Before the Independent Hearings Panel

In the matter of the Resource Management Act 1991

And

In the matter of Plan Change 56 to the Hutt City Council District Plan

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Legal submissions on behalf of Hutt City Council addressing matters raised by the hearings panel

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MAY IT PLEASE THE PANEL

1 We have been asked to provide legal advice in support of the Hutt City Council (**Council**) officers' right of reply on the Plan Change 56 (**PC56**) hearings, the Council's Intensification Planning Instrument (**IPI**). We have provided written advice on specific topics in advance of the hearing, and attended the hearing on three occasions to address matters arising. We do not repeat the written advice already provided in these submissions.

2 In summary, these submissions address:

2.1 Scope issues, including:

2.1.1 The Kāinga Ora position on scope,

2.1.2 Scope for relief sought by Greater Wellington Regional Council,

2.1.3 Scope for relief sought by Retirement Villages Association of New Zealand Incorporated and Ryman Healthcare Limited submissions, and

2.1.4 Scope for relief sought by the Department of Corrections.

2.2 The Hill Residential activity area, specifically whether:

2.2.1 The Hill Residential activity area is the equivalent of a large lot residential zone; and

2.2.2 Whether rezoning requests in the Hill Residential activity area are within scope.

2.3 Heritage, specifically on:

2.3.1 The extent to which controls can be placed on heritage buildings through PC56,

2.3.2 The consultation required for heritage listings, and

2.3.3 Whether heritage and character are appropriately dealt with separately.

2.4 Whether the KiwiRail submissions seeks controls beyond what can be authorised in an IPI.

2.5 Whether restricting access to the Eastern Bays is potentially a qualifying matter.

2.6 Whether the Kāinga Ora approach of having flood maps which sit outside the Plan, but control activity status, is legally viable.

SCOPE

3 We have previously provided analysis on the legal framework to determine the scope of a plan change and submissions on that plan change. Many of the legal submissions presented on behalf of PC56 submitters have also addressed this law. In summary, as clause 6 of Schedule 1 applies to an IPI process, submitters are limited to submitting on PC56, in the same way that they are limited to submitting on a standard district plan change.

4 As a preliminary step before considering whether a submission is 'on' PC56, we consider it important to address the validity of relief sought through the IPI process. That is because the IPI process is constrained by statute (it is not an open-ended plan change process, and the Council has not notified a wider plan change to be determined at the same time). It is therefore necessary to consider whether the outcome sought through each submission can actually be implemented through an IPI. In respect of this

housing intensification plan change process, the RMA is directive as to what must be included in an IPI, what may be included, and what cannot be included. Once validity of submissions is established in this context, the standard scope considerations relating to relief sought in submissions, as confirmed through caselaw, can be applied.

5 The legal principles relevant to determining whether a submission is 'on' a plan change, in accordance with Schedule 1 clause 6, are well-settled. In respect of clause 6, the High Court confirmed in *Palmerston North City Council v Motor Machinists Limited*[1] that a two-limbed test must be satisfied:

5.1 the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

5.2 the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

Kāinga Ora

6 Kāinga Ora in its legal submissions proposes a novel approach to considering scope, ie. that the Panel should disregard the settled High Court authority on how scope of a plan change should be assessed.[2] We disagree with this proposition, and consider the Panel must approach scope on the basis of the established caselaw and as summarised above.

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[1] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290

[2] Legal submissions for Kāinga Ora dated 21 April 2023 at [4.20]

7 Our only point of agreement with the proposed approach is the attention drawn by Kainga Ora as to the difference in approach that clause 99(2) dictates.[3] However, as set out in earlier submissions, clause 99(2) enables the Panel to consider matters, and make recommendations, that are beyond the scope of issues raised in submissions. This power is however still constrained overall by the scope of PC56.

Wellington Regional Council

8 The Greater Wellington Regional Council (**GWRC**) is seeking amendments to PC56 in relation to the National Policy Statement on Freshwater Management (**NPS-FM**), and the Regional Policy Statement (**RPS**), including Change 1 to the RPS. The importance of addressing the NPS-FM and the RPS is not in dispute. The issue is simply whether PC56 is the appropriate process for that task.

9 The NPS-FM was approved on 3 August 2020, with amendments released on 6 December 2022. The RPS was made operative on 24 April 2013. Change 1 to the RPS has been notified on 19 August 2022, with submissions filed by 19 December 2022. The next steps are hearings.

10 As set out above, the first inquiry must be whether proposed changes arising from having regard to the RPS are 'on' the IPI. Just because a RPS objective is very directive in nature, that does not mean that it automatically must be implemented in PC56 – the amendment proposed first needs to be 'on' PC56.

11 The IPI is not a full district plan review. PC56 is limited in scope to the ISPP, implementing MDRS and Policy 3, rather than being a wider change. PC56 is a targeted and specific plan change, required by law in response to a specific and targeted central

[3] Legal submissions for Kāinga Ora dated 21 April 2023 at [4.13]

government statutory amendment. Given this, the scope of PC56, together with the option to use the IPI to implement the NPS-FM and the RPS, is very limited. This means that much of the relief sought in the GWRC submission cannot be achieved through PC56.

12 If the amendment sought is 'on' PC56, then (in relation to the NPS-FM), clause 4.1(1) of the NPS-FM provides that every local authority must give effect to the NPS-FM as soon as reasonably practicable. There is accordingly an obligation under section 75(3)(a) of the RMA for PC56 to give effect to the NPS-FM, to the extent that this is the reasonably practicable time to do so. It is submitted (and acknowledged by GWRC)[4] that the IPI cannot give full effect to the NPS-FM. The evidence of Mr Shield confirms that:[5]

> Greater Wellington is not seeking full implementation of the NPS-FM 2020 through the IPI. Instead, Greater Wellington is seeking amendments to PC56 that ensure that the adverse effects on freshwater resulting from the intensification it provides for will be appropriately managed.

13 The obligation on the Hearings Panel in terms of Change 1 to the RPS is to have regard to Change 1. To ‘have regard to’ means that the decision makers need to give genuine thought and attention to the matter, but it is not necessary that it is accepted. Given this, what the Hearings Panel is required to do is consider Change 1 to the RPS (including as expressed in the GWRC submission) and turn its mind to how PC56 should respond to Change 1. Provided 'genuine thought and attention' to Change 1 is given, it is open to the Panel to decline to make any amendments to PC56 in response to Change 1 (and the submission from the GWRC).

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[4] Legal submissions on behalf of GWRC dated 11 April 2023 at [29]

[5] Evidence of Mr Shield dated 29 March 2023 at [36]

14 In giving that thought and attention, it is submitted that there are some key factors for the Hearings Panel to consider. Firstly, Change 1 to the RPS has not advanced very far through the Schedule 1 process – there are still hearings to be held, decisions, appeals, mediation, and appeal hearings. There is accordingly a strong prospect of change to the RPS. It is submitted that even if it could be interpreted that proposed changes are on PC56, this is a relevant factor in determining how much weight to place on Change 1. Given this limited progress through the Schedule 1 process, it is submitted that very limited weight can be placed on Change 1.

15 Secondly, PC56 is not the only and final opportunity to implement Change 1. Once Change 1 to the RPS is operative (approved under Schedule 1), the obligation is that the District Plan must then 'give effect' to the RPS– section 75(3)(c) of the RMA. The requirement to 'give effect to' is a strong one. It requires positive implementation of the superior instrument. In addition, section 104(1)(b) of the RMA requires that the decision maker have regard to a RPS, or proposed RPS, and NPS. If the relevant RPS/NPS-FM are not incorporated into the District Plan, the decision maker can 'look up' to these documents. Accordingly, there will be future plan changes (and resource consents) where Change 1 can be, and will need to be, given greater weight.

Retirement Villages

16 Retirement Villages Association of New Zealand Incorporated and Ryman Healthcare Limited (**Retirement Villages)** sought that the 'use' of retirement villages be permitted,[6] and seek a more enabling and responsive planning framework for retirement villages in the relevant zones included in PC56.[7] The regime proposed by the Retirement Villages provides a package of

[6] Legal submissions on behalf of the Retirement Villages dated 18 April 2023 at [5.3]

[7] Legal submissions on behalf of the Retirement Villages dated 18 April 2023 at [46]

measures, including objectives, policies, rules, notification provisions, activity status and matters of discretion specific to Hutt City's ageing population and retirement villages.

17 The thrust of the submissions is that retirement villages as a whole are a residential use and should be enabled as such, including through PC56.[8]

18 The Reporting Officer considers that a specific rule framework for retirement villages, including the permitted activity status for retirement villages as a land use, is inappropriate, stating that:[9]

> … it is not recommended that a specific rule framework be included for retirement villages in Chapters 4F and 4G. For consistency and fairness, this would require the Plan to provide specific rules to address all other potentially compatible and appropriate activities, which adds unnecessary length to the section and increases the risk that a particular activity may be erroneously missed. In addition, as the approach from the Operative District Plan has been carried over for retirement village activities, amendments to the approach are considered out of scope.

19 There is a substantive interpretation argument as to whether retirement village activities are or are not residential activities (and how such residential activities relate to the MDRS). However, before considering that matter, in our view the relief sought is outside scope of PC56. The need to include a full suite of provisions, from objective through to rule level, as sought by the Retirement Villages is evidence of this. A whole new suite of provisions (from higher to lower order) for a new category of activity must logically be outside scope of a focused plan change such as PC56.

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[8] Legal submissions on behalf of the Retirement Villages dated 18 April 2023 at [64]

[9] Section 42A report at (515).

20 The NPS includes the following definition for residential activity:

> means the use of land and building(s) for people's living accommodation

21 It also includes a separate definition for 'retirement village', which is:

> means a managed comprehensive residential complex or facilities used to provide residential accommodation for people who are retired and any spouses or partners of such people. It may also include any of the following for residents within the complex: recreation, leisure, supported residential care, welfare and medical facilities (inclusive of hospital care) and other non-residential activities.

22 The current relevant definitions in the District Plan are:

> **Retirement Village / Housing for the Elderly**
>
> a managed comprehensive residential development used to provide accommodation for aged people, including recreation, leisure, supported residential care, welfare and medical facilities and other related non-residential activities.

23 It is accepted that there is crossover between the definition of 'residential activity' and 'retirement village'. The definitions of 'retirement village' make it clear that the purpose of such a facility is to provide 'residential accommodation', ie. using land and buildings for living accommodation. However, the definition of 'retirement village' also goes wider than residential activity. In both the District Plan and NPS, the definition also includes 'non-residential activities'. Given this, any specific provision for retirement villages in PC56 will go further than providing for residential activities. Such an approach is outside the scope of PC56, which is to provide for MDRS and Policy 3, not 'non-residential activities' associated with retirement villages. Providing for a retirement village activity also requires additional assessment, and (as above) a full set of provisions, which is more appropriately dealt with outside the PC56 process.

Department of Corrections

24 The notified version of PC56 inserted a new definition into Chapter 3 Definitions as follows:

> Residential Unit
>
> Means a building(s) or part of a building that is used for a residential activity exclusively by one household, and it must include sleeping, cooking, bathing and toilet facilities.

25 Relevantly, Chapter 4F then inserted a new development standard (Rule 4F4.2.1AA) which limited the number of 'residential units per site' as a permitted or restricted discretionary activity. This is a change in the way this development standard is expressed. For example, Rule 4A4.2.1, which is part of the Operative District Plan governing the general residential activity area, provides for 'dwellings per site' as part of the development standard.

26 It is understood that this change (from 'dwelling' to 'residential unit') is to reflect the requirement of the National Planning Standards. The existing references to 'dwellings' in chapters which are not part of PC56 are not proposed to be changed.

27 The Department of Corrections seeks the following relief:

27.1 Retention of the definition of 'residential unit',

27.2 Insertion of a definition of 'household',

27.3 Inclusion of a definition of 'residential activity', and

27.4 Inclusion of the National Planning Standard definition of 'community corrections activity', and

27.5 Reclassification of the activity status of 'community corrections activities' in certain zones.

28 In relation to the new definition for 'household', the section 42A report stated that the submission was outside the scope of the plan change because, as notified, PC56 did not seek to make amendments to land uses enabled in different activity areas, except minor consequential changes.[10] While the National Planning Standards provide support for the definition sought by the Department of Corrections, PC56 does not seek to give full effect to the NPS. The subsequent full district plan review to be notified will rationalise this. The proposed new definition proposed by this submission may significantly increase what is considered to be a household within the District Plan, and therefore have implications for a wider range of activities than those within the notified scope of PC56. It is accordingly outside the scope of PC56.

29 In relation to the relief sought, the section 42A report noted that the submission seeking amendments to provide for community corrections activities is outside the scope of the plan change because PC56, as notified, did not seek to make amendments to the land uses enabled in different activity areas, except minor consequential changes.[11] It is submitted that the submission by the Department of Corrections is similar to the approach taken by the Retirement Villages. Like those submissions, it is also outside scope. The submission seeks a new set of provisions for a new activity (community corrections activities). This is not within the scope of PC56, as it does not relate sufficiently closely to implementing the MDRS or to Policy 3.

HILL RESIDENTIAL

30 The section 42A report states that:[12]

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[10] Section 42A report at (201).

[11] Section 42A report at (658) and (659).

[12] Section 42A report at (555). See also at (581) and (582)

> The Hill Residential Zone has been interpreted to be equivalent to the large lot residential zone of the National Planning Standards, which are specifically excluded from the RMA definition of relevant residential zone and therefore were not considered as part of this Plan Change. Rezoning of the Hill Residential Zone could be considered under the full District Plan review process.

31 These submissions address the following:

31.1 Was the Hill Residential Activity Area appropriately excluded from PC56?

31.2 Can specific rezoning proposals[13] from Hill Residential to Medium Density be addressed?

Exclusion of Hill Residential Activity Area

32 Under section 77G(1) of the RMA, 'every relevant residential zone' in an urban environment must have the MDRS incorporated into that zone. Under section 77G(2) of the RMA, 'every relevant residential zone' in an urban environment must give effect to Policy 3 of the NPS-UD.

33 'Residential zone' and 'relevant residential zone' are defined in section 2 of the RMA as follows:[14]

> **residential zone** means all residential zones listed and described in standard 8 (zone framework standard) of the national planning standard or an equivalent zone

[13] E.g. Bin Wang (020) seeks that 2/275 Maungaraki Road be included in the MDRAA. This site is currently part of the Hill Residential Zone. Sam Lister (128.1) seeks 23A McGowan Road, Wainuiomata be rezoned from Hill Residential to Medium Density Residential Activity Area. Waka Kotahi NZ Transport Agency oppose this submission. Teramo Developments Ltd (209.1) seek rezoning 76 Antrim Crescent, Wainuiomata along with other Hill Residential-zoned land extending west to, and including 30 Pencarrow Crescent Wainuiomata, from Hill Residential Activity Area to Medium Density Residential Activity Area.

[14] We note that cl 1.4(4) of the NPS-UD also states that a reference in the NPS-UD to a 'zone' is 'a reference to the nearest equivalent zone, in relation to local authorities that have not yet implemented the Zone Framework in the National Planning Standard'.

relevant residential zone—

(a) means all residential zones; but

(b) does not include—

(i) a large lot residential zone:

(ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:

(iii) an offshore island:

(iv) to avoid doubt, a settlement zone

34 'Large lot residential zone', which is referred to in the definition of relevant residential zone is also defined in section 2 of the RMA as follows:

> **large lot residential zone** means a zone listed as a large lot residential zone and described in standard 8 (zone framework standard) of the national planning standards (within the meaning of section 77F), or an equivalent zone

35 'Equivalent zone', which is referred to in the definitions of residential zone and large lot residential zone is also defined in section 2 of the RMA as follows:

> **equivalent zone** means the zone in a district plan that is the nearest equivalent zone to the zone described in standard 8 (zone framework standard) of the national planning standards that would apply if those standards had been implemented

36 At present, the Council does not have to comply with Standard 8 Zone Framework Standard of the National Planning Standards.

The residential zones in the HDP therefore need to be considered in the context of being 'equivalent zones' to those in Standard 8.[15]

37 The Council has to date proceeded on the basis that the Hill Residential Activity Area is equivalent to a large lot residential zone.

38 The large lot residential zone description in Standard 8 of the National Planning Standards is as follows:

> **Large lot residential zone**
>
> Areas used predominantly for residential activities and buildings such as detached houses on lots larger than those of the Low density residential and General residential zones, and where there are particular landscape characteristics, physical limitations or other constraints to more intensive development.
>
> **Low density residential zone**
>
> Areas used predominantly for residential activities and buildings consistent with a suburban scale and subdivision pattern, such as one to two storey houses with yards and landscaping, and other compatible activities.

39 Council completed a review of the relevant District Plan provisions relating to the Hill Residential Activity Area in its section 32 report on PC56.[16] Based on that review, together with consideration of the District Plan, it is submitted that the following characteristics of the Hill Residential Activity Area is relevant, in the context of the above National Planning Standards descriptions:

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[15] That said, the Council will need to comply with Standard 8 within five years from when the National Planning Standards 2019 came into effect.

[16] At Appendix 4

39.1 It appears that the Hill Residential Activity Area is used predominantly for residential activities.

39.2 The Hill Residential Activity Area contains a minimum net site area of 1000m^2 for permitted development (with various exceptions).

39.3 The Hill Residential Activity Area generally appears to have landscape characteristics and physical limitations (eg some have steep slopes and difficult access) that may constrain more intensive development.

39.4 There are various references to 'low density residential development' in provisions relating the Hill Residential Activity Area.

40 Accordingly, based on these characteristics it is submitted that the Hill Residential Activity Area is the equivalent of a large lot residential area. This conclusion relates to consideration of the characteristics of properties in the activity area as a whole, and it is accepted that a review of particular properties may not always have these same characteristics.

Specific Zoning proposals

41 Several submitters have sought rezoning of land from large lot residential to medium density residential. The implications of these rezoning changes would be that, based on the Council's interpretation set out above, those sites would change to being a relevant residential zone from an area outside that definition. The implication would be to enable intensification through the MDRS for any rezoned properties.

42 The outcome of these submission requests could be the creation of pockets of medium density residential land surrounded by other zones. PC56 has not proposed rezoning of this nature. While PC56 has rezoned residential land, that rezoning has been to

relevant residential land to align with the newly created medium or high-density zoning required by the IPI statutory process. On that basis, and in reliance on the two-step test from *Motor Machinists*, such spot zoning requests are outside the scope of PC56. Those site-specific rezoning requests should be dealt with as part of the full district plan review in 2024.

HERITAGE

Heritage controls

43 When notified, PC56 included Bay Street and Beach Street in Petone as part of the new High Density Residential Activity Area, without being subject to any qualifying matters that would limit development in that area.[17] This High-Density Zoning would enable a more intensified form of development, with a permitted building height of 22m and density of 3 dwellings per site.

44 PC56 also proposed new heritage areas for parts of the city, including the Heritage Area which adjoins Beach Street to the east. Those heritage areas were introduced as qualifying matters to limit the application of the MDRS to those sites.

45 There were a variety of submissions in relation to the proposed heritage provisions in PC56, including support for what was proposed, opposition to heritage protection, and submissions requesting additional heritage protection for some areas.

46 Three submissions were received from residents of Beach and Bay Streets. Two of these related to heritage issues, one requesting a voluntary approach to heritage listing (Stephen Taylor, DPC56/190), the other requesting additional heritage

[17] Section 42 A Report at (1022)

areas including Beach and Bay Streets (Laura Skilton, DPC56/44).

47 In relation to the latter submission, the Council reporting officer's report states:[18]

> In response to these submission points, Chessa Stevens (Appendix 5, paras. 43-49) has reviewed the existing evidence and that provided by submitters and recommends extending the heritage area to Beach and Bay Streets. I agree with her reasons as to why these areas are consistent.
>
> Beach and Bay Streets were not proposed as heritage areas in PC56 and so there is a question of scope. In my opinion, this relief is within scope as the practical effect of the Petone Foreshore Heritage Area is to limit building height and density to existing levels. I therefore recommend accepting these submissions points in part to the extent of including Beach and Bay Street within the Petone Foreshore Heritage Area.

48 The proposed PC56 controls associated with the Heritage Area consist of height and density controls, along with a new objective and policy relating to the heritage. Demolition within the Heritage Area is permitted (which it would be regardless of its location inside or outside a Heritage Area), and additions and alterations are also permitted, subject to meeting the height and density rules. However, height and density in the Heritage Area are limited to that which was in place in August 2022, through Rule 4F 5.1.3.1 which states:

> (a) Construction or alteration of a building is a permitted activity in the Residential Heritage Precinct if:
>
> (i) The height of the building does not exceed the maximum height of buildings that were on the site on 20 August 2022.
>
> (ii) The number of ~~dwellings~~ residential units on the site does not exceed the number of

[18] Section 42 A Report at (1021) and (1022)

~~dwellings~~ residential units that were on the site on 20 August 2022.

49 If not permitted, the activity defaults to non-complying.

50 The District Plan zoning for sites now included as a High Density Residential Activity Area will vary, but in the General Residential Activity Area (chapter 4A), residential activities were permitted,[19] subject to restrictions on numbers of dwellings.[20] There were limits on construction or alteration to a building height of 8m.[21] Given this, proposed controls negate the underlying High Density Activity Area rules and are slightly more restrictive than the controls in the Operative District Plan in relation to building height (ie. if the buildings on site as at August 2022 are lower in height than 8m).

51 The Hutt Voluntary Heritage Group (**VHG**) opposes this approach on the basis that the evidence provided by Council is insufficient to sustain the proposed areas.[22] Ultimately, VHG submit that the heritage areas proposed in PC56 are not entered into the District Plan until the Council has further considered a voluntary heritage approach and a complete heritage review has been completed.

52 The Panel has also raised a query about whether the development constraints proposed in heritage areas go beyond that which is permitted in an IPI process because of the impact on height controls being linked to that which exists as at 20 August 20022, with particular consideration of the recent Environment

[19] Rule 4A 4.1.1

[20] Rule 4A 4.2.1

[21] Rule 4A 4.23.3

[22] Submissions on behalf of Voluntary Heritage Group dated 19 April 2023 at (3.1). Note VHG also appears to have a concern that there is some crossover between special character areas and heritage areas in the Plan. There appears to be an acknowledgement that Council is not seeking to propose special character areas. It also appears to be a concern that there has not been an assessment of whether modification has diminished any heritage values.

Court decision in *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga*.[23]

53 In that decision, the Environment Court found that the inclusion of a new site of significance within the applicable schedule of the Kāpiti Coast District Plan was *ultra vires* as it went beyond what could be achieved through an IPI or ISPP. The Court focused on the fact that due to the scheduling of that residentially zoned site, activities other than the activities subject to the MDRS or policy 3 (ie not just residential units) were constrained when they previously had not been. The activities in that case included earthworks, fencing, cultivation and planting, which the Court considered to be associated with a residential activity. That, in the Court's view, went beyond modifying the 9 density standards set out in the MDRS to be less enabling of development (which are, for the construction and use of residential units or buildings, the number of units per site, height, height in relation to boundary, setbacks, building coverage, outdoor living space (per unit), outlook space (per unit), windows to street and landscape areas):[24]

> 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

[23] *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056

[24] *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056 at [31].

from permitted to either restricted discretionary or non-complying.

54 For the purpose of reconciling that judicial guidance to the PC56 approach, the key distinguishing feature between *Waikanae Land Company Ltd* and the Council's position on PC56 is that the Council proposal controls activities covered by a MDRS density standard – building height for residential units. In contrast, in *Waikanae Land Company Ltd* there were controls placed on activities outside the MDRS density standards (eg. earthworks, fencing, cultivation and planting).

55 This is consistent with the powers of the Council through the IPI process. Where there is an applicable qualifying matter, the default density and height standards are amended by rules. We consider this to be consistent with the legislative provisions and the recent decision, even where the standards are now more restrictive than the comparative standards in the Operative District Plan. It is where new controls have been added, which regulate activities beyond the scope of those otherwise sought to be authorised by the MDRS or policy 3, or that regulate activities covered by the MDRS that do not relate to the MDRS density standards, that the Council may face issues.

56 On this basis, in our view the Council's position is not contrary to this caselaw. For completeness, it is noted that the decision is under appeal to the High Court, and that appeal is yet to be heard.

57 We understand that an issue has arisen as to whether it would be a valid use of the ISPP to include heritage demolition and alteration controls. As per the assessment above, controls on the demolition of heritage sits outside the MDRS density matters, and (in accordance with *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga)* sits outside the powers of the Council in the IPI process. Alteration controls are likely the same, albeit it

may depend on whether the alteration controls relate to a MDRS matter.

Consultation

58 We understand the VHG have raised concerns about whether consultation by Council met the requirements of section 82 of the Local Government Act 2002 (**LGA02**), which sets out the principles of consultation. This is in Part 6 of the LGA02, and immediately follows the sections of the LGA02 (76 to 81) which set out the decision-making obligations on local councils.

59 The Council is required to apply the decision-making principles in Part 6 of the LGA02 to every decision made by it, unless they are inconsistent with specific requirements in the relevant Act under which it is making a decision (in this case, the RMA). Section 76(5) provides:

> Where a local authority is authorised or required to make a decision in the exercise of any power, authority, or jurisdiction given to it by this Act or any other enactment or by any bylaws, the provisions of subsections (1) to (4) and the provisions applied by those subsections, unless inconsistent with specific requirements of the Act, enactment, or bylaws under which the decision is to be made, apply in relation to the making of the decision.
>
> [emphasis added]

60 This is intended to cover situations where an Act (such as the RMA) has specific processes and or/criteria to apply when making a decision, and those take precedence over the LGA02 requirements where there is an inconsistency between the two. For example, where a RMA process *requires* consultation (such as when notifying a plan change), it would be inconsistent with that to consider the LGA02 decision making requirements around consultation and how to consult (ie, that is already set out in the RMA).

61 Section 79(2)(c) of the LGA02 requires that when Council is making a judgement about how to achieve compliance with sections 77 and 78 of the LGA02, it must have regard to the nature and circumstance in which a decision is taken. Section 79(3) provides that:

> The nature and circumstances of a decision referred to in subsection 2(c) include the extent to which the requirements for such decision-making are prescribed in or under any other enactment (for example, the Resource Management Act 1991).
>
> [emphasis added]

62 Commentary provides that the effect of section 79(3) of the LGA02:[25]

> …appears to confirm that statutory procedures — for example under the Resource Management Act 1991 — and any applicable rules of standing or evidence, etc, should be taken into account when determining decision-making compliance.

63 In terms of the interpretation of these provisions, neither section 76(5) nor section 79(3), which was added to the LGA02 by amendment in 2004, have been considered judicially. Accordingly, the interpretation is governed by section 5(1) of the Interpretation Act 1999, which provides that the meaning of an enactment must be ascertained from its text in the light of its purpose is of assistance.

64 We consider that the plain meaning of the text of these provisions means that when a specific statutory process is set out for how a decision is made and what criteria to apply in another piece of legislation (such as the RMA), the LGA02 decision making principles do not apply. Given this, compliance with section 82 is not required – instead, following the RMA plan process will

[25] Westlaw New Zealand commentary on the Local Government Act 2002.

ensure that appropriate and adequate consultation is completed. In this case, we are satisfied that the RMA plan process has been adequately followed by the Council.

Character

65 The verbal right of reply from the Council notes that:[26]

> For this plan change, the council took the view, and I agree, that heritage is a matter of national importance and justifies limiting building height, density, and development capacity. Character on the other hand is not a qualifying matter. It is a relevant issue to consider in a plan but does not justify departing from the intensification requirements of NPS-UD Policy 3 and the MDRS.

66 The Court has confirmed this distinction in *Auckland Council v Dalal:*[27]

> There is a substantial difference in the way the RMA treats historic heritage as distinct from areas or buildings with special character. The protection of historic heritage from inappropriate use and development is a matter of national importance while maintenance of the special character of an area or building in the context of amenity values or the quality of the environment is a matter to which particular regard must be had.

67 In this case, the Court also commented that historic heritage is provided for under section 6(1)(f) of the RMA, whereas there is no such specific protection is provided to special character. Accordingly, it is submitted that the Council approach is consistent with the comment the Court has provided on the distinction between historic heritage and special character. The heritage areas must be assessed against the heritage protection provisions of the RMA in order to be a qualifying matter.

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[26] At [58]

[27] *Auckland Council v Dalal* [2022] NZDC 24249 at [64]

KiwiRail

68 The section 42A Report notes that:[28]

> KiwiRail (188.13) request an amendment to the existing definition of “noise sensitive activity”. This definition is not part of PC56 as notified, therefore this submission is outside the scope of the plan change.

69 The legal submissions for KiwiRail state:[29]

> The Operative Hutt City District Plan currently contains a standard – Rule 14A 5 Standard 6, which applies an acoustic performance standard within the Railway Corridor Buffer Overlay which is 40 metres of the boundary of a designation from rail corridor purposes. KiwiRail's submission seeks to extend the application of this standard to 100 metres from the rail corridor for noise and 60 metres for vibration.
>
> …
>
> Dr Chiles' evidence is also that the current distance of 40 metres is inadequate to protect new and altered noise sensitive activities from adverse health effects from vibration, and 60 metres is a more appropriate distance.

70 Standard 6 appears to apply to 'all new buildings containing noise sensitive activities, or existing buildings with new noise sensitive activities'. It is a restriction on development, so presumably KiwiRail seek to have Standard 6 included as a qualifying matter.

71 However, applying the *Waikanae* case, the relief sought by KiwiRail clearly goes beyond control of the density standards – it would control any new building, and new noise sensitive activities in existing buildings. As discussed above in relation to demolition

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[28] Section 42A Report at (212)

[29] Legal submission for KiwiRail dated 21 April 2023 at [4.8] – [4.11]

controls for heritage, this is beyond the purpose of an IPI, and therefore cannot be included in PC56.

72 KiwiRail's submission seeks to extend Standard 6 so that it applies to all activities that are generally considered to be sensitive to noise and vibration. Again, this is beyond the powers of the Panel in relation to PC56, which is about application of MDRS and Policy 3, and appropriate qualifying matters, not about placing restrictions on all activities which may be sensitive to noise and vibration.

HAZARDS: ACCESS TO EASTERN BAYS

73 A question has arisen on whether intensification in the Eastern Bays can be reduced, as access to Eastern Bays may be at risk from natural hazards (flooding and/or coastal inundation). The Officers Verbal Right of Reply noted that:[30]

> Regarding the single access route in and out of the Eastern Bays, the Hearing Panel queried whether a qualifying matter could relate to access to an area, or whether the qualifying matter needed to directly apply to the subject land. Mr Quinn will comment on this matter.

74 To date, we understand that the application of overlays (eg the Flood Hazard Overlay or the Coastal Hazard Overlay) trigger rules which then control activities, such as new residential units, or additions to residential buildings. Presumably the issue above arises from sites which are not included within such an overlay (ie are not directly going to be affected by the natural hazard or for which the modelling is yet to be completed), but which may be impacted in some way by a lack of access in the instance of an event that limits access to the Eastern Bays (which is characterised as having one main road access).

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[30] Officers' Verbal Right of Reply dated 28 April 2023 at (70)

75 A qualifying matter means a matter referred to in section 77I or 77O.[31] Section 77I states 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 one or more of the listed qualifying matters that are present.

76 There are two pathways for applying a qualifying matter in relation to natural hazards:

76.1 under section 77I(a), combined with section 6(h), where the qualifying matter relates to the management of significant risks from natural hazards.

76.2 under section 77I(j), where another matter makes higher density inappropriate in an area, where section 77L is satisfied.

77 Section 77J(3) of the RMA provides the relevant requirements for the Council's section 32 evaluation report, which are in addition to the standard requirements of section 32, must demonstrate why the territorial authority considers that the area is subject to a qualifying matter; and why this is incompatible with MDRS/Policy 3.

78 In order to use the section 77I(a) pathway, the Panel would need to be provided with sufficient evidence to determine that there is a significant risk arising from a natural hazard which requires management, such that the risk means that development in the relevant area (presumably the Eastern Bays) is incompatible with

[31] Section 2 of the RMA

intensification. A significant risk is one that is noteworthy, important, or consequential.[32]

79 It is for the panel to assess the evidence on the degree of risk which requires management in terms of the impact on the road\access to the Eastern Bays, but it is noted that quantification of that risk needs to take into account mitigation measures which are consented. In this case, the resource consents for the shared pathway have been granted and it is under construction. That project may itself lead to a conclusion that, once completed, the road is not sufficiently subject to the hazard to such a level that would justify not applying the density controls to the Eastern Bays on a global basis.

80 In considering whether such evidence is present, it is understood that the modelling of coastal inundation and sea level rise at this stage takes no account of engineering solutions. The consented shared pathway to the Eastern Bays (which is under construction) and the Riverlink consents for the Hutt River flood risk control are recent examples of such engineering solutions.

81 If the reduction in intensification does not relate to the management of a significant risk from a natural hazard, section 77L provides a pathway through the catch-all qualifying matter category in section 77I(j) of the RMA. However, there is an additional assessment required by section 77L that includes identification of the specific characteristic that makes the level of development inappropriate in that area, and includes a site-specific analysis, identifying the site to which the matter relates, and providing a site-specific evaluation to determine the geographic area where intensification needs to be compatible with the qualifying matter.

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[32] The New Zealand Oxford Dictionary – significant (3) noteworthy, important, consequential

82 The conservative analysis is that 'site' means individual title, and some 'site-specific' analysis needs to be undertaken of the sites to satisfy the section 77L requirements. However, where there are groups of sites that share common characteristics, these could be assessed together. While it is possible that access to the Eastern Bays could be a qualifying matter, there would need to evidence that supports that site specific analysis of the specific characteristics which justify that reduction in intensification, after taking proper account of the effect of the storm surge control of the roadway through engineering means by implementation of the existing consent for the shared pathway.

FLOODING MAPS OUTSIDE THE PLAN

83 The approach in the notified version of PC56 is to have in place rules (such as 14H 2.2, 14H 2.3 etc) which control activities such as new residential units, or additions to residential units within 'overlays' identified in the Plan, such as the Flood Hazard Overlay.

84 The suggested approach by Kāinga Ora is to move those Overlays to outside the Plan. This is to enable this mapping to be updated without requiring a Schedule 1 process. Instead of reference to a map, reference would be made in the provisions to definitions (for example to a 'High Hazard Area'), which maps outside the Plan would help parties identify.

85 The legal submissions by Kāinga Ora refer to legal submissions filed by Simpson Grierson in relation to PC27 to the Tauranga City Plan, which concludes that the general approach suggested by Kāinga Ora is legally available, provided the rules are not so unclear as to be void for uncertainty. The submissions refer to

Twisted World Limited v Wellington City Council [33] to support their statement that:

> The permissible extent of any flexibility is a matter of judgment as to whether it is "too wide or too vague to have the element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing factors".4

86 Whilst we do not necessarily disagree that the approach proposed by Kāinga Ora may be available, we note that such an approach would mean that the provisions of the Plan which apply to individual sites would be subject to change without any notification to the owner of that site, and without any opportunity to have involvement in that change. Given this impact on members of the community, it is submitted that the more certain and appropriate method is as per the notified version of PC56.

Date: 25 May 2023

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SF Quinn/K Rogers
Counsel for Hutt City Council

[33] *Twisted World Limited v Wellington City Council* W024/2002, at [64], relying on *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.