BEFORE THE INDEPENDENT HEARING PANEL
APPOINTED BY THE KĀPITI COAST DISTRICT COUNCIL

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of Plan Change 2 to the Operative Kapiti Coast District Plan

LEGAL SUBMISSIONS ON BEHALF OF KĀPITI COAST DISTRICT COUNCIL

Dated: 28 April 2023

Simpson Grierson
Barristers & Solicitors

M G Conway / S B Hart
Telephone: +64-4-924-3459
Email: matt.conway@simpsongrierson.com / sam.hart@simpsongrierson.com
PO Box 2402
WELLINGTON 6014

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These legal submissions are filed on behalf of Kāpiti Coast District Council (**Council**), following the hearings before this Panel in respect of Plan Change 2 (**PC2**) to the Operative Kapiti Coast District Plan (**ODP**).

1.2 These legal submissions supplement the Council officers' reply and address the vires of the wāhi tapu listing[1] in PC(N). We specifically address the Environment Court's recent decision in *Waikanae Land Company v Heritage New Zealand Pouhere Taonga* (**Decision**), where the Court determined that the Council had acted unlawfully by including the wāhi tapu listing in PC(N).[2] The Decision is relied on in the legal submissions filed by Waikanae Land Company (**WLC**).

1.3 In summary, the Council maintains its submission that the wāhi tapu listing is a lawful exercise of the Council's powers, and that it is within the scope of provisions that the Council may include in its IPI under section 80E. The Council has appealed the Decision to the High Court, so the conclusions expressed in the Decision are subject to the outcome of that process.

1.4 The Council seeks that the Panel continue to consider the proposed wāhi tapu listing and include a recommendation on that proposal in its report to the Council.

2. VIRES OF THE WĀHI TAPU LISTING

2.1 Our opening legal submissions address the reasons why the Council maintains that the wāhi tapu listing is a lawful inclusion in the IPI.[3] In summary they are "related provisions" that are "consequential on" the Council's obligation to incorporate the MDRS.[4] Those submissions anticipated and addressed the points that have since been made on behalf of Waikanae Land Company on that issue. The main additional development since our opening submissions is the issuing of the Court's Decision, which is relied on by Waikanae Land Company. Hence our submissions primarily focus on the Decision and its consequences.

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1 Refer Council legal submissions dated 14 March 2023 at [4.2].
2 *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.
3 Refer opening submissions at [4.10] to [4.53].
4 Section 80E(1)(b)(iii).

2.2 As stated, the Environment Court found that the Council acted unlawfully by including the wāhi tapu listing in PC(N). The Decision materially includes the following findings, which we respectfully disagree with:

(a) **Effect of section 77I:** the Decision finds the Council has acted unlawfully in that:

(i) the effect of section 77I is that qualifying matters introduced through the IPI must relate to the matters set out in clauses 10-18 of Schedule 3A, and can make those standards less enabling;[5] and

(ii) the wāhi tapu listing "goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I".[6]

(b) **Scope of section 80E:** the Decision finds that the wāhi tapu listing falls outside of the scope of section 80E, and in particular subsections (1)(b)(iii) and (2). According to the Decision:

(i) there is an inherent limitation in the matters which fall within the related matters category under section 80E(2), as per section 80E(1)(b)(iii);[7] and

(ii) as the MDRS sets out to impose "*more permissive standards"*, the wāhi tapu listing, which precludes the level of development that must otherwise be permitted in accordance with the MDRS, is not "consequential on" the MDRS.[8]

2.3 While we address these two findings below, it is further submitted that there were other elements of the Court's approach that were in error. Firstly, at a general level, the Decision appears to elevate the purpose of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**2021 Amendment Act**) above the RMA's purpose and scheme, despite Part 2 of the RMA remaining unchanged.

5 Decision, above n 2, at [25].
6 At [31] and [32].
7 At [28].
8 At [30].

2.4 Secondly, the Decision also treats the concept of MDRS as being confined to the standards set out at clauses 10-18 of Schedule 3A of the RMA, instead of applying the RMA's definition of the MDRS.[9]

2.5 Finally, there are contextual factors that the Council was required to consider when preparing its IPI, which the Decision does not appear to have had regard to:

(a) the Council's operative district plan already includes protections for wāhi tapu sites that the Council has identified (including urupā located in the General Residential Zone);

(b) the information that was available to the Council on Kārewarewa urupā's existence, when it was preparing its IPI for notification; and

(c) the requirement for the Council to carry out a suitable evaluation under sections 32 and 77J, and through this evaluation to examine whether the provisions in the IPI are the most appropriate way to achieve the objectives of the district plan, and in turn, the RMA's purpose.

2.6 We now turn to the findings set out at 2.2 above.

Effect of section 77I

2.7 The Court found that the effect of section 77I is that qualifying matters introduced through the IPI must relate to the matters set out in clauses 10-18 of Schedule 3A, and can make those standards less enabling (at [25]).[10] The Decision appears to take the approach that section 77I imposes a strict limit on the effect that a qualifying matter, introduced through an IPI, may have:[11]

9 At [15] and [31].
10 At [25].
11 At [31] and [32].

> [31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions **goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I**. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.
>
> [32] **We find that amending the District Plan in the manner which the Council has purported to do is ultra vires**...
>
> (Emphasis added)

2.8 Section 77I relevantly states:

> **77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**
>
> 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:
>
> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:

2.9 We respectfully maintain our submission that section 77I does not represent the sum total of the impact that recognising a qualifying matter may have. Instead, that provision's focus is on the consequences *for the MDRS* of recognising a qualifying matter. For example, where a qualifying matter is a section 6 matter, recognising and providing for that section 6 matter may require more significant restrictions on development than simply altering the standards set out at clauses 10-18 of Schedule 3A of the RMA.

2.10 As evidence of Parliament's intent on this matter, the select committee report expressly anticipates that where a qualifying matter exists, a council may restrict development completely:[12]

> the qualifying matters provisions in the bill give councils flexibility to manage development in areas where a qualifying matter is present. For example, there would be different ways to manage hazards depending on the nature of the

12 Environment Committee, Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (December 2021) at 7.

hazard. **Where a significant hazard exists, such as an identified flood flow path, a council could identify that area as being inappropriate for any further development**.

(our emphasis)

2.11 The select committee clearly identified that for section 6 matters, it may be necessary for the IPI to disable both the MDRS and the underlying provisions in the plan that would otherwise enable development. Following this report, the Bill's next iteration as recommended by select committee[13] included the wording of sections 77I and 80E as enacted.[14]

2.12 Further, the Court's interpretation of section 77I leaves it open for a party to argue that even under the normal Schedule 1 process, the Council is unable to protect the urupā beyond making the MDRS less enabling. The reason for this is that:

(a) The section 77G(1) duty to incorporate the MDRS into every relevant residential zone is an ongoing duty. That is, the Council is obliged to ensure that the MDRS are incorporated in every residential zone when in any future review of its district plan or other plan change. That the duty is ongoing is made clear by section 77G(3), which requires the relevant council to use the ISPP "when changing its district plan for the first time to incorporate the MDRS".

(b) Likewise, section 77I applies to councils on an ongoing basis. As a result, the Court's indication in [31] that section 77I limits the effect of a qualifying matter to making the MDRS and relevant building height or density requirements less enabling, has the potential to impact on any future plan change that seeks to provide for a qualifying matter.

2.13 Such an approach would result in an outcome that is at odds with the RMA's purpose and scheme, and would substantially restrict the ability for territorial authorities to provide for section 6 matters that it has identified within relevant residential zones.

13 This iteration was introduced via SOP at the Committee of the Whole House stage. While normally changes recommended by select committee would be presented to the House at second reading, at the time of the Bill's second reading, the recommendations of the Environment Committee were being finalised by Parliamentary Counsel Office (7 December 2021) 671 NZPD 6783.

14 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill 83—2, cl 80DA.

2.14 This potential outcome provides an additional reason for adopting the Council's interpretation of section 77I; that is that its focus is on the consequences *for the MDRS* of recognising a qualifying matter (but does not represent the sum total of the impact that recognising a qualifying matter may have).

Scope of section 80E

2.15 We agree with the Court's finding that the wāhi tapu listing does not "support" the MDRS.[15] However, we respectfully maintain our submission that the wāhi tapu listing is "consequential on" the MDRS.

2.16 Our opening legal submissions set out why the wāhi tapu listing is "consequential on" the MDRS, namely that:

(a) it was consequential on the MDRS to schedule this particular wāhi tapu site (at [4.26] to [4.30]); and

(b) the level of protection that arises as a result of the wāhi tapu listing is also consequential on the MDRS and therefore *vires* (at [4.32] to [4.46]).

2.17 The Court appears to have made its finding on the basis that the MDRS sets out to impose "*more permissive standards"* and the listing "precludes operation of the MDRS".[16] However, in our respectful submission this approach takes too narrow a view of:

(a) The types of provisions that can be "consequential on" the MDRS. It essentially equates "consequential on" with "supports".

(b) What the MDRS are. They are not simply *"more permissive standards"* or a top-up to the existing residential zoning. Instead, the RMA defines the MDRS as *"the requirements, conditions, and permissions set out in Schedule 3A"*.[17] Schedule 3A includes objectives, policies, and a rule framework, and then goes on to set out a series of standards in clause 10-18.

15 Decision, above n 2, at [30]
16 At [30].
17 RMA, s 2.

2.18 It follows that provisions that are "consequential on" the MDRS are not confined to those that are consequential on the standards set out in clauses 10 – 18 of Schedule 3A; instead, a provision will meet the "consequential on" threshold where it is consequential on any aspect of Schedule 3A that comprises a requirement, condition or permission. One such requirement is the inclusion of Policy 2 (clause 6(2)(b)), which proves an express carve-out to the more permissive regime:

> apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga):

2.19 The short point is that when determining whether a matter is consequential on the MDRS, this assessment must be undertaken by referring to Schedule 3A in its entirety, rather than just clauses 10 – 18.

2.20 We refer to our opening submissions at [4.26] to [4.30] for the way in which the wāhi tapu listing is consequential on the MDRS.

The Decision does not bind the Panel but has persuasive value

2.21 It is accepted that:

(a) the Council's appeal against the Decision does not operate as a stay;[18] and

(b) the issue addressed in the Decision (i.e. the vires of the wāhi tapu listing[19] in PC(N)) is essentially the same as one of the issues now before the Panel.

2.22 Nonetheless, the Decision is not binding on the Panel. It is a well-established principle that the Environment Court is not bound by its own decisions.[20] That principle exists to ensure that each case that comes before the Court is determined on its merits and on the evidence before the Court.

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18 High Court Rules 2016, r 20.10.
19 Refer Council legal submissions dated 14 March 2023 at [4.2].
20 *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712; *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605, (1976) 6 NZTPA 40(SC) at 607; 41–42.

2.23 For similar reasons, it is submitted the Panel is not bound by the Decision. The Decision contains a finding on a legal issue within the context of a resource consent application being considered under section 104 of the RMA (where the requirement is to have regard to any relevant provisions of a proposed plan), and heard by the Environment Court following limited notification. The procedural context is different from that of a plan change that has been publicly notified and is being considered under different RMA provisions. The Environment Court did not hear any evidence during the one-day hearing, which materially differentiates the process leading to its decision from the present process

2.24 It may also be noted that the High Court, in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, has expressed the view that issue estoppel has either no or limited application in the resource management context.[21] Moreover, for there to be a *res judicata* the Environment Court has stated several conditions need to be met, including that "*the parties to the judicial decision or their privies were the same persons as the parties to the decision in which the estoppel is raised or their privies*".[22]

2.25 This condition is not met here. Parties to the resource consent proceedings were only involved following limited notification of the consent application. The procedural context is completely different from that of a plan change that has been publicly notified. Further, the decision has no binding effect *in rem*.

2.26 In light of this, it is submitted the Decision does not bind the Panel, but is of persuasive value, at least up until the point that a decision on the appeal is made.

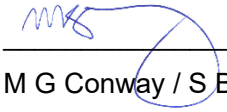
3. CONCLUSION

3.1 For the reasons set out in these submissions and the Council's opening submissions, the Council submits that the wāhi tapu listing is a lawful inclusion in the Council's IPI.

21 [2012] 1 NZLR 271 (HC) at [58]–[66].
22 *Andre v Auckland Regional Council* EnvC Auckland A173/2002, 28 August 2002 at [26].

3.2 The Council will notify the Panel if the High Court issues its decision prior to the 20 August 2023 deadline.

Dated: 28 April 2023



M G Conway / S B Hart
Counsel for Kāpiti Coast District Council