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: 14 March 2023

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CONTENTS

MAY IT PLEASE THE PANEL

1. INTRODUCTION

1.1 These legal submissions are made on behalf of Kāpiti Coast District Council (**Council**), in respect of Plan Change 2 (**PC2**) to the Operative Kapiti Coast District Plan (**ODP**). PC2 is an intensification planning instrument (**IPI**).

1.2 In the course of reviewing submissions and further submissions, the Council has identified two issues that raise questions of law:

(a) First, the Council has identified that some submissions fall outside the scope of PC2.

(b) Secondly, one submitter, the Waikanae Land Company (**WLC**) argues that the Council has acted unlawfully in proposing that PC2 amend Schedule 9 of the ODP, titled “Sites and Areas of Significance to Māori” to include Kārewarewa Urupā.

1.3 These legal submissions address both of these matters after briefly covering the purpose and statutory scope of the plan change.

2. PURPOSE AND STATUTORY SCOPE OF PC2

2.1 The amendments to the Resource Management Act introduced by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 created a requirement for all Tier 1 territorial authorities to prepare and notify an IPI by 20 August 2022.

2.2 The Council is a Tier 1 territorial authority. It prepared, consulted on and notified PC2, which is the Council's IPI, in accordance with the requirements and limitations placed on the Council by the legislation.

2.3 Consistent with those requirements and limitations, the purpose of PC2 is to:[1]

(a) incorporate the Medium Density Residential Standards (**MDRS**) into the District Plan;

1 Section 32 Evaluation Report, pp.12-14.

(b) give effect to Policy 3 of the National Policy Statement on Urban Development 2020 (**NPS-UD**);

(c) provide for a range of existing and new qualifying matters in relation to (a) and (b) above;

(d) amend the District Plan to enable papakāinga; and

(e) amend financial contributions provisions.

2.4 The intensification streamlined planning process (**ISPP**) (Part 6, Schedule 1 of the RMA) has been used for PC2. The ISPP differs from the standard process for considering plan changes as set out in Part 1 of Schedule 1 to the RMA.[2]

The scope of an IPI

2.5 The RMA, through section 80E, prescribes what an IPI must include, and what it may include. No other uses of the IPI are permissible.[3] Given its importance, section 80E is set out in full here:

> **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; or
> (B) in the case of a tier 2 territorial authority to which regulations made under section 80I(1) apply, policy 5 of the NPS-UD; or
> (C) in the case of a tier 3 territorial authority to which regulations made under section 80K(1) apply, policy 5 of the NPS-UD; and
> (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

2 In particular clause 107 provides that there is no right of appeal against any decision made under Part 6.
3 Section 87G.

(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.

2.6 At a broad level, PC2 will incorporate the MDRS into the ODP and give effect to Policies 3 and 4 of the NPS-UD.[4] These are the two mandatory outcomes prescribed under section 80, subsection (1)(a).

2.7 Under subsection (1)(b), the IPI can also, at the Council's discretion, include provisions relating to financial contributions, provisions to enable papakāinga housing, and "related provisions" that support or are consequential on the implementation of the MDRS and Policies 3 and 4 of the NPS-UD.

2.8 "Related provisions" are provisions that relate to any of the matters set out in section 80E(1)(b)(iii), but they must also either support or be consequential on achieving either of the two mandatory outcomes under subsection 80(1)(a).

2.9 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.

2.10 While "related provisions" must either "support" or be "consequential on" the MDRS or Policies 3 and 4 of the NPS-UD, the RMA does not further elaborate on the meaning of "support" or "consequential on". In the absence of specific guidance, we submit that:

(a) an amendment would "support" if it assists or enables the MDRS to be incorporated, or assists with giving effect to policies 3 or 4; and

4 As is required by section 80E of the RMA. The MDRS are set out in Schedule 3A to the RMA.

(b) an amendment would be "consequential on" if it follows or is required because of the Council's obligation to incorporate the MDRS and give effect to policies 3 and 4.

2.11 There are also spatial requirements for any "related provisions":

(a) For the MDRS, section 77G(1) provides that the MDRS must be incorporated into every "relevant residential zone".

(b) For Policy 3:

(i) section 77G(2) provides that every residential zone in an urban environment must give effect to Policy 3; and

(ii) section 77N(2) provides that the ODP's provisions for each urban non-residential zone within the Council's urban environment must give effect to Policy 3.

2.12 As a result, any related provisions that apply beyond these geographic confines would need to either "support" or be "consequential on" the application of the two mandatory outcomes within these geographic confines. Where the Council's IPI amends provisions that also have application outside urban areas (e.g. district-wide provisions), the amendments will necessarily have effect in those wider areas too.[5]

2.13 Given the section 80E constraints on what can be included within an IPI, section 80E is also a key reference point for whether a submission is within scope of PC2. Where a submitter relies on the ability to include related provisions under section 80E(1)(b)(iii), a submitter would need to be able to demonstrate the necessary link between the amendment sought, and achieving one of the mandatory outcomes, to show that the submission is "on" PC2. We discuss this further in the next section.

5 An example is the updated references to the Council's Land Development Minimum Requirements (LDMR). Updating these references supports incorporating the MDRS into the District Plan, because the LDMR includes updates to infrastructure standards that take into account increased residential density. However, the LDMR is a district-wide matter, and updating it outside the spatial confines of the MDRS and Policy 3/4 is also consequential to incorporating the MDRS and Policy 3/4, because it avoids the illogical outcome of the Council administering two different infrastructure standards throughout the district.

3. PERMISSIBLE SCOPE OF SUBMISSIONS

3.1 Whether the Panel is able to make recommendations on a submission point, on an IPI, is a question of scope. This raises two points of law:

(a) what is the scope of an IPI (addressed in the previous section); and

(b) what is the legal test for determining whether a submission falls within the scope of an IPI (addressed below).

Submissions must be "on" the IPI

3.2 The ISPP is provided for under Part 6 of Schedule 1 of the RMA. Within Part 6, clause 95 identifies which clauses of Part 1 (i.e. the normal plan change process) apply to the ISPP. One of these clauses is clause 6, which provides for the ability to make submissions on the IPI:

> **6 Making of submissions under clause 5**
>
> (1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) **may make a submission on it** to the relevant local authority.
>
> (our emphasis)

3.3 In addition, clause 99 of Part 6 of Schedule 1 provides for the IHP's ability to make recommendations to the Council on the IPI:

> **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—
>
> (a) must be related to a matter identified by the panel or any other person during the hearing; but
> (b) are not limited to being within the scope of submissions made on the IPI…

3.4 The consequence of these clauses is that submissions must be "on" the IPI, and similarly, that the IHP must make recommendations "on" the IPI. Although, for sake of clarity, those recommendations are not limited to the scope of submissions made.

3.5 Despite the fact that the ISPP is a novel RMA process, it is submitted that the case law developed in relation to conventional plan changes under Part 1 of Schedule 1 remains generally applicable.

3.6 In *Albany North Landowners v Auckland Council*[6] the High Court determined that 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.

3.7 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]

3.8 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]

3.9 Accordingly, below we set out the established case law for determining whether a submission is "on" a proposed plan change.

3.10 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:

(a) A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

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.

(b) 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 submission is truly "on" the variation.

3.11 These tests were followed by the High Court in *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:

(a) a submission raises matters that should have been addressed in the section 32 evaluation and report; or

(b) 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.

3.12 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]

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

(a) 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;

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

(c) there had therefore been no consideration of the effects of rezoning MML's property.

10 [2013] NZHC 1290.
11 *Motor Machinists Limited* at [81].
12 *Motor Machinists Limited* at [85]–[89].

3.14 The Council has set out the application of these tests to specific submissions in section 4.14 of its planning evidence.

4. KĀREWAREWA URUPĀ

Background

4.1 In the course of preparing PC2, the Council identified several qualifying matters where it would be inappropriate to apply the MDRS or Policy 3 of the NPS-UD. One of these qualifying matters is Kārewarewa Urupā.

4.2 To provide for this qualifying matter, PC(N) makes the following amendments (referred to as the **wāhi tapu listing**):

(a) Amendment 18.1 of PC(N) proposes to amend Schedule 9 "Sites and Areas of Significance to Māori" of the ODP to include two new entries:

District Plan ID	Name	Type	Iwi	Key access and view points	Wāhanga
WTSx1	Kārewarewa	Urupā	Āti Awa		Tahi
WTSx2	Kārewarewa	Urupā	Āti Awa		Rua

(b) Amendment 19.5 amends the ODP's Historical, Cultural, Infrastructure and Districtwide map series, so that it includes a map that identifies the spatial area of the wāhi tapu listing. This map is at Appendix E of PC(N):

4.3 The wāhi tapu listing has taken immediate legal effect; section 86B(3)(d) provides that "a rule in a proposed plan has immediate legal effect if the rule protects historic heritage".

4.4 Additionally, amendment 20.11 adds a new definition of "qualifying matter area" to the definitions chapter of the District Plan.[13] The definition in amendment 20.11 includes that a qualifying matter area means a "place and area of significance to Māori listed in Schedule 9".

4.5 In its submission on PC2, Waikanae Land Company (**WLC**) opposes the wāhi tapu listing on two grounds:[14]

(a) First, WLC submits that the area identified in the Appendix E map is not Kārewarewa urupā. This submission is addressed in the Council's planning evidence.[15]

(b) Secondly, WLC submits that the wāhi tapu listing is *ultra vires*. This submission is addressed further below.

13 In response to submissions, Council officers are recommending the title of the definition be amended to "identified qualifying matter".
14 Submitter S104, submission dated 15 September 2022.
15 See section 4.13 of the Council's planning evidence.

4.6 WLC is pursuing similar arguments in the context of a resource consent application it lodged on 30 June 2021. The application seeks consent for subdivision and earthworks on a site that is partially situated within the wāhi tapu site. The application is being heard by the Environment Court under the RMA's direct referral provisions.[16] When PC2 was notified, WLC's application became subject to additional objectives, policies and rules because:

(a) some, but not all, of the subject site is situated within the area proposed by PC(N) to be incorporated into Schedule 9; and

(b) the wāhi tapu listing has immediate legal effect.

4.7 In its submission on PC2, WLC has noted that these Environment Court proceedings are taking place, and argued that "it is inefficient and inappropriate for Council to notify the wāhi tapu listing pending the outcome of that litigation".[17] The Council disagrees; having identified the wāhi tapu, it was incumbent on the Council to properly provide for it in PC2. Failing to do so would have left it unable to satisfy its section 6 and section 32 obligations.

4.8 The Court will conduct a hearing on the application later this year, but heard legal arguments on the *vires* of the wāhi tapu listing on 1 February 2023 with a view to issuing an interim decision addressing its views on that matter in the context of the consent application. No timing indication has been given for that interim decision and in our respectful submission the Panel is able to (and necessarily must, in view of the statutory timeframe) continue with the IPI hearing and its recommendations. If the Court issues its interim decision before those recommendations are made, further legal submissions on that decision's relevance to the IPI process could be sought at that stage.

4.9 In summary, for the reasons outlined in more detail below, the Council disagrees with WLC's arguments about vires. Whether a provision can be included in an IPI turns on whether it falls within the scope of section 80E. The inclusion of qualifying matters in an IPI is expressly authorised by section 80E(2)(e) and the wāhi tapu listing is a related provision that is *consequential on* the Council's obligation to incorporate the MDRS. The wāhi tapu listing is therefore a lawful

16 RMA, section 87C-87G.
17 Submitter S104, submission dated 15 September 2022 at [5.9].

inclusion in the IPI, and necessarily triggers the ODP's existing provisions that regulate activities within Sites and Areas of Significance to Māori.

The ability to include "related provisions" in an IPI

4.10 As has been explained, section 80E prescribes what an IPI must include, and what it may include. No other uses of the IPI are permissible.[18]

4.11 Kārewarewa urupā is situated predominantly within the General Residential Zone.[19] That zone is subject to the Council's general duty in section 77G(1) to incorporate the MDRS:

> [e]very relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone.

4.12 Conversely, Kārewarewa urupā is not situated in within an area that is subject to Policy 3 or 4 of the NPS-UD. Consequently, it is the following provisions of section 80E(1) are relevant:

> **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;
> …
> (b) that may also amend or include the following provisions:
> …
> (iii) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on—
> (A) the MDRS

4.13 In summary, section 80E(1):

(a) imposes, as a "default" position, a requirement that the IPI incorporate the MDRS in respect of the General Residential Zone, including over Kārewarewa urupā; but

(b) allows the Council to alter this default position, by including or amending "related provisions", if those provisions fall within the scope of subsection (1)(b)(iii).

18 Section 87G.
19 A small part of the north corner of the listing also overlaps with the Natural Open Space Zone.

4.14 The wāhi tapu listing falls within the scope of subsection (1)(b)(iii) because:

(a) the wāhi tapu listing provisions are "related provisions"; and

(b) these related provisions fall within the scope of subsection (1)(b)(iii) as they are "consequential on" the MDRS.

The wāhi tapu listing provisions are "related provisions"

4.15 Section 80E takes a broad approach to the meaning of "related provisions"; they include "objectives, policies, rules, standards, and zones". Further, section 80E(2) broadly states:

> In subsection (1)(b)(iii), related provisions also includes provisions that relate to any of the following, without limitation…
> …
> (e) qualifying matters identified in accordance with section 77I or 77O:

4.16 The wāhi tapu listing falls within the meaning of "related provisions". The listing and the provisions it triggers are "provisions that relate to … qualifying matters identified in accordance with section 77I".

Kārewarewa urupā is a qualifying matter

4.17 The Amendment Act incorporates "qualifying matters" into the RMA. However, while qualifying matter is a new concept to the RMA:

(a) the NPS-UD has already, for some time, provided for qualifying matters; and

(b) as such, many of the matters that are now expressly listed in the RMA as qualifying matters were already part of the RMA framework, for example matters of national importance under section 6.

4.18 In relation to the MDRS, section 77I prescribes what "qualifying matters" are.[20] It reads as follows:

> **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:
>
> (b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:
>
> (c) a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:
>
> (d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:
>
> (e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:
>
> (f) open space provided for public use, but only in relation to land that is open space:
>
> (g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:
>
> (h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:
>
> (i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:
>
> (j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

4.19 The Council has identified Kārewarewa urupā as being a qualifying matter under section 77I(a), and the justification for doing so is set out in the Section 32 Evaluation Report. We provide a brief overview of recent events that led to the Council doing so.

4.20 In 2020, the Waitangi Tribunal published the Kārewarewa Urupā Report.[21] The Report was prepared by the Tribunal in response to a claim lodged by Te Ātiawa / Ngā Ātiawa ki Kāpiti, due to concerns that further development would take place on land that is part of Kārewarewa. The Report is a "pre-publication" report

20 The NPS-UD also sets out a definition of qualifying matters, however that definition has now essentially been overriden by section 77I 's definition (at 3.32).

21 Waitangi Tribunal *The Karewarewa Urupa Report: Pre-Publication Version* (WAI 2200, 2020).

released in advance of the Tribunal's main iwi report; however, the Tribunal notes that its findings and recommendations will not change in the final publication.

4.21 The Tribunal made its conclusions in terms that are unequivocal:[22]

> There does seem to have been uncertainty at times about the name of the urupā located at Tamati Place. But there has always been certainty within the iwi of the existence of an urupā at the confluence of the rivers. The 20-acre block we are concerned with in this report has been consistently identified as a 'Māori cemetery' or 'urupā' in records since 1896
>
> …
>
> In our view, the traditional, historical, and archaeological evidence is clear that this block was an urupā. We have no doubts on that point.

4.22 In late 2021, the Council began engagement with iwi on PC2.[23] Ātiawa ki Whakarongotai provided feedback and sought that Kārewarewa urupā be recognised and provided for in the ODP.[24] On 7 March 2022, the Council engaged with Ātiawa ki Whakarongotai specifically in relation to Kārewarewa, and confirmed its intended approach to provide for the urupā as a wāhi tapu site.[25]

4.23 In April 2022, the Council published a draft version of PC2 that included the wāhi tapu listing. Ātiawa ki Whakarongotai provided a submission on this draft that identifies key factual matters. It summarises the site's history, and emphasises the significance of the site and its wāhi tapu status.[26] That submission expressed strong opposition to housing development being allowed to continue at the urupā/cemetery. Ngā Hapū o Ōtaki also provided a submission on draft PC2 that advocated for protection of Kārewarewa.[27]

4.24 Both the Tribunal's findings on the urupā's existence, and the feedback received from iwi, provided a strong basis for the Council to conclude that the urupā was a matter of national importance that it was required to recognise and provide for under section 6.

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22 Waitangi Tribunal *The Karewarewa Urupa Report: Pre-Publication Version* (WAI 2200, 2020) at 5 and 7.
23 Section 32 evaluation report at [3.4.1].
24 Section 32 evaluation report at [3.4.1].
25 Section 32 evaluation report at [3.4.1].
26 Te Atiawa supporting information to 2 May 2022 submission on draft PC2 (25 May 2022) in section 32 report, Appendix A.
27 Section 32, Appendix A.

4.25 On 18 August 2022, the Council notified PC2 and published its section 32 evaluation report. The importance of the Waitangi Tribunal's findings are explained in the section 32 report's justification for including Kārewarewa urupā as a qualifying matter:[28]

> **Justification for the qualifying matter (s77J(3)(a) of the RMA)**
>
> The Waitangi Tribunal report states that on the basis of traditional, historical and archaeological evidence, it is clear that the block of land was an urupā. On the basis of these findings, the existence of the urupā is a matter that the Council must recognise and provide for under s6(e) of the Act. On this basis, Te Ātiawa ki Whakarongotai have reviewed and support the proposal as part of PC2 to add Kārewarewa Urupā to Schedule 9 of the District Plan.
>
> In addition to this, wāhi tapu are historic heritage features under the provisions of the District Plan, as well as the definition of historic heritage outlined in s2 of the Act. On this basis, wāhi tapu are also a matter that Council must recognise and provide for under s6(f) of the Act.

The wāhi tapu listing provisions are "consequential on" the MDRS

4.26 The RMA does not define "consequential on", but we submit that an amendment would qualify as "consequential on" if it follows or is required because of the Council's obligation to incorporate the MDRS.

4.27 Parliament's intent is clear that provisions that are consequential on the MDRS can include provisions that provide for section 6 matters. This is the logical consequence of:

(a) Section 80E(2) expressly including qualifying matters in the meaning of "related provisions"; and

(b) section 77I, which recognises that territorial authorities may provide for a section 6 matter as a qualifying matter, to limit the MDRS's applicability in any given area.

4.28 It therefore follows that provisions protecting a wāhi tapu site can be "consequential on" the MDRS.

28 Section 32 report at 160-161.

4.29 Turning to the scheduling of this particular wāhi tapu, the fact that this change was consequential on the MDRS is illustrated by the following points.

(a) The Council was required by the RMA, as amended, to incorporate the MDRS through its IPI into the General Residential Zone.

(b) In order to implement that requirement, the Council was required to consider the appropriate level of development in the relevant areas, including through carrying out a suitable section 32 evaluation.

(c) That section 32 evaluation required the Council to examine whether the provisions in the IPI are the most appropriate way to achieve the objectives of the district plan, which include a directive to recognise and protect tāngata whenua historic heritage, including Waahi Tapu and Other Places and Areas Significant to Māori (Objective DO-O7).

(d) When it carried out that examination, the Council had information demonstrating that the urupā (which is also in the General Residential Zone) is a qualifying matter.

(e) Having identified the urupā, the Council had an obligation to protect it, in a manner consistent with section 6(e) and (f). To fail to do so would render the Council unable to satisfy the requirements of section 32 in relation to the IPI.

4.30 In these circumstances, the Council was obliged to consider the urupā as a qualifying matter as part of applying the MDRS to the zone, and inclusion of the urupā in the IPI was therefore consequential on the MDRS.

Why the level of protection provided for Kārewarewa urupā is *vires*

4.31 The question then turns to how far provisions may go to protect a wāhi tapu site.

What the wāhi tapu listing does

4.32 Prior to PC2 being notified, the ODP enabled a range of activities to be carried out in the General Residential Zone. However, a number of provisions across the ODP restrict the ability to undertake such activities, where the activity would

occur in a location that is listed in Schedule 9. Some (non-exhaustive) examples of this are as follows:

(a) The ODP contains objectives and policies in relation to areas listed in Schedule 9 (i.e. DO-O7 and SASM-P1);

(b) The ODP includes specific rules and activity classifications for activities in areas listed in Schedule 9;

(c) Some rules in the ODP include standards that must be complied with in relation to the Schedule 9 areas, and a failure to comply means that a more restrictive activity classification applies (i.e. SUB-DW-R10).

(d) In respect of earthworks, the earthworks chapter does not apply and instead the land disturbance rules under the Sites and Areas of Significance to Māori section of the Historical and Cultural Values Chapter will apply.

4.33 The consequence of this is that the wāhi tapu listing restricts and regulates the range of activities that can occur on the urupā, by disabling some of the underlying provisions that would normally apply in the General Residential Zone.

The IPI can include provisions that protect Kārewarewa urupā in a manner consistent with section 6

4.34 For the reasons that follow, we submit that an IPI can provide for a qualifying matter with its foundation in section 6, in a manner that is able to respond fully to the section 6 requirement.

4.35 First, we note that the majority of the listed qualifying matters are section 6 matters that predated the Amendment Act, and therefore already have implications that predate and are wider than the scope of matters that the MDRS will change.

4.36 To take the most relevant example, Schedule 9 already listed 43 different sites that predate the IPI and are considered to be wāhi tapu. Prior to the IPI's notification, the ODP already included provisions to protect these sites, including

specific rules that must be considered alongside the underlying zoning provisions.

4.37 The IPI now includes each of these wāhi tapu sites as a "qualifying matter", and in every case the qualifying matter acts to trigger provisions beyond the underlying zoning.

4.38 If the Panel accepts that the Amendment Act permits councils to include such areas as qualifying matters, it logically follows that qualifying matters may go further than merely making the MDRS less enabling. This is supported by the MDRS itself, and specifically Policy 2, which states "apply the MDRS across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant…".

4.39 Secondly, section 80E(1)(b)(iii) and 77I do not expressly prevent the inclusion of a new qualifying matter from triggering existing provisions that appropriately provide for the values of the qualifying matter. Rather, providing for those values is a logical consequence of (in this case) section 6 of the RMA.

4.40 Thirdly, sections 6(e) and (f) required the Council to prepare the IPI in a manner that recognised and provided for:

(a) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other Taonga; and

(b) the protection of historic heritage from inappropriate subdivision, use, and development.

4.41 In light of the Waitangi Tribunal's findings on the existence of Kārewarewa urupā, as well as feedback provided by iwi and in particular Ātiawa ki Whakarongotai, it was reasonable for the Council to conclude that it must substantively restrict and regulate the types of activities that could occur within the urupā, to provide for Ātiawa ki Whakarongotai's relationship with the urupā.

4.42 The section 32 report explains why it was necessary to add the urupā to schedule 9. In summary:

(a) As an urupā, the site is sensitive to any form of development that involves the disturbance of land. This is because there is a possibility that land disturbance would encounter or otherwise disturb kōiwi.[29]

(b) It would have been inappropriate to implement the MDRS on land identified as the Kārewarewa Urupā without also applying the operative plan's provisions that protect wāhi tapu, and therefore it should be considered to be a "qualifying matter".

(c) The most appropriate way of protecting the urupā was listing it in Schedule 9 "Sites and Areas of Significance to Māori" (i.e. the wāhi tapu listing).[30]

4.43 Finally, the legislative history to section 80E supports being able to include qualifying matters that modify underlying zoning provisions. At the select committee stage, the Environment Committee's report stated the following on the scope of IPIs:[31]

> We consider that **the scope of what could be included in an IPI is too narrow, and recommend broadening it**. We propose an amendment 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.
>
> (our emphasis)

4.44 The report goes on to set out the evidence required to justify qualifying matters, and states:

> 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 hazard. **Where a significant hazard exists, such as an identified flood flow**

29 Section 32 report at 161.
30 Section 32 report at 164 and 225-232.
31 Environment Committee, Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (December 2021) at 7.

path, a council could identify that area as being inappropriate for any further development.

(our emphasis)

4.45 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.

4.46 Following this report, the Bill's next iteration as recommended by select committee[32] included what is now section 80E.[33]

Section 77I does not prevent the ODP's usual wāhi tapu provisions from applying to a new qualifying matter

WLC's argument

4.47 WLC's argument at the 1 February Environment Court hearing of its directly referred consent application can be summarised as follows:

(a) The Council is able to include new qualifying matters in the IPI.

(b) If the Council does identify a new qualifying matter, section 77I permits the IPI to make the MDRS less enabling in respect of that qualifying matter.

(c) An IPI can entirely disable the MDRS in respect of a qualifying matter, if the Council determines that to be necessary to accommodate the qualifying matter.

(d) An IPI can go no further than disable the MDRS. It may not trigger provisions that already exist in the ODP, if this means there are more restrictions on development than what existed prior to the IPI's notification.

32 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.

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

4.48 WLC's argument is largely reliant on the chapeau to section 77I, which relevantly states:

> A specified territorial authority may make the MDRS… 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

4.49 In reliance on this chapeau, WLC argues that a qualifying matter may make the MDRS less enabling of development, but may make no changes to the underlying zoning. To use its words:

> In a sense, the existing residential zoning is a baseline on top of which MDRS—enabling greater or lesser development depending on the effect of a qualifying matter on the MDRS—is applied.

4.50 The key error in this argument is 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. The chapeau's wording goes no further than expressly stating that a territorial authority may make the MDRS[34] less enabling. This is expressly set out again in section 77G:

(a) Section 77G(1) provides for the general requirement to incorporate the MDRS: "Every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone".

(b) Section 77G(6) then qualifies the general requirement to incorporate the MDRS:

> (6) A specified territorial authority **may make the requirements set out in Schedule 3A or policy 3 less enabling of development** than provided for in that schedule or by policy 3, **if authorised to do so under section 77I**.
>
> (Our emphasis)

4.51 Crucially, the requirement to incorporate the MDRS sits separately in the RMA to the requirement to prepare an IPI. The former is an obligation that the Council

34 As well as the relevant building height or density requirements under policy 3, which is not relevant here.

must adhere to indefinitely, whereas the latter relates to a one-off bespoke process.

4.52 It is therefore incorrect to look to section 77I to ascertain what the Council can and cannot include in its IPI. Instead, the answer to that question is found in section 80E.

4.53 In summary, the inclusion of qualifying matters in an IPI is expressly authorised by section 80E(2)(e) and the wāhi tapu listing is a related provision that is *consequential on* the Council's obligation to incorporate the MDRS. The wāhi tapu listing is therefore a lawful inclusion in the IPI, and necessarily triggers the ODP's existing provisions that regulate activities within Sites and Areas of Significance to Māori.

5. THE COUNCIL'S EVIDENCE

5.1 Evidence for the Council in support of PC2 is being given by:

(a) Andrew Banks, Planner, Boffa Miskell;
(b) Katie Maxwell, Planner, Boffa Miskell;
(c) Derek Todd, Coastal and Hazards Scientist, Jacobs New Zealand.

Dated: 14 March 2023

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