

Before the Independent Hearings Panels

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

And

In the matter of Hearing Stream 4 (Urban Development)

**Legal submissions in reply on behalf of Wellington Regional Council
– Hearing Stream 4**

Date: 23 November 2023



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MAY IT PLEASE THE PANEL:

INTRODUCTION

1 These legal submissions in reply on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 4 (Urban Development) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**).

2 The legal framework and plan change tests that apply to Change 1 were set out in our submissions of 8 June 2023, for Hearing Stream 1. That framework and those tests apply equally to this hearing stream.

3 GWRC has filed a section 42A report for this topic (jointly prepared by Mika Zöllner and Owen Jeffreys), reply evidence and rebuttal evidence from both Mika Zöllner, and Owen Jeffreys and reply evidence (jointly prepared by Mika Zöllner, and Owen Jeffreys).

4 These submissions address:

4.1 Issue 1: Meaning of adjacent and adjoin.

4.2 Issue 2: Whether Policy UD.3 gives effect to the NPS-UD.

ISSUE 1 – MEANING OF 'ADJACENT' AND 'ADJOIN'

5 The meaning of 'adjacent' versus 'adjoin' was discussed in the hearing) and is raised in the reply from the Council officers in relation to Policy 55(a)(2)(i).¹.

¹ Right of Reply of Mika Zöllner and Owen Jeffreys dated 24 November 2023 at [39]

6 *Re Central Otago District Council*² states that (in relation to service requirements on adjoining neighbours under the LGA for a road stopping:³

“Adjoining” means “next to and joined with”

7 *Staufenberg Family Trust No 2 v Queenstown Lakes District Council*⁴ stated that (in the context of whether the open character of any adjacent land was compromised):⁵

“Adjacent” means “... near to; adjoining, bordering (not necessarily touching)”

8 The word 'adjacent' was also considered by the High Court in the *McBride* cases⁶ in the context of an appeal against a parking conviction. The issue was whether a parking meter was 'adjacent to' a parking space. Justice Gendall referred to the wider meaning of 'adjacent' as being:

8.1 'near to – in the vicinity or neighbourhood of'.

8.2 'adjacent to' must mean 'near', 'close' or 'neighbouring', and something more than 'at'.

9 This reflects the position provided to the Panel at the hearing – adjoining means directly next to (and connected to), and adjacent is near to, but not necessarily touching (but it can be).

² Environment Court 9 April 2009 ENC Christchurch C021/09, 9 April 2009

³ At [13]

⁴ Environment Court 9 May 2013 [2013] NZEnvC 100

⁵ At [125]

⁶ *McBride v Wellington City Council* HC WN CRI-2009-485-44, 28 July 2009, and *Wellington City Council v McBride* HC WN CRI-2007-485-33, 22 August 2007

ISSUE 2 - WHETHER POLICY UD.3 GIVES EFFECT TO THE NPS-UD

- 10 Minute 14 from the Panels in relation to Hearing Stream 4 (dated 12 October 2023) stated (at clause 'ee') that:

We have read the legal submissions of Council regarding Policy UD.4 and the planning evidence for Summerset Group Holdings Limited.

Does Counsel consider that changes are required to Policy UD.3 in light of the concerns raised by submitters (in particular Mr Lewandowski on behalf of Summerset and Peka Peka Farm Limited) that the responsive planning provisions in HS4 do not give proper effect to the NPS-UD?

- 11 The notified version of PC1 included a new Policy UD.3. This has since been through a range of amendments. The version from the reply evidence of Ms Zöllner is:

For local authorities with jurisdiction over part, or all, of an *urban environment*. When determining whether a plan change for *urban development* will be treated as adding significantly to development capacity that is not otherwise enabled in a plan or is not in sequence with planned land release, the following criteria must be met:

[range of criteria listed]

- 12 It appears to be common ground that Policy UD.3 responds to the requirements of clause 3.8 of the NPS-UD⁷, which states:

- (1) This clause applies to a plan change that provides significant development capacity that is not otherwise enabled in a plan or is not in sequence with planned land release.
- (2) Every local authority must have particular regard to the development capacity provided by the plan change if that development capacity:

⁷ For example, the evidence of Mr Lewandowski at para 5.43 and section 42A report, para 380/436

- a. would contribute to a well-functioning urban environment; and
- b. is well-connected along transport corridors; and
- c. meets the criteria set under subclause (3).

(3) Every regional council must include criteria in its regional policy statement for determining what plan changes will be treated, for the purpose of implementing Policy 8, as adding significantly to development capacity

13 In terms of what is required to respond to the NPS-UD, our prior submissions (dated 26 September 2023) dealt with this in a general sense, with a focus in those submissions on Policy UD.4. In summary, under section 62(3) of the RMA, a RPS must 'give effect' to the NPS-UD. After analysing the NPS-UD, and the meaning of 'give effect to', our submissions concluded that:

To give effect to the NPS-UD, the RPS needs to be 'responsive to' unanticipated or out of sequence urban development 'plan changes that would add significantly to development capacity and contribute to well-functioning urban environments'. It is submitted that to be responsive in the context of the RPS means such development can be responded to and that a possible pathway is provided for such development where it is appropriate – it does not require it to be provided for in all situations or as the first or most appropriate option.

14 In addition, as noted in our prior submissions, there are wider considerations in the NPS-UD the RPS must be in accordance with. Other provisions of the NPS-UD seek other outcomes than simply being responsive to out of sequence and unanticipated development. Ms Zöllner also notes (in relation to Policy UD.4) that it is not just about implementing the NPS-UD, but also relates to addressing regionally significant issues and regional council functions under section 30 of the RMA, as well as other national

policy statements.⁸ In addition, PC1 is not just required to consider the NPS-UD, the plan change test is significantly wider than one National Policy Statement.

15 While those submissions did focus on Policy UD.4, the general principles referred to above also apply to Policy UD.3.

16 For Policy UD.3, the issue raised by Mr Lewandowski appears to be Policy UD.3 goes beyond what is required by Clause 3.8 and the NPS-UD. Mr Lewandowski takes issue with a number of matters in Policy UD.3 in his evidence for Peka Peka Farm Ltd and Summerset, but we only comment on those that have a legal aspect and which have not been addressed by changes made to the provision in the officers reply. Those are:

16.1 The use of 'must be met' in the chapeau rather than 'have particular regard' which is used in the NPS-UD and Mr Lewandowski thinks should be used in Policy UD.3 (para 5.48 statement of his evidence).

16.1.1 It is submitted that this is not what clause 3.8 of the NPS-UD requires. It requires every local authority to 'have particular regard to the development capacity provided by the plan change if that development capacity'...'meets the criteria in subclause 3'. Subclause 3 requires the Council to include criteria in its RPS for determining what plan change is treated as adding significantly to development capacity. The 'have particular regard to' in the NPS-UD is in relation to the fact that significant development capacity is provided, not 'have particular regard to' the criteria set in the RPS.

⁸ Reporting Officer Right of Reply of Mika Zöllner and Owen Edward Jeffreys dated 24 November 2023 at [155]

The use of 'must be met' is consistent with the NPS directing the Council to set 'criteria' for determining what constitutes significant development capacity and the requirement that the development capacity 'meets the criteria' set in the RPS. By their very nature, 'criteria' are something that need to be met.

16.2 That (e) seeks to favour existing zoned land over an additional area of zoned land (para 5.59 of his statement of evidence). Mr Lewandowski states that clause 3.8 of the NPS-UD does not seek to provide this form of criteria.

16.2.1 It is submitted that whether this is the most appropriate provision is a planning matter, but the NPS-UD does not prevent a criteria requiring a justification of the need for additional urban zoned land in the particular location to meet demand and as part of that, demonstrating there has been consideration of what is already enabled in existing zones.

16.3 That (f) goes beyond the NPS-UD in that land use conflict does not need to be specific criteria for considering what plan changes will be treated as adding significantly to development capacity and that the impact on the feasibility and affordability of already anticipated urban development oversteps what is required by clause 3.8 of the NPS-UD (paras 5.60 and 5.61 of his evidence).

16.3.1 Clause 3.8 of the NPS-UD *requires* particular regard to be given to the development capacity in a plan change if it contributes to a well-functioning environment, is well-connected along transport corridors and meets the RPS

criteria. There is nothing in that clause that prevents the criteria in (f) being included in the RPS

17 Accordingly, it is submitted that Policies UD.3 and UD.4 do give effect to the NPS-UD, in that they provide a pathway for out of sequence or unanticipated development and they set criteria for determining what plan changes will be treated as adding significantly to development capacity.

18 In addition, as set out above, Policy UD.3 is not constrained to just giving effect to the NPS-UD, there are a range of other considerations which Policy UD.3 can respond to.

Date: 23 November 2023



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