Before an Independent Hearings Panel
appointed by Christchurch City Council

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under:	the Resource Management Act 1991
in the matter of:	the hearing of submissions on Plan Change 14 (Housing and Business Choice) to the Christchurch District Plan
and:	**LMM Investments 2012 Limited, Carter Group Limited, Catholic Diocese of Christchurch, Church Property Trustees, Daresbury Limited, Christchurch Casino Limited, NHL Properties Limited, Wigram Lodge (2001) Limited, Elizabeth Harris and John Harris**

Memorandum of counsel on behalf of LMM Investments 2012 Limited (and various other clients) regarding scope of Plan Change 14

Dated: 21 December 2023

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MAY IT PLEASE THE INDEPENDENT HEARINGS PANEL

INTRODUCTION

1 At the hearing for Residential Zones on 16 November 2023, on behalf of LMM Investments 2012 Limited, we provided legal submissions which were expanded on verbally on the issue of scope and/or jurisdiction of the Independent Hearings Panel (*IHP*) to grant relief sought in submissions which does beyond the four corners of what the Council have notified.

2 As noted in those verbal submissions, the issue of scope is a complex one and our view has evolved throughout the course of the hearing.

3 As requested by the IHP, this memorandum sets out our "more evolved" position on the jurisdiction of the IHP to make decisions on an Intensification Planning Instrument (*IPI*) beyond the version of PC14 that Council have notified.

4 In preparing this memorandum, we have considered the legal submissions of other counsel from around the country, including the legal submissions of counsel for the Retirement Villages Association of New Zealand Incorporated and Ryman Healthcare Limited (Mr Hinchey) and Ara Poutama Aotearoa, the Department of Corrections (Ms Murdoch), as mentioned by Commissioner McMahon at the hearing. The legal analysis below is consistent with these legal submissions.

5 This memorandum was originally intended to:

5.1 Set out the legal position on the IHP's jurisdiction to grant relief beyond what Council have notified;

5.2 Apply this position to our various clients' submissions;

5.3 Clarify the relief sought by LMM Investments 2012 Limited; and

5.4 Address the PC14 and PC13 interface.

6 We note the IHP's Minute 29 and the direction at paragraph 17 that all further 'homework' be provided to the secretariat by 16 February 2024. As we had already prepared the part of the memorandum addressing paragraph [5.1] above, we provide this now for the IHP's benefit. We will provide the remainder of our response, addressing the matters in paragraphs [5.2]-[5.4] above, by 16 February 2024.

WHAT IS SCOPE?

7 There is no definition in the Resource Management Act 1991 (*RMA*) as to what is meant by 'scope' in the context of plan change. Scope is simply defined in the Oxford English Dictionary as meaning:

> "*the extent of the area or subject matter that something deals with or to which it is relevant.*"

8 The Courts have provided guidance over the years as to what the limits of 'scope' are in the context of submissions and decision making on a typical Schedule 1 plan change process. We go into these in more detail later in this memorandum but caution too much reliance on cases whose facts had a clear geographical or contextual limit – here the context is very different.

9 It is also important to acknowledge that the IPI process is a specific planning process introduced by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the *Amendment Act*) to achieve an identified objective. It does not have the same legislative framework as a typical Schedule 1 plan change process.

10 Caution and care must therefore be taken in ascribing the usual considerations of scope of allowable decision making to the IPI process. The legislative purpose and context of the IPI process here is wide and is a good touchstone for considering what in fact are the appropriate tests for 'scope' available to the IHP in the IPI process.

11 There are four different, often conflated, areas in which issues of 'scope' arise in the context of the IPI process:

11.1 the scope of what the Council was legally entitled to include and notify in its IPI, as prescribed under the RMA; and

11.2 whether Council's notification defines the outer limits of the scope of the plan change and the IHP cannot go further than the outer bounds of what was notified;

11.3 whether submissions made on the IPI which go beyond the Council's notification are therefore within the scope of the IPI; and

11.4 the scope of the IHP's jurisdiction to make recommendations on the IPI which extend beyond matters raised in submissions but achieve the purpose of the Amendment Act.

12 We first consider the Amendment Act before addressing each of these in detail below.

THE PURPOSE OF THE AMENDMENT ACT AND THE IPI PROCESS

13 Section 10(1) of the Legislation Act 2019 requires the meaning of any statutory provision to be ascertained from its text and in the light of its purpose and its

context. Case law notes the importance of a "purposive approach", where the overriding purpose of the legislation needs to remain a clear and separate focus.[1]

14 It is therefore important, when considering the scope issues listed in paragraph [11] above, to read the legislation in light of the purposes of the Amendment Act and the IPI process.

15 The Amendment Act was passed in the context of New Zealand facing an acute housing shortage and a desire by the Government to improve housing affordability across the country. [2]

16 The purpose of the Amendment Act and IPI process is therefore to **enable** development through the:[3]

16.1 expedition of the implementation of the National Policy Statement on Urban Development 2020 (*NPS-UD*); and

16.2 removal of restrictive (and set more permissive) planning rules in order to expedite the supply of housing, particularly through intensification; and

16.3 application of the medium density residential standards (*MDRS*) in all tier 1 urban environments.

17 These purposes are to be implemented through a 'non-standard' and streamlined process set out in the Amendment Act (an IPI). This process materially alters the usual Schedule 1 RMA process, particularly in terms of:

17.1 substantially reduced timeframes;[4]

17.2 no appeal rights on the merits;[5] and

17.3 wider legal jurisdiction for decision-making.[6]

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1 See *Auckland Council v Teddy and Friends Limited* [2022] NZEnvC 128 at [27], when considering the dicta of the Supreme Court *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

2 Cabinet Legislation Committee "Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill: Approval for Introduction" (30 September 2021) LEG-21-MIN-0154 (*Cabinet Minute*) at [1]

3 Cabinet Minute at [2]-[4]; Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (83-1) (select committee report) at 2.

4 Under s 80F, tier 1 councils were required to notify IPIs by 20 August 2022. Under the ISPP the usual timeframes for plan changes are compressed and the decision making process is altered.

5 There are no appeals against IPIs that go through the ISPP, aside from judicial review (ss 107 and 108). The new process will allow for submissions, further submissions, a hearing and then recommendations by an Independent Panel of experts to Council (s 99). If the Council disagrees with any of the recommendations of the Independent Panel, the Minister for the Environment will make a determination (s 105).

6 Resource Management Act 1991, sch 1 cl 99.

18 Given the intrinsic connection of the Amendment Act to the implementation of the NPS-UD, the wider NPS-UD purpose and context is also relevant to consider and provides a useful 'check and balance' to the specific requirements of the Amendment Act.

19 The key themes of the NPS-UD are as follows:

19.1 a broad objective of ensuring well-functioning urban environments that meet the changing needs of New Zealand's diverse communities;

19.2 enabling sufficient development capacity through to the long term in a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments;

19.3 removing overly restrictive rules; and

19.4 enabling a variety of homes for all people and communities.

20 The enabling intent of the NPS-UD has been acknowledged in *Middle Hill Ltd v Auckland Council*,[7] where the Environment Court stated (our emphasis added):

> [33] … The NPS-UD has the broad objective of ensuring that New Zealand's towns and cities are well-functioning urban environments that meet the changing needs of New Zealand's diverse communities. Its emphasis is to direct local authorities to enable greater land supply and ensure that planning is responsive to changes in demand, while seeking to ensure that new development capacity enabled by councils is of a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments. It also requires councils to remove overly restrictive rules that affect urban development outcomes in New Zealand cities…

21 It is clear that the references in the Amendment Act to specific policies of the NPS-UD do not elevate these particular policies above any of the other policies in the NPS-UD or limit the IHP's consideration to only those policies explicitly mentioned. This is because the proper approach to legislative interpretation requires the NPS-UD to be read as a whole, and the District Plan, including PC14, must give effect to any national policy statement.[8]

THE SCOPE OF WHAT THE COUNCIL IS LEGALLY ENTITLED TO INCLUDE AND NOTIFY IN ITS IPI

22 In a typical Schedule 1 plan change process, there is generally no bar on what the Council may or may not include in a proposed district plan change, provided it

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7 *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162.

8 Resource Management Act 1991, s 75(3)(a).

complies with the purpose and intended contents of a district plan as set out in the RMA which is very broad.[9]

23 While typically, a Council would be authorised to include in a plan change anything it deems appropriate or necessary (which would then set the 'four corners' of scope for submissions and decision making as discussed below), the IPI process is **not** a typical plan change process.

24 The Amendment Act has established a special process for the development of an IPI and sets clear bounds as to what may or may not be included in such an instrument. In this sense, it is the legislation that sets out the 'scope' of an IPI.

25 The RMA, as amended by the Amendment Act, sets clear parameters for what may or may not be included in an IPI:

25.1 Section 77G provides that a Council **must** use an IPI and the IPI process to:

(a) incorporate the MDRS into every relevant residential zone;[10] and

(b) give effect to Policy 3 and 4 of the NPS-UD in every residential zone in an urban environment.[11]

25.2 In a similar manner, section 77N provides that a Council must use an IPI and the IPI process to ensure that the provisions in its district plan for each urban non-residential zone within the urban environment give effect to Policy 3.[12]

25.3 These are mandatory requirements for inclusion in an IPI and are framed in the RMA as duties on the Council.[13] These are a mandatory minimum.

25.4 In implementing the Council's duties under sections 77G and 77N, the Council **may**:

(a) create new residential zones or amend existing residential zones;[14]

(b) create new urban non-residential zones or amend exiting urban non-residential zones;[15]

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9 Resource Management Act 1991, ss 72 and 75.

10 Resource Management Act 1991, s 77G(1).

11 Resource Management Act 1991, s 77G(2).

12 Resource Management Act 1991, s 77N(2).

13 Resource Management Act 1991, ss 77G and 77N.

14 Resource Management Act 1991, s 77G(4).

15 Resource Management Act 1991, s 77N(3)

(c) provide additional objectives and policies to provide for matters of discretion to support the MDRS;[16]

(d) enable a greater level of development by providing for more lenient density standards than the MDRS;[17] and

(e) modify the requirements set out in the MDRS or policy 3 to be less enabling of development, if provided for by a qualifying matter.[18]

25.5 This necessarily means that the IHP has jurisdiction to accept relief in submissions of additional, or different, matters which it considers are necessary under sections 77G and 77N.

25.6 Sections 77I and 77O provide that a council may modify requirements of the MDRS or Policy 3 to be "less enabling" than those requirements provide only to the extent necessary to accommodate one or more qualifying matters.

25.7 Section 80E defines an IPI and is the key provision for determining the permissible scope of an IPI:

(a) Section 80E(1)(a) provides mandatory components for IPIs, namely that they **must** (consistent with the duties in sections 77G and 77N):

> (i) incorporate the MDRS; and
>
> (ii) give effect to,—
>
> (A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD;…

(b) Section 80E(1)(b) provides discretionary components for IPIs, namely that they **may** also amend or include the following provisions:

> (iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—
>
> (A) the MDRS; or
>
> (B) policies 3, 4, and 5 of the NPS-UD, as applicable.
>
> (2) In subsection (1)(b)(iii), related provisions also includes provisions that relate to any of the following, without limitation:
>
> (a) district-wide matters:

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16 Resource Management Act 1991, s 77G(5)(b).

17 Resource Management Act 1991, s 77H.

18 Resource Management Act 1991, ss 77G(6) and 77N(3)(b).

(b) earthworks:

(c) fencing:

(d) infrastructure:

(e) qualifying matters identified in accordance with section 77I or 77O:

(f) storm water management (including permeability and hydraulic neutrality:

(g) subdivision of land.

25.8 While at first glance, the scope of the 'related provisions' in section 80E(2) appears broad, these are limited as is clear by the wording in section 80E(1)(b)(iii). That being that any 'related provisions' must "support" or "be consequential" on the MDRS or Policy 3 and 4 of the NPS-UD. The broad language regarding 'related provisions' also needs to be read in light of the wider statutory purpose and context of the IPI.

25.9 Finally, and for completeness, section 80G(1)(b) provides that the Council "*must not … use the IPI for any purposes other than the uses specified in section 80E*".

26 It is clear that the Amendment Act, as with the NPS-UD, is intended to apply to "urban environments".[19] The Council (see Ms Oliver's section 42A report) has defined the spatial extent of the 'urban environment' for the purposes of PC14 to be Greater Christchurch as shown on Map A of the Canterbury Regional Policy Statement. By defining the 'urban environment' in this way the Council has accordingly defined the spatial scope to which this IPI applies. Within this urban environment, the IPI must address those matters listed in section 80E.

27 It is clear from these provisions, that Parliament intended to prescribe specific parameters for what could be included in an IPI to give effect to the purposes of the Amendment Act. An IPI was never intended to open the box and allow councils to advance changes to their district plans that are not related to the enabling of development and the expedition of the NPS-UD – for example, changes which are outside the urban environment or which create rural zones.

28 To this end, the Council was only legally entitled to notify in PC14, changes which are reasonably within the parameters of section 80E. Anything else will be ultra vires.

29 The *Waikanae* case[20] dealt with this issue of what a Council is legally entitled by the Amendment Act to include in its IPI. We note the uncertainties around this case and

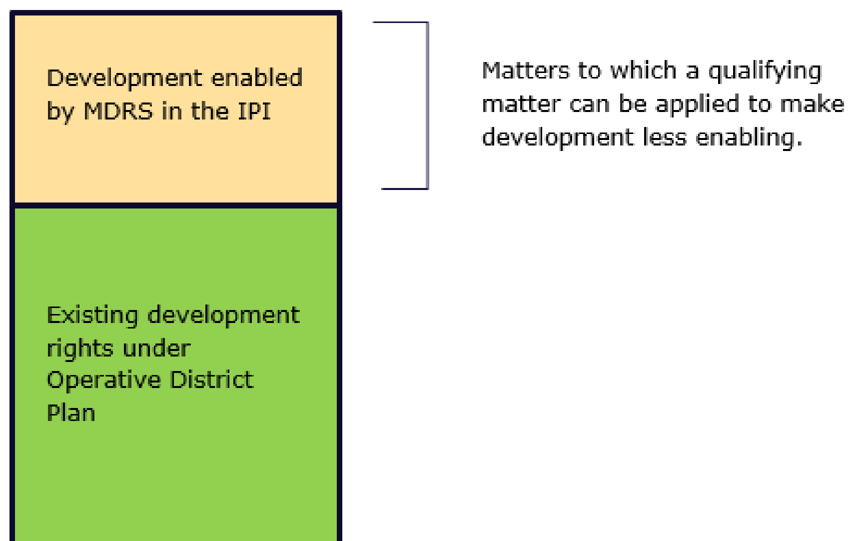
[19] As defined in s 77F of the Resource Management Act 1991.

[20] *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056, (2023) 24 ELRNZ 710.

that it is subject to a High Court appeal. Some of the findings may appropriately apply in the context in which it was decided, but beyond that care needs to be exercised in applying it on a blanket basis.

30 Regardless of where *Waikanae* lands, the RMA only allows the Council to make the MDRS less enabling of development where a qualifying matter exists. In other words, a qualifying matter should only apply to or 'qualify' that which is further enabled through the IPI (i.e. the MDRS or the Policy 3 and 4 provisions).

31 We demonstrate this in the figure below:



32 Nothing in the Amendment Act enables the Council through an IPI to make more than the MDRS (such as the status quo) less enabling. This would not be in keeping with the purpose and context of the Amendment Act.

33 This is also consistent with what the Select Committee envisaged in respect of qualifying matters limiting development:[21]

> Where a significant hazard exists, such as an identified flood flow path, a council could identify that area as being inappropriate for **any further development**. Where a lesser hazard exists such as a ponding area, a council could use the qualifying matters to still allow **some additional intensification if appropriate** but with additional requirements such as higher floor heights.

34 Nothing in the Select Committee's report suggests that qualifying matters might warrant that less development is appropriate in areas where this was previously enabled. It must be assumed that the provisions in the District Plan have already

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[21] Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (83-1) (select committee report) at 16.

accounted for the appropriateness of those existing rights. It is also highly relevant that there are no rights of appeal.

35 There is nothing stopping Council from introducing other plan changes to do these things under the usual Schedule 1 process which has all the usual rights of appeal, but not the IPI. The Council is in fact progressing Plan Change 12 (Coastal Hazards) and Plan Change 13 (Heritage) as well as PC14, albeit these plan changes are currently on hold.

36 There have been a number of examples in PC14 which we have highlighted to the IHP as being outside the scope of what the Council was allowed to include in its IPI. These include, for example:

36.1 The introduction of a number of provisions in the historic heritage chapter[22] which impose additional controls to existing development rights;

36.2 The application of qualifying matters over areas that are not relevant residential zones nor subject to submissions seeking that they be new residential zones;

36.3 Additional transport provisions unrelated to intensification; and

36.4 Additional urban design rules in character areas.

37 What the Council can or cannot include in its IPI is also highly relevant to the question of scope of submissions and the scope of the IHP's jurisdiction to make recommendations.

Is an IPI limited to giving effect to Policy 3 and 4 of the NPS-UD?

38 We have identified the permissible scope of what Council is legally entitled to notify in its IPI as being anything reasonably within the parameters of section 80E.

39 Section 80E specifies that an IPI must give effect to the MDRS and certain specific policies of the NPS-UD, namely in this case policies 3 and 4. This begs the question, should an IPI required to give effect to the other objectives and policies in the NPS-UD as a whole (although with the obvious limitation of being only insofar as they are dealing with the urban environment).

40 It is clear that the IPI can, and should, give effect to the NPS-UD as a whole:

40.1 The NPS-UD is a higher order document and the district plan (and any changes to the district plan) must give effect to that national policy statement.[23]

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[22] Including a change to the test for demolition, the introduction of residential heritage areas, and the listing of additional heritage items.

[23] Resource Management Act 1991, ss 74(1)(ea) and 75(3)(a).

40.2 It is not appropriate to read single policies within the NPS-UD on a stand-alone basis. The NPS-UD is intended to be read as a whole. Policies 3 and 4 give effect to the objectives of the NPS-UD (in particular objectives 1, 3, 4, and 6) and to disregard these because they are not expressly listed in section 80E would be a narrow and artificial interpretation of the section. The exercise of giving effect to Policy 3, for example, cannot be divorced from the objectives it seeks to achieve.

40.3 As we have clearly set out above, one of the key purposes of the Amendment Act and IPI process was to expedite the implementation of the NPS-UD as a whole. While certain policies are referred to in the Amendment Act, it would be wrong to conclude that the Amendment Act intended to implement only those policies in isolation and out of context.

40.4 Section 80E also requires that IPIs must incorporate the MDRS. The MDRS is set out in Schedule 3A of the RMA and includes a number of objectives and policies that the Council must include in its District Plan. These are:

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:

Objective 2

(b) a relevant residential zone provides for a variety of housing types and sizes that respond to—

(i) housing needs and demand; and

(ii) the neighbourhood's planned urban built character, including 3-storey buildings.

Policy 1

(a) enable a variety of housing types with a mix of densities within the zone, including 3-storey attached and detached dwellings, and low-rise apartments:

Policy 2

(b) apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga):

Policy 3

(c) encourage development to achieve attractive and safe streets and public open spaces, including by providing for passive surveillance:

Policy 4

(d) enable housing to be designed to meet the day-to-day needs of residents:

Policy 5

(e) provide for developments not meeting permitted activity status, while encouraging high-quality developments.

40.5 These objectives and policies clearly reflect the wording of objectives 1, 3, and 4, and policies 1, 3, 4, 5, and 6 of the NPS-UD. This further confirms the intent for an IPI to give effect to the whole of the NPS-UD.

40.6 Section 80E(1)(b)(iii) also allows an IPI to include related provisions (including objectives, policies, rules, standards, and zones) that support or are consequential on the MDRS (including those objectives and policies listed above), and policies 3 and 4 of the NPS-UD. This gives relatively wide parameters for an IPI to include provisions giving effect to the NPS-UD as a whole.

41 An IPI under section 80E is required to include provisions that give effect to the NPS-UD as a whole, and not just those specifically listed policies of the NPS-UD. Any other interpretation would frustrate the overriding purpose and intention of the Amendment Act and IPI process.

SCOPE OF THE IHP'S JURISDICTION TO MAKE RECOMMENDATIONS

42 Typically, in a Schedule 1 plan change process, clause 10 provides that a decision must be given "on the provisions and matters raised in submissions".[24]

43 'The provisions' is a reference to the provisions of the plan change as notified by the Council. This is what normally establishes the 'four corners'[25] of scope of a plan change.

44 However, the Amendment Act provides the IHP with much wider powers to make recommendations than the typical Schedule 1 plan change process. Clause 10 does not apply to an IPI process, rather clause 99(2) of Schedule 1, provides that an IHP

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[24] Resource Management Act 1991, sch 1 cl 10.

[25] *Halswater Holdings Limited v Selwyn District Council* (1999) 5 ELRNZ 192 (EnvC) at [41]; and confirmed in *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

must make recommendations to a specified territorial authority on the IPI. Those recommendations:[26]

> *"(a) must be related to a matter identified by the panel or any other person during the hearing; but*
>
> *(b)* ***are not limited to being within the scope of submissions made on the IPI****."*

45 The allowable scope of the IHP's jurisdiction to make recommendations in an IPI process must therefore be determined by reference to the legislation, and not by merely looking at what was notified by the Council in an IPI or even what was raised in submissions. Clause 99(2)(b) expressly allows this IHP to make recommendations that are neither on provisions notified in the IPI, or raised in submissions.

46 At first glance, this would appear to grant the IHP with an unfettered power to make any recommendations on the District Plan. However, this power must be read in light of the intended statutory purpose and context (as discussed above) to *enable* development through an IPI. In this respect, the IHP could not make any recommendations on matters which the Council was not itself lawfully entitled to include in its IPI under section 80E, including detracting from existing status quo property rights, or on matters outside the urban environment.

47 Again, the fact that there are no appeal rights to a recommendation and final decision on an IPI is an important consideration.

WHETHER SUBMISSIONS ARE WITHIN THE SCOPE OF THE IPI

48 Clause 6, Schedule 1 of the RMA provides that once a proposed plan is publicly notified, persons may make submissions "on" the plan change to the relevant local authority.[27]

49 This same clause applies to the IPI process.[28]

50 A submission that is not "on" the plan change, therefore will be out of scope then as the Council has no jurisdiction to consider or make a decision on it. That is because the submission would go beyond the 'four corners' of the notified plan change.

51 Whether a submission is "on" a plan change for any particular plan change is nuanced and highly dependent on the context of the particular plan change in question. The Court has provided guidance on this matter in the context of a typical Schedule 1 plan change process:

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[26] Resource Management Act 1991, sch 1 cl 99(2).

[27] Resource Management Act 1991, sch 1 cl 6.

[28] Resource Management Act 1991, sch 1 cl 95(2)(i).

Clearwater[29]

51.1 This case concerned a variation to the Christchurch District Plan which sought to amend a policy and explanation related to the Airport Noise Contour. The geographical extent of the Airport Noise Contour had already determined and included in the District Plan through the proposed plan process in 1995.

51.2 Clearwater appealed the variation challenging, among other things, the geographical extent of the Airport Noise Contour and its reasonableness.

51.3 The Court was required to determine whether Clearwater's submission was "on" the variation. It established a two limb test:[30]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
>
> 2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation."

51.4 The Court elaborated that:[31]

> It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

51.5 The Court ultimately found that if the function of the Airport Noise Contour was different under the variation to the District Plan, then a challenge to the location of that contour is fairly "on" the variation.[32] However, if the Airport Noise Contours serve the same function as under the District Plan, the fact that the variation might refer to these contours cannot be regarded as having the consequence that a challenge to the contour lines is "on" the variation.[33]

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[29] *Clearwater Resort Ltd and Canterbury Golf International Ltd v Christchurch City Council HC* Christchurch AP34/02, 14 March 2003 *(Clearwater)*.

[30] *Clearwater* at [66].

[31] *Clearwater* at [69].

[32] *Clearwater* at [75]-[78].

[33] *Clearwater* at [80]-[82].

***Motor Machinists*[34]**

51.6 *Motor Machinists* involved a plan change that sought to rezone land along a ring road from residential to business zoning. Motor Machinists owned land outside of the area covered by the plan change, and lodged a "me too" submission seeking to include that land in the business zoning proposed as part of the plan change.

51.7 The Court affirmed and expanded on the test established in in *Clearwater*.[35]

51.8 Ultimately, while the Court acknowledged the plan change was quite wide in scope, it held that the rezoning sought by Motor Machinists was more than an incidental or consequential extension of the plan change and therefore was not "on" the plan change.

51.9 In expanding on the *Clearwater* test, the High Court made the following observations:

(a) Regarding the first limb of the *Clearwater* test:

> For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.[36]
>
> … the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. … Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.[37]

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[34] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519 (*Motor Machinists*).

[35] *Motor Machinists* at [54]-[56].

[36] *Motor Machinists* at [80].

[37] *Motor Machinists* at [81].

(b) Regarding the second limb of the *Clearwater* test:

> A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, … thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage … might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument.[38]
>
> To override the reasonable interests of people and communities by a submissional sidewind would not be robust, sustainable management of natural resources.[39]

51.10 Ultimately, while the Court acknowledged the plan change was quite wide in scope, it held that the rezoning sought by Motor Machinists was more than an incidental or consequential extension of the plan change and therefore was not "on" the plan change.

***Calcutta Farms*[40]**

51.11 The Environment Court in *Calcutta Farms* also considered the issue in the context of a plan change intended on identifying future need for residential areas and held that (our emphasis added):[41]

> Whilst the scale and degree of a proposal can assist in determining whether a submission is "on a plan change", I do not read the Option 5 decision as indicating that it is determinative. Much will depend on the nature of the plan change which can assist to determine its scope, (whether it is a review or a variation for example) and what the purpose of it is. In this case, the purpose of the plan change is to review the future need for residential areas in Matamata, and to identify areas next to urban areas where future residential activity is proposed to occur. The method by which the latter is proposed to occur in PC47 is by the application of the Future Residential Policy Area notation. Underpinning the need for the size and scale of both new Residential Zones and the Future Residential Policy Area are the population predictions, which Calcutta Farms' submission directly sought to challenge. I agree with Mr Lang that the District Plan review process should be such that differing views on the appropriate scale of such policy areas can be considered, rather than assuming that the Council's nominated scale of policy areas represents the uppermost limit for future planning. I therefore agree with Mr Lang that the difference and scale and degree of what is proposed by Calcutta Farms is a matter going to the merits of the submission rather than to its validity.

38 *Motor Machinists* at [77].

39 *Motor Machinists* at [82].

40 *Calcutta Farms Ltd v Matamata Piako District Council* [2018] NZEnvC 187 (*Calcutta Farms*).

41 *Calcutta Farms* at [87].

52 This case law deals with submissions in a typical schedule 1 plan change which have an easily defined geographical or contextual extent. Caution needs to be given when applying the same tests to the IPI process which affords the IHP with a much wider ability to incorporate the MDRS, and give effect to Policy 3 in both residential and non-residential zones within the urban environment (as defined here by Council as Greater Christchurch).

53 Under the Amendment Act, Councils have an express statutory duty to incorporate the MDRS and to give effect to Policy 3,[42] with little discretion available in relation to these matters. This is in contrast to other plan changes, which are promoted at Council's discretion.

54 As noted, section 80E contains reasonably wide scope to enable related provisions. Clause 99 also expressly enables an ISPP hearings panel to make recommendations that extend beyond the scope of submissions made on the IPI. Clause 101(5) expressly empowers territorial authorities to accept such recommendations. These provisions are ultimately designed to ensure that a package of plan provisions that enable housing are included in the final IPI decision.

55 The High Court case of *Albany North Landowners v Auckland Council* is also of assistance on the present scope question.[43] In Albany North Landowners, the Court was tasked with considering scope issues applicable to the special legislation process for the Proposed Auckland Unitary Plan (PAUP).[44] As is the case for the IPI, submissions were required to be "on" the PAUP.[45] The Hearings Panel was not limited to making recommendations that were within the scope of submissions.[46] His Honour, Justice Whata, held:

> [129] …the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*, *Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J [in *Clearwater*] was therefore very wide.

56 Although PC 14 is not a full plan review, it proposes significant amendments to the parts of the Plan that relate to the urban environment which is spatially defined. It is

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[42] Resource Management Act 1991, ss 77G and 77N.

[43] *Albany North Landowners v Auckland Council* [2017] NZHC 138.

[44] Note that the powers of the IHP are even broader than those of the PAUP Hearings Panel that were considered in *Albany North*. The PAUP Hearings Panel could only make recommendations that were "on" the PAUP: Local Government (Auckland Transitional Provisions) Act 2010, s 144. While submissions on PC14 must be "on" the plan change, the IHP is not subject to that same restriction.

[45] Local Government (Auckland Transitional Provisions) Act 2010, s 123(2).

[46] Local Government (Auckland Transitional Provisions) Act 2010, s 144(5).

considerably further along the continuum than the traditional *Clearwater*-type scenario. It does so in light of a clear direction from Parliament to enable greater intensification. The changes contemplated by PC14 permeate through almost all of the chapters of the District Plan. In that context, a narrow interpretation of whether a submission is "on" PC14 is not appropriate.

57 The purpose of the IPI is to implement MDRS and give effect to the NPS-UD. To this end, it is clear that:

57.1 Submissions proposing a reasonable and appropriate method to give effect to these purposes, and therefore the Amendment Act, can reasonably be considered to be "on" the plan change.

57.2 The "overarching gateway" of section 80E should be the focus, not the notified version of PC14. Section 80E covers the MDRS, Policies 3 and 4 of the NPS-UD and related/consequential provisions.

57.3 Accordingly, if relief proposed by a submitter can be shown to meet the requirements of section 80E, and the IHP has the power to make a recommendation to include the provision under Clause 99, the relief sought will be within scope and "on" PC14.

57.4 In other words, submissions must be on matters which the Council was legally entitled to include in its IPI. This could include, for example, requests for new residential zones provided these are within the urban environment.

58 It is clear that the scope of PC14 is limited to provisions that fall within the categories set out in section 80E. As long as the changes sought are reasonably within the parameters of section 80E, such amendments are within the lawful scope of the IPI, regardless of what the Council may or may not have notified in its IPI.

59 To restrict the scope of submissions to supporting, or being less than matters that were notified in PC14 would unduly restrict submitters' ability to participate in the process and inform the IHP of how the District Plan might better give effect to the purposes of the Amendment Act and the NPS-UD. A submitter might be prevented from bringing to the attention of the IHP, a matter which the IHP might otherwise have reached on their own conclusion and recommended. This is the antithesis of the statutory purpose and the function of the IHP.

60 It is highly unlikely that in every instance a Council will have correctly and most efficiently notified its IPI to give effect to the intent and purposes of the legislation. There are so many variables and submissions and hearings are the way of testing the appropriateness of what Council proposes. It would not be appropriate for submitters to be precluded from bringing to the IHP alternative means and methods of achieving these just because the Council itself might have failed to consider or include these when notifying its IPI. This includes proposals for creating new residential zones, or amending existing zones to introduce different types of wording as in the case of LMM Investments 2012 Limited's submission.

61 To this end, case law has established:

61.1 a presumption that where the purpose of the RMA and objectives and policies "*can be met by a less restrictive regime that regime should be adopted*";[47] and

61.2 that there is no legal presumption that proposals advanced by the Council are to be preferred to the alternatives being promoted by other participants in the process.[48]

62 Turning to the second limb of the *Clearwater* test, there is no dispute that the public should be provided with a real opportunity to participate where they are potentially affected.

63 However, given the inherently broad scope of change allowed under an IPI, applying to an entire urban environment, more often than not this requirement will be met.

64 It must be presumed that the public is aware of the law (including the Amendment Act and the NPS-UD) and therefore the intent of an IPI and the wide-ranging implications these could result in in all relevant residential zones. Particularly given the Council's powers to create new residential zones, amend existing zones, impose MDRS across all relevant residential zones, and determine the extent of the urban environment's qualifying matters. The Amendment Act requirements and expectations for intensification have also been highly and widely publicised across the country.

65 Further, PC14 was publicly notified, and submissions and further submissions were publicly available. It could not be said that affected persons may have lost the opportunity to participate.

66 It should not be a surprise to anyone that this process might result in significant changes to existing zones, and the rezoning of entirely new areas. The public should be taken to be aware of legislation and its wide application.

CONCLUSION

67 We thank the IHP for the opportunity to provide these submissions. As set out at the outset of this memorandum, we had intended to go on to apply this analysis to each of our client's relief and positions. Given the uncertainty of the PC14 following Council's request to the Minister and a reluctance by a number of our clients to spend any more money in a process which may not proceed, we will provide this

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[47] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* ENC Christchurch C153/2004, 21 October 2004 at [56]. In 2017 the Environment Court confirmed that this remains the correct approach following amendments to s 32 of the Resource Management Act 1991 in *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].

[48] *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136, [2020] NZRMA 55 at [41].

information by 16 February 2024 in the hope that the Minister will provide more clarity prior to this date on the status of PC14.

Dated: 21 December 2023

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