

IN THE MATTER OF: **THE RESOURCE MANAGEMENT ACT 1991**

AND

IN THE MATTER OF: **REVIEW OF DISTRICT PLAN FOR PORIRUA CITY**

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**MEMORANDUM in RESPONSE**  
to  
**MINUTE 19**

**ROBYN SMITH**

**31 January 2022**

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## MAY IT PLEASE THE PANEL

1. This Memorandum is filed in relation to the Panel's invitation via Minute 19 seeking comment on the implications of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ('the Amendment Act') as far as its provisions might have a bearing on the matters before the Panel and the subject of the Porirua District Plan review (the PDP).
2. Minute 19 is subsequent to a memorandum from Mr Stewart McKenzie (PCC's Environment and City Planning Manager), dated 16 December 2021, requesting amendments to the hearing schedule for Hearing Streams 5 and 6.
3. Minute 19 is also subsequent to the Panel's invitation (by of council email dated 16 December 2021) seeking comment from submitters on the Council's request to amend the hearing schedule for the PDP.
4. My response to the 16/12/2021 invitation noted the potential implications for submitters (as well as the Council) from the Amendment Act and the need, as far as possible, for a 'level playing field'.
5. As the Panel will appreciate, I am a lay submitter. I am not blessed with resources sufficient to acquire legal advice which is clearly desirable if someone in my position were to navigate the minefield that the Amendment Act has created.
6. I have reviewed the Panel's Minute 19 and I'm grateful for its thoroughness and clarity.
7. My key take-outs from the Panel's Minute 19, the Council's memorandum (16/12/2021), and the parts of the Amendment Act that I have been able to decipher, are as follows:
  - a. The Council is required to notify a variation to the PDP - the Intensification Planning Instrument ('the IPI Variation').
  - b. Council staff believe that the IPI Variation will "...incorporate and extend the topics proposed to be heard in HS7".<sup>1</sup>
  - c. Council staff have not yet contacted submitters indicating whether the IPI Variation will address matters that are the subject of HS1 to HS6, and if so to what extent.
  - d. Clause 33(3)(d)(iii) of Part 5 of Schedule 12 (as per the Amendment Act) in essence allows the Council, at its choosing, to include or exclude any matter from the IPI Variation.
  - e. Participants in the PDP process are unlikely to know what the implications of Clause 33(3)(d)(iii), Part 5 of Schedule 12 are until such time as the IPI Variation is notified. I note that the provisions of the IPI Variation will take immediate effect in terms of section 88(B) of the RMA<sup>2</sup>.

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<sup>1</sup> Para. 6 of S. McKenzie's memorandum dated 16 December 2021

<sup>2</sup> See Clause 33(5), Part 5 of Schedule 12 (as per the Amendment Act)

- f. The Panel's Minute 19 request allows submitters the opportunity to consider and comment on the extent to which the Amendment Act is relevant to the matters raised in their submissions.
  - g. There are no 'Transitional Provisions' relating to the Amendment Act, and accordingly the Panel's decisions on submissions are (in essence) required to be made under the scenario that the Amendment Act took effect before any process relating to the PDP was commenced.
  - h. Or in other words, the Panel should ensure that as far as possible submissions, s.42A reports and evidence, etc all have taken into account, or at least been given the opportunity to take into account, the RMA as it now reads (ie; since 21 December 2021)
  - i. Of course, this requires some circumspection and I don't envy the Panel's role in this in this regard.
8. It is by no means clear the extent to which the RMA (as amended) allows the IPI Variation process to cover, revisit or simply adopt the ground already covered in the PDP proceedings to date. My suspect that, from a procedural point of view, it is unlikely (regardless of its desirability) the Panel has the liberty of re-opening those matters for submissions, s.42A assessment and evidence.
  9. Correspondence from council staff<sup>3</sup> suggests an intention by staff to keep the IPI Variation quite confined to HS7 matters. Presumably though this will be the subject of full consideration by elected councillors, and that has yet to be determined.
  10. Regardless, as the Panel has noted in Minute 19 the scope and outcome of the IPI Variation is outside its control.
  11. At the risk of stating the obvious, in the proceedings relating to HS1 – HS6 the Panel is required to recognise and provide for the Matters of National Importance [ss.6(a) to (h) of the RMA], and also to accommodate the resource management matters encompassed by s.75 of the RMA [Contents of District Plans].
  12. The Amendment Act introduced into the principal act the concept of 'Qualifying Matters'. The concept of qualifying matters only applies to land that is "within a residential zone", and because there are no transitional limitations this is a concept that the Panel must consider. I believe this is what the Panel alluded to at Para. 25 of its Minute 19.
  13. The Qualifying Matters are listed in s.77I (a) to (h) as being:
    - a. *a matter of national importance that decision makers are required to recognise and provide for under section 6:*
    - b. *a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:*

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<sup>3</sup> Mr Stewart McKenzie's memorandum dated 16 December 2021

- c. *a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:*
  - d. *a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:*
  - e. *a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:*
  - f. *open space provided for public use, but only in relation to land that is open space:*
  - g. *the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:*
  - h. *a matter necessary to implement, or to ensure consistency with, iwi participation legislation:*
  - i. *the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:*
  - j. *any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77I is satisfied.*
14. Hand in hand with the obligation referred to in Para. 12 above, is a need to consider the extent to which provisions of the PDP achieve the recognition and provision required by s.6 of the RMA. There is presumably a spectrum of some sort that addresses questions like this: *“are the PDP provisions essential for recognising and providing for the matters of national importance, or are they just relevant to, and assist with, meeting that obligation”.*
15. In this regard and by way of an example, I note that the section 32 evaluation report ‘Part 2 Natural Character and Public Access’ states that ss.6(a), (c), (d), (e), (g) and (h) of the RMA are all *“relevant to this topic.”* Council planners could potentially claim that this doesn’t necessarily mean that all the provisions of the Natural Character (NATC) chapter and the Public Access (PA) chapter are in the PDP to address those things referred to in the Amendment Act as being ‘Qualifying Matters’. We do not know because the s.32 report pre-dates the RMA being amended to accommodate the concept of ‘Qualifying Matters’.
16. As the Panel has noted<sup>4</sup>,... *“the Hearing Panel must give effect to those amendments in its decisions on submissions and further submissions.”*
17. In its consideration of the PDP provisions encompassed by HS1 to HS6, the Panel will in effect be making a judgement call about the extent to which the things listed in s. 77I (a) to (h) of the RMA are required to achieve the purpose of the Act. This would have been the case if the Amendment Act had not been enacted. The Amendment Act has not introduced a fundamentally new decision-making obligation on the Panel, it has simply assigned a label of ‘Qualifying Matters’ to some of the things the Panel is required to consider.

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<sup>4</sup> Para. 25 of Minute 19.

18. Nonetheless, 'Qualifying Matter' is, for better or worse, a new statutory construct. I submit that in its decision making the Panel is obligated to determine and subsequently specify which provisions of the PDP are prerequisites for achieving those aspects of sustainable resource management listed in ss.77I (a) to (h) of the RMA, and which aren't.
19. The Panel has had the benefit of receiving extensive submissions and related evidence, submitter statements and presentations, much of which has been for the purpose of achieving those things listed in ss.77I (a) to (h) of the RMA but prior to those things being conglomerated under the heading 'Qualifying Matters'.
20. In this regard, and as far as my own submission is concerned, the Panel will recall that my submission referred to ss. 6(a), (b), (c), (d), (f) and (h) of the RMA and in context of issues relating to: coastal and riparian margins, wetlands, esplanade reserves, significant natural areas, natural character and landscapes, ground instability, hydrological regimes and downstream effects, and historic buildings. I also referred to Open Space in the context of public land within a residential area.
21. I expect that, because of the Amendment Act, when making decisions on the matters raised in my submissions the Panel will identify which of those are considered to fall within the ambit of being necessary for achieving the 'Qualifying Matters' and which do not.
22. From my perspective all the provisions of the PDP to which I have referred in my submission, and which relate to: coastal and riparian margins, esplanade reserves, significant natural areas, natural character and landscapes, ground instability, hydrological regimes, historic buildings, and open space within residential areas, are in the PDP because they are essential for achieving one or more of the matters listed in ss.77I (a) to (h) of the RMA.
23. I ask the Panel to review the matters and issues to which this memorandum refers.
24. Thank you for your time and consideration.

Dated 31 January 2022

A handwritten signature in black ink, appearing to be 'Robyn Smith', written in a cursive style.

Robyn Smith