, 13 PA_{PFZ}-R10 PA_{PFZ}-S1 and S2, and proposed new standard New standard PB_{PFZ}-P1 and P2. New objective and policy PB_{PFZ}-R1, R2, R5, R6, R7, R8 PB_{PFZ}-R10, 11, 12 PB_{PFZ}-R9 PB_{PFZ}-S1 and S2, and proposed new standard	These provisions are either not proposed to be amended by PC19, or the submission point is unrelated to the amendments proposed by PC19. The amendments to the Plimmerton Farm Zone were specifically targeted to give effect to the mandatory outcomes required by section 80E. The relief sought by these submission points goes beyond achieving those outcomes, by seeking a range of other amendments. It is possible that the submitter may be able to show that there is a connection between the relief sought and the scope of PC19, however taken at face value there is no obvious connection. We note that a number of the submission points seek retention of the provisions as drafted, which would not provide any scope to change those provisions in any case.	Submission points beyond scope.
	Ngāti Toa (Submitter #114)		
OS114.5	Seeking a new overlay in High Density Residential and MDRS zoning by defining this	The submission seeks the following:	As addressed in the body of the legal submissions, this relief appears to seek

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
	overlay as "*is a zone where Ngāti Toa has uninhibited Tino Rangatiratanga and Mana as Tangata Whenua".*	"*We observe that the arbitrary requirements coming from the IPI and MDRS implementation mean that Ngāti Toa will end up with zoning that it may not be desirable for the future use of their land. Since te Rūnanga have not received or claimed these lands yet, we would like these areas to be exempt from an imposed District Plan zoning*." The reasoning for this is repeated in the submission on Subdivision: "*Since Te Rūnanga, when the time comes, will receive lands as part of the Claims Act, in a regime that has been already established by the Crown, Plan Variation and provisions may pose risks around taking advantage of this returned land- and giving further limitations to the way iwi would like to develop and use that land*." The relief sought is for "*Council to identify all such land and create overlay of 'Ngāti Toa Zone' by defining this overlay as: is a zone where Ngāti Toa has uninhibited Tino Rangatiratanga and Mana as the Tangata Whenua*." To the extent that the submission indicates that the relevant land is exempt from District Plan zoning, the Council, as the responsible planning authority under the RMA, does not have the power to carve out areas of the district where the district plan will not apply, nor is it clear what regulatory regime would apply to those areas in the interim period if the relief was granted. If the eventual zoning of Ngāti Toa's land is considered to be inappropriate, that can be challenged on appeal, or be the subject of a plan change request in the future. The Council, may however, have jurisdiction to include an overlay across the relevant land, if it can be demonstrated that such an overlay directly relates to one of the mandatory outcomes – we anticipate that this overlay would be a qualifying matter.	changes that would be beyond the Council's jurisdiction.

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
		Note that some of the settlement areas are not in the urban environment, and therefore any submission to amend areas outside the urban environment would be beyond the scope of the Variation.	
OS114.44 OS114.45 OS114.46 OS114.47 OS114.48 OS114.49 OS114.50	SUB-P1 SUB-P2 SUB-P3 SUB-P4 SUB-P5 SUB-P6 SUB-P7	The relief sought in relation to these policies is not clear, and it is also uncertain how the relief (or the policies) relates to the Council giving effect to the mandatory outcomes. If there is a connection between the relief sought and those outcomes, then these submission points may be within scope, but this is not currently apparent. The exception is with SUB-P7 which relates to the Future Urban Zone. That zone is not subject to Variation 1, so to the extent that this submission relates to SUB-P7 it is considered to be beyond scope.	Submission on SUB-P7 appears to be beyond scope. Currently the rest of this submission appears to be beyond scope unless the submitter can show how the relief supports or is consequential to, one of the mandatory outcomes.
	KM & MG Holdings Limited (Submitter #54)		
OS54.1	Rezoning of Plimmerton Farm Zone	This submission point seeks to re-label the zoning of the Plimmerton Farm Zone. As the spatial extent of this zone includes non-urban residential areas (i.e. Precinct C), and it is not connected to the implementation of the mandatory outcomes, this submission point is considered to be beyond scope. A similar submission was made on the PDP by this submitter. As the land that was subject to PC18 does not form part of the PDP (as appears to be acknowledged in submission 149 on the PDP) this submission point is also considered to be beyond the scope of the PDP.	Beyond the scope of Variation 1 or PC19 (and the PDP).
OS54.2 OS54.4	Updating BORA maps in Plimmerton Farm	We consider that updating the identification of BORA falls within the purpose of the “related provisions” clauses, as making the amendments could support the implementation of the MDRS and Policy 3. To interpret the provisions otherwise would frustrate the purpose of the Enabling Housing legislation, because the MDRS and	Submission point is within scope for Precincts A and B. If the submitter can show a connection between the

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
		Policy 3 of the NPS-UD would not be able to be implemented, in a particular area, because of a known mapping error. To the extent that the mapping error relates to Precinct C, KM &MG Holdings will need to show that there is a direct relationship between the BORA removed from Precincts A and B and those added, removed, or amended in Precinct C. In other words, if a clear connection could be shown between providing additional residential density (in Precincts A and B) and the identification of the BORA in Precinct C there is considered to be scope for the amendment sought – in order to satisfy the "supports or is consequential to" requirement.	amendment of BORA areas in Precincts A and B, and the amendment of such areas in Precinct C, that submission could fall within scope. The Panel will need to be satisfied that amendment the BORA maps in Precinct C "supports or is consequential to" achieving a mandatory outcome, given that Precinct C is not a "relevant residential zone".
	Greater Wellington Regional Council (Submitter #74)		
OS74.1	Provisions relating to impacts on freshwater	Seeking new provisions are included to "*promote positive effects of urban development on the health and well-being of water bodies and freshwater ecosystems*". The covering submission for GWRC notes that it considers its submission is within the scope of s80E, and that some of their submissions will be "related provisions" under section 80E. However the difficulty with this submission point is that it appears to be seeking relief that is broader than the implementation of the MDRS or giving effect to the relevant policies of the NPS-UD. It is therefore difficult to determine the extent to which the relief sought supports or is consequential to either the MDRS or the relevant policies of the NPS-UD; demonstrating this link is a requirement of being considered a "related provision" under section 80E.	While these submission points seek relief in reliance on the ability to include "related provisions" in an IPI, the link between the proposed relief and the mandatory requirements in s80E is not clear.

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
		The fact that this change is sought across the "Whole Plan" creates further scope queries, as the scope of an IPI is generally spatially limited to the urban environment – and therefore amendments to other areas, such as rural areas, are unlikely to be within the scope of Variation 1.	
OS74.2	Strategic direction objective and/or policy regarding equity and inclusiveness	GWRC has sought a new strategic objective and/or policy to provide direction regarding ki uta ki tai, partnering with mana whenua, upholding Māori data sovereignty, and making decisions with the best available information including Mātauranga Māori. GWRC appears to rely on section 74 once again, when the requirement is to have regard to the pRPS. The GWRC submission point notes that "In regard to scope, matters addressed in the policy are related to district-wide matters which can be addressed in an IPI". While it is correct that district-wide matters are included as a type of "related provision" for the purpose of subsection 80E(2), what the GWRC submission fails to acknowledge is that subsection 80E(2) needs to be read alongside subsection 1(b)(iii), which engages the mandatory requirements. GWRC has not explained the link to those requirements at all. Furthermore, this change seeks amendments to the strategic directions provisions which will apply to all decision-making across the district (i.e. will not be limited to those areas or matters that are directly connected to the implementation of the mandatory outcomes). To the extent that the proposed objective or policy relates to those areas it is considered to be beyond the scope of Variation 1. It is also not clear that these amendments will accord with the policy intention of the changes proposed by the Amendment Act.	Taken at face value, it is difficult to accept that this relief is on Variation 1. There is no explanation of how it will support or be consequential to the matters in section 80E(1), or consideration given to any spatial constraints. As noted in the above row, further particulars are required from GWRC to determine whether the relief it seeks is within the scope of Variation 1.

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
OS74.3 OS74.4 OS74.5 OS74.6 OS74.7 OS74.8 OS74.9 OS74.10 OS74.11 OS74.12 OS74.13 OS74.14 OS74.15 OS74.16	Strategic direction chapter Three Waters chapter Subdivision chapter Structure plans Earthworks chapter Infrastructure chapter Residential zones chapter	In line with the comments above, the focus of this submission appears to be on achieving a purpose other than implementing the MDRS or policy 3 and 4 of the NPS-UD, and there is no explanation of how the changes proposed by the relief sought "support or are consequential to" one of the mandatory outcomes. The amendments seek to achieve a new/different purpose altogether – and therefore appear to be beyond scope. Further, as noted above, the IPI generally does not have the power to amend district wide provisions – it is spatially limited to the urban environment unless there is a direct link between the relief sought and the implementation of the mandatory outcomes.	Taken at face value, relief appears beyond scope.
OS74.17 OS74.18 OS74.19 OS74.20 OS74.21 OS74.22 OS74.23 OS74.24 OS74.25 OS74.26 OS74.27 OS74.28 OS74.29 OS74.30	Transport chapter Subdivision chapter Infrastructure chapter Structure plans	The submission states "*In regard to scope, infrastructure is a related matter under RMA section 80E(2)(d) so can be included in an IPI, and therefore is within scope of submissions. These provisions would assist in addressing effects associated with intensification*." As discussed above, for a matter to be a "related provision", it must be demonstrated that the amendment "supports or is consequential to" one of the mandatory outcomes. The fact that infrastructure is listed in section 80E(2)(d) is, of itself, not sufficient to determine that the submission is within scope. We consider that more would be required to demonstrate that all of the relief sought in this submission point can be clearly linked to achieving one of the mandatory outcomes. We note that some of the amendments appear to make the relevant areas *less* enabling of development, which would not support the mandatory requirements.	As there is some potential for certain submission points to be "related", however GWRC will need to provide further particulars and details that link the relief to the matters in section 80E(1).

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
OS74.31 OS74.32 OS74.33	Natural Hazards chapter Zone Rules	The submission states "*In regard to scope, climate-resilient urban areas may be considered in the scope of the IPI under section 80E(2)(a) as a district-wide matter*". For the reasons discussed above, it is unclear how the relief sought "supports or is consequential to" either of the mandatory outcomes. Again, a "whole plan" amendment is sought that is also beyond the scope of an IPI (which is spatially limited to the urban environment). It is unclear whether the proposed provisions relating to climate resistance are intended to be "qualifying matters" or not. In other words, it is not clear whether the relief sought is seeking to alter urban density provisions in response to the possible effects of climate change, or instead limit development to where design can improve climate resilience.	Taken at face value, relief appears to be beyond scope.
OS74.34 OS74.35 OS74.36 OS74.37	Natural Hazards chapter Infrastructure chapter Subdivision chapter	Submission seeks "whole plan" amendments to include nature-based solutions for certain development aspects. For the reasons set out above, this submission appears to be beyond scope because it is unclear how this relief will achieve one of the mandatory outcomes.	Taken at face value, relief appears to be beyond scope.
OS74.38 OS74.39	REE strategic direction Subdivision, transport, infrastructure, renewable energy provisions where relevant	For the same reasons discussed above, this appears to be beyond scope – is it unclear how the changes sought are necessary to give effect to the mandatory outcomes. The request that amendments are made to the whole plan further reinforces this.	Taken at face value, relief appear beyond scope. .
OS74.40 OS74.41 OS74.42	Ecosystems and indigenous biodiversity	For the same reasons discussed above, this appears to be beyond scope – is it unclear how the changes sought are necessary to give	Taken at face value, relief appear beyond scope. .

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
OS74.43 OS74.44 OS74.45 OS74.46 OS74.47 OS74.48 OS74.49		effect to the mandatory outcomes. The request that amendments are made to the whole plan further reinforces this.	
OS74.50	Residential, Commercial and Mixed-Use Zones	It appears that these submission points may be in scope, however this will depend on the specific relief that is sought which is not specifically articulated in the GWRC submission.	Submission appears to be within scope to the extent that GWRC can demonstrate a clear link between the relief sought and achieving one of the mandatory outcomes.
OS74.51 OS74.52 OS74.53	Papakāinga chapter Zones where relevant	Submission states "*Ensure that Deed of Settlement areas are not subject to the District Plan, as this will most effectively provide for the exercise of tino rangatiratanga by Ngāti Toa Rangatira*." Refer to earlier comments on a similar submission by Ngāti Toa, and the scope of the Council's jurisdiction. This is discussed further in the body of our submissions.	Submission to retain the Papakāinga chapter is within scope, although no relief is sought. Submission on the application of the District Plan to Deed of Settlement areas is beyond scope, for lack of jurisdiction.
OS74.57	Natural hazards chapter Zones Structure plans	The matters set out in these submission points are generally within scope, however spatially can likely only apply to the urban environment – therefore "whole plan" change is unlikely to be within scope. To the extent that GWRC seeks relief outside of the urban environment it will	Within scope to the extent that the relief relates to urban environments. Beyond the urban environment the submitter

SUB NO.	SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
		need to show how the relief links to implementation of one of the mandatory outcomes.	will need to show a connection to implementing one of the mandatory outcomes.
OS74.58	Renewable Energy Generation Zone provisions	This submission point seeks amendments to the renewable energy generation provisions, the subdivision chapter and zone chapters to: • Recognise the benefits that renewable energy sources have for greenhouse gas emission reduction. • Include policy to promote energy efficiency in development such as layout in design to maximise solar and renewable energy generation. • Include as a matter of control or discretion for subdivision and comprehensive housing developments how the development provides for solar orientation of buildings to achieve passive solar gain. While we consider that there is a connection between the second and third bullet and the mandatory outcomes, it is difficult to see how the first bullet point is connected with the implementation of those outcomes.	Submission point is beyond the scope of Variation 1 to the extent it seeks recognition of the benefits that renewable energy sources have for greenhouse gas emission reduction.

BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY THE KĀPITI COAST DISTRICT COUNCIL

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of Plan Change 2 to the Operative Kapiti Coast District Plan

LEGAL SUBMISSIONS ON BEHALF OF KĀPITI COAST DISTRICT COUNCIL

Dated: 28 April 2023

Simpson Grierson
Barristers & Solicitors

M G Conway / S B Hart
Telephone: +64-4-924-3459
Email: matt.conway@simpsongrierson.com / sam.hart@simpsongrierson.com
PO Box 2402
WELLINGTON 6014

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These legal submissions are filed on behalf of Kāpiti Coast District Council (**Council**), following the hearings before this Panel in respect of Plan Change 2 (**PC2**) to the Operative Kapiti Coast District Plan (**ODP**).

1.2 These legal submissions supplement the Council officers' reply and address the vires of the wāhi tapu listing[1] in PC(N). We specifically address the Environment Court's recent decision in *Waikanae Land Company v Heritage New Zealand Pouhere Taonga* (**Decision**), where the Court determined that the Council had acted unlawfully by including the wāhi tapu listing in PC(N).[2] The Decision is relied on in the legal submissions filed by Waikanae Land Company (**WLC**).

1.3 In summary, the Council maintains its submission that the wāhi tapu listing is a lawful exercise of the Council's powers, and that it is within the scope of provisions that the Council may include in its IPI under section 80E. The Council has appealed the Decision to the High Court, so the conclusions expressed in the Decision are subject to the outcome of that process.

1.4 The Council seeks that the Panel continue to consider the proposed wāhi tapu listing and include a recommendation on that proposal in its report to the Council.

2. VIRES OF THE WĀHI TAPU LISTING

2.1 Our opening legal submissions address the reasons why the Council maintains that the wāhi tapu listing is a lawful inclusion in the IPI.[3] In summary they are "related provisions" that are "consequential on" the Council's obligation to incorporate the MDRS.[4] Those submissions anticipated and addressed the points that have since been made on behalf of Waikanae Land Company on that issue. The main additional development since our opening submissions is the issuing of the Court's Decision, which is relied on by Waikanae Land Company. Hence our submissions primarily focus on the Decision and its consequences.

---

1 Refer Council legal submissions dated 14 March 2023 at [4.2].
2 *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.
3 Refer opening submissions at [4.10] to [4.53].
4 Section 80E(1)(b)(iii).

2.2 As stated, the Environment Court found that the Council acted unlawfully by including the wāhi tapu listing in PC(N). The Decision materially includes the following findings, which we respectfully disagree with:

(a) **Effect of section 77I:** the Decision finds the Council has acted unlawfully in that:

(i) the effect of section 77I is that qualifying matters introduced through the IPI must relate to the matters set out in clauses 10-18 of Schedule 3A, and can make those standards less enabling;[5] and

(ii) the wāhi tapu listing "goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I".[6]

(b) **Scope of section 80E:** the Decision finds that the wāhi tapu listing falls outside of the scope of section 80E, and in particular subsections (1)(b)(iii) and (2). According to the Decision:

(i) there is an inherent limitation in the matters which fall within the related matters category under section 80E(2), as per section 80E(1)(b)(iii);[7] and

(ii) as the MDRS sets out to impose "*more permissive standards"*, the wāhi tapu listing, which precludes the level of development that must otherwise be permitted in accordance with the MDRS, is not "consequential on" the MDRS.[8]

2.3 While we address these two findings below, it is further submitted that there were other elements of the Court's approach that were in error. Firstly, at a general level, the Decision appears to elevate the purpose of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**2021 Amendment Act**) above the RMA's purpose and scheme, despite Part 2 of the RMA remaining unchanged.

5 Decision, above n 2, at [25].
6 At [31] and [32].
7 At [28].
8 At [30].

2.4 Secondly, the Decision also treats the concept of MDRS as being confined to the standards set out at clauses 10-18 of Schedule 3A of the RMA, instead of applying the RMA's definition of the MDRS.[9]

2.5 Finally, there are contextual factors that the Council was required to consider when preparing its IPI, which the Decision does not appear to have had regard to:

(a) the Council's operative district plan already includes protections for wāhi tapu sites that the Council has identified (including urupā located in the General Residential Zone);

(b) the information that was available to the Council on Kārewarewa urupā's existence, when it was preparing its IPI for notification; and

(c) the requirement for the Council to carry out a suitable evaluation under sections 32 and 77J, and through this evaluation to examine whether the provisions in the IPI are the most appropriate way to achieve the objectives of the district plan, and in turn, the RMA's purpose.

2.6 We now turn to the findings set out at 2.2 above.

Effect of section 77I

2.7 The Court found that the effect of section 77I is that qualifying matters introduced through the IPI must relate to the matters set out in clauses 10-18 of Schedule 3A, and can make those standards less enabling (at [25]).[10] The Decision appears to take the approach that section 77I imposes a strict limit on the effect that a qualifying matter, introduced through an IPI, may have:[11]

9 At [15] and [31].
10 At [25].
11 At [31] and [32].

> [31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions **goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I**. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.
>
> [32] **We find that amending the District Plan in the manner which the Council has purported to do is ultra vires**...
>
> (Emphasis added)

2.8 Section 77I relevantly states:

> **77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**
>
> A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
>
> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:

2.9 We respectfully maintain our submission that section 77I does not represent the sum total of the impact that recognising a qualifying matter may have. Instead, that provision's focus is on the consequences *for the MDRS* of recognising a qualifying matter. For example, where a qualifying matter is a section 6 matter, recognising and providing for that section 6 matter may require more significant restrictions on development than simply altering the standards set out at clauses 10-18 of Schedule 3A of the RMA.

2.10 As evidence of Parliament's intent on this matter, the select committee report expressly anticipates that where a qualifying matter exists, a council may restrict development completely:[12]

> the qualifying matters provisions in the bill give councils flexibility to manage development in areas where a qualifying matter is present. For example, there would be different ways to manage hazards depending on the nature of the

12 Environment Committee, Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (December 2021) at 7.

hazard. **Where a significant hazard exists, such as an identified flood flow path, a council could identify that area as being inappropriate for any further development**.

(our emphasis)

2.11 The select committee clearly identified that for section 6 matters, it may be necessary for the IPI to disable both the MDRS and the underlying provisions in the plan that would otherwise enable development. Following this report, the Bill's next iteration as recommended by select committee[13] included the wording of sections 77I and 80E as enacted.[14]

2.12 Further, the Court's interpretation of section 77I leaves it open for a party to argue that even under the normal Schedule 1 process, the Council is unable to protect the urupā beyond making the MDRS less enabling. The reason for this is that:

(a) The section 77G(1) duty to incorporate the MDRS into every relevant residential zone is an ongoing duty. That is, the Council is obliged to ensure that the MDRS are incorporated in every residential zone when in any future review of its district plan or other plan change. That the duty is ongoing is made clear by section 77G(3), which requires the relevant council to use the ISPP "when changing its district plan for the first time to incorporate the MDRS".

(b) Likewise, section 77I applies to councils on an ongoing basis. As a result, the Court's indication in [31] that section 77I limits the effect of a qualifying matter to making the MDRS and relevant building height or density requirements less enabling, has the potential to impact on any future plan change that seeks to provide for a qualifying matter.

2.13 Such an approach would result in an outcome that is at odds with the RMA's purpose and scheme, and would substantially restrict the ability for territorial authorities to provide for section 6 matters that it has identified within relevant residential zones.

13 This iteration was introduced via SOP at the Committee of the Whole House stage. While normally changes recommended by select committee would be presented to the House at second reading, at the time of the Bill's second reading, the recommendations of the Environment Committee were being finalised by Parliamentary Counsel Office (7 December 2021) 671 NZPD 6783.

14 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 83—2, cl 80DA.

2.14 This potential outcome provides an additional reason for adopting the Council's interpretation of section 77I; that is that its focus is on the consequences *for the MDRS* of recognising a qualifying matter (but does not represent the sum total of the impact that recognising a qualifying matter may have).

Scope of section 80E

2.15 We agree with the Court's finding that the wāhi tapu listing does not "support" the MDRS.[15] However, we respectfully maintain our submission that the wāhi tapu listing is "consequential on" the MDRS.

2.16 Our opening legal submissions set out why the wāhi tapu listing is "consequential on" the MDRS, namely that:

(a) it was consequential on the MDRS to schedule this particular wāhi tapu site (at [4.26] to [4.30]); and

(b) the level of protection that arises as a result of the wāhi tapu listing is also consequential on the MDRS and therefore *vires* (at [4.32] to [4.46]).

2.17 The Court appears to have made its finding on the basis that the MDRS sets out to impose "*more permissive standards"* and the listing "precludes operation of the MDRS".[16] However, in our respectful submission this approach takes too narrow a view of:

(a) The types of provisions that can be "consequential on" the MDRS. It essentially equates "consequential on" with "supports".

(b) What the MDRS are. They are not simply *"more permissive standards"* or a top-up to the existing residential zoning. Instead, the RMA defines the MDRS as *"the requirements, conditions, and permissions set out in Schedule 3A"*.[17] Schedule 3A includes objectives, policies, and a rule framework, and then goes on to set out a series of standards in clause 10-18.

15 Decision, above n 2, at [30]
16 At [30].
17 RMA, s 2.

2.18 It follows that provisions that are "consequential on" the MDRS are not confined to those that are consequential on the standards set out in clauses 10 – 18 of Schedule 3A; instead, a provision will meet the "consequential on" threshold where it is consequential on any aspect of Schedule 3A that comprises a requirement, condition or permission. One such requirement is the inclusion of Policy 2 (clause 6(2)(b)), which proves an express carve-out to the more permissive regime:

> apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga):

2.19 The short point is that when determining whether a matter is consequential on the MDRS, this assessment must be undertaken by referring to Schedule 3A in its entirety, rather than just clauses 10 – 18.

2.20 We refer to our opening submissions at [4.26] to [4.30] for the way in which the wāhi tapu listing is consequential on the MDRS.

The Decision does not bind the Panel but has persuasive value

2.21 It is accepted that:

(a) the Council's appeal against the Decision does not operate as a stay;[18] and

(b) the issue addressed in the Decision (i.e. the vires of the wāhi tapu listing[19] in PC(N)) is essentially the same as one of the issues now before the Panel.

2.22 Nonetheless, the Decision is not binding on the Panel. It is a well-established principle that the Environment Court is not bound by its own decisions.[20] That principle exists to ensure that each case that comes before the Court is determined on its merits and on the evidence before the Court.

---

18 High Court Rules 2016, r 20.10.
19 Refer Council legal submissions dated 14 March 2023 at [4.2].
20 *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712; *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605, (1976) 6 NZTPA 40(SC) at 607; 41–42.

2.23 For similar reasons, it is submitted the Panel is not bound by the Decision. The Decision contains a finding on a legal issue within the context of a resource consent application being considered under section 104 of the RMA (where the requirement is to have regard to any relevant provisions of a proposed plan), and heard by the Environment Court following limited notification. The procedural context is different from that of a plan change that has been publicly notified and is being considered under different RMA provisions. The Environment Court did not hear any evidence during the one-day hearing, which materially differentiates the process leading to its decision from the present process

2.24 It may also be noted that the High Court, in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, has expressed the view that issue estoppel has either no or limited application in the resource management context.[21] Moreover, for there to be a *res judicata* the Environment Court has stated several conditions need to be met, including that "*the parties to the judicial decision or their privies were the same persons as the parties to the decision in which the estoppel is raised or their privies*".[22]

2.25 This condition is not met here. Parties to the resource consent proceedings were only involved following limited notification of the consent application. The procedural context is completely different from that of a plan change that has been publicly notified. Further, the decision has no binding effect *in rem*.

2.26 In light of this, it is submitted the Decision does not bind the Panel, but is of persuasive value, at least up until the point that a decision on the appeal is made.

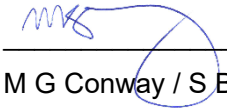
3. CONCLUSION

3.1 For the reasons set out in these submissions and the Council's opening submissions, the Council submits that the wāhi tapu listing is a lawful inclusion in the Council's IPI.

21 [2012] 1 NZLR 271 (HC) at [58]–[66].
22 *Andre v Auckland Regional Council* EnvC Auckland A173/2002, 28 August 2002 at [26].

3.2 The Council will notify the Panel if the High Court issues its decision prior to the 20 August 2023 deadline.

Dated: 28 April 2023



M G Conway / S B Hart
Counsel for Kāpiti Coast District Council