

**BEFORE THE INDEPENDENT HEARINGS PANEL APPOINTED BY THE
WESTERN BAY OF PLENTY DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act
1991 (**RMA**)

AND

IN THE MATTER of Proposed Plan Change 92 to the
Western Bay of Plenty District Plan
First Review - Ōmokoroa and Te
Puke Enabling Housing Supply and
Other Supporting Matters

**OPENING LEGAL SUBMISSIONS ON BEHALF OF
WESTERN BAY OF PLENTY DISTRICT COUNCIL**

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MAY IT PLEASE THE COMMISSIONERS**1. INTRODUCTION**

- 1.1 Proposed Plan Change 92 (**PC92**) is the Western Bay of Plenty District Council (**Council**)'s Intensification Planning Instrument (**IPI**) under section 80E of the Resource Management Act 1991 (the **RMA**).
- 1.2 The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**) required Tier 1 local authorities to change their district plans to accelerate the implementation of the National Policy Statement on Urban Development (**NPS-UD**). This was to address long standing housing supply issues at a national level and was to be done, in part, by decreasing planning restrictions through the insertion of the Medium Density Residential Standards (**MDRS**).
- 1.3 To achieve this, the Amendment Act introduced a suite of changes that local authorities were required to make to their district plans. PC92 is Council's response to the Amendment Act's direction. PC92 is required to be progressed through the new process called the Intensification Streamlined Planning Process (**ISPP**).
- 1.4 These opening legal submissions will address:
- (a) The Amendment Act (section 2);
 - (b) Context for PC92, and changes proposed (section 3);
 - (c) Scope of IPI / PC92 (section 4);
 - (d) Scope of relief on IPI (section 5);
 - (e) Statutory framework and considerations (section 6);
 - (f) Response to issues raised by submitters (section 7); and
 - (g) Council's evidence (section 8).
- 1.5 Further matters that are raised in the legal submissions on behalf of submitters may also be addressed at the hearing in the opening submissions on behalf of Council.

2. RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT ACT 2021

- 2.1 The RMA was amended on 21 December 2021 by the Amendment Act. The Amendment Act followed a truncated parliamentary process with the introduction of the bill on 19 October 2021, a short select committee process, and the bill receiving royal assent on 20 December 2021.
- 2.2 The Amendment Act required that all Tier 1 local authorities (including WBOPDC) prepare and notify an IPI no later than 20 August 2022.¹ The Council notified PC92 on 20 August 2022.
- 2.3 The statutory framework enacted by the Amendment Act inserted new provisions into the RMA. New subpart 5A in Part 5, and Part 6 of Schedule 1, provide the process for the preparation of an IPI in order to achieve “*an expeditious planning process*”.²
- 2.4 The matters to be included in an IPI are set out in section 80E and are different to a standard plan change. The IPI:
- (a) must contain the mandatory matters in section 80E;
 - (b) may contain the discretionary matters in section 80E; and
 - (c) must not be used for any purpose other than the uses specified in section 80E.³
- 2.5 The mandatory elements that an IPI must contain under section 80E(1)(a) are:
- (a) incorporate the Medium Density Residential Standards into every “relevant residential zone”⁴; and
 - (b) give effect to, in the case of a Tier 1 local authority, policies 3 and 4 of the NPS-UD in every residential and urban non-residential zone within the authority’s urban environment⁵.

¹ Section 80F(1).

² Section 80D.

³ Section 80G(1)(b).

⁴ Section 77G.

⁵ Sections 77G and 77N.

- 2.6 Policies 3 and 4 of the NPS-UD as amended by the Amendment Act are set out for completeness:

Policy 3: In relation to tier 1 urban environments, regional policy statements and district plans enable:

- (a) in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and
- (b) in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and
- (c) building heights of at least 6 storeys within at least a walkable catchment of the following:
 - (i) existing and planned rapid transit stops;
 - (ii) the edge of city centre zones;
 - (iii) the edge of metropolitan centre zones; and
- (d) **within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and density of urban form commensurate with the level of commercial activities and community services.**

Policy 4: Regional policy statements and district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.
(emphasis added)

- 2.7 The MDRS required to be incorporated into the District Plan are set out in Schedule 3A and will be familiar to the Panel. Part 1 of Schedule 3A contains permitted and restricted discretionary activity rules, special subdivision rules and a rule precluding notification requirements in certain circumstances. The standards in Schedule 3A, Part 2 govern building height, height in relation to boundary, set-backs, building coverage, outdoor living space, and outlook space, windows to street and landscaped area. In addition, Part 1 of Schedule 3A contains objectives and policies in clause 6 that must be included in the District Plan as part of the IPI.
- 2.8 The discretionary matters that an IPI may also amend or include under section 80E(1)(b) are:
- (a) provisions relating to financial contributions, if the local authority chooses to amend its district plan under section 77T;
 - (b) provisions to enable papakāinga housing in the district; and
 - (c) related provisions, including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS, or on policies 3 and 4 of the NPS-UD.

- 2.9 Under section 80E(2) “related provisions” expressly includes, but is not limited to, district wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management (including permeability and hydraulic neutrality) and subdivision of land.
- 2.10 A specified territorial authority may create new residential or urban non-residential zones or amend existing zones. “Relevant residential zone”⁶, “urban environment”⁷, “new residential zone”⁸ and “urban non-residential zone”⁹ are all defined in the RMA.
- 2.11 The limited exceptions to allowing the MDRS and enabling greater development on residential land are provided through the use of “qualifying matters”. A number of specific considerations apply to the use of qualifying matters where they are proposed to make development less enabling than the MDRS.¹⁰
- 2.12 The decision process for the ISPP differs from the standard council-initiated plan change process (under Part 1 of Schedule 1 of the RMA) in two notable ways:
- (a) If a local authority does not accept any recommendations of the IHP, the Minister for the Environment makes the final decision in relation to those recommendations;¹¹ and

⁶ Section 2: “**relevant residential zone**—

(a) means all residential zones; but

(b) does not include—

(i) a large lot residential zone:

(ii) an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:

(iii) an offshore island:

(iv) to avoid doubt, a settlement zone”

⁷ Section 77F: “**urban environment** means any area of land (regardless of size, and irrespective of territorial authority or statistical boundaries) that—

(a) is, or is intended by the specified territorial authority to be, predominantly urban in character; and

(b) is, or is intended by the specified territorial authority to be, part of a housing and labour market of at least 10,000 people”

⁸ Section 2: “**new residential zone** means an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone”

⁹ Section 77F: “**urban non-residential zone** means any zone in an urban environment that is not a residential zone”

¹⁰ Sections 77I and 77O.

¹¹ Schedule 1, clauses 104 and 105.

- (b) There are no rights of appeal to the Environment Court and the only avenue for legal challenge is to apply to the High Court for judicial review.¹²

3. CONTEXT FOR PC92, AND CHANGES PROPOSED

- 3.1 Within the Western Bay of Plenty District, the implementation of the Amendment Act and Policy 3 is limited to Ōmokoroa and Te Puke as these are the only areas of land that meet the definition of urban environment. They are the only areas of land that are *intended to be* predominantly urban in character and part of a housing and labour market of at least 10,000 people.
- 3.2 At a high level, in Ōmokoroa and Te Puke, PC92 as notified:
- (a) Incorporates the MDRS into the District Plan in the two relevant urban environments (Ōmokoroa and Te Puke) and gives effect to Policy 3 of the NPS-UD. A new Section 14A – Ōmokoroa and Te Puke Medium Density Residential Zone - Ōmokoroa and Te Puke (**new MDRZ**) is created in the District Plan to do this¹³;
 - (b) Amends the existing subdivision provisions to provide for subdivision in accordance with the MDRS;
 - (c) Identifies existing and proposed Qualifying Matters;
 - (d) Amends or includes a number of “related provisions” (including objectives, policies, rules, standards and zones) that support or are consequential on the MDRS or Policy 3 of the NPS-UD.
- 3.3 PC92 proposes to rezone all “relevant residential zones” in Ōmokoroa and Te Puke to Medium Density Residential (MDRZ) and in addition seeks to rezone further areas of land to MDRZ that are currently Future Urban or Rural Zones.
- 3.4 As explained in both the section 32 and section 42A reports, because of the long term and advanced stage of planning for urbanisation, for Ōmokoroa only, the “related provisions” that PC92 proposes to include

¹² Schedule 1, clauses 107 and 108.

¹³ The operative chapter (Section 14 - Medium Density Residential) will continue to apply within those zoned areas of Katikati and Waihi Beach only.

new zones across Future Urban zoned land to support the Medium Density Residential Zone, being Industrial, Commercial, Rural Residential and Commercial (existing zones) and a new Natural Open Space zone.

- 3.5 In our submission, the circumstances in Ōmokoroa are unique in terms of the background and setting for the IPI.
- 3.6 Ōmokoroa has been recognised as one of the main growth areas in the Western Bay of Plenty sub-region, and has been recognised as suitable for urban development since the 1970s. A large part of Ōmokoroa was zoned Future Urban in 2012. Since that time Council, in consultation with the community and tangata whenua, had been developing and had well progressed structure planning for the new growth area (operative Future Urban Zone) and related provisions to provide the framework for the urbanisation of this area.
- 3.7 The Council formally applied to the Minister for the Environment in 2021 to undertake a plan change utilising the Streamlined Planning Process (SPP). The basis for this was to fast-track the necessary planning process to enable the residential expansion of Ōmokoroa to assist in addressing the significant shortage of housing in the wider Western Bay of Plenty area. The proposed plan change was provided to the Minister in July 2021 with the expectation that the Minister would confirm the approach within three months.
- 3.8 However, in the intervening period the Amendment Act was introduced (October 2021) and came into force (December 2021). The SPP application was formally withdrawn in May 2022 prior to notification of PC92 in August which was progressing through the ISPP.

4. **SCOPE OF IPI / PLAN CHANGE 92**

- 4.1 The permissible scope of an IPI is set out in sections 80E and 80G.
- 4.2 The planning evidence on behalf of N & M Bruning (submitter 31) has raised concerns regarding the Council's ability to rezone the submitter's property in the operative Ōmokoroa Future Urban Zone to Industrial, Rural

Residential and / or Natural Open Space as part of an IPI under section 80E.¹⁴

- 4.3 The argument set out in planning evidence on behalf of N & M Bruning appears to be that neither the Rural Residential nor the new Natural Open Space zone are an “urban” zone or a related (such as Residential or Commercial) zone that supports or is consequential to the MDRS outcomes, and therefore these zones are not changes that are enabled under the Amendment Act or NPS-UD.
- 4.4 With respect, we disagree for the reasons below. We reserve the right to respond to the legal submissions on behalf of N & M Bruning at the hearing.
- 4.5 Section 80E(1)(b)(iii) allows Council to “*amend or include...zones, that support or are consequential on the MDRS or policies 3, 4 and 5 of the NPS-UD*”.
- 4.6 Section 77N provides that when changing its plan to give effect to Policy 3 or 5, and to meet its obligations under section 80F, a council must use an IPI and “*may create new urban non-residential zones or amend existing urban non-residential zones*”.¹⁵
- 4.7 The Amendment Act is new legislation which has not yet been tested. There is no case law on the meaning of “support” or “consequential” in section 80E, or equivalent usage of these terms in the RMA. In our opinion (as explained below), using the plain and ordinary meaning of these terms, the new zonings do “support” the MDRS and the greater intensification on the Ōmokoroa Peninsula and therefore fall within the permissible scope of an IPI under section 80E.
- 4.8 This interpretation is supported by Parliament’s intentions when drafting section 80E. As originally drafted in the version of the Bill introduced to Parliament, the scope of change an IPI could implement was narrow, being limited to a change to a plan to incorporate the MDRS, give effect

¹⁴ Statement of Aaron Collier on behalf of N & M Bruning (submitter 31) at paragraphs 5.11 and 7.1.

¹⁵ Section 77N(3)(a). The definition of urban non-residential zone does not require the zones to be urban zones themselves, but instead they must be zones in urban areas.

to policies 3, 4 or 5 of the NPS-UD, or to amend financial contribution provisions.¹⁶

- 4.9 In its report, the Select Committee considered that the scope of IPIs was too narrow, and recommend broadening it so the IPI could be used to change provisions in plans (including objectives, policies, rules, standards, and zones) that are consequential and complementary to the MDRS and NPS-UD intensification policies.¹⁷
- 4.10 The Select Committee noted the importance of enabling non-residential activities in residential zones including industrial activities, and that they were advised that the NPS-UD provides sufficient provision for this (such as objective 1 regarding well-functioning urban environments and policy 1(c) regarding accessibility).¹⁸
- 4.11 MfE's Departmental Report on the Bill considered the Committee recommendations and submissions. It considered the inefficiency of multiple plan processes and the need for comprehensive planning as being driving factors in broadening the scope of the IPI definition (whilst noting it is not expected to replace a full plan review process):

Several submitters ...provided feedback that the scope of the ISPP is too narrow, and it would be beneficial to include other changes. Broadening the scope will allow councils to develop more comprehensive plans and remove other provisions that limit intensification. It will also remove the need to carry out multiple plan change processes in some cases – although we do not recommend expanding the scope as much as some submitters requested (e.g. full plan reviews would not be able to go through the ISPP as appeals are still appropriate for things such as significant natural areas).¹⁹

Councils should be able to rewrite zoning frameworks to improve drafting and to implement the national planning standards. The ISPP has not been designed for full plan reviews. We do not think it is appropriate for the ISPP to be used for this purpose, particularly as there are likely to be matters where it would not be appropriate to have no appeal rights (e.g. significant natural areas). However, we acknowledge that some full plan reviews are underway and having multiple plan processes is inefficient.²⁰

- 4.12 Related provisions that support the MDRS and NPS-UD policies include the matters listed in 80E(2), but are specifically not limited to these. In our submission this reflects Parliament's intention that section 80E should be

¹⁶ Section 80G(1)(b), Amendment Bill 83-1, introduced 19 October 2021.

¹⁷ Amendment Bill 83-1, Report of the Environment Committee, December 2021, at 4 and 7.

¹⁸ Ibid at 19.

¹⁹ Departmental Report on the Amendment Bill, MfE, at 13.

²⁰ Ibid at 25.

interpreted broadly. The list of “related provisions” specifically includes storm water management, which is a purpose of the new Natural Open Space zone proposed.

- 4.13 In our opinion the scope of what an IPI can do was deliberately broadened from its initial narrow scope in part to facilitate comprehensive planning and in recognition of the inefficiency of multiple plan processes.
- 4.14 We turn to each of the new zones that are being challenged as they relate to the N & M Bruning property.

Rural-residential zone

- 4.15 The proposed Rural-Residential zones flank the Industrial and new MDRZ land either side of the Ōmokoroa Peninsula. In the planning reports and evidence the proposed Rural-Residential zone was described as being generally not suited for more intensive residential activities but can provide variety to the living opportunities²¹ and a transition between the Residential zoning and the Natural Open Space zone which provides the interface with the coastline.²²
- 4.16 The proposed Rural Residential zone is a key support for the new MDRZ, and complementary to the MDRZ, because it provides a buffer and transition between the MDRZ and Natural Open Space zone, a variety of urban form, and utilisation of land not suitable for more intensive residential development.

Natural Open Space zone

- 4.17 The proposed Natural Open Space zone is described as being the “green lungs” to the urbanisation, zoned to “*provide appropriate identification and direction to the areas of constrained land and considering their role in supporting the urbanisation of the area primarily through having a storm water management function, coastal interface role and potential public*

²¹ Section 32 report at page 142, , Section 42A report – Section 16 – Rural-Residential at 2, Evidence in Reply of Jeff Hextall at [27].

²² Section 32 report at page 166 , s 42A report – Section 16 – Rural-Residential at 2.

recreation capabilities".²³ It is noted as having "very limited development opportunities"²⁴ and being necessary to "support the urbanisation".²⁵

- 4.18 The proposed Natural Open Space zone is a key support for the new MDRZ, and complementary to the MDRZ, because the Natural Open Space zone provides storm water management, recreational opportunities and a buffer between other zones and the coast.

Industrial zone

- 4.19 The Industrial zone proposed in PC92 runs parallel to SH2, and joins up with an existing piece of Industrial zoned land on the eastern side of Ōmokoroa Road. The section 32 report describes the provision of this new industrial land as being "*essential to provide employment opportunities to the area*"²⁶ as well as a SH2 buffer, and in line with the live, work, learn, and play philosophy of the SmartGrowth principles.²⁷
- 4.20 The proposed Industrial zoning supports the MDRZ and urbanisation of the Ōmokoroa peninsula because it provides employment opportunities and a buffer between SH2 and the MDR zone. The planning evidence of Matt Norwell on behalf of Foodstuffs North Island Limited provides support for the industrial rezoning of land to "*ensure that there are employment opportunities to support urban growth contributing to a well-functioning urban environment*".²⁸
- 4.21 The proposed Industrial zone is to replace (in part) previously zoned Industrial land which was located near the Town Centre, but subsequent to its zoning has been used for residential purposes, and is now proposed to be rezoned through PC92 as MDRZ to reflect its actual use. The relocation of the Industrial zoning is "consequential" on the new MDRZ.
- 4.22 To conclude, in our submission, the changes proposed under the notified PC92 are within the permissible scope of an IPI under the Amendment Act, and specifically section 80E.

²³ Section 32 report at page 125.

²⁴ Section 32 report at page 130.

²⁵ Section 32 report at page 137 and 142.

²⁶ Section 32 report at page 60.

²⁷ Section 32 report at page 119.

²⁸ Evidence of Matt Norwell dated 25 August 2023 at paragraph 6.1.

5. SCOPE OF RELIEF ON IPI

- 5.1 Submissions on an IPI are made under clause 6(1) of Schedule 1 to the RMA²⁹ in the same way as for a standard plan change process. Clause 6(1) requires that a person may make a submission “on” the proposed plan change.
- 5.2 In a standard plan change process, if the relief sought is not “on” the plan change, there is no jurisdiction for relief to be granted by the decision maker. Clause 10 requires a council to give a decision on the provisions of the notified plan change and matters “raised” in submissions.
- 5.3 However, clause 10 does not apply to an IPI. The Amendment Act inserted clause 99 of Schedule 1 which relates to the IHP recommendations to the Council on an IPI. Clause 99 states:

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) An independent hearings panel, in formulating its recommendations, must be satisfied that, if the specified territorial authority were to accept the panel’s recommendations, sections 85A and 85B(2) (which relate to the protection of protected customary rights) would be complied with.
- 5.4 To determine whether a submission or IHP recommendation is “on” the plan change, in our opinion the tests developed under the case law relating to standard plan changes provide relevant guidance.
- 5.5 In the leading case of *Clearwater Resort Limited v Christchurch City Council*³⁰ the High Court identified a two-step approach to the question of scope:
- (a) A submission can only fairly be regarded as being “on” a plan change if it addresses the extent to which the plan change alters the pre-existing status quo;

²⁹ Schedule 1, clause 95 specifies that clause 6 applies to the ISPP.

³⁰ *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

- (b) But if the effect of regarding a submission as “on” a plan change would be to permit a planning instrument to be amended without real opportunity for participation by those potentially affected, this is a powerful consideration against finding that the submission was “on” the plan change
- 5.6 The IHP must “*identify any recommendations that are outside the scope of the submissions made in respect of those provisions*” under clause 100(2)(b).
- 5.7 While clause 99(2)(b) has not been tested as far as we are aware in the context of an IPI, the High Court held in relation to the Auckland Unitary Plan process (which had an equivalent provision to clause 99(1) requiring the IHP recommendations to be “on” the proposed plan) “*the IHP’s jurisdiction to make recommendations is circumscribed by the ambit of the notified plan change*”.³¹
- 5.8 Further, in our opinion care should be taken in terms of natural justice considerations where IHP recommendations are made under clause 99(2)(b). This is because recommendations of the IHP and subsequent decisions (of Council or the Minister) are amenable to judicial review under clause 108 of Schedule 1, and should be made in accordance with the principles of natural justice.
- 5.9 There was a list of submission points in the section 42A report that were identified as being potentially out of scope. From the written evidence received from submitters, we are aware that some of those points are no longer being pursued. However, we comment briefly on each of the submission points that we understand are being pursued and, in our opinion, are not “on” PC92 with reference to the *Clearwater* tests above.
- 5.10 The approach by the Council witnesses has been to note where submission points are potentially out of scope but then to assist submitters and the Panel by addressing the relief sought on its merits.

Armada Properties (submission point 8.1)

- 5.11 This submitter has sought to include the property at 22 Landscape Road within PC92 and rezone the property from Rural to Medium Density

³¹ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at paragraph 104(a).

Residential. This matter is addressed in the section 42A report for Te Puke Zoning Maps, Topic 1. No written evidence was received from this submitter.

- 5.12 The land at 22 Landscape Road is adjacent to a pocket of land that is rezoned under PC92 but PC92 did not change the status quo for the property. Further, for the reasons explained in the s42A report, rezoning of the property is not an incidental or consequential extension of the proposed plan change zoning. The requested rezoning is considered outside the scope of PC92.
- 5.13 Notably, the majority of the land at 22 Landscape Road is classed as LUC 3 and the NPS-HPL would need to be considered as part of any proposed rezoning.

Kāinga Ora

- 5.14 In its submission Kāinga Ora sought a new High Density Zone in both Te Puke and Ōmokoroa. It is understood from Ms Tait's planning evidence on behalf of Kāinga Ora that this is no longer being pursued for Te Puke. Instead of pursuing the High Density Zone for Te Puke, Kāinga Ora is now seeking additional height from 11m to 24.5m with additional minimum dwelling size and outlook space performance standards, as well as changes to daylight controls in the Commercial Zone in both Te Puke and Ōmokoroa. Kāinga Ora's original submission did not seek changes to these rules.
- 5.15 With reference to the two *Clearwater* tests:
- (a) As notified PC92 included limited changes to the Section 19 Commercial Zone provisions. These were described in the section 42A report as follows:

There are existing Commercial Zones in Ōmokoroa and Te Puke, but no new Commercial Zones are proposed in Plan Change 92...The Commercial Section has been updated to recognise the existence of this Master Plan [in Ōmokoroa] and to provide for greater height in this area...There are no changes to the rules in the Commercial or Commercial Transition Sections for Te Puke.

In our submission, PC92 did not alter the status quo for the Commercial Zone in Te Puke, but did make changes that relate to the Commercial Zone within Ōmokoroa.

- (b) In terms of the Commercial Zone in Ōmokoroa we consider that there has been an opportunity for participation by those potentially affected by changes to the heights within the town centre (from 11m to 23m) so the request in the submitter's written evidence to increase the height to 24.5m may be within the scope of PC92.
- (c) However, in terms of the Commercial Zone in Te Puke, the changes sought by Kāinga Ora, if approved, would be to permit a planning instrument to be amended without real opportunity for participation by those potentially affected. For that reason we do not consider the relief sought by the submitter in its written evidence, as it relates to Te Puke, is "on" the plan change.

Ara Poutama (submission point 24.11)

- 5.16 This submission point requests that "community corrections activities" be inserted into the permitted activity list in the operative Commercial Zone (at Rules 19.3.1).³²
- 5.17 There were no changes proposed to the permitted activity list within the Commercial Zone as part of PC92, and therefore the plan change did not alter the status quo for activities within the Commercial Zone. However, given that there were some changes proposed within the Commercial Zone as it relates to Ōmokoroa, the status quo was changed to a greater extent for Ōmokoroa than Te Puke.
- 5.18 This matter was addressed in the section 42A report and the reply evidence of Ms Price, who considers the activity is already provided for within the operative provisions in the Plan and no further changes are required to address this submitter's concerns.

³² At paragraph 5.9(d) of the evidence of Sean Grace on behalf of Ara Poutama he confirms that the relief is no longer sought in relation to the Commercial Transition Zone and Industrial Zone.

Retirement Villages Association (submission points 34.45-52)

- 5.19 These submission points request changes to the Commercial and Commercial Transition Zones. A number of new provisions are sought to provide for retirement villages in these zones.
- 5.20 The evidence of Nicki Williams on behalf of the Retirement Villages Association and Ryman Healthcare Limited confirms the requests to amend and add new retirement village provisions no longer relate to the Commercial Transition Zone on the basis that there is no Commercial Transition Zone in Ōmokoroa or Te Puke.³³
- 5.21 For similar reasons to those outlined above in relation to the Kāinga Ora submission, while there were limited changes proposed in PC92 to the Commercial Zone provisions, the status quo was changed to a greater extent for Ōmokoroa than Te Puke. It is arguable that submissions seeking changes to the Ōmokoroa Commercial Zone may be “on” PC92.

Mike and Sandra Smith (submission point 50.3)

- 5.22 This submission point requested changes to the boundary of an ecological feature. This matter was addressed in the Section 42A Report (Ecological and Landscape Features).
- 5.23 While PC92 identified Significant Ecological Features and Outstanding Landscape Features as existing qualifying matters, it did not propose any new features or changes to existing features. One of the existing features U14/135 is named Mangawhai Bay Inlet is in Appendix 1 - Schedule of Identified Significant Ecological Features. It is identified as having an estuarine vegetation habitat and shown on the planning maps at 467E Ōmokoroa Road.
- 5.24 In their submission on PC92, the landowners sought changes to the boundary of the existing feature. Following a site visit from Council staff, recommended amendments are proposed to the ecological feature to better align with the areas of ecological significance.
- 5.25 In our opinion the submission point could be considered within the scope of PC92 for the following reasons:

³³ Evidence of Nicki Williams at paragraph 55.

- (a) While the notified PC92 did not propose any changes to existing features, it did identify existing Significant Ecological Features as existing qualifying matters;
- (b) In terms of the second test in *Clearwater*, the changes proposed through the ground truthing would not mean that the District Plan is amended without the opportunity for participation by those potentially affected because the changes have been sought by the landowner, who is the most affected party; and
- (c) No other parties are considered affected by the limited nature of the changes proposed, particularly where the amendments seek to better align the extent of the feature with the areas of ecological significance.

6. STATUTORY FRAMEWORK AND CONSIDERATIONS

6.1 The usual statutory considerations apply to PC92, subject to any modifications that are specific to an IPI and the ISPP. The relevant statutory framework for the IHP's consideration of PC92 include:

- (a) whether PC92 is designed to accord with and assist the Council to carry out its functions to achieve the purpose of the Act;³⁴
- (b) whether PC92 gives effect to any national policy statement, the New Zealand Coastal Policy Statement, the regional policy statement and national planning standard;³⁵
- (c) whether PC92 is consistent with any regional plan;³⁶
- (d) whether PC92 is in accordance with any regulations (including national environmental standards);³⁷
- (e) whether PC92 has regard to any emissions reduction plan and national adaptation plan;³⁸

³⁴ Sections 31, 72 and 74(1).

³⁵ Section 75(3).

³⁶ Section 75(4)(b).

³⁷ Section 74(1).

³⁸ Section 74(2)(d) and (e).

- (f) whether PC92 takes into account any relevant planning document recognised by an iwi authority;³⁹
- (g) a district plan assessment of the extent to which each objective is the most appropriate way to achieve the purpose of the RMA;⁴⁰
- (h) whether the provisions in PCC92 are the most appropriate way to achieve the objectives by:⁴¹
 - (i) identifying other reasonably practicable options for achieving the objectives; and
 - (ii) assessing the efficiency and effectiveness of the provisions for achieving the objectives.
- (i) whether the rules have regard to the actual or potential effects on the environment;⁴²
- (j) whether every relevant residential zone has the MDRS incorporated into that zone except to the extent that a qualifying matter is accommodated;⁴³ and
- (k) whether every residential zone in an urban environment has given effect to policy 3 or policy 5, as the case requires, and whether the provisions in the district plan for each urban non-residential zone within the urban environment give effect to policy 3 or policy 5, except to the extent that a qualifying matter is accommodated.⁴⁴

6.2 The higher order planning documents and strategic plans that are relevant to PC92 have been assessed in the section 32 and section 42A reports. It is not necessary to repeat those matters here.

7. RESPONSE TO ISSUES RAISED BY SUBMITTERS

7.1 In this section we respond to the key issues we anticipate will be before the IHP based on the written evidence filed by submitters. The evidence

³⁹ Section 74(2A).

⁴⁰ Section 32(1)(a).

⁴¹ Section 32(1)(b).

⁴² Section 76(3).

⁴³ Section 77G(1).

⁴⁴ Sections 77G(2) and 77N(2).

in the section 42A report provided substantive responses to matters raised in submissions.

Ōmokoroa Zoning Maps

- 7.2 Kāinga Ora seeking a new High Density Zone within the Ōmokoroa Stage 3C Area Specific Overlay. This is not supported by Mr Hextall because he considers it would create unnecessary duplication in the Plan and the proposed yield requirements are “minimum” yields so are already enabling.⁴⁵
- 7.3 The issues raised on behalf of N & M Bruning relating to the scope of PC92 over their property were discussed above. Mr Hextall considers the zoning proposed in the Section 42A Report remains the most appropriate planning response but has indicated that the Panel may consider the site as having unique or exceptional circumstances given the significant designations over the property.⁴⁶
- 7.4 In relation to the proposed Natural Open Space Zone Mr Hextall does not support additional changes requested by the Bay of Plenty Regional Council witnesses. An extensive exercise was undertaken by Council with most property owners to determine the proposed boundaries.⁴⁷

Medium Density Residential - Ōmokoroa and Te Puke (section 14A)

- 7.5 (Part 1) In his reply evidence Mr Hextall responds to submitters’ written evidence as it relates to a number of topics such as the explanatory statement, significant issues, objectives and policies.⁴⁸ Some further amendments are supported to these provisions as outlined in his evidence.
- 7.6 (Part 2) Mr Clow has addressed matters relating to the definitions, activity lists and activity performance standards in the section 42A report and his evidence in reply.⁴⁹ In response to Mr Collier’s evidence a change is proposed to the definition of ‘impervious surfaces’. A new definition of ‘emergency service activities’ is proposed in response to evidence from

⁴⁵ Reply evidence of Mr Hextall dated 6 September 2023 at pages 4-6.

⁴⁶ Reply evidence of Mr Hextall dated 6 September 2023 at pages 9-10.

⁴⁷ Reply evidence of Mr Hextall dated 6 September 2023 at pages 10-11.

⁴⁸ Reply evidence of Mr Hextall dated 6 September 2023 at pages 12-22.

⁴⁹ Reply evidence of Mr Clow dated 6 September 2023 at pages 3-32.

Fire and Emergency New Zealand. Mr Clow's recommendations are otherwise unchanged from the section 42A report.

- 7.7 (Part 3) Mr Hextall addresses the requested changes to the matters of control and discretion in the section 42A report and reply evidence.⁵⁰

Commercial and Commercial Transition (sections 19 and 20)

- 7.8 In his reply evidence Mr Hextall responds to the request by Kāinga Ora to increase heights in the Commercial Zones in Ōmokoroa and Te Puke.⁵¹ From a planning perspective Mr Hextall supports the requested changes for Ōmokoroa. Both Mr Hextall and Ms Price are of the opinion that the potential for higher density in Te Puke will be addressed in a comprehensive way through the future Te Puke Spatial Plan Process which will also ensure meaningful engagement with the community and other stakeholders.
- 7.9 In her reply evidence Ms Price responds to the written evidence on behalf of the Retirement Village Association and Ryman Healthcare who seek provisions for retirement village use in Commercial Zones. Ms Price does not support these provisions from a planning perspective based on her assessment of the land available within the Commercial Zones in Ōmokoroa and Te Puke.⁵²
- 7.10 Ms Price also responds to the submitter Ara Poutama who seeks a new permitted activity within the Commercial Zone for "community corrections activities" and does not support the request on the basis that the activity is already permitted in that zone.⁵³

Subdivision and development (section 12)

- 7.11 Mr Manihera has addressed the changes sought to section 12 in the section 42A report and his reply evidence.⁵⁴ He responds to the written evidence on behalf of the Bay of Plenty Regional Council, Fire and Emergency New Zealand, Kāinga Ora, Jace Investments and Kiwi Green

⁵⁰ Reply evidence of Mr Hextall dated 6 September 2023 at pages 22-27.

⁵¹ Reply evidence of Mr Hextall dated 6 September 2023 at pages 27-29.

⁵² Reply evidence of Ms Price dated 6 September 2023 at [8].

⁵³ Reply evidence of Ms Price dated 6 September 2023 at [19].

⁵⁴ Reply evidence of Mr Manihera dated 6 September 2023 at pages 6-15.

in his reply evidence. Some further amendments are supported to these provisions as outlined in his evidence.

Natural Open Space (section 24)

- 7.12 The Bay of Plenty Regional Council has sought changes to the provisions relating to the Natural Open Space zone through its submission and written evidence. Mr Hextall has addressed these in the section 42A report and his reply evidence and does not recommend any further changes. In his opinion the provisions requested go further than the matters required to be controlled through a district plan.⁵⁵

Amenity (section 4C)

- 7.13 Ms Price addresses matters relating to section 4C of the Plan in the section 42A report and her evidence in reply. In response to KiwiRail seeking additional provisions relating to noise and vibration controls in the vicinity of the railway lines, Ms Price acknowledges that some setback could be considered appropriate but does not agree with the 100m sought.

Ecological and landscape features

- 7.14 M & S Smith sought further minor changes to the boundary of the ecological area on their property. In his evidence in reply Mr Clow recommends one further change based on further ecological assessment.⁵⁶

Financial contributions (section 11)

- 7.15 As authorised under section 77T the Council proposes to change its financial contribution provisions in response to the Amendment Act. This is to allow the Council to collect financial contributions for development enabled under the MDRS as a permitted activity (which the operative plan did not provide for) and to respond to the greater density to be enabled in Ōmokoroa and Te Puke by PC92.
- 7.16 A number of submissions were received on the changes to section 11 (financial contributions) proposed by PC92. As set out in the section 42A

⁵⁵ Reply evidence of Mr Hextall dated 6 September 2023 at pages 29-30.

⁵⁶ Reply evidence of Mr Clow dated 6 September 2023 at page 47.

report, a number of changes were proposed to the notified provisions by Mr Clow in response to submissions received.

- 7.17 Further changes were sought to the provisions in the written evidence on behalf of some of the submitters, including as they relate to developable area, and the average net lot area for which 1 household equivalent (HHE) will be charged in the Te Puke area, in particular. These matters have been further addressed in the evidence in reply of Mr Clow.
- 7.18 It is important to note that PC92 did not propose any changes to the formula in the operative District Plan for determining a household equivalent (Rule 11.4.1). The inputs to the formula are updated annually through the Annual Plan and / or Long Term Plan process and those matters sit outside the district plan and the PC92 process.
- 7.19 Mr Clow has proved detailed evidence in reply in relation to the matters raised in written evidence on behalf of the submitters.

Retirement villages (various topics)

- 7.20 The Retirement Villages Association and Ryman Healthcare have provided further evidence to support changes to rules and definitions and new objectives and policies associated with retirement village activities as requested in their submissions. Mr Clow and Mr Hextall consider Plan Change 92 sufficiently provides for retirement village activities without the amendments requested.⁵⁷

Appendix 7 – Structure Plans

- 7.21 In his reply evidence Mr Manihera responds to matters relating to the Ōmokoroa Roothing and Ōmokoroa Walkways / Cycleways.⁵⁸ M & S Smith sought further minor changes to the alignment of a walkway / cycleway recommended over their property. JACE Investments and Kiwi Green Limited sought the inclusion of a road over land owned by the Ministry of Education. No changes are recommended in response.
- 7.22 In response to the written evidence on behalf of the North Twelve Limited Partnership, Mr Manihera has proposed some changes to the wastewater

⁵⁷ Reply evidence of Mr Tony Clow dated 6 September 2023 at [93], and Reply evidence of Mr Hextall at [84].

⁵⁸ Reply evidence of Mr Manihera dated 6 September 2023 and pages 16-18.

projects within the Te Puke Structure Plan.⁵⁹ No changes are recommended in response to Ōmokoroa wastewater projects.

7.23 No written evidence was circulated in opposition to the following parts of the Section 42A Report:

- (a) General matters;
- (b) Te Puke Zoning Maps;
- (c) Rural-Residential Zone (section 16);
- (d) Industrial Zone (section 21);
- (e) Natural Hazards (section 8);
- (f) Infrastructure, Network Utilities and Designations (section 10);
- (g) Transportation, Access, Parking and Loading (Section 4B).

7.24 It is anticipated that the planning witnesses on behalf of Council will provide an update on these matters as part of the Council's opening.

8. **COUNCIL'S EVIDENCE**

8.1 Evidence for the Council in support of PC92 is being given by:

- (a) Mr Jeff Hextall:
 - (i) Ōmokoroa zoning Maps;
 - (ii) Section 14A Ōmokoroa and Te Puke Medium Density Residential – Part 1 – Section Labelling, Explanatory Statement, Issues, Objectives & Policies;
 - (iii) Section 14A – Ōmokoroa and Te Puke Medium Density Residential – Part 2 – Definitions, Activity Lists and Activity Performance Standards, with respect to the density standards for height;

⁵⁹ Reply evidence of Mr Manihera dated 6 September 2023 and pages 18-20.

- (iv) Section 14A Ōmokoroa and Te Puke Medium Density Residential – Part 3 – Matters of Control and Matters of Discretion;
 - (v) Section 19 Commercial Zone;
 - (vi) Section 24 Natural Open Space Zone;
- (b) Mr Tony Clow:
- (i) Section 14A – Ōmokoroa and Te Puke Medium Density Residential – Part 2 – Definitions, Activity Lists and Activity Performance Standards;
 - (ii) Section 11 – Financial Contributions;
 - (iii) Ecological and Landscape Features;
 - (iv) Section 8 – Natural Hazards and Planning Maps;
- (c) Ms Anna Price:
- (i) Sections 19 & 20 – Commercial and Commercial Transition Zones;
 - (ii) Section 4C – Amenity;
- (d) Mr Taunu Manihera:
- (i) Section 4B – Transportation, Access, Parking and Loading;
 - (ii) Section 12 – Subdivision and Development;
 - (iii) Appendix 7 – Structure Plans.


9. CONCLUSION

- 9.1 PC92 was prepared by Council as a response to the Amendment Act and the requirement to accelerate the provision of housing and enable greater intensification in Ōmokoroa and Te Puke.
- 9.2 The planning witnesses on behalf of Council have carefully considered the submissions, the written evidence on behalf of submitters, and have

made further amendments to their recommended provisions through that process.

- 9.3 Together, PC92 and the provisions recommended by Council witnesses:
- (a) comply with the requirements in section 80E in terms of the permissible scope of an IPI;
 - (b) fall within the scope of submissions, or in a small number of instances may require the IHP to make recommendations outside the scope of submissions under clause 99(2)(b) but are “on” the plan change; and
 - (c) when assessed against the statutory considerations are the most appropriate provisions that meet the requirements of the Amendment Act, NPS-UD, and Part 2 of the RMA.

Dated: 7 September 2023

A handwritten signature in blue ink, appearing to be 'K. Stubbing' or similar, written over a light blue rectangular background.

Kate Stubbing / Jemma Hollis
Counsel for the Western Bay of Plenty District Council