Before an Independent Hearings Panel
Appointed by Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions on Variation 1 to the Proposed Waimakariri District Plan

and: Hearing Stream 12D: Ōhoka Rezoning

and: **Rolleston Industrial Developments Limited** *(Submitter 60)*

Memorandum of counsel regarding scope of Variation 1

Dated: 8 November 2024

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MEMORANDUM OF COUNSEL REGARDING SCOPE OF VARIATION 1

1 This memorandum of counsel is filed on behalf of Rolleston Industrial Developments Limited (Submitter 60) (*RIDL*) regarding its submission on Variation 1 to the Proposed Waimakariri District Plan in accordance with Minute 46 of the Panel.

2 The purpose of this memorandum is to address points in paragraph 7 of the Panel's Minute 29 and other matters listed in Minute 46, being:

2.1 Whether there remains scope for RIDL's Variation 1 submissions, in particular given:

(a) RIDL no longer are seeking a general residential zone (*GRZ*) for part of the rezoning site (under the PDP submission) and are instead seeking to replace it with a settlement zone (*SETZ*). The other residential zone proposed is large lot residential zone (*LLRZ*).

(b) RIDL are no longer seeking a medium density residential zone (*MRZ*) under Variation 1 for that part of the site that was sought to be zoned GRZ under the PDP submission.

(c) Under s77G of the RMA, a specified territorial authority may create new residential zones through an Intensification Planning Instrument (this is Variation 1).

(d) A new residential zone is defined as a "an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone".

(e) A relevant residential zone is defined as meaning all residential zones, but does not include a LLRZ or a SETZ, which are the zonings now proposed by RIDL.

2.2 Whether RIDL should be permitted to produce GRZ provisions at this stage of proceedings, particularly taking into account the Panel's previous direction in Minute 31 to provide an updated set of provisions to be applied to the Ohoka proposal by 26 July 2024, and RIDL not providing any further provisions or relevant evidence in Hearing Stream 12E(b) where Variation 1 was considered, and how introducing them now would be consistent with natural justice and fair process.

SCOPE TO INTRODUCE GRZ AT THIS STAGE OF PROCEEDINGS

3 It is important when considering this issue to set out the factual background of what occurred at the various hearing streams:

3.1 RIDL filed planning evidence and legal submissions in respect of its submission on the Variation prior to the hearing for Stream 12D (held on 1 to 4 July 2024). This was on the basis that the section 42A report recorded that RIDL's submission on Variation 1 would be considered as part of Hearing Stream 12D.

3.2 RIDL sought leave to cross-examine a number of witnesses under Variation 1 at Hearing Stream 12D by way of memorandum dated 24 June 2024.

3.3 The Panel responded to this request in Minute 29 where it declined to grant leave to cross examine on the basis that there was uncertainty around matters related to scope. The Panel requested that the Council provide it with legal advice on scope matters specific to RIDL's submission in a timely manner and indicated that following receipt of this the Panel would be in a position to determine whether RIDL should be granted leave to cross examine witnesses at Hearing Stream 12E (where the Council indicated further information regarding capacity and the Variation would be provided).

3.4 The Panel had signalled to RIDL that it would hear its case on its Variation 1 submission towards the end of the hearing for Stream 12D but time did not allow and the issue was never returned to. RIDL understood however it would be provided with other opportunities to address the submission (either in Hearing Stream 12E or at the reconvened hearing for Stream 12D).

3.5 This legal advice was never provided to the Panel, and the section 42A report for Hearing Stream 12E(B) did not consider RIDL's submission on the Variation at all. Therefore, RIDL did not appear at Hearing Stream 12E to address matters of scope of its submission. RIDL did appear at Hearing Stream 12E but in respect of its further submission opposing the development of high hazard areas in Kaiapoi. In those legal submissions, we indicated to the Panel that RIDL had already indicated to the Panel (by way of email to Audrey Benbrook dated 2 August 2024) intended on addressing its Variation 1 submission at the Hearing Stream 12D reconvened hearing (given there was no time to address it at the substantive Hearing Stream 12D hearing on 1 – 4 July 2024).[1]

3.6 While Minute 31 did direct Mr Walsh to provide an updated set of provisions to be applied to the Ōhoka proposal by 26

[1] Legal submissions on behalf of Carter Group Limited and Rolleston Industrial Developments Limited for Hearing Stream 12E dated 9 August 2024 at [5].

July 2024, this was ahead of Hearing Stream 12E. We had understood this direction only related to the PDP provisions, given the issue of scope was still yet to be traversed as between Buddle Findlay, the Panel, and RIDL who were hesitant to instruct Mr Walsh to prepare these provisions ahead of fully understanding the Council's position on the matters listed in Minute 29 and whether any provisions would even be considered.

4 With the benefit of hindsight, we could have sought clarification earlier but as the Panel will appreciate, this process has been long and complex.

5 In any case, introducing the GRZ provisions at this stage in the process will not prejudice any party and would be consistent with natural justice and fair process, noting:

5.1 The relief sought by RIDL has not changed from that set out in its legal submissions on Variation 1 dated 20 June 2024.

5.2 The intent is that the GRZ provisions would have exactly the same effect and outcome as the SETZ provisions being proposed through the PDP. The difference is a matter of form rather than substance, so that the Panel is provided with the provisions required to create a new residential zone should it consider this appropriate.

5.3 Mr Boyes, planner for the Oxford-Ōhoka Community Board accepted in his evidence for the reconvened that the allotment size and resulting character of the SETZ and GRZ are similar.[2]

6 In our submission there would be prejudice to RIDL if the Panel did not permit it to produce the GRZ provisions.

WHETHER THE RELIEF SOUGHT IN RIDL'S SUBMISSION IS WITHIN THE SCOPE OF VARIATION 1

The Council's position

7 We have considered the following documents which set out the Council's legal position on the scope of submissions for Variation 1:

7.1 Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023.

[2] Supplementary evidence of Nick Boyes on behalf of Oxford-Ohoka Community Board (Hearing Stream 12D) dated 18 October 2024 at [7].

7.2 Memorandum of Peter Wilson to the Panel titled "Scope issue" dated 1 June 2023 provided in response to Minute 2.

7.3 Speaking notes of Buddle Findlay provided at Hearing Stream 12E titled "Speaking notes for particular legal issues arising in Hearing Stream 12E" dated 19 August 2024.

8 We understand the Council's position on the scope issue for Variation 1 to be:

8.1 A variation is a plan change which is different from a full plan review.[3]

8.2 The Council has no jurisdiction to consider a submission point if it falls outside the scope of the Variation due to it not being "on" the Variation.[4]

8.3 Whether a submission is "on" a plan change has been well established through case law as invoking the following enquiries:

(a) The bipartite test set out in *Clearwater* whereby:[5]

(i) The submission must reasonably fall within the ambit of the variation by addressing the extent to which the plan change or variation changes the pre-existing status quo; and

(ii) The decision-maker should consider whether there is a real risk that persons potentially affected by changes sought in a submission have been denied an effective opportunity to participate in the decision-making process. This second limb is directed to asking whether there is a real risk that persons directly affected by the additional change being proposed in a submission have been denied an appropriate response.

(b) The findings of the High Court in *Motor Machinists*[6] that the Clearwater tests do not exclude altogether zoning extensions by submission provided these are incidental

[3] Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [7].

[4] Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [7].

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

[6] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [81].

or consequential extensions and that no further s 32 analysis is required to inform affected persons of the comparative merits of that change.

(c) The High Court in *Option 5 Inc v Marlborough District Council*[7] considered that whether a submission is "on" a plan change or variation will involve a question of scale and degree, and when considering the question, it is relevant to take into account:

(i) the policy behind the variation;

(ii) the purpose of the variation;

(iii) whether a finding that the submissions were on the variation would deprive interested parties of the opportunity for participation.

8.4 All in all, if a rezoning request relates to land that has not had its zoning altered by the notification of Variation 1, then:[8]

(a) if that land is not adjacent to land that has had its zoning altered by Variation 1, then it falls outside the scope of Variation 1.

(b) if that land is adjacent to land that has had its zoning altered by Variation 1, then it can be considered as falling within the scope of Variation 1 only if, on a precautionary assessment of fact, circumstances, scale and degree, it can be considered as an incidental or consequential extension of zoning changes proposed by Variation 1 having regard to the relevant factors set out in the case law.

9 We understand the Council's position on the Panel's powers to make recommendations under Variation 1 to be:[9]

9.1 Clause 99(2) of Schedule 1 of the RMA provides the Panel with an ability to make recommendations that have not been raised within the scope of submissions made on the IPI.

9.2 Clause 99 of Schedule 1 of the RMA does not provide the Panel with unfettered discretion to make recommendations

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7 *Option 5 Inc v Marlborough District Council* HC Blenheim CIV-2009-406-144, 28 September 2009 at [41].

8 Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [20].

9 Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [21]-[24].

that fall outside the scope of Variation 1. Clause 99(1) makes it clear that the IHP's recommendations must still be "on" the IPI (Variation 1).

9.3 The scope principles above regarding he need for a submission to be "on" a variation or plan change, equally apply to the scope of the IHP's recommendations being "on" the IPI.

10 We now set out the Submitter's position on the scope issue for Variation 1 and where appropriate respond to the Council's view.

The law relating to scope (but in the context of schedule 1 plan changes)

11 There is no definition in the Resource Management Act 1991 (*RMA*) as to what is meant by 'scope' in the context of plan change or a variation. Scope is simply defined in the Oxford English Dictionary as meaning:

> "*the extent of the area or subject matter that something deals with or to which it is relevant.*"

12 The Courts have provided guidance over the years as to what the limits of 'scope' are in the context of submissions and decision making on a typical Schedule 1 plan change process.

13 We generally agree with Buddle Findlay's description of the findings of the Court about the scope of submissions in a plan change, summarised above at paragraph 8. However, caution should be exercised so as to not place too much reliance on these cases as all of the cases noted concerned typical Schedule 1 plan change processes against the backbone of a settled and operative district plan with a clear geographical or contextual limit.

14 There are no cases that we are aware of that deal with scope of a full review of a district plan and then a variation to that proposed plan.

15 Added to the complexity is the fact that the variation here is an IPI as a result of a unique piece of legislation. The IPI planning tool introduced well after any of the standard cases dealing with plan changes were determined. It provides a bespoke planning regime different from anything that has been seen before in the RMA. It is not a typical Schedule 1 plan change process, nor a typical variation process. Indeed, this is not a matter that Buddle Findlay disagrees with, having conceded Variation 1 is distinguishable and

contextually different from a standard plan change which the case law authorities on scope were concerned about.[10]

16 The High Court in *Albany North Landowners v Auckland Council* is of assistance on this point.[11] In *Albany North Landowners*, the Court was tasked with considering scope issues applicable to the special legislation process for the Proposed Auckland Unitary Plan (*PAUP*). As is the case for the IPI, submissions were required to be "on" the PAUP.[12] The Hearings Panel was not limited to making recommendations that were within the scope of submissions.[13] His Honour, Justice Whata, held:[14]

> *…the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in Clearwater, Option 5 and Motor Machinists. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J [in Clearwater] was therefore very wide.*

17 The extent of changes notified under the PAUP were extensive and provided the decision-maker in that case with very wide scope in terms of what relief could be considered as "on" the PAUP.

18 In this sense, we also see a critical difference between the decision of the Independent Hearings Panel for plan change 14 (*PC14*) to the operative Christchurch District Plan. The PC14 Panel considered the contextual differences between an IPI and a standard plan change, they concluded (amongst other things) that it is outside of scope for submitters to request to rezone land that is not a relevant residential zone.[15] However, PC14 was a change to a settled and operative district plan which is inherently more narrow than a

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10 Speaking notes of Buddle Findlay provided at Hearing Stream 12E titled "Speaking notes for particular legal issues arising in Hearing Stream 12E" dated 19 August 2024 at [2.2] and [2.9].

11 *Albany North Landowners v Auckland Council* [2017] NZHC 138.

12 Local Government (Auckland Transitional Provisions) Act 2010, s 123(2).

13 Local Government (Auckland Transitional Provisions) Act 2010, s 144(5).

14 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [129].

15 Speaking notes of Buddle Findlay provided at Hearing Stream 12E titled "Speaking notes for particular legal issues arising in Hearing Stream 12E" dated 19 August 2024 at [2.16].

variation to a full district plan review where the public is already on notice the entire plan may change and the IPI is just a further move in that direction.

19 The document being varied by an IPI must be the key consideration to the consideration of scope. Indeed, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (*Amendment Act*) sets out slightly different processes if an IPI is on a proposed plan or an operative plan.[16] In that context, the PC14 Panel's findings on the permissible scope of submissions is less relevant as it was determined in a different context of a specific plan change to an already operative and beyond challenge district plan. A narrow interpretation of whether a submission is "on" Variation 1, being a variation to a complete review under a proposed district plan, is not appropriate.

20 That is not to say, however, that the case law does not provide some helpful guidance in determining what is or is not in the permissible scope of Variation 1. Namely, the case law directs us to consider:

20.1 the policy behind and the purpose of the variation;

20.2 the reasonable ambit of the variation as compared to the submission;

20.3 whether the relief sought in the submission constitutes a consequential or incidental amendment; and

20.4 whether there is a real risk that persons potentially affected by changes sought in a submission have been denied an effective opportunity to participate in the decision-making process.

21 We now turn to consider each of these factors with respect to a submission on Variation 1 seeking a rezoning to a new residential zone (and in particular, RIDL's submission to rezone the land at Ohoka to GRZ under Variation 1).

The policy behind and the purpose of Variation 1

22 As with all decision-making, it is appropriate to read legislation in light of its purpose and context.[17]

[16] Resource Management Act 1991, s 77G; and sch 12, cl 33.

[17] Legislation Act 2019, s 10(1).

23 The Amendment Act was passed in the context of New Zealand facing an acute housing shortage and a desire by the Government to improve housing affordability across the country.[18]

24 The purpose of the Amendment Act and IPI process is therefore to **enable** development through the:[19]

24.1 expedition of the implementation of the National Policy Statement on Urban Development 2020 (*NPS-UD*); and

24.2 removal of restrictive (and set more permissive) planning rules in order to expedite the supply of housing, particularly through intensification; and

24.3 application of the medium density residential standards (MDRS) in all tier 1 urban environments.

25 These purposes are to be implemented through a 'non-standard' and streamlined process set out in the Amendment Act (an IPI). This process materially alters the usual Schedule 1 RMA process, particularly in terms of:

25.1 substantially reduced timeframes;[20]

25.2 no appeal rights on merits;[21] and

25.3 wider legal jurisdiction for decision-making.[22]

26 Given one of the key purposes of the Amendment Act and IPI process is the expedition of the implementation of the NPS-UD, the purpose and intent of the NPS-UD also become relevant. Key themes of the NPS-UD include:

26.1 ensuring well-functioning urban environments that meet the changing needs of New Zealand's diverse communities;

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18 Cabinet Legislation Committee "Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill: Approval for Introduction" (30 September 2021) LEG-21-MIN-0154 (*Cabinet Minute*) at [1].

19 Cabinet Minute at [2]-[4]; Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (83-1) (select committee report) at 2.

20 Under s 80F, tier 1 councils were required to notify IPIs by 20 August 2022. Under the ISPP the usual timeframes for plan changes are compressed and the decision making process is altered.

21 There are no appeals against IPIs that go through the ISPP, aside from judicial review (ss 107 and 108). The new process will allow for submissions, further submissions, a hearing and then recommendations by an Independent Panel of experts to Council (s 99). If the Council disagrees with any of the recommendations of the Independent Panel, the Minister for the Environment will make a determination (s 105).

22 Resource Management Act 1991, sch 1 cl 99.

26.2 enabling sufficient development capacity through to the long term in a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments;

26.3 removing overly restrictive rules; and

26.4 enabling a variety of homes for all people and communities.

27 The enabling intent of the NPS-UD has been acknowledged in *Middle Hill Ltd v Auckland Council*,[23] where the Environment Court stated (our emphasis added):

> *The NPS-UD has the broad objective of ensuring that New Zealand's towns and cities are well-functioning urban environments that meet the changing needs of New Zealand's diverse communities. Its emphasis is to direct local authorities to enable greater land supply and ensure that planning is responsive to changes in demand, while seeking to ensure that new development capacity enabled by councils is of a form and in locations that meet the diverse needs of communities and encourage well-functioning, liveable urban environments. It also requires councils to remove overly restrictive rules that affect urban development outcomes in New Zealand cities…*

28 One important aspect of an IPI is that there is no appeal available on the merits of a decision.[24] As noted at the reconvened hearing for Stream 12D, that is one of the key reasons RIDL seeks that the Panel make the land a new residential zone. It would provide the developer with certainty that it will not end up before the Court on appeal for potentially many years should the Panel determine to it appropriate to rezone the land for residential use.

29 While some may consider this unfair or warranting an even tighter view on the permissible scope of an IPI, it is entirely consistent with the purpose and intention of Parliament in enacting the Amendment Act – that planning decisions enabling significant housing supply should be expedited and not subject to overly restrictive rules or protracted processes.

30 It is important to keep in mind these policies and purposes underpinning Variation 1 as we step through the next considerations.

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[23] *Middle Hill Ltd v Auckland Council* [2022] NZEnvC 162 at [33].

[24] Resource Management Act 1991, Schedule 1, cl 107.

The reasonable ambit of the variation as compared to the submission

31 Buddle Findlay consider that beyond the mandatory statutory matters the Council was required to be notified in an IPI, submissions related to any discretionary elements the Council was entitled to include in its IPI would be subject to the same restrictions as set out in the case law applying to ordinary plan changes.

32 One such discretionary element includes the ability for the Council to create a new residential zone.[25] We note that:

32.1 'new residential zone' is defined as meaning "*an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone*";[26] and

32.2 'relevant residential zone' is defined as meaning including all residential zones (excluding large lot residential zones and settlement zones).[27]

33 There is no legal presumption that proposals advanced by the Council are to be preferred to the alternatives being promoted by other participants in the process.[28]

34 The relief sought by RIDL to rezone the Ohoka land to GRZ under the Variation 1 process is consistent with those two definitions above. The Amendment Act does not require the creation of a new residential zone to be MRZ. While there is a duty on the Council to incorporate the MDRS into every relevant residential zone,[29] qualifying matters may be imposed where appropriate to make the MDRS less enabling. The evidence of Mr Phillips on Variation 1 notes that the evidence suggests that MRZ is not appropriate for the subject land, but that on the evidence, the rezoning of the land to residential up to a certain level is appropriate.[30] This brings in GRZ as a possibility. MRZ is not appropriate for a number of reasons set out in the bespoke planning provisions for the PDP rezoning request (including that limits on development need to be imposed to account for, for example, transport infrastructure upgrades). Such matters effectively constitute qualifying matters and can be drafted as such in the proposed GRZ provisions for RIDL's Variation 1 submission

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25 Resource Management Act 1991, s 77G(4).

26 Resource Management Act 1991, s 2.

27 Resource Management Act 1991, s 2.

28 *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2019] NZEnvC 136, [2020] NZRMA 55 at [41].

29 Resource Management Act 1991, s 77G(1).

30 Evidence of Jeremy Phillips on Variation 1 Hearing Stream 12D dated 5 March 2024 at [15]-[16].

(which Mr Walsh will be providing Mr Willis on 19 November 2024 pursuant to Minute 46).

35 We do not agree with Buddle Findlay that the decision the Council has to include new residential zones does not form part of the reasonable ambit for submission or the Panel's powers to make such a recommendation under the IPI process established by the Amendment Act. Indeed, the Panel's powers under the Variation 1 process differ from that of a typical plan change process:

35.1 Typically, in a Schedule 1 plan change process, clause 10 provides that a decision must be given "on the provisions and matters raised in submissions".[31] 'The provisions' are a reference to the provisions of the plan change as notified by the Council. This is what is within the scope of a plan change.

35.2 However, the Amendment Act provides the IHP with much wider powers to make recommendations than the typical Schedule 1 plan change process. Clause 10, under which all of the scope case law discussed above was considered, does not apply to an IPI process. Rather, clause 99(2) of Schedule 1, provides that an IHP must make recommendations to a specified territorial authority on the IPI. Those recommendations:

> *(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.*

36 The Amendment Act has established a special process for the development of an IPI and sets clear bounds as to what may or may not be included in such an instrument. In this sense, it is the legislation that sets out the 'scope' of an IPI.

37 This necessarily means that the IHP has jurisdiction to accept relief in submissions of additional, or different, matters which it considers are necessary under section 77G.

38 In our submission, the allowable scope of the Panel's jurisdiction to make recommendations in an IPI process must be determined by reference to the legislation, and not simply by what was raised in submissions, or what might be 'on the provisions' as would be required in a typical Schedule 1 plan change process (noting that clause 99 does not use the words 'on the provisions' when setting out the permissible scope of the Panel's recommendations).

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[31] Resource Management Act 1991, sch 1 cl 10.

39 We are not suggesting that the Amendment Act allows an IPI to open the box and advance requests that fall entirely outside of the provisions or purpose of the Amendment Act. For example, as with the NPS-UD, the Amendment Act applies expressly to 'urban environments' (defined the same in both documents).[32] The Panel therefore could not make a recommendation on Variation 1 that concerns areas outside the 'urban environment'.

40 In this respect, the IHP could not make any recommendations on matters which the Council was not itself lawfully entitled to include in its IPI, including for example on matters outside the urban environment.

41 As agreed by all of the planning witnesses for Hearing Stream 12D, Greater Christchurch is the 'urban environment' against which the proposed rezoning of land at Ohoka should be considered against for the purposes of the NPS-UD.[33] This must be the same for the Amendment Act given the definitions are identical.

42 As such, the permissible spatial extent/ambit that applies to Variation 1 is Greater Christchurch. Provided a submission (as well as a recommendation of the Panel) concerns an area within Greater Christchurch and the request is within the bounds of what the Council themselves were able to notify in an IPI (including for example the creation of a new residential zone), then the submission will be "on" Variation 1.

43 In other words, submissions must be on matters which the Council was legally entitled to include in its IPI. As long as the changes sought in a submission are reasonably within these parameters, such changes are within the lawful scope of the IPI, regardless of what the Council may or may not have notified in its IPI. This could include, for example, requests for new residential zones provided these are within the urban environment.

Consequential or incidental amendments

44 Buddle Findlay are of the view that the High Court's use of the word "extension" in *Motor Machinists* of a zoning change proposed in a variation implies that a proposed rezone that is separated from, rather than adjacent to, land proposed to be rezoned in a variation, cannot be considered within scope as a consequential and incidental zoning extension.[34]

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[32] Resource Management Act 1991, s 77F; and National Policy Statement on Urban Development 2020, cl 1.4.

[33] Joint Witness Statement – Confirmation of agreement of planning matters (Hearing Stream 12D: Ōhoka rezoning request) dated 16 July 2024 at [2.1].

[34] Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [14].

45 In their view, only land that immediately adjacent to/adjoining land subject to Variation 1 could be permissible as being a consequential or incidental amendment. However, the case law does not support this.

46 Indeed, both Buddle Findlay and Mr Wilson agree that whether land falls within the scope of Variation 1 requires a fact-specific assessment of the particular circumstances of the submission and all of the relevant factors identified in case law (including the policy behind and the purpose of the variation).[35] This fact-specific assessment must also relate to whether a submission constitutes a permissible consequential or incidental amendment.

47 As set out above, the geographical extent of what Council is able to notify in its IPI and therefore what the geographical extent of what the Panel is able to make recommendations on is the urban environment of Greater Christchurch. In our submission, a request to create a new residential zone within the urban environment of Greater Christchurch is a permissible consequential or incidental amendment to an IPI variation. Again noting the very different statutory regime between a standard Schedule 1 plan change and an IPI process under the Amendment Act against the backdrop of the purpose of that Act.

48 Mr Wilson's memorandum on Variation 1 scope issues notes in numerous places that the section 42A officers for the various streams should consider the applicability of the scope tests set out by Buddle Findlay on a case-by-case basis in making their recommendations, including submissions seeking new residential zones that may not be immediately adjacent to land notified as being subject to Variation 1.[36]

49 Mr Willis in his section 42A Report for Hearing Stream 12D purports to deal with RIDL's submission on Variation 1.[37] Yet Mr Willis provides no analysis of whether the submission is within scope or not. He considers the scope of submissions on the variation will be assessed further at Hearing Stream 12E.[38] This means there has not been a proper assessment of the scope of RIDL's submission on

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35 Buddle Findlay legal advice titled "Proposed Waimakariri District Plan and Variation 1 – Advice on scope" dated 30 May 2023 at [20(b)]; Memorandum of Peter Wilson to the Panel titled "Scope issue" dated 1 June 2023 provided in response to Minute 2 at [16(b)].

36 Memorandum of Peter Wilson to the Panel titled "Scope issue" dated 1 June 2023 provided in response to Minute 2 at [18], [26], [41(b)], and [44].

37 Section 42A Report of Mr Willis "Proposed Waimakariri District Plan: Ōhoka Rezonings" dated 31 May 2023" at [8].

38 Section 42A Report of Mr Willis "Proposed Waimakariri District Plan: Ōhoka Rezonings" dated 31 May 2023" at [359].

Variation 1 by the Council. This memorandum provides that assessment.

50 For completeness, *Motor Machinist*s goes on to consider further that consequential or incidental amendments are permissible only where no further section 32 analysis is required to inform affected persons of the comparative merits of the change.[39] On this point:

50.1 We note that the outcome of the relief sought in RIDL's submission on Variation 1 is no different to that sought by the same submitter seeking to rezone the land to SETZ under the PDP process (as discussed earlier in these submissions).

50.2 Mr Walsh has provided section 32 analyses of the relief sought under the PDP process, which would equally apply to the relief sought through RIDL's Variation 1 submission.[40]

50.3 While such an analysis was not available at the time Variation 1 was notified, that is to be expected given the submission seeks the creation of a new residential zone not included in the Council's notified variation. As discussed further in the next section, a section 32 analysis of the relief was not required to inform affected persons seeking to participate in the Variation process.

Public participation

51 The final consideration on whether a submission is within the scope of a variation is whether there is a real risk that persons directly affected by the additional change being proposed in a submission have been denied an appropriate response. On this point, the Court in *Motor Machinists* considered:[41]

> *A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, … thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage … might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument.*

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39 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [81].

40 Evidence of Mr Walsh for Hearing Stream 12D dated 5 March 2024 at [276]-[312]; Further reconvened hearing statement of evidence of Mr Walsh for Hearing Stream 12D dated 1 November 2024.

41 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [77].

52 There is no dispute that the public should be provided with a real opportunity to participate where they are potentially affected. However, we do not consider any person that might have been affected by RIDL's submission on Variation 1 have been denied an effective opportunity to participate in the decision-making process.

53 Again, the variation in question is a variation to a full review of the district plan which places everything up for grabs in terms of submissions, as opposed to a plan change to an operative district plan which will by definition be limited. In this sense, everyone is affected by a proposed plan, and therefore any amendments to that proposed plan through a variation.

54 The Environment Court in *Sloan* (a case referenced by Buddle Findlay) notes that while the tests in Clearwater are useful, they must not be considered as the only relevant factors:[42]

> *The idea behind making a submission is to change what the Council is promoting in its plan change or variation. While a Council chooses the subject of a variation there may come a point where it is procedurally unfair and substantially inappropriate – because the Council's proposal may not accomplish the purpose of the Act – for a Council to try limit the ambit of submissions. Those are questions of fact and degree to be decided in each case in a robust and pragmatic way.*

55 Given the inherently broad scope of change allowed under an IPI, and that it must apply to the entire urban environment of Greater Christchurch, there is less risk in such a process (compared to a schedule 1 plan change which are typically quite narrow) that a person could be deemed to have been denied an opportunity to participate.

56 To some extent, it must be presumed that the public is aware of the law (including the Amendment Act and the NPS-UD) and therefore the intent of an IPI and the wide-ranging implications these could result in tier 1 districts. Particularly given the Council's powers to create new residential zones, amend existing zones, impose MDRS across all relevant residential zones, and determine the extent of the urban environment's qualifying matters. The Amendment Act requirements and expectations for intensification have also been highly and widely publicised across the country.

57 Further, both the PDP and Variation 1 were publicly notified, and submissions and further submissions were publicly available. It

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[42] *Sloan v Christchurch City Council* ENC Christchurch C082/07, 25 June 2007 at [30].

could not be said that affected persons may have lost the opportunity to participate.

58 Eight further submissions were lodged in respect of RIDL's submission on Variation 1,[43] including further submissions by both the Oxford-Ohoka Community Board[44] and the Ohoka Residents Association,[45] being the main opposers of the proposed rezoning request in Hearing Stream 12D and having presented their case and expert evidence at that hearing in respect of both the PDP and the Variation requests.

59 By analogy, Variation 1 to the proposed Selwyn District Plan was also a variation to a proposed district plan (rather than a change to an operative plan) and in that process the Panel had no issue with finding scope to (amongst other things):

59.1 Create a new residential zone in Lincoln (despite there being no submission seeking this relief on the Variation) because the PDP Panel had determined to rezone the land under the Proposed Plan process to GRZ.[46]

59.2 Rezone land in Lincoln, Prebbleton, and Rolleston to MRZ despite that land not forming part of the notified extent of the variation changes.[47]

CONCLUSION AND RELIEF SOUGHT BY RIDL

60 RIDL seek that the Panel rezone the Ohoka land to GRZ as a new residential zone under Variation 1 for the reasons set out above.

61 In accordance with the Panel's Minute 46, Mr Walsh will be providing Mr Willis with a final set of provisions for the Ohoka rezoning by 19 November 2024. This will include both a set for the SETZ sought under the PDP submission, and the GRZ sought under the Variation

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43 Section 42A Report of Mr Willis "Proposed Waimakariri District Plan: Ōhoka Rezonings" dated 31 May 2023" at [350].

44 Further submission of Oxford-Ohoka Community Board on Variation 1: Housing Intensification to the Proposed Waimakariri District Plan dated 18 November 2022.

45 Further submission of the Ohoka Residents Association on Variation 1: Housing Intensification to the Proposed Waimakariri District Plan dated 21 November 2022.

46 Report of the Independent Hearing Panel on Variation 1 to the Selwyn Proposed District Plan "V1 Part A Hearing 1: Residential" at [17(g)], [167], and [170].

47 Report of the Independent Hearing Panel on Variation 1 to the Selwyn Proposed District Plan "V1 Part A Hearing 1: Residential"; Report of the Independent Hearing Panel on Variation 1 to the Selwyn Proposed District Plan "V1 Part A Hearing 7: Rezoning Requests – Rolleston"; and Report of the Independent Hearing Panel on Variation 1 to the Selwyn Proposed District Plan "V1 Part A Hearing 9: Rezoning Requests – Prebbleton".

1 submission. In reality, there will be no substantive difference between the two sets of provisions.

Dated: 8 November 2024

J M Appleyard / L M N Forrester
Counsel for Rolleston Industrial Developments Limited