Plan Change 2
Council Officers' Planning Evidence

Appendix D

Legal advice on scope of submissions for PC2 (Simpson Grierson, 2023)

Our advice

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Scope of submissions PC2

Background

The Kāpiti Coast District Council (**Council**) notified Proposed Plan Change 2 (**PC2**) on 18 August 2022. The submission period closed on 27 September 2022 and the further submission period closed on 24 November 2022.

PC2 is an intensification planning instrument (**IPI**) under section 80E of the Resource Management Act 1991 (**RMA**). At a high level, its purpose is to incorporate the Medium Density Residential Standards (**MDRS**) into the District Plan, give effect to Policy 3 of the National Policy Statement on Urban Development 2020 (**NPS-UD**), provide for a range of existing and new qualifying matters, amend the District Plan to enable papakāinga, and amend the District Plan financial contributions provisions.

The Council has received submissions on PC2 which relate to:

- The rezoning of sites which were not proposed to be rezoned as part of PC2; and
- District Plan provisions that were not notified as part of PC2.

The Council is seeking advice on the legal tests to apply to these submissions and whether these submissions are "on" PC2.

The Council is also seeking advice on a particular submission, which relates to Kārewarewa Urupā (**the Urupā**). PC2 added the Urupā to Schedule 9 in the District Plan (which contains wāhi tapu sites). A submission has alleged that this was an improper use of an IPI, or ultra vires.

Questions and answers

1. **What is the legal test for determining whether a submission is "on" a plan change, in the context of an IPI?**

   The legal tests are summarised and set out in Appendix 1 to this advice. In summary, if the proposed plan change is not altering the status quo in the District Plan in relation to an issue raised by a submission, the issue is unlikely to have been addressed in the section 32 evaluation and report, and the submission is unlikely to be "on" the plan change. However, if the change was analysed in the section 32 report, or the change is "incidental or consequential", in

that no substantial further section 32 analysis would be required, then the submission may be "on" the plan change.

2. **How does this test apply in relation to submissions requesting rezoning of particular sites?**

   The tests in Appendix 1 will apply. In summary, "incidental or consequential" extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that zoning change.

   There are some submissions that seek to rezone sites that were considered as part of the preparation of PC2 but were ultimately not included in the notified PC2. The consideration of these sites is documented in Appendix B to the section 32 report, which outlines why these sites were not considered appropriate to rezone as part of PC2. A submission requesting the rezoning of such a site may be considered to be a submission 'on' PC2.

   In some cases, the extent of rezoning requested in submissions is unclear and has had to be inferred as part of preparing the summary of decisions requested. In our view this is unlikely to have any bearing on scope assessments. This is because the majority of the rezoning requests relate to sites for which PC2 d*oes not* alter the management regime (nor are the sites adjacent to sites for which PC2 *does* alter the management regime). In those circumstances, the level of clarity about the precise extent of the request should assume a lower level of significance.

3. **Is a submission on a district-wide objective, policy or rule that was not notified as part of PC2 a submission "on" PC2?**

   The answer to this question is likely to change on a case-by-case basis, depending on the application of the district-wide objective, policy or rule. For each submission on a district-wide provision that was not notified as part of PC2, we would recommend following the process set out in Appendix 1.

4. **Was the listing of Kārewarewa Urupā as a wāhi tapu site via PC2 ultra vires?**

   In our view, it was not ultra vires. As set out in our previous advice,[1] to include new wāhi tapu sites in the Schedule of such sites in the District Plan, the Council would need to demonstrate how introduction of wāhi tapu sites supports or is consequential on the MDRS or policies 3 and 4 of the NPS-UD.[2] If an area that is subject to an IPI includes known wāhi tapu sites that are not currently scheduled (such as the Urupā), we consider that it would arguably be consequential on

1 *What does the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 enable?* (21 February 2022) at [55].
2 Under section 80E.

that IPI that those wāhi tapu sites are added to the District Plan. To find otherwise would result in illogical outcomes – mainly that wāhi tapu sites would not be protected, despite there being clear intentions that such sites would be qualifying matters.

Reasoning explained

Question 1 – What is the legal test for determining whether a submission is "on" a plan change, in the context of an IPI?

Section 80E in the RMA sets the scope of matters that may be included in an IPI and therefore the scope of PC2

1. In order to answer this question we have first set out the scope of an IPI, given its relevance to what may be included within an IPI, whether as notified or as sought in a submission.

2. The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) amended the RMA on 21 December 2021.

3. The Amendment Act was intended to accelerate the implementation of the NPS-UD, and requires Tier 1 local authorities to make amendments to district plans to increase housing supply through the implementation of the MDRS.

4. Tier 1 councils were required to implement these plan changes by notifying an IPI by 20 August 2022.

5. PC2 is an IPI prepared in accordance with the requirements of the Amendment Act. The Amendment Act prescribes mandatory matters that must be included in an IPI, and discretionary matters that may be included.

6. Section 80E of the RMA sets the scope of matters that may be included in an IPI, and therefore the scope of PC2 is also set by section 80E. This is made clear in section 80G, which states that the territorial authority must not "use the IPI for any purpose other than the uses specified in section 80E". The relevant parts of section 80E provide:

> **80E Meaning of intensification planning instrument**
>
> (1) In this Act, intensification planning instrument or IPI means a change to a district plan or a variation to a proposed district plan—
>
> (a) that **must**—
>
> (i) incorporate the MDRS; and
>
> (ii) give effect to,—

(A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; ….

(b) that **may** also amend or include the following provisions:

(i) provisions relating to financial contributions, if the specified territorial authority chooses to amend its district plan under section 77T:

(ii) provisions to enable papakāinga housing in the district:

(iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—

(A) the MDRS; or

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

(2) In subsection (1)(b)(iii), related provisions also includes provisions that relate to any of the following, without limitation:

(a) district-wide matters:
(b) earthworks:
(c) fencing:
(d) infrastructure:
(e) qualifying matters identified in accordance with section 77I or 77O:
(f) storm water management (including permeability and hydraulic neutrality):
(g) subdivision of land.

7. At a broad level the IPI is required to incorporate the MDRS and Policies 3 and 4 of the NPS-UD within Kāpiti's urban environment (the **mandatory outcomes**).[3] According to section 80E, the Council can also, at its discretion, include provisions relating to papakāinga housing, financial contributions, and *related provisions*, including objectives, policies, rules, standards, and zones that support or are consequential on the implementation of the MDRS and Policies 3 and 4.[4] *Related provisions* include provisions that relate to, amongst other things, district-wide matters.[5]

8. The Council may include "related provisions" in its IPI, with section 80E(1)(b)(iii) setting out a list of matters that fall within that term. For a provision to be a "related provision", it must either support or be consequential on achieving either of the two mandatory outcomes.

9. In our view, section 80E is framed in such a way as to demonstrate that the mandatory outcomes are critical, and it is only after (or as part of) satisfying them that related provisions can be included within an IPI. In this way, the words "related provisions" indicate a purpose that is secondary to the mandatory outcomes, as they will support or be consequential on those outcomes. Amendments

3 Section 80E(1)(a).
4 Section 80E(1)(b).
5 Section 80E(2).

could be said to "support" if they assist or enable the MDRS to be incorporated, or assist with giving effect to policy 3.

10. There are also spatial requirements for any related provisions. The IPI is required to satisfy the mandatory outcomes within an "urban environment". As a result, any related provisions would similarly need to relate to an urban environment - if they did not, it may be difficult to demonstrate the necessary link between that provision and achieving one of the mandatory outcomes. However, it also seems clear that if an IPI amends provisions that also have application outside urban areas (e.g. district-wide provisions – see section 80E(2)(a)), the amendments will have effect in those wider areas too.

11. The list of related provisions in section 80E(2) includes "qualifying matters identified in accordance with sections 77I or 77O". Sections 77I and 77O provide that (emphasis added):

> A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone **only to the extent necessary to accommodate 1 or more of the following qualifying matters** that are present…

12. Given the section 80E constraints on what can be addressed within an IPI, section 80E will be relevant to consideration of whether a submission is "on" PC2. For a submission to be "on" the plan change, it must be "on" one of the matters set out in section 80E. If relying on the ability to include related provisions, a submitter would need to be able to demonstrate the necessary link between the amendment sought, and achieving one of the mandatory outcomes, to prove that the submission is "on" the plan change. We discuss this further in the next section.

In the same way as a submission must be "on" a plan change, a submission must be "on" the IPI

13. Clause 95 of Part 6 of Schedule 1 of the RMA identifies clauses of Part 1 of Schedule 1 that apply to the Intensification Streamlined Planning Process (**ISPP**), to the extent they are relevant to specified territorial authorities.

14. The identified provisions include clause 6 which provides that, once a proposed plan change is publicly notified, the described persons may make a submission "on" it to the relevant local authority.

15. In addition, clause 99 of Part 6 of Schedule 1 provides as follows:

> **99 Independent hearings panel must make recommendations to territorial authority on intensification planning instrument**
>
> (1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.
>
> (2) The recommendations made by the independent hearings panel—
>
> 15.1 must be related to a matter identified by the panel or any other

person during the hearing; but

15.2 are not limited to being within the scope of submissions made on the IPI…

16. Importantly, not only must submissions be "on" the IPI, but the IHP must make recommendations "on" the IPI under clause 99(1).

17. Therefore, in our view, to determine whether a submission is "on" an IPI, the tests developed in relation to conventional plan changes under Part 1 of Schedule 1 are applicable. The case law discussed below is consistent with this approach.

Case law indicates that the orthodox principles of scope will apply to the ISPP

18. While the case law on scope is generally derived from conventional plan change processes under Part 1 of Schedule 1 to the RMA, in *Albany North Landowners v Auckland Council*[6] the High Court considered whether the orthodox principles of scope applied to special "streamlined" provisions under the Local Government (Auckland Transitional Provisions) Act 2010 (**LG(ATP)A**). The provisions under the LG(ATP)A, which applied to development of the Auckland Unitary Plan (**AUP**), are similar in some key respects to those that govern the ISPP.

19. In relation to section 144(1) of the LG(ATP)A, which is equivalent to clause 99(1) of the RMA (in that both provisions require IHP recommendations to be "on" the proposed plan), the High Court concluded that "the IHP's jurisdiction to make recommendations is circumscribed by the ambit of the notified plan change".[7]

20. The High Court proceeded with its decision on the basis that "orthodox" principles of scope applied to the streamlined process under the LG(ATP)A, noting that the policy of public participation remains strongly evident and there is nothing in the legislation to suggest that the longstanding careful approach to scope should not apply.[8] In our view, these findings are equally applicable to the ISPP.

The test from *Clearwater Resort Limited,* as applied in *Motor Machinists Limited*, is still relevant

21. The test for whether a submission is "on" a proposed plan change has been established through case law.

22. The leading case on scope of submissions is *Clearwater Resort Limited v Christchurch City Council.*[9] That case concerned whether a submission was "on" a variation to the noise contour policies of the then proposed Christchurch District Plan. The High Court identified the following two-step approach, which is fundamentally concerned with observing the principles of natural justice:

1. A submission can only fairly be regarded as "on" a variation if it is

6 [2017] NZHC 138.
7 *Albany North Landowners*, at [104](a).
8 *Albany North Landowners*, at [118].
9 HC Christchurch AP34/02, 14 March 2003.

addressed to the extent to which the variation changes the pre-existing status quo.

2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without a real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submissions is truly "on" the variation.

23. These tests were followed by the High Court in the more recent case *Motor Machinists Limited v Palmerston North City Council.*[10] In that case, the Court found that the first requirement above (being the "dominant consideration") would be unlikely to be met if:

23.1 A submission raises matters that should have been addressed in the section 32 evaluation and report; or

23.2 A submission seeks a new management regime for a particular resource (such as a particular lot) when the plan change did not propose to alter the management regime in the operative plan.

24. Importantly, in *Motor Machinists Limited*, the Court found that these tests will not altogether exclude zoning extensions by submission. It found that "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 zoning change.[11] We discuss this point further in relation to question 2, below.

25. In *Motor Machinists Limited*, the Court ultimately found that the submission was not 'on' the plan change because:[12]

25.1 the plan change concerned very limited rezoning of the 'ring road' and three adjoining roads, which MML's (the submitter) property was not located on;

25.2 there was an extensive section 32 report, which did not address rezoning MML's property; and

25.3 there had therefore been no consideration of the effects of rezoning MML's property.

26. Finally, in *Albany North Landowners v Auckland Council*, the scope for submissions to be "on" the proposed plan was found to be "very wide"; because that case involved a full plan review (i.e. the proposed AUP) meaning "there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation)".[13]

27. In contrast, the IPI is a plan change with more limited scope as it is

10 [2013] NZHC 1290.
11 *Motor Machinists Limited*, at [81].
12 At [85] - [89].
13 *Albany North Landowners*, at [129].

focused on “urban” zones, i.e. residential and commercial centre zones.

28. The flow diagram in **Appendix 1** demonstrates the general approach to the decision-making process for jurisdictional issues relating to the scope of a plan change. In our view, this approach should be adopted when determining whether submissions are “on” the IPI.

Question 2 – How does this test apply in relation to submissions requesting rezoning of particular sites?

Where the proposed plan change is not altering the *status quo* for a matter in the District Plan, a submission on that matter is unlikely to be “on” the plan change, but incidental or consequential zoning changes may be “on” the plan change

29. As mentioned above, in *Motor Machinists Limited*, the Court found that the scope test will not automatically exclude submissions that request extensions to zones. It found that “incidental or consequential” extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that zoning change.[14]

30. It follows that the fundamental question for the Council, when considering rezoning requests is, “does the proposed plan change alter the status quo for that land under the operative plan?” If the answer is no, the next question is, “is the change is one that is incidental or consequential?”

31. If the proposed plan change is not altering the status quo in the District Plan in relation to an issue raised by a submission, the issue is unlikely to have been addressed in the section 32 evaluation and report, and the submission is unlikely to be “on” the plan change. However, if the section 32 report evaluated the potential change, or the change is “incidental or consequential”, in that no substantial further section 32 analysis would be required, then the submission may be “on” the plan change.

32. By way of example, there may be submissions that seek to rezone land from General Rural Zone to General Residential Zone. In these circumstances, because the operative zoning remains the same under PC2, there is no change to the *status quo* which could be addressed in submissions or recommendations. Assuming these rezoning proposals seek more than an “incidental or consequential” change, they are likely to be beyond the scope of PC2.

33. However, a significant exception to this is where the rezoning of particular sites has been considered as part of preparing PC2 (for example, those sites that are set out in Appendix B to the section 32 report). Requests related to the rezoning of those sites may be considered to be within the scope of PC2.

34. Also relevant are the sites considered in Appendix N to the section

14 *Motor Machinists Limited*, at [81].

32 report. Appendix N is an assessment of the constraints and opportunities associated with future urban development of a range of areas (32, mostly rural areas) across the district. Only those areas that that met all of the four criteria (outlined on page 139 of the section 32 report) were given consideration for inclusion in PC2.

35. Although an area needed to meet all four criteria to be considered for inclusion in PC2, our view is that some level of consideration has been given to the areas included in the Appendix N assessment, as part of the preparation of the plan change, even if to conclude that their inclusion in PC2 was not appropriate.

36. For that reason, our view is that a submission on any area covered by the Appendix N assessment may be considered to be a submission on PC2. A strict interpretation of scope on this issue may lead to perverse outcomes – in our view it cannot be that a submitter could only submit on areas or sites that have been included in the notified version of PC2, particularly when assessments of other areas are contained within the section 32 report.

Question 3 – Is a submission on a district-wide objective, policy or rule that was not notified as part of PC2 a submission "on" PC2?

The answer to this question will be context dependent, but the steps in Appendix 1 will assist

37. We assume that this question relates to objectives, policies and rules that are **not** "related provisions" that have been included in the IPI under section 80E. Rather, this question relates to objectives, policies and rules that are not notified as part of PC2.

38. In summary, the answer to this question is likely to require a case-by-case assessment. For each submission on a district-wide provision that was not notified as part of PC2, we would recommend following the process set out in Appendix 1.

Question 4 - Was the listing of Kārewarewa Urupā as a wāhi tapu site via PC2 ultra vires?

Our previous advice is relevant

39. In our previous advice, we answered the question *can new wāhi tapu sites located in the urban environment be added to the schedule of wāhi tapu sites in the district plan as part of the IPI?* [15]

40. That advice is relevant and should be read in conjunction with our analysis below.

41. Essentially, we previously advised that, to rely on section 80E to include new wāhi tapu sites in Schedule 9, the Council would need

15 *What does the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 enable?* (21 February 2022) from [47]].

to demonstrate how introduction of wāhi tapu sites supports or is consequential on the MDRS or policies 3 and 4 of the NPS-UD.

42. The Waikanae Land Company has lodged a submission on PC2 stating that the wāhi tapu listing is ultra vires, and that it is an improper use of an IPI to introduce provisions that have the effect of disabling the underlying residential zoning.

43. Having considered the Waikanae Land Company submission, our view remains that, if an area that is subject to an IPI includes known wāhi tapu sites that are not currently scheduled (such as the Urupā), it would arguably be consequential on that IPI that those wāhi tapu sites are added to the District Plan. To find otherwise would result in illogical outcomes – mainly that wāhi tapu sites would not be protected, despite there being clear intentions that such sites would be qualifying matters.

44. We have set out some further observations below, to supplement the matters addressed in our previous advice.

The level of development permitted by the MDRS is likely to be inappropriate to occur at the Urupā

45. Kārewarewa Urupā is located within the General Residential Zone, a zone which is otherwise subject to the MDRS.

46. As an Urupā, the site is sensitive to any form of development that involves the disturbance of land. The prospect that further development might occur at the Urupā is a cause of deep concern for Te Ātiawa ki Whakarongotai.

47. PC2 proposes restrictions on development for Kārewarewa Urupā, by adding it to Schedule 9 of the District Plan, on the basis that the level of development permitted by the MDRS is likely to be inappropriate to occur at the Urupā.

48. Schedule 9 is a schedule of sites that are subject to the provisions contained within the Sites and Areas of Significance to Māori chapter of the plan. Schedule 9 includes a range of different types of sites of significance (referred to as *wāhanga*) and describes appropriate levels of development.

49. PC2 proposes that the undeveloped part of the Urupā site is added to Schedule 9 under the *wāhanga tahi* category, while land that has already been developed is proposed to be added under the *wāhanga rua* category. The spatial extent of both areas are shown in **Error! Reference source not found.** and identified in the proposed District Plan maps.

The MDRS can be made less enabling of development where a qualifying matter

50. Section 77I provides that a territorial authority may make the MDRS and the relevant building height or density requirements (under policy 3 of the NPS-UD) less enabling of development in relation to an area, to the extent necessary to accommodate qualifying matters that are present.

is present

51. The qualifying matters include matters of importance in section 6 of the RMA. The matters of importance in section 6 include the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga,[16] and the protection of historic heritage from inappropriate subdivision, use and development.[17]

52. There is no express (or implied) requirement that particular qualifying matters must already be recognised in the relevant district plan in order to trigger section 77I, and in our view it is lawful for the Council to recognise further qualifying matters by including them in an IPI.

53. Section 77J of the RMA sets out the requirements for the evaluation report that must be produced by council officers. Most importantly for the purposes of this advice, the evaluation report must:

    53.1 demonstrate why the territorial authority considers that an area is subject to a qualifying matter and that the qualifying matter is incompatible with the level of development permitted by the MDRS (or as provided for by policy 3 in the NPS-UD for that area; and

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

    53.3 assess the costs and broader impacts of imposing those limits.

A qualifying matter may have implications that are wider than just a reduction in the enabling effect of the MDRS

54. The Waikanae Land Company's submission appears to suggest that a qualifying matter may make the MDRS and the relevant building height or density requirements less enabling than what they would otherwise be, but may not make those provisions less enabling than the pre-existing underlying zoning.

55. In our view this view is based on a very narrow reading of the introductory wording in section 77I. That is, the submitter considers that the only planning impact a qualifying matter could potentially have in the context of an IPI would be to reduce the enabling effect of the MDRS or relevant building height or density requirements, rather than to also trigger other restrictions that override the existing zoning.

56. In our view, such an interpretation would require section 77I to be treated as a code in relation to qualifying matters (that is, treated as if the only potential implication of the presence of a qualifying matter is a reduction in the enabling effect of the MDRS and height and density requirements), and it would be unworkable and inconsistent with the scheme of the RMA. This is because the majority of the listed qualifying matters are section 6 matters that predated the

16 Section 6(e).
17 Section 6(f).

Amendment Act, and already have implications that also predate and are wider than the scope of IPIs.

57. For example, wāhi tapu areas already exist in district plans, and are subject to existing protections in district plans. We do not consider it credible to argue that the only protection a district plan could give to a qualifying matter is an adjustment to the MDRS or relevant building height or density requirements, if giving effect to section 6 would require a greater level of protection than that.

58. However, whether an IPI can include a qualifying matter in a manner that triggers the application of *related provisions* (such as those associated with wāhi tapu sites) and in doing so makes the provisions applying to that land less enabling than they were before the plan change, will ultimately depend on whether doing so is "consequential on" the MDRS and accordingly comes with the scope of section 80E. This may be a matter that the Council could consider, as the section 32 report does not provide reasoning on this specific matter (nor was it expressly required to under section 77J).

59. In summary, we remain of the view that it is lawful for the IPI to introduce a new qualifying matter and for that matter to trigger protections in the District Plan that go beyond a simple reduction in the enabling effect of the MDRS or relevant building height or density requirements.

60. We acknowledge however that submissions on PC2 are yet to be heard by the Independent Hearings Panel, and it is possible that the submitter's argument will be developed further and may require reconsideration, including as part of the direct referral of that submitter's current subdivision consent application for its Barrett Drive site in Waikanae.

Please call or email to discuss any aspect of this advice

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Appendix 1

Process for determining whether a submission point is "on" the IPI