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

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LEGAL SUBMISSIONS IN REPLY ON BEHALF OF WESTERN BAY OF PLENTY DISTRICT COUNCIL

Dated: 29 September 2023

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MAY IT PLEASE THE COMMISSIONERS

1. This Intensification Planning Instrument (**IPI** or **PC92**) was heard before Commissioners Carlyon (Chair), Bennett, Main, and Withy between 11 and 15 September 2023 (the **Hearing**). The Hearing was adjourned, and hearing directions were issued by the Panel in the Hearing Direction 3 dated 20 September 2023 (**Post Hearing Directions**).

2. The Post Hearing Directions require the Council to file its written reply by 29 September 2023. These legal submissions in reply have been prepared alongside a closing planning statement. The submissions and the planning reply statement provide a written record of the matters addressed in the reply presented orally on Thursday 14 September 2023, respond to additional matters raised by submitters, and also respond to the Post Hearing Directions from the Panel.

3. These reply submissions respond to the legal matters raised during the hearing:

   (a) The North Twelve Limited Partnership – relating to the proposed changes to the financial contribution provisions (section 11) in the District Plan;

   (b) Kāinga Ora – relating to the scope of changes sought to the Te Puke Commercial Zone provisions;

   (c) Bruning – relating to the scope of PC92 as it relates to the proposed zoning to the submitter's property;

   (d) Waka Kotahi – relating to the proposed rule that seeks to control development within the Ōmokoroa Stage 3 area in the future to manage potential effects on the operation of the SH2 / Ōmokoroa Road intersection;

   (e) Brief reply to questions in relation to the National Policy Statement on Highly Productive Land (**NPS-HPL**); and

   (f) Brief summary of advice in relation to presentation by Pirirākau.

The North Twelve Limited Partnership (North Twelve)

4. At the hearing the representations on behalf of North Twelve sought to argue that Council's financial contribution regime is "*unfair*", "*illogical*" and "*not justified*". The submitter's concerns relate specifically to Te Puke. In summary, North Twelve claims there is no additional new or improved infrastructure planned for Te Puke to justify the changes to financial contribution provisions proposed under PC 92.[1]

5. Based on the evidence presented by the witnesses on behalf of Council at the hearing, these arguments are strongly opposed, and not supported by evidence.

6. As further context, it is noted that local authorities across New Zealand have different tools they can use to fund the infrastructure required for growth in their district. Importantly, development contributions are levied under the Local Government Act 2002,[2] and financial contributions are provided for under the RMA. Western Bay of Plenty District Council is unique because it is the only Tier 1 authority that relies solely on financial contributions (other Tier 1 councils rely on development contributions, or a combination of both).

7. The requirement to pay financial contributions is assessed at the time of resource consent for a subdivision or development, and the required financial contribution(s) are imposed as a condition of consent under section 108. Section 108(10) requires that conditions can only be imposed in accordance with the purposes specified in the plan, and that "*the level of contribution is determined in the manner described in the plan*".

8. As the Panel is aware, section 11 of the District Plan sets out the purposes and manner by which financial contributions can be collected through the resource consent process. In addition, Structure Plans in Appendix 7 contain infrastructure schedules showing the estimated costs of projects required to provide for growth in both Te Puke and Ōmokoroa. Changes are proposed to both section 11 and the structure plans through PC92.

[1] Representations on behalf of The North Twelve Partnership, dated 7 September 2023 at paragraph 4.
[2] Subpart 5 Local Government Act 2002.

9. As acknowledged by Mr Gardner-Hopkins, PC92 is a plan change "*not revisiting the fundamentals*" of the Council's financial contributions regime. PC92 does not propose changes to the formula in Rule 11.4.1, or as explained in the Explanatory Note to Rule 11.4.1 the inputs to the formula which are updated annually through the Annual or Long Term Plan processes (which are subject to the consultation requirements of the LGA).[3] As noted in opening submissions these matters sit outside the District Plan and PC92 process.[4]

10. In our submission the Panel has robust evidence from the Council that addresses the matters raised by North Twelve:

    (a) Mr Clow explained why the alleged "67%"[5] increase on the per hectare charge is not correct. Council's evidence is also that there are more than 100-200 lots / units yet to be consented within Te Puke (contrary to the assertion by Mr Dillon). Mr Clow expressed the view that, regardless of how many lots / units remain, it is nevertheless important to ensure the proposed provisions are most appropriate for the collection of the required financial contributions. Mr Clow explained the basis and rationale for the changes proposed.

    (b) Mr Manihera discussed the infrastructure schedules and confirmed that the infrastructure to be funded by financial contributions is required for Te Puke to grow to the projected population of 13,000 people. Mr Manihera confirmed his recommendation to remove two projects from the Te Puke infrastructure schedules (WWINT-1 and WWINT-2).

    (c) Mr Rod Barnett (Council's Senior Business Analyst for the General Manager of Infrastructure Services) confirmed that the expected population of the model for Te Puke is 13,000, not 16,500 as asserted by the submitter which appeared to be a misunderstanding. Mr Barnett described to the Panel how it is a growth proportion recovery model.

[3] See Part 6 LGA 2002, section 82.
[4] Opening Legal Submissions on behalf of Council at [7.18].
[5] Evidence of John Dillon, at [6].

Kāinga Ora

11. The legal submissions from Mr Matheson (Counsel for Kāinga Ora) at the hearing focussed on the issue of jurisdiction, and whether the Panel has scope to make recommendations to increase the building heights within the Commercial Zone in Te Puke from 12.5m to 24.5m (see Counsel's written notes dated 13 September 2023).

12. Mr Matheson invited the Panel to consider that the changes or increase in building heights in the Te Puke Commercial Zone could be considered "on" the plan change by relying on section 80E. In Mr Matheson's submission, the section 80E requirement that territorial authorities "*give effect to*" policy 3(d) of the NPS-UD expands the meaning of "on the IPI" in the context of clause 99.

13. For the reasons set out in the opening legal submissions, we do not agree. PC92 did not change the status quo for the Commercial Zone in Te Puke.[6]

14. However, even if the first test in *Clearwater* could be met by allowing section 80E to somehow broaden what is considered "on" an IPI, the second test and the natural justice considerations are important.

15. The changes requested to the building heights within the Commercial Zone in Te Puke were only sought through the evidence of Ms Tait on behalf of Kāinga Ora, filed on 25 August 2023.[7] The Commercial Zone in Te Puke was specifically excluded from PC92 as notified,[8] and an increase in building heights within the Commercial Zone was not sought by any submitter, or further submitter on PC92.

16. At paragraph 9 of Counsel's notes, Mr Matheson argues that "*there is no evidence of any material risk of natural justice concerns arising*" from the proposed additional height on the basis that "*any (reasonably informed) submitter*" would have been on notice that the heights within the Commercial Zone could be increased, or any submitter would not be adversely affected by the additional height. Further, Mr Matheson described the requested increased height limit as a "*bonus*" for landowners.

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[6] Opening Legal Submissions on behalf of Council at [5.15].
[7] Evidence of Susannah Tait, at [1.5].
[8] As shown in Figure 3, Appendix 3, s 32 Evaluation Report.

17. As outlined in our opening legal submissions, care should be taken in terms of natural justice considerations where the Panel is making recommendations under clause 99(2)(b). While some submitters sought to describe this as a very broad power, in our submission it is not unfettered and needs to be exercised with care.

18. Mr Matheson's submissions fail to consider the following parties, who in our submission may have a genuine interest in the building height rules in the Commercial Zone in Te Puke:

    (a) parties that are not submitters to PC92 (both Mr Matheson's examples in paragraph 9 focussed on submitters to PC92);

    (b) residential property owners / occupiers in the vicinity, including those immediately adjacent residential properties where the proposed Medium Density Residential Zone abuts the existing Commercial Zone;

    (c) the wider community;

    (d) the existing Town Centre owners / occupiers; and

    (e) other Te Puke landowners who may want to seek commercial zoning on their properties.[9]

19. In our submission these potentially affected parties have not had a real opportunity for participation in relation to what the appropriate buildings heights are for the Te Puke Town Centre / Commercial Zone.

20. In so far as Mr Matheson argues that Council has not given effect to Policy 3(d) of the NPS-UD within the Te Puke Commercial Zone, it was acknowledged that no changes are proposed in relation to the Commercial Zone in Te Puke. The reasons for this were discussed at the hearing and include because a wider spatial planning process for Te Puke is underway (with Ms Price providing evidence that community led engagement is scheduled to commence in October 2023).

21. Mr Matheson framed the question to the Panel as what was the risk of something adverse happening in the next two years if the building height

[9] For example, Vercoe Holdings whose submission sought that residential zone land in Te Puke be rezoned for Commercial use. s 42A Report, Te Puke Zoning Maps, at 7.

was doubled from 12.5m to 24.5m. However, in our submission, what is the risk of not enabling greater height until the Council has had the opportunity to properly consult on any proposals and respond to the community and key stakeholder feedback. Further, as Mr Hextall described to the Panel, the existing Town Centre in Te Puke contains buildings with a current height of two storeys. The operative District Plan height limit of 12.5m would enable 3 to 4 storeys which suggests that some level of further development potential exists at present.

22. In conclusion, in our submission the Panel would not have scope to make recommendations to increase the building heights within the Commercial Zone in Te Puke from 12.5m to 24.5m though the PC92 process.

Bruning

23. The focus of the legal submissions of Ms Barry-Piceno were on the issue of whether it was open to the Panel to rezoning the Bruning land as Natural Open Space. Ms Barry-Piceno stated that it was "*not only not appropriate to rezone land but unnecessary*".

24. For the reasons outlined in the opening legal submissions we consider that the proposed zonings on the Bruning land are within the permissible scope of an IPI under section 80E of the Amendment Act. Mr Hextall confirmed in the Council's opening that he also considered that the proposed zonings were the most appropriate planning response. However, following the presentation of the Waka Kotahi evidence on Monday 11 September 2023, Mr Hextall provided an update to the Panel and advised that given the extent of the proposed alteration to the existing designation on the Bruning land, the Panel may consider it is unnecessary to rezone the Bruning land until such time as there is greater certainty as to the impact of the proposed changes to the existing designations and what would be the appropriate zoning of that land and residual land.

Waka Kotahi

25. Direction 1 in the Post Hearing Directions related to the proposed rule to address concerns regarding the safe and efficient operation of the State

Highway 2 / Ōmokoroa Road intersection as a result of the development enabled by PC92.

26. The planning reply describes the discussions which have continued between experts for Waka Kotahi, Kāinga Ora and Council.[10] In summary, the parties have agreed that it would be appropriate for there to be a rule that requires resource consent once the maximum capacity of the SH2 / Ōmokoroa Road intersection is reached.[11]

27. The proposed rule raises a potential legal issue in terms of whether the state highway should be considered as a qualifying matter.

28. Section 77I of the RMA states that the Council may make "*the MDRS and the relevant building height or density requirements under policy 3 less enabling of development*" only to the extent necessary to accommodate a qualifying matter. Because the proposed rule will, at some point in the future, require resource consent where the density requirements in the Amendment Act are intended to allow 1-3 dwellings as a permitted activity, the issue is whether the proposed rule would operate as a qualifying matter.

29. The need to ensure the safe and efficient operation of nationally significant infrastructure (which includes state highways)[12] can be a qualifying matter (see section 77I(e)).

30. In our submission on a strict legal interpretation of the Amendment Act provisions, the MDRS can only be reduced to accommodate a qualifying matter and therefore a rule less enabling of development could be considered as a qualifying matter. If that is the case, the requirements in section 77J apply.

31. The Auckland IHP provided guidance that a council or any submitter could seek to introduce a qualifying matter and that this power was not limited to councils. What is important is that suitable information on the qualifying matter is available to satisfy the evaluation requirements of s 32.[13]

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[10] At [5].
[11] Tony Clow, Planning Reply at [7].
[12] National Policy Statement on Urban Development, at 7.
[13] 'Interim guidance on matter of statutory interpretation and issues relating to the scope of the relief sought by some submissions', 12 June 2023, at [72].

32. In the original submission (dated 16 September 2022) Waka Kotahi requested the intersection improvements be included as a qualifying matter to address safety concerns.

33. In our submission it is open to the Panel to consider that it has sufficient evidence (as required by section 77J) to provide for the state highway to be a qualifying matter for the following reasons:

    (a) Traffic modelling indicates that the proposed rule (requiring resource consent for further residential development) would not be triggered until 97% of Ōmokoroa total growth, or 89% of the growth expected in the Ōmokoroa Stage 3 area, is exceeded. This is not expected to occur until 2046[14] or 2048.[15]

    (b) Given the proposed timeframe before the rule would be triggered, development within the Stage 3 area will not be limited in the short or medium term so the MDRS or density standards are not less enabling until approximately 2046/2048.

34. As described during the hearing, it is important that potentially affected parties have the opportunity to address qualifying matters through the IPI process.[16] In addition to the Waka Kotahi submission requesting a new qualifying matter, we note:

    (a) the need to address traffic safety issues associated with the SH2 / Ōmokoroa Road intersection to support the new residential development areas at Ōmokoroa was identified in the section 32 report;[17] and

    (b) The submission by Waka Kotahi attracted a number of further submissions which opposed a rule restricting development.[18]

35. In conclusion, in our submission it is open to the Panel to include the proposed rule in its recommendations on PC92.

[14] Summary Statement of Duncan Tindall on behalf of Waka Kotahi at paragraph 12.
[15] Tony Clow, Rebuttal Evidence at [41].
[16] Oral legal submissions on behalf of Council, 12 September 2023.
[17] Page 63 and 208, s 32 report.
[18] Jace Investments (FS 69.5), Kāinga Ora (FS 70.25) and Ōmokoroa Country Club (FS 74.33), see s 42A Topic 7 – Rules 14A.3.4 and 14A.3.5.

NPS-HPL

36. During the hearing the Panel asked questions in relation to the application of the NPS-HPL. For completeness we record that the land affected by PC92 is not "highly productive land" under the NPS. This is because the definition of highly productive land for the purposes of the NPS-HPL (until the Regional Council has undertaken the required mapping) excludes land that is "*subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle*" (see clause 3.7(b)(ii)).

37. PC92 was notified on 20 August 2022. The NPS-HPL was gazetted on 17 October 2022. Therefore the land that was included in the notified PC92 is excluded from the definition of highly productive land because it was the subject of a notified Council plan change, and the NPS-HPL does not apply to PC92.

Pirirākau – Presentation on Monday 11 September 2023 by Julie Shepherd

38. These submissions record in writing the legal advice provided to the Panel on Tuesday 12 September 2023 in response to the question from Chair Carlyon as to whether the Panel can consider the information they heard from Julie Shepherd on behalf of Pirirākau in their deliberations.

39. In the absence of any submissions on PC92 from tangata whenua in our submission it was open to Panel to consider that it needed to hear from tangata whenua to make its recommendations on PC92.

40. Under clause 98 of Schedule 1, the Panel has power to regulate its own proceedings. Ms Shepherd presented to the Panel during the hearing. Submitters had the opportunity to hear the presentation, and some submitters were asked questions from the Panel on the matters raised by Ms Shepherd.

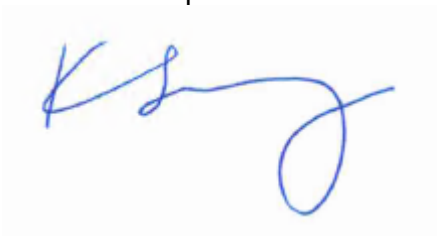
41. If the Panel seeks to rely on information provided by Pirirākau to make a recommendation (that does not relate to a matter raised in another submission) then any recommendation still needs to be "on" the plan change. However, as discussed in opening legal submissions, clause 99(2) provides that the Panel's recommendations can relate to a matter "*identified by the Panel…during the hearing*"

42. In terms of scope and what is “on” the plan change, these matters were addressed in section 6 of the opening legal submissions.

Conclusion

43. In our submission the PC92 provisions, with the further changes recommended by Council witnesses in the planning reply statement, are the most appropriate provisions when assessed against the statutory considerations and meet the requirements of the Amendment Act, NPS-UD, and Part 2 of the RMA.

Dated: 29 September 2023



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