

BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 12 to the Operative Hamilton
City District Plan

**LEGAL SUBMISSIONS FOR HAMILTON CITY COUNCIL ON SCOPE
(AFFORDABLE HOUSING/INCLUSIONARY ZONING)**

Dated 24 March 2023

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MAY IT PLEASE THE HEARING PANEL**INTRODUCTION**

1. These submissions are made on behalf of Hamilton City Council (**HCC**) the proponent of Plan Change 12 to the Operative Hamilton City District Plan (**PC12**), HCC's Intensification Planning Instrument (**IPI**). They respond to the Hearing Panel's Direction #9¹ dated 3 March 2023 that legal submissions by the Councils be lodged on whether submissions seeking inclusionary zoning/affordable housing (**IZ/AH**) relief is within the scope of the Waikato IPIs². In accordance with the timetable in Direction #9, legal submissions have been filed on the issue on behalf of:³
 - a) Waikato Community Lands Trust, Waikato Housing Initiative, Habitat for Humanity, Momentum Waikato, and Bridge Housing Trust (joint submitters), and Waikato Housing Initiative (as a separate submitter) (together **IZ/AH submitters**) dated 10 March 2023;
 - b) The Adare Company Limited (**Adare**) dated 17 March 2023; and
 - c) Kāinga Ora – Homes and Communities dated 17 March 2023.
2. To be clear, HCC's submissions address whether the IZ/AH submissions are within the scope of PC12. They do not address the scope of Waipā District Council's Plan Change 26, nor Waikato District Council's Variation 3.
3. For the reasons set out below, HCC submits that submissions seeking

¹ Direction #10 on Plan change 26 and Variation 3.

² Independent Hearing Panel Direction #9 dated 3 March 2023, para 2(c).

³ Rangitahi Limited filed legal submissions dated 17 March 2023 which only apply to Waikato District Council's Variation 3.

IZ/AH relief are beyond the scope of PC12.

INCLUSIONARY ZONING/AFFORDABLE HOUSING SUBMISSIONS

4. The IZ/AH submitters have lodged submissions which seek to include IZ/AH provisions in PC12⁴. HCC agrees with the summary of the relief sought by the IZ/AH submitters as out in paragraph 5 of Adare’s legal submissions.
5. It is important to emphasise that the terms “Inclusionary Zoning” and “Affordable Housing” are not amenable to general findings of whether they are within, or beyond the scope of PC12. The terms are not defined and can mean different things to different people. The correct approach to determining scope is to examine the specific relief sought under these broad terms. Sweeping statements about these terms and topics are generally unhelpful in the examination of scope.

LEGAL PRINCIPLES: SCOPE OF RELIEF

6. The legal principles governing the scope of the relief that can be sought through an IPI were set out for the Hearing Panel in the Joint Opening Legal Submissions of Counsel for the Councils dated 8 February 2023 at paragraph 5 and are not repeated here.
7. To be within the scope of PC12, submissions must sit within the limitations prescribed in s 80E of the Amendment Act, and must be “on” PC12 in accordance with the established bipartite test in *Clearwater Resort Ltd v Christchurch City Council (Clearwater)*, as follows:
 - a) A submission can only fairly be regarded as being “on” a plan

⁴ Submission points 298.1, 287.1, 287.2, 287.3, 287.4, 287.5, 287.6, 287.7, 287.8, 287.8, 287.10, 287.11, 287.13, 287.14, 287.15, 287.16, 287.17 and 287.18.

change or variation “if it is addressed to the extent to which the plan change or variation alters the pre-existing status quo”; and

- b) If the effect of regarding a submission as “on” a plan change or variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against finding that the submission was “on” the plan change or variation.
8. HCC agrees with Adare’s summary and interpretation of the High Court decision *Albany North Landowners v Auckland Council*⁵ (**Albany North**) as set out in paragraphs 35 to 38 of its legal submissions. In particular, that *Albany North* does not distinguish, nor modify the *Clearwater* tests. HCC submits that *Clearwater* and *Motor Machinists* remain the leading authorities on the issue of scope, including with respect to an IPI.

AMBIT OF IPI

9. Dealing first with the matters included in an IPI, the central purpose of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) is to rapidly accelerate the supply of housing where housing demand is high⁶. Pursuant to that singular purpose, under s 80E(1)(a) of the RMA, an IPI must do the following (**mandatory elements**):
- a) Incorporate the medium density residential standards (**MDRS**) into all relevant residential zones; and
 - b) Give effect to Policies 3 and 4 of the National Policy Statement on Urban Development (**NPS-UD**) in respect of urban environments⁷.

⁵ [2016] NZHC 138.

⁶ Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 2021 83-1, explanatory note.

⁷ In the case of a tier 1 territorial authority, such as HCC.

10. Section 80E(1)(b) provides that an IPI may also amend or include any of the following (**discretionary elements**):
 - a) Provisions relating to financial contributions;
 - b) Provisions to enable papakāinga housing in the district; and
 - c) Related provisions that support or are consequential on the MDRS or Policies 3 and 4 of the NPS-UD, as applicable.
11. Section 80G is clear that HCC must not use the IPI “for any purpose other than the uses specified in s 80E”⁸.
12. The question for the Hearing Panel is whether the IZ/AH submissions seek relief which falls within, or outside of, the mandatory or discretionary elements of an IPI in the context of PC12 as notified.

IPI CONSTRAINTS WHICH IMPACT SCOPE

13. The first constraint on scope is found in s 80G which dictates that an IPI must not be used for any purpose other than those specified in s 80E. Section 80E(1)(b) establishes a confined set of discretionary elements that may be included in an IPI. Relief seeking amendment to provisions which are not addressing the mandatory MDRS requirements must fit within this set of discretionary elements. Relief relating to IZ/AH falls into this category.
14. Dealing with the criteria for these discretionary elements, relief relating to IZ/AH is not framed as papakāinga housing, so cannot be considered under that criteria.⁹ Nor can it be said that relief relating to IZ/AH is

⁸ RMA, s 80G(1)(b).

⁹ RMA, s 80E(1)(b)(ii).

supporting or consequential on the MDRS or Policies 3 and 4.¹⁰ This is because the introduction of increased residential densities through the IPI does not give rise to an effect which needs addressing through IZ/AH. In fact, the opposite is intended to occur; that is, increased densities will increase supply and contribute to easing housing affordability. On this basis it is difficult to make the causative link that would establish IZ/AH relief as *supporting or consequential on the MDRS or Policies 3 and 4* as required under s 80E(1)(b)(iii). Accordingly, relief related to IZ/AH does not fit within this criteria.

15. On that basis, that only leaves the criteria set out at s 80E(1)(b)(i) which enables, as a discretionary element of an IPI, provisions relating to financial contributions. HCC has introduced financial contribution provisions within the IPI. So, if the relief relating to IZ/AH was framed as financial contribution provisions, there would be scope, at least under s 80E, for that relief to be considered by the Hearing Panel.
16. Notably, much of the relief sought under the IZ/AH submissions is not framed as a financial contribution, and those aspects of the relief are outside the ambit of s 80E and therefore beyond the scope of an IPI. Some of the relief is framed as a financial contribution regime, and this relief is within the ambit of s 80E.
17. However, being within the ambit of s 80E is only the first scope hurdle. The second hurdle is that the relief sought must meet both limbs of the *Clearwater* test. Here, even framed as a financial contribution, the relief relating to IZ/AH fails to meet the *Clearwater* tests for the reasons set out below.

¹⁰ RMA, s 80E(1)(b)(iii).

CLEARWATER LIMB ONE

18. Having concluded above that only the relief framed as a financial contribution is within the scope of s 80E, it is necessary to next assess whether the IZ/AH relief purporting to be a financial contribution is “on” PC12 in accordance with the first limb of *Clearwater*.
19. For the IZ/AH relief to be “on” PC12, it must address the extent to which PC12 alters the status quo. That is, it must be directly connected to the “degree of notified change proposed to the extant plan”.
20. Under PC12, the changes to HCC’s financial contributions regime are limited to establishing that financial contributions may be required for permitted and consented activities and providing for them to be collected for three additional purposes, each of which is linked to offsetting or addressing the effects of the increase in housing density and intensification enabled by PC12 on:
 - a) The Waikato River and its tributaries in accordance with the statutory requirements of Te Ture Whaimana;
 - b) Residential/streetscape amenity; and
 - c) Local network infrastructure renewals.
21. Given PC12’s very narrow alteration to the “status quo”, and the focussed purposes to which financial contributions can be applied, it is not open to submitters to make wholesale changes to the financial contributions regime by way of submission. Introducing through submissions an additional purpose for collecting a financial contribution will only be “on” PC12 if it similarly addresses an effect of intensification. As stated above, enabling increased housing supply and intensification does not exacerbate housing unaffordability. It is generally accepted, or

intended at least, that it will have the opposite effect. A financial contribution for the purpose of providing for affordable housing is therefore incongruous with the ambit of the notified financial contribution provisions, and therefore is not “on” PC12.

22. For the foregoing reasons, the relief does not meet the first limb of the *Clearwater* test. It is therefore beyond the scope of PC12. Even if the Panel disagreed, the IZ/AH relief also fails the second limb of the test for the reasons that follow.

CLEARWATER LIMB TWO

23. The IZ/AH relief is wide-ranging and goes beyond the limited scope of PC12. There are no IZ/AH provisions in the ODP and their introduction is likely to have implications for anyone seeking to undertake residential development in Hamilton. Accordingly, a significant number of people may be affected.
24. IZ/AH is not addressed in the Amendment Act, nor the PC12 documents, nor are the introduction of IZ/AH provisions sufficiently evaluated in the s 32 report. Notably, nothing in the list of references in the s 32 report that the IZ/AH submitters point to as demonstrating that IZ/AH relief is “on” PC12, refer to IZ/AF¹¹. No person reading the s 32 report would understand, based on either such oblique references as ‘enabling housing choice’ and ‘providing for a range of housing typologies’ nor the evaluation of the proposed changes to financial contributions, that IZ/AH provisions might be the subject of submissions on PC12, prompting them to make a decision about whether to become involved in PC12 by lodging a submission.
25. In HCC’s view, there is a real and appreciable prospect that, if the relief

¹¹ Opening submissions on scope for joint submitters dated 10 March 2023, para 20.

is determined to be in scope, that persons directly or potentially affected would be denied an effective opportunity to respond through the plan change process. The changes sought by the IZ/AH submissions may have important impacts on those persons. IZ/AH relief is novel and “out of left-field” in the context of PC12. For these reasons the second limb of *Clearwater* is not met.

CONCLUSION

26. PC12’s central purpose is to enable housing supply through proposed plan provisions that increase housing density. Its purpose is confined by s 80E of the RMA. Parliament has not enabled affordability provisions to be included, unless they can be addressed through the financial contributions regime.
27. PC12’s notified financial contributions provisions are focussed on the effects of intensification and, having regard to the bipartite tests in *Clearwater*, are not amenable to the purpose extension sought by the IZ/AH submitters. Accordingly, the Hearing Panel has no jurisdiction to grant the relief sought in the IZ/AH submissions.

Dated 24 March 2023



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