IN THE MATTER of the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER **Intensification Planning Instruments Plan Changes (IPI) to the Auckland Unitary Plan – Operative in Part (AUP-OP)**

INTERIM GUIDANCE ON MATTER OF STATUTORY INTERPRETATION AND ISSUES RELATING TO THE SCOPE OF THE RELIEF SOUGHT BY SOME SUBMISSIONS – 12 JUNE 2023.

1. In accordance with the Resource Management Act 1991 (RMA) - Part 6 Clause 96 of the First Schedule, the Auckland Council (the Council) has appointed an Independent Hearing Panel (IHP). The IHP has been delegated to hear submissions and make recommendations to the Council on the IPI plan change. Its delegations also include addressing any procedural matters.

Introduction

2. During the Pre-Hearing Conference for Plan Change 78 (PC78) the Independent Hearing Panel (IHP) and other parties identified several issues of statutory interpretation of the IPI provisions in the RMA and their application to PC78, as well as issues relating to the scope of the relief sought by some submissions on PC78 (cl 6 of the RMA First Schedule). To consider and provide early guidance on these matters the IHP issued a Hearing Direction – Preliminary plan change 78 - interpretation and scope issues (14 March 2023)[1] which posed a number of questions for parties to address by way of legal submissions. A preliminary hearing was held on the 3rd, 4th and 5th April 2023 to consider these legal submissions from the Council and those submitters who had addressed any of the matters posed in the IHP's direction.

3. The IHP wishes to express its thanks to those parties who provided and presented legal submissions on the legal interpretation and scope matters. These have greatly assisted us in our interpretation of the relevant IPI provisions of the RMA and to address the issue of submission scope. The list of parties who provided and presented legal submissions to the IHP is attached[2].

4. We provide our view on the interpretation and scope matters discussed at the preliminary hearing by way of this interim guidance minute, having considered the legal submissions presented to us. This guidance is issued to assist the parties (and the IHP) to better prepare

[1] Attached as Appendix 1

[2] Attached as Appendix 2.

for the forthcoming hearings with our preliminary views on the interpretation of the RMA's provisions and in relation to relief scope.

5. We stress that our interim guidance is precisely that: *interim* and *guidance* only. It sets out the IHP's current interpretation and scope assessment based upon the legal submissions presented to us. It is also the interim guidance of the IHP that heard and considered the legal submissions, and an IHP with a different composition may take an alternative view. Our guidance should not be construed as determinative or final; it may change as a result of further legal submissions and evidence (both expert and non-expert) throughout the entire hearing process. In this respect the IHP specifically records that it retains an 'open-mind' on interpretation and scope issues.

Scope (Legal tests)

6. Before we address the specific questions of scope that we posed in relation to submissions on PC78 seeking relief within the Auckland Light Rail Corridor (ALRC) and the excluded Special Housing Areas (SHA), we set out what we consider to be the legal tests that apply to relief scope in the context of PC78 and the bespoke intensification streamlined planning process (ISPP) by which PC78 is being considered. We then turn to address scope in relation to the specific scope questions we posed.

7. Clause 95(2) of Part 6 of Schedule 1 to the RMA confirms that clause 6 of Schedule 1 applies to the ISPP. Clause 6 entitles the persons described in sub-clauses (2) to (4) to make a submission "on" a proposed policy statement or plan (change). The meaning of that simple word "on" has been the subject of considerable judicial consideration (which we turn to below), but for present purposes we record that no party contended that submissions on PC78 did not have to satisfy this initial jurisdictional threshold to be considered. Rather, the issue was whether the established "on" jurisprudence was apt for the ISPP by which PC78 was being processed.

8. There was broad consensus that the leading authorities on whether a submission is "on" a plan change (or not) are *Clearwater Resorts Limited v Christchurch City Council* (Clearwater) and *Palmerston North City Council v Motor Machinists* (Motor Machinists)[3]. Although it accepted the relevance of these authorities in relation to this issue, we note that counsel for Te Tūāpapa Kura Kāinga - Ministry of Housing and Urban Development (MHUD) described this case law as "inapt" to apply to PC78 due to its statutorily directed genesis and the specifics of that legislation, and because of its breadth. This submission was made in response to the legal submissions of Auckland Council in relation to scope matters and the applicability of the established jurisprudence.

9. MHUD submitted that the reasons put forward by the Council as to why submissions in relation to the ALRC and SHAs were not "on" the plan change were unconvincing based on *Clearwater* – saying that decision expressly recognised that "*extensions of zoning changes proposed in the plan change are permissible, provided that no substantial further 32 analysis is required to inform affected persons of the comparative merits of that change*". Because of

[3] *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003, and more recently upheld in *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.

the application of section 77J(4)(b), no substantial s 32 analysis is required to enable the Council to meet its statutory duty to impose the MDRS as a minimum in every relevant residential zone.

10. Several other counsel agreed that in some respects the case law was inapt, but nonetheless submitted that it did provide relevant principles to assist in determining scope. We agree. As an example, Kāinga Ora submitted that the *Clearwater* and *Motor Machinists* decisions could not be ignored, but that they might require careful application in the context of an intensification planning instrument (IPI) being promoted under the Resource Management Enabling Housing Supply and Other Matters Amendment Act 2021 (Amendment Act) via an ISPP given that:

    (a) Councils have an express statutory duty set out in section 77G to incorporate the MDRS into "every relevant residential zone" and to give effect to Policy 3 or 5 of the NPS-UD in "every residential zone in an urban environment". The duty to give effect to Policy 3 or 5 extends to urban non-residential zones under section 77N of the RMA. There is little, if any, discretion available to the Council to limit the reach of the IPI it is required to advance (see (d) below);

    (b) When changing their district plan for the first time to fulfil this duty, councils must use an IPI and the ISPP;

    (c) Section 80F imposes a positive time-bound obligation on tier 1 territorial authorities (including Auckland) to notify its IPI before 20 August 2022. Further, no more than one IPI may be notified (section 80G);

    (d) The IPI may not be used "*for any purpose other than the uses specified in section 80E*". Aside from the directive to incorporate the MDRS, councils "*may also amend or include*" provisions that address a specific range of matters (section 80E(1)(b)); and

    (e) Clause 99 expressly enables an ISPP hearings panel to make recommendations that extend beyond the scope of submissions made on the IPI, and clause 101(5) expressly empowers territorial authorities to accept such recommendations (though acceptance is discretionary).

11. Kāinga Ora and others also addressed the applicability of the High Court decision in *Albany North Landowners v Auckland Council* (Albany Landowners)[4]. We discuss this case, and its implications, below.

12. The *Clearwater/Motor Machinists* test involves the consideration of two inter-connected factors:

    (a) Whether the submission addresses the change to the status quo advanced by the plan change; and

[4] Albany North Landowners v Auckland Council [2017] NZHC 138

(b) Whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

13. Most of the legal submissions addressed these two factors (limbs).

First Limb: Extent to which the status quo is altered

14. In our view the following principles apply to determining whether a submission is "on" a plan change:

(a) A determination as to scope is context dependent and must be analysed in a way that is not unduly narrow. In considering whether a submission reasonably falls within the ambit of a plan change, two things must be considered: the breadth of alteration to the status quo proposed in the plan change; and whether the submission addresses that alteration.

(b) For relatively discrete plan changes, the ambit of the plan change (and therefore the scope for submissions to be "on" the plan change) is limited, compared to a full plan review (i.e., the proposed AUP process in *Albany Landowners* which we address below) which will have very wide ambit given the extent of change to the status quo proposed.

(c) The purpose of a plan change must be apprehended from its provisions (which are derived from the section 32 evaluation), and not the content of its public notification.

15. Contrary to the position taken by Auckland Council, we do not consider that PC78 is a plan change of narrow scope or limited reach. Rather our view is that it proposes extensive changes to the status quo over a significant geographic area. Its purpose (as statutorily required by the RMA) is to:

(a) Incorporate the Medium Density Residential Standards (MDRS) into relevant residential zones and to give effect to Policies 3 and 4 of the NPS-UD.[5]

(b) With regard to the NPS-UD:

(i) Policies 3 and 4 refer to: city centre zones; metropolitan centre zones; areas within a walkable catchment of rapid transit stops, city centre zones and metropolitan centre zones; and neighbourhood centre zones, local centre zones and town centre zones (or equivalent). That list applies to all of the land in Auckland's centre zones and extensive areas in the immediate vicinity of those centres and of rapid transit stops.

(ii) The RMA requires the AUP to "*give effect to*" any NPS including the NPS-UD.

(c) The obligation to "*incorporate the MDRS into relevant residential zones*" requires consideration of all urban residential areas within the AUP.

[5] section 80E RMA

16. In response, PC78 appropriately involves:

(a) Amendments to provisions relating to overlays and to Business, Residential and other zones (e.g., Open Space zones).

(b) Changes to the extent of land subject to overlays and zones throughout the metropolitan urban area.

(c) Amendments to provisions relating to site-specific precincts.

17. From our analysis of the purpose of PC78 and our study of the changes it proposes to the AUP, we consider that PC78 is not a narrow plan change. It encompasses most of the Auckland region and substantially alters the status quo for land use intensification in both residential and commercial areas. Furthermore, with regard to b (ii) above, while the RMA requires the IPI to give effect to Policies 3 and 4 NPS-UD, we note that section 75(3) of the RMA also applies, such that PC78 must also be assessed and implemented in a way that gives effect to the balance of the NPS-UD (subject to scope). This is an important finding that, for reasons that follow, means a wider rather than narrower interpretation of the IPI needs to be applied.

18. For the purposes of our preliminary views on scope and the first limb assessment to be undertaken, it also means that the ambit of PC78 is wide and that submissions that fairly and reasonably raise matters that go to its broad purpose (as set out in paragraph 14) have a strong likelihood of satisfying this threshold and being "on" the plan change.

Second Limb: Fairness to other parties

19. The second *Clearwater/Motor Machinists* limb requires an assessment of whether accepting the relief sought in a particular submission would result in the planning instrument being appreciably amended without real opportunity for participation by those potentially affected. However, by way of preface, we note that:

(a) PC78 makes extensive changes to the level of intensification enabled under the AUP. A person who is impacted by (or excluded from) these changes can fairly and reasonably seek relief via a submission that seeks to alter this position. In essence, this is the purpose of Clause 6 of Schedule 1 to the RMA; and

(b) Although a local authority typically sets the parameters of a plan change, for the reasons we set out later in relation to the ALRC and SHAs, it may still be procedurally unfair and substantively inappropriate (e.g., a proposal may not accomplish the purpose of the RMA) for a council to try to limit the ambit of submissions.

20. As set out by a number of parties, PC78 is a unique plan change in the AUP context. This is because Auckland Council had limited discretion to set its parameters: it was required by the Amendment Act to introduce an IPI in order to incorporate the MDRS and to give effect to Policy 3 NPS-UD.

21. Given the region-wide scope of PC78 and the extent and breadth of changes proposed throughout the urban area, it was argued that potentially interested or affected parties should have been alive to the possibility of submissions seeking changes to provisions governing intensification within the region, their neighbourhood, and in the ALRC.

22. In a similar vein, others argued that the appropriateness of PC78, including the Council's decision to defer PC78 from the ALRC, has been the subject of extensive public discussion and debate in Auckland, and that this would have increased the likelihood that interested parties and potential further submitters would be aware of the relevant issues and the possibility that submissions may be filed seeking changes with broad application.

23. However, it was also contended by some parties, including the Council, that there is a real risk that persons who may be directly affected by the relief sought in submissions regarding, for example, the ALRC, SHAs or other extensive zoning requests, would be denied an effective opportunity to respond to what the submissions seek. Such persons may include owners and occupiers of properties within the relevant area impacted who may be directly affected by the decisions sought in such submissions because they would not have anticipated that the area could be the subject of the IHP's recommendations, given the ambit of PC78, and did not make a submission. To participate after that point, they would have had to review the Summary of Decisions Requested (SDR) as produced by the Council (which is a substantial document) and make a further submission. Yet they would not have been on notice that its contents may have been relevant to their property and therefore would have had no reason to view its contents.

24. Before we specifically address scope issues in terms of some of the questions we posed, we address the *Albany Landowners* decision. We think that the High Court's decision in relation to the PAUP is useful as it relates to the PAUP, and offers some helpful guidance in relation to both limbs of the scope test set out above, but particularly the second.

Albany Landowners decision

25. Justice Whata did not accept that a submission on the PAUP was likely to be out of scope if the relief raised in the submission was not specifically addressed in the original section 32 report. He went on to say the section 32 does not purport to "*fix the final frame of the instrument as a whole or an individual provision*" and is itself subject to challenge by way of submission. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "*out of scope*" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original section 32 evaluation.

26. Applying the above reasoning to PC78, we make the following observations:

    (a) As we have stated already, PC78 bears a closer resemblance to a full plan review than it does to the more discrete plan changes or variations addressed in the scope case law referred to above, in light of the significance of the change to the status quo across the urban environment in Auckland (as we have set out earlier);

(b) Accordingly, the scope for submissions to be "on" PC78 is wide, and wider than submitted by the Council; and

(c) Whether the subject matter of a submission is specifically discussed in the section 32 report is not necessarily determinative of the first limb of the scope test.

27. On the matter of the second limb and natural justice concerns, the High Court made findings in relation to that, and in the context of residential intensification submissions made by various parties. Some of these, relevant to PC78, included:

(a) The SDR was publicly available, described the broad effect of the submissions and alerted the reader to the potential for significant changes to the proposed plan relating to the provision for residential intensification;

(b) A landowner genuinely interested in preserving local residential amenity when presented with these submissions on residential zoning "*must have appreciated that broad and detailed changes to the nature and extent of residential zoning throughout Auckland were sought by numerous parties and indeed had been contemplated since the creation of the Auckland Plan*"; and

(c) The standard of enquiry to be expected of potentially affected landowners seeking information about residential intensification must be reasonable in the context of the planning process and the issue under consideration.

28. The parallels with *Albany North Landowners*, in terms of the second limb of *Clearwater*, suggest that, while being alive to natural justice concerns:

(a) In the context of a plan change with a broad spatial extent, effecting significant change across all urban environment residential zones in the city, landowners potentially affected by submissions seeking to fill various gaps in coverage omitted by the Council should exercise a reasonable level of diligence, particularly where they are interested in preserving the status quo; and

(b) The SDR clearly set out the range of submission points advanced by various parties to address, for example the ALRC and SHA's (to address those matters). It was open to concerned landowners to respond to those submission points by way of further submissions, thereby ensuring their ongoing ability to participate in the hearing process.

29. In the context of the above discussion and the unique circumstances of PC78 (as addressed above), we now address the specific questions we posed in our Direction. And whether those submissions are "on" the plan change – including whether or not there is potential for a real risk that the reasonable interests of persons who may be directly affected by the decisions sought in such submissions would not have had a fair or reasonable opportunity to participate in the planning process.

The Auckland Light Rail Corridor (ALRC) and Special Housing Areas (SHA)[6]

Are submissions that address the ALRC and the SHAs seeking that the provisions of Plan Change 78 be extended to the deferred ALRC area and the areas covered by the SHAs in the plan maps "on" the Plan Change (cl 6 of the RMA First Schedule), and if so, the implications of this for the IHP's hearing and recommendation schedule?

Auckland Light Rail Corridor

30. The area of the ALRC has been excluded from PC78 and is identified with 'whiteout' in the PC78 map viewer and a notation which states "*Auckland Light Rail Corridor – intensification plan change implementation deferred pending variation intended for 2023".*

31. The Council is proposing to notify a variation to PC78 for the area covered by the ALRC once the route and stations have been confirmed. This was set out in the Council's Memorandum provided in advance of the conference held on 3rd May 2023[7]. Until the variation is notified, the Council considers that the current zonings and overlays of the AUP will continue to apply to this area; however, PC78 proposes changes to zone objectives, policies and rules which do apply within the 'whiteout' area.

32. The Council's position is that, in light of the principles outlined in *Motor Machinists*, any submissions relating to the ALRC are not "on" PC78 and the IHP has no jurisdiction to make recommendations regarding the relief sought. This includes where submissions request that the MDRS is incorporated, and Policy 3 of the NPS-UD is implemented within the ALRC area. It sets out reasons for this in paragraphs 23 and 24 of its legal submissions.

33. Other parties (notably MHUD, Kāinga Ora and Foodstuffs) did not agree with the Council's position. They submitted that submissions seeking the incorporation of the MDRS and implementation of the NPS-UD to the ALRC whiteout area are clearly "on" PC78. The reasons for this are set out in those legal submissions.

IHP's Position –

First Limb

34. The Auckland Council has an express statutory duty set out in section 77G of the RMA to incorporate the MDRS into "every relevant residential zone" and to give effect to Policy 3 or 5 of the NPS-UD in "every residential zone in an urban environment". The duty to give effect to Policy 3 or 5 extends to urban non-residential zones under section 77N of the RMA.

35. Given the directive requirements on the Council to implement the NPS-UD, it is the IHP's view that there was no legal basis on which the ALRC area could have been excluded from PC78, or grounds to indicate via the Plan viewer that application of the MDRS to this area was deferred pending resolution of the Auckland light rail route.

[6] Housing Accords and Special Housing *Areas Act 2013*

[7] 1 May 2023

36. In terms of the first limb, it is our view that the submissions seeking to include the ALRC whiteout area are clearly "on" PC78.

37. Even if this were not the case, we do not accept the Council's submission that the IHP has no power to make recommendations regarding any such out-of-scope relief sought by these submissions. Clause 99(2)(b) of Part 6 of Schedule 1 clearly gives us that power. This power is relevant to our determination of the Council's request to strike out the submissions it claimed were out of scope, which we have addressed separately in IHP's Minute dated 12 June 2023 addressing striking out submissions.

Second Limb

38. Some of the IHP accept that the second limb is satisfied for the reasons set out above, notably: the SDR was publicly available and described the broad effect of the submissions which would have alerted people to the potential for significant changes to the proposed plan relating to the provision for (residential) intensification and the region wide extent of this; and those people interested in/concerned about Auckland and their local area (given the well-publicised intensification proposal) should have reasonably appreciated that broad and detailed changes to the nature and extent of residential zoning throughout Auckland were sought by numerous parties and indeed had been contemplated since the creation of the Auckland Plan, and that on that basis should have submitted on PC78.

39. To reinforce the above paragraph, some submitters (e.g. FoodStuffs and Kāinga Ora) advised via counsel that a number of further submissions in opposition to the requests made by those submitters had been lodged, thus indicating that a range of parties had viewed the SDR, understood the scale and scope of PC78, were not discouraged by the Council's 'deferral notice' displayed on the ALRC whiteout area, and made detailed submissions nonetheless.

40. However, some of the IHP remain concerned with the second limb and agree with the Council that there is a real risk of persons being denied an effective opportunity to participate. On this aspect, the Council's legal submissions stated[8]:

> *In terms of the second limb of the test in* Motor Machinists*:*
>
> > *There is a real risk that persons who may be directly affected by the decisions sought in such submissions regarding the ALRC have been denied an effective opportunity to respond to what the submissions seek;*
> >
> > *Such persons, including owners and occupiers of properties within the ALRC area who may be directly affected by the decisions sought in such submissions would not have anticipated that the ALRC area could be the subject of the IHP's recommendations, given the ambit of PC78 and the wording of the notation on the PC78 map viewer. They would have had to rely on the Summary of Decisions Requested (SDR) produced by the Council but would not have been on notice that*

[8] Paragraph 24

its contents may have been relevant to their property and therefore would have had no reason to view the contents of the SDR;

There is therefore a real risk that the reasonable interests of persons who may be directly affected by the decisions sought in such submissions would be overridden by a 'submissional side-wind' if the IHP were to make recommendations on submissions relating to the ALRC. Those persons, including owners and occupiers of properties in the ALRC, would be denied an effective opportunity to participate in the process by which the existing AUP zoning and provisions would be changed, including provisions potentially applying to their properties.

41. The basis for the concern is the notation on the PC78 Map Viewer advising the public that this area is deferred from PC78 pending variation in 2023. By including this notation the IHP considers that the Council has effectively, and without proper legal basis, distorted the public's consideration and assessment of PC78 for the purpose of making submissions. Although the notation was likely to have been considered helpful to the public by the Council, in the IHP's view it was inappropriate and regrettable.

42. As already addressed earlier the Council is proposing to notify a variation to PC78 for the area covered by the ALRC once the route and stations have been confirmed[9]. The Council's Memorandum to the IHP seeking to pause PC78 (21 April 2023) stated[10]:

> *"… we are advised that Council officers understand that the Notices of Requirement for Auckland Light Rail are likely to be lodged in August 2023, and as a result Council officers consider that the Council's planning response[11] for the Auckland Light Rail Corridor may not be notified until the end of this year / early next year, several months later than originally anticipated*."

43. In the Council's Memorandum in advance of the Conference (1 May 2023) the Council recorded:

> *The Council's planning response to the Auckland Light Rail corridor may not be notified until the end of 2023 / early 2024*

44. In the meantime, the procedural landscape for processing PC78 has shifted significantly, with the Council requesting, and the Minister for the Environment granting, a further 12 months for the decisions on PC78 to be notified. Thus, at the date of finalising this interim guidance, the IHP understands that the ALRC area will be addressed by way of a variation and this will catch-up with PC78 and be considered next year within the (now extended) timeframes given to the Council to complete this ISPP.

45. The IHP's position is that such a variation would address the current position with respect to the ALRC and remedy the effect of the distortion and consequent unfairness caused to the submission process by the Council with its deferral notation.

[9] 21 April 2023
[10] Paragraph 11
[11] The Council confirmed at the Conference that "planning response" meant a variation

46. Given the above, the IHP prefers not to make a definitive finding on the scope of submissions on the ALRC. It has set out its views on the application of the legal tests above and will revisit this issue if a variation is not promulgated as indicated. However, it may be that although these submissions are not unanimously accepted by the IHP as being "on" PC78 (for the reasons noted above), the IHP will nevertheless proceed to hear them because the existence of the over-riding power in clause 99(2) and the significance of the issue at stake. In that instance, the IHP will have to look to the submitters in question to "fill-in" the blanks in their evidence with appropriate provisions and section 32AA analysis to the extent required.

Special Housing Areas (SHA)

47. The IHP agrees with those legal submissions that express the view that establishment of SHAs under separate legislation does not preclude these areas from being re-zoned under subsequent plan changes, noting that many of the areas would meet the definition of "relevant residential zone" and still form part of the AUP. In short, the IHP does not understand the Council's rationale for excluding them from PC78.

48. SHAs were established under the Housing Accords and Special Housing Areas Act 2013 (HASHAA) through an Order in Council issued by the Governor-General. The purpose of the HASHAA was to enhance housing affordability by facilitating an increase in land and housing supply in certain regions and districts identified as having housing supply and affordability issues.

49. The Council has elected not to include SHAs in PC78 on the basis that they were created by different legislation to the RMA and are bound by the provisions of the PAUP as notified. A number of parties, including Kāinga Ora, contend that the Council's position is incorrect.

50. It appears to us that excluding the SHAs is at odds with the intent of both the HASHAA legislation and the provisions introduced by the Amendment Act which allow for greater housing supply to assist with housing affordability issues. The jurisdictional point, however, is that HASHAA had a built-in repeal section, and all SHAs had a built-in disestablishment mechanism. The HASHAA was repealed and SHAs disestablished in 2021.

51. The SHAs underlying SHA precincts in the AUP therefore no longer exist and it follows that those areas are no longer subject to any restrictions that existed under the HASHAA. They are now solely governed by the RMA, and on that basis, we think that they should be treated as any other precinct in the AUP and addressed by PC78.

52. Moreover, many of the areas in the SHA precincts meet the definition of "relevant residential zone". In the context of PC78, this means all residential zones located in an urban environment. "Urban environment" is defined and most of the SHA precincts in Auckland exist in already developed surroundings that would be within the urban environment. They are predominantly residential zoned, and most have open spaces and local centres; a clear indication that the SHA is intended to be a part of the broader housing and labour market, not a self-contained pocket.

53. With respect to whether the submissions seeking to include the SHA areas in PC78 are "on" the plan change, the IHP notes that its position is the same as that set out in relation to the ALRC (in terms of both limbs of the case law). Although the Plan Viewer notation with respect to the SHAs is different to that in relation to the ALRC (i.e., it advises that the relevant SHA Precinct area is "excluded from PC78"), such notation has similarly distorted the submission process in relation to these areas.

54. The Council addressed SHA's in its response Memorandum following the Conference[12].

> *Because of the nature of the provisions in issue* [SHA]*, the changes that would be necessary are, in the Council's view, beyond the scope of an intensification planning instrument and would require a standard plan change. The Council has considered Commissioner Kurzeja's question following the conference and counsel are instructed that the Council will be scoping what work is required to progress such a plan change during any pause.*

55. However, as with the ALRC, the IHP may nevertheless have to proceed to hear the submissions because of the existence of the over-riding power in clause 99(2) and the significance of the issue at stake. In that instance, the IHP will look to the submitters in question to "fill-in" the blanks in their evidence with appropriate provisions and section 32AA analysis to the extent required.

Amendments to the AUPOP via Plan Change C78 (either per notification or submission relief) seeking to:

> ***Change the zoning of non-residential zones (e.g., Industrial to Mixed Use), or extend existing non-residential zone (e.g., extend a Metropolitan zone), or include a new residential zone (e.g., change from business zone to residential zone).***
>
> ***Change or remove existing, or introduce new, plan provisions such as: activity status, development standards, noise controls, and AUP definitions (e.g. dwellings, household units, Community correction facility).***
>
> *Does s80E of the RMA limit the scope of the amendments that may be made to the AUPOP by the IPI, and if so, to what extent? Are submissions seeking such relief "on" Plan Change 78 in terms of cl 6 of the RMA First Schedule?*

56. In response to the first tranche of the question, our interim guidance is as follows.

57. We accept that an IPI can include new urban non-residential zones (and new residential zones) in order to carry out its functions to give effect to Policy 3 of the NPS-UD. This is a discretionary element of an IPI. Notwithstanding the potential to include new urban non-residential zones under section 77N(3)(a) of the RMA, the Council's position was that submissions seeking amendments to the zoning of urban non-residential zones are not "on" PC78 and would not meet either limb of the *Motor Machinists* test for the following key reasons:

[12] Paragraph 36 - Memorandum dated 5 May 2023

- *PC78 did not include any new non-residential zones. In addition, PC78 did not propose rezoning any land from one type of business zone to another, rezoning any business land to residential, or extending the spatial extent of any non-residential zones.*

- *Accordingly, any submissions seeking such changes to the zoning of urban non-residential zones do not address PC78 and the extent of the alteration to the status quo which the change entails.*

- *The effects of these types of changes to urban non-residential zones have not been considered in the Council's section 32 report for PC78, and the changes proposed go beyond an 'incidental' or 'consequential' extension of PC78's ambit.*

- *Given that PC78 maintains the AUP's current application of urban non-residential zones and no changes such as those outlined above were included in PC78, there is a real risk that persons who would be directly affected by the changes have been denied an effective opportunity to participate in the plan change process and could be affected by a 'submissional sidewind'.*

58. Other submitters took a different view to the Council on this issue. It was their submission that, in relation to the matter of scope (as set out earlier), submissions that seek changes to any of the following elements of the AUP would be within the ambit of PC78 and likely to be within scope, provided the changes assist to give effect to Policies 3 or 4 of the NPS-UD or to incorporate the MDRS:

    (a) The zoning of land within the urban areas identified on the PC78 map viewer.

    (b) The extent of walkable catchments around centres and rapid transit stops, special height controls and special character notations.

    (c) Any provisions within the Residential and Business Centre Zones.

    (d) Any precinct provisions.

59. In addressing this issue, we reiterate what we have set out earlier - that our view is that PC78 is not a narrow plan change, and needs to be assessed and implemented in a way that gives effect to the entire NPS-UD.

60. We accept that any zoning request would still need to address ‘scope’ as outlined above in terms of whether the submissions are “on” PC78.

61. The duty of the Council is to implement the MDRS into relevant residential zones and give effect to Policy 3 of the NPS-UD. If the Council has not fully discharged this duty in PC78 as notified, as was submitted by some, then it needs to be assessed through the hearing process before the IHP so that parties can present legal submissions and evidence on why the rezoning is within scope, is appropriate, and will give effect to the NPS-UD.

62. Whether the changes sought in submissions help to give effect to Policies 3 or 4 of the NPS-UD or to incorporate the MDRS is a matter that can be addressed on the merits during the hearing process. Accordingly, in our preliminary view there is no basis for discounting these rezoning requests at this stage. That is, they should not be ruled out due to scope, and can be set down for hearing on the merits in due course.

Change or remove existing, or introduce new, plan provisions such as: activity status, development standards, noise controls, and AUP definitions (e.g. dwellings, household units, Community correction facility).

63. In response to the second tranche of this question, our interim guidance is as follows.

64. The IPI must incorporate the MDRS into relevant residential zones and give effect to Policies 3 and 4 of the NPS-UD.

65. Under section 80E(1)(b)(iii) of the RMA an IPI may "amend or include … 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.

66. The meaning of the words "support" and "consequential" are well understood and in our view serve to set the frame for the range of "related provisions" that the IPI may amend or include. By definition, these terms are broad and provide considerable range for the type of "related provisions" that may be included or amended. Further, when combined with the non-exhaustive definition of "related provisions" in section 80E(2), the range of lawfully acceptable "related provisions" able to be included in an IPI is likely to be extensive. For example, it follows from the inclusion of "qualifying matters identified in accordance with section 77I or 77O" in section 80E(2), that changes to the status of an activity to accommodate a qualifying matter, would clearly be within the scope of an IPI.

67. However, where the plan change as notified, or a submission on that plan change, seeks to include or amend a provision in a plan in circumstances where that inclusion or amendment does not support or follow from the MDRS or implementing Policies 3 and 4 of the NPS-UD, it cannot be considered as within the scope of an IPI as defined by section 80E, and would therefore infringe the statutory limitation on the scope of an IPI set out in section 80G(1)(b). Changes to the status of activities that are not affected by the MDRS or necessary to implement Policies 3 and 4 of the NPS-UD, or changes sought to provisions of zones outside the urban environment, are likely to be outside the scope of an IPI in the IHP's view. Moreover, such relief requests would not be salvageable under clause 99(2), because they would offend section 80G(1)(b).

68. Of the types of relief potentially of concern highlighted in our Direction, and by way of example, we note that Ara Poutama Aotearoa/The Department of Corrections seeks permitted rather than discretionary activity status through its submission on PC78 for community corrections facilities/activities within specific zones, including the Business – General Business and Business – Light Industry Zones, and a change in definition and activity status for community corrections facilities/activities across the entire AUP. Ara Poutama Aotearoa also seeks inclusion of certain National Planning Standards definitions (noting that at present the Council does not have to implement the National Planning Standards).

69. By reference to our analysis of the scope of amendments to related provisions considered capable of request by this IPI, our view is that the changes sought by Ara Poutama Aotearoa, and any similar requests, would not fall within the scope of amendments able to be made by PC78 to the AUP under section 80E(b)(iii) as (on the basis of the materials we have considered to date), they do not support, and are not consequential on, the MDRS or Policies 3 and 4 of the NPS-UD. Our preliminary view is that these submissions would not be capable of inclusion in the IPI via PC78. However, as this is only interim guidance and we have decided not to exercise the power in section 41C to strike out any submission, this submitter (and others seeking similar relief) will be able to present their case (legal submissions and/or evidence) in support of their submission in due course. In doing so, the IHP encourages them to address the requirements in section 80E.

70. By way of a further example, the Retirement Villages Association of New Zealand Inc and Ryman Healthcare Limited (Retirement Villages) seek a retirement village specific planning framework through its submission on PC78. Among other matters, the submission seeks that retirement villages be excluded from the existing definition of "integrated residential development" and instead be classified as a specific activity, and propose the addition of new retirement village specific policies, and new bespoke matters of discretion.

71. While we accept that the Retirement Village submissions are about residential development, and seek to provide for that activity in a different way to that proposed by PC78 (and the AUP), as outlined above in relation to the changes sought by Ara Poutama Aotearoa, it is our view that the amendments to existing provisions and new plan provisions the Retirement Village submission seeks through PC78 (and any other similar submissions) are not "related provisions" that support or are consequential on the MDRS or Policies 3 and 4 of the NPSUD. On this basis we do not consider at this preliminary stage that they are able to be included in the AUP via PC78 under section 80E(b)(iii).

Qualifying Matters - Scope of discretion to make MDRS and Policy 3 requirements less enabling (s77I (residential areas) and s77O (non-residential areas))

Is the Council the only party who can exercise the discretion (i.e., per notification of the IPI, or by way of variation) to include Qualifying Matters per s77I(a) to (j) or s77O(a) to (j)? Or can any party request the inclusion of additional Qualifying Matters, or the extension of notified Qualifying Matters to other geographical areas covered by PC78?

If other parties can seek the inclusion or extension of Qualifying Matters, what information is required (in terms of ss77J, 77K and 77L, or ss77P, 77Q and 77R) for them to be included in Plan Change 78?

In terms of ss77L and 77R specifically, what does a "site-specific" analysis require?

72. None of the parties who provided legal submissions to us submitted that it was only the Council who could propose Qualifying Matters (new ones or extensions to existing Qualifying Matters). We agree. Our position is that the Council and any submitter may seek to introduce Qualifying Matters. The issue becomes - what information is required?

73. We agree with the Council's submission that a consequence of any party being able to propose a Qualifying Matter, is that any recommendations of the IHP supporting additional

or extended qualifying matters would need to be sufficiently comprehensive to satisfy the additional requirements for a section 32 evaluation report specified in sections 77J, 77K and 77L, and sections 77P, 77Q and 77R of the RMA as relevant to the nature of the qualifying matters in question.

74. We also agree with the Council (and others) that the onus would be on the party promoting a new qualifying matter or seeking to extend a qualifying matter in PC78 to additional sites/areas (as opposed to the Council), to provide sufficiently comprehensive evidence to satisfy the section 32AA and additional information requirements in the RMA as amended by the Amendment Act (unless the IHP was inclined to use its powers to request such information from parties). It is only practical if that level of information is before the IHP that the IHP could produce a section 32AA evaluation accompanying a recommendation that supported inclusion of a new qualifying matter or extension of a qualifying matter area in PC78.

75. We accept we would also need to determine if any new or an extended qualifying matter proposed was "on" PC78 as already addressed earlier. Whether the qualifying matter was "on" PC78 would depend on the nature of the qualifying matter at issue, including whether it is proposed to have a wide application across the Auckland region, and the overall effect of the plan provisions proposed by the submitter to accommodate the qualifying matter.

Site-specific analysis

76. In terms of sections 77L and 77R of the RMA, which apply to "any other" qualifying matter, these provisions stipulate three conjunctive requirements which include a site-specific analysis outlined in sections 77L(c) and section 77R(c).

77. We note when considering sections 77L and 77R that the RMA does not include a definition of 'site' or 'site-specific'.

78. There was a general consensus within the submissions presented to us, including those from the Council, that site-specific analysis is not to be equated with a 'site-by-site' analysis. The type of analysis required will depend on the nature of the proposed qualifying matter and whether the matter is confined or extends over an area.

79. It is our view that sections 77L and 77R recognise that qualifying matters can relate to areas. If the qualifying matter's quality or attributes are determined at a spatial level that is greater than a site, we accept that the analysis should identify those attributes and identify the sites where those attributes are present. The site-specific analysis should then evaluate an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS or as provided for by Policy 3 while managing the specific characteristics that are shared by the sites.

80. A 'site-by-site' analysis of the range of appropriate options is therefore not required as many qualifying matters exist at a broad scale and individual analysis on a detailed site-specific basis would not produce an effective or efficient analysis as the whole qualifying matter is greater than the sum of the constituent parts.

Urban Environment

The definition of "Urban Environment" is:

***urban environment** means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:*

(a) is, or is intended to be, predominantly urban in character; and
(b) is, or is intended to be, part of a housing and labour market of at least 10,000 people.

Can areas such as Wellsford, Snells Beach and other settlements, be excluded from Plan Change 78 on the basis of their location/disconnection from the contiguous urban area notwithstanding they are predominantly urban in character and are part of Auckland's housing and labour market (of at least 10,000 people), and if not, what are the implications of this for the IHP's hearing and recommendation schedule?

81. The defined term "urban environment" is used specifically in sections 77G(2) and 77N(2) of the RMA. The former section requires the Council to give effect to Policy 3 or Policy 5 in "every residential zone" in its "urban environment". The latter section obliges the Council to give effect to Policy 3 or Policy 5 within its "urban environment" by ensuring that provisions for each of its non-residential zones in that environment give effect to the changes required by those policies. In both cases, Policy 3 is the relevant NPS-UD provision to be given effect to.

82. On the basis of the evidence, we have considered thus far, we do not consider that the multiple coastal or rural settlements in the Auckland Region that are not contiguous with the quasi-conurbation that is Auckland City can be excluded from the definition of "urban environment". Where those settlements have residential, industrial and commercial land uses in close proximity and urban infrastructure and reticulation, they will clearly be urban in character, and because they are within a daily commutable distance to the city, are likely to be part of a housing and labour market which exceeds more than 10,000 people (i.e., Auckland).

83. However, applying the explicit requirements of Policy 3 to these settlements inevitably limits the extent to which PC78 must make changes to their land use zonings etc. Unless these settlements have walkable catchments (Policy 3(c)) or include "neighbourhood centre zones, local centre zones, and town centre zones (or equivalent)" (Policy 3(d)), there is no obligation on PC78, or ability by way of submission, to seek application of the policy to them. But if any of these settlements include such features then Policy 3 is relevant and a submission seeking that outcome will be within scope.

84. This preliminary view does not mean that Council has failed to comply with these provisions in relation to all coastal and rural settlements and must revisit how they are to be treated under PC78. We are satisfied that it has applied this aspect of the legislation in a reasonable manner. Rather, our view effectively 'holds the door open' for those submitters who are seeking application of Policy 3 to their landholdings in rural and coastal settlements not included within PC78 by the Council. That is, we accept that their submissions are "on" PC78 and must be considered. Evidence satisfying the IHP that Policy 3 applies to these sites, and

that the outcome sought is within the scope of the IPI (section 80E), will be expected by the IHP in the hearings in due course.

85. We conclude this section of our guidance by making two further observations.

86. First, the fact that rural and coastal settlements may be within the "urban environment" (as defined), does not require the MDRS to be applied to the residential zones within them. The MDRS only has to be incorporated into "every relevant residential zone" of the relevant territorial authority. The definition of "every relevant residential zone" is (now) set out in section 2(1) of the RMA and does not include, inter alia, "an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000" that the local authority does not intend to become part of an urban environment. Therefore, Council's exclusion of the MDRS from residential zones meeting this criterion is lawful and in our view is unable to be challenged by way of submission to PC78. Put another way, submissions seeking application of the MDRS to residential zones excluded by reference to this aspect of the definition would not be "on" PC78.

87. Second, section 77(G)(2) does not use the defined term "relevant residential zone". Rather, it uses the definition "residential zone" which is broader than the term "relevant residential zone". However, the use of this broader term in section 77G(2) appears to be of limited consequence as this section only requires the Council to give effect to Policy 3 in these zones, which is limited to the matters in Policy(3)(c) and (d), and not the incorporation of the MDRS into them. In our view, submissions seeking that latter outcome will not be "on" PC78.

Relevant Residential Zone

Are the Future Urban Zone and the Residential - Large Lot Zone relevant residential zones under s77G of the RMA and thus required to have the MDRS incorporated in them? If so, what are the implications of this for the IHP's hearing and recommendation schedule?

88. None of the legal submissions presented to us argued that the Future Urban Zone and the Residential - Large Lot Zone are "relevant residential zones" under s77G of the RMA. We agree that they are not.

89. However, as we have already set out several times, our view is that PC78 is not a narrow plan change, and needs to be assessed and implemented in a way that gives effect to the balance of the NPS-UD (subject to scope). It is on this basis, and our guidance in relation to "Urban Environment" above, that we address this question.

90. Section 77G states that, "every relevant residential zone … must have the MDRS incorporated into that zone". The RMA's definition of "relevant residential zone" means "all residential zones" but has exclusions including the large lot residential and settlement zones. The AUP's definition of residential zones includes Residential - Large Lot Zone; • Residential - Rural and Coastal Settlement Zone; • Residential - Single House Zone; • Residential - Mixed Housing Suburban Zone; • Residential - Mixed Housing Urban Zone; and • Residential - Terrace Housing and Apartment Buildings Zone; but not the FUZ.

91. On this basis, the MDRS provisions do not need to be incorporated into the Large Lot or FUZ per se. No party contended otherwise. However, this does not preclude the application of MDRS to such land if it were determined (through evidence) to be appropriate to rezone that land to a "relevant residential zone". This is because section 77G(4) enables the creation of new residential zones or the amendment to existing residential zones to achieve sections 77G(1) and (2), and PC78 may include provisions that support giving effect to NPS-UD Policy 3 and incorporating the MDRS.[13]

92. Accordingly, our initial view is that PC78 can address potential rezonings from land zoned (say) FUZ if that is considered to be an appropriate response to the balance of the NPS-UD provisions. Section 80G of the RMA states that the Council "must not … use the IPI for any purpose other than the uses specified in section 80E". Accordingly, provided any proposed rezoning gives effect to the NPS-UD or helps incorporate the MDRS, they are not precluded by section 80G and therefore can be considered as "on" PC78.

93. As a consequence, it is our view that submissions seeking relief in respect of rezoning FUZ and Residential - Large Lot Zone to a "relevant residential zone" should not be ruled out due to scope, and can be set down for hearing on the merits in due course.

Rapid Transit Stops

> *Are Ferry Terminals "Rapid Transit Stops" for the purposes of NPS-UD Policy 3 given their definition and that of "Rapid Transit Service" (as follows), and if so, what are the implications of this for the IHP's hearing and recommendation schedule?*

rapid transit service *means any existing or planned frequent, quick, reliable and high-capacity public transport service that operates on a permanent route (road or rail) that is largely separated from other traffic*

rapid transit stop *means a place where people can enter or exit a rapid transit service, whether existing or planned*

94. The term "rapid transit stop" and "rapid transit service"' are defined in clause 1.4 of the NPS-UD as:

- *rapid transit stop - means a place where people can enter or exit a rapid transit service, whether existing or planned*
- *rapid transit service means any existing or planned frequent, quick, reliable and high-capacity public transport service that operates on a permanent route (road or rail) that is largely separated from other traffic*

95. The terms 'planned' and 'public transport' are also defined in clause 1.4 of the NPS-UD as

- **planned** in relation to forms or features of transport, means planned in a regional land transport plan prepared and approved under the Land Transport Management Act 2003

[13] Section 80E(1)(b) RMA

- **public transport** means any existing or planned service for the carriage of passengers (other than an aeroplane) that is available to the public generally by means of:

    (a) a vehicle designed or adapted to carry more than 12 persons (including the driver); or

    (b) a rail vehicle; or

    (c) a ferry

96. In our view (which is consistent with that of the Council and Waka Kotahi) the definition explicitly relates solely to road and rail, and does not include ferries or other water-based transport. The definition of 'rapid transit services' specifically limits such services to those that operate on permanent road or rail routes, largely separate from traffic. A plain reading of the definition excludes ferries from being considered as "a rapid transit service".

97. Any enquiries regarding this Interim Guidance, or related matters, should be directed to the council's Senior Hearing Advisor, Mr Sam Otter by email at npsudhearings@aucklandcouncil.govt.nz.

Greg Hill Chairperson

12 June 2023

Attachment – Legal Submissions provided to IHP

Alan McArdle
Ara Poutama – Department of Corrections
Auckland Council
Auckland Thoroughbred Racing Inc
Avondale Jockey Club
Brightway GS Investments Limited
Channel Terminal Services
Character Coalition
Charles Levin
Christopher Robert Smale
Citadel Capital Limited
Devonport Heritage
Drive Holdings Limited
Eke Panuku
Foodstuffs North Island Limited
Green City Developments Limited
Joshua Marshall
Kāinga Ora - Homes and Communities
Kiwi Property Group Limited
KiwiRail
Matvin Group
Middle Hill Limited
OGC2 Limited
Precinct Properties
Radio New Zealand Limited
Retirement Villages Association of New Zealand
Ryman Healthcare Limited
Samsom Corporation
Silver Hill Limited
Southern Cross Healthcare
St Mary's Bay Association
Te Tūāpapa Kura Kāinga (Ministry of Housing and Urban Development)
Te Tūāpapa Kura Kāinga (Ministry of Housing and Urban Development) – Land Acquisition and Development Team
Templeton Group
The Catholic Diocese of Auckland
The Kilns Limited
The Rosanne Trust
Vector Limited
Viaduct Harbour Holdings Limited
Waka Kotahi