BEFORE THE 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, Proposed Plan Change 26 to the Operative Waipā District Plan, and Variation 3 to the Proposed Waikato District Plan

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JOINT OPENING LEGAL SUBMISSIONS OF COUNSEL FOR THE COUNCILS FOR JOINT OPENING HEARING

Dated 8 February 2023

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1. INTRODUCTION

1.1 Proposed Plan Change 26 to the Operative Waipā District Plan (**Plan Change 26**), Proposed Plan Change 12 to the Operative Hamilton City District Plan (**Plan Change 12**) and Variation 3 to the Proposed Waikato District Plan (**Variation 3**) are Intensification Planning Instruments (**Waikato IPIs**) under section 80E of the Resource Management Act 1991 (the **Act**).

1.2 These Joint Opening Legal Submissions are submitted on behalf of Waipā District Council, Hamilton City Council and Waikato District Council (the **Councils**) for the purpose of the Joint Opening Hearing scheduled to be held in Hamilton from 14 to 17 February 2023. The Councils have submitted joint legal submissions to ensure consistency in the approach taken by the Councils and to avoid unnecessary duplication in individual legal submissions submitted by each Council.

1.3 The Joint Opening Hearing is to be limited to the presentation of legal submissions and strategic planning evidence which together will provide the Independent Hearing Panel (the **Panel**) with an overview of the approaches that each of the Councils have taken to the implementation of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**). It is intended to be a "scene setting" hearing that will help inform the panel of the key issues and assist it to determine how the later hearings of the substantive technical and lay evidence should best be conducted.[1]

1.4 These Joint Opening Legal Submissions will address:

(a) The legal framework for district plans;

(b) The enactment of the Amendment Act;

[1] Paragraph 2.2 of Direction #1 dated 23 August 2022 and Direction #5 dated 20 December 2022.

(c) The matters that may be included in an Intensification Planning Instrument (**IPI**);

(d) The scope of relief that may be sought on the IPIs;

(e) The Medium Density Residential Standards (**MDRS**);

(f) Policies 3, 4 and 5 of the National Policy Statement on Urban Development 2020 (**NPS-UD**);

(g) The evaluation of qualifying matters;

(h) Financial contributions; and

(i) The Intensification Streamlined Planning Process (**ISPP**).

2. THE LEGAL FRAMEWORK FOR DISTRICT PLANS

2.1 The Waikato IPIs propose changes to the Operative Waipā District Plan, the Operative Hamilton City District Plan, and the Proposed Waikato District Plan. The legal framework for district plans is set out in sections 72-77 of the RMA. A summary of the mandatory requirements for district plans was set out by the Environment Court in *Colonial Vineyard Ltd v Marlborough District Council*[2] (***Colonial Vineyard***). These matters remain part of the matters the Panel is required to consider in making recommendations on the Waikato IPIs. An updated summary that incorporates both amendments that have been made to the relevant RMA provisions since the issue of *Colonial Vineyard,* and the new requirements introduced through the Amendment Act, is set out in **Appendix A** to these submissions for ease of reference.

[2] [2014] NZEnvC 55 at [17].

3. THE RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT ACT 2021 (AMENDMENT ACT)

3.1 The Act was amended by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) which came into force on 21 December 2021. The passing of the Amendment Act followed an urgent parliamentary process from the introduction of the Bill on 19 October 2021, a reduced select committee process of 37 days, to the final reading of the Bill on 14 December 2021.

3.2 The Amendment Act imposes obligations on "specified territorial authorities" which include all tier 1 territorial authorities, and any tier 2 or 3 territorial authorities required by regulations to prepare and notify on IPI.[3] In the Waikato Region, the tier 1 territorial authorities include Hamilton City Council, Waikato District Council and Waipā District Council. To date, Rotorua District Council is the only tier 2 territorial authority required to prepare and notify an IPI.[4] No tier 3 territorial authorities have been required by regulations to prepare and notify an IPI.

3.3 The Amendment Act required that an IPI be prepared and notified by 20 August 2022.[5] In the Waikato Region, the following IPIs were prepared and notified:

(a) Plan Change 12 was notified by Hamilton City Council on 19 August 2022;

(b) Plan Change 26 was notified by Waipā District Council on 19 August 2022; and

(c) Variation 3 was notified by Waikato District Council on 19 September 2022.

[3] Section 2(1) of the Act, definition of "specified territorial authority".
[4] [*insert name of notice*]
[5] Section 80F(1) of the Act.

3.4 The IPIs are required to be prepared:[6]

(a) Using the ISPP;

(b) In accordance with clause 95 of Schedule 1 (which identifies which provisions of Schedule 1 apply to the ISPP); and

(c) In accordance with any requirements specified by the Minister in a direction made under section 80L.

3.5 On 14 May 2022 the Minister issued a direction under section 80L of the Act.[7] The Notice requires the Councils to notify decisions on the independent hearing panels' recommendations in accordance with clause 102 of Schedule 1 of the RMA by 31 March 2024.

3.6 As the Amendment Act made changes to the Act, all subsequent references in these Joint Opening Legal Submissions will be to the relevant section of the Act.

4. MATTERS THAT MAY BE INCLUDED IN AN INTENSIFICATION PLANNING INSTRUMENT

4.1 The matters that may be included in an IPI are described in section 80E of the Act. Unlike a standard plan change or variation, the IPIs:

(a) **Must** contain the mandatory matters set out in section 80E;

(b) **May** contain the discretionary matters set out in section 80E; and

(c) **May not** be used for any purpose other than the uses specified in section 80E.[8]

[6] Section 80F(3) of the Act.
[7] The Resource Management (Direction for the Intensification Planning Process to Hamilton City Council, Waikato District Council, Waipā District Council and Rotorua District Council) Notice 2022.
[8] Section 80G(1)(b) of the Act.

Mandatory elements

4.2 Section 80E(1)(a) of the Act requires that an IPI **must**:

(a) Incorporate the Medium Density Residential Standards (**MDRS**); and

(b) Give effect to, in the case of tier 1 territorial authorities, policies 3 and 4 of the NPS-UD.

4.3 The requirements of the MDRS, and policies 3 and 4 of the NPS-UD, will be addressed in detail in sections 5 and 6 respectively of these Joint Opening Legal Submissions.

Discretionary elements

4.4 Section 80E(1)(b) provides that an IPI **may** also amend or include the following provisions:

(a) Provisions relating to financial contributions if the Council chooses to amend its district plan under section 77T. Financial contributions will be addressed in section 8 of these Joint Opening Legal Submissions.

(b) Provisions to enable papakāinga housing in the district.

(c) Related provisions, including objectives, policies, rules, standards and zones, that support or are consequential on the MDRS or policies 3 and 4 of the NPS-UD. "Related provisions" expressly includes (but is not limited to) district wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management and subdivision of land. The requirements for qualifying matters will be addressed in detail in section 7 of these Joint Opening Legal Submissions.

5. SCOPE OF RELIEF ON AN INTENSIFICATION PLANNING INSTRUMENT

5.1 As with a standard plan change or variation process, submissions on an IPI are made under clause 6(1) of Schedule 1 to the RMA which provides:[9]

> 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.
>
> [Emphasis added].

5.2 A person may, in the prescribed form, make a submission seeking decisions "on" a proposed plan. If the relief sought in the submission is not "on" the plan change or variation, there is no jurisdiction for relief to be granted by the Panel (or, on appeal, the Court).[10]

5.3 In a standard plan change or variation process, clause 10 requires a council to give a decision on the provisions of the notified plan change and matters "fairly and reasonably raised" in submissions.[11] However, clause 10 does not apply in an ISPP. Under clause 99 of Schedule 1, the Amendment Act has introduced a new dimension to scope that applies only to an IPI. It provides (relevantly):

> (1) An independent hearings panel must make recommendations to a specified territorial authority **on the IPI**.
> (2) The recommendations made by the independent hearings panel-
> **(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.**
>
> [Emphasis added].

5.4 The wording of clause 99(1) mirrors clause 6 in that it empowers the Panel to make recommendations that are "on the IPI" but subclause (2) broadens its jurisdiction so that the scope of its recommendatory power

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[9] Section 80F requires Council to prepare the IPI using the Intensification Streamlined Planning Process (**ISPP**) in accordance with clause 95 of Schedule 1. Clause 95 specifies that Clause 6 of Schedule applies to the ISPP.

[10] *Federated Farmers & Ors v Otorohanga District Council* [2014] NZEnvC 070 at [11].

[11] *Federated Farmers & Ors v Otorohanga District Council* [2014] NZEnvC 070 at [11]; *Royal Forest and Bird Protection Society v Southland District Council* [1997] 145 at [43].

is bounded by the notified IPI at one end and matters raised in the hearing at the other. This contrasts with the orthodox approach which limits scope to matters that are deemed "on" the plan change provided they are raised in submissions.

5.5 Whether a matter raised in the hearing is "on" the IPI remains subject to the established tests, notwithstanding that it may be consistent with what is enabled under the Act. The relief sought by submitters must still meet the bipartite test in *Clearwater Resort Ltd v Christchurch City Council* (***Clearwater***), as follows:[12]

(a) A submission can only fairly be regarded as being "on" a plan 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.

Out of scope submissions

5.6 The Councils have received a number of submissions which are potentially beyond the scope of the notified Waikato IPIs. These submissions have been grouped into four categories in the Themes and Issues report dated 15 December 2022, as follows:[13]

(a) Zoning requests: Submissions seeking a rezoning of individual or groups of properties.

(b) Inclusionary Zoning/Affordable Housing provisions: Submissions seeking provision for 'inclusionary zoning' as a pathway to

[12] [2013] NZHC 1290.
[13] Paragraphs 4.30 – 4.49.

increasing the supply of affordable housing in each local authority area. Options to implement this zoning include either the provision of a 10% requirement for greenfield sites and larger scale brownfield development of 5 or more units of affordable units or an equivalent rate of financial contribution.

(c) Activity specific requests: Submissions seeking that activity specific provisions be inserted into the IPIs.

(d) Climate change: Waikato Regional Council has submitted on a range of points relating to climate change seeing the IPIs as an opportunity to give effect to national and regional climate change policy.

5.7 Matters of scope are not the subject of the Strategic Hearing. As Waipā District Council's Plan Change 26 requires a determination on scope issues prior to its substantive hearing commencing in April 2023, the Panel has established a submission exchange timetable for Plan Change 26 submissions in the rezoning category.[14] The Panel has directed that all procedural issues concerning scope for Waikato District Council's Variation 3 and Hamilton City Council's Plan Change 12, and all remaining procedural issues concerning scope for Plan Change 26, be addressed at the conclusion of the Strategic Hearing[15]. It is anticipated that decisions on the relevant submissions will be made at the end of an as-yet-to-be-determined submission timetable, well ahead of the substantive hearings.

[14] Joint memorandum of counsel dated 22 December 2022, Appendix 2; Direction #8 for Plan Change 12 and Variation 3, Direction #9 for Plan Change 26.
[15] Direction #8 for Plan Change 12 and Variation 3, Direction #9 for Plan Change 26.

6. MEDIUM DENSITY RESIDENTIAL STANDARDS (MDRS)

6.1 Section 77G(1) requires that every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone. As the MDRS is mandatory, the Councils are not required to evaluate the MDRS under section 32 of the Act, and the Panel does not have power to amend the MDRS, except where a qualifying matter applies (sections 77I and 77O of the Act).[16]

Incorporation of the MDRS

6.2 The Medium Density Residential Standards or MDRS is defined to mean the requirements, conditions, and permissions set out in Schedule 3A of the Act.[17]

6.3 Schedule 3A of the Act contains two parts:

Part 1 (clauses 1 to 9)

(a) Requirements regarding the activity status of residential units and the subdivision of land for the purpose or the construction and use of residential units (clauses 2, 3 and 4);

(b) Requirements relating to the public and limited notification of applications for resource consent for residential units and the subdivision of land for the purpose or the construction and use of residential units (clause 5);

(c) Objectives and policies (clause 6);

(d) Additional requirements relating to subdivision rules and standards (clauses 7, 8 and 9);

[16] Acknowledged in paragraph 7 of Direction #5/6.
[17] Section 2(1) of the Act, definition of "medium density residential standards or MDRS".

Part 2 (clauses 10 to 18)

(e) Density Standards including:

(i) Number of residential units per site (clause 10);

(ii) Building height (clause 11);

(iii) Height in relation to boundary (clause 12);

(iv) Setbacks (clause 13);

(v) Building coverage (clause 14);

(vi) Outdoor living space (per unit)(clause 15);

(vii) Outlook space (per unit) (clause 16);

(viii) Windows to street (clause 17); and

(ix) Landscaped area (clause 18).

6.4 A short interpretation section is contained at clause 1 of Schedule 3A. This section assists in the application of clauses 2 to 18 but is not itself required to be included in the district plan.

6.5 In addition, clause 2(2) provides that there must be no density standards included in a district plan additional to those set out in Part 2 of Schedule 3A relating to a permitted activity for a residential unit or building. "Density standard" is defined in Schedule 3A to mean:

> … a standard setting out requirements relating to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to street, or landscaped area for the construction of a building.

6.6 Clause 2(2) does not prevent additional standards which do not fall within the definition of "density standards" and this is specifically recognised by

reference to related provisions such as fencing and stormwater management in section 80E(1)(b).

6.7 Further guidance regarding incorporation of the MDRS is contained in sections 77G and 77H of the Act, which clarify that a Council **may**:

(a) Create new residential zones or amend existing residential zones;[18]

(b) 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 MDRS and to reflect any more lenient density standards;[19]

(c) Make the requirements of Schedule 3A less enabling of development than provided for in Schedule 3A, if authorised to do so under section 77I (which relates to the application of qualifying matters and will be addressed in section 7 of these Joint Opening Legal Submissions);

(d) Enable a greater level of development than provided for under the MDRS by omitting one of more of the density standards or including rules that are more lenient than the density standards.[20]

6.8 In respect of the more lenient provisions enabled under section 77H:

(a) Plan Change 12 incorporates more lenient provisions with respect to the following:

(i) General Residential Zone:

- Building Coverage

(ii) Medium Density Residential Zone:

[18] Section 77G(4) of the Act.
[19] Section 77G(b) of the Act.
[20] Section 77H of the Act.

- Building height
- Height in Relation to Boundary
- Building Coverage

(iii) High Density Residential Zone:

- Building height
- Building setbacks
- Building Coverage
- Outlook space
- Landscaping
- Height in Relation to Boundary; and

(b) Plan Change 26 and Variation 3 do not incorporate provisions that are more lenient than the MDRS.

6.9 It is submitted that, unless required by policy 3 of the NPS-UD, the Councils are not required to incorporate provisions more lenient than the MDRS. However, where submitters have requested more lenient provisions, the Councils will consider and respond to these submissions at the substantive hearings.

Relevant residential zones

6.10 The MDRS is required to be incorporated into every relevant residential zone.[21] There are a number of definitions which are relevant to identifying whether an existing zone in a district plan is a "relevant residential zone".

[21] Section 77G(1) of the Act.

6.11 Section 2(1) of the Act provides the following definition of "relevant residential zone":

> (a) Means all residential zones; but
> (b) Does not include-
> (i) A large lot residential zone:
> (ii) An area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:
> (iii) An offshore island:
> (iv) To avoid doubt, a settlement zone.

6.12 In turn, "residential zone" is defined to mean:

> … all residential zones listed and described in standard 8 (zone framework standard) of the national planning standard or an equivalent zone.

6.13 The following residential zones are listed and described in standard 8 of the National Planning Standard:

Table 13: Zone names and descriptions

Zone name	Description
Large lot residential zone	Areas used predominantly for residential activities and buildings such as detached houses on lots larger than those of the Low density residential and General residential zones, and where there are particular landscape characteristics, physical limitations or other constraints to more intensive development.
Low density residential zone	Areas used predominantly for residential activities and buildings consistent with a suburban scale and subdivision pattern, such as one to two storey houses with yards and landscaping, and other compatible activities.
General residential zone	Areas used predominantly for residential activities with a mix of building types, and other compatible activities.
Medium density residential zone	Areas used predominantly for residential activities with moderate concentration and bulk of buildings, such as detached, semi-detached and terraced housing, low-rise apartments, and other compatible activities.
High density residential zone	Areas used predominantly for residential activities with high concentration and bulk of buildings, such as apartments, and other compatible activities.

6.14 The Hamilton City Operative District Plan[22] and the Operative Waipā District Plan have not yet been modified to reflect the National Planning Standard. However, the MDRS has been applied to the residential zones

[22] Proposed Plan Change 5: Peacocke Structure Plan to the City of Hamilton Operative District Plan reflects the National Planning Standard. At the time of writing these submissions, decisions on the plan change are pending.

which are the equivalent of the residential zones listed in the above standard (with the exception of the large lot residential zone which is expressly excluded).

6.15 The Proposed Waikato District Plan (decisions version) was modified to reflect the National Planning Standard. Variation 3 has therefore applied the MDRS to the residential zones which are identified in the table above (with the exception of the large lot residential zone which is expressly excluded).

6.16 Both the Waikato District and the Waipā District contain residential zones which are located in urban areas which had a resident population of less than 5,000 in the 2018 census. Consideration of whether these areas fall within the exception in clause (b)(ii) will be provided in submissions by the respective councils.

IPI must show how the MDRS is incorporated

6.17 Section 80H requires the Councils to show in their IPI which provisions incorporate the objectives and policies in clause 6 of Schedule 3A and the density standards in Part 2 of Schedule 3A, and which provisions of the operative district plan are replaced by these provisions. This is particularly important in circumstances where the rules of the IPI will have immediate legal effect under section 86BA of the Act, as the new rules are treated as operative.

6.18 Section 80H has been addressed:

(a) In Plan Change 12 by the use of green shading;

(b) In Plan Change 26 by the use of orange shading; and

(c) In Variation 3 by the use of grey shading.

7. POLICIES 3 AND 4 OF THE NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT 2020 (NPS-UD)

7.1 Section 80E provides that an IPI must give effect to, in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD. The definition of "tier 1 territorial authority" includes Hamilton City Council, Waikato District Council and Waipā District Council.[23]

7.2 Section 77G requires that every residential zone in an urban environment of a specified territorial authority must give effect to policy 3 in that zone.

7.3 Section 77N requires that, in giving effect to policy 3, the territorial authority must ensure that the provisions in its district plan for each urban non-residential zone within an urban environment gives effect to the changes required by policy 3.

7.4 Policy 3 of the NPS-UD (as amended by the Amendment Act) provides as follows:

> **Policy 3:** In relation to tier 1 urban environments, regional policy statements and district plans enable:
>
> (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
>
> (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
>
> (c) building heights of at least 6 storeys within at least a walkable catchment of the following:
>
> (i) existing and planned rapid transit stops
>
> (ii) the edge of city centre zones
>
> (iii) the edge of metropolitan centre zones; and
>
> (d) within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.

[23] Section 80E(1)(a) provides that a tier 2 territorial authority, to which regulations made under section 80I(1) apply, must give effect to policy 5 of the NPS-UD.

7.5 Subparagraphs (a), (b) and (c) apply to city centre zones and metropolitan centre zones and are relevant to Hamilton City. As the Waikato District and the Waipā District do not contain city centre zones or metropolitan centre zones, these subparagraphs are not relevant to these districts. However, subparagraph (d) is relevant to all of the Councils.

7.6 Further guidance is provided regarding giving effect to policy 3 of the NPS-UD in sections 77G, 77H and 77N of the Act, which clarify that a Council **may**:

(a) Create new residential zones or amend existing residential zones;[24]

(b) Create new urban non-residential zones or amend existing urban non-residential zones;[25]

(c) Make the requirements of policy 3 less enabling of development than provided for by policy 3, if authorised to do so under section 77I (which relates to the application of qualifying matters and will be addressed in section 7 of these Joint Opening Legal Submissions).

Urban environment

7.7 Sections 77G and 77N apply to residential and non-residential zones within urban environments. "Urban environment" is defined in section 77F of the Act to mean:

> …any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:
> (a) Is, or is intended by the specified territorial authority to be, predominantly urban in character; and
> (b) Is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people.

[24] Section 77G(4) of the Act.
[25] Section 77N(3)(a) of the Act. An "urban non-residential zone" is defined in section 77F to mean any zone in an urban environment that is not a residential zone.

7.8 Both the Waikato District and the Waipā District contain towns and villages which do not meet this definition of "urban environment". Consideration of which towns and villages fall within the definition of "urban environment" will be provided by the Councils at the substantive hearings. Any towns or villages which meet the definition of "urban environment" will be assessed against the requirements of Policy 3.

8. THE EVALUATION OF QUALIFYING MATTERS

8.1 Section 77I (in relation to residential zones) and section 77O (in relation to non-residential zones) enable the Councils to make the MDRS or the relevant building height or density requirements under policy 3 less enabling of development only to the extent necessary to accommodate 1 or more of the 10 listed qualifying matters.

8.2 The listed qualifying matters include:

(a) A matter of national importance that decision makers are required to recognise and provide for under section 6 of the Act;

(b) A matter required to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010;

(c) A matter required to give effect to Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River (**Te Ture Whaimana**);

(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 requirements in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand; and

(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 77L or section 77R is satisfied.

8.3 Sections 77J, 77K and 77L (in relation to residential zones) and sections 77P, 77Q and 77R (in relation to non-residential zones) set out the requirements for evaluation of qualifying matters. These requirements differ for qualifying matters that are:

(a) Existing qualifying matters that are operative in the relevant district plan when the IPI is notified;[26]

(b) New qualifying matters that are notified in the IPI;[27] or

(c) Other qualifying matters under sections 77I(j) or 77O(j) which must meet the additional site-specific evaluation required by sections 77L or 77R.

[26] Sections 77K and 77Q.
[27] Sections 77J and 77P.

Existing qualifying matters

8.4 Sections 77K and 77Q provide an alternative evaluation process for existing qualifying matters. This alternative process recognises that these are matters that are already contained in an operative district plan and have therefore already been through the Schedule 1 process.

8.5 The sections set out a five-step process for existing qualifying matters as follows:

(a) Identify by location (for example, by mapping) where an existing qualifying matter applies;

(b) Specify the alternative density standards proposed for those areas identified under paragraph (a);

(c) Identify in the report prepared under section 32 why the territorial authority considers that 1 or more existing qualifying matters apply to those areas identified under paragraph (a);

(d) Describe in general terms for a typical site in those areas identified under paragraph (a) the level of development that would be prevented by accommodating the qualifying matter, in comparison with the level of development that would have been permitted by the MDRS and policy 3; and

(e) Notify the existing qualifying matter in the IPI.

8.6 Each Council's district plan is at a different procedural stage:

(a) Waipā District Council's Operative District Plan was wholly operative prior to notification of Plan Change 26;

(b) Hamilton City Council's Operative District Plan was subject to recent plan changes (including Plan Change 9: Historic Heritage and

Natural Environment and Plan Change 5: Peacocke Structure Plan) at the time of notification of Plan Change 12;

(c) Waikato District Council's Proposed District Plan was the subject of decisions on submissions on 17 January 2022; the IPI is therefore a variation to the Proposed District Plan. As a result, all of the qualifying matters within Variation 3 have been evaluated as new qualifying matters.

8.7 As a result of these differences, the qualifying matters that are existing qualifying matters will vary between the Councils and will therefore be considered in individual Council submissions. However, a consistent approach has been taken to the evaluation of existing qualifying matters.

8.8 It is important to clarify that in respect of existing qualifying matters, such as significant natural areas identified in the relevant operative district plan, the consideration by the Hearing Panel relates to the extent to which the MDRS or policy 3 should be modified to accommodate the significant natural area. This hearing is not an opportunity to reassess the location or the attributes of the significant natural area which has already been through a Schedule 1 process.

New qualifying matters

8.9 For new qualifying matters identified in the IPI, the evaluation report must consider the matters identified in subsections (3) and (4) of section 77J or 77P:

(a) Demonstrate why the territorial authority considers that the area is subject to a qualifying matter, and that the qualifying matter is incompatible with the level of development permitted by the MDRS or policy 3;

(b) Assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and

(c) Assess the costs and broader impacts of imposing those limits.

8.10 Each of the three Councils has introduced new qualifying matters in their plan change or variation. These qualifying matters will be addressed in individual Council submissions.

Other qualifying matters

8.11 "Any other matter" which relies on sections 77I(j) or 77O(j) will also be an existing or new qualifying matter requiring assessment against the requirements set out in paragraph 8.5 or 8.9 above.

8.12 However, this category of qualifying matters must also meet the additional "site-specific" evaluation requirements in section 77L or section 77R of the Act:

(a) Identify the specific characteristic that makes the level of development provided by the MDRS or policy 3 inappropriate in the area; and

(b) Justify why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and

(c) Include a site-specific analysis that:

(i) Identifies the site to which the matter relates;

(ii) Evaluates the specific characteristics on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and

(iii) Evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS or policy 3 while managing the specific characteristics.

8.13 Each of the three Councils has qualifying matters which are "other matters" under sections 77I(j) or 77O(j). These qualifying matters will be addressed in individual Council submissions.

9. GUIDANCE FROM THE MINISTRY FOR THE ENVIRONMENT

9.1 The Ministry for the Environment has published a number of guidance documents to assist councils and the public to implement the requirements of the Amendment Act. These documents include:

(a) "Understanding the RMA (Enabling Housing Supply and Other Matters) Amendment Act 2021: General Overview" fact sheet dated 19 July 2022.

(b) "Medium Density Residential Standards: A guide for territorial authorities" fact sheet dated 19 July 2022.

(c) "Intensification streamlined planning process" fact sheet dated 19 July 2022.

(d) "Information Pack for independent hearings panel members and those involved in plan changes on the National Policy Statement on Urban Development and medium density residential standards" undated but provided to Councils by MFE officials on 13 December 2022.

9.2 As recognised by the Environment Court in a recent decision[28], these fact sheets or guidelines are not binding on the Court or the Hearing Panel

[28] *Federated Farmers of New Zealand v Northland Regional Council* [2022] NZEnvC 16 (dated 11 February 2022) at paragraphs [15] to [29]. This case concerned a guideline issued by the Ministry for the Environment titled "Defining 'natural wetlands' and 'natural internal wetlands'" issued in

and have no role in the hearing of these IPIs, particularly given that the Ministry for the Environment is not a submitter on the Waikato IPIs.

10. FINANCIAL CONTRIBUTIONS

10.1 Section 77T of the Act provides that a specified territorial authority may, if it considers it appropriate to do so, include financial contribution provisions, or change its financial contribution provisions, as part of its IPI.

10.2 The Amendment Act inserted a new section 77E into the Act which increases and clarifies the powers of local authorities in respect of financial contributions, not only in respect of IPIs but in respect of all plans or proposed plans. In particular:

(a) Financial contributions may now be required for any class of activity other than a prohibited activity.[29] This means that the district plan can now require the payment of a financial contribution in respect of a permitted activity.

(b) A rule requiring a financial contribution must specify:

(i) The purpose for which the financial contribution is required (which may include the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(ii) How the level of financial contribution will be determined; and

(iii) When the financial contribution will be required.

September 2021. The Court found that "*If the guideline at A is intended to instruct the Court, then we cannot and should not take it into account. For current purposes, we understand our statutory duty is to determine the case devoid of any sector influence*."

[29] Section 77E(1) of the Act.

10.3 Both the Hamilton City Council and the Waipā District Council have amended their financial contribution provisions as part of their IPI plan changes. The specific changes that are proposed will be addressed in submissions by the individual Councils. The Proposed Waikato District Plan does not currently include financial contributions, and the Council's IPI does not propose to include them.

11. INTENSIFICATION STREAMLINED PLANNING PROCESS (ISPP)

11.1 The IPIs are required to be prepared using the ISPP.[30] The ISPP is set out in Part 6 of Schedule 1. The key features of the ISPP include:

(a) Pre-notification consultation, notification, submissions and further submissions are the same as the usual Schedule 1 process.[31]

(b) A hearing of submissions must be held by an independent hearings panel having the powers set out in clause 98 of Schedule 1.[32]

(c) Following the hearing of submissions, the independent hearings panel must make recommendations to each Council on their IPI.[33]

(d) Each Council must decide whether to accept or reject each recommendation.[34] In making its decision, the Council cannot consider any submission or evidence unless it was made available to the independent hearing panel. However, the Council can seek clarification from the independent hearing panel on a recommendation.[35]

(e) Each rejected recommendation must be referred to the Minister for decision, including any alternative recommendation provided by

[30] Section 80F(3) of the Act.
[31] Clause 95 of Schedule 1.
[32] Clause 96 of Schedule 1.
[33] Clauses 99 and 100 of Schedule 1.
[34] Clause 101 of Schedule 1.
[35] Clause 101(4) of Schedule 1.

the Council.[36] In making its decision, the Minister may take into account only those considerations that the independent hearing panel could have taken into account when making its recommendation, but may have regard to compliance with directions under section 80L.[37]

(f) Decisions of the Council and the Minister are to be publicly notified by the Council and will become operative.[38]

(g) There is no right of appeal against a decision of the Council or the Minister.[39]

11.2 The role of this Joint Opening Hearing is to set the scene for the more detailed hearing of submissions on each IPI which will follow later this year. The Councils do not seek any determination from the Panel at this stage.

11.3 Subject to the issue of formal notices of hearing, the substantive hearings have been scheduled to take place on the following dates:

(a) Waipā District Council's Plan Change 26 will be heard in Cambridge on 26 April to 3 May 2023;

(b) Waikato District Council's Variation 3 will be heard in Ngāruawahia on 26 July to 4 August 2023;

(c) Hamilton City Council's Plan Change 12 will be heard in Hamilton on 4 to 22 September 2023.

[36] Clause 101(2) of Schedule 1.
[37] Clause 105(2) of Schedule 1.
[38] Clauses 102 and 106 of Schedule 1.
[39] Clause 107 of Schedule 1.

12. CONCLUSION

12.1 These Joint Opening Legal Submissions address legal and planning matters which are common to each of the Waikato IPIs. In support of each individual IPI, additional and separate opening legal submissions will be presented by counsel for each Council.

Signed this 8th day of February 2023

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APPENDIX A: LEGAL REQUIREMENTS FOR DISTRICT PLANS

A. General requirements - district plan (change)

1 A district plan (change) should be designed to **accord with**[1] — and assist the territorial authority to **carry out** — its functions[2] so as to achieve the purpose of the Act[3].

2. The district plan (change) must also be prepared **in accordance with** any national policy statement, New Zealand Coastal Policy Statement*, a national planning standard,[4] regulation[5] and any direction given by the Minister for the Environment[6].

3. When preparing its district plan (change) the territorial authority **must give effect** to[7] any national policy statement (including Policies 3 and 4 of the NPS-UD), New Zealand Coastal Policy Statement*, and national planning standard.[8]

4. When preparing its district plan (change) the territorial authority shall:

   (a) **have regard to** any proposed regional policy statement (change);[9]

   (b) **give effect** to any operative regional policy statement.[10]

5. In relation to regional plans:

   (a) the district plan (change) must **not be inconsistent** with an operative regional plan for any matter specified in section 30(1) or a water conservation order*;[11] and

   (b) the district plan (change) **must have regard** to any proposed regional plan (change) on any matter of regional significance etc.[12]

6. When preparing its district plan (change) the territorial authority must also:

   - **have regard to** any relevant management plans and strategies under other Acts, and to any relevant entry in the New Zealand Heritage List/Rārangi Kōrero and to various fisheries regulations* and to any relevant project area and project objectives (if section 98 of the Urban

[1] RMA, section 74(1).
[2] As described in section 31 of the RMA.
[3] RMA, sections 72 and 74(1).
[4] RMA, section 74(1)(ea).
[5] RMA, section 74(1).
[6] RMA, sections 74(1)(c) and 80L.
[7] RMA, section 75(3).
[8] The reference to "any regional policy statement" in the Rosehip list here has been deleted since it is included in (4) below which is a more logical place for it.
[9] RMA, section 74(2)(a)(i).
[10] RMA, section 75(3)(c). Section 77G(8) provides that the requirement in section 77G(1) to incorporate the MDRS into a relevant residential zone applies irrespective of any inconsistent objective or policy in a regional policy statement.
[11] RMA, section 75(4).
[12] RMA, section 74(2)(a)(ii).

Development Act 2020 applies)*[13] to the extent that their content has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities[14] and to any emissions reduction plan and any national adaptation plan made under the Climate Change Response Act 2002*[15];

- **take into account** any relevant planning document recognised by an iwi authority;[16] and
- not have regard to trade competition or the effects of trade competition:[17]

7. The formal requirement that a district plan (change) must[18] also state its objectives, policies and the rules (if any) and may[19] state other matters.

B. Objectives [the section 32 test for objectives]

8. **Examine** the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the Act.[20]

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to **implement** the objectives, and the rules (if any) are to **implement** the policies;[21]

10. Whether the provisions (the policies, rules or other methods) are the most appropriate way to achieve the purpose of the district plan change and the objectives of the district plan by:[22]

    (a) identifying other reasonably practicable options for achieving the objectives;[23] and

    (b) assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:[24]

        i. identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:

            - economic growth that are anticipated to be provided or reduced;[25] and

[13] RMA, section 74(2)(b).
[14] RMA, section 74(2)(c).
[15] RMA, section 74(2)(d) and (e).
[16] RMA, section 74(2A).
[17] RMA, section 74(3)
[18] RMA, section 75(1).
[19] RMA, section 75(2).
[20] RMA, section 74(1) and section 32(1)(a).
[21] RMA, section 75(1)(b) and (c).
[22] See summary of tests under section 32 of the RMA for 'provisions' in *Middle Hill Limited v Auckland Council* Decision [2022] NZEnvC 162 at [30].
[23] RMA, section 32(1)(b)(i).
[24] RMA, section 32(1)(b)(ii).
[25] RMA, section 32(2)(a)(i).

- employment that are anticipated to be provided or reduced;[26]

ii. if practicable, quantifying the benefits and costs;[27] and

iii. assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions;[28]

- Summarising the reasons for deciding on the provisions;[29]
- If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances.[30]

D. Rules

11. In making a rule the territorial authority must **have regard to** the actual or potential effect of activities on the environment.[31]
12. Rules have the force of regulations.[32]
13. Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[33] than those under the Building Act 2004.
14. There are special provisions for rules about contaminated land.[34]
15. There must be no blanket rules about felling of trees[35] in any urban environment.[36]

E. Other statues:

16. Finally territorial authorities may be required to comply with other statutes (which within the Waikato Region includes the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010).

F. Requirements relating to Medium Density Residential Standards (**MDRS**)

17. Every residential zone of a specified territorial authority must have the MDRS incorporated into that zone except to the extent that a qualifying matter is accommodated.[37]

G. Specific requirements relating to Policy 3 and Policy 5 of the NPS-UD

18. Every residential zone in an urban environment of a specified territorial authority must give effect to policy 3 or policy 5, as

[26] RMA, section 32(2)(a)(ii).
[27] RMA, section 32(2)(b).
[28] RMA, section 32(2)(c).
[29] RMA, section 32(1)(b)(iii).
[30] RMA, section 32(4).
[31] RMA, section 76(3).
[32] RMA, section 76(2).
[33] RMA, section 76(2A).
[34] RMA, section 76(5).
[35] RMA, section 76(4A).
[36] RMA, section 76(4B).
[37] RMA, section 77G(1).

the case requires, in that zone,[38] and every tier 1 specified territorial authority must ensure that the provisions in its district plan for each urban non-residential zone within the authority's urban environment give effect to the changes required by policy 3 or policy 5, as the case requires, except to the extent that a qualifying matter is accommodated.[39]

H. Additional requirements for qualifying matters[40]

19. In relation to a proposed amendment to accommodate a qualifying matter,[41] the specified territorial authority must:

(a) **demonstrate** why the territorial authority considers—

(i) that the area is subject to a qualifying matter;[42] and

(ii) in residential zones that the qualifying matter is incompatible with the level of development permitted by the Medium Density Residential Standards (**MDRS**) (as specified in Schedule 3A of the RMA) or policy 3 for that area[43] or in non-residential zones that the qualifying matter is incompatible with the level of development as provided for by policy 3 for that area;[44] and

(b) **assess** the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity;[45] and

(c) **assess** the costs and broader impacts of imposing those limits.[46]

(d) **describe** in relation to the provisions implementing the MDRS—

(i) how the provisions of the district plan allow the same or a greater level of development than the MDRS;[47]

(ii) how modifications to the MDRS as applied to the relevant residential zones are limited to only those modifications necessary to accommodate qualifying matters and, in particular, how they apply to any spatial layers relating to overlays, precincts, specific controls, and development areas, including—

- any operative district plan spatial layers; and
- any new spatial layers proposed for the district plan.[48]

I. Alternative process for existing qualifying matters

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[38] RMA, section 77G(2).
[39] RMA, section 77N(2).
[40] The evaluation report for an IPI may, for the purpose of section 77J(4), describe any modifications to the requirements of section 32 necessary to achieve the development objectives of the MDRS.
[41] As defined in section 77I(a) -(i)/77O(a)-(i) of the RMA.
[42] RMA, section 77J(3)(a)(i)/77P(3)(a)(i).
[43] RMA, section 77(3)(a)(ii).
[44] RMA, section 77J(3)(a)(ii)/77P(3)(a)(ii).
[45] RMA, section 77J(3)(b)/77P(3)(b).
[46] RMA, section 77J(3)(c)/77P(3)(c).
[47] RMA, section 77J(4)(a).
[48] RMA, section 77J(4)(b).

20. When considering existing qualifying matters,[49] the specified territorial authority may:

(a) **identify** by location (for example, by mapping) where an existing qualifying matter applies;[50]

(b) **specify** the alternative density standards proposed for the area or areas identified;[51]

(c) **identify** why the territorial authority considers that 1 or more existing qualifying matters apply to the area or areas;[52]

(b) **describe** in general terms for a typical site in those areas identified the level of development that would be prevented by accommodating the qualifying matter, in comparison with the level of development that would have been permitted by the MDRS and policy 3 in residential zones[53] and by policy 3 in non-residential zones.[54]

J. Further requirements for 'other' qualifying matters under section 77I(j)/77O(j)

21. A matter is not a qualifying matter under section 77I(j)/77O(j) unless an evaluation report:

(a) **identifies** for residential zones the specific characteristic that makes the level of development provided by the MDRS (as specified in Schedule 3A or as provided for by policy 3) inappropriate in the area[55] or for non-residential zones **identifies** the specific characteristic that makes the level of urban development required within the relevant paragraph of policy 3 inappropriate;[56] and

(b) **justifies** why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD;[57] and

(c) includes a site-specific analysis that—

(i) **identifies** the site to which the matter relates;[58] and

(ii) **evaluates** the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter;[59] and

(iii) **evaluates** an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS (as

[49] Being a qualifying matter referred to in sections 77I(a)-(i)/77O(a)-(i) that is operative in the relevant district plan when the IPI is notified.
[50] RMA, section 77K(1)(a) / 77Q(1)(a).
[51] RMA, section 77K(1)(b) / 77Q(1)(b).
[52] RMA, section 77K(1)(c) / 77Q(1)(c).
[53] RMA, section 77K(1)(d).
[54] RMA, section 77Q(1)(d).
[55] RMA, section 77L(a).
[56] RMA, section 77R(a).
[57] RMA, sections 77L(b)/77R(b).
[58] RMA, sections 77L(c)(i)/77R(c)(i).
[59] RMA, sections 77L(c)(ii)/77R(c)(ii).

specified in Schedule 3A)[60] or as provided for by policy 3[61] while managing the specific characteristics.

[60] RMA, section 77L(c)(iii).
[61] RMA, section 77L(c)(iii)/77R(c)(iii).