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 Wrap-up Hearing

15 September 2023

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Legal submissions on behalf of Wellington City Council Wrap-up Hearing

1 Matters addressed

1.1 These submissions:

(a) Recap the Proposed District Plan (**PDP**) process to-date and update the Panel on some matters addressed in previous hearings;

(b) Discuss the City Outcome Contribution mechanism;

(c) Describe the Council's approach to notification provisions.

2 Recap and update

2.1 In this Part I update the Panel on some matters arising from earlier in the hearing process.

2.2 The process started with some consternation about the division of matters and submissions between the ISPP and Part 1, Schedule 1 processes. I can address the Panel on any further matters arising from this if desired but, notwithstanding the *Waikanae Land Company* case addressed further below, the matter does not seem to have loomed large in the hearings process after all.

NPS-UD

2.3 The IPI seeks to give effect to the NPS-UD in Wellington. The NPS-UD is a strongly directive document. While for that purpose objective 3 and policy 3 are significant, I consider it important to emphasise objective 4 and policy 6 as well. To some extent, this objective and policy seek to shift the status quo bias inherent in too much decision-making under the RMA.[1]

[1] Resource Management Review Panel, *New Directions for Resource Management in New Zealand, Report of the Resource Management Review Panel* (June 2020), Chapter 5.

Qualifying matters

2.4 To that end, the Council has taken an appropriate conservative approach to qualifying matters. I consider that the Council's approach fulfils the intent of the NPS-UD and the Resource Management (Enabling Housing Supply) Amendment Act by only seeking to modify the building heights and densities otherwise required by policy 3 to the extent necessary to accommodate each qualifying matter identified. There is no prohibition (at least by way of activity status) on development under any of the provisions affected by qualifying matters; the approach has instead been to carefully consider an appropriate balance of values and risks while still enabling development.

2.5 By the end of the hearings there remained a few hot spots of dispute, but by and large in my submission the Council has landed at an appropriate and suitably enabling position.

***Waikanae Land Company* case**

2.6 My understanding is that the High Court appeal by Kāpiti Coast District Council will not be heard until February 2024. That is a month or so before the Panel's IPI recommendations are expected. While it is therefore possible that the High Court may have released a decision prior to the Panel's report being released, that is unlikely.

2.7 I have addressed in earlier submissions the reasons that I consider the Environment Court's decision to be wrong, and in any event not applicable to the Council's IPI.

2.8 In the meantime, the Kāpiti Coast District Council Independent Hearing Panel Report was released on 20 June 2023. The Panel highlighted limitations in the Court's interpretive exercise, given that without the evidence the Panel had heard it may not have been suitable to have been determined as a preliminary question. It also recorded doubts about the correctness of the decision in any event, including for some of the same reasons counsel has expressed.

2.9 The Panel expressed the opinion that:

> [194] The Panel considers that if a local territory authority analysing the appropriate content of an IPI establishes that there are qualifying matters of such significance that:

(a) The MDRS should not apply; and

(b) The tools available in the Plan that recognise those values and impose further restrictions on land use should be used and will also achieve Objective 1 MDRS together with the aim in (a);

then the provisions fulfilling aim (b) above can be characterised as related provisions that support or are consequential on the MDRS.

[195] Applying the analysis to another context is helpful. Consider the situation where a territorial authority examines whether or not the MDRS should apply to land subject to flood hazards. It becomes apparent to the territorial authority when examining recent flood hazard information that certain land not previously identified as flood-prone is not only unsuitable for greater density and height but is also unsuitable for existing levels of development. As a consequence, the Council considers further restrictions on development should apply. Consequently, in its IPI, the Council extends the existing flood hazard mapping tool in its Plan to apply to land identified as flood-prone. On the Environment Court's analysis, that would not be a supporting or consequential provision of the MDRS because it has the added effect of introducing more restrictive land use controls rather than simply disqualifying the MDRS. Even though the measure is necessary to achieve a safe and well-functioning urban environment under Objective 1 of the MDRS.

[196] It is apparent from the example above that the conclusion of the Environment Court unduly restricts sensible planning necessary to achieve Objective 1, and the 'inherent' limitation found in s 80E runs across the purpose and principles of the RMA in Part 2

2.10 I respectfully agree with the Kāpiti Coast District Council Independent Hearing Panel's position.

Port Otago **Supreme Court decision**

2.11 I draw the Panel's attention to the recent Supreme Court decision in the *Port Otago* case.[2] The Court resolved questions about how to reconcile apparently conflicting policies of the NZCPS in lower-order planning documents, relating to the Otago | Ōtākou Harbour.

2.12 While to some extent the explanation is specific to the policies to be reconciled in that case and the factual situation, the Court gave some general guidance about the reconciliation process (footnotes removed):

[78] The appropriate balance between the avoidance policies and the ports policy must depend on the particular circumstances, considered against the values inherent in the various policies and objectives in the NZCPS (and any other relevant plans or statements). All relevant factors must be

2 *Port Otago Limited v Environmental Defence Society Inc* [2023] NZSC 112.

> considered in a structured analysis to decide whether, in the particular factual circumstances, the resource consent should be granted. This means assessing which of the conflicting directive policies should prevail, or the extent to which a policy should prevail, in the particular circumstances of the case.
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> …
>
> [81] We also comment that the structured analysis is not the same as the "overall judgment" approach rejected by this Court in *King Salmon*. This involved "an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources" under s 5 of the RMA. The "overall judgment" approach tended to subordinate the preservation and protection of the environment to the promotion of sustainable management. It did not give full recognition to the fact that protection of the environment is an element of sustainable management and therefore it did not reflect the proper relationship between ss 5 and 6 of the RMA. Nor did it reflect the approach of the NZCPS. Of course, judgments must still be made by consent authorities in accordance with the purpose of the Act, but they are not loose "overall" evaluations. Rather they are disciplined, through the analytical framework we have provided, to focus on how to identify and resolve potential conflicts among the NZCPS directive policies.

Natural and Built Environments Act 2023

2.13 Finally for this Part of these submissions, since Hearing Stream 5 took place the Natural and Built Environment Act 2023 (**NBEA**) has been passed by Parliament. The NBEA replaces the RMA over a period of time according to the transitional provisions in Schedule 1. Because of this the NBEA does not affect this ISPP process or advancement of the PDP in general. Part 5 of the RMA does not cease to apply in Wellington until the "region's NBEA date", which is the date that the decisions version of the first natural and built environment plan made for the region in accordance with Schedule 6 is treated as operative.[3] That will be some years away and I consider that the Panel need not consider the new legislation further.

3 City Outcomes Contribution

3.1 The Panel has been assisted in its consideration of the COC provisions by advice from James Winchester.

3.2 Mr Winchester's advice is helpful in confirming that:

(a) While a link between the effects of additional height (or as I have put it, height as a proxy for intensification) is relevant to whether

[3] NBEA, Sch 1, cl 5(1).

the provisions are justified on the merits, any absence of link is not in any event fatal in terms of validity. It is permissible to advance provisions which do not have a clear relationship between effects generated and the outcomes sought.[4]

(b) Notwithstanding criticism from some submitters (eg, Kāinga Ora), the COC provisions are not unlawful for the way in which they might duplicate or address legal requirements under other legislation.

3.3 Mr Winchester considers that the remaining issues relate to certainty, and the possible reservation of unlawful discretion, and the use of a mandatory notification rule.

3.4 Ms Stevens (the Council's reporting officer) has concluded that it is more appropriate not to provide for mandatory notification where there is non-compliance with the COC policy. Sections 95A-95G of the RMA will apply, so the latter issue has resolved itself. That said, for myself, I do not agree with Mr Winchester's position because there is no standard or threshold in s 77D (which empowers the making of rules for mandatory notification or preclusion). A statutory power is subject to limits even if it is conferred in unqualified terms,[5] but I consider mandatory notification to incentivise certain behaviour to be a legitimate policy choice to give effect to the purpose of the Act.

3.5 Nor do I agree with Mr Winchester that there is no logical relation between the effects of an over-height building and the matters addressed by the COC policy. Ms Stevens has explained that height has been adopted as a trigger given it is a suitable proxy for increased intensification, the benefits of which the COC policy is seeking to maximise as required by NPS-UD policy 3(a).

3.6 Nonetheless, on the question of certainty I agree in part with Mr Winchester that there is a risk that the approach reserves an unlawful discretion to the Council.

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4 This is consistent with my submissions concluding that while there was no need for a direct link between effects of height and the COC policy, nonetheless, in my view a link can be established. I do not consider this to be contradictory.

5 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [53].

3.7 For my part, I consider the operation of the rules is clear and logical. Building height is unlimited in the CCZ, though above (and below) a certain height this is subject to compliance with the standard CCZ-S1. I do not consider it can be said that "it is entirely uncertain at which height an alteration or new building is permitted" in the CCZ.

3.8 The more difficult issue is the degree of subjectivity in the allocation of points by Council processing planners to achieve that standard. I consider for the reasons explained by Ms Stevens in her response on the COC policy the degree of subjectivity can be overstated. I note too that it is not dissimilar to the current ODP approach to "design excellence" which is undoubtedly subjective, and in fact the more prescriptive COC approach could be said to be less subjective than that example. However, I agree with Mr Winchester that there remains a residual risk of reserving an unlawful discretion. My reasoning differs a little from Mr Winchester's, because in the event of non-compliance the activity status remains restricted discretionary, so it is not a matter of activity status changing as a result of a controversial assessment by processing planners. But because non-compliance results in additional matters of discretion becoming relevant, I cannot say that there is no legal risk in taking such an approach.

3.9 If the Panel agrees with my assessment of the legal issues (and even if it prefers Mr Winchester's) but is otherwise satisfied of the merits of the proposal, then in my submission it is appropriate to recommend to the Council the adoption of the COC, recording any reservations, and leaving it for the Council to make an assessment of legal risk. If the Council is prepared to take that legal risk – which should fundamentally be for the Council, not the Panel – the position can later be tested through consenting processes and potentially the Environment Court.

4 Notification provisions

4.1 In Minute 29 the Panel invited the Council to address the general approach that has been followed or applied to determine notification preclusions or requirements in the PDP.

4.2 I note that, despite its concerns, Kāinga Ora did not in its memorandum of counsel dated 7 August 2023 identify any notification preclusions said to be inconsistent.

4.3 Section 77D provides:

> **77D Rules specifying activities for which consent applications must be notified or are precluded from being notified**
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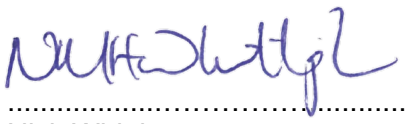
> A local authority may make a rule specifying the activities for which the consent authority—
>
> (a) must give public notification of an application for a resource consent:
>
> (b) is precluded from giving public notification of an application for a resource consent:
>
> (c) is precluded from giving limited notification of an application for a resource consent.

4.4 As I commented above in relation to the COC policy, this s 77D discretion is not qualified by a standard or threshold to establish when such rules are appropriate. I assume that is one reason for the Panel's view, with which I agree, that there need not be a uniform approach to notifications provisions in the PDP.

4.5 Mr McCutcheon has addressed the approach taken by authors to use of notification provisions.[6] That analysis demonstrates a clear and logical approach has been taken.

4.6 As a result I do not consider that notification provisions having been considered by multiple reporting officers is likely to have resulted in inconsistencies or differences of approach. Parties have been free and able to challenge proposed preclusions, or request additional preclusions through the submissions and further submissions process, and through their evidence and submissions in each hearing.

Date: 15 September 2023



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6 Wrap-up Hearing Section 42A Report, Part 12.