

**Before the Independent Hearings Panel
Upper Hutt City Council**

In the matter of the hearing of Submissions and Further Submissions
on the Upper Hutt City Council Proposed
Intensification Planning Instrument under Schedule 1
of the Act

**Legal submissions on behalf of Wellington Regional Council -
Submitter 41**

Date: 19 April 2023



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MAY IT PLEASE THE PANEL:

- 1 The Wellington Regional Council (**GWRC**) is a submitter (submission 41) on Upper Hutt City Council's Intensification Planning Instrument (**IPI**).

- 2 The purpose of these submissions is to address the Panel on two issues raised through UHCC's section 42A reports – scope of relief available through an IPI and the relevance of higher order directions, including Proposed Change 1 to the Regional Policy Statement (**Change 1 to the RPS**).

- 3 In summary:
 - 3.1 It is accepted that the approach to assessing scope of relief sought on the IPI is different to assessing scope on a standard First Schedule process. While the assessment of whether a submission is 'on' the 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, the Panel is not solely limited to making recommendations *within scope of what is raised* in those submissions. The Panel has a broader discretion to make recommendations than it would under the standard Schedule 1 process, provided the matters are raised at the IPI hearing and are matters that can be included in an IPI.

3.3 It is submitted that the relief being pursued by GWRC is an outcome that can be achieved through an IPI process. The relief sought supports the incorporation of the MDRS and policy 3 of the NPS-UD as it supports a well-functioning urban environment.

3.4 In respect of higher order documents, to clarify, GWRC is seeking through its submission on the IPI, that the IPI:

3.4.1 give effect to the National Policy Statement for Freshwater Management 2020 (**NPS-FM**);

3.4.2 give effect to the operative RPS; and

3.4.3 have regard to Proposed Change 1 to the RPS.

3.5 That is simply what the RMA requires.

3.6 In order to 'give effect' to the higher order documentation, it must be *implemented*. The IPI presents an opportunity for UHCC to take steps towards that (noting that the RPS has been around since 2010 so it is not new policy direction) although it is accepted that the UHCC does not need to give full effect to the NPS-FM through the IPI.

3.7 In order to 'have regard' to Change 1 to the RPS, the Panel is required to 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, or simply because there are submissions in opposition to it.

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 IPI 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 Inserting and/or amending policies and rules, including triggers for consent and matters of control or discretion, to protect and enhance the health and well-being of water bodies and freshwater ecosystems, including requirements for the application of water sensitive urban design principles and sustainable stormwater design (having regard to Proposed RPS Change 1 Policy FW.3). [OS41.5 clauses (f)(g)(h)(j)(k)(l)]
- 5.2 Including a policy and amending relevant rules to require hydrological controls for use, development and subdivision of land and insert the definition of hydrological controls from the RPS (to address the effects of increased stormwater runoff from urban intensification on urban streams) [OS41.6]
- 5.3 Including policies which seek to improve climate resilience of urban areas through measures identified in Policy CC.14 of Proposed RPS Change 1. Including policies and rules for new development areas that require the development to include actions and initiatives that improve climate resilience. Including a matter of control or discretion in relevant rules that considers the extent to which the development within the design will improve climate resilience. [OS41.10]

- 5.4 Amending the IPI as necessary to have regard to Proposed RPS Change 1 Policy CC.7 and Policy CC.12:
- 5.5 Including a policy that seeks nature- based solutions when providing for new infrastructure and in new developments, such as the use of green infrastructure.
- 5.6 Permitting the development of green infrastructure in appropriate locations and subject to necessary controls, ie, planting works undertaken by regional council.
- 5.7 As a matter of control or discretion for subdivision, including the extent to which the design protects, enhances, restores, or creates nature-based solutions to manage the effects of climate change, or similar.
- 5.8 Including provisions for recognising the functions of the 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:
 - 5.8.1 direct the protection of areas that already perform a function as a nature -based solution, including the many wider benefits these can have and
 - 5.8.2 encourage the restoration of nature-based solutions.
- 5.9 Amending UFD-O1 (well-functioning urban environment) and other relevant policies in the IPI to include environmental components of wellbeing and have regard to the articulation of the qualities and characteristics of well-functioning urban environments set out in Objective 22 of Proposed RPS Change 1.

Ensuring all Zone provisions have regard to the qualities and characteristics of well- functioning urban environments as articulated in Objective 22 of Proposed RPS Change 1, by including necessary objectives, policies, permitted standards and rules that provide for these qualities and characteristics. [OS41.18]

5.10 Inserting 3 new policies and new conditions or matters of discretion into Rules GRZ-R12, GRZ-12A, GRZ-12B, SUB-RES-R1, SUB-RES-R2, SUB-RES-R6, SUB-RES-R9, SUB-RES-R10, SUB-HRZ-R1 and Standard HRZ-S2 of the Plan, to give effect to RPS Objective 12, NPS-FM section 3.5(4), have regard to Proposed RPS Change 1 Policy FW.3 and implement Te Mahere Wai and the Te Whanganui a Tara Whaitua Implementation Programme. [Submission points 41.3 and 41.5]

6 This relief is expressly addressed in the evidence of Ms Pam Guest (embedding of nature-based solutions, additional stormwater management and water sensitive urban design) and Mr Richard Sheild (freshwater). Specifically, see Appendix 3 to Ms Guest's evidence and Appendix 1 to Mr Sheild's evidence for suggested drafting of amendments.

SCOPE OF AN IPI

The issue raised

7 Scope of an IPI is a relevant issue to GWRC's submission as the section 42A report has taken issue with GWRC's submission seeking relief that goes beyond what can be achieved by an IPI. Specifically:¹

Some of the matters requested in the submissions of GWRC above – such as S41.5, appear to be

¹ Paragraphs 121(f) and 135 of the section 42A report.

requesting amendments that go beyond the matters that can be included in an IPI under sections 80E and 80G of the RMA. Examples include the request to include provisions that control roofing materials for water quality purposes, and rules that manage earthworks and buildings within riparian areas. I do not consider requested relief such as this to be related provisions that support or are consequential on the MDRS provisions set out in Schedule 3A of the RMA. I consider they are not related matters that would support or be consequential on giving effect to the height and density requirements of Policy 3 of the NPS-UD – nor can they be clearly linked with providing for existing or proposed qualifying matters.

...I also have reservations as to whether giving effect to the NPS-FM and the incorporation of Te Mana o Te Wai fits within the scope of the matters that can be included in an IPI under sections 80E and 80G of the RMA.

The legal framework

- 8 Tier 1 territorial authorities were required to notify an IPI on or before August 2022 to achieve the obligations section in section 77G and 77N, being the incorporation of the MDRS and policy 3 requirements into the district plan framework.² An IPI is a change to a district plan or a variation to a proposed district plan. Section 80E of the RMA sets out that the requirements of an IPI:

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; or

² Section 80F, RMA.

... and

(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.

- 9 'Related provisions' include (without limitation) provisions that relate to district-wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management (including permeability and hydraulic neutrality) and subdivision of land.³
- 10 Section 77G(5) of the RMA provides that a territorial authority may include objectives and policies in addition to those set out in clause 6 of Schedule 3A, to provide for matters of discretion to support the MRDS.
- 11 Territorial authorities are required to prepare the IPI, using the intensification streamlined planning process (**ISPP**) and in accordance with clause 95 of Schedule 1 of the RMA.⁴ Territorial

³ Section 80E(2), RMA. Related provisions, include objectives, policies, rules, standards, and zones.

⁴ Section 80F, RMA.

authorities must not use the IPI for any purpose other than the uses specified in section 80E of the RMA.⁵

Analysis of relief sought

12 In summary, GWRC's position is that the relief it is seeking, as particularised in the evidence of Ms Guest and Mr Sheild, is within scope of what can be included in an IPI. Specifically, the additional policies and matters of discretion or control are directed at supporting the MDRS in accordance with both section 77G and section 80E of the RMA.

13 For the reasons set out in evidence the relief sought in respect of stronger policy direction as to the protection and enhancement of freshwater, and the embedding of nature-based solutions are drivers for the achievement of a well-functioning environment, and are in that way supportive of the incorporation of the MDRS.

14 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 includes 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.

15 The IPI includes this new objective, as objective UFD-O1.

16 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,

⁵ Section 80G, RMA.

and cultural wellbeing, and for their health and safety, now and into the future.

- 17 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.
- 18 The driver for the inclusion of nature-based solutions, additional stormwater management and water sensitive urban design in the District Plan framework through the IPI is resilience to climate change and the health of freshwater ecosystems. 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 what can be included in an IPI. They are amendments that are seeking to give effect to the objective of achieving a well-functioning urban environment through related provisions in the IPI and are therefore supportive of the MDRS, in accordance with the requirements of section 80E(2) and section 77G(5).
- 19 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.
- 20 In respect of the changes sought regarding new policies and additional matters of control or discretion for freshwater outcomes, as set out in Mr Sheild's evidence, integrated management of urban intensification and freshwater is:

- 20.1 essential to producing better environmental outcomes and achieving a well-functioning urban environment; and
- 20.2 required by the NPS-FM 2020; and
- 20.3 necessary to prevent further degradation of the urban catchments within Upper Hutt City, which are generally in a poor and degrading state, and without appropriate provision for freshwater in the IPI there will be further degradation.
- 21 As Mr Sheild sets out the NPS-FM requires that UHCC adopt an integrated approach to freshwater management, including the management of adverse effects of urban development on freshwater bodies. There is similar direction in Proposed RPS Change 1 and in the Te Whaitua Te Whanganui a Tara Whaitua Implementation Programme and Te Mahere Wai o Te Kāhui Taiao that UHCC has committed to implementing.
- 22 Taking an integrated approach to the management of freshwater that incorporates the adverse effects of urban development is essential if the health of water bodies within Upper Hutt City is to be improved. It is also essential to achieve the new urban environment objective in the IPI of 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.
- 23 Again, this relief is clearly within the scope of what can be included within an IPI as it supports the intensification enabled through the MDRS through encouraging well-functioning urban environments.
- 24 For those reasons, it is submitted that the relief sought is within the scope of what the Panel can make recommendations on, and should be recommended by the Panel.

CHANGE 1 TO THE RPS AND HIGHER ORDER DIRECTION

The issue

25 GWRC through its submission has sought amendments to the IPI that give effect to the NPS-FM, give effect to the operative RPS, and are as a result of having regard to proposed Change 1 to the RPS.

26 The section 42A report has recommended this relief be declined for a range of reasons, including scope of an IPI (addressed above), that it is not required to give effect to Proposed Change 1 to the RPS, and that the changes in respect of giving effect to the NPS-FM are poorly timed.⁶

Overview of Proposed Change 1

27 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.

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

28.1 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.

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

⁶ Refer to paragraph 121 of the section 42A report.

- 28.2.1 How Te Mana o Te Wai applies to freshwater in the region.
 - 28.2.2 Long-term visions for freshwater bodies in areas with completed whitua processes.
 - 28.3 Responding to the climate emergency:
 - 28.3.1 Through provisions to reduce emissions.
 - 28.3.2 By recognising the role that natural ecosystems play.
 - 28.3.3 By reducing the impacts of climate change.
 - 28.4 Strengthening the existing provisions for indigenous ecosystems to maintain and restore ecosystem processes and biodiversity generally, not just significant biodiversity.
- 29 As set out in the evidence of Ms Guest, Change 1 includes significant new regional direction, including on the topics of climate change, urban development, indigenous biodiversity and freshwater. Of particular significance to the IPI and the impacts of development on freshwater is Proposed Policy FW.3 in Change 1. That policy sets out GWRC's method to give effect to clause 3.5(4) of the NPS-FM.
- 30 Freshwater, 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.

31 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 proposed regional policy direction.

Having regard to Change 1

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

33 The meaning of 'have regard to' has been judicially considered and its meaning is well defined:⁷

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.

⁷ *Taggart Earthmoving Ltd v Heritage New Zealand Pouhere Taonga* [2016] NZEnvC 123 at [51] - [52].

- 34 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 UHCC (and other submitters) have raised issues with it through submissions. The Panel must still give genuine thought and attention to Change 1 to the RPS when making decisions on the IPI. It cannot simply put it to one side as suggested by the section 42A report.
- 35 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 IPI 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.
- 36 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 IPI process and ideally consistency with its general policy intent achieved.
- 37 It is submitted by GWRC that the Panel can have regard to Change 1, and should make changes to the IPI as a result of that consideration, which remain within the scope of what can be achieved through the IPI process.
- 38 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.

- 39 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, and only enables UHCC to incorporate the MDRS even where there is an inconsistent objective or policy in the RPS. There is no similar constraint in respect of any inconsistent objective or policy in a national policy statement. There is no inconsistency issue being taken here, and instead the GWRC position is simply that the IPI has, as notified, failed to have regard to Change 1, and has failed to give effect to (ie it does not implement) the operative RPS, specifically objective 12, and the directive requirements in the NPS-FM.

Giving effect to the operative RPS and NPS-FM

- 40 The statutory obligations in respect of the higher order policy direction, is that as required by section 745(3) of the RMA the District Plan must give effect to the operative RPS and give effect to the NPS-FM. Give effect to simply means 'implement'.
- 41 The section 42A report considers that the relief sought by GWRC in respect of giving effect to the NPS-FM is 'poorly timed' and that it is for the RPS to direct UHCC how to give effect to the NPS-FM. With respect, that position is unsustainable.
- 42 The obligation to give effect to the NPS-FM, is not to give effect to the NPS-FM as directed by the RPS. The IPI is required to give effect to both documents. In accordance with section 55(2D)(a) of the RMA, UHCC is required in this instance to give effect to the NPS-FM as soon as possible, not as soon as possible after the RPS gives effect to the NPS-FM. The current IPI process provides an opportunity for UHCC to give effect to the NPS-FM and GWRC considers that not giving effect to the NPS-FM as sought through its submission and evidence, will result in a failure to comply with this statutory direction.

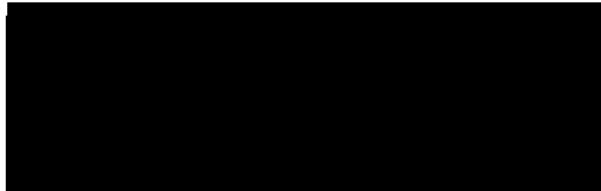
43 While there is no RPS provision that is equivalent to section 55(2D)(a) of the RMA, it is noted that the operative RPS, to which the IPI must give effect, was made operative in 2010.

44 The substance of these matters is set out in Mr Sheild's evidence.

CONCLUSION

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

Date: 19 April 2023



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Council