

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS
IN THE WAIKATO REGION**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE
WAIKATO**

UNDER the Resource Management Act 1991 (**RMA**)

IN THE MATTER of the hearing of submissions on the Waikato IPIs –
Hamilton CC PC12, Waipā DC PC26 and Waikato DC
Variation 3

HEARING TOPIC: Procedural Matters - Scope of submissions seeking
“inclusionary zoning / affordable housing” provisions

**LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA - HOMES
AND COMMUNITIES**

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INTRODUCTION

1. These submissions are made on behalf of Kāinga Ora – Homes and Communities (“**Kāinga Ora**”) and concern the issue of whether submissions seeking provisions requiring inclusionary zoning / affordable housing (“**Inclusionary Zoning**”) are within scope of Proposed Plan Change 26 to the Operative Waipā District Plan, Proposed Plan Change 12 to the Operative Hamilton City District Plan and Variation 3 to the Proposed Waikato District Plan (“**the Waikato IPIs**”).
2. Kāinga Ora has a statutory role in promoting affordable housing products in the market¹ but it is important that any such mechanisms are lawful. Kāinga Ora has concerns regarding the lawfulness of the provisions proposed by the Submitters. In any event, Kāinga Ora considers that the submissions concerning Inclusionary Zoning seek cannot be upheld by the Independent Hearing Panel (“**IHP**”), as the relief sought is not “on” the Waikato IPIs. In summary:
 - 2.1 The Inclusionary Zoning relief sought extends beyond the scope of the notified Waikato IPIs, which relate only to an increase in housing capacity and choice and introduce financial contribution provisions only in relation to a limited range of matters.
 - 2.2 While, consistent with its statutory objectives, Kāinga Ora supports provision of affordable housing products, under the Waikato IPIs this can only be addressed through amendments to the planning framework to provide for increased capacity and dwelling choice.
3. Inclusionary Zoning has been sought in the joint submission by the Waikato Community Lands Trust, Bridge Housing Charitable Trust, Waikato Housing Initiative, Habitat for Humanity Central Region, Momentum Waikato² and Waikato Housing Initiative³ (“**Submitters**”). The Submitters seek the introduction of provisions requiring residential subdivision or development to provide up to 10% of lots sold at an affordable price to community housing providers or financial contributions

¹ See for example sections 12(1)(a), 13(1)(f) and 14(1)(f) of the Kāinga Ora-Homes and Communities Act 2019.

² PC12 submission number 298.1; PC26 submission number 64.1-2; and Variation 3 submission number 93.1.

³ PC12 submission numbers 287.2 - .8; .10, .11, .13, .14, .15, .18.

of land or money of equivalent value. The submissions were all identified and opposed in Kāinga Ora's further submissions on the Waikato IPIs.

LEGAL FRAMEWORK / PRINCIPLES

4. The scope of persons able to make submissions on an Intensification Planning Instrument ("IPI") is the same as that under the standard plan change process. A person may make a submission seeking decisions "on" a proposed plan.⁴ If the relief sought in the submission is not "on" the plan change, there is no jurisdiction for relief to be granted by the Independent Hearing Panel ("Panel").
5. While the Panel's ability to make recommendations on the Waikato IPIs is broader than that under the usual Schedule 1 RMA process⁵ the recommendations must still be "on" the IPI.⁶
6. In *Clearwater Resorts Limited v Christchurch City Council*⁷, the High Court set out the following two limbed test for determining whether a submission is "on" a plan change:
 1. *A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.*
 2. *If the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be amended without real opportunity for participation by those affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.*
7. As outlined in *Palmerston North City Council v Motor Machinists*⁸, one way of analysing whether a submission falls within the ambit of the plan change (i.e.: the first limb) is by asking⁹:
 - 7.1 Whether the management regime in the plan for a particular

⁴ Clause 95(2) of Schedule 1 to the RMA which confirms that clause 6 of Schedule 1 applies equally to an IPI.

⁵ in that the Panel's recommendations are not limited to being within the scope of submissions made on the IPI.

⁶ See clause 99(1) and (2)(b) of Schedule 1 to the RMA.

⁷ *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [66].

⁸ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290

⁹ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 at [81].

resource is altered by the plan change; or

- 7.2 Whether the submission raised matters that should have been addressed in the s32 evaluation and report.

If the management regime is not changing, or the submission raises matters that should (but were not) have been assessed as part of the s32 evaluation the submission is unlikely to be “on” the plan change. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change.¹⁰

8. Whether a submission falls within the ambit of a plan change does not, of itself, answer the *Clearwater* test. The second limb requires an assessment of whether a planning instrument may be appreciably amended without real opportunity for participation by those potentially affected.
9. If the proposition advanced by the submitters can be regarded as coming out of “left field”, those affected by or interested in the relief may not have an opportunity to participate.¹¹ This is due to the limited procedural safeguards that exist for further submissions as compared to primary submissions, and the risk that those directly affected by a submission may not be adequately informed of what is proposed.¹² Where this is the case, and effective public participation is hindered, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is “on” the variation.¹³
10. While the position as set out in *Clearwater* and *Motor Machinists* may be different in the context of a whole of plan review¹⁴, the Waikato IPIs are discrete plan changes whose scope is further limited by the requirements of section 80E of the RMA.

¹⁰ *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 at [81].

¹¹ *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [69].

¹² *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 at [79].

¹³ *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [69].

¹⁴ *Albany North Landowners v Auckland Council* [2017] NZHC 138. In the sense that in the context of a whole of plan review, the scope for a submission being ‘on’ a plan change is much wider as it may effectively address every aspect of the status quo in planning terms.

ANALYSIS

11. Kāinga Ora submits that the Inclusionary Zoning provisions meet neither limb of the *Clearwater* test above and cannot be considered within the scope of the Waikato IPIs. Correspondingly, the Panel has no jurisdiction to make recommendations regarding the relief sought. Addressing each limb in turn:

Limb 1: Extent to which the status quo is altered

12. Submissions seeking Inclusionary Zoning do not fall within the ambit of the Waikato IPIs. That is because, in *Clearwater* terms, there was no alteration to the status quo entailed in the plan change.
13. Each of the Waikato IPIs have a purpose that is focused on increasing housing supply and enabling greater housing intensification as required by the RMA, as amended (emphasis added):¹⁵

Plan Change 12

“The primary purpose of PC12 is to implement the changes required by the NPS-UD and HSAA. These changes are intended to rapidly accelerate the supply of housing by enabling greater housing intensification in the district plan.”

Variation 3

“Variation 3 – Enabling Housing Supply – constitutes Council’s Intensification Planning Instrument (IPI) under s80E of the RMA (Variation 3). Variation 3 seeks to vary the PDP to implement the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (Amendment Act) by:

- a. Applying the MDRS to relevant residential zones; and*
- b. Give effect to Policy 3 in the NPS-UD*

In implementing Variation 3, Council’s objectives are to:

- a. Meet legislative requirements;*
- b. Enable additional residential capacity in the district’s larger towns subject to qualifying matters;*
- c. Contribute towards achieving the targets for housing development capacity as set out in the PDP and Future Proof;*
- d. Enable a variety of housing choice;*

¹⁵ Hamilton City Council Plan Change 12 Section 32 Evaluation Report, Part 1: Plan Change Overview Report, p 8 (1.1); Waipā District Council Proposed Plan Change 26: Residential Zone Intensification Section 32 Evaluation Report, p 5(1.1); Variation 3 to the Proposed Waikato District Plan Section 32 Report – Volume 1, p 3 (1.1).

- e. Reduce pressure on urban expansion and associated infrastructure investment requirements by enabling more intensification of existing urban areas;
- f. Create quality built form outcomes; and
- g. Deliver on a more walkable and compact urban form by increasing residential intensification in close proximity to the town centres of the four largest towns.

Plan Change 26

“The purpose of Proposed Plan Change 26 is to incorporate the medium density residential standards as set out in Schedule 3A of the Resource Management Act 1991 into the Waipā District Plan. The proposed plan change will also amend existing provisions in the District Plan to accommodate the new medium density residential standards, including consequential changes to give effect to the legislation.”

- 14. Reflective of their limited purpose, the notified versions of the Waikato IPIs did not include provisions relating to affordable housing, let alone Inclusionary Zoning. Rather, any changes are limited to introducing the MDRS, increasing heights and densities around centres and transport corridors and amending provisions in order to address issues raised by the increase in height and density (e.g.: by requiring infrastructure assessments or provision of trees).
- 15. While the increase in housing supply and choice promoted through the Waikato IPIs may indirectly benefit housing affordability, that is simply a consequential effect of incorporating provisions which are enabling of intensification. That is very different in concept to the Inclusionary Zoning provisions sought by the Submitters, which are a tool concerned not with increasing the supply of housing, but rather controlling the price at which (a portion of) such housing is eventually sold or requiring a property or monetary contribution towards meeting affordable housing needs. Indeed, there is a significant (merits) issue as to whether such provisions in practice have any benefits for housing supply or affordability overall, (because the reduced prices for some dwellings will be funded by increased prices for others).
- 16. To the extent that the Submitters argue that the Inclusionary Zoning provisions are “financial contributions” and therefore “on” the plan change because PC12 and PC26 propose financial contributions, or because financial contributions provisions can be introduced through an IPI by virtue of section 80E(1)(b)(i) RMA, Kāinga Ora says:

- 16.1 Even if financial contributions are able to be introduced through an IPI, they still must be “on” the notified plan change.
- 16.2 The changes to the financial contribution provisions proposed through the Waikato IPI’s are limited to:
 - (a) **Plan Change 26:** Confirming that financial contributions may be required for permitted developments; and enabling financial contributions to be collected for the following purposes: three waters/infrastructure network, residential amenity and Te Ture Whaimana.
 - (b) **Plan Change 12:** Confirming that financial contributions may be required for permitted developments; and enabling financial contributions to be collected for the following purposes: local network infrastructure renewals, residential amenity and Te Ture Whaimana.
 - (c) **Variation 3:** No financial contributions proposed.
- 16.3 Thus the changes to the financial contribution provisions proposed through the Waikato IPIs are limited to three distinct purposes. They address adverse environmental effects that might arise as a consequence of the increased density enabled through the Waikato IPI’s.
- 16.4 In contrast, the financial contributions sought by the Submitters purport to address “housing affordability”, which is a purpose that is entirely unrelated to (a) the purpose of the Waikato IPIs; and (b) the increase in density proposed through the Waikato IPIs.
- 16.5 Accordingly, the Inclusionary Zoning provisions go well beyond the breadth of alteration to the status quo proposed in the IPI’s and are not “on” those IPIs.
17. More broadly:
 - 17.1 The proposed Inclusionary Zoning provisions are wide ranging and will have significant implications for any person seeking to undertake residential subdivision or development across the districts. There are no such provisions in the existing plans and

nor were these issues addressed in the section 32 evaluation reports.

- 17.2 The Inclusionary Zoning provisions do not meet the 'incidental' or 'consequential' exception identified in *Motor Machinists*. The provisions sought are not limited in extent or effect, but would have implications for any person seeking to undertake residential subdivision or development within the Waikato Region.

Limb 2: Fairness to other parties

18. In terms of the second limb, and as outlined above:
- 18.1 The scope of the Waikato IPIs are limited in extent and relate only to increasing heights and density, along with associated rules to mitigate the effects of those changes (e.g. requirements as for infrastructure assessments, urban trees).
- 18.2 The Inclusionary Zoning provisions are not limited in spatial extent but would apply across the Region to any person proposing residential subdivision or development.
- 18.3 This is not a whole of plan review in which it may be reasonable to expect submitters to assume that almost every aspect of the status quo was up for grabs. Rather, it is a discrete plan change, and unlike the usual Schedule 1 RMA process, the scope of the IPIs to make changes to the status quo is limited by statute.
- 18.4 Inclusionary Zoning is not addressed in any of the background documents to the Waikato IPIs, nor is it mentioned in the NPS-UD or RMA (as amended). Instead, these documents focus on enabling intensification, not on how to lower the cost of housing once intensification has occurred.
19. Kāinga Ora considers that there is a real risk that persons who may be directly affected by Inclusionary Zoning submissions would not have been aware of the potential for such relief to be sought and would have been denied an effective opportunity to respond to it given: a) the narrow ambit of the Waikato IPIs; b) the clear statutory purpose relating to increased housing supply and intensification; c) the absence of any reference to

housing affordability in the relevant higher order provisions and the IPI's themselves.

17 March 2023

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