Steve Rice

To: Sean Grace
Cc: MILLAR, Andrea (WELLHO); Rachel Murdoch
Subject: RE: Ara Poutama - Waipa DC PC26 hearing - Supplementary information

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From: Sean Grace [mailto:sean.grace@boffamiskell.co.nz]
Sent: Friday, April 28, 2023 12:59 PM
To: Steve Rice
Cc: MILLAR, Andrea (WELLHO); Rachel Murdoch
Subject: Ara Poutama - Waipa DC PC26 hearing - Supplementary information

Kia ora Steve,

Further to Ara Poutama Aotearoa the Department of Corrections' appearance yesterday at the PC26 hearing, there was a question raised by the Panel in regards to the scope regarding one of Ara Poutama's submission points. As discussed yesterday, Ara Poutama's legal counsel has prepared legal submissions recently on the Hutt City Council's IPI on this same matter; namely the inclusion of the National Planning Standards' definition of "community corrections activity".

As offered to the Panel, Ara Poutama's legal counsel has provided the email below relating to this matter, including addressing the *Waikanae Land Company* Environment Court decision. That email sets out the context behind the attachments included.

Please note also that I have also attached Ara Poutama's legal submissions relating to the Upper Hutt City Council's IPI, which were lodged after the Hutt City Council legal submissions, and do directly refer to the *Waikanae Land Company* decision.

It would be much appreciated if this supplementary information package could be passed on to the Panel.

Regards
Sean

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From: Rachel Murdoch <rmurdoch@greenwoodroche.com>
Sent: Friday, 28 April 2023 10:15 AM
To: MILLAR, Andrea (WELLHO) <Andrea.Millar@CORRECTIONS.GOVT.NZ>
Cc: Sean Grace <sean.grace@boffamiskell.co.nz>; Heather Philip <HPhilip@greenwoodroche.com>
Subject: Waikanae - Corrections [GREE-DMS.FID171040]

Hi Andrea,

Further to our discussion yesterday, please find attached the legal submissions filed on behalf of the Department during the Hutt City IPI process. I've also attached a summary of those submissions, which was presented during the hearing.

Those submissions do not reference the Environment Court's decision in *Waikanae Land Company* (attached), which was released just prior to the lodgement date for those submissions. I did however have the benefit of reviewing that decision prior to the hearing, and, for the reasons set out below, I

considered that the findings of the Environment Court in that case did not directly relate to, or otherwise constrain, the relief sought by the Department.

Waikanae Land Company v Heritage NZ Pouhere Taonga

Waikanae was a decision on a preliminary question of law relating to an intensification planning instrument notified by Kapiti Coast District Council. In that IPI, Council proposed to:

1. Include existing wahi tapu sites and areas as qualifying matters under section 77I, RMA. As you are aware, the medium density residential standards to be included through an IPI may be "less enabling" only to the extent necessary to accommodate qualifying matters.
2. Add the subject site to the schedule of wahi tapu sites on the basis that it too was a qualifying matter.

The Court's particular focus in the decision was on the legality of the second action. It concluded that:

1. As wide as a territorial authorities' power may seem in undertaking an IPI, it is apparent they are not open ended. [23].
2. Qualifying matters introduced through the IPI process must relate to the defined "density standards" and clauses 10 – 18 of Schedule 3A, and make those standards less enabling. [25].
3. Provisions which comprise an IPI are, on the face of section 80E, extremely wide. "Related provisions", described in section 80E(2), may extend beyond those matters identified in ss 2(a)-(g). [27].
4. However, the scope of those provisions are not unlimited - they all must support or be consequential on the MDRS or policies 3 – 5 (as relevant). [28] – [29].

In that context, the Court held that inclusion of the subject site as a scheduled wahi tapu site neither supports nor is consequential on the MDRS; rather, it actively precludes operation of the MDRS on the site. Consequently, use of the IPI process for that purpose was held to be *ultra vires.*

Relevance for Corrections

In the vast majority of IPIs across the country, the relief sought by Corrections' does not relate to qualifying matters. Rather, that relief seeks the addition or amendment of related provisions which support the MDRS as envisaged by section 80E(2). In that regard, the position expressed by the Court in *Waikanae* – that related provisions must be tied to intensification enabled under the MDRS and policies 3 -5 – is consistent with Corrections' approach, and its relief, which seeks to ensure that accessibility to its *community corrections* facilities remains commensurate with the level of activity enabled through the MDRS and policies 3 – 5. Unlike in *Waikanae,* that relief is consequential on, and will support, the MDRS and policies 3 – 5 in achieving well-functioning urban environments. It is therefore a "related provision" which may lawfully be included as part of an IPI.

Please don't hesitate to contact me if you require anything further.

Ngā mihi | Kind regards

Rachel Murdoch | Principal

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