

Before the Independent Hearing Panel
Appointed by the Christchurch City Council

Under the Resource Management Act 1991

In the matter of A hearing of submissions on Plan Change 14 (Housing and
Business Choice) to the Christchurch District Plan

Topic: Residential Zones

**Memorandum of Counsel for Kauri Lodge Rest Home 2008 Limited (Submission
ID: 2059)**

30 April 2024

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May it please the Commissioners

- 1 This memorandum is provided on behalf of Kauri Lodge Rest Home 2008 Limited (the **Submitter**) on Plan Change 14 (Housing and Business Choice) (**PC14**) to the Christchurch District Plan (**CDP**).
- 2 At the Submitter's hearing presentation on 15 November 2023, Commissioner Munro asked if, in making a recommendation to the Christchurch City Council (**Council**) that a qualifying matter be applied and that the status quo be maintained, it is available to the Panel to recommend to Council that it also consider whether the CDP provisions should be made less enabling to further provide for the qualifying matter, through a Schedule 1 process. As relevant to the Submitter, the issue arose in the context of a qualifying matter for Riccarton Bush.
- 3 Commissioner Murno was interested to understand if, in the context of PC14, once the Panel identify a qualifying matter and then move to recommend a response:
 - (a) "It's all in" – meaning a less-enabling zoning, if appropriate, could be recommended;
 - (b) "It's all out" – meaning a less-enabling zoning, even if appropriate, cannot be recommended; or
 - (c) "It's a combination" – meaning a less-enabling zoning cannot be recommend but a recommendation for a schedule 1 process to be undertaken could be.

Legal Context

- 4 As the Panel will be aware, the Resource Management Act 1991 (**RMA**)¹ requires the Council to implement the MDRS through the use of an Intensification Planning Instrument (**IPI**), which is to be developed through a new bespoke Intensification Streamlined Planning Process (**ISPP**). The ISPP requires an Independent Hearing Panel to hear submissions and make recommendations to the Council.

¹ As amended by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**)

Scope of IPI

- 5 As set out in our earlier legal submissions,² in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*,³ the Environment Court determined that imposing a more restrictive activity status through an IPI process which disenables or removes the rights held under the operative district plan, and goes beyond the scope of an IPI.
- 6 The requirements for introducing an IPI are contained within sections 77F-77T, and Schedules 3A and 3B of the RMA.
- 7 Notably, section 77G(4) of the RMA enables the Council to create new residential zones or amend existing residential zones, but only in carrying out its functions to incorporate the MDRS and give effect to policy 3 and 5 of the NPS-UD.
- 8 In particular:
 - (a) Section 80E provides that an IPI means a change to a district plan that must:
 - (i) incorporate the MDRS; and
 - (ii) give effect to, in the case of tier 1 authority, policies 3 and 4 of the NPS-UD.
 - (b) It may also include the following:
 - (i) provisions relating to financial contributions;
 - (ii) provisions relating to papakainga housing in the district; and
 - (iii) related provisions,⁴ including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS or policies 3, 4, and 5 of the NPS-UD, as applicable.
- 9 Section 80G provides that a Council must not use an IPI for any purpose other than the uses specified in Section 80E, and section 77H of the RMA

² Legal submissions on behalf of Kauri Lodge Rest Home 2008 Limited (Submission ID: 2059) dated 8 November 2023

³ [2023] NZEnvC 56 at [30]-[32]

⁴ Related provisions also include provisions that relate to any of the following, without limitation: district-wide matters; earthworks; fencing; infrastructure; qualifying matters identified in accordance with section 77I or 77O; storm water management (including permeability and hydraulic neutrality); and subdivision.

enables the MDRS requirements in Schedule 3A to be modified to enable greater development.

- 10 In terms of the relevant NPS-UD policies referred to above:
 - (a) Policy 3 relates to enabling building heights and density of urban form in and around centres to maximise intensification, capacity and urban form outcomes; and
 - (b) Policy 4 relates to modification of the relevant building heights or density requirements prescribed in Policy 3 to accommodate a qualifying matter.
- 11 In our submission, it is not open to the IHP to recommend a less-enabling zoning than currently provided in the CDP. The purpose of the Amendment Act and PC14 was to accelerate the implementation of the NPS-UD and incorporate the MDRS to enable residential development.
- 12 Accordingly, this memorandum focuses on whether the Panel can comment on the appropriateness of the current CDP provisions (relevant to Riccarton Bush) and recommend a Schedule 1 planning process be undertaken by the Council, outside of PC14, to consider the appropriateness of the CDP provisions further.

IHP Powers

- 13 The IHP has the same duties and powers as a local authority under the RMA.⁵ The IHP must make recommendations to the Council on the IPI.⁶ Recommendations must be related to a matter identified by the panel or any other person during the hearing, but are not limited to being within the scope of submissions made on the IPI.⁷
- 14 The IHP's recommendations must be provided in one or more written reports and must address five mandatory requirements.⁸ The report may also include "*any other matter that the panel considers relevant to the IPI that raised from submissions or otherwise.*"⁹

⁵ Clause 98, Schedule 1 to the RMA

⁶ Clause 99(1), Schedule 1 to the RMA

⁷ Clause 99(2), Schedule 1 to the RMA

⁸ Clause 100(2), Schedule 1 to the RMA

⁹ Clause 100(3)(b), Schedule 1 to the RMA

Discussion

- 15 The ability for the IHP to include in its report any other matter that it considers relevant to the IPI, whether it is raised in a submission or not, is critically important. The key consideration is then whether a recommendation for the Council to undertake a Schedule 1 process to amend current CDP provisions in response to an identified qualifying matter is relevant to the IPI.
- 16 In our submission, relevance must be determined with reference to the scope of the IPI, which is to incorporate the MDRS and give effect to policies 3 and 4 of the NPS-UD.
- 17 A recommendation that the Council undertake a Schedule 1 process to make further amendments to the CDP in relation to an identified qualifying matter (in this case, Riccarton Bush) must logically require a restriction on the implementation of the MDRS and policies 3 and 4 of the NPS-UD, in that area. We consider that would be in direct conflict with the scope of the IPI and cannot be considered relevant to the IPI.
- 18 For completeness, we record that if a recommendation was made by the IHP to consider further amending the CDP provisions to address a qualifying matter, that 'recommendation' could not be accepted in Council's decision on PC14, as that decision must also be within the scope of an IPI. We also suggest that evidence as to the effect of further restricting development may be limited, as submitters have relied on *Waikanae* rather than calling this evidence, and therefore the recommendation may not be based on complete or balanced evidence. A recommendation of this nature would be similar to an obiter comment in a Court reported decision, and would not be binding on Council.

Conclusion

- 19 In our submission, it is outside the scope of the IHP powers to make a recommendation for Council to initiate a Schedule 1 process to make further amendments to the CDP to make it less enabling in response to a qualifying matter. The purpose of PC14 is not to address perceived failures in the CDP that are outside the scope of PC14. Any such recommendation will not be binding on Council.

Dated this 30th day of April 2024

A handwritten signature in black ink, appearing to read 'SEveleigh', with a long horizontal flourish extending to the right.

Sarah Eveleigh / Samantha Gardener
Counsel for Kauri Lodge Rest Home 2008 Limited