BEFORE AN INDEPENDENT HEARINGS PANEL OF PORIRUA CITY COUNCIL

IN THE MATTER	of the Resource Management Act 1991 (the **Act**)
	AND
IN THE MATTER	of hearing of submissions and further submissions on the Proposed District Plan (**PDP**), Variation 1 to the PDP, and Proposed Plan Change 19 to the Porirua District Plan

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OPENING LEGAL SUBMISSIONS ON BEHALF OF PORIRUA CITY COUNCIL

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MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These submissions are given on behalf of Porirua City Council (**Council**) in respect of Hearing Stream 7. The specific matters being considered as part of Hearing Stream 7 include the hearing of submissions and further submissions on the Proposed District Plan (**PDP**), Variation 1 to the PDP, and Proposed Plan Change 19 to the Porirua District Plan (**PC19**).

1.2 In part this hearing stream relates to the implementation of the obligations set out in the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**), which amended the Resource Management Act 1991 (**RMA**) on 21 December 2021.

1.3 In order to give effect to the requirements of the Amendment Act, the Council notified Variation 1 to the PDP and PC19 on 11 August 2022.

1.4 Variation 1 and PC19 are the Council's intensification planning instrument (**IPI**) and were prepared in accordance with sections 77F to 77T and subpart 5A of Part 5 of the RMA (introduced by the Amendment Act). As the Panel is aware, this hearing stream also considers submission points that were assigned to be heard as part of Hearing Stream 7, which was to encompass PDP matters only.

1.5 The Panel will be familiar with the statutory framework that applies to the review of a district plan. However to assist the Panel, we provide a summary of the statutory functions and legal tests for plan changes in **Appendix 1** to these submissions.

1.6 Where the statutory framework differs in relation to an IPI, we address that in the relevant section of these submissions. However, we note that with the exception of the specific matters

addressed in these submissions, the Panel is required to consider the broader RMA framework when considering and making recommendations on the IPI. In other words, the provisions of the Amendment Act are not to be treated as a code for considering the IPI.

1.7 These submissions cover the following matters:

(a) Overview of the hearing stream 7 topics;
(b) Scope of the Council's IPI;
(c) Description of the distinction between the intensification streamlined planning process (**ISPP**) and the standard Schedule 1 process;
(d) Approach taken to differentiating between qualifying matters and overlays;
(e) Scope of submissions on Variation 1 and PC19;
(f) Jurisdictional issues raised by submissions;
(g) Implications of objectives inserted in accordance with Schedule 3A of the RMA;
(h) Discussion regarding other relevant statutory documents;
(i) Specific matters raised in submitter evidence; and
(j) Concluding comments.

2. OVERVIEW OF THE HEARING STREAM 7 TOPICS

2.1 Hearing Stream 7 comprises the following topics:

(a) Variation 1 to the PDP, including:
    (i) Residential Zones;
    (ii) Commercial and Mixed-Use Zones;
    (iii) Northern Growth Development Area;
    (iv) Consequential amendments to district-wide matters (including infrastructure, subdivision and noise provisions);
(b) PC19 to the Operative Porirua District Plan (**ODP**) (which relates to the Plimmerton Farm Zone);

(c) PDP submissions on the Future Urban Zone, Hospital Zone, Open Space Zone chapters; and

(d) Overarching or plan-wide PDP matters that have not yet been addressed in earlier hearing streams.

Relevant context

2.2 Variation 1 substantially amends the Residential, Commercial and Mixed-Use Zones, which were originally notified as part of the PDP.

2.3 When the Amendment Act was passed, the Council made a decision to defer the hearing of these zones to Hearing Stream 7, allowing Variation 1 to 'catch-up' procedurally and to enable the Panel to hear all submission points on these zones at the same time (albeit through the PDP and IPI).

2.4 There are also a number of other submission points that have not yet been heard as part of the earlier hearing streams. These are also being dealt with in this hearing stream and are addressed in the "Overarching" and "District-Wide" section 42A reports.

3. SCOPE OF THE COUNCIL'S IPI (VARIATION 1 AND PC19)

3.1 Section 80E prescribes the content of an IPI. It provides:

> **80E Meaning of intensification planning instrument**
>
> (1) In this Act, intensification planning instrument or IPI means a change to a district plan or a variation to a proposed district plan—
>
> (a) that **must**—
>
> (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) that **may** also amend or include the following provisions:
>
> (i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T:

(ii) provisions to enable papakāinga housing in the district:

(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:
(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.

3.2 Section 80E(1)(a) prescribes the *mandatory* matters that must be included in an IPI, being:

(a) to incorporate the medium density residential standards, which are set out in Schedule 3A (**MDRS**); and

(b) to give effect to Policies 3 and 4 of the National Policy Statement for Urban Development (**NPS-UD**), within Porirua's urban environment.

(the **mandatory outcomes**).

3.3 Section 80E also allows a local authority, at its discretion, to amend or include provisions relating to papakāinga housing, financial contributions, and "*related provisions … that support or are consequential on*" the MDRS or Policies 3 and 4.[1]

3.4 For a provision to be a "related provision", it must either support or be consequential to achieving either of the two mandatory outcomes in section 80E(1)(a). This requirement is submitted to be important in terms of clarifying the scope of the IPI, and what relief can properly be said to be "on" the IPI.

1 Section 80E(1)(b).

3.5 In our submission, section 80E is framed in a way that makes the mandatory outcomes the primary requirement of an IPI. It is only after (or as part of) satisfying the mandatory outcomes that there is the potential to amend or include *related* provisions. In this way, the words "related provisions" indicate a purpose that is secondary, due to the support / consequential role of those provisions. By way of example, it is submitted that amended or new provisions could be said to "support" if they assist or enable the MDRS to be incorporated, or assist with giving effect to policy 3 of the NPS-UD.

3.6 While section 80E specifies the requirements of an IPI, section 80G highlights that the Council must not use the IPI for any other purpose. In this way, section 80G has a constraining effect on what can be included in an IPI, informing the scope of what can be notified by Council.

3.7 The IPI is required to satisfy the mandatory outcomes within an "urban environment".[2] As a result, in our submission there is a spatial aspect to the relief that can be sought / recommended, including for any related provisions. As for the mandatory outcomes, any related provisions would need to relate to an urban environment - if they did not, there would be difficulties in demonstrating the necessary link between that provision and achieving one of the mandatory outcomes.

Qualifying matters

3.8 Section 80E enables the Council to alter the mandatory outcomes in certain circumstances i.e. where there is a "qualifying matter". The list of related provisions in section 80E(2) includes "qualifying matters identified in accordance with sections 77I or 77O". Sections 77I and 77O provide that (emphasis added):

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2 Sections 77G and 77N prescribe where the MDRS and policy 3 or 5 of the NPS-UD must be implemented - and both those provisions are qualified by "urban environment". Urban environment is defined in section 77F as "any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that— (a) is, or is intended by the specified territorial authority to be, predominantly urban in character; and (b) is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people.

> A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone **only to the extent necessary to accommodate 1 or more of the following qualifying matters** that are present…

3.9 Sections 77I and 77O set out a list of "qualifying matters" that can be used to justify enabling lower levels of development than that anticipated by the mandatory outcomes. Sections 77J and 77P require the Council to prepare supporting 'evaluation reports' where any qualifying matters are proposed to be relied on.

3.10 The Council's overview section 32 report prepared in support of the IPI sets out the "qualifying matters" relied on as part of the IPI. In particular, Tables 1 and 2 identify the qualifying matters that the Council proposes to rely on to modify the provisions implementing the mandatory outcomes.[3]

3.11 The overarching section 32 report includes the relevant requirements that must be included in an evaluation report in accordance with sections 77J and 77P.[4]

4. DISTINCTION BETWEEN THE ISPP AND STANDARD SCHEDULE 1 PROCESS

PCC's District Plan Review process

4.1 The PDP was notified prior to the commencement of the Amendment Act. Therefore, in accordance with clause 33 of Schedule 12, the Council is not required to incorporate the MDRS or give effect to policies 3 and 4 of the NPS-UD into the "relevant residential zones" within the ODP. Instead it was required to notify a variation to the PDP to incorporate the amendments.

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3 Refer to pages 16 – 19 of the Section 32 Evaluation Report – Part A: Overview to Section 32 Evaluation.
Table 1 lists the qualifying matters from the PDP that amend the MDRS and building height and density requirements under policy 3.
Table 2 sets out the additional qualifying matters introduced by Variation 1.

4 See section 2.7.3.

4.2 Clause 33(3)(d) provides that such a variation to a proposed plan:

> May include –
>
> (i) Any provision that is proposed to be included in a residential zone; and
>
> (ii) Any other provision that is proposed to be included in a non-residential urban zone, where that zone is giving effect to the intensification policies in accordance with section 77N; and
>
> (iii) any changes consequential on, or necessary to give effect to, the variation.

4.3 PC19 has been notified to implement the mandatory outcomes in the Plimmerton Farm Zone (which includes "relevant residential zones", albeit that those zones are in the form of precincts within the zone)[5]. The reason PC19 is progressing separately is that the Plimmerton Farm Zone was excluded from the PDP at notification, because it was re-zoned by Plan Change 18 to the ODP (**PC18**) shortly before the notification of the PDP. PC19 is therefore a change to the ODP, by way of an IPI.

4.4 The Council's PDP is now running in parallel with the IPI, with this hearing stream encompassing matters under both the PDP and the IPI. This creates additional complexities in terms of procedure, timing and the matter of scope, as the Panel is now tasked with considering submissions on the IPI at the same time as it is considering submissions on the PDP.

4.5 As the PDP is a full plan review (excluding PC18), the scope for change is broad. This is distinct from the IPI which was notified to satisfy the requirements of the Amendment Act only, and seeks to amend a limited number of provisions in both the PDP and the ODP.

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5 Section 77G requires the incorporation of the MDRS, and for policy 3 to be given effect to in "relevant residential zones". Precincts A and B within the Plimmerton Farm Zone are considered to fall within the definition of "relevant residential zone".

4.6 It is understandable that this has led to some confusion for submitters in terms of the matters that they could raise in submissions on Variation 1 and PC19, and we discuss this in further detail in later sections of these submissions where we discuss scope.

Process

4.7 As required by section 80F(3)(a), the IPI is to be considered using the ISPP. The ISPP was introduced by the Amendment Act and is "*the planning process set out in subpart 5A* [i.e. sections 80D to 80N] *of Part 5 and Part 6 of Schedule 1* [of the RMA]".[6]

4.8 In terms of the procedure to be followed, most of the Schedule 1 processes still apply with all necessary modifications (clause 95(2) of Schedule 1). The ISPP requires the IPI to be considered by an independent hearing panel which then will make recommendations to the Council.[7]

4.9 Clause 98 sets out the Panel's duties and powers, which are broadly the same as the equivalent powers for a "standard" Schedule 1 process. However, as the Panel is aware,[8] the powers also enable the panel to allow cross-examination (which is a departure from Schedule 1):

> (4) At a hearing, an independent hearings panel may—
>
> (a) permit a party to question another party or a witness:
> (b) prohibit cross-examination:
> (c) permit cross-examination at the request of a party, but only if the panel is satisfied that it is in the interests of justice:
> (d) regulate the conduct of any cross-examination

6 As defined in section 2 of the RMA.
7 See clause 96 of Schedule 1.
8 As set out in Minute 52 from the Panel.

4.10 In relation to the IPI, clauses 99 to 106 of Schedule 1 set out the process that is to be followed for the Panel's recommendations, and subsequent decisions on the Panel's recommendations.

Decision vs recommendation making powers

4.11 The ISPP is different from the standard process as clause 99, Schedule 1 only confers on the Panel the ability to make recommendations on the IPI. Clause 99 reads:

> **99 Independent hearings panel must make recommendations to territorial authority on intensification planning instrument**
>
> (1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.
>
> (2) The recommendations made by the independent hearings panel—
>
> (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…

4.12 This can be contrasted with the Panel's ability to make decisions on the PDP as a result of the Council's delegations made to it.

4.13 Clause 100 prescribes how the Panel is to provide recommendations on the IPI. It requires the following:

> **100 How independent hearings panel must provide recommendations**
>
> (1) The independent hearings panel must provide its recommendations to a specified territorial authority in 1 or more written reports.
>
> (2) Each report must—
>
> (a) set out the panel's recommendations on the provisions of the IPI covered by the report; and
>
> (b) Identify any recommendations that are outside the scope of the submissions made in respect of those provisions; and

(c) set out the panel's recommendations on the matters raised in submissions made in respect of the provisions covered by the report; and

(d) state the panel's reasons for accepting or rejecting submissions; and

(e) include a further evaluation of the IPI undertaken in accordance with section 32AA (requirements for undertaking and publishing further evaluations).

(3) Each report may also include—

(a) matters relating to any alterations necessary to the IPI as a consequence of matters raised in submissions; and

(b) any other matter that the panel considers relevant to the IPI that arises from submissions or otherwise.

(4) In stating the panel's reasons for accepting or rejecting submissions in accordance with subclause (2)(d), each report may address the submissions by grouping them according to—

(a) the provisions of the IPI to which they relate; or

(b) the matters to which they relate.

(5) To avoid doubt, a panel is not required to make recommendations in a report that deal with each submission individually.

4.14 Following the Panel's recommendation on the IPI, the Council will then make decisions on those recommendations.[9]

Appeal rights

4.15 In relation to the IPI, clause 107 states:

107 Scope of appeal rights

There is no right of appeal under this Act against any decision or action of the Minister, a specified territorial authority, or any other person under this Part.

9 RMA, Schedule 1, clause 101.

4.16 This is an important difference from the Schedule 1 appeal rights, where decisions can be appealed on their merits to the Environment Court.[10]

4.17 Given the lack of any appeal right (noting that judicial review remains available) arising from decisions on the IPI, when writing its report(s) the Panel will need to be clear as to its response to submissions, and clarify which aspects relates to the PDP vs the IPI. The section 42A reports prepared by Council have sought to assist the Panel by identifying the processes relevant to each submission, in Tables annexed to each Report, titled "Recommended Responses to submissions and further submissions".[11]

Limitations on decision making as prescribed by clause 99, Schedule 1

4.18 In making its recommendations, clause 99 provides two important directions to the Panel being:

(a) the requirement to make recommendations that are "on" the IPI, and

(b) the power to make recommendations that are beyond the scope of submissions made on the IPI.

Recommendations must be "on" the IPI

4.19 Although clause 99 is concerned with the exercise of substantive functions, in the form of recommendations, as opposed to scope (of submissions), it is submitted that the tests set out in *Clearwater Resort Limited v Christchurch City Council,*[12] remain relevant. For ease of reference, the *Clearwater* two-step test, was fundamentally concerned with observing the principles of natural justice, and stated that:

10 Schedule 1, clause 14.
11 The Council has also 'deemed' some submissions on the PDP to be on the IPI. We discuss this further, including the appeal rights, at paragraphs [6.26]-[6.29].
12 HC Christchurch AP34/02, 14 March 2003.

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 a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly "on" the variation.

4.20 The Panel is required to hear submissions and then make recommendations <u>on</u> the IPI, which comprise the changes proposed from the status quo (and includes the relief sought in valid 'in scope' submissions).

4.21 A contrast can be drawn between the framing of subclauses 99(1) and (2), which supports this interpretation and the application of the *Clearwater* tests. To explain, the wording used in clause 99(1) deliberately uses the phrase "on the IPI". If subclause (1) was capable of being interpreted in a way that did not engage the *Clearwater* tests, then there would be no need for the provision at all, as the power to make recommendations could be governed by subclause (2) only. It is submitted that clause 99 acts to confine the Panel's recommendations to matters that are <u>on</u> the IPI, and that subclause (2) should be read in that same way. While subclause (2) allows for recommendations that are beyond the scope of matters raised by submitters, it is submitted that those recommendations must still be <u>on</u> the IPI.

The IHP may make recommendations that are beyond the scope of submissions

4.22 Council acknowledges that the Panel has the power, under clause 99(2)(b), to make recommendations that are beyond the scope of submissions on the IPI, but submits that this power should be approached both lawfully and conservatively.

4.23 First, this power is available only where the recommendation relates to a matter identified by the panel or any other person during the hearing (subclause (2)(a)). This requirement is an important natural justice safeguard, which highlights that the

power to go beyond the scope of submissions is not unconstrained. Given the narrow focus of the IPI, any matters raised during the hearing will need to be linked to the mandatory outcomes (in a direct or related way). Stepping outside those matters would be at odds with the principles underlying scope (which relate to fairness and public participation), and would extend beyond the empowering provisions introduced by the Amendment Act. On this point, the IPI is specific in its purpose and limited by its statutory context. It has been prepared to satisfy section 80E only, with section 80G clarifying that an IPI must not be used for any purpose other than those specified in section 80E.

4.24 We observe that when exercising its powers under clause 100(2)(b) the Panel is required to "*identify any recommendations that are outside the scope of the submissions made in respect of those provisions*".

4.25 For completeness, we note that the IPI does not constrain all of the Panel's decision making powers in relation to Hearing Stream 7. The Panel is still considering the PDP more broadly, and as the submissions on the PDP remain live they will also give the Panel scope to make amendments to the provisions.

4.26 It is submitted that the Panel should remain cognisant of these matters when deliberating and making recommendations, particularly where it may wish to go beyond the scope of submissions.

5. APPROACH TAKEN TO DIFFERENTIATING BETWEEN QUALIFYING MATTERS AND OVERLAYS

5.1 In addition to the qualifying matters which alter the implementation of the mandatory outcomes, the PDP contains a number of overlays that spatially identify sites, items, features, settings or areas with distinctive values, risks or other factors within the City which require management in a different manner from underlying zone provisions. These matters are

set out in Schedules 2 to 11[13] and the Natural Hazard Overlay and Coastal Hazard Overlay of the PDP.

5.2 Although some of these overlays *relate to* matters that can be "qualifying matters", because they are not used to directly modify the MDRS, or height or density of urban form requirements, they have not been applied as qualifying matters.[14] As supported by the section 32 analysis undertaken for the PDP, the continued use of those overlays, and the notified PDP frameworks that will apply to each overlay, is considered to be the most appropriate way to manage those environmental matters. In particular, this is because the overlays were developed to provide for comprehensive management of those matters across the district. This approach continues to be appropriate as these matters cannot simply be managed by altering density standards.

5.3 The overlays that apply in the Porirua District were generally included within the notified version of the PDP. However, Variation 1 includes a flood hazard overlay for the remainder of the Council's urban catchments not covered by the PDP flood hazard maps including Camborne, Mana, Paremata, Papakowhai, Aotea, Pukerua Bay and Whitby.[15] This is in reliance on the ability to include "related provisions" in an IPI.

5.4 Inclusion of the flood hazard overlay in these areas supports and is consequential to the implementation of the mandatory outcomes as the inclusion of the overlays is intended to manage significant risks from natural hazards in accordance with section 6(h) of the RMA. The connection between the mandatory outcomes and the introduction of the overlays is to ensure that any additional urban development appropriately takes into account flood hazard risks.

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13 SCHED2 - Historic Heritage Items (Group A), SCHED3 - Historic Heritage Items (Group B), SCHED4 - Historic Heritage Sites, SCHED5 - Notable Trees, SCHED6 - Sites and Areas of Significance to Māori, SCHED7 - Significant Natural Areas, SCHED8 - Urban Environment Allotments, SCHED9 - Outstanding Natural Features and Landscapes, SCHED10 - Special Amenity Landscapes, SCHED11 - Coastal High Natural Character Areas.

14 i.e. some of these provisions relate to matters listed in 77I(a)-(j) and 77O(a)-(j).

15 For completeness we note that at its meeting on 23 February 2023 the Council approved the removal of flood hazard maps for the Waiohata/Duck Creek Catchment from the Proposed District Plan.

5.5 The inclusion of these overlays aligns with Objective 8 and Policy 1(f) of the NPS-UD, as they assist with ensuring resilience to climate change and enabling achievement of a well-functioning urban environment.

6. SCOPE OF SUBMISSIONS

6.1 While the PDP was notified as applying to the Porirua District (except for the area that was subject to Plan Change 18 to the ODP), the IPI does not apply to the whole city. For submissions to be valid, and therefore able to be considered by the hearing panel, they must therefore be "on" the IPI.

6.2 To determine whether this jurisdictional requirement is met, it is submitted that the same tests developed in relation to conventional plan changes under Part 1 of Schedule 1 will apply.

6.3 The leading case on scope is *Clearwater Resort Limited v Christchurch City Council*.[16] As discussed at paragraph 4.19 of these submissions, in *Clearwater* the High Court adopted a two-step approach to the assessment.

6.4 The *Clearwater* approach was followed by the High Court in the more recent case of *Motor Machinists Limited v Palmerston North City Council*.[17] The High Court in *Motor Machinists Ltd* stated that for a submission to be "on" a plan change:[18]

(a) it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that plan change; and

(b) there must be no real risk that people directly affected by additional changes proposed in the submission have been denied an effective response to those

16 HC Christchurch AP34/02, 14 March 2003.
17 [2013] NZHC 1290.
18 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 at [80] to [82]; citing *Clearwater Resort Limited v Christchurch City Council HC Christchurch* AP34/02, 14 March 2003.

additional changes on the plan change process;"*To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources*."

6.5 The first limb can be expressed another way, in that the submission must reasonably be said to fall within the ambit of the plan change; there must be a connection between the submission and the degree of notified change proposed.[19] The Court in *Motor Machinists* stated:[20]

> One way of analysing this 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.

Is the approach different for an IPI?

6.6 While the above case law has been derived from plan change or review processes under Schedule 1 to the RMA, in *Albany North Landowners v Auckland Council*[21] the High Court considered whether the orthodox principles of scope applied to the bespoke "streamlined" process provided for under the Local Government (Auckland Transitional Provisions) Act 2010 (**LG(ATP)A**). The LG(ATP)A process is similar in several respects to the ISPP.

6.7 In relation to section 144(1) of the LG(ATP)A, which is equivalent to clause 99(1) of the RMA (in that both provisions require IHP recommendations to be "on" the proposed plan), the High Court concluded that "the IHP's jurisdiction to make

19 Ibid at [80] and [81].
20 At [81].
21 [2017] NZHC 138.

recommendations is circumscribed by the ambit of the notified plan change".[22]

6.8 In *Albany*, the High Court proceeded on the basis that the "orthodox" principles of scope should apply to the streamlined process under the LG(ATP)A, noting that the policy of public participation remains strongly evident, and there is nothing in the legislation to suggest that the longstanding, and careful, approach to scope should not apply.[23] In our submission, these findings are equally applicable to the ISPP, as there are no statutory indications that suggest that the orthodox approach should not apply.

6.9 As discussed earlier, the driving provision for the IPI is section 80E. In our submission, the extent to which a submission seeks relief that stems from the requirements of section 80E(1) will largely determine whether it can be said to be "on" the IPI, or not. While section 80E does not expressly frame the scope for submissions, it clarifies the reasons for the proposed amendments, and matters that may be included in an IPI. It is submitted for Council that valid submissions ("on" the IPI) must be linked to one of the matters set out in section 80E.

6.10 We anticipate that questions of scope, through the ISPP, will most often arise in relation to whether relief relates to a "related provision". The reason for this is that it should be relatively straightforward to establish whether a submission seeks relief related to achieving one of the mandatory requirements.

6.11 Although section 80E(2) provides a list of matters that related provisions may relate to, it is non-exhaustive and therefore there is no clear definition or description as to what a "related provision" can provide for. In our submission to determine whether a submission is "on" any related provision in terms of section 80E(2), the question must be whether the relief sought by the submission "supports or is consequential on" one of the

22 *Albany North Landowners*, at [104](a).
23 *Albany North Landowners*, at [118].

mandatory outcomes. Put another way, there must be a clear link between the relief sought, and either incorporating the MDRS or giving effect to policies 3 and 4 of the NPS-UD.

The scope of submissions on Variation 1 and PC19

6.12 If a submission is on a matter in the Variation or PC19 that changes the *status quo* of the PDP (in the case of Variation 1), or the ODP (in the case of PC19) then it will be considered to be within scope. If not, then it is unlikely to be a submission "on" the plan change. Further, if a submission seeks more than "incidental or consequential" changes, or raises matters that should have be addressed in the section 32 evaluation and report (but were not), the submission will not be "on" a plan change.

6.13 Applying these legal tests to this hearing, Council considers that the PDP represents the "status quo" that Variation 1 seeks to amend, although as decisions have not been made on the PDP the status quo may also change over time. To the extent that Variation 1 proposes changes to the PDP, submissions on those amendments will clearly be within scope.

6.14 As a starting point, it is submitted that the IPI is spatially limited to urban environments. To the extent that submission points seek amendments to non-urban provisions (or for district wide matters to the extent they apply to non-urban environments), consideration will need to be given to whether the submissions, and the relief sought, "supports or is consequential to" one of the mandatory outcomes – if they do not, it may be difficult to demonstrate the necessary link between that provision and achieving one of the mandatory outcomes. On this point it is accepted that it may be possible for the IPI or submissions on the IPI to relate to matters beyond the urban environment, but only where there is a causal connection with the implementation of a mandatory outcome (i.e. that the matter supports or is consequential to the mandatory outcomes).

6.15 **Appendix 2** to these submissions identifies the submission points made by submitters on the IPI that are considered to be beyond the scope of the IPI.

6.16 The most common issues identified in Council's review of submissions is an attempt to rely on the "related provisions" clause in section 80E as a basis for seeking an amendments to the notified provisions. These issues are finely balanced, however to treat these submission points as in scope the Panel will need to be satisfied that the submission points support or are consequential to one of the mandatory outcomes.

6.17 The difficulty facing the Council / Panel is that the submissions often do not attempt to make this link, instead seeking relief without drawing the necessary connection. It will therefore be for the Panel to determine whether, on balance, these submissions fall within the ambit of one of the matters set out in section 80E, taking into account the two-step test set out in case law. Council has attempted to assist with this issue through its section 42A reports, by noting where officers have a concern that submissions do not fit within the section 80E criteria.

6.18 Scope issues have also arisen where submitters are proposing new objectives, polices, or rules where Variation 1 or PC19 propose amendments to the relevant chapter. In considering whether there is scope, it is relevant to consider the content of the submission to determine whether the submission is:

(a) seeking to achieve one of the "mandatory outcomes" of an IPI (or the related matters in section 80E); or

(b) on an unrelated matter (and therefore out of scope).

6.19 The Council is of course happy to assist the Panel if it has any questions regarding scope that arise through the course of the hearing.

Scope to change the biodiversity offsetting and restoration areas (BORA) as part of PC19

6.20 Through its submission KM and MG Holdings Limited[24] has sought that the BORA maps in the Plimmerton Farm Zone be updated, on the basis that the maps that were included in the final decision on PC18 were incorrect.

6.21 KM and MG Holdings Limited has provided expert evidence on this matter from Mr Cummings, and this particular issue is dealt with at paragraph [47] of his evidence in chief. We understand the mapping is alleged to be incorrect across Precincts A, B and C.

6.22 While we consider that correcting the mapping within Precincts A and B would be within the scope of the IPI (PC19 in particular), it is less clear how scope would be established for amending the mapping in Precinct C.

6.23 Precinct C is not considered to be a "relevant residential area" as defined by the RMA,[25] however Precincts A and B are considered to satisfy that definition. Therefore, to the extent that amendments are sought to the BORA maps in Precinct C, the Panel will need to be satisfied that updating the mapping in Precinct C is a related provision, in terms of supporting or being consequential to achieving one of the mandatory outcomes. We do not consider that Mr Cummings has clearly shown how amending the BORA maps in Precinct C meets this requirement.

Council's approach to submissions seeking changes to the mandatory outcomes

6.24 A number of submitters have sought amendments to the mandatory outcomes in particular areas.

24 Submitter 54.
25 Precinct C provides for large lot residential development.

6.25 The Council was directed to incorporate the mandatory outcomes as part of its IPI, except where, or insofar, a qualifying matter applies. The Council has therefore treated submissions seeking amendments to the MDRS as being requests that rely on the existence of qualifying matters, even where they were not expressed in this way. Given the statutory direction to implement the MDRS, unless the Council treats those submission points as seeking qualifying matters, there would be a jurisdictional bar to the Panel recommending acceptance of the submission points.

The Council's approach to including submission points across from PDP

6.26 To ensure that submission points are appropriately considered the Council has 'deemed' some PDP submission points to be on the IPI, and officers have considered the relief sought by those submissions with reference to the amendments made by the IPI.

6.27 In some instances the Council has been able to incorporate the relief sought in PDP submissions into the provisions of the notified IPI.

6.28 This approach has been taken in reliance on clause 16B(1) of Schedule 1 of the RMA, which treats PDP submissions as being "*deemed to be a submission….against the variation*". Clause 95 of Schedule 1 does not modify the application of clause 16B for the ISPP. In our submission, the intention behind clause 16B is that where a person made a submission on a provision, and that provision is subsequently altered by a variation, that person should be able to pursue their original relief and be involved in consideration of the varied provision. In other words, the fact that a provision has been amended by a variation, and that a submission is deemed to be on Variation 1, does not cut across the submitter's right to pursue their initial relief (even if it may be challenging to achieve on its merits).

6.29 Council has adopted this approach to ensure that the relief sought is being appropriately considered against the relevant provisions, and through the proper process. This is needed as it would be nonsensical to consider the submission point against the original PDP provision, which has since been amended or replaced by the IPI provisions.

Appeal rights in relation to PDP submissions on provisions that are altered by Variation 1

6.30 Council's 'deeming' approach for PDP submission points has been used to enable the appropriate consideration of the relief sought, rather than to bring those submissions into the ISPP process.

6.31 While clause 16B states that a submission on a proposed plan is "deemed" to be a submission on a variation, this does not mean that the subject submission should be treated as having been made on the IPI, and therefore inherit the limited right of appeal (in accordance with clause 107).

6.32 The reason for this is that the PDP submission was made under the "normal" Schedule 1 process, and there is nothing in the legislation that extinguishes the associated appeal rights under clause 14. If the notification of a variation had the effect of removing, or limiting, associated appeal rights, in our submission this would create natural justice issues. Furthermore clause 16B was not drafted in contemplation of the Amendment Act, nor the alteration of the standard Schedule 1 appeal rights as part of the ISPP.

6.33 In practice, if a submitter seeks to exercise their normal appeal rights in relation to a PDP submission, there would likely be difficulties. For example, the submitter (and then appellant) could not pursue a full merits appeal, given the constraints of the Amendment Act and narrower intentions of the IPI. In addition, if the IPI were to remove the relevant provision (or matter) entirely, then the scope for amendment of that provision

would also be removed. In effect, a PDP submitter will need to carefully consider the utility of lodging an appeal that seeks the initial relief, as the scope for appeal may be extremely limited because of section 80E.

7. JURISDICTIONAL ISSUES

7.1 Ngāti Toa's submission raises matters which we submit are beyond the Council's jurisdiction. The submission states:

> "*We observe that the arbitrary requirements coming from the IPI and MDRS implementation mean that Ngāti Toa will end up with zoning that it may not be desirable for the future use of their land. Since te Rūnanga have not received or claimed these lands yet, we would like these areas to be exempt from an imposed District Plan zoning*."

7.2 Specifically in relation to subdivision the submission states:

> *"Since Te Rūnanga, when the time comes, will receive lands as part of the Claims Act, in a regime that has been already established by the Crown, Plan Variation and provisions may pose risks around taking advantage of this returned land- and giving further limitations to the way iwi would like to develop and use that land."*

7.3 The relief sought is for "*Council to identify all such land and create overlay of 'Ngāti Toa Zone' by defining this overlay as: is a zone where Ngāti Toa has uninhibited Tino Rangatiratanga and Mana as the Tangata Whenua*."

7.4 It is unclear how this proposed zone would work in practice, or where it would apply (spatially). To the extent that the proposed zone would result in the district plan essentially not applying to certain land, Council as the responsible planning authority under the RMA, does not have the power to carve out areas of the district where the district plan will not apply, nor is it clear what regulatory regime would apply to those areas in the interim period if the relief was granted.

7.5 In the long term, if the zoning of land received by Ngāti Toa through the claims process is considered to be inappropriate, that could be changed through a future plan change process.

7.6 The Council, may however, have jurisdiction to include an overlay across the relevant land, if it can be demonstrated that

such an overlay directly relates to one of the mandatory outcomes – we anticipate that this overlay would be a qualifying matter. However, Council's understanding is that some of the settlement areas are not in the urban environment, and therefore any submission to amend areas outside the urban environment would be beyond the scope of the Variation.

7.7 A similar issue was raised by Greater Wellington Regional Council's submission[26] on the IPI which sought the following relief:

Ensure that Deed of Settlement areas are not subject to the District Plan, as this will most effectively provide for the exercise of tino rangatiratanga by Ngāti Toa Rangatira.

7.8 This raises the same jurisdictional issue as above, although in a more blunt way, as it is unclear as to the planning framework that would apply to the Deed of Settlement areas if the District Plan did not apply. It is submitted that granting this relief would be beyond the Council's jurisdiction.

8. IMPLICATIONS OF MDRS OBJECTIVES

8.1 Schedule 3A directs that certain objectives (and policies) must be included in a district plan. The two objectives to be included 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) [sic] 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

26 Submitter number 74.

8.2 The Council considers that Objective 1 is given effect to through the identification of areas for intensification (using zoning, precinct and site specific controls), as well as the management of the distribution of land uses across the urban environment to achieve this outcome. This objective has been included in Variation 1 in the Strategic Direction – Urban Form and Development chapter, as UFD-07.

8.3 The Council has identified, and sought to remove, a number of land use activity regulatory barriers which it considers could impact on the ability to achieve a well-functioning urban environment. This has included barriers identified by submitters through the PDP process. This has resulted in the inclusion of the following in Variation 1:

(a) provisions managing land use in the relevant residential zones;
(b) provisions managing land use in the non-residential urban zones;
(c) consequential changes to the Noise chapter in relation to NOISE-R4 and S5 and S6;
(d) consequential changes to the Infrastructure chapter in relation to the permitted height of certain structures; and
(e) new and amended definitions.

8.4 It is submitted that this approach is consistent with section 80E of the Act, and the matters that Parliament intended to be included in an IPI.

8.5 Mandatory objective 2 (set out above) has been included in the General Objectives and Policies chapter, that applies to all Residential Zones(as RESZ-01).Council has increased the density of its relevant residential zones by both implementing the MDRS and increasing height limits as directed by Policy 3. At a high level this is evidenced by the replacement of the PDP residential zones with the High and Medium Density

Residential Zones. The Council has also given effect to this objective in the way it has spatially identified the High and Medium Density Residential Zones across the district.

8.6 The approach enables higher density residential development, as compared with the PDP zoning, but does not compel it. The market will therefore respond to the needs of the community to provide for appropriate housing typologies. In this way the Council considers Objective 2 will be met.

9. OTHER STATUTORY DOCUMENTS

9.1 Although the focus of the IPI is the implementation of the mandatory outcomes, the broader requirements of the RMA (including the obligations set out in sections 31, 32 and 72-76 of the RMA) are still required to be met. As noted earlier in these submissions those obligations will be well known to the Panel, and are addressed in **Appendix 1**. This section touches on some of those higher order documents that are considered to be of particular relevance to the matters being considered as part of this hearing stream.

National Policy Statement on Urban Development

9.2 Variation 1 and PC19 have been notified to meet the Council's obligations under the Amendment Act, and more broadly they give effect to the NPS-UD within the Porirua District. This is discussed in detail in the overarching section 32 report at section 3.2.1.

The weight to be given to Change 1 to the Wellington Regional Policy Statement (RPS)

9.3 Submissions on Variation 1 and PC19 by GWRC, among others, sought that they give effect to Proposed Change 1 to the Regional Policy Statement (as notified) (**Change 1**).

9.4 The Overarching section 42A Report has set out the Council's approach to taking Change 1 into account, at section 2.6.[27]

9.5 The legal requirement is that the Council, when changing its district plan, must "have regard to" Change 1 as it is a proposed regional policy statement.[28]

9.6 It is submitted that "have regard to" means that Change 1 must be given genuine consideration, but that it does not necessarily need to be followed.[29] If relevant parts of Change 1 are beyond challenge, significant weight can be given to those parts. However, until that happens, the legal requirement is that the Council must "have regard to" Change 1, and "give effect to" the Operative Regional Policy Statement.

9.7 Given the early stage that Change 1 is currently at, with the public submission period closing relatively recently (19 December 2022) and the hearing process yet to commence, it is submitted that the correct approach is to apply little weight to Change 1.

Objective 22A and Table 9A of the RPS

9.8 For completeness, the NPS-UD required GWRC to insert housing bottom lines into the RPS without using the Schedule 1 process. [30] To give effect to this direction, on 19 August 2022 GWRC inserted objective 22A and Table 9A into the RPS. Table 9A includes a short-medium term (2021-2031) requirement for 5,916 additional dwellings within the Porirua District, and a long term (2031-2051) requirement for 8,062 additional dwellings.

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27 GWRC has submitted seeking changes to Variation 1 and PC19 to give effect to Proposed Change 1 to the RPS (as notified). These submission points are addressed individually though the Overarching s42A and Part B topic-based reports.

28 Section 74(2)(a)(i)).

29 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); The matters must be given genuine attention and thought, and such weight as is considered to be appropriate, but the decision maker is entitled to conclude that the matter is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function. (Discussed in *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394, and similar principles followed in [2016] NZEnvC 123, [2016] NZAR 93).

30 Refer to clause 3.6 of the NPS-UD.

9.9 Though its PDP and the IPI, the Council has given effect to objective 22A. In particular the Council has assessed the additional development capacity enabled as being 26,955.

9.10 Council's experts consider that the PDP and IPI give effect to the Operative Regional Policy Statement, and that the proposals have had proper regard to Change 1.

National Policy Statement on Highly Productive Land

9.11 In Minute 52, the Panel has advised of its preliminary view that the NPS-HPL is "*likely to have limited effect on our decisions, principally because it specifically excludes land already zoned urban or Rural Lifestyle in a notified District Plan, or identified for future urban development in a Council Growth Strategy*".

9.12 We agree. The NPS-HPL comprises one objective and nine policies, and imposes obligations on territorial authorities. Whether any of these provisions are relevant to Hearing Stream 7 depends on whether the Council's proposed changes in this hearing stream impact on "highly productive land".

9.13 The RPS does not yet contain operative maps of highly productive land in the region, and will not do so until approximately 2025. In this interim period, clause 3.5(7) provides that "highly productive land" is land that:

(a) is:

(i) zoned general rural or rural production; and

(ii) LUC 1, 2, or 3 land; but

(b) is not:

(i) identified for future urban development; or

(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

9.14 Paragraphs 74 to 77 of the s 42A "Overarching report" sets out that the other criteria in clause 3.5(7) are not satisfied in relation to any of the land that hearing stream 7 concerns.

9.15 It follows that the NPS-HPL has no bearing on the Panel's consideration of the topics that are covered by this hearing stream.

National Adaptation Plan (NAP) and Emissions Reduction Plan (ERP)

9.16 The Resource Management Amendment Act 2020, and following Order in Council,[31] required that from 30 November 2022 matters to be considered by territorial authorities, under section 74 of the RMA, would include any ERP and NAP.

9.17 The Council notified Variation 1 on 11 August 2022 meaning that the notification pre-dates the requirement to consider the ERP and NAP.

9.18 Despite this, in its Overarching section 42A Report, the Council sets out how it has considered the ERP and NAP in relation to the PDP, Variation 1, and PC19. It is submitted that this demonstrates the Council's genuine consideration of the relevance of the ERP and NAP, including areas for improvement, and therefore, that the requirement to have regard to the ERP and NAP is satisfied.

10. SPECIFIC MATTERS RAISED IN SUBMITTER EVIDENCE

Response to Waka Kotahi in relation to the Northern Growth Development Area

10.1 As the Panel is aware, Variation 1 proposes the rezoning of land near Pukerua Bay for urban development. This is to meet Council's obligations to enable increased housing supply and intensification in accordance with the NPS-UD and the statutory directions made in the Amendment Act.

31 Resource Management Amendment Act 2020 Commencement Order 2021.

10.2 The intent of the proposed re-zoning, which includes a structure plan, is to enable an integrated and holistic approach to be taken towards the management of environmental effects and the provision of infrastructure.

10.3 In its submission, Waka Kotahi sought that an integrated planning approach be progressed to support the proposed rezoning and development of the northern growth area as a whole package. This was further expanded on in Waka Kotahi's evidence where at [4.3] of her evidence Ms Claudia Kirkbridge proposed either:

(a) The Northern Growth Development Area could be re-zoned as a 'deferred zone' until a strategy has been developed with the key stakeholders; or

(b) Provisions could be provided for under the Northern Growth Development Area Chapter that restrict subdivision use and development until an overarching transport strategy (or a similar mechanism) has been established.

10.4 Waka Kotahi may wish to expand on its two options at the hearing as we submit that both options would require precise technical drafting to ensure they did not raise *vires* issues.

10.5 In terms of the two options:

(a) Given the lack of information, it is not clear how a deferred zoning would work (or how it could meet the requirements of the Planning Standard); and

(b) Depending on how the provisions are drafted, the second option could raise *vires* issues if the overarching transport strategy was required as a standalone activity, or as a part of an initial consent (the activity status of an activity cannot be dependent

by a prior grant of consent).[32] However, it may be possible for a planning framework to be developed whereby the existence of an overarching transport strategy could amend the activity status of residential development should that strategy not be tied to a consent. The drafting of any such provision would need to be carefully considered.

10.6 In his supplementary evidence dated 9 March 2023, Mr Rory Smeaton has considered this matter further. Mr Smeaton is progressing an amendment to Policy DEV-NG-P2 in response to Waka Kotahi's refined request, we understand that this position is supported by Waka Kotahi.

Response to Kāinga Ora's interpretation regarding walkable catchments

10.7 In her evidence on behalf of Kāinga Ora, Ms Williams has challenged the Council's interpretation of walkable catchments within the context of policy 3 of the NPS-UD.

10.8 Policy 3(c)(i) of the NPS-UD requires the enablement of building heights of at least six stories within a "walkable catchment" of current and planned rapid transit stops. The term "walkable catchment" is not defined by the NPS-UD. Rather than just using a blunt definition of a walkable catchment simply being as the area within a particular number of metres of a transit stop (e.g. 800 metres as suggested), the Council has applied a definition of "walkable catchment" that takes into account the broader requirements of the NPS-UD.

10.9 As discussed in the section 32 reports, in determining what a "walkable catchment" is the Council has considered features it considers to be pre-requisites to support a well-functioning urban environment where density is increased. These factors include that a primary school, supermarket and local park are to be within walking distance of the areas where 6 storey

32 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2014] EnvC 93.

building heights are enabled. Without these matters, the Council considers that it would effectively lock in, and potentially exacerbate, unstainable transport patterns (as people generally walk or drive to primary schools and the supermarket) which would not meet the NPS-UD desire to support reductions in greenhouse gas emissions.

10.10 It is submitted that Council's approach is appropriate, in terms of best achieving the overall intent of the NPS-UD. Council's approach takes into consideration real-world factors that impact on urban environments and the ability to actually achieve density in appropriate places.

11. CONCLUDING COMMENTS

11.1 The Council remains supportive of the version of the PDP, and IPI as amended by the section 42A reports and in the supplementary evidence prepared on behalf of the Council.

11.2 At the start of the Council's presentation for Hearing Stream 7 the Council proposes that Mr Michael Rachlin and Mr Torrey McDonnell will provide an overview of the matters to be covered, focusing on the changes made by the IPI. Counsel will then be available to answer questions from the Panel.

Mike Wakefield, Katherine Viskovic, Elizabeth Neilson
Counsel for Porirua City Council

9 March 2023

APPENDIX 1

COUNCIL FUNCTIONS, STATUTORY OBLIGATIONS AND RELEVANT LEGAL TESTS

1. The legal framework for district plans (including plan changes) is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council* (as replicated below).[33]

2. Section 5 sets out the sustainable management purpose of the RMA. Applying section 5 of the RMA involves an overall broad judgement of whether a proposal will promote sustainable management. Exercising this judgment allows for the balancing of conflicting considerations in terms of their overall relative significance or proportion in the final outcome.

3. Under section 6, identified matters of national importance must be protected from inappropriate use and development. What is "inappropriate" should be assessed by what is sought to be protected and will be heavily influenced by the context. Particular regard is to be had to the "other matters" listed in section 7, which include efficiency, amenity values and ecosystems. Under section 8, the principles of the Treaty of Waitangi are to be taken into account.

4. Pursuant to section 74(ea), a territorial authority must prepare and change its district plan in accordance with –

> (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; ….

5. The planning standards were introduced as part of the 2017 amendments to the RMA, with the purpose of improving consistency in plan and policy statement structure, format, and content. The Minister for the Environment and the Minister of Conservation released the first

33 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55, more recently summarised in *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229.

set of national planning standards on 5 April 2019, and they came into force on 3 May 2019.

6. The question of weight as between the higher order planning instruments, and Part 2 of the RMA is a matter for the Panel's discretion, bearing in mind *Colonial Vineyards*, and the directedness of the wording used in relevant provisions.

7. The RMA requires that there shall at all times be one district plan for each district prepared by a territorial authority in the manner set out in Schedule 1 of the RMA.[34] The purpose of the preparation, implementation and administration of a district plan is to assist a territorial authority to carry out its functions in order to achieve the purpose of the RMA.[35]

Colonial Vineyard Limited v Marlborough District Council[36]

A. General requirements

1. A district plan (change) should be designed to accord with[37] - and assist the territorial authority to carry out – its functions[38] so as to achieve the purpose of the Act[39].

2. The district plan (change) must also be prepared in accordance with any regulation[40] and any direction given by the Minister for the Environment[41].

3. When preparing its district plan (change) the territorial authority must give effect to[42] any national policy statement[43].

4. When preparing its district plan (change) the territorial authority shall:
   a. Have regard to any proposed regional policy statement[44];
   b. Give effect to any operative regional policy statement[45].

5. In relation to regional plans:

34 Section 73(1), RMA.
35 Section 72, RMA.
36 At [17].
37 Section 74(1) of the Act
38 As described in section 31 of the Act
39 Sections 72 and 74(1) of the Act
40 Section 74(1) of the Act
41 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.
42 Section 75(3) RMA
43 The reference to “any regional policy statement” in the Rosehip list here has been deleted since it is included in (3) below which is a more logical place for it.

a. The district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order[46]; and
b. Must have regard to any proposed regional plan on any matter of regional significance etc[47].

6. When preparing its district plan (change) the territorial authority must also:
   - Have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations[48] to the extent that their context has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[49]

   - Take into account any relevant planning document recognised by an iwi authority[50]; and

   - Not have regard to trade competition[51] or the effects of trade competition;

7. The formal requirement that a district plan (change) must[52] also state its objectives, policies and the rules (if any) and may[53] state other matters.

B. Objectives [the section 32 test for objectives]

8. Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act[54].

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies[55];

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives[56] of the district plan taking into account:
    i. The benefits and costs of the proposed policies and methods (including rules); and
    ii. The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[57]; and

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47 Section 74(2)(a)(ii) of the Act
48 Section 74(2)(b) of the Act
49 Section 74(2)(c) of the Act
50 Section 74(2A) of the Act
51 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009
52 Section 75(1) of the Act
53 Section 75(2) of the Act
54 Section 74(1) and Section 32(3)(a) of the Act
55 Section 75(1)(b) and (c) of the Act (also section 76(1))
56 Section 32(3)(b) of the Act
57 Section 32(4) of the RMA

iii. If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[58].

D. Rules

11. In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment[59].

12. Rules have the force of regulations[60].

13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[61] than those under the Building Act 2004.

14. There are special provisions for rules about contaminated land[62].
15. There must be no blanket rules about felling of trees[63] in any urban environment[64].

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes.

The Colonial Vineyard decision predated the 2013 amendment to the Act coming into effect.

Accordingly, the tests poised by the Environment Court need to be read subject to the effect of that Amendment Act, specifically:

Points A1 and 2 need to be read subject to the amended section 74(1) of the Act which states:

"A territorial authority must prepare and change its District Plan in accordance with –

a. Its functions under section 31; and
b. The provisions of Part 2; and
c. A direction given under section 25A(2) [by the Minister for the Environment]; and
d. Its obligation (if any) to prepare an evaluation report in accordance with section 32; and
e. Its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
f. Any regulations".

58 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.
59 Section 76(3) of the Act.
60 Section 76(2) RMA
61 Section 76(2A) RMA
62 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009
63 Section 76(4A) RMA as added b the Resource Management (Simplifying and Streamlining) Amendment Act 2009.
64 Section 76(4B) RMA – this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009

Point C10 needs to be read subject to the amended section 32[65] including in particular:

"(1) An evaluation report required under this Act must - …

a. Examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by –
   i. Identifying other reasonably practicable options for achieving the objectives;
   and
   ii. Assessing the efficiency and effectiveness of the provisions in achieving the
   objectives; and
   iii. Summarising the reasons for deciding on the provisions; and
   …

(2) An assessment under subsection (1)(b)(ii) must –

a. identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for –
   i. Economic growth that are anticipated to be provided or reduced; and
   ii. Employment that are anticipated to be provided or reduced; and

b. If practicable, quantify the benefits and costs referred to in paragraph (a); and

c. Assess the risk of acting or not acting if there is uncertainty or insufficient information about the subject matter of the provisions….

(4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified the circumstances of each region or district in which the prohibition or restriction would have effect."

65 Introduced by section 70 of the Resource Management Amendment Act 2013

APPENDIX 2 – REVIEW OF PARTICULAR SUBMISSION POINTS RAISING SCOPE ISSUES IN RELATION TO THE IPI

SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
Fire and Emergency New Zealand (Submitter #58)		
	VARIATION 1	
Submissions on Noise chapter, including request for new definition (in Interpretation section) for "*Temporary Emergency Services Training Activity*"	The requested new definition is related to the submission that seeks that a new rule should be included in the Noise Chapter – which seeks to permit noise from Temporary Emergency Services Training (in all zones). The reasoning provided in the submission on the Noise chapter is that "*Due to urban growth, population changes and commitments to response times, FENZ may need to locate anywhere within the urban and rural environment*". The issue is that FENZ has sought that the new permitted rule apply to all zones – rather than only those zones that are amended by Variation 1. For example, as noted in the quote above, the submission states that "FENZ may need to be located anywhere within the urban **and rural** environment " The rural environment is not subject to Variation 1 or PC19, and therefore any submissions seeking amendments to the rural environment (or zones) are not "on" the Variation. Further, FENZ has sought new objectives and policies for the Noise Chapter, which is a General District-Wide Matter. If accepted, these objectives and policies would apply across the entire district. To the extent that they relate to non-urban environments, these changes are also not "on" Variation 1. The submission point could be considered to	The new definition could be within scope – on the basis that it will only be implemented in the urban environment. The relief seeking a new rule is able to be treated as "on" Variation 1 in so far as it applies to zones subject to Variation 1 – i.e. urban zones. It is not "on" the variation to amend or include rules in the rural zones. The proposed objective and policy cannot apply across the entire district – it is beyond the scope of Variation 1 to allow new district wide noise provisions. This submission point may be valid to the extent it applies to urban environments only.

SUBMISSION	POTENTIAL SCOPE ISSUE	RECOMMENDATION
	be within scope in relation to the application of the proposed provisions to urban environments, if it can be shown that the submission is a related provision for the purposes of section 80E.	
HH-R6, HH-R9	While the submission supports these provisions, the rules are not subject to Variation 1, and nor are the policies which the rules refer to. The submissions are therefore not "on" the plan change. We note that even if they were, as no changes are sought they do not provide any scope for amendment.	Submission is beyond the scope of Variation.
SUB-R10, SUB-R11, SUB-R12, SUB-R13, SUB-R14	While the submission supports these provisions, the rules are not subject to Variation 1. The submission is therefore not "on" the plan change. We note that these rules do not directly or consequentially relate to implementation of any of the mandatory outcomes.	Submission is beyond the scope of Variation.
GIZ-S6	This standard is referred to in GIZ-R3, which Variation 1 does not amend. It is therefore arguable that there is no proposal to amend the "status quo" through Variation 1, with the submission not "on" the plan change. However, given that Variation 1 amends the GIZ chapter to remove density standards from land use activities, and the connection that this standard has with that amendment, it is arguable that the submission is within scope.	On balance, the submission could be argued to be within scope.
PC19		
New objective and policy	This submission seeks a new objective and policy to essentially provide for infrastructure. It is arguable that this	Submission beyond scope.

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	relates to the housing intensification enabled by PC19, however given the targeted nature of the amendments proposed by PC19 we consider that unless FENZ can clearly explain the relationship between the proposed objective and policy and the implementation of the mandatory outcomes, this submission point should be considered as beyond scope.	
New objective and policy	It is not clear to us how the proposed new objective and policy support, or consequential on, achieving the mandatory outcomes or otherwise related to the PC19 proposals.	Submission points beyond scope.
PFZ-01 PA_{PFZ}-P1 and PA_{PFZ}-P3 PA_{PFZ}-R1, R2, R5, R6, R7, and R-10. PA_{PFZ}-R8, 9, 11, 12, 13 PA_{PFZ}-R10 PA_{PFZ}-S1 and S2, and proposed new standard New standard PB_{PFZ}-P1 and P2. New objective and policy PB_{PFZ}-R1, R2, R5, R6, R7, R8 PB_{PFZ}-R10, 11, 12 PB_{PFZ}-R9 PB_{PFZ}-S1 and S2, and proposed new standard	These provisions are either not proposed to be amended by PC19, or the submission point is unrelated to the amendments proposed by PC19. The amendments to the Plimmerton Farm Zone were specifically targeted to give effect to the mandatory outcomes required by section 80E. The relief sought by these submission points goes beyond achieving those outcomes, by seeking a range of other amendments. It is possible that the submitter may be able to show that there is a connection between the relief sought and the scope of PC19, however taken at face value there is no obvious connection. We note that a number of the submission points seek retention of the provisions as drafted, which would not provide any scope to change those provisions in any case.	Submission points beyond scope.

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Ngāti Toa (Submitter #114)		
Seeking a new overlay in High Density Residential and MDRS zoning by defining this overlay as "*is a zone where Ngāti Toa has uninhibited Tino Rangatiratanga and Mana as Tangata Whenua".*	The submission seeks the following: "*We observe that the arbitrary requirements coming from the IPI and MDRS implementation mean that Ngāti Toa will end up with zoning that it may not be desirable for the future use of their land. Since te Rūnanga have not received or claimed these lands yet, we would like these areas to be exempt from an imposed District Plan zoning*." The reasoning for this is repeated in the submission on Subdivision: "*Since Te Rūnanga, when the time comes, will receive lands as part of the Claims Act, in a regime that has been already established by the Crown, Plan Variation and provisions may pose risks around taking advantage of this returned land- and giving further limitations to the way iwi would like to develop and use that land*." The relief sought is for "*Council to identify all such land and create overlay of 'Ngāti Toa Zone' by defining this overlay as: is a zone where Ngāti Toa has uninhibited Tino Rangatiratanga and Mana as the Tangata Whenua*." To the extent that the submission indicates that the relevant land is exempt from District Plan zoning, the Council, as the responsible planning authority under the RMA, does not have the power to carve out areas of the district where the district plan will not apply, nor is it clear what regulatory regime would apply to those areas in the interim period if the relief was granted. If the eventual zoning of Ngāti Toa's land is considered to be inappropriate, that can be challenged on appeal, or be the subject of a plan change request in the future.	As addressed in the body of the legal submissions, this relief appears to seek changes that would be beyond the Council's jurisdiction.

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	The Council, may however, have jurisdiction to include an overlay across the relevant land, if it can be demonstrated that such an overlay directly relates to one of the mandatory outcomes – we anticipate that this overlay would be a qualifying matter. Note that some of the settlement areas are not in the urban environment, and therefore any submission to amend areas outside the urban environment would be beyond the scope of the Variation.	
SUB-P1 **SUB-P2** **SUB-P3** **SUB-P4** **SUB-P5** **SUB-P6** **SUB-P7**	The relief sought in relation to these policies is not clear, and it is also uncertain how the relief (or the policies) relates to the Council giving effect to the mandatory outcomes. If there is a connection between the relief sought and those outcomes, then these submission points may be within scope, but this is not currently apparent. The exception is with SUB-P7 which relates to the Future Urban Zone. That zone is not subject to Variation 1, so to the extent that this submission relates to SUB-P7 it is considered to be beyond scope.	Submission on SUB-P7 appears to be beyond scope. Currently the rest of this submission appears to be beyond scope unless the submitter can show how the relief supports or is consequential to, one of the mandatory outcomes.
KM & MG Holdings Limited (Submitter #54)		
Rezoning of Plimmerton Farm Zone	This submission point seeks to re-label the zoning of the Plimmerton Farm Zone. As the spatial extent of this zone includes non-urban residential areas (i.e. Precinct C), and it is not connected to the implementation of the mandatory outcomes, this submission point is considered to be beyond scope. A similar submission was made on the PDP by this submitter. As the land that was subject to PC18 does not	Beyond the scope of Variation 1 or PC19 (and the PDP).

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	form part of the PDP (as appears to be acknowledged in submission 149 on the PDP) this submission point is also considered to be beyond the scope of the PDP.	
Updating BORA maps in Plimmerton Farm	We consider that updating the identification of BORA falls within the purpose of the "related provisions" clauses, as making the amendments could support the implementation of the MDRS and Policy 3. To interpret the provisions otherwise would frustrate the purpose of the Enabling Housing legislation, because the MDRS and Policy 3 of the NPS-UD would not be able to be implemented, in a particular area, because of a known mapping error. To the extent that the mapping error relates to Precinct C, KM &MG Holdings will need to show that there is a direct relationship between the BORA removed from Precincts A and B and those added, removed, or amended in Precinct C. In other words, if a clear connection could be shown between providing additional residential density (in Precincts A and B) and the identification of the BORA in Precinct C there is considered to be scope for the amendment sought – in order to satisfy the "supports or is consequential to" requirement.	Submission point is within scope for Precincts A and B. If the submitter can show a connection between the amendment of BORA areas in Precincts A and B, and the amendment of such areas in Precinct C, that submission could fall within scope. The Panel will need to be satisfied that amendment the BORA maps in Precinct C "supports or is consequential to" achieving a mandatory outcome, given that Precinct C is not a "relevant residential zone".

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Greater Wellington Regional Council (Submitter #74)		
Provisions relating to impacts on freshwater	Seeking new provisions are included to "*promote the positive effects of urban development on the health and well-being of water bodies and freshwater ecosystems*". The covering submission for GWRC notes that it considers its submission is within the scope of s80E, and that some of their submissions will be "related provisions" under section 80E. However the difficulty with this submission point is that it appears to be seeking relief that is broader than the implementation of the MDRS or giving effect to the relevant policies of the NPS-UD. It is therefore difficult to determine the extent to which the relief sought supports or is consequential to either the MDRS or the relevant policies of the NPS-UD; demonstrating this link is a requirement of being considered a "related provision" under section 80E. The fact that this change is sought across the "Whole Plan" creates further scope queries, as the scope of an IPI is generally spatially limited to the urban environment – and therefore amendments to other areas, such as rural areas, are unlikely to be within the scope of Variation 1.	While these submission points seek relief in reliance on the ability to include "related provisions" in an IPI, the link between the proposed relief and the mandatory requirements in s80E is not clear.
Strategic direction objective and/or policy regarding equity and inclusiveness	GWRC has sought a new strategic objective and/or policy to provide direction regarding ki uta ki tai, partnering with mana whenua, upholding Māori data sovereignty, and making decisions with the best available information including Mātauranga Māori. GWRC appears to rely on section 74 once again, when the requirement is to have regard to the pRPS. The GWRC submission point notes that "In regard to scope, matters addressed in the policy are related to	Taken at face value, it is difficult to accept that this relief is on Variation 1. There is no explanation of how it will support or be consequential to the matters in section 80E(1), or consideration given to any spatial constraints.

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	district-wide matters which can be addressed in an IPI". While it is correct that district-wide matters are included as a type of "related provision" for the purpose of subsection 80E(2), what the GWRC submission fails to acknowledge is that subsection 80E(2) needs to be read alongside subsection 1(b)(iii), which engages the mandatory requirements. GWRC has not explained the link to those requirements at all. Furthermore, this change seeks amendments to the strategic directions provisions which will apply to all decision-making across the district (i.e. will not be limited to those areas or matters that are directly connected to the implementation of the mandatory outcomes). To the extent that the proposed objective or policy relates to those areas it is considered to be beyond the scope of Variation 1. It is also not clear that these amendments will accord with the policy intention of the changes proposed by the Amendment Act.	As noted in the above row, further particulars are required from GWRC to determine whether the relief it seeks is within the scope of Variation 1.
Strategic direction chapter Three Waters chapter Subdivision chapter Structure plans Earthworks chapter Infrastructure chapter Residential zones chapter	In line with the comments above, the focus of this submission appears to be on achieving a purpose other than implementing the MDRS or policy 3 and 4 of the NPS-UD, and there is no explanation of how the changes proposed by the relief sought "support or are consequential to" one of the mandatory outcomes. The amendments seek to achieve a new/different purpose altogether – and therefore appear to be beyond scope. Further, as noted above, the IPI generally does not have the power to amend district wide provisions – it is spatially limited to the urban environment unless there is a direct link between the relief sought and the implementation of the mandatory outcomes.	Taken at face value, relief appears beyond scope.

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Transport chapter Subdivision chapter Infrastructure chapter Structure plans	The submission states "*In regard to scope, infrastructure is a related matter under RMA section 80E(2)(d) so can be included in an IPI, and therefore is within scope of submissions. These provisions would assist in addressing effects associated with intensification*." As discussed above, for a matter to be a "related provision", it must be demonstrated that the amendment "supports or is consequential to" one of the mandatory outcomes. The fact that infrastructure is listed in section 80E(2)(d) is, of itself, not sufficient to determine that the submission is within scope. We consider that more would be required to demonstrate that all of the relief sought in this submission point can be clearly linked to achieving one of the mandatory outcomes. We note that some of the amendments appear to make the relevant areas *less* enabling of development, which would not support the mandatory requirements.	As there is some potential for certain submission points to be "related", however GWRC will need to provide further particulars and details that link the relief to the matters in section 80E(1).
Natural Hazards chapter Zone Rules	The submission states "*In regard to scope, climate-resilient urban areas may be considered in the scope of the IPI under section 80E(2)(a) as a district-wide matter*". For the reasons discussed above, it is unclear how the relief sought "supports or is consequential to" either of the mandatory outcomes. Again, a "whole plan" amendment is sought that is also beyond the scope of an IPI (which is spatially limited to the urban environment). It is unclear whether the proposed provisions relating to climate resistance are intended to be "qualifying matters" or not. In other words, it is not clear whether the relief sought is seeking to alter urban density provisions in	Taken at face value, relief appears to be beyond scope.

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	response to the possible effects of climate change, or instead limit development to where design can improve climate resilience.	
Natural Hazards chapter Infrastructure chapter Subdivision chapter	Submission seeks "whole plan" amendments to include nature-based solutions for certain development aspects. For the reasons set out above, this submission appears to be beyond scope because it is unclear how this relief will achieve one of the mandatory outcomes.	Taken at face value, relief appears to be beyond scope.
REE strategic direction Subdivision, transport, infrastructure, renewable energy provisions where relevant	For the same reasons discussed above, this appears to be beyond scope – is it unclear how the changes sought are necessary to give effect to the mandatory outcomes. The request that amendments are made to the whole plan further reinforces this.	Taken at face value, relief appear beyond scope. .
Ecosystems and indigenous biodiversity (two separate submission points)	For the same reasons discussed above, this appears to be beyond scope – is it unclear how the changes sought are necessary to give effect to the mandatory outcomes. The request that amendments are made to the whole plan further reinforces this.	Taken at face value, relief appear beyond scope. .
Residential, Commercial and Mixed-Use Zones	It appears that these submission points may be in scope, however this will depend on the specific relief that is sought which is not specifically articulated in the GWRC submission.	Submission appears to be within scope to the extent that GWRC can demonstrate a clear link between the relief sought and achieving one of the mandatory outcomes.
Papakāinga chapter Zones where relevant	Submission states "*Ensure that Deed of Settlement areas are not subject to the District Plan, as this will most effectively provide for the exercise of tino rangatiratanga by Ngāti Toa Rangatira*." Refer to earlier comments on a	Submission to retain the Papakāinga chapter is within scope, although no relief is sought.

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	similar submission by Ngāti Toa, and the scope of the Council's jurisdiction. This is discussed further in the body of our submissions.	Submission on the application of the District Plan to Deed of Settlement areas is beyond scope, for lack of jurisdiction.
Natural hazards chapter Zones Structure plans	The matters set out in these submission points are generally within scope, however spatially can likely only apply to the urban environment – therefore "whole plan" change is unlikely to be within scope. To the extent that GWRC seeks relief outside of the urban environment it will need to show how the relief links to implementation of one of the mandatory outcomes.	Within scope to the extent that the relief relates to urban environments. Beyond the urban environment the submitter will need to show a connection to implementing one of the mandatory outcomes.
Renewable Energy Generation Zone provisions	This submission point seeks amendments to the renewable energy generation provisions, the subdivision chapter and zone chapters to: • Recognise the benefits that renewable energy sources have for greenhouse gas emission reduction. • Include policy to promote energy efficiency in development such as layout in design to maximise solar and renewable energy generation. • Include as a matter of control or discretion for subdivision and comprehensive housing developments how the development provides for solar orientation of buildings to achieve passive solar gain.	Submission point is beyond the scope of Variation 1 to the extent it seeks recognition of the benefits that renewable energy sources have for greenhouse gas emission reduction.

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	While we consider that there is a connection between the second and third bullet and the mandatory outcomes, it is difficult to see how the first bullet point is connected with the implementation of those outcomes.	