BEFORE INDEPENDENT HEARING COMMISSIONERS
IN CHRISTCHURCH

TE MAHERE Ā-ROHE I TŪTOHUA MŌ TE TĀONE O ŌTAUTAHI

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the hearing of submissions on Plan Change 14 (Housing and Business Choice) to the Christchurch District Plan

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MEMORANDUM OF COUNSEL FOR CHRISTCHURCH CITY COUNCIL REGARDING FURTHER CLARIFICATIONS SOUGHT

19 August 2024

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MAY IT PLEASE THE INDEPENDENT HEARINGS PANEL:

Introduction and overview

1. Christchurch City Council (**Council**) is grateful to the Panel for promptly clarifying a number of matters regarding the Panel's recommendations on Plan Change 14 (**PC14**), through its minutes 50 and 51 (and associated materials).

2. There are likely to be a number of other matters on which the Council seeks clarification, which will be set out in a subsequent memorandum. In the meantime, the purpose of this memorandum is to ask the Panel to clarify how it has interpreted and applied the High Court decision in *Kāpiti Coast District Council v Waikanae Land Company Limited* (***Waikanae***).[1]

3. In particular, the Panel's recommendations appear to be based on two different approaches to whether certain kinds of plan provision might *"remove existing development rights"*, which the Panel has found to be impermissible under section 80E of the Resource Management Act 1991 (**RMA**).

4. Some recommendations are based on the Panel's finding that PC14 cannot alter the permitted activities or consenting pathways existing in the operative District Plan, including by applying any more restrictive activity statuses, changing definitions, or introducing or changing matters of assessment or discretion within the same activity category. This is the case for the Panel's recommendations regarding Chapter 14: Residential and for those rejecting:

   (a) the radiocommunications qualifying matter (**QM**);

   (b) the Riccarton Bush interface area QM;

   (c) proposed changes to transport provisions (including in respect of vehicle and pedestrian accesses to multi-unit developments);

   (d) the rezoning of the Industrial General zone to Mixed Use zone;

   (e) a proposed change to the definition of 'building';

   (f) the rezoning of Residential New Neighbourhood zoned land to Future Urban Zone; and

[1] [2024] NZHC 1654.

(g) other proposed QMs, namely in relation to significant and heritage trees, four proposed new residential character areas (**RCAs**) and changes to controls within RCAs, and historic heritage.

5. Other recommendations by the Panel, however, envisage PC14 introducing a more restrictive activity status than the *status quo* or new or different matters of assessment or discretion within the same activity category. This is the case for:

   (a) a number of new or amended matters of control and/or discretion where the permitted level of development has been increased from the *status quo*, such as in respect of tall buildings in centres; and

   (b) the coastal hazards QMs, where the Panel recommends the activity statuses of subdivision and *"residential intensification"* be elevated to non-complying, from restricted discretionary or discretionary in the operative District Plan.

6. The Panel purports to rely on *Waikanae* in its discussion of both approaches.

7. The Council seeks further clarification to assist in reconciling the Panel's recommendations. In particular, the Council asks the Panel to:

   (a) advise whether the Council has correctly understood the recommendations in respect of these matters (as summarised in this memorandum);

   (b) clarify how it has interpreted and applied *Waikanae*, supplementing (to the extent necessary) the analysis of that recommendation in its Recommendation Reports;

   (c) confirm whether any changes to the Panel's recommendations are necessary; and

   (d) provide the details of any legal opinion(s) or submission(s) the Panel has relied upon to support its analysis of and approach to *Waikanae*, in addition to those referred to in paragraphs [176] and [178] of Part 1 of its Recommendations Report (**Part 1**).

8. In seeking these clarifications the Council is conscious that the Panel:

(a) has set out its key findings in respect of *Waikanae* in paragraphs [155] to [183] of Part 1 and in paragraphs [59] and [60] of Part 4 of its Recommendations Report (**Part 4**); and

(b) has already provided clarifications regarding the redrafting of Chapter 14 of the District Plan in its minute 50, which exercise has brought to light the additional matters on which clarification is now sought.

9. Counsel are also mindful that the Panel has not invited further legal argument from the Council or submitters in respect of *Waikanae*, for the reasons given at paragraph [158] of Part 1. To be clear, this memorandum does not promote any particular legal position on behalf of the Council. Rather, the Council respectfully seeks further details regarding the Panel's reasoning and application of *Waikanae* in order to have that information when making its own decisions on the Panel's recommendations.

10. These matters are addressed in further detail below.

The *Waikanae* decision

11. As the Panel is aware, its interpretation and application of *Waikanae* has a bearing on numerous aspects of its recommendations, summarised at paragraph [182] of Part 1. It also has a bearing on the redrafting of Chapter 14 currently being attempted by Council officers, for the reasons given at paragraph [173] of Part 1.

12. In *Waikanae* the High Court determined the legal dispute brought before it considering the facts of that case (in the usual way).

13. The key facts, summarised at paragraph [7] of the judgment, were that the relevant intensification planning instrument (**IPI**) *"purported to add the Subject Land to the list of wāhi tapu sites set out in sch 9 of its district plan (…) If effective in that regard, the Intensification Instrument would not disapply the Density Standards to the Subject Land by preserving the status quo. It would go further, limiting the extent of the Company's previous ability to develop the Subject Land by altering some previously permitted activities to restricted discretionary activities, and others to non-complying activities"*.

14. The High Court thus considered IPI provisions purporting to change permitted activities – in the sense described in section 87A(1) of the RMA – to activities for which resource consent would be required, and found that IPI to be invalid in that respect.

15. The key passages in the High Court's reasoning, paragraphs [56] to [60], are reproduced by the Panel in full at paragraphs [161] and [162] of Part 1. The Court found, in respect of the power in section 80E(1)(b) for a council to use an IPI to *"amend or include (…) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on"* the MDRS or policies 3 and 4, that it:[2]

> *"requires such amendments [to] or inclusions [in a district plan] strictly to be such as to moderate the effect upon the status quo that the Density Standards would otherwise have, not to limit the development previously permitted".*

16. The Court also found that the inclusion of objective 1 and policy 2 of the National Policy Statement on Urban Development (**NPS-UD**) among the medium density residential standards (**MDRS**):

> *"(…) serve to confirm that authorities may decline to apply Density Standards where a qualifying matter is relevant. But [they do] not go further, to empower authorities to amend or include provisions that limit the level of development previously permitted prior to incorporation of the Density Standards"*.

17. The High Court therefore considered provisions of an IPI that purported to limit development that was *"previously permitted"* and found that an IPI could validly contain *"consequential"* provisions *"to moderate the effect upon the status quo that the Density Standards would otherwise have"*, but *"not to limit the development previously permitted".*

18. The Court did not explain further how IPI provisions might validly *"moderate the effect upon the status quo that the Density Standards would otherwise have"*; the Court did not need to do so in order to determine the dispute before it. As such, the Court did not analyse further the extent to which provisions, including objectives, policies, rules, standards, and zones, might validly be included in an IPI as a consequence – and to moderate the effect – of MDRS and policy 3 intensification.

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[2] *Waikanae* at [56].

The Panel's interpretation of *Waikanae* in Part 1 and Part 4

19. PC14, as notified, contains a wide range of provisions proposed as *"related provisions"* that are *"consequential"* on the MDRS and policies 3 and 4 of the NPS-UD.

20. Some of those proposed provisions are similar to those considered by the High Court in *Waikanae*, in that they would *"[alter] some previously permitted activities to restricted discretionary activities, and others to non-complying activities"* (or indeed to discretionary activities).

21. A range of other PC14 provisions differ from those considered by the High Court in that they do not require consent for *"previously permitted activities"* but instead impose additional permitted activity standards or alter *status quo* consenting pathways for non-permitted activities (e.g. alterations affecting controlled and restricted discretionary activities).

22. As such, the task of the Panel (and of the Council as decision-maker) involves applying the findings in *Waikanae* to a wider range of circumstances – including numerous different circumstances – than the discrete matter considered by the High Court.

23. The Panel's interpretation of *Waikanae* is summarised in various key passages in Part 1, including the following:

> *[164] Our approach, consistent with the findings of the High Court is that, where a s77I or s77O QM is found to be appropriate to make the MDRS and Policy 3 intensification response of building height and density requirements less enabling, and those matters have been appropriately assessed as required by sections 77J-L and P to R, then they can be included in the IPI. The inclusion of 'related' provisions as set out in s80E(1)(b)(iii) and (2) that support or are consequential on the introduction of the MDRS and Policy 3 and 4 responses, cannot however, constrain existing development rights under the ODP. (…)*
>
> *[170] (…) In our view, s80E anticipates that situation by only enabling related provisions that "support or are consequential" on the introduction of the MDRS and NPS-UD Policy 3 and 4, but that does not extend to changes that remove existing development rights.*
>
> *[171] The Council endeavoured to provide drafting solutions to avoid removal of existing development rights in the context of the coastal hazards overlay (…)*
>
> *[176] Counsel for Kāinga Ora, Mr B Matheson submitted that the Housing Supply Amendment Act is not intended to be a complete code. However, even though the IPI is also a plan change in the normal RMA sense and must therefore give effect to a range of other instruments including the NPS-UD (e.g. s75(3)(a) RMA), it must be*

assessed against the 'orthodox' s32 tests, albeit there is a caveat that this broader assessment is not permitted to undermine or detract from the mandatory intensification objectives encapsulated within the MDRS provisions and NPS-UD Policy 3 and 4. He submitted:

> *In particular, it is not lawful for the Council to use the broader considerations to extend the ambit of countervailing factors beyond the very confined scope of s80E, and the very restricted ability to constrain this additional development (i.e. through qualifying matters). (…)*

[178] Ms Appleyard, Counsel for a number of submitters, who took an active role in hearings, also approached the interpretation in a purposive approach and emphasised that an IPI could not remove existing development rights. Ms Appleyard illustrated this with a helpful diagram (which we find applies equally to an NPS-UD Policy 3 response). (…)

24. The Panel's findings on *Waikanae* are summarised in paragraph [181] of Part 1, which relevantly includes the following:

> *(a) PC 14 must implement the mandatory requirements of s80E and not be a vehicle for any other purpose. (…)*
>
> *(e) QMs cannot change the status of activities in underlying zones to be more restrictive, including by changing definitions or adding criteria to the matters of assessment or discretion within the same activity category, except as provided in (a). (…)*
>
> *(f) Notwithstanding that a proposed QM, or amendment to or introduction of, other objectives, policies, rules and standards (provisions) into the operative plan may achieve the wider purpose of the RMA on their own merit, unless those provisions are related to and are supportive and consequential to the mandatory requirements of an IPI, they cannot be subject to the ISPP process and should be pursued through a standard Schedule 1 process.*
>
> *(g) Appeals to a well-functioning urban environment as it appears within either or both of the NPS-UD or RMA Schedule 3A, "density done well", Part 2 of the RMA, or the CRPS cannot have the effect of countermanding or broadening the matters set out above.*

25. In Part 4, the Panel also makes the following findings on the application of *Waikanae*:

> *[59] Referring to our Part 1 Report and our approach to the Waikanae issue of not removing status-quo enablements, we find the issue of restrictions in matters of discretion highly nuanced. At face value an amended or new restriction of discretion giving the Council greater opportunities to refuse consent than it previously held could be seen as a reduction in enablement to the extent that the Council could now take into account matters that it had previously excluded itself from. We find that this would only be the case if the relevant underlying ODP enablements in terms of activity status and applicable standards had also not changed. However, PC 14 does change, in both the MRZ and HRZ, the status quo in all instances so as to allow more development including as a permitted activity than previously.*

> *[60] We are satisfied that where a permitted level of development has been increased from the status quo, amended or additional restrictions of discretion (or assessment matters) may be able to be added in a manner that still satisfies the boundary of not removing status-quo levels of enablement. Taking this view, we have reviewed each proposed amended and additional restrictions of discretion in the MRZ and HRZ, and record our general agreement with the Council's justifications for each as they relate to development beyond existing ODP enablements. For the case of development to a level less than the MDRS or Policy 3 response, which is currently enabled and which we find must be retained. We found that Council's proposed use of the definition of "residential intensification" which we accepted, in the case of Chapter 5, Natural Hazards, may have utility elsewhere in Chapter 14, and we have referred to that in our directions to changes to Chapter 14 below and in Part 8 of the Report, Appendix G.*

26. Reading these passages together, the Council understands that in Parts 1 and 4 the Panel has interpreted section 80E of the RMA, and the High Court's findings that an IPI could validly contain *"consequential"* provisions *"to moderate the effect upon the status quo that the Density Standards would otherwise have"* but *"not to limit the development previously permitted"*, as prohibiting IPI provisions that would:

    (a) *"constrain"* or *"remove existing development rights",* where existing development rights are not limited to *"development previously permitted"* in the operative District Plan, but would also include development previously provided for as controlled, restricted discretionary, discretionary or non-complying activities in the operative District Plan; and/or

    (b) change the status of activities in underlying zones to be *"more restrictive"*, including by changing definitions or adding criteria to the matters of assessment or discretion within the same activity category, except as necessary to implement the mandatory requirements of section 80E of the RMA.

27. As noted above, if the Panel has relied on any specific legal submissions in arriving at this interpretation, other than those referred to in paragraphs [176] and [178] of Part 1, it would be helpful for the Council to be able to refer to them.

The Panel's application of *Waikanae* in its recommendations on PC14

28. The Panel appears to have taken two different approaches (broadly speaking) to applying the principles it has derived from *Waikanae* to the various aspects of its recommendations.

29. It is clear, for all aspects, that the Panel's recommendations do not allow operative **permitted activity rules** to be changed to provisions requiring resource consent for those same activities, in line with the factual circumstances and decision in *Waikanae*.

30. The Council also understands the Panel's recommendations are based on an interpretation of *Waikanae* as not allowing for any changes to the activity status of operative **controlled activity rules**.

31. Otherwise, for a number of aspects of PC14, the Panel has interpreted section 80E as allowing the introduction of:

    (a) more stringent activity status than the *status quo* for some consenting pathways (beyond permitted and controlled activities), in response to a QM; and

    (b) amended or additional controls (not being part of the *status quo*) for certain activities in order to moderate the effect of allowing for greater building heights and densities through introduction of the MDRS and/or implementation of policy 3, either as a result of a QM or otherwise.

32. An example of the Panel recommending more stringent activity status in response to a QM relates to coastal hazards, where the Panel recommends activity statuses of subdivision and *"residential intensification"* (i.e. residential development beyond *status quo* permitted or controlled activities) to be elevated to non-complying, from restricted discretionary or discretionary in the operative District Plan.

33. Examples of the Panel recommending amended or additional controls for certain activities in order to moderate the effect of PC14 allowing for greater building heights and densities (as discussed by the Panel at paragraphs [59] and [60] of Part 4), include a number of new or amended matters of control and/or discretion where the permitted level of development has been increased from the *status quo*, such as in respect of tall buildings in centres.

34. As an aside, the Panel's Recommendation Reports seem to indicate that some new controls, responding to new intensification, are intended to apply universally, but the Council no longer understands this to be the case in light of minute 50, where the Panel has confirmed that existing permitted activities and consenting pathways in the operative District Plan are to be retained. This is the case for:

(a) the airport noise influence area QM, where the Panel recommends new permitted activity standards, not required by the operative District Plan, regarding noise insulation and mechanical ventilation; and

(b) the residential / industrial interface QM, where the Panel recommends that buildings above an 8m height standard trigger restricted discretionary activity status, including in areas zoned Residential Medium Density in the operative District Plan where buildings up to 11m high are currently permitted.

35. In any case, in contrast to the above examples, for a number of other aspects of PC14 the Panel's recommendations must be based on a narrower interpretation of section 80E, and an associated broader reading of what might constitute a *"constraint on"* or *"removal of existing development rights"*. In those instances, the Panel has recommended that PC14 introduce no new constraint whatsoever on any *status quo* development rights, notwithstanding the intensified development also being provided for through PC14, in the sense that:

(a) all pre-existing permitted activities **and** consenting pathways from the operative District Plan must be retained; and

(b) for those pre-existing consenting pathways there must be no additional matters of control or discretion, additional or more onerous built form standards or consenting triggers, more stringent activity statuses, or more restrictive objectives or policies than contained in the operative District Plan.

36. An example of the Panel applying section 80E in this way is its recommendation for chapter 14 to be redrafted so it continues to provide for *status quo* permitted activities and consenting pathways, confirmed in its minute 50.

37. Other examples are the Panel's recommendations, relying (at least in part) on *Waikanae*, to reject proposed provisions in respect of the following matters:

(a) The **radiocommunications QM** does not alter *status quo* permitted activities but instead proposes to make buildings encroaching within the relevant airspace (between 40 and 79m above mean sea level[3]) a

[3] At the Lyttelton Datum. The Panel's Recommendations Report refers incorrectly to building heights above ground level; paragraph [158] of Part 3.

non-complying activity, instead of a discretionary activity under the operative District Plan (as all buildings of that height currently are). While the Panel identified obvious merit of including such provisions in the Plan, it relied on *Waikanae* to reject an activity status change from discretionary to non-complying (in apparent contrast to the approach taken by the Panel in the case of the coastal hazards QM).[4]

(b) The **Riccarton Bush interface area**, in particular the proposal for breaches of height, setback and site coverage controls to assume discretionary activity status (rather than restricted discretionary in the operative District Plan). Other than an acknowledged *Waikanae* issue regarding side-yard setbacks, the proposed QM does not alter *status quo* permitted activities.[5]

(c) **Vehicle and pedestrian accesses to developments of four or more residential units**, among other proposed changes to the Transport Chapter and associated rules.[6]

(d) Rezoning **Industrial General zones to Mixed Use**, in respect of which the Panel explained that do so would require consent for some previously permitted activities (contrary to *Waikanae*).[7] Unlike the situation in *Waikanae*, however, such rezoning would have also provided for new permitted activities and other development opportunities.

(e) **Amending the definition of 'building'** to apply in certain zones.[8]

(f) **Rezoning Residential New Neighbourhood zoned land to Future Urban Zone**, in respect of which the Panel found that any alteration to an existing *"planning mechanism to develop the land for residential purposes (whether through an approved outline development*

[4] The Panel's reasoning is summarised at paragraph of Part 4 of its Recommendations Report: *"In accordance with our findings in Part 1 at [210], and in light of the High Court findings in Waikanae, we find that despite the obvious merit of including provisions in the plan to identify the pathway, this is not a matter we can accommodate via an IPI, in this way, that is because it affects status quo development rights. To the extent that it may be able to be accommodated without affecting such rights is moot, because it was not clear that in a real-world sense a development enabled in response to Policy 3(a), (c)(ii) or (d) would breach the radio communication signal plane in any event."*

[5] The Panel appears to have misunderstood, at paragraph [438] of Part 5 of its Recommendations Report, that the provisions proposed by the Council had been altered to remove any other such issues (as set out in Appendix L to a memorandum of counsel for the Council dated 29 November 2023).

[6] Paragraph [98] of Part 4 of the Panel's Recommendations Report.

[7] Paragraph [386] of Part 3 of the Panel's Recommendations Report.

[8] Paragraph [62] of Part 4 of the Panel's Recommendations Report.

plan/resource consent, or a pathway to obtain that approval), in effect disenabled development of that land, and falls foul of Waikanae".[9]

(g) **Other proposed QMs**, namely in relation to significant and heritage trees, four proposed new residential character areas (**RCAs**) and changes to controls within RCAs, and historic heritage.

Further clarifications sought

38. The Council would therefore be grateful for the Panel to provide the further clarifications sought at paragraph 7 above.

Dated: 19 August 2024

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[9] Paragraph [115] of Part 7 of the Panel's Recommendations Report.