STEPHEN QUINN
BARRISTER

Nathan Geard
Hutt City Council
LOWER HUTT
By Email

16 October 2026

Dear Nathan

Proposed district plan advice – Infrastructure – Response to Minute 18

1. Following the hearing of submissions on the Infrastructure chapter of the PDP, the Panel issued Minute 18 dated 30 September 2026. Minute 18 directs responses by submitters and Council officers to a number of identified questions. In paragraphs 31-44, Minute 18 also outlines a number of legal questions for advice to be provided by 16 October.

2. The specific detail and explanation for each question is contained in Minute 18. I address each of the questions and my answers in the Summary section below, before providing a more fulsome analysis under each of the heading topics that follow:

Summary

Rule THW-R2(2) notification preclusion

3. The advice sought relates to the ability for the Council to use Clause 16(2) Schedule 1 of the RMA to inform a determination on whether a potential amendment is 'of minor effect' or corrects 'any minor errors.' The Panel is considering a recommendation to modify the notification clause to also preclude limited notification for applications that do not meet the hydraulic neutrality permitted activity requirements for new buildings in an Urban Zone under Rule THW-R2(1). The question is whether adding limited notification to the notification preclusion clause within the rule is of minor effect, or whether it corrects a minor error.

4. The second question on this topic is that one of proposed reasons for the modification of the limited notification clause within rule THW-R2(2) is that the change is required to make the notification provisions of rule THW-R2(2) as notified lawful under section 77G of the RMA (for the residential zones which are required to incorporate the Medium Density Residential Standards). The Panel notes that hydraulic neutrality is not a

Capital Chambers
Level 14 | 89 The Terrace | PO Box 10048 | Wellington 6143

M 027 434 9668
E stephen.quinn@capitalchambers.co.nz

Medium Density Residential Standard. Legal direction is sought on whether the rationale and cited legal basis for amending the notification clause within the rule are correct.

5. *Summary Response to each question:*

    a. *Yes, the proposed amendment can be an alteration of minor effect within the scope of clause 16(2) of Schedule 1 of the RMA.*

    b. *The Medium Density Residential Standards in the RMA set out some notification preclusions for the construction and use of residential units. This provides a limited additional justification for the proposed change to the notification preclusion regarding hydraulic neutrality for new dwellings, however the amendment can be justified on the terms of clause 16(2) as addressed in answer to the first question, irrespective of this additional reason.*

KiwiRail's requested 5m setback and qualifying matters evaluation requirements

6. The submission of KiwiRail requests a new permitted activity standard requiring a 5m building setback from the edge of the rail corridor designation boundary as a new qualifying matter to make the Medium Density Residential Standards less enabling of development. Section 77I(e) of the RMA is relied on. The Panel seeks advice on whether, as a new qualifying matter, the requested new 5m building setback would also need to be supported by an evaluation of the matters specified within section 77J of the RMA.

7. *Summary response:*

    a. *In my view, if section 77I(e) is relied on as a qualifying matter to support the proposed 5m setback then an evaluation under section 77J is also required, as well as analysis under a number of other RMA provisions. Simply because the fulsome analysis under this section was completed by the Council when the MDRS was first introduced into the now operative ODP, this does not absolve the need for the analysis being required now for any proposed new qualifying matters relied on. If KiwiRail is justifying this proposed change to the PDP under section 77I(e), it needs to be supported by a section 77J evaluation.*

The requested 'Orphan Objective' to protect the Waiwhetū Aquifer

8. The submission of Wellington Water (now Tiaki Wai) seeks to include a new PDP objective. The submission does not request any specific policies or rules/standards to achieve this objective. To cover the scenario where no existing PDP or ODP provisions are identified that support the proposed objective, the Panel wishes to confirm the requirements of section 75(1) of the RMA where an objective is contained within a

district plan but there are no policies to implement the objective, and no rules to implement the policies.

9. *Summary response*:

    a. *The inclusion of an objective in the PDP, with no supporting policies and rules, is not sound resource management practice. Section 75(1) of the RMA anticipates that policies will implement the objectives, and rules will implement the policies. Without this cascade, the objective has limited legal effect.*

    b. *While it is not unlawful to have an orphan objective, it is also not a model structure for a district plan. It can create the potential for future conflict when assessing resource consent applications. It is possible that no rules may be necessary where other implementation methods suffice, however an objective should at least have policies to address the implementation of that objective.*

Section 44A and removing duplication or conflict with National Environmental Standards

10. The Panel notes that it has heard from the s42A authors and submitters that the PDP contains numerous provisions that either duplicate or are in conflict with national direction contained within national environmental standards. The Panel therefore wishes to confirm the process for the Council, and the role of the Panel (if any), in addressing instances of duplication or conflict between PDP provisions and current national environmental standards.

11. The Panel notes its understanding that the Council is required under section 44A of the RMA to amend operative and proposed district plans to remove conflict or duplication with a national environmental standard without using the process in Schedule 1 of the RMA. Advice is accordingly sought on:

    a. The necessary legal process and timing to address this matter;

    b. The responsibilities and actions necessary for the Council and the Panel in meeting the requirements of section 44A;

    c. How best to integrate or capture this process through the PDP hearings process to ensure duplication or conflict is removed, that all relevant submission points are noted/addressed, and to ensure that the Panel is not in the position of addressing s44A matters under the Schedule 1 hearing process.

    d. Any other advice on how best to expediently resolve this matter.

12. *Summary response:*

    a. *For this PDP process, the Council and the Panel are constrained by the subject matters in the PDP that are covered by the exemption. This means that this PDP process is ring-fenced by those exemption topics, and subject to the scope of submissions.*

    b. *The timing of the section 44A process in relation to national environmental standards is a matter for the Council to determine, after taking into account its statutory obligations under section 44A.*

    c. *There is a difficulty with the Panel making amendments to address any duplication or conflict under section 44A through this Schedule 1 RMA process. The PDP process is governed by the terms of the Schedule 1 process, including appeal rights. By contrast, section 44A does not require the Council to use the Schedule 1 process, and accordingly provides no appeal rights. On this basis, the Council should progress the response to those national environment standard matters in a holistic manner independent of the Schedule 1 PDP process, meaning that compliance with section 44A is not within the scope of the Panel's role.*

    d. *In practical terms, the Panel may choose to note issues of duplication and conflict that the PDP may have with national environmental standards that have been raised through submitters. That list will then be considered as matters for the Council to subsequently address through a section 44A process that does not use Schedule 1.*

Lawfulness of provisions in a plan referring to resource consents as a pre-qualification for permitted activity status

13. The submission of Te Kārearea Ltd and Rosco Ice Cream Ltd seek (for a specific site at 30 Benmore Crescent) to add a maximum 'vehicle trips per day' standard that has been confirmed via a resource consent, while also seeking reference within the permitted activity standard to 'or similar resource consent with the same vehicle trips'. The Panel wishes to understand the lawfulness of including provisions in a district plan that include rules or standards where activity status is dependent on the future grant of a resource consent. For example, whether the same lawfulness issues arise as those identified by the Environment Court through the case *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 93.

14. *Summary response*:

    a. *In my view, it is not sound resource management practice for the terms or details of an existing or potential future resource consent to be referred to directly in district plan rules or standards. The PDP provisions, including to determine activity status,*

should be certain without reference to resource consents or dependent on future consent decisions.

15. I now address each of these questions in more detail.

Rule THW-R2(2) notification preclusion clause 32

16. There are two related questions on this topic. Both link to the notification preclusion in THW-R2.2. That provision is a component of the restricted discretionary rule for activities that do not comply with THW-R2.1, and currently reads:

> ***Notification***
> *Public notification is precluded for applications under this rule*.

17. The wording above contrasts with other notification preclusions in this chapter (eg. THW-R1.2, THW-R3.2 and THW-R4.2) which read:

> ***Notification***
> *Public notification and limited notification are precluded for applications under this rule*.

18. Notification preclusion rules are enabled by a combination of sections 77D, 95A and 95B of the RMA. Section 77D enables a district plan rule that either requires public notification or precludes public or limited notification for specified rules. When processing a resource consent and determining notification under section 95A(5) and 95B(5) of the RMA, a rule in a plan can preclude both public and limited notification. The relevant rule in the plan accordingly needs to be specific regarding any variation to the application of the normal notification tests in the RMA.

19. Clause 16(2) of Schedule 1 to the RMA is a provision that enables amendments to be made to a proposed plan without following through the full notification and submission process. It is however constrained to situations 'where such an alteration is of minor effect, or may correct any minor errors.'

20. The intention of this clause is to assist with administrative efficiency to make corrections, however to also constrain the application of this clause so that it is not abused by using it for changes that are substantive or that may inappropriately remove the participation rights of interested or affected parties. This is supported by the caselaw that reflects a degree of caution in the use of this provision.

21. The term 'minor effect' is not explicitly defined, but in evaluating whether an alteration qualifies under this clause, consideration is given to whether the adjustment affects the public's rights in a prejudicial or beneficial manner. If the alteration is considered neutral, it is likely to meet the threshold for 'minor'. However, if the alteration could lead

to submissions or objections from the public, it may exceed the scope of clause 16(2) and would require a more formal process.[1]

22. Against this background, it is understood that the Panel is proposing to recommend that the Council makes this change on the basis that the approach to the notification clause in THW-R2 is different to the three other rules in this chapter, and appears to be an error. This is supported by the officer's recommendation in paragraphs 138-141 of section 4.2.13 of the 42A report for Three Waters. This confirms that there are no submissions directly on this point, however the issue is raised as a matter of consistency with other rules in the chapter and to correct a drafting error.

23. My view is that the proposed change by the Panel fits within the nature of changes anticipated by clause 16(2). The correction is to align this rule with the same approach taken for the other rules. There is no clear reason why limited notification would specifically be available for this rule, and not the others. It is accordingly a drafting error, and fits within the scope of anticipated changes through use of clause 16(2). I would not anticipate submissions on the substance of the proposed change.

24. The second question arises from the reference in paragraph 141 of the section 42A report to section 77G of the RMA. It is understood that this paragraph is added as a further reason to justify the proposed change to this notification preclusion rule under clause 16(2) of Schedule 1. It is not the sole reason for the recommended change. The Panel is raising whether section 77G is relevant to this issue.

25. Section 77G is part of a suite of provisions introduced in 2021, which required the Council to initiate a process to introduce a standard set of provisions (defined as the Medium Density Residential Standards or MDRS) into residential zones of the district plan. In essence, this was to require a standard national approach to enable housing intensification.

26. It was possible to modify the MDRS so that the building height or density was less enabling if one of the qualifying matters in 77I was applicable. That was a matter of assessment and decision to be made on each occasion.

27. These RMA provisions contained a timing requirement for the Council to amend the district plan. The Council complied with that required, and the district plan now includes the requirements for the MDRS. For this reason, there is often no need to further review and interpret these RMA provisions.

[1] *Coastal Ratepayers United Inc v Kapiti Coast District Council* [2017] NZEnvC 31 at paras [59]-[61], *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at paras [56]-[59].

28. Despite this background, section 77G has now been raised as a further justification for the proposed change to the notification preclusion rule in this case. Paragraph 141 of the section 42A report for Three Water states:

> *Of particular relevance for this issue, under s77G of the RMA the PDP is required to incorporate the Medium Density Residential Standards (the MDRS) listed in Schedule 3A of the RMA for relevant residential zones, which would make the notification provisions of rule THW-R2 as notified unlawful to the extent that they apply to residential zones.*

29. Where this comment arises from is that clause 5 of Schedule 3A of the RMA provides a statutory preclusion for public and limited notification for construction and use of 4 or more residential units that comply with the density standards, and a preclusion of public notification for the construction and use of 1-3 residential units.

30. The terms of clause 5 of Schedule 3A is therefore different from the relevant notification preclusion at issue here for a hydraulic neutrality rule. However, in broad terms it provides a direction as to the notification expectations of district plans for density development. It accordingly provides some further justification for the proposed change to correct a minor error. and for consistency with other rules, under clause 16(2).

KiwiRail's requested 5m setback and qualifying matters evaluation requirements

31. This question relates to one of the justifications submitted on behalf of KiwiRail for the proposed 5m building setback from the edge of the rail corridor designation boundary. KiwiRail have asserted that one of the grounds for this setback is as a new qualifying matter to make the MDRS less enabling of development. The particular provision relied on is section 77I(e) of the RMA, which provides that it is:

> *'a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure.'*

32. The legal submissions dated 17 September 2026 on behalf of KiwiRail only address the qualifying matter in limited detail in paragraphs 5.16-5.19, and only in response to matters raised in the section 42A report. While KiwiRail submitted evidence in support of the relief sought in its submission, the evidence and legal submissions contain no:

    a. Detailed analysis under section 77I(5), particularly specific to the Hutt Valley network.

    b. Evaluation as required under section 77J.

    c. Outline of what parts of the setback are within residential zones that are affected by the MDRS, versus those properties that have a different zoning. This links to the

analysis under sections 77N-77R regarding the intensification requirements in non-residential zones.

d. Analysis of the requirements in clauses 3.32 - 3.33 of the NPS-UD, as the qualifying matters framework is also relevant to a departure from NPS-UD Policy 3, as well as the MDRS.

33. The evaluation of the substance and merits of the relief sought is a matter for the Panel to assess. However, the absence of the analysis required on the matters listed above in the evidence and legal submissions will constrain the conclusions that the Panel can reach on the KiwiRail submission. While the submission includes a section 32 evaluation, the Panel has specifically raised in Minute 18 whether, in addition to the section 32 analysis, the requested 5m building setback would also need to be supported by an evaluation of the matters specified in section 77J of the RMA, as a new qualifying matter.

34. As noted above in response to the first question, the analysis under these sections of the RMA introduced in 2021 was completed by the Council, and the appointed Panel, when the MDRS was introduced into the ODP through a plan change process. That plan change involved a full assessment of the MDRS being incorporated into the district plan. Council officers will be able to check the records relating to that plan change to advise on the extent and nature of KiwiRail's involvement as a submitter in that previous plan change process.

35. As the MDRS now forms part of the ODP, engagement with these provisions of the RMA does not arise frequently. However, there is no statutory constraint on the provisions now being subsequently relied on through a plan change process. On that basis, if a qualifying matter is proposed to vary how the MDRS have been incorporated into the PDP, the analysis should be undertaken by reference to the full suite of considerations. Those considerations include the following matters:

a. A duty under section 77G on the Council to incorporate the MDRS and give effect to policy 3 and 5 in residential zones.

b. The ability under section 77I for the Council to make the district plan less enabling than these standards where one of the listed qualifying matters is present. That list includes (e) as quoted above.

c. A requirement in section 77J for an evaluation report to address a number of matters to justify the adoption of the qualifying matter to vary the MDRS. This requires a detailed evaluation to address the specified matters.

d. The ability in section 77K to adopt an alternative process for assessing existing qualifying matters instead of the section 77J assessment.

e. Consideration of the underlying zoning - this links to the analysis required under sections 77N-77R regarding the intensification requirements in non-residential zones.

f. Analysis of the requirements in clauses 3.32 - 3.33 of the NPS-UD, as the qualifying matters framework is also relevant to a departure from NPS-UD Policy 3, as well as the MDRS.

36. As noted above, the legal submissions dated 17 September 2026 on behalf of KiwiRail only address some of these matters briefly in paragraphs 5.16 - 5.19, which relies on the planning analysis produced. Brief references are made to section 77I of the RMA, but no analysis is provided under section 77J, section 77K, sections 77N-77R or the other identified matters.

37. In my view, if section 77I(e) is relied on as a qualifying matter to support the proposed 5m setback then an evaluation under section 77J is also required, as well as the other identified provisions. Simply because the fulsome analysis under this section was completed by the Council when the MDRS was first introduced into the now operative ODP, this does not absolve the need for the analysis being required now for any proposed new qualifying matters relied on. If KiwiRail is justifying this proposed change to the PDP under section 77I(e), it needs to be supported by a section 77J evaluation.

The requested 'Orphan Objective' to protect the Waiwhetū Aquifer

38. The submission of Wellington Water (now Tiaki Wai) seeks to include a new objective. Subject to the completion of further planning analysis as requested by the Panel to explore whether the ODP or PDP contain existing provisions that may support this proposed objective, the submission does not request any specific policies or rules/standards to achieve this objective. To cover the scenario where no related existing PDP provisions are identified, the Panel wishes to confirm the requirements of section 75(1) of the RMA where an objective is contained within a district plan but there are no policies to implement the objective, and no rules to implement the policies.

39. Section 75(1) of the RMA provides:

> *A district plan must state—*
> *(a) the objectives for the district; and*
> *(b) the policies to implement the objectives; and*
> *(c) the rules (if any) to implement the policies.*

40. It is clear from the wording of this section that a cascade of objectives, supporting policies and implementation rules is anticipated. The relationship between these components is sequential and hierarchical. This makes for sound processing of a resource consent. In the absence of supporting policies and rules, an objective may not be able to be implemented. Alternatively, it can result in other policies and rules being

potentially misinterpreted, in an attempt to read them consistently with an orphan objective.

41. No caselaw directly on this issue has been identified. That is not surprising, as it is unusual that a Council or submitter would propose an objective without supporting policies or rules. However, it is noted that the section 32(1)(b) analysis requirements reinforce this cascade structure, by requiring an evaluation of whether the proposed provisions are the most appropriate way to achieve the objectives. It is implicit in this section that policies and rules to support an objective will be proposed. There are many cases that address the adequacy of a section 32 analysis, but normally in the context of an evaluation of the efficiency and effectiveness of provisions to support an objective, rather than there being no policies or rules to support an objective.

42. While this statutory structure does not go as far as making rules mandatory, their use is determined by the necessity to achieve the objectives and policies. On this basis, it would not align with the purpose and structure of the RMA to have a district plan that contains objectives without at least having supporting policies to achieve the objectives. There should also be rules if they are necessary to implement those objectives and policies (unless other methods to meet the objectives and policies will suffice).

Section 44A and removing duplication or conflict with National Environmental Standards

43. On this topic the Panel notes that it has heard from the s42A authors and submitters that the PDP contains numerous provisions that either duplicate or are in conflict with national direction contained within national environmental standards. The Panel therefore wishes to confirm the process for the Council, and the role of the Panel (if any), in addressing instances of duplication or conflict between PDP provisions and current national environmental standards.

44. The Panel notes its understanding that the Council is required under section 44A of the RMA to amend operative and proposed district plans to remove conflict or duplication with a national environmental standard without using the process in Schedule 1 of the RMA. While section 44A sets out the obligation on the Council, this Panel is assessing submissions and provisions on those parts of the PDP that fall within the Minister's exemption. Against this background, advice is accordingly sought on:

    a. The necessary legal process and timing to address this matter;

    b. The responsibilities and actions necessary for the Council and the Panel in meeting the requirements of section 44A;

    c. How best to integrate or capture this process through the PDP hearings process to ensure duplication or conflict is removed, that all relevant submission points are

noted/addressed, and to ensure that the Panel is not in the position of addressing s44A matters under the Schedule 1 hearing process.

d. Any other advice on how best to expediently resolve this matter.

45. The requirements of section 44A of the RMA are key to this series of questions. Section 44A applies if a district plan or proposed plan contains a rule that duplicates or conflicts with a provision within a national environmental standard. The section requires the Council to amend the plan to address the duplication or conflict without following the process in Schedule 1 of the RMA. While that role and obligation on the Council is clear, the questions from the Panel essentially test whether these are matters for the Panel or for the Council to separately address.

46. The primary role of the Panel is to hear and determine submissions on the PDP and make recommendations on those submissions. Those recommendations then proceed to the elected Council for decisions to be made under clause 10 of Schedule 1 of the RMA (which can then be subject to an Environment Court appeal). It is accordingly important that the recommendations of the Panel, and the subsequent decision of the Council, are limited to those matters covered by the scope of the Minister's exemption.

47. For this PDP process, Council and the Panel are constrained by the subject matters in the PDP that are covered by the exemption. This means that this PDP process is ring-fenced by those exemption topics and the scope of submissions. In practical terms, this will not enable all higher order documents to be addressed in a comprehensive manner though this constrained PDP process. The PDP can only give effect to higher order documents to the extent practicable within the scope of the exemption and the scope of submissions.

48. This means that the Panel should give effect to the new/altered higher order documents to the extent practicable within the scope provided by the exemption and submissions. Any new PDP provisions required to give effect to the new/altered higher order documents should be addressed in a future plan review process by the Council, rather than attempting to change the scope of this PDP process. The timing of the section 44A process in relation to national environmental standards, in particular, is a matter for the Council to determine, taking into account its statutory obligations under section 44A.

49. There is a further difficulty with the Panel making amendments to address any duplication or conflict under section 44A through this Schedule 1 RMA process. The PDP process is governed by the terms of the Schedule 1, including appeal rights. By contrast, section 44A does not require the Council to use the Schedule 1 process, and accordingly has no appeal rights. The Council should progress those matters in a holistic manner independent of the Schedule 1 PDP process, meaning that compliance with section 44A is not within the scope of the Panel's role.

50. In practical terms, the Panel may choose to note issues of duplication and conflict that the PDP may have with national environmental standards which have been raised through this process. That list will then be matters for the Council to subsequently address through a section 44A process that does not use Schedule 1.

Lawfulness of provisions in a plan referring to resource consents as a pre-qualification for permitted activity status

51. This question relates to the lawfulness of district plan provisions that reference an existing or future resource consent in a rule or standard that will determine activity status. This question arises following consideration of a submission affecting a specific site at 30 Benmore Crescent.

52. While the merits of the submission are a matter for the Panel, there is some legal guidance that may assist the Panel's consideration of this matter. That includes the need for certainty when determining the requirements of a district plan:

    a. District plans are subsidiary legislation under the RMA, and must be interpreted to ensure clarity and coherence in their rules, objectives, and policies.

    b. The principle of certainty ensures that the provisions of a plan can be reasonably understood and applied by an ordinary, reasonable member of the public. The language used in district plans should be unambiguous, with terms given their plain, ordinary meaning unless doing so would contradict the statutory purpose or create absurdities or contradictions; *Powell v Dunedin City Council* [2004] NZRMA 49.

53. The Panel has referred to *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] NZEnvC 93. This is a very long Environment Court case that involved a plan change for approximately 96 hectares of rural land to be rezoned for urban development. This was an interim decision following a 6 week hearing. The Panel's Minute does not clarify which particular part of that decision it is referring to. However, one of the questions considered by the Court was whether a grant of resource consent may be relevant to an assessment of the environment for the purpose of the plan change (para 122). The Court found that there was no inevitability as to the grant of consents and whether they will be implemented (paras 128 and 133). That finding was then incorporated into its subsequent analysis.

54. In my view, it is not sound resource management practice for the terms or details of an existing or potential future resource consent to be referred to directly in district plan rules or standards. This is because the consent process and district plan process operate within distinct frameworks within the RMA. District plans need to stand independently and provide certainty. District plans also have an extended life. They must specifically state objectives, policies, and rules to guide activities without creating ambiguity or inherent discretion for territorial authorities, especially when creating permitted activities. A member of the public should be able to ascertain with certainty

what the district plan requirements are, without the need to have knowledge of or separately refer to a resource consent.

55. District plans cannot directly reserve discretion for territorial authorities in relation to permitted activities, ensuring clarity and predictability in their application. These distinctions indicate that resource consent details are separate matters, and should only be indirectly referenced in a district plan (insofar as they may guide the establishment of standards or the framework established in the plan to define when resource consents are required), but should not be directly referenced.

56. I am happy to expand on any of these matters further.

Yours sincerely



Stephen Quinn
Barrister