Before the Independent Hearings Panel
Porirua City Council

In the matter of Variation 1 to the Proposed District Plan

Legal submissions on behalf of Wellington Regional Council - Submitter 74 - scope and Change 1 to the Regional Policy Statement

Date: 9 March 2023

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MAY IT PLEASE THE PANEL

1 The Wellington Regional Council (**GWRC**) is a submitter (submission 74) on Variation 1 to the Proposed District Plan (**Variation**).

2 The purpose of these submissions is to address the Panel on two issues raised through PCC's section 42A reports – scope of submissions and the relevance of Proposed Change 1 to the Regional Policy Statement (**Change 1 to the RPS**).

3 In summary:

3.1 The approach to assessing scope of a submission on Variation 1 is different to assessing scope on a standard First Schedule process. While the assessment of whether a submission is 'on' the Intensification Planning Instrument (**IPI**) is the same as would apply when considering whether a submission is 'on' a standard plan change, there is an overlay to the IPI process in terms of what the Panel can do in response to submissions.

3.2 The overlay is that as an IPI, there are statutory constraints on what can be included in an IPI and therefore what can be achieved through submissions. This constrains the Panel's discretion when assessing submissions. In contrast, while any submissions must be *on* the IPI, as set out below, the Panel is not solely limited to making recommendations *within scope of what is raised* in those submissions. In that regard the Panel has a broader discretion to make recommendations than it would under the standard Schedule 1 process, provided the matters are raised in the IPI process and are matters that can be included in an IPI.

3.3 It is submitted that the relief being pursued by GWRC is both within scope of the Variation and an outcome that can be achieved through an IPI process.

3.4 In respect of Change 1 to the RPS, the Panel is required to 'have regard' to that policy document when making recommendations on submissions on the Proposed District Plan (**PDP**) and the Variation. This means it must give genuine thought and attention to Change 1 and cannot simply disregard it based on where it is currently at in the Schedule 1 process.

4 Each issue is addressed in turn below.

RELIEF SOUGHT

5 Before addressing the legal issues, this section sets out the relief sought by GWRC. The GWRC submission raised a number of concerns with the Variation on a range of topics. While GWRC continues to pursue all submission points, its focus through evidence and these submissions is the refined relief sought in respect of:

5.1 Embedding nature-based solutions into the Variation by including:

5.1.1 policies seeking to improve the climate resilience of urban areas through measures identified in proposed RPS Change 1 Policy CC.14 [OS74.31, FS74.94].

5.1.2 matters of control or discretion in relevant rules that consider the extent to which the development will improve climate resilience [OS74.33].

5.1.3 a matter of control or discretion for subdivision and increases in density, the extent to which the development design protects, enhances, restores, or creates nature-based solutions to manage the effects of climate change or similar [OS74.36].

5.1.4 provisions that recognise the functions of ecosystems providing nature-based solutions to climate change and avoid adverse effects of subdivision, use and development on their functions, including before they are mapped. Policies should:

(a) direct the protection of areas that already preform a function as a nature-based solution, including the many wider benefits these can have [OS74.37].

(b) encourage the restoration of areas that provide nature-based solutions [OS74.37].

(c) require water sensitive urban design and consideration of downstream effects on freshwater for activities that will increase density and are not permitted [OS74.10,74.11, 74.7, 74.8, 74.14 and FS74.169 and 135].

5.2 Inserting provisions to reduce water demand by seeking efficient water use [OS74.15], and

5.3 Acknowledging the existence of the already mapped coastal hazards as a qualifying matter to limit

development in areas of medium and high coastal hazard [OS74.76].

6 This relief is expressly addressed in the evidence of Dr Iain Dawe (new coastal hazard qualifying matter) and Ms Pam Guest (embedding of nature-based solutions and efficient water use). Specifically, see Appendix 1 to Ms Guest's evidence for suggested drafting of amendments.

SCOPE

7 Scope is a relevant issue to GWRC's submission as the relevant section 42A report has taken issue with GWRC's submission in respect of nature-based solutions and potentially, water efficiency. No scope concern has been raised in respect of the coastal hazard qualifying matter.

8 In respect of embedding nature-based solutions, the Overarching Section 42A Report addresses these submission points at section 7.9.5.2. In respect of scope, it states (emphasis added):

> 316. The submitter has stated that these provisions are related provisions but has not provided reasoning that explains why. Further, as no clear link is made between the relief sought and any of the proposed new provisions in Variation 1, I consider that these submission points are likely all out of scope.
>
> 317. The submitter may seek to clarify these submission points through the hearings process and provide some justification; however even if they were to do so, I consider that it is highly unlikely any submitters would have reasonably known exactly what relief was sought, which raises a natural justice issue.

9 In respect of water use efficiency, the relevant submission point OS74.15, is only commented on in passing in the section 42A reports. Submission point OS74.15 is listed in the summary of relief sought by GWRC at [313] of the Overarching Section 42A Report and included at [327] as part of a list of submission points the report author recommends be rejected. No clear explanation

is given by the Section 42A Report as to why it recommends rejection other than the following statement:[1]

> …(k) does not specify which subdivision policy is sought to be amended.

10 While this statement is not directed at scope, for completeness, these submissions address scope of the relief sought in that submission point.

Fairly and reasonably raised

11 In respect of issue taken with GWRC's submissions as to clarity of relief sought, submitters and natural justice, while the proposition that the relief is unclear is disputed, it is important to note that the legislation provides a clear difference between decision making on an IPI, such as Variation 1, and a standard Schedule 1 plan change. Significantly, while decision makers on a standard Schedule 1 process are limited to making decisions on submissions, and therefore matters fairly and reasonably raised in the submissions themselves, the Panel does not have the same restriction in respect of this IPI.

12 Where under the standard Schedule 1 process, recommendations and decisions are made under clauses 9 and 10 (which limit the process to recommendations and decisions on the submissions on the plan change), those provisions do not apply to the IPI process. Instead, recommendations are made under clause 99 and decisions under clause 101 of Schedule 1. Clause 99 provides that the recommendations made by the Panel are not limited to being within scope of submissions made on the IPI:[2]

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[1] Refer paragraph [324] of the section 42A report – Overarching.
[2] The ISPP decision scope is more analogous to that which applied to the Auckland Unitary Plan process under the Local Government (Auckland Transitional Provisions) Act 2010 than the RMA Schedule 1 process.

(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.

13 While the Panel's recommendations will still be limited to being **on** the IPI (ie, within scope of the IPI as notified), there is discretion for the Panel to make recommendations beyond the scope of submissions made, as long as they are within the scope of the Variation (ie, **on** the IPI). Therefore, the 'fairly and reasonably raised' assessment of relief sought through evidence/at the hearing against the submission is not necessary.

14 Regardless, the relief sought by GWRC in respect of nature-based solutions and efficient water use, was squarely raised in the submission points cross referenced above.[3] It is accepted that specific wording for that relief was not provided, but that is not a requirement of a valid submission.[4] The intention of the submission is clear, it is an issue being raised at the hearing as required by clause 99, it addresses a resource management issue and is required to be considered by the Panel as part of making its decision on the IPI.

'On' the variation

15 As the Panel is aware, the IPI process differs from the standard Schedule 1 plan making process. Clause 95(2) of Schedule 1 sets out which parts of the standard Schedule 1 process apply. Part 6 of Schedule 1 sets out the balance of the IPI process. Relevant to the question of scope, clause 6 of the First Schedule applies to submissions on IPIs.

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[3] OS74.7, 8, 10, 11, 14, 15, 31, 33, 36, and 37.
[4] *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171

16 Clause 6 of Schedule 1 sets out the submission process, and specifies (emphasis added):

> Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission *on* it to the relevant local authority.

17 The legal principles relevant to determining whether a submission is 'on' a plan change, in accordance with Schedule 1, clause 6 are well-settled.[5] It is submitted that the caselaw that applies to that clause when part of a normal First Schedule process, equally applies when that clause applies to an IPI process.

18 In respect of clause 6, the High Court confirmed in *Palmerston North City Council v Motor Machinists Limited* that a two-limbed test must be satisfied:[6]

18.1 the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

18.2 the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

19 In considering the first limb, the High Court held in *Motor Machinists* that whether the submission falls within the ambit of the plan change may be analysed by asking whether it raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular

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[5] These were most recently considered by the Environment Court in *Te Tumi Kaituna 14 Trust v Tauranga City Council* [2018] NZEnvC 21.
[6] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC1290 at [80]-[82].

resource is altered by the plan change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the plan change. However, some extensions to a plan change are not excluded. Incidental or consequential extensions are permissible if they require no substantial section 32 analysis.

20 In considering the second limb, the High Court identified the risk that the Council must guard against is that the reasonable interests of others might be overridden by a 'submissional side-wind.' The concern identified was that a plan change could be so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission, which had not been directly notified to them.

21 Subsequent to this case, the Environment Court found in *Bluehaven Management Limited v Western Bay of Plenty District Council* that a submission which went beyond an alteration to the status quo as entailed in a plan change might still be in scope, provided that:[7]

21.1 the plan change proposed some change to the management regime for the relevant activity; and

21.2 the evaluation report prepared for the plan change addresses, or should have addressed, the matter raised in the submission.

22 *Motor Machinists* is still good law and should be applied by the Panel.

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[7] *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [58]-[60].

Analysis of relief sought

23 The scope for the new coastal hazard overlay is clear and not disputed through the section 42A reports. Instead, this matter is dismissed by the Overarching Section 42A Report on the basis that the submission is seeking to rezone an area of the district as a coastal hazard zone and that zone is not a zone available under the National Planning Standards.[8] This does not recognise the clear intention of this submission point to have this area recognised as a qualifying matter. This substantive issue is addressed in the evidence of Dr Dawe. The relief sought is not to re-zone the area as a new unavailable zone, the intention is to have the area that is already subject to a mapped overlay, be subject to rules that limit intensification on the basis that those areas are impacted on by a qualifying matter and therefore modify the requirements of the MDRS.[9] This is relief that can be achieved through the IPI process.

24 In respect of the amendments sought to the Variation to embed nature-based solutions and reduce water demand by increasing efficiency of use, those are matters within the ambit of Variation 1 because it is directly related to what a well-functioning urban environment is, which is one of the MDRS requirements.

25 Objective 1 of the NPS-UD states:

> New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.

[8] Refer paragraph 393 of the Overarching Section 42A report.
[9] Specifically, as a matter required in order to give effect to the New Zealand Coastal Policy Statement 2010 (section 77I(b) of the RMA), and as a matter of national importance that decision makers must recognise and provide for, being the management of significant risks from natural hazards (section 77I(a) and 6(h) of the RMA).

26 Section 77G of the Resource Management Act 1991 (**RMA**) requires every relevant residential zone to have the MDRS incorporated into it. Clauses 6(1) and 6(2) of Schedule 3A to the RMA require that the Council include the following objective in its district plan as part of the MDRS:

> Objective 1: 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.

27 Variation 1 includes this new objective, as objective UFD-O7 in the strategic directions chapter and the new Residential Zones – General Objectives and Policies Chapter. It also includes amendments to UFD-O3 Urban Form to provide direction on achieving a well-functioning urban environment and UFD-O6 to provide direction on urban design and achieving well-functioning and healthy urban environments. Variation 1 also includes greater direction on urban design to provide for the health and well-being of people and communities.

28 Policy 1 of the NPS-UD provides guidance as to what a well-functioning urban environment is, including that, as a minimum, they have or enable a variety of homes that are resilient to the likely current and future effects of climate change.

29 While nature-based solutions are not directly referenced in the section 32 evaluation report for Variation 1, well-functioning urban environments, and resilience to climate change are. For example, at section 5.4 the section 32 Report states that:

> MDRS objective 1(a) effectively incorporates NPS-UD objective 1 into the PDP. The NPS-UD defines well-functioning urban environment as having the meaning in Policy 1 to that NPS.

30 It goes on to state that Policy 1 of the NPS-UD articulates a set of outcomes that will help achieve a well-functioning urban environment and that this requires urban environments that,

among other things, are resilient to the likely current and future effects of climate change. It then concludes that:[10]

> Where and how urban intensification is enabled is linked to achieving the well-functioning urban environment required by the NPS-UD.

31 The driver for the inclusion of nature-based solutions and water efficiency in the District Plan framework through Variation 1 is resilience to climate change. This link is clearly set out in the evidence of Ms Guest and Mr Farrant. Climate resilience is a key component of a well-functioning urban environment and therefore the changes sought by GWRC to the policy and rule framework to expressly reference climate-resilient environments, and the utilisation of nature-based solutions in respect of the same, is squarely within the ambit of Variation 1. They are amendments that are seeking to give effect to the objective of achieving a well-functioning urban environment through related provisions in the Variation.

32 It is important to draw the Panel's attention to section 80E(2) of the RMA, which clearly indicates that an IPI is able to deal with not only district wide matters, but also provisions relating to infrastructure and stormwater management (including permeability and hydraulic neutrality). This is a clear signal that provisions such as those sought by GWRC in respect of nature-based solutions, including stormwater, are within scope of what can be addressed through an IPI.

33 In respect of water efficiency by reducing demand, that too has a climate change resilience driver (ie, some places will receive more water, but others will receive less, meaning both stormwater and water supply are important components of climate resilience). Water efficiency also has a clear link to a well-functioning urban environment and specifically, a link to the enablement of

[10] Section 32 report, page 61.

communities to provide for their health and safety (NPS-UD Objective 1) and the enablement of housing to meet the day to day needs of residents (ie, access to a secure water supply) which is a mandatory policy of the MDRS and included as a new policy RESZ-P4 in the Variation.

34 Rejecting the submission point on the sole basis that it was unclear from the original submission which subdivision policy was being sought to be amended to achieve the relief is not robust and focuses on the form of the submission and not its substance.

35 Variation 1 is changing the PDP in respect of intensification and the provision of a well-functioning urban environment. The relief sought is addressing the change in the status quo and therefore the first limb of the *Motor Machinists* test is satisfied.

36 In respect of the second limb, as the matters sought by GWRC relate directly to intensification and what forms part of a well-functioning urban environment, there is not a real risk that those potentially directly affected by the submission have been denied an opportunity to respond. The second limb is therefore also satisfied.

37 While GWRC's position is that the relief it is seeking was clearly articulated in its submission, even if it were not, it is clearly articulated through its evidence, these submissions and will be addressed at the hearing. It would have well and truly been raised and therefore fall within what the Panel can decide based on Schedule 1, Clause 99.

38 For those reasons, it is submitted that the relief sought is within the scope of Variation 1 and within the scope of what the Panel can make recommendations on.

CHANGE 1 TO THE RPS

39 Change 1 to the RPS was publicly notified on 19 August 2022. 156 submissions were received. A summary of submissions was subsequently published with further submissions closing on 17 December 2022.

40 As set out on GWRC's website, Change 1 to the RPS will implement new national direction. It includes:

40.1 Enabling urban development and infrastructure in appropriate locations. Encouraging more intensive urban development that is sensitive to the environment and meets the needs of more people.

40.2 Developing objectives with its mana whenua partners to protect waterways, including:

40.2.1 How Te Mana o Te Wai applies to freshwater in the region.

40.2.2 Long-term visions for freshwater bodies in areas with completed whaitua processes.

40.3 Responding to the climate emergency:

40.3.1 Through provisions to reduce emissions.

40.3.2 By recognising the role that natural ecosystems play.

40.3.3 By reducing the impacts of climate change.

40.4 Strengthening the existing provisions for indigenous ecosystems to maintain and restore ecosystem processes and biodiversity generally, not just significant biodiversity.

41 Coastal hazards, nature-based solutions and water demand and efficiency are squarely addressed in Change 1. It provides new direction to district plans to ensure that urban intensification is not at the expense of indigenous biodiversity, freshwater, coastal environments, the region's transition to being low-emissions and climate resilient and the ability for Māori to express their cultural and traditional norms.

42 This direction is consistent with the intensification drivers of the MDRS and Policy 3 of the NPS-UD in that it is seeking that intensification occurs in the right areas. It is not a scenario where the national direction is in conflict with the regional policy direction.

The legal framework

43 Section 74(2)(a)(i) of the RMA sets out that when preparing or changing its district plan, PCC shall have regard to Change 1 to the RPS. There is nothing in the specific IPI provisions of the RMA that change this position.

44 For completeness, it is important to note that section 77G(8) of the RMA does provide that:

> The requirement in subsection (1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.

45 Given the definition of 'regional policy statement' in section 43AA of the RMA, this is a reference only to the operative Regional Policy Statement and it only relates to incorporation of the MDRS, not giving effect to the NPS-UD.

46 The meaning of 'have regard to' has been judicially considered and its meaning is well defined:[11]

> By way of starting point, the High Court refers to *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* where Wylie J said:
>
> > "We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The tribunal may not ignore the statement. It must be given genuine attention and thought, and such weight as the tribunal considers appropriate. But having done that the tribunal is entitled to conclude it 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."
>
> Similar observations are made by the Court of Appeal in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* and by the High Court in *Foodstuffs (South Island) Ltd v Christchurch City Council*. Provided that the court gives genuine attention and thought to the matters in question it is free to allocate weight as it sees fit but does not necessarily have to accept them.

47 Caselaw has established that 'have regard to' means that the decision maker needs to give genuine attention and thought to the matter, but it is not necessary that the matter is accepted. This means that material consideration is required. However, the Panel cannot simply disregard and not consider Change 1 due to its early stage in the process, or simply because PCC (and other submitters) have raised issue with it through submissions. The Panel must still give genuine thought and attention to Change 1 to the RPS when making decisions on both the Proposed District Plan, and Variation 1. It cannot simply put it to one side as suggested by the Overarching section 42A Report at 2.6.2.1:[12]

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[11] *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 123 at [51] - [52].
[12] Refer paragraphs 84 and 85.

> Proposed Change 1 is a substantial change in regional policy direction, and it comes during a period of extensive change to national direction including: amendments to the RMA (December 2021), introduction of the NPS-HPL (September 2022), amendments to NPS-FM and NES-F (December 2022). It is likely therefore that Proposed Change 1 will need to be significantly revised through the Schedule 1 process to align with new national direction.
>
> There are also a number of submissions challenging provisions within Proposed Change 1. In my opinion, the combination of both of these factors (national direction change and opposition) means that Change 1 should be given minimal weighting under s74(2) until it has progressed further through the Schedule 1 process.

48 A position which was summarised by the Panel in Minute 57 as:

> The advice we have received in the Overarching Section 42A Report (at Section 2.6.2.1) is that Proposed Change 1 should be given minimal weighting until it has progressed further through the First Schedule process.

49 The caselaw guidance is simply that the Panel must give Change 1 genuine thought and attention and it is up to the Panel what weight it is given. This does not require the Variation to give effect to Change 1, but equally, it cannot simply be discounted. As a matter of general good decision-making process, reasons should be provided for the weight it is given by the Panel. It cannot just be disregarded as that would make a nonsense of the statutory direction to have regard to a proposed regional policy statement.

50 While Change 1 to the RPS is at a reasonably early stage in the Schedule 1 process, it is signalling a significant shift in regional policy direction and it is implementing national direction. For that reason, GWRC submits it should be given weight in this Variation process and ideally consistency with its general policy intent achieved.

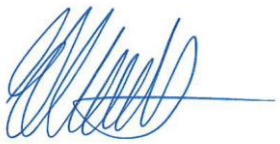
51 It is submitted by GWRC that the Panel can have regard to Change 1, and make changes to the Variation as a result of that

consideration, which remain within the scope of what can be achieved through the IPI process.

CONCLUSION

52 For the reasons set out above, and in reliance on the evidence of Dr Dawe, Ms Guest and Mr Farrant, GWRC respectfully requests that the changes sought to the Variation, as set out in its submission and as modified through the evidence of Ms Guest and Dr Dawe are made by the Panel.

Date: 9 March 2023



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