IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	Plan Change 56 to the Hutt City District Plan

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LEGAL SUBMISSIONS ON BEHALF OF
ARA POUTAMA AOTEAROA, THE DEPARTMENT OF CORRECTIONS
(SUBMITTER # 111)

Dated 6 April 2023

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1 INTRODUCTION

1.1 These legal submissions are made on behalf of Ara Poutama Aotearoa, the Department of Corrections (**Ara Poutama** or **the Department**) in relation to matters raised in its submission dated 20 September 2022[1] on Plan Change 56 (**PC56**) to the Hutt City District Plan (**HCDP**).

1.2 PC56 responds to the statutory requirements of the Resource Management Act 1991 (**RMA**) to strengthen implementation of the National Policy Statement on Urban Development 2020 (**NPS-UD**) [2] in district plans throughout the country.

Relief sought

1.3 Within that context, Ara Poutama's submission seeks to ensure that intensification enabled under PC56 will contribute to well-functioning urban environments and enable all people and communities to provide for their well-being and health and safety, both now and into the future. To that end, it seeks the following relief:

(a) Retention of the proposed definition of *residential unit,* which the PC56 Officers' Report accepted.

(b) Inclusion of a definition of *household*, which is a term used in the proposed definition of *residential unit*.

(c) Inclusion of a definition of *residential activity* consistent with that required to be implemented by the National Planning Standards, which is also a term used in the proposed definition of *residential unit*.

(d) Inclusion of the National Planning Standards definition of *community corrections activity*.

(the **Definitions Relief**)

(e) Re-classification of the activity status of *community corrections activities* in the Central Commercial Activity Area, General business Activity Area, Petone Commercial Activity Area (Area 2), Suburban

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1 Submitter #111.
2 As amended in 2022.

Mixed Use Activity Area. Having further considered the rule structure for these Activity Areas, Ara Poutama has amended its relief in this regard and considers that amendment is only needed to the Petone Commercial Activity Area (Area 2) and Suburban Mixed Use Activity Area (where it adjoins High Density Residential Activity Area).

(the **CCA Relief**)

1.4 The appropriateness of Ara Poutama's Relief in terms of the purpose of the RMA and achieving the relevant objectives of the HCDP has been comprehensively addressed in the evidence of Mr Maurice Dale on behalf of Ara Poutama. I do not intend to repeat that careful analysis in these submissions, but simply commend it to you as a sound basis on which to approve that relief and include it in the HCDP as part of your decision on PC56.

1.5 These legal submissions instead address what the Council Officer has identified as the key constraint on approving part of the Definitions Relief (relating to the proposed definition of *household*) and the CCA Relief, being the issue of scope, and in particular, whether Ara Poutama's desired relief falls within the scope of PC56.

2 LEGAL APPROACH TO SCOPE

2.1 The orthodox legal approach to determine whether a submission is within the scope of a standard RMA plan change is well-established, and is set out in *Palmerston North City Council v Motor Machinists Limited.*[3] The two limbs of the test are:[4]

(a) Whether the submission falls within the ambit of the plan change, i.e. does it address the extent of the alteration to the status quo that the plan change proposes to address?

(b) Whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the

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3 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

4 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66]; and *Palmerston North City Council v Motor Machinists Limited*, above n 3, at [81] to [82].

submission have been denied an effective response to those additional changes in the plan change process.

2.2 The starting point to any scope assessment under the standard Schedule 1 process is therefore establishing the ambit of a particular plan change. In the usual course, this involves consideration of the objectives of a plan change as articulated in the notification documents, and identification of what relevant matters are, or should have been, addressed in the section 32 report.

2.3 On the later point, the Environment Court in *Bluehaven Management* confirmed that:

(a) The question of whether a submission is 'on' a plan change is not simply related to whether the section 32 evaluation report did or did not address the issue raised in the submission.

(b) Rather, it is an inquiry as to what matters should have been included in the section 32 evaluation report and whether the issue raised in the submission addresses one of those matters.

(c) That assessment should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission.[5]

2.4 In my submission, the findings of the Court in these cases provide important, helpful guidance when considering issues of scope for the Intensification Streamlined Planning Process (**ISPP**). However, as discussed further below, there are key differences between the ISPP and a standard plan change process which, in my submission, modify the extent to which those findings may be considered binding authority on questions of scope in an IPI context.

Intensification Requirements

2.5 In contrast to a standard plan change, as an Intensification Planning Instrument (**IPI**) PC56 is required to address the prescribed matters set

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[5] *Palmerston North City Council v Motor Machinists Limited,* above n 3, at [81]; *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191, at [38] - [39].

out in section 80E of the RMA. The ambit of that IPI, in other words, is set by section 80E, which requires PC56 to:

(a) incorporate the medium density residential standards (**MDRS**), included in Schedule 3A;

(b) give effect to policies 3 – 5 of the NPS-UD (as applicable) in relevant residential zones and urban non-residential zones.

2.6 A territorial authority must also include the specific objectives and policies set out in clause 6 of Schedule 3A.[6]

2.7 In accordance with section 80E, an IPI may also amend or include:

(a) "Related provisions", including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS or the relevant NPS-UD policies.[7]

(b) Provisions that relate to, without limitation, district-wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management and subdivision of land.[8]

2.8 Importantly, where the Panel considers that, having regard to the applicable legal framework, alterations to the notified IPI are necessary or appropriate to address the matters in section 80E (whether or not those alterations have been requested in submissions), the Panel is authorised to recommend those alterations provided they relate to matters which have at least been raised during the hearing.[9]

2.9 In my submission, the sum effect of these provisions is to expand the recommending role of the Panel in terms of the content of an IPI beyond what is contemplated under the orthodox legal approach to scope, described earlier in my submission. While it is clear that a territorial authority has an important function in preparing and notifying an IPI, that notified version does not set the finite legal boundaries of an IPI; those boundaries are established by section 80E. Where it addresses matters within those boundaries, a submission can and should therefore

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6 RMA, section 77G(5).
7 RMA, section 80E(1)(b)(iii).
8 RMA, section 80E(2).
9 RMA, Schedule 1, clause 100(3).

be considered 'on' the plan change in a *Motor Machinists* sense, whether that matter has been raised in the notified IPI or not.

2.10 This different statutory context for an IPI also has implications for the second limb of the *Motor Machinists* test. In my submission, the relevant natural justice considerations in this context must be viewed in light of:

(a) the prescribed content of an IPI (under section 80E), which will enable significant change across the relevant parts of the urban environment; and

(b) the expanded recommending role of the Panel in determining what does and does not fall within that IPI.

2.11 The effect of both of these components is, in my submission, to elevate the standard of inquiry that might reasonably be expected from potentially affected parties in relation to how the IPI (as notified) and submissions on that IPI might impact their interests.[10] Where relief sought through submissions clearly pertains to matters identified in section 80E, the further submissions process provides opportunity for an effective response, and ensures a role for those potentially affected parties in the relevant hearings.

3 SECTION 80E: RELATED PROVISIONS

3.1 It is Ara Poutama's submission that its Definitions Relief and CCA Relief are "related provisions which support…the MDRS and policies 3 – 5" pursuant to s80E(1)(b)(iii), and therefore fall within the ambit of PC56.

3.2 Before addressing that relief in further detail, it is first necessary to examine what constitutes "a related provision" in that context.

3.3 In my submission, the answer to that question in terms of issues of scope requires an examination not only of the MDRS and specified NPS-UD provisions themselves, but also their broader purpose, and the legislative/regulatory context in which they are located. This is consistent with the well-established primary principle of statutory

[10] Refer similar discussion on the interpretation of the second limb in the Proposed Auckland Unitary Plan context in *Albany North Landowners v Auckland Council [*2017] NZHC 138, at [169] - [172].

interpretation, which requires the meaning of legislation to be ascertained from its text and in light of its purpose and context.[11]

3.4 The passage of the Enabling Act was intended to accelerate and strengthen implementation of the NPS-UD. While the particular focus of the Enabling Act is on intensification and enabling more people to live and operate in appropriate areas, achieving that outcome cannot be – and is not – divorced from the other objectives of the NPS-UD. Put another way, neither the RMA (as amended by the Enabling Act) nor the NPS-UD contemplates intensification in isolation from realising well-functioning urban environments. One must support the other.

3.5 The important connection between the intensification outcomes and the broader objectives of the NPS-UD, including realisation of a well-functioning urban environment, is recognised in the supporting evaluations for PC56.[12]

3.6 In respect of the MDRS, that connection is also specifically secured through the objectives and policies which accompany those standards in Schedule 3A and, as noted above, are required to be inserted in district plans. Those objectives are:

> *Objective 1*
>
> (a) a well-functioning urban environment that enables all people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, now and in the future:
>
> *Objective 2*
>
> (b) a relevant residential zone provides for a variety of housing types and sizes that respond to:
>
> (i) housing needs and demand; and
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> (ii) the neighbourhood's planned urban built character, including 3-storey buildings.[13]

(together, the **Mandatory Objectives**)

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11 Legislation Act 2019, section 10(1).

12 See for example: PC56 - Plan Change Document – Volume 2 at pages 39, 46, section 4(30).

13 RMA, Schedule 3A, clause 6.

3.7 In accordance with the guidance in *Bluehaven,* submissions which seek major alterations to the Mandatory Objectives will not be "on" PC56 (and, in fact, would be unlawful given the requirement to incorporate them). However, alterations to policies and methods within the framework of those objectives may be within the scope of the proposal.[14]

3.8 In that context, provisions which support the MDRS and policies 3 -5 of the NPS-UD (as applicable) towards achieving the Mandatory Objectives and the other relevant objectives of the NPS-UD may, in my submission, be lawfully considered a "related provision" in terms of section 80E.

3.9 That interpretation also aligns with the identified intent of the "related provision" component of section 80E, which was recommended for insertion in the Enabling Act by the Select Committee to:

> *"…enable councils to amend or develop provisions that support or are consequential on the MDRS and NPS-UD. This could include objectives, policies, rules, standards, and zones. It could also include provisions that are used across a plan relating to subdivision, fences, earthworks, district-wide matters, infrastructure, qualifying matters, stormwater management (including permeability and hydraulic neutrality), provision of open space, and provision for additional community facilities and commercial services."*[15]

3.10 In that context, the balance of these submissions address whether the following aspects of Ara Poutama's relief fall within the scope of PC56 as "related provisions" which support or are consequential on the MDRS or policies 3 – 5:

(a) The proposed definition of *household* and the National Planning Standards' definition of *community corrections activity.*

(b) The CCA Relief.

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14 *Bluehaven Management Limited v Western Bay of Plenty District Council*, above n 5, at [37].

15 Resource Management (Enabling Housing Supply And Other Matters) Amendment Bill Environment Select Committee Report, page 7.

4 DEFINITIONS RELIEF

4.1 With respect to the proposed definitions of *household* and *community corrections activity*:

(a) As part of implementing the MDRS, PC56 proposes the inclusion of the National Planning Standards' definition of *residential unit.* The definition of *residential unit* includes the word *household.*

(b) By including that *residential unit* definition, PC56, as notified, proposes to alter the status quo regarding land use activities in the relevant residential zones.

(c) Ara Poutama's proposal to include a definition of *household* is directly related to, and seeks to enhance clarity of, the changes already proposed. It therefore does not go beyond the proposed alteration to the status quo.

(d) Ara Poutama's request to include a definition of *household* is also directly related to, and will help implement, the Mandatory Objectives which also fall within the ambit of PC56. In particular, it aims to provide clarity that intensification enabled under this Plan Change will provide for, and meet the needs of, a variety of different households, including those managed by Ara Poutama.

(e) With respect to the *community corrections activity* definition, including the National Planning Standards definition is practical, efficient and will enable the CCA Relief sought by the Department to support intensification facilitated by PC56.

4.2 For these reasons, the proposed definitions sought by Ara Poutama may lawfully be considered "related provisions" in terms of section 80E, and are therefore within the ambit of PC56.

4.3 With respect to any natural justice considerations:

(a) The High Court has previously recognised that the further submission process provides an opportunity for public engagement on a matter, provided that the original submission was not out of "left field".[16]

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[16] *Clearwater Resort Limited v Christchurch City Council*, above n 4, at [69].

(b) To that end, it was identified in the PC56 supporting documents that definitions would be amended and/or proposed as part of PC56 to support the operation of the amended intensification provisions.[17] In a more general sense, reconciling activity definitions which may be engaged by that plan change with the relevant National Planning Standards definitions is not, in my submission, a "left field" submission.

(c) As set out above, Ara Poutama's submission to include a definition of *household* is directly related to, and seeks to enhance clarity of, the changes already proposed (being the definition of *residential unit*). It will also support implementation of the Mandatory Objectives.

(d) While the notified PC56 did not propose to include the National Planning Standards' definition of *community corrections activity* that relief was sought by Ara Poutama in its original submission, and for the reasons outlined above, is considered to be a "related provision" in terms of section 80E.

(e) On the basis that the Definitions Relief was clearly set out in Ara Poutama's original submission, all parties that would be potentially interested in that relief would have accordingly had an opportunity to provide an effective response to that relief through further submissions.[18]

4.4 For these reasons, I submit that Ara Poutama's Definitions Relief falls within the scope of PC56, and may be subject to recommendations on its merits.

5 CCA RELIEF

5.1 With respect to the question of whether the CCA Relief falls within the ambit of PC56:

(a) PC56, as notified, proposes to alter the status quo in respect of the Petone Commercial and Suburban Mixed Use Activity Areas by:

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17 See for example PC56 – Plan Change Document – Volume 2 at pg 7.

18 The only further submission received on Ara Poutama's submission was from Kāinga Ora – Homes and Communities.

(i) Altering the level of density that can be accommodated in these zones through increasing permitted building heights; and

(ii) Including a new Urban Environment chapter and accompanying objective seeking "a well-functioning urban environment that enables all people and communities to provide for their…wellbeing and health and safety, now and into the future".[19]

(b) As part of its evaluation of those changes, the Council specifically acknowledged that the provisions of PC56 would need to give effect to the NPS-UD and, in particular, to achieve a "well-functioning urban environment" as defined in Policy 1, NPS-UD. [20]

(c) For the reasons set out above, I agree with that assessment, and consider that a contextual evaluation to the MDRS and the relevant NPS-UD policies is appropriate in terms of establishing the ambit of PC56.

(d) Of particular relevance to the CCA Relief, a "well-functioning urban environment" must have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport.[21]

(e) A *community corrections activity* is a community service.

(f) As noted in Ara Poutama's submission, that activity is currently subject to discretionary consenting requirements in the Petone Commercial Activity Area (Area 2) and Suburban Mixed Use Activity Area (adjacent to the High Density Residential Activity Area). Removing those consenting requirements will better enable a *community corrections activity* to locate in those areas which are subject to intensification, as proposed in PC56.

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19 PC56 – Plan Change Document – Volume 1, Amendment 3.
20 PC56 - Plan Change Document – Volume 2 at page 39.
21 NPS-UD, policy 1(c).

(g) In that way, Ara Poutama's CCA Relief seeks to ensure that:

(i) PC56 will better enable the opportunity for access to those services that is commensurate with the increased level of activity/demand in the relevant zones resulting from intensification; and

(ii) consequently, that intensification enabled in accordance with policies 3 and 4 will achieve a "well-functioning urban environment".

(h) The CCA Relief therefore constitutes related provisions which supports those policies, and the manner in which they are given effect to through PC56.

(i) The fact that enhanced provision for these activities in these zones was not contemplated in PC56 as notified is not, in my submission, fatal to the issue of scope. As noted by the Court in *Bluehaven* (discussed above), it may well be that a submission raises a matter which, on evaluation of its broader statutory/regulatory context, should lawfully be addressed as part of that plan change. In my submission, that guidance has direct applicability to the CCA Relief, which does not seek any "radical" changes to the objectives of PC56, but rather provides an additional/alternative method to support the achievement of those objectives.[22]

(j) In my submission, it can therefore be considered to fall within the ambit of PC56.

5.2 With respect to natural justice considerations:

(a) PC56's supporting documents make it clear that its provisions must give effect to the NPS-UD. As part of its evaluation of PC56, Council acknowledged that increased development capacity (enabled, for example, through intensification) can necessitate additional provision for community facilities.[23]

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22 *Bluehaven Management Limited v Western Bay of Plenty District Council*, above n 5, at [37].

23 PC56 – Plan Change Document – Volume 2, page 16.

(b) While no change to the status of community activities was proposed through the notified PC56, the relief in respect of *community corrections activity* was sought by Ara Poutama in its original submission.

(c) The further submission process accordingly provided an opportunity for public involvement in the Relief sought by Ara Poutama.[24]

(d) Finally, as noted in Mr Dale's evidence,[25] community corrections activities are administered exclusively by Ara Poutama, and are delivered in locations commensurate with identified demand. Permitting these activities will therefore not result in a proliferation of community corrections facilities throughout the areas proposed for intensification under PC56.

6 CONCLUSION

6.1 For the reasons stated, Ara Poutama therefore respectfully submits that there is scope under the RMA for the Panel to consider the merits of its submission, and to accordingly make recommendations in respect of the same.

6.2 In that regard, I submit that:

(a) It is appropriate to include the National Planning Standards definition of *residential activity* as it does not have wider implications for the HCDP framework.

(b) Ara Poutama's proposed definition of *household* should be included to provide additional clarity for interpreting the term *residential unit* to avoid misinterpretation and ensure that the housing needs of those housed by Ara Poutama and/or its service providers within the community are met.

(c) *Community corrections activity* should be defined and provided for as a permitted activity in the Petone Commercial (Area 2) Activity Area, and Suburban Mixed Use Activity Area (where it adjoins the High Density Residential Activity Area) given that such activities:

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24 *Clearwater Resort Limited v Christchurch City Council*, above n 4, at [69].

25 At 8.9.

(i) contribute to a well-functioning urban environment consistent with Objective 1 and Policy 1 of the NPS-UD;

(ii) are consistent with the character and amenity of those areas and are not prone to reverse sensitivity. Several examples have been provided in Mr Dale's evidence demonstrating this;

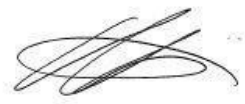
(iii) are discrete in number and will not impact on the wider availability of commercial land;

(iv) ensure good connectivity/accessibility between housing, jobs, and community services by limiting such activities in the Suburban Mixed Use Activity Area to locations where it adjoins the High Density Residential Activity Area.

(v) meet local needs in areas with good connectivity to align with the NPS-UD, and the policy framework of the HCDP and Regional Policy Statement for Wellington Region as amended by Plan Change 1.

6.3 Ara Poutama wishes to thank the Panel for the opportunity to speak further to its submission.

DATED this 6th day of April 2023



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