BEFORE THE INDEPENDENT HEARINGS PANEL
FOR PROPOSED PLAN CHANGE 56 TO HUTT CITY DISTRICT PLAN

UNDER	the Resource Management Act 1991 (RMA)
IN THE MATTER	of Proposed Plan Change 56 to the Operative Hutt City District Plan

SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF WELLINGTON REGIONAL COUNCIL (149 and F02)
21 April 2023

Wellington Regional Council's Solicitor
PO Box 4341 CHRISTCHURCH 8140
DX WX11179
Tel +64 3 379 7622
Fax +64 379 2467

Solicitor: M A Mehlhopt
(michelle.mehlhopt@wynnwilliams.co.nz)

WYNN WILLIAMS

MAY IT PLEASE THE PANEL:

Introduction

1 These supplementary legal submissions are filed on behalf of Wellington Regional Council (**WRC** or **Greater Wellington** or **Regional Council**) on proposed Plan Change 56 (**PC56**) to the operative Hutt City District Plan (**District Plan**).

2 At the hearing on 12 April 2023 the Hearing Panel requested that Greater Wellington provide information on a number of matters by 21 April 2023. This included:

(a) Revised wording for new Policy C recommended by Richard Sheild requiring new developments to achieve target attribute states for water bodies.

(b) An electronic copy of the Waiwhetū Aquifer Source Water Management Risk Implications Report dated 22 March 2023

(c) A revised title for Map SPZ2 in Mr Lowe's evidence which better reflects its objective.

(d) A full consolidated set of all amendments sought by Greater Wellington including a definition of 'well-functioning urban environment' and reference to the relevant submission point providing scope for the relief sought.

(e) An evaluation of the amendments to Rule 14H 2.9 (New residential units in High Coastal Hazard Area) recommended by Dr Dawe under section 77J of the Act as a qualifying matter.

(f) A copy of the summary of evidence presented by Ms Guest and Mr Farrant.

(g) A legal opinion on how specific wording of relief sought in a submission can be accepted when the original submission did not go into detailed wording.

(h) Comment on matters raised with Mr Quinn, including:

(i) Can the Petone Community Board make a submission on the plan change?

(ii) A legal opinion on the different pathways for supporting suggestions from Greater Wellington (section 80E(1)(b)(iii), 77I/77J, 77G(5)(b)(i)).

Revised wording for new Policy C

3 Mr Sheild has reflected on his recommended wording of new Policy C set out in his Statement of Evidence and has proposed the following new Policy C to address the concerns raised about the difficulty of controlling the effects of a single development to achieve target attribute states for water bodies.

> **New Policy C**
>
> Control earthworks and vegetation removal to minimise the effects of earthworks and vegetation removal on water quality and cultural values.

4 This amendment is included in the consolidated set of amendments sought by Greater Wellington filed with these legal submissions.

Supplementary evidence of Mr Lowe

5 Mr Lowe has prepared a supplementary statement of evidence which includes:

(a) Revised wording for the new policy sought by Greater Wellington to protect the Waiwhetū/Hutt Valley Aquifer as a drinking water source. The revisions remove the reference to delineating Drinking Water Source Protection Areas 1, 2 and 2A on the District Planning Maps.

(b) Recommended wording for a new advice note advising users of the plan where they can find the maps identifying Drinking Water Source Protection Areas 1, 2 and 2A and that resource consent may be required from Greater Wellington for investigation bores, excavation, and construction of building foundations in these areas.

(c) Revised titles for the source water protection zone maps.

(d) A copy of the Waiwhetū Aquifer Source Water Risk Management Implications Report dated 22 March 2023.

6 The relief sought in Mr Lowe's supplementary statement of evidence is also incorporated in the consolidated set of amendments sought by Greater Wellington.

Supplementary evidence of Dr Dawe

7 Dr Dawe has prepared a supplementary statement of evidence which includes:

(a) A track change version of the relief sought to Rule 14H 2.9 (New residential units in the High Coastal Hazard Area); and

(b) An evaluation of the relief sought under section 77J as a qualifying matter.

8 Again the relief sought is included in the consolidated set of amendments.

Summary of evidence presented by Ms Guest and Mr Farrant

9 A copy of the written summaries that Ms Guest and Mr Farrant spoke to at the hearing on 12 April 2023 are provided with these legal submissions.

Scope in submission for specific relief sought in evidence

10 Before recommending any amendments to PC56, the Hearing Panel must consider whether there is scope to make such amendments. In doing so, the Hearing Panel must consider whether:

(a) Submissions received are "on" PC56; and

(b) Any amendments are within the scope of a submission such that the Hearing Panel has jurisdiction to recommend the amendments.

11 In my legal submissions dated 11 April and my summary of legal submissions dated 12 April 2023, I addressed the issue of whether the relief sought in the Greater Wellington submission was "on" PC56.

12 These legal submissions address the second aspect to scope. The Hearings Panel has asked me to specifically address the issue where relief is sought in a submission, but the specific wording of that relief is sought through evidence rather than the submission itself.

13 Case law has established that for an amendment to be considered within the scope of a submission, the amendment must be fairly and reasonably within the general scope of:[1]

(a) An original submission; or

(b) The plan change as notified; or

(c) Somewhere in between.

14 The question of whether an amendment goes beyond what is reasonably and fairly raised in submissions will usually be a question of degree, to be judged by the terms of the plan change and the content of submissions. This should be approached in a realistic workable fashion rather than from the perspective of legal nicety, with consideration of the whole relief package detailed in submissions.[2]

15 Further, the courts have recognised that councils need scope to deal with the realities of the situation and a legalistic interpretation that a council can only accept or reject relief sought in any given submission is unreal.[3] Approaching such amendments in a precautionary manner, to ensure that people are not denied an opportunity to effectively respond to additional changes in the plan change process, has also been endorsed by the courts.[4]

16 Changes that are considered to be incidental to, consequential upon, or directly connected to the plan change are also considered to be within scope.[5]

17 An amendment can be anywhere on the line between the plan change and the submission. Consequential changes can flow downwards from whatever point on the first line is chosen, as a submission may only be on an objective or policy, but there may be methods or rules which are then incompatible with the new objective or policy in the proposed plan

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1 *Re Vivid Holdings Ltd* (1999) 5 ELRNZ 264 at [19].

2 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60].

3 *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [107], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 170.

4 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [82].

5 *Well Smart Holding (NZQN) Limited v Queenstown Lakes District Council* [2015] NZEnvC 214 at [16].

change as revised.[6] Consequential changes may also flow 'upwards' as a result of accepting a submission point (e.g. changes to the policies may be required as a result of amending the activity status of a rule).[7]

18 Further, amendments required for clarity and refinement of detail are allowed on the basis that such amendments are considered to be minor and un-prejudicial.[8]

19 Ultimately, the Hearing Panel must be satisfied that the proposed changes are appropriate in response to the public's contribution.[9] As Wylie J noted in *General Distributors Limited v Waipa District Council*, the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[10]

20 A degree of specificity is required in a submission to ensure that all are sufficiently informed about what is proposed.[11] The requirement for specificity is not merely technical, but goes to the heart of the scheme of the RMA to ensure that others involved in the plan making process can understand the relief requested and be able to determine whether to support or oppose it.[12]

21 It is not unusual for relief to be amended in response to evidence called by other parties and its testing during a hearing.[13] Even so, any proposed amendments must remain within the general scope of the notified plan change or the original submissions on the plan change or somewhere in between.[14]

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6 *Campbell v Christchurch City Council* [2002] NZRMA 332 (EnvC) at [20].

7 *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [40]-[48]; *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [96], [113]-[118] and [135].

8 *Oyster Bay Developments Limited v Marlborough District Council* EnvC C081/2009, 22 September 2009 at [42].

9 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

10 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [55], cited in *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [116].

11 *Vernon v Thames-Coromandel District Council* [2017] NZEnvC 2 at [12], citing *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [62]-[63]

12 *Vernon v Thames-Coromandel District Council* [2017] NZEnvC 2 at [13].

13 *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [16].

14 *Re Vivid Holdings Ltd* (1999) 5 ELRNZ 264 at [19].

22 This need stems from the requirements of procedural fairness. One of the purposes in notifying the plan change, receiving submissions and further submissions, is to ensure that all are informed about what is proposed, "otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[15]

23 The amendments pursued, must, therefore, remain within what was fairly and reasonably raised in the original submission lodged on the plan change.[16]

24 Adding complexity is the fact that local authorities usually face multiple submissions, often conflicting and often prepared by persons without professional help.[17] Councils need to be able to deal with the reality of a situation.[18] That being the case, the assessment about whether any amendment was reasonably and fairly raised in the course of submissions is to be approached in a realistic workable fashion.[19] This approach requires:[20]

> … that the whole relief package detailed in submissions be considered when determining whether or not the relief sought is reasonably and fairly raised in the submissions…

25 The fact that a submission does not identify the relevant provision to be amended is not determinative.[21] The High Court in *Albany North Landowners v Auckland Council*[22] observed:

> [149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way – that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order

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15 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [17].

16 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [166]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [18].

17 *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [19].

18 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [165]-[166]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [19].

19 Royal Forest & Bird Protection Society Inc v Southland District Council [1997] NZRMA 408 (HC); *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [19].

20 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [60]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [19].

21 *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [20].

22 *Albany North Landowners v Auckland Council* [2017] NZHC 138; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [20].

objectives and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

26 Approached this way, the question about whether the submission is on or about the plan change will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[23] It is important to keep in mind that the Hearing Panel cannot permit the plan change to be appreciably changed without a real opportunity for participation by those who are potentially affected.[24]

Analysis of relief sought by Greater Wellington

27 The consolidated version of the amendments sought to PC56 includes a reference to the relevant submission point that Greater Wellington is relying on to provide scope for the relief sought.

28 There are some instances where the specific wording for the relief sought was not sought in the submission. However, it is still clear on the face of the submission that new provisions, or amendments to provisions, were being sought to address the issues raised in the submission. When read as a whole it is clear that Greater Wellington considered that additional provisions were required to meet clauses (a)(ii), (e) and (f) of Policy 1 of the NPS-UD 2020 and submission points that did prescribe specific amendments to provisions provided clear guidance as to the nature of the changes being sought.

29 Anyone reading Greater Wellington's submission would have been on notice about the nature of the provisions that could be included in PC56 to address the issues raised in the Greater Wellington submission.

30 There are instances where:

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23 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at [166]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [21].

24 Clearwater Resort Ltd v Christchurch City Council HC Christchurch AP 34/02, 14 Mrach 2003 at [66]; *Re Otago Regional Council* [2021] NZEnvC 174, Annexure 2 at [21].

(a) a new policy was sought in the submission, but a new objective and policy is being pursued through the evidence presented by Greater Wellington; or

(b) that changes to rules are being sought through the evidence when the submission only prescribed specific relief in respect of a relevant policy.

31 As set out above, consequential changes can flow downwards (e.g. amendments to methods or rules are required to implement a new objective or policy). Consequential changes may also flow 'upwards' as a result of accepting a submission point (e.g. changes to the objectives or policies may be required as a result of amendments to the policy or rule. The key is whether the amendments were fairly and reasonable raised in the original submission.

32 In my submission, the relief sought by Greater Wellington through the evidence presented at the hearing could be reasonably foreseen as a direct or otherwise logical consequence of relief sought in the submission. There are consequential changes that flow upwards. For example a new objective is sought when the submission only prescribed specific wording for a new policy. However, when the example wording is read it is both a mix of an objective and policy. When read together with submission point 1 which seeks the inclusion of objectives to meet clauses (a)(ii), (e) and (f) of Policy 1 of the NPS-UD, persons reading the submission as a whole would have been aware of the issues raised by Greater Wellington and the nature of the changes sought to address those issues.

33 In my submission, the amendments pursued are on the line between the plan change and the submission and are within what was fairly and reasonably raised in the original submission. Persons have had a real opportunity to participate in the matters raised by Greater Wellington through further submissions and in evidence.

34 Following the exchange of expert evidence, submitters would have had a further opportunity to comment on the specific wording of amendments sought by Greater Wellington during their respective presentations at the hearing.

Definition of well-functioning urban environment

35 In accordance with clause 6 of Schedule 3A of the RMA, a territorial authority is required to include the following objective in its district plan:

> Objective 1
>
> (a) A well-functioning urban environment that enables all people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, now and into the future.

36 This mirrors Objective 1 of the National Policy Statement on Urban Development (**NPS-UD**). Well-functioning urban environment is defined in the NPS-UD as having the meaning in Policy 1 of the NPS-UD. Given the term has been defined in the NPS-UD it is important that it is also defined in the District Plan so that it is clear what a well-functioning urban environment is. The concern for Greater Wellington is that if the term is not defined then there is a risk that all of the qualities of a well-functioning urban environment set out in Policy 1 of the NPS-UD may not be considered. For example, urban environments that:

> (e) support reductions in greenhouse gas emissions; and
>
> (f) are resilient to the likely current and future effects of climate change.

37 This change is within the scope of Greater Wellington's submission point 149.1 which sought that the plan change include objectives, policies, permitted standards and rules that provide for the qualities of well-functioning urban environments. The reasons for that submission point were set out as follows:

> The district plan requires further amendments to give effect to Policy 1 of the NPS-UD 200. Greater Wellington considers tat additional provisions are required to meet clauses (a)(ii), (e), and (f) of Policy 1 of the NPS-UD 2020 and would have regard to Objective 22 of the Proposed RPS Change.

38 For completeness, the Council also has the ability to make amendments to PC56 in accordance with clause 16(2) of Schedule 1 to the RMA.

39 Clause 16(2) provides for alterations that are of minor effect, or to correct any minor errors.

40 The scope of any such amendments is limited to those which would be neutral, and therefore do not affect the rights of members of the public.[25]

41 Further, the power to correct minor errors is limited to changes that would not alter the meaning of the document (such as typographical or cross-referencing errors).[26]

42 The inclusion of a definition of well-functioning urban environment would not alter the meaning of the document. It would simply be providing users of the plan clarity on the meaning of well-functioning urban environment which is already defined in the NPS-UD.

Ability of the Petone Community Board to make a submission

43 Whether the Petone Community Board can make a submission on PC56 will depend on the functions, responsibilities, duties, and powers that it has been delegated by the Council.

44 It appears on the face of *Poari Hapori Eastbourne, Petone and Wainuiomata Community Boards Functions and delegations 2022-2025* that the Petone Community Board does have a relevant function of making a submission on a plan change.

45 The functions and delegations document includes a general function of:

> Provide their local community's input on
>
> - Changes or variations to the District Plan.
>
> Any submissions lodged by a Board or Committee require formal endorsement by way of resolution.

46 Mr Quinn will be able to address whether a submission lodged was formally endorsed by way of a resolution.

Pathway for supporting suggestions from Greater Wellington (section 80E (1)(b)(iii), 77I/77J, 77G(5)(b)(i)

47 Counsel addressed section 80E(b)(iii) and 77G(5)(b)(i) in legal submissions dated 11 April 2023.

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25 *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (EnvC) at 10.

26 *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (EnvC) at 11.

48 Under section 80E(1)(b)(iii) a plan change that incorporates the MDS may also amend or include related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS of policies 3, 4 and 5 of the NPS-UD, as applicable.

49 Whilst section 80E(2) lists some matters that related provisions may include, there is no limit to the matters that the related provisions may relate to.

50 Section 77G provides that a territorial authority may include objectives and policies in addition to those mandatory objectives and policies set out in clause 6 of Schedule 3A to provide for matters of discretion to support the MDRS and link to the incorporated density standards to reflect how the territorial authority has chosen to modify the MDRS in accordance with section 77H.

51 Section 77G only refers to objectives and policies. It does not refer to rules, standards and zones like in section 80E(b)(iii).

52 Section 77G(6) provides that a territorial authority may make the requirements set out in Schedule 3A 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. Subclause (6) only applies to the requirements set out in Schedule 3A or policy 3, not any other provisions in the plan.

53 Clause 2 in Schedule 3A provides that it is a permitted activity to construct or use a building if it complies with the density standards in the district plan. Density standard is defined as:

> a standard setting out requirements relating t building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to streets, or landscaped area for the construction of a building.

54 No other density standards may be included in a district plan additional to those in Part 3 of Schedule 3A relating to a permitted activity for a residential unit or building. However, a territorial authority can make the MDRS and the relevant building height or density requirements under policy 3 less enabling to the extent necessary to accommodate 1 or

more qualifying matters that are present.[27] Further, there is nothing in the intensification planning instrument (**IPI**) provisions in the Act that prevents a territorial authority from including additional matters of discretion or policy direction so long as they support or are consequential on the MDRS. As an example, the plan change includes provisions that deal with the effects on the stormwater system and the mitigation of additional stormwater runoff through onsite stormwater retention.

55 In my submission, the objectives and policies that Greater Wellington have sought to be included in PC56 could be included as matters of discretion that support the MDRS under section 77G(5)(b)(i). Likewise the additional matters of discretion can be included as related provisions that support or are consequential on the MDRS or policies 3 and 4 of the NPS-UD as they are necessary to help implement and achieve the objective of a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future which forms part of the MDRS.

56 If the Hearing Panel is not minded to include all of the provisions sought as related provisions under section 80E(1)(b)(iii) or as additional objectives and policies under 77G, there is also a pathway to include some of these provisions as a qualifying matter under 77I. The matters identified by Greater Wellington are required in order to give effect to the National Policy Statement for Freshwater Management 2020 (**NPS-FM**) or are a matter of national importance that decision-makers are required to recognise and provide for under section 6, including the management of significant risks from natural hazards.

57 Section 77J sets out some additional matters that must be considered in the section 32 evaluation report when considering a proposed amendment to accommodate a qualifying matter.

58 This includes:

(a) Demonstrate why the territorial authority considers –

(i) That the area is subject to a qualifying matter; and

[27] RMA, s 77I.

(ii) That the qualifying matter is incompatible with the level of development permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 for that area; and

(b) Assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and

(c) Assess the costs and broader impacts of imposing those limits.

59 Should the Hearing Panel be minded to include any of the relief sought by Greater Wellington as a qualifying matter rather than under sections 80E(1)(b)(iii) or 77G, the matters set out in paragraph 58 could be addressed through the further evaluation required under section 32AA of the Act.

Dated this 21st day of April 2023

M A Mehlhopt

Counsel for Wellington Regional Council