

**IN THE MATTER OF**

the Resource Management Act 1991

**AND**

**IN THE MATTER OF**

the Intensification Planning  
Instrument as a proposed plan  
change to the Upper Hutt City  
District Plan

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**LEGAL SUBMISSIONS ON BEHALF OF  
ARA POUTAMA AOTEAROA, THE DEPARTMENT OF CORRECTIONS  
(SUBMITTER #28)**

Dated: 19 April 2023

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## 1 INTRODUCTION

- 1.1 These legal submissions are made on behalf of Ara Poutama Aotearoa, the Department of Corrections (**Ara Poutama**) in relation to matters raised in its submission dated 29 September 2022<sup>1</sup> on the Upper Hutt City Intensification Planning Instrument (**Upper Hutt IPI**) to the Upper Hutt City District Plan (**UHCDP**).
- 1.2 The Upper Hutt IPI responds to the statutory requirements of the Resource Management Act 1991 (**RMA**) to strengthen implementation of the National Policy Statement on Urban Development 2020 (**NPS-UD**)<sup>2</sup> in district plans throughout the country.

### *Relief sought*

- 1.3 Within that context, Ara Poutama's submission seeks to ensure that intensification enabled through the Upper Hutt IPI will contribute to well-functioning urban environments and enable all people and communities to provide for their well-being and health and safety, both now and into the future.
- 1.4 To that end, Ara Poutama seeks the following specific relief:
- (a) Inclusion of a definition of *household* (being a term used in the existing UHCDP definition of *residential unit*) to ensure that intensification enabled under this IPI will provide for, and meet the needs of, a variety of different households.

### (the **Definitions Relief**)

Permitting community corrections activities in the City Centre, Town Centre and Mixed Use zones to better ensure good accessibility between those activities and those zones which are proposed for intensification.

- 1.5 The appropriateness of Ara Poutama's relief in terms of the purpose of the RMA and achieving the relevant objectives of the IPI and UHCDP has been comprehensively addressed in the evidence of Mr Maurice Dale on

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<sup>1</sup> Submitter #28.

<sup>2</sup> As amended in 2022.

behalf of Ara Poutama. I do not intend to repeat that careful analysis in these submissions, but simply commend it to you as a sound basis on which to approve that relief and include it in the UPCDP as part of your decision on the Upper Hutt IPI.

- 1.6 These legal submissions address what the Council Officer has identified as a potential constraint on approving the Definitions Relief, being the issue of scope, and in particular, whether Ara Poutama's desired relief falls within the scope of the IPI.

## **2 LEGAL APPROACH TO SCOPE**

- 2.1 The orthodox legal approach to determine whether a submission is within the scope of a standard RMA plan change is well-established, and is set out in *Palmerston North City Council v Motor Machinists Limited*.<sup>3</sup> The two limbs of the test are:<sup>4</sup>

- (a) Whether the submission falls within the ambit of the plan change, i.e. does it address the extent of the alteration to the status quo that the plan change proposes to address?
- (b) Whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.

- 2.2 The starting point to any scope assessment under the standard Schedule 1 process is therefore establishing the ambit of a particular plan change. In the usual course, this involves consideration of the objectives of a plan change as articulated in the notification documents, and identification of what relevant matters are, or should have been, addressed in the section 32 report.

- 2.3 On the later point, the Environment Court in *Bluehaven Management* confirmed that:

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<sup>3</sup> *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

<sup>4</sup> *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66]; and *Palmerston North City Council v Motor Machinists Limited*, above n 3, at [81] to [82].

- (a) The question of whether a submission is 'on' a plan change is not simply related to whether the section 32 evaluation report did or did not address the issue raised in the submission.
- (b) Rather, it is an inquiry as to what matters should have been included in the section 32 evaluation report and whether the issue raised in the submission addresses one of those matters.
- (c) That assessment should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission.<sup>5</sup>

2.4 In my submission, the findings of the Court in these cases provide important guidance when considering issues of scope for the Intensification Streamlined Planning Process (**ISPP**). However, as discussed further below, there are key differences between the ISPP and a standard plan change process which, in my submission, modify the extent to which those findings may be considered binding authority on questions of scope in an IPI context.

### **Intensification Requirements**

- 2.5 In contrast to a standard plan change, an IPI is required to address the prescribed matters set out in section 80E of the RMA. The ambit of the Upper Hutt IPI is set by section 80E which requires the IPI to:
- (a) incorporate the medium density residential standards (**MDRS**), included in Schedule 3A; and
  - (b) give effect to policies 3 – 5 of the NPS-UD (as applicable) in relevant residential zones and urban non-residential zones.
- 2.6 A territorial authority must also include the specific objectives and policies set out in clause 6 of Schedule 3A.<sup>6</sup>
- 2.7 In accordance with section 80E, an IPI may also amend or include:

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<sup>5</sup> *Palmerston North City Council v Motor Machinists Limited*, above n 3, at [81]; *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191, at [38] - [39].

<sup>6</sup> RMA, section 77G(5).

- (a) "Related provisions", including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS or the relevant NPS-UD policies.<sup>7</sup>
  - (b) Provisions that relate to, without limitation, district-wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management and subdivision of land.<sup>8</sup>
- 2.8 Importantly, where the Panel considers that, having regard to the applicable legal framework, alterations to the notified IPI are necessary or appropriate to address the matters in section 80E (whether or not those alterations have been requested in submissions), the Panel is authorised to recommend those alterations provided they relate to matters which have at least been raised during the hearing.<sup>9</sup>
- 2.9 In my submission, the sum effect of these provisions is to expand the recommending role of the Panel in terms of the content of an IPI beyond what is contemplated under the orthodox legal approach to scope. While it is clear that a territorial authority has an important function in preparing and notifying an IPI, that notified version does not set the finite legal boundaries of an IPI; those boundaries are established by section 80E. Where it addresses matters within those boundaries, a submission can and should therefore be considered 'on' the plan change in a *Motor Machinists* sense, whether that matter has been raised in the notified IPI or not.
- 2.10 This different statutory context for an IPI also has implications for the second limb of the *Motor Machinists* test. In my submission, the relevant natural justice considerations in this context must be viewed in light of:
- (a) the prescribed content of an IPI (under section 80E), which will enable significant change across the relevant parts of the urban environment; and
  - (b) the expanded recommending role of the Panel in determining what does and does not fall within that IPI.

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<sup>7</sup> RMA, section 80E(1)(b)(iii).

<sup>8</sup> RMA, section 80E(2).

<sup>9</sup> RMA, Schedule 1, clause 100(3).

2.11 The effect of both of these components is, in my submission, to elevate the standard of inquiry that might reasonably be expected from potentially affected parties in relation to how the Upper Hutt IPI (as notified) and submissions on that IPI might impact their interests.<sup>10</sup> Where relief sought through submissions clearly pertains to matters identified in section 80E, the further submissions process provides opportunity for an effective response, and ensures a role for those potentially affected parties in the relevant hearings.

### **3 SECTION 80E: RELATED PROVISIONS**

3.1 It is Ara Poutama’s submission that its Definitions Relief is a related provision that supports the MDRS and policies 3 – 5 pursuant to section 80E(1)(b)(iii) and therefore falls within the ambit of the IPI.

3.2 Before addressing that relief in further detail, it is first necessary to examine what constitutes “a related provision” in that context.

3.3 The Environment Court has given recent clarification on what constitutes a “related provision”, finding that:

(a) The effect of prefacing section 80E(2) with the term ‘without limitation’ is that related provisions may extend beyond the matters identified in subsections 2(a)-(g) to include other matters as well as those defined.<sup>11</sup>

(b) There is however an inherent limitation in the matters which fall within the related matters category, being that they must support or be consequential on the MDRS or policies 3, 4 and 5 of the NPS-UD.<sup>12</sup>

3.4 The Court was not required to go further in addressing how to determine whether a provision “supported or was consequential” on those matters, as it was clear on the facts of that case that the provision in question did not meet this test.<sup>13</sup>

<sup>10</sup> Refer similar discussion on the interpretation of the second limb in the Proposed Auckland Unitary Plan context in *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [169] - [172].

<sup>11</sup> *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056, at [27]

<sup>12</sup> At [28]-[29].

<sup>13</sup> The subject site was proposed for inclusion as a wāhi tapu area with the effect being to actively preclude operation of the MDRS on the site.

- 3.5 In the present circumstances, the primary principle of statutory interpretation, being to ascertain the meaning of legislation from its text and in light of its purpose and context, is instructive.<sup>14</sup> In accordance with that approach, determining whether a proposed provision supports or is consequential on the MDRS or policies 3 - 5 of the NPS-UD requires an examination not only of the MDRS and specified NPS-UD provisions themselves, but also their broader purpose, and the legislative/regulatory context in which they are located.
- 3.6 That context is primarily set by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Enabling Act**), the passage of which was intended to accelerate and strengthen implementation of the NPS-UD. While the particular focus of the Enabling Act is on intensification and enabling more people to live and operate in appropriate areas, achieving that outcome cannot be – and is not – divorced from the other objectives of the NPS-UD. Put another way, neither the RMA (as amended by the Enabling Act) nor the NPS-UD contemplates intensification in isolation from realising well-functioning urban environments. One must support the other.
- 3.7 The important connection between the intensification outcomes and the broader objectives of the NPS-UD, including realisation of a well-functioning urban environment, is recognised in the supporting evaluations for the IPI.<sup>15</sup>
- 3.8 In respect of the MDRS, that connection is also specifically secured through the objectives and policies which accompany those standards in Schedule 3A and, as noted above, are required to be inserted in district plans. Those objectives 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 in the future:

<sup>14</sup> Legislation Act 2019, section 10(1).

<sup>15</sup> See for example: Upper Hutt IPI – Section 32 Report – Volume 1: Overview at 1.2.2, page 6 and 2.2.1, page 24.

*Objective 2*

- (b) a relevant residential zone provides for a variety of housing types and sizes that respond to:
  - (i) housing needs and demand; and
  - (ii) the neighbourhood's planned urban built character, including 3-storey buildings.<sup>16</sup>

(together, the **Mandatory Objectives**)

- 3.9 In accordance with the guidance in *Bluehaven*, submissions which seek major alterations to the Mandatory Objectives will not be "on" PC56 (and, in fact, would be unlawful given the requirement to incorporate them). However, alterations to policies and methods within the framework of those objectives may be within the scope of the proposal.<sup>17</sup>
- 3.10 In that context, provisions which support the MDRS and policies 3 - 5 of the NPS-UD (as applicable) towards achieving the Mandatory Objectives and the other relevant objectives of the NPS-UD may, in my submission, be lawfully considered a "related provision" in terms of section 80E.
- 3.11 That interpretation also aligns with the identified intent of the "related provision" component of section 80E, which was recommended for insertion in the Enabling Act by the Select Committee to:

*"...enable councils to amend or develop provisions that support or are consequential on the MDRS and NPS-UD. This could include objectives, policies, rules, standards, and zones. It could also include provisions that are used across a plan relating to subdivision, fences, earthworks, district-wide matters, infrastructure, qualifying matters, stormwater management (including permeability and hydraulic neutrality), provision of open space, and provision for additional community facilities and commercial services."<sup>18</sup>*

- 3.12 In that context, the balance of these submissions address whether the specific relief sought by Ara Poutama falls within the scope of the Upper

<sup>16</sup> RMA, Schedule 3A, clause 6.

<sup>17</sup> *Bluehaven Management Limited v Western Bay of Plenty District Council*, above n 5, at [37].

<sup>18</sup> Resource Management (Enabling Housing Supply And Other Matters) Amendment Bill Environment Select Committee Report, page 7.

Hutt IPI as a related provision which supports or is consequential to the MDRS or policies 3 – 5:

#### **4 DEFINITIONS RELIEF**

4.1 With respect to the proposed definition of *household*:

- (a) The UHCDP already includes a definition for *residential unit* which is consistent with the National Planning Standards definition. The definition of *residential unit* includes the word *household* which is undefined.
- (b) The Upper Hutt IPI, as notified, proposes to alter the status quo in respect of how residential units are provided for, by:
  - (i) adopting the MDRS and in particular amending the density and scale enabled through increasing permitted building heights; and
  - (ii) including new supporting objectives in the UHCDP that require 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.<sup>19</sup>
- (c) As part of its evaluation of those changes, the Council specifically acknowledged that in order to give effect to Policies 3 and 4 of the NPS-UD, there are a range of related objectives and policies contained within the NPS-UD that also need to be given effect to and which apply to the general approach taken within the IPI to:<sup>20</sup>
  - (i) achieve a well-functioning urban environment; and
  - (ii) enable more homes that meet the needs of different households.
- (d) For the reasons set out above, I agree with that assessment, and consider that a contextual evaluation to the MDRS and the relevant

<sup>19</sup> Intensification Planning Instrument for the Upper Hutt City District Plan, District Wide Matters, Urban Form and Development: UFD-01, CMU-01, GRZ-02, HRZ-01, .

<sup>20</sup> Upper Hutt IPI – Section 32 Report – Volume 1: Overview at 1.2.2, page 6 and 2.2.1, page 24.

NPS-UD policies is appropriate in terms of establishing the ambit of the Upper Hutt IPI.

- (e) Specifically, Ara Poutama’s request to include a definition of *household* under the Upper Hutt IPI will provide for, and meet the needs of, a variety of different households, including those managed by Ara Poutama. It is also directly related to, and will help implement, the Mandatory Objectives which fall within the ambit of the Upper Hutt IPI. The Definitions Relief will therefore support the intensification facilitated by the Upper Hutt IPI.

4.2 For these reasons, the proposed definition sought by Ara Poutama may lawfully be considered a “related provision” in terms of section 80E, and is therefore within the ambit of the Upper Hutt IPI.

4.3 With respect to any natural justice considerations:

- (a) The High Court has previously recognised that the further submission process provides an opportunity for public engagement on a matter, provided that the original submission was not out of “left field”.<sup>21</sup>
- (b) To that end, the Upper Hutt IPI as notified included a number of amendments to, and proposed several new, definitions to support the operation of the intensification provisions.
- (c) While the Upper Hutt IPI did not proposed to include a definition of *household*, that relief was sought by Ara Poutama in its original submission, and for the reasons outlined above, is considered to be a “related provision” in terms of section 80E.
- (d) On the basis that amendments to the Definitions chapter in the UHCDP were proposed in the Upper Hutt IPI as notified, and that the Definitions Relief was clearly set out in Ara Poutama’s original submission, all parties that would be potentially interested in that relief would have accordingly had an opportunity to provide an effective response to that relief through further submissions.<sup>22</sup>

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<sup>21</sup> *Clearwater Resort Limited v Christchurch City Council*, above n 4, at [69].

<sup>22</sup> Applying *Clearwater Resort Limited v Christchurch City Council*, above n 4, at [66], and noting that a further submission on the relief sought by Ara Poutama was received from Kāinga Ora – Homes and Communities.

4.4 For these reasons, I submit that Ara Poutama's Definitions Relief falls within the scope of the Upper Hutt IPI, and may be subject to consideration on its merits.

## **5 CONCLUSION**

5.1 For the reasons stated, Ara Poutama therefore respectfully submits that there is scope under the RMA for the Panel to consider the merits of its submission, and to accordingly make recommendations in respect of the same.

5.2 In that regard, I submit that Ara Poutama's proposed definition of *household* should be included to ensure that the housing needs of those housed by Ara Poutama and/or its service providers within the community are met.

5.3 Ara Poutama wishes to thank the Panel for the opportunity to speak further to its submission.

**DATED** this 19<sup>th</sup> day of April 2023

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**Rachel Murdoch**

Counsel for Ara Poutama Aotearoa, the Department of Corrections