BUDDLE FINDLAY

23 August 2024

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Dear Mark

Legal Response to Minute 33 – Hearing Stream 12C and 12D

1. You have asked for a legal response to the following queries raised in attachment 2 of Minute 33 of the Hearings Panel (**Panel**) on the proposed Waimakariri District Plan (**Proposed Plan**):

   (a) Whether the LLRZO is exempted from the National Policy Statement for Highly Productive Land 2022 (**NPS-HPL**)?

   (b) Whether the phrase 'at all times, provide at least sufficient development capacity' in National Policy Statement on Urban Development 2020 (**NPS-UD**) Policy 2 (read alongside objectives 2 and 3), together with the quarterly monitoring requirement in clause 3.9 and the requirements to address shortfalls in 3.7 and 3.37, indicates a presumption or preference for providing more development capacity than is required to meet forecast demand?

   (c) Does the 'at least sufficient development capacity' phrase put the onus on Council to provide, at all times, the infrastructure (or a mechanism to provide for it) to meet the demand period, and within the various locations of demand?

   (d) Does Objective 6 of the NPS-UD require infrastructure planning and timing decisions be responsive to proposal that would supply significant development capacity? *(see legal submissions (paras 43-47) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)*

   (e) Regardless of whether there is sufficient development capacity or not under Policy 2 of the NPS-UD, can a rezoning request be considered on its merits under Policy 8 if it is determined that the NPS-UD applies? *(see legal submissions (para 116) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)*

   (f) In giving effect to the NPS-UD, should a proposed district plan account for how NPS-UD Policy 2 will be satisfied throughout the life of the plan (rather than simply at its

commencement), insofar that this requires 'at least' sufficient development capacity, 'at all times? *(see legal submissions (para 85) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)*.

(g) Does Policy 6.3.9 of the RPS put a veto on rezoning land rural lifestyle or large lot residential that is not identified in a rural residential development strategy prepared under the LGA 2002? In the event that a rezoning to a large lot residential zone is considered to be urban for the purposes of the NPS-UD, what weight should be afforded to the chapeau of Policy 6.3.9 which only provides for further rural residential rezoning where it is in accordance with an adopted rural residential development strategy?

(h) Is the methodology that is used in the WCGM22 consistent with the requirements of the NPS-UD? In preparing the WCGM22, has the Council approached the requirements of the NPS-UD correctly in assessing whether there is sufficient development capacity within Waimakariri District in the short, medium and long term, taking into account all the objectives and policies of the NPS-UD, but in particular Objectives 1, and 2, Objective 3(c) and Policy 1(a)(i)?

2. We intend to answer each of the above questions in turn, with the exception that we will address questions 1(b) and 1(f) together, as they are inter-related questions which we consider are best answered together.

3. Before addressing each question, we briefly outline our approach to interpreting national policy statements.

Approach to interpretation

4. The Panel's queries raise issues of interpretation of the NPS-HPL and the NPS-UD. The Courts ascertain the meaning of statutory instruments and plan provisions from their text and in light of their purpose.[1] The Courts strive to give a provision its plain and ordinary meaning. However, regard needs to be had to the immediate context and, where any ambiguity, obscurity or absurdity arises, it may also be necessary to refer to other sections of the instrument or plan to derive a purposive interpretation.[2]

5. When interpreting provisions of a planning instrument, relevant factors to consider include:

(a) The text of the relevant provision in its immediate context;

(b) The purpose of the provision;

(c) The context and scheme of the plan and any other indications in it;

(d) The history of the plan;

(e) The purpose and scheme of the RMA; and

[1] Section 10 of the Legislation Act 2019.
[2] See for example, *Powell v Dunedin City Council* [2005] NZRMA 174 (CA); *Lower Hutt City Council (Re an Application)* (W46/07); *Nanden v Wellington City Council* [2000] NZRMA 562; *North Canterbury Clay Target Association Inc v Waimakariri District Council* [2014] NZHC 3021 at [17] – [18].

(f) Any other permissive guides to meaning.[3]

6. Furthermore, when competing interpretations of a planning instrument are available, the interpretation ought to:

(a) Avoid absurdity or anomalous outcomes;

(b) Be consistent with the expectations of property owners; and

(c) Promote administrative practicality (e.g. rather than requiring lengthy historical research to assess lawfulness or otherwise).[4]

7. We have adopted the above approach to interpretation in this opinion.

Question 1(a) – Whether the LLRZO is exempted from the NPS-HPL?

8. We have provided the Council with two letters addressing the LLRZO and the NPS-HPL dated 29 June 2023 and 26 June 2024. In summary, our advice is that the LLZRO is not exempt from the NPS-HPL where the underlying zoning is "General Rural" and the relevant land is LUC 1, 2 or 3 land. The key reason for this conclusion is that the LLRZO is not "*identified for future urban development*" as defined in the NPS-HPL.

9. We have considered the legal submissions of Mr Cleary for Survus Ltd (submitter #250) for Stream 12C and confirm those submissions do not change our earlier opinions. We have not responded to all of the submissions made by Mr Cleary in this regard but have addressed the key submissions which go to the material consideration for our opinion that the LLZRO is not exempt from the NPS-HPL – whether the Waimakariri District Rural Residential Development Strategy (**RRDS**) identified an area "*at a level of detail that makes the boundaries of the area identifiable in practice*".[5]

10. We understand the LLRZO was informed, at least in part, by the RRDS. We agree the RRDS is a "*strategic planning document*" which could be said to identify "*areas suitable for commencing urban development over the next 10 years*"[6] as Mr Cleary has submitted. However, those areas are not identified "*at a level of detail that makes the boundaries of the area identifiable in practice*".[7] While we agree it is not necessary to identify boundaries of an area at a cadastral level,[8] the RRDS identifies directions for growth (with arrows on maps). It does not identify areas for growth at a level of detail that makes the boundaries of the area identifiable in practice. It is evident looking at the maps in the RRDS that part (b)(ii) of the definition in the NPS-UD is not met.

11. The boundaries of the LLRZO were not identified until they were included in the Proposed Plan. That is a separate process to the RRDS / strategic planning document which the exemption in clause 3.5(7)(b)(i) of the NPS-HPL and relevant definition relates to. The Proposed Plan is not a "strategic planning document" as defined in clause 1.3(1).[9] With respect to Mr Cleary's submission

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[3] *Queenstown River Surfing Ltd v Central Otago District Cou*ncil [2006] NZRMA 1 at [7].
[4] *Nanden v Wellington City Council* [2000] NZRMA 562; *Mount Field Limited v Queenstown Lakes District Council* 31 October 2008, Heath J, HC Invercargill CIV 2007-428-700.
[5] Clause 1.3(1)(b)(ii) of the NPS-HPL.
[6] Clause 1.3(1)(b)(i) of the NPS-HPL.
[7] Clause 1.3(1)(b)(ii) of the NPS-HPL.
[8] Legal submissions on behalf of Survus Ltd dated 12 July 2024 (here) at paragraph 2.23.
[9] Strategic planning document means any non-statutory growth plan or strategy adopted by local authority resolution.

at paragraph 2.25, the issue is whether the RRDS (as the relevant strategic planning document) identifies an area(s) at a level of detail that makes the boundaries of the area identifiable in practice not whether the PDP identifies the boundaries of the LLRZO (which of course it does, and must do).

12. We note that amendments to the NPS-HPL were notified on 16 August 2024, with amendments taking effect on 14 September. No changes have been made to clause 3.5(7) or the definition of "identified for future urban" which are the key provisions for the purposes of our earlier advice on this question.

Question 1(b) – Whether the phrase 'at all times, provide at least sufficient development capacity' in NPS-UD Policy 2 (read alongside objectives 2 and 3), together with the quarterly monitoring requirement in clause 3.9 and the requirements to address shortfalls in 3.7 and 3.37, indicates a presumption or preference for providing more development capacity than is required to meet forecast demand?

Question 1(f) – In giving effect to the NPS-UD, should a proposed district plan account for how NPS UD Policy 2 will be satisfied throughout the life of the plan (rather than simply at its commencement), insofar that this requires 'at least' sufficient development capacity, 'at all times? ***(see legal submissions (para 85) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)***

13. Questions 1(b) and 1(f) raise inter-related issues regarding the interpretation and application of NPS-UD policy 2.

14. Question 1(b) asks whether policy 2 of the NPS-UD (read alongside other provisions) indicates a presumption or preference to provide "more development capacity than is required to meet forecast demand". The answer is that NPS-UD policies 2, clause 3.2(2)(d) and clause 3.22 indicate a *requirement* (not a *presumption* or *preference*) for tier 1 local authorities like the Council to provide more development capacity than is required to meet forecast (or expected) demand, because there is a need for development capacity to meet expected demand plus the appropriate competitiveness margin. Clause 3.2(2)(d) requires a competitiveness margin to be incorporated into the policy 2 requirement to "at all times, provide at least sufficient development capacity", while clause 3.22(1) confirms that the competitiveness margin is a margin of development capacity "over and above" the forecast/expected demand that tier 1 local authorities must provide. Clause 3.22(2) provides for the following competitiveness margins:

    (a) 20% for the short and medium terms; and

    (b) 15% for the long terms.[10]

15. However, we have assumed that the Panel may have intended question 1(b) to instead ask whether the NPS-UD (particularly policy 2 read alongside other provisions) indicates a presumption or preference to provide more than sufficient development capacity, as the NPS-UD test for sufficiency

[10] Clause 3.22 of the NPS-UD.

already incorporates (amongst other things) a competitiveness margin.[11] We comment on this alternative query below.

16. Policy 2 requires local authorities to provide "at least" sufficient development capacity. The plain ordinary meaning of the phrase "at least" is "not less than, at the minimum".[12] Accordingly, the phrase "at least" does not import a presumption or preference that local authorities provide more than sufficient development capacity, but simply denotes a minimum that must be met, but with a discretion to exceed it. Putting it another way, the phrase "at least" anticipates that policy 2 can be met by hitting the minimum, with no legal presumption or preference for the minimum to be exceeded.

17. Policy 2 further requires local authorities "at all times" to provide at least sufficient development capacity. The phrase "at all times" is relevant to both questions 1(b) and 1(f). The legal submissions for Carter Group Ltd and Rolleston Industrial Developments Ltd (together, **RIDL**) express the view that the phrase "at all times" encourages oversupply in excess of providing "sufficient" development capacity, because "at all times" means at all times during the life of the plan, not just at the start of its life.[13] In particular, it appears RIDL's view is that in order for a proposed plan to provide "sufficient" development capacity "at all times", the Council needs to continuously provide development capacity for the "medium term" (which the NPS-UD defines as 3 to 10 years), throughout the potential life of the proposed plan. RIDL appears to rely on clause 3.4(1)(b) of the NPS-UD which states:

> *Development capacity is plan-enabled for housing or for business land if:*
>
> *(a) in relation to the short term, it is on land that is zoned for housing or for business use (as applicable) in an operative district plan*
>
> *(b) in relation to the medium term, either paragraph (a) applies, or it is on land that is zoned for housing or for business use (as applicable) in a proposed district plan*
>
> [our underlining for emphasis]

18. The implication of RIDL's view is that if another district plan review is not likely to occur until about 2034, then the Panel must ensure that the proposed plan must now provide zoned land to meet capacity for development until 2044, that is, 20 years of capacity.[14]

19. We disagree with RIDL's view for the reasons provided below.

20. Policy 2 does not direct that a proposed district plan must now provide for 20 years' worth of development capacity. The function of policy 2 is simply to state the required "big picture" outcome, which is to provide at least sufficient development capacity at all times. Policy 2 neither specifies nor directs the means or method by which that outcome is to be achieved by local authorities. Rather, the means/method for achieving that outcome is outlined by other NPS-UD provisions.

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[11] Other elements for "sufficient" development capacity is that it must also be "plan-enabled", "infrastructure-ready" and:
- for housing, "feasible and reasonably expected to be realised";
- for business land, "suitable to meet the demands of different business sectors".

[12] *The New Shorter Oxford English Dictionary* (6th ed Oxford University Press, 2007).
[13] Legal submissions on behalf of RIDL dated 20 June 2024 (here) at paragraphs 83 to 86.
[14] Ibid, at paragraph 85.3.

21. The means/method by which the NPS-UD anticipates a local authority will provide sufficient development capacity at all times is via requirements to undertake monitoring, regular demand and capacity assessments, and changes to its district plan and future development strategy (**FDS**). It is via that means/method that local authorities are to ensure there will be now, and in the future, (i.e. at all times) sufficient development capacity over the short, medium and long terms. In particular:

    (a) Under clause 3.9, a local authority is required to monitor quarterly, and publish at least annually, various data points which (amongst other things) covers dwelling demand, supply and capacity.

    (b) Under clauses 3.10 and 3.19 to 3.30, a local authority needs to prepare a housing and business capacity assessment (**HBA**) every three years. Amongst other things the HBA assesses demand in urban environments, and the development capacity that is sufficient to meet that demand in the district in the short, medium and long term. Pursuant to clause 3.6, as soon as practicable after a HBA is made publicly available, housing bottom lines are inserted into a regional policy statement and district plans without using a Schedule 1.[15]

    (c) Under clause 3.37, a local authority must also monitor the extent to which development is occurring in specified types of urban zones.

    (d) In the event monitoring and HBAs identify insufficient development capacity in the short, medium or long term, or a failure to give effect to housing bottom lines, then clauses 3.7 and 3.37(3) require the local authority to address the deficiency by changing the district plan if the insufficiency is wholly or partly a result of the district plan. If the insufficiency is instead the result of a lack of development infrastructure, then clause 3.7 directs local authorities to consider other options – discussed further in question 1(c) below.

    (e) However, should monitoring and HBAs identify there is sufficient development capacity in the short, medium and long term, then there is no requirement to change the district plan. Rather, the obligation is to continue monitoring and assessing sufficiency over time.

22. Accordingly, the wider context, purpose and the scheme of the NPS-UD does not require that the method/means to implement the phrase "at all times" in policy 2 is via providing 20 years of capacity in a proposed plan. Rather, the NPS-UD method/means for providing sufficient development capacity "at all times" is for local authorities to continue monitoring and assessing sufficiency over time, and to change the district plan to address any identified insufficiency resulting from the district plan.

23. Question 1(b) also requests a consideration of NPS-UD objectives 2 and 3 when interpreting policy 2. We comment on those objectives below.

[15] Housing bottom lines state the *amount* of development capacity that is sufficient to meet expected housing demand plus the appropriate competitiveness margin in the region and each constituent district of a tier 1 or tier 2 urban environment. Any subsequent zonings to provide any additional capacity will need to go through a plan change process.

24. Objective 2 provides:

> ***Objective 2:*** *Planning decisions improve housing affordability by supporting competitive land and development markets.*
>
> [our underlining for emphasis]

25. In our opinion, objective 2 does not import a presumption or preference that policy 2 requires provision of more than sufficient development capacity. The method by which the NPS-UD anticipates objective 2 would be met is by requiring local authorities to provide development capacity to meet expected demand plus the appropriate competitiveness margin. This outcome is confirmed by clause 3.22(1) which links the objective of supporting competitive land and development markets with the method of providing competitiveness margin as follows:

> *A competitiveness margin is a margin of development capacity, over and above the expected demand that tier 1 and tier 2 local authorities are required to provide, that is required in order to support choice and competitiveness in housing and business land markets.*
>
> [our underlining for emphasis]

26. Accordingly, the policy 2 requirement to provide at least "sufficient" development capacity (which incorporates the competitiveness margin) will implement objective 2 for planning decisions to support competitive land and development markets. Objective 2 adds no *presumption* or *preference* that policy 2 should provide more than the competitiveness margin specified in clause 3.22, or to otherwise provide more than "sufficient" development capacity. In our opinion, the plain ordinary meaning of the phrase "at least" in policy 2 continues to denote a minimum that *may* be exceeded, rather than imposing any legal *presumption* or *preference* for that minimum to be exceeded.

27. Objective 3 provides:

> ***Objective 3:*** *Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply:*
>
> *(a) the area is in or near a centre zone or other area with many employment opportunities*
>
> *(b) the area is well-serviced by existing or planned public transport*
>
> *(c) there is high demand for housing or for business land in the area, relative to other areas within the urban environment.*

28. In our view, there is nothing in objective 3 to warrant a departure from the plain ordinary meaning of the phrase "at least" in policy 2 that denotes a minimum that *may* be exceeded, rather than a legal *presumption* or *preference* for that minimum to be exceeded. Rather, objective 3 seeks to direct where higher densities are to be located – being those areas of an urban environment where one of more of the factors listed in subclauses (a) to (c) of objective 3 apply.

29. Ultimately, we consider that:

    (a) There is no legal presumption or preference in policy 2 for a local authority (or the Panel) to provide more than sufficient development capacity over the short, medium and long term.

(b) While a local authority (or the Panel) can meet the requirements of policy 2 by electing to provide sufficient development capacity in the proposed plan, policy 2 provides a *discretion* to exceed that through the use of the phrase "at least".

(c) However, if a local authority (or the Panel) considered it appropriate to exercise its discretion to provide more than sufficient development capacity in its proposed plan (e.g. an oversupply exceeding 10 years for the medium term), then pragmatically that will likely defer the time when ongoing monitoring and HBAs will eventually identify a medium term capacity shortfall resulting from the district plan that the local authority must then address via a plan change. Thus, while the NPS-UD expresses no presumption or preference for providing an oversupply, pragmatically an oversupply may increase the length of time between plan changes needed to address any future shortfalls resulting from the district plan.

Question 1(c) – Does the 'at least sufficient development capacity' phrase put the onus on Council to provide, at all times, the infrastructure (or a mechanism to provide for it) to meet the demand period, and within the various locations of demand?

30. While there is a short answer to question 1(c) on its face, the question also raises some nuanced issues that need to be borne in mind.

31. The short answer is that the policy 2 requirement on local authorities to provide at all times "at least sufficient development capacity" necessarily requires the capacity provided to also be "infrastructure-ready". Briefly, that is because:

(a) NPS-UD clauses 3.2(2)(b) and 3.3(2)(b) confirm that in order for housing and business development capacity to be "sufficient" to meet expected demand, it must be (amongst other things) "infrastructure ready".

(b) Clause 3.4(3) outlines that development capacity is "infrastructure-ready" if:

(i) in relation to the short term, there is adequate existing development infrastructure to support the development of the land;

(ii) in relation to the medium term, either (i) applies, or funding for adequate development infrastructure to support development of the land is identified in a long-term plan;

(iii) in relation to the long term, either (ii) applies, or the development infrastructure to support the development capacity is identified in the local authority's infrastructure strategy (as required as part of its long-term plan).

32. Accordingly, any development capacity that is not "infrastructure ready" cannot be counted when monitoring, assessing or providing "at least sufficient development capacity".

33. However, our answer should **not** be read as suggesting that there is an ability under the proposed district plan or RMA process to direct local authorities to make infrastructure decisions to provide, at all times, infrastructure (or a mechanism to provide for it) to meet a demand period or a demand location. Furthermore, our answer should **not** be taken as suggesting that a developer, submitter or plan change proponent seeking to rely on the NPS-UD responsiveness provisions has no onus to demonstrate that their plan change includes a proposal that will provide adequate development

infrastructure to support the development of the relevant land for housing or business use. We address the first of these points below, while the second is discussed as part of our answer to question 1(d).

No RMA ability to direct local authorities to make infrastructure decisions

34. At paragraphs 21 and 22 above, we noted that the NPS-UD places an onus on local authorities to continue monitoring and assessing sufficiency over time, and to change the district plan to address any identified insufficiency *resulting from the district plan*.

35. However, the NPS-UD anticipates that insufficient development capacity could be caused by a lack of development infrastructure rather than by a district plan. For example, clauses 3.27(3) and 3.30(3) of the NPS-UD requires a HBA to "*analyse the extent to which RMA planning documents, a lack of development infrastructure, or both, cause or contribute to the insufficiency*" [our underlining for emphasis].

36. As noted above, the NPS-UD requires a local authority to respond to an insufficiency resulting from RMA planning documents by changing those documents (clause 3.7(1)(b)). However, for an insufficiency resulting from a lack of development infrastructure, the NPS-UD requires a local authority to "*consider other options*" for increasing development capacity and otherwise enabling development (see clause 3.7(1)).

37. It is implicit from clause 3.4(3) that "other options" that a local authority can consider includes increasing "infrastructure-ready" development capacity, such as by:

    (a) providing the actual infrastructure;

    (b) identifying funding for the infrastructure in the Long Term Plan (**LTP**) of the local authority;

    (c) identifying the infrastructure in the infrastructure strategy of the local authority.

38. However, these other options are matters for a local authority to consider and make decisions on outside of the proposed district plan and RMA process. There is no ability for submitters or the Panel to compel, direct or otherwise require a local authority to provide infrastructure (or a means to provide for such infrastructure) via the proposed district plan process or otherwise pursuant to the RMA. Local authority decision-making in relation to providing infrastructure (or a means to provide for such infrastructure) is a matter governed by a separate process under the Local Government Act 2002 (**LGA**) with its different purposes, considerations (including financial accountability and management) and consultative procedures.

39. The NPS-UD recognises the separation of RMA decision-making from LGA/infrastructure decision-making, which is why objective 6(a) of the NPS-UD requires local authority decisions on urban development that effect urban environments to be *integrated* with infrastructure planning and funding decisions. In other words, planning decisions under the RMA should be integrated with LGA/infrastructure planning and funding decisions.

40. However, the NPS-UD method of integration is not, as appears to be asserted by RIDL, that local authorities need to make, or must be responsive to making, future infrastructure planning and funding decisions to provide infrastructure in a manner that aligns with where developers may wish

to undertake unanticipated rezonings. We comment on this point below in our answer to question 1(d).

41. However, here we note that the method by which the NPS-UD encourages RMA planning decisions to be integrated with LGA/infrastructure planning and funding decisions is the requirement that local authorities prepare and make publicly available a Future Development Strategy (**FDS**) every 6 years.[16] The purpose of the FDS is to (amongst other things):

    (a) promote long-term strategic planning by setting out how a local authority intends provide "at least sufficient development capacity" over the next 30 years to meet expected demand;[17] and

    (b) assist the integration of planning decisions under the RMA with infrastructure planning and funding decisions.[18]

42. Clause 3.17 of the NPS-UD;

    (a) requires local authorities to "*have regard to*" the FDS when preparing or changing RMA documents; and

    (b) "*strongly encourages*" local authorities to use the FDS to inform:

        (i) long-term plans, and particularly infrastructure strategies;

        (ii) regional land transport plans prepared by a local authority under Part 2 of the Land Transport Management Act 2003; and

        (iii) any other relevant strategies and plans.

43. Another NPS-UD method to encourage integrated land use and infrastructure planning is provided by policy 10(b) which is that tier 1, 2 and 3 local authorities "*engage with providers of development infrastructure and additional infrastructure to achieve integrated land use and infrastructure planning"*.

44. The point is that neither the FDS process, nor the NPS-UD policy 10(b) direction to engage with infrastructure providers, imports a requirement that local authorities need to make, or must be responsive to making, future infrastructure planning and funding decisions to provide infrastructure in a manner that aligns with where developers may wish to undertake unanticipated rezonings.

45. Below, we comment on RIDL's view that objective 6 requires local authority infrastructure planning and timing decisions to be responsive to proposal that would supply significant development capacity.

[16] NPS-UD clause 3.12.
[17] NPS-UD clause 3.13(1)(a)(ii).
[18] NPS-UD clause 3.13(b).

Question 1(d) – Does Objective 6 of the NPS-UD require infrastructure planning and timing decisions be responsive to proposal that would supply significant development capacity? *(see legal submissions (paras 43-47) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)*

46. The core proposition in paragraphs 43 to 47 of the legal submissions for RIDL[19] is that subclauses (a) and (c) of objective 6 must be read together, so that objective 6 requires local authority infrastructure planning and funding decisions to be responsive to developer/submitter proposals that would supply significant development capacity. The implication of this proposition is succinctly described in paragraph 210 of the legal submissions as follows:

> *Being responsive in this context would require the Council to be open to adapting its LTP to accommodate such a proposal should it be approved. We note Objective 6(c) of the NPS-UD specifically requires Councils to be responsive to proposals that would supply significant development capacity in decisions it makes in respect of its LTPs.*

47. We disagree with the above proposition for the following reasons.

48. Firstly, the proposition is inconsistent with a plain reading of objective 6 by failing to account for the context in subclause (a) confirming that the introductory sentence (or chapeau) of objective 6 can only be concerned about planning decisions under the RMA, not LGA/infrastructure planning and funding decisions. For ease of reference we set out objective 6 as follows:

> ***Objective 6:*** *Local authority decisions on urban development that affect urban environments are:*
>
> *(a) integrated with infrastructure planning and funding decisions; and*
>
> *(b) strategic over the medium term and long term; and*
>
> *(c) responsive, particularly in relation to proposals that would supply significant development capacity*

49. The chapeau of objective 6 is concerned about "*local authority decisions on urban development that affect urban environments*". Considered in isolation, the meaning of the chapeau is somewhat ambiguous as it does not specify, in and of itself, whether it is addressing planning decisions under the RMA, or local authority infrastructure planning and funding decisions under the LGA, or both. However, this ambiguity is resolved by subclause (a) which is concerned about the decisions described in the chapeau being integrated with infrastructure planning and funding decisions. Noting it would be nonsensical to interpret the chapeau as requiring infrastructure planning and funding decisions to be integrated with infrastructure planning and funding decisions, the chapeau is better interpreted as requiring local authority planning decisions to be integrated with infrastructure planning and funding decisions. This interpretation is consistent with the sentiment expressed in clause 3.13(1)(b) which comments on the integration of *planning decisions* under the RMA with infrastructure planning and funding decisions, which is to be assisted by a FDS.

50. Secondly, the proposition is inconsistent with the immediate structural context of objective 6, which sets out subclauses (a) to (c) as separate and distinct outcomes that planning decisions must achieve. The structure of objective 6 is to have a chapeau followed by 3 subclauses, so that the

[19] Legal submissions on behalf of RIDL dated 20 June 2024 (here).

concepts outlined in the subclauses are made separated and distinct from one another. The structure does not allow for a reading of the objective that would require infrastructure planning and funding decisions as described in subclause (a) to be the topic or subject matter that is to be responsive as described in subclause (c). Rather, it is the subject matter of the chapeau, not subclause (a), that is to achieve each of the outcomes described in subclauses (a) to (c).

51. Thirdly, the proposition is inconsistent with the responsiveness provisions of the NPS-UD, because it fails to note that the NPS-UD responsiveness provisions places the onus on the plan change proponent (or submitter or developer), not the local authority, to demonstrate that a proposal that is to provide significant "development capacity" must also include a proposal to provide adequate infrastructure to support development of the relevant land. It is not a case where a developer can propose out of sequence or unanticipated rezoning, and then place the onus on Council be responsive by making infrastructure planning and funding decisions to provide adequate infrastructure (or a mechanism to provide that infrastructure) to support development of the relevant land.

52. The chapeau of policy 8, like the chapeau of objective 6, is concerned about the responsiveness of "*local authority decisions* [affecting] *urban environments*", being local authority planning decisions under the RMA, not local authority decisions on infrastructure planning and funding. Thus, it is RMA planning decisions that are to be responsive to plan change that meet the policy 8 criteria.

53. Objective 6(c) and policy 8 place the onus on a plan change proponent (or developer or submitter) to demonstrate that a proposal would meet the criteria of contributing to well-functioning urban environments and adding significantly to "development capacity". Clause 1.4(1) defines "development capacity" as follows:

> ***development capacity*** *means the capacity of land to be developed for housing or for business use, based on:*
>
> *(a) the zoning, objectives, policies, rules, and overlays that apply in the relevant proposed and operative RMA planning documents; and*
>
> *(b) the provision of adequate development infrastructure to support the development of land for housing or business use*
>
> [our underlining for emphasis]

54. When the definition of "development capacity" is considered as part of responsiveness objective 6(c) and policy 8, it is not sufficient for a developer or submitter to simply demonstrate that a plan proposal provides will provide significant *plan-enabled* capacity via proposed zoning, objectives, policies, rules and overlays. To qualify for consideration as "development capacity", a developer submitter must also demonstrate that subparagraph (b) of the definition of "development capacity" can be met. In short, the onus is on the developer or submitter to show how adequate "development infrastructure" needed to support the plan proposal would be provided. This is unsurprising because council infrastructure planning and funding would not be expected to account

for development infrastructure for unanticipated urban development. The NPS-UD defines "development infrastructure" as:

> ***development infrastructure*** *means the following, to the extent they are controlled by a local authority or council controlled organisation (as defined in section 6 of the Local Government Act 2002):*
>
> *(a) network infrastructure for water supply, wastewater, or stormwater*
>
> *(b) land transport (as defined in section 5 of the Land Transport Management Act 2003)*

55. It is not sufficient for a developer or submitter to overcome the onus of showing how adequate infrastructure needed to support the proposal would be provided by simply noting that there are "viable options" for servicing a proposal with infrastructure via funding methods such as development contributions, financial contributions and developer agreements, as appears to be asserted in paragraphs 182 to 201 of the legal submissions for RIDL.[20] The mere listing of the existence of such potential options is insufficient to show that a plan change proposal is based on "the provision of adequate development infrastructure to support the development of land for housing or business use" as required by sub-clause (b) of the definition of development capacity.

56. Rather, in our opinion, a developer or submitter needs to demonstrate that subparagraph (b) of the definition of "development capacity" can be met by providing an actual, realistic and workable proposal that will provide adequate development infrastructure to support the development of the relevant land for housing or business use. In the absence of such a demonstration, there is no "development capacity" that can be considered under the NPS-UD responsiveness provisions.

57. A developer or submitter can overcome this onus in a number of ways, including by demonstrating that adequate supporting infrastructure for the plan change proposal will be provided via:

    (a) the local authority agreeing to amend their relevant infrastructure plans, budgets and financial policies (eg, development contributions policy);

    (b) the local authority and landowner entering into contractual agreements with the relevant infrastructure providers to enable the direct provision of development infrastructure, and ongoing ownership and maintenance requirements;

    (c) establishing a 'special purpose vehicle' to finance infrastructure under the Infrastructure Funding and Financing Act 2020.[21]

58. Accordingly, the problem with RIDL's proposition (at paragraph 46 above) is that it removes the NPS-UD onus on the developer to demonstrate that adequate supporting infrastructure for the plan change proposal will be provided, and instead attempts to place the onus on Council to ensure that its future infrastructure planning and funding decisions are responsive to wherever a developer proposes to provide unanticipated *plan-enabled* development capacity. Policy 8 only applies where a plan change would (amongst other things) add significantly to "development capacity", and there is no "development capacity" to consider in the absence of the developer/submitter demonstrating

[20] Legal submissions on behalf of RIDL dated 20 June 2024 (here).
[21] These examples are mentioned on page 5 the Ministry for the Environment's guide for understanding and implementing the responsive planning policies, as published in September 2020 (here).

the provision of adequate supporting infrastructure to support development of the relevant land. RIDL's proposition is therefore inconsistent with the responsiveness provisions of objective 6 and policy 8 of the NPS-UD.

59. As a final observation, paragraphs 200 to 201 of the legal submissions for RIDL refer to the planning tribunal decision in *Bletchley Developments v Palmerston North City Council*[22] to suggest that it is not necessary or appropriate for details of infrastructure arrangements to be worked out prior to the point when land might be rezoned for development.[23] However, we consider the *Bletchley* case does not support such a proposition for reasons given below.

60. *Bletchley* did not concern a plan or rezoning process nor draw any analogy to such a process. It concerned an appeal against a subdivision consent condition, and the issue before the planning tribunal concerned a council that required a developer to provide services in a subdivision beyond those required to serve the subdivision itself, and serve future development beyond the subdivision. The passage in *Bletchley* which the legal submissions for RIDL appear to rely on relates to the use of section 92 to request further information and place a resource consent application on hold. The planning tribunal considered that section 92 "*does not authorise a consent authority to "put on hold" a resource consent application while it negotiates with the applicant about the cost of works that it would like to have done by the applicant*".[24] This was followed by the Court taking note of the fact that delays can be expensive for applicants including subdividers who have holding costs. It was in this context that the planning tribunal stated that:

> *For a consent authority to put an application "on hold" and interrupt processing it as a way of leaving pressure on an applicant to reach agreement about carrying out works or meeting costs so as to have the processing of the application resumed could amount to an abuse of public power.*

61. Thus, *Bletchley* was concerned about a council pressuring and requiring a subdivision applicant to carry out subdivision works beyond those required to serve the subdivision. *Bletchley* was not concerned about whether or not it is necessary or appropriate for details of infrastructure arrangements to be worked out with a local authority in the context of developers/submitters seeking to demonstrate that their proposal meets subparagraph (b) of the NPS-UD definition of "development capacity" in order to then place reliance on the NPS-UD responsiveness provisions. There is no correlation with concerns about any alleged abuse of power. In our view, *Bletchley* is not relevant to the present query.

Question 1(e) – Regardless of whether there is sufficient development capacity or not under Policy 2 of the NPS-UD, can a rezoning request be considered on its merits under Policy 8 if it is determined that the NPS-UD applies? *(see legal submissions (para 116) for Carter Group and RIDL at Stream 12D, as adopted for Stream 12C)*

62. We agree with the submission at paragraph 116 of the legal submissions for RIDL[25] that there is no requirement in policy 8 that a proponent must first demonstrate an insufficiency or shortfall in

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[22] *Bletchley Developments v Palmerston North City Council* [1995] NZRMA 337.
[23] Legal submissions on behalf of RIDL dated 20 June 2024 (here).
[24] *Blechley Developments v Palmerston North City Council* [1995] NZRMA 337, at 352.
[25] Legal submissions on behalf of RIDL dated 20 June 2024 (here).

development capacity to invoke the responsiveness planning framework, although this may be a relevant factor in considering whether a proposal adds "significantly to development capacity".

63. There is nothing in the language of policy 8 to suggest that a capacity insufficiency or shortfall is a prerequisite or requirement for policy 8 to apply. Rather, the language anticipates that responsiveness policy 8 applies when:

    (a) a local authority is making a decision affected "urban environments"; and

    (b) a plan change proponent can demonstrate that a plan change:

        (i) adds significantly to development capacity; and

        (ii) contribute to well-functioning urban environments.

Question 1(g) – Does Policy 6.3.9 of the RPS put a veto on rezoning land rural lifestyle or large lot residential that is not identified in a rural residential development strategy prepared under the LGA 2002? In the event that a rezoning to a large lot residential zone is considered to be urban for the purposes of the NPS-UD, what weight should be afforded to the chapeau of Policy 6.3.9 which only provides for further rural residential rezoning where it is in accordance with an adopted rural residential development strategy?

64. We answer each component of question 1(g) in turn below. In providing answers to this question, we have considered the relevant legal submissions on behalf of Mark and Melissa Prosser, Oxford-Ōhoka Community, Crichton Development Limited and RIDL.

Policy 6.3.9 a veto?

65. Policy 6.3.9 of the RPS provides that "rural residential development"[26] beyond that zoned in District Plans (as at 1 January 2013) can only be provided for in accordance with an adopted rural residential development strategy (**RRDS**) under the LGA 2002, subject to the further criteria in 1 to 7 (our emphasis).

66. The District Plan is required to "*give effect to*" the RPS.[27] The phrase "*give effect to*", means "*implement*" which is a "*strong directive, creating a firm obligation of the part of those subject to it*".[28]

67. In the recent *Port of Otago* decision,[29] the Supreme Court made the following comment about the interpretation of policies in the New Zealand Coastal Policy Statement (**NZCPS**):

> *[61] The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. As this Court said in King Salmon, the various objectives and policies in the NZCPS have been expressed in different ways deliberately. Some give decision-makers more flexibility or are less prescriptive than others.*

[26] "Rural residential development" is not defined for the purpose of Chapter 6, but there is a definition of "rural residential activities" for Greater Christchurch which refers to residential development at an average density of between 1 to 2 households per hectare outside the identified Greenfield Priority Areas and Future Development Areas.
[27] Section 75(4) of the Resource Management Act.
[28] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593 at [77].
[29] *Port Otago Ltd v Environmental Defence Society* [2023] NZSC 112.

> *Others are expressed in more specific and directive terms. These differences in expression matter.*[30]

68. While policy 6.3.9 of the RPS is not framed as an avoid policy, it has a "directive character".[31] Rural residential development "*can only be provided for*" in accordance with a RRDS,[32] subject to the other aspects of the policy. The converse being that rural residential development is to be avoided where it is not in accordance with a RRDS. While we agree with the submissions for the Prossers that regard needs to be had to the RPS as a whole,[33] there is very little "wriggle room" or flexibility in the language used in policy 6.3.9 to enable a decision-maker to justify departing from this policy.

69. We consider that policy 6.3.9 of the RPS can, contrary to the submission on behalf of the Prossers,[34] operate to effectively "veto" a rezoning request for "rural residential development" on land not identified in an approved RRDS (unless NPS-UD policy 8 applies as discussed below). Policy 6.3.9 also includes further restrictions on rural residential rezoning.[35]

70. We have understood the second component of question 1(g) to concern the relationship between policy 8 of the NPS-UD and policy 6.3.9 of the RPS in the context of LLRZ rezoning proposals. The question, and our opinion below, is predicated on the assumption the LLRZ rezoning request is within an "urban environment" as defined by the NPS-UD.[36] LLRZ rezoning proposals outside the "urban environment" are subject to different considerations.

71. The other key assumption made in our advice is that the question arises following a determination that the LLRZ rezoning request "*adds significantly to development capacity*" and contributes "*to a well-functioning urban environment*" such that policy 8 is engaged. Policy 8 directs responsiveness, even if the development capacity is unanticipated by RMA planning document,[37] only where the dual requirements in the policy are met by the plan change. This is where the apparent conflict between policy 8 of the NPS-UD and policy 6.3.9 of the RPS arises.

72. A decision maker has to consider all relevant provisions in NPS-UD and RPS, with the District Plan being required by s75(4) of the RMA to "*give effect to*" National Policy Statements and the RPS. We agree with the submissions for the Oxford-Ōhoka Community Board (**OCB**) in this respect.[38] The submissions regarding the hierarchy of RMA planning documents are also supported.[39] It is necessary to consider the NPS-UD because it post-dates the RPS.

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[30] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593 at [127].
[31] *Port Otago Ltd v Environmental Defence Society* [2023] NZSC 112 at [71].
[32] Also noting sub-clauses 1 to 7 which may be relevant.
[33] Legal submissions on behalf of Mark and Melissa Prosser dated 15 August 2024 (here) at paragraph 83.
[34] Ibid, at paragraph 82.
[35] Policy 6.3.9 subclauses 1 - 7 of the Canterbury Regional Policy Statement.
[36] The NPS-UD definition of "urban environment" is:
"urban environment means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that:
(a) is, or is intended to be, predominantly urban in character; and
(b) is, or is intended to be, part of a housing and labour market of at least 10,000 people."
[37] Clause 1.4(1) of the NPS-UD; RMA planning document is defined to include a regional policy statement.
[38] Legal submissions on behalf of Oxford-Ōhoka Community board dated 20 June 2024 (here) at paragraph 33.
[39] Legal submissions on behalf of Carter Group Property Limited and Rolleston Industrial Developments Limited dated 20 June 2024 (here) at paragraph 8 of Appendix 1; Legal submissions on behalf of Mark and Melissa Prosser dated 15 August 2024 (here) at paragraph 12 and 13.

73. The Supreme Court decisions in *King Salmon*[40] and *Port of Otago*[41] identified principles as to how higher order documents should be given effect to as part of plan change processes, including where there are tensions or conflicting policies. The more recent decision in *East West Link*[42] also addresses conflicting policies albeit in the resource consent context.

74. We agree with the submissions for RIDL that where there is an apparent tension or conflict the Courts strive to reconcile any conflict.[43] There is more recent case law authority than that cited in those submissions to support this principle of interpretation.[44] In *King Salmon* the Supreme Court said decision-makers should first "*make a thoroughgoing attempt to find a way to reconcile them*".[45] Paying "*close attention*" to the wording of policies may mean an apparent conflict dissolves.[46]

75. In *East West Link* the Supreme Court also said that:

> *[77] The specific language of directive policies is important. It will provide the best guidance on how policies that are in tension may be reconciled. In King Salmon, "inappropriate" did that work.*

76. If the documents cannot be reconciled, the Court will seek to limit or confine the conflict as far as possible. Fact and context will be important in determining how tensions between policies will be resolved.[47]

77. In the event there is an irreconcilable conflict between policy 8 of the NPS-UD and policy 6.3.9 of the RPS with respect to rural residential development in areas outside those identified in the RRDS, we are of the view that policy 8 of the NPS should be given greater weight than policy 6.3.9 in respect of the conflict (i.e the chapeau of policy 6.3.9) because the NPS-UD is a higher order document and is more recent in time than the RPS. This conclusion is consistent with the legal submissions referred to in paragraph 64. Other aspects of policy 6.3.9 which control or limit rural residential development which are not related to identified limits on the location of development still need to be given effect to, along with other relevant provisions of the RPS.

78. Recourse to the principle of implied repeal, outlined in the legal submissions for RIDL,[48] is not required. Any conflict is addressed by a weighting exercise.

79. The submissions for the OCB note that relevant provisions of the NPS-UD "have not yet been the subject of consideration by the Courts".[49] We have not identified any case law which addresses policy 8 of the NPS-UD.

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[40] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593.
[41] *Port Otago Limited v Environmental Defence Society* [2023] NZSC 112.
[42] *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency* [2024] NZSC 26.
[43] Legal submissions on behalf of Carter Group Property Limited and Rolleston Industrial Developments Limited dated 20 June 2024 (here) at paragraph 10 of Appendix 1.
[44] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593; *Port Otago Limited v Environmental Defence Society* [2023] NZSC 112.
[45] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593 at [131].
[46] *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [203].
[47] *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Zealand Transport Agency* [2024] NZSC 26 at [80].
[48] See paragraphs 11 and 18. Noting these legal submissions address different provisions of the NPS-UD and RPS.
[49] Legal submissions on behalf of Oxford-Ōhoka Community board dated 20 June 2024 (here) at paragraph 72.

Question 1(h) – Is the methodology that is used in the WCGM22 consistent with the requirements of the NPS-UD? In preparing the WCGM22, has the Council approached the requirements of the NPS-UD correctly in assessing whether there is sufficient development capacity within Waimakariri District in the short, medium and long term, taking into account all the objectives and policies of the NPS-UD, but in particular Objectives 1, and 2, Objective 3(c) and Policy 1(a)(i)?

80. Question 1(h) appears to assume that the WCGM22 methodology needs to be consistent with, and take into account, "all the objectives and policies of the NPS-UD".

81. However, the WCGM22 was commissioned and intended only to be a growth model that provides an assessment of the demand for housing and capacity within the district, and the sufficiency assessment required in the NPS-UD.[50] It was developed primarily to inform the Greater Christchurch Housing Capacity Assessment (**GCHCA**) for the NPS-UD, and was an input into that HCA.[51] Accordingly, the provisions of the NPS-UD that will be relevant to the WCGM22 are those relating to the monitoring and assessment of residential demand, capacity and sufficiency, rather than all the objectives and policies of the NPS-UD per se. The WCGM22 was not commissioned or intended to account for all objectives and policies of the NPS-UD beyond an assessment of residential demand, capacity and sufficiency. For example, the WCGM22 was not intended to function as a section 32 report that evaluates (amongst other things) whether the notified proposed district plan "gives effect to" the NPS-UD pursuant to section 75(3) of the RMA.

82. In terms of what the WCGM22 was commissioned and intended to do, we consider the WCGM22 has undertaken an assessment of residential demand, capacity and sufficiency in a manner consistent with what the NPS-UD provisions require for an assessment of those matters.

83. Clause 3.10 succinctly describes the assessment a local authority must undertake for housing demand and development capacity as follows:

> ***3.10 Assessing demand and development capacity***
>
> *(1) Every local authority must assess the demand for housing and for business land in urban environments, and the development capacity that is sufficient (as described in clauses 3.2 and 3.3) to meet that demand in its region or district in the short term, medium term, and long term.*
>
> *(2) Tier 1 and tier 2 local authorities comply with subclause (1) in relation to tier 1 and tier 2 urban environments by preparing and publishing an HBA as required by subpart 5.*
>
> [our underlining for emphasis]

84. With regards to demand, the NPS-UD requires an assessment of the demand for housing "in urban environments". The NPS-UD does not require an assessment of demand for housing in non-urban (rural) environments. The WCGM22 is consistent with this because it assessed all urban housing demand in the district, and only excluded rural housing demand. The WCGM22 demand

[50] Formative, 8 December 2023, *Waimakariri Residential Capacity and Demand Model – IPI 2023, Economic Assessment* (here), at page 28 and 40.
[51] Memorandum from Peter Wilson to the Panel dated 16 August 2024, *Council response to Minute 34 – WCGM22* (here), at paragraphs 3 and 9.

assessment was not limited to urban housing demand for the main towns of Rangiora, Kaiapoi, and Woodend/Pegasus, but considered all urban demand in the district.[52]

85. With regards to the assessment of whether development capacity for housing is "sufficient" to meet the identified demand or housing "in urban environments", the NPS-UD requires as assessment of "sufficient" as described in clause 3.2 of the NPS-UD. Appendix B to Formative's report on the WCGM22 records that the WCGM22 was developed to assess "sufficient" development capacity, and that the concept of "sufficiency" is that outlined in policy 2, implemented in clause 3.2, and defined further in clauses 3.24, 3.25 and 3.27.[53] We agree that policy 2, clauses 3.2, 3.24, 3.25 and 3.27 are all relevant to take into account in an assessment of "sufficient" development capacity.

86. The Panel has specifically asked whether the WCGM22 assessment of whether there is sufficient development capacity took into account objectives 1, 2, 3(c) and policy 1(a)(i). These provisions are not explicitly mentioned in Formative's report on the WCGM22. We comment on these objectives and policy below.

Objective 1

87. For ease of reference, objective 1 states:

> ***Objective 1:*** *New Zealand has well-functioning urban environments that enable all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future.*

88. Objective 1 does not expressly comment or provide guidance on the assessment of residential demand, capacity or sufficiency that a local authority is required to undertake. As noted above, the WCGM22 was commissioned and intended only to model residential demand, capacity and sufficiency, not comment or assess wider matters such as whether the proposed district plan gives effect to all the various elements of objective 1 including well-functioning urban environments, wellbeing, and health and safety.

Objective 2

89. Objective 2 is set out in paragraph 0 above. As mentioned in paragraph 25 above, the method by which the NPS-UD anticipates objective 2 would be met is by requiring local authorities to provide development capacity to meet expected demand plus the appropriate competitiveness margin. As the WCGM22 applies the appropriate competitiveness margin[54], the WCGM22 is consistent with the NPS-UD methodology for implementing objective 2.

Objective 3(c)

90. Objective 3 is set out in paragraph 27 above. As mentioned in paragraph 28 above, objective 3 seeks to direct where higher densities are to be located, with subclause (c) referring to areas of an urban environment in which there is high demand for housing or for business land in the area, relative to other areas within the urban environment. Thus, if an area in an urban environment is

[52] Memorandum from Peter Wilson to the Panel dated 16 August 2024, *Council response to Minute 34 – WCGM22* (here), at paragraph 7.
[53] Formative, 8 December 2023, *Waimakariri Residential Capacity and Demand Model – IPI 2023, Economic Assessment* (here), from page 40.
[54] Ibid, at pages 28 and 29.

identified (in the WCGM22, the GCHCA, or subsequently through evidence) to have higher demand relative to other areas in the urban environment, then objective 3(c) seeks to enable more people to live in, and more businesses and community services to locate in, that area.

91. Although not clear, the Panel's reference to objective 3(c) may suggest an intention to query whether an assessment of sufficient development capacity, such as that undertaken by the WCGM22, requires an assessment of demand in different areas of the urban environment to identify areas of higher demand relative to other areas. We comment on the NPS-UD requirement to consider location as part of demand and capacity assessments below, from paragraph 95.

Policy 1(a)(i)

92. For ease of reference, policy 1(a)(i) states:

> ***Policy 1:*** *Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:*
>
> *(a) have or enable a variety of homes that:*
>
> *(i) meet the needs, in terms of type, price, and location, of different households; and*

93. Like well-functioning urban environment objective 1, policy 1 does not expressly comment or provide guidance on the assessment of residential demand, capacity, feasibility or sufficiency that a local authority is required to undertake.

94. Although not clear, the Panel's reference to policy 1(a)(i) may suggest an intention to query whether an assessment of sufficient development capacity, such as that undertaken by the WCGM22, requires an assessment of needs of different households in terms of (amongst other things) location. We comment on the NPS-UD requirement to consider location as part of demand and capacity assessments below, from paragraph 95.

Does policy 2 of the NPS-UD require a location-specific assessment and provision of sufficient development capacity?

95. Although not clear, the Panel's request to account for objective 3(c) and policy 1(a)(i) above may suggest an intention to query whether policy 2 requires a *location-specific* assessment of sufficient development capacity in the manner asserted in paragraphs 98 to 99 of the legal submissions for RIDL.[55] In essence, RIDL's view is that the NPS-UD, when read as a whole, requires local authorities to:

(a) assess housing demand and capacity in different locations; and

(b) provide sufficient development capacity in different locations of housing demand.

96. While we agree with (a) above, we do not consider (b) is a mandated outcome of the NPS-UD. We provide our reasons below.

[55] Legal submissions on behalf of RIDL dated 20 June 2024 (here).

Assessing housing demand and capacity in different locations

97. We agree that the NPS-UD anticipates that local authorities will assess housing demand and capacity in different locations. For example:

    (a) With regards to housing demand, clause 3.24(1) requires a Housing and Business Development Capacity Assessment (**HBA**) to estimate demand for additional housing in different "*locations"*.

    (b) With regards to housing capacity, clause 3.25(2) requires development capacity in a HBA to be quantified as numbers of dwellings in different "*locations, including in existing and new urban areas*".

98. However, the NPS-UD does not specify how must further locational granularity a housing demand and capacity assessment must consider, beyond the minimum specified in clause 3.25(2)(a) which anticipates that the different locations considered in a capacity assessment would include existing and new urban areas:

    3.25 Housing development capacity assessment

    (2) The development capacity must be quantified as numbers of dwellings:

    (a) in different locations, including in existing and new urban areas;

    [our underlining for emphasis]

99. Accordingly, while NPS-UD requires an assessment of housing demand and capacity in different locations, it only mandates that the different locations include existing and urban areas. The NPS-UD neither mandates, nor prohibits, a local authority electing to undertake an assessment of housing demand and capacity that uses a finer granularity in terms of location. This conclusion is reinforced by clause 3.24(2) which states:

    Local authorities may identify locations in any way they choose.

100. While local authorities may identify locations in any way they choose, that does not prevent submitters from calling, and the Panel from considering, any new or additional evidence that seeks to provide a more granular assessment of housing demand and capacity by location than that undertaken by the WCGM22.

101. The NPS-UD anticipates this, for while the WCGM22 and its input into the GCHCA are intended to inform the notified proposed district plan, the WCGM22 was not intended to model or inform unanticipated or out of sequence rezonings that might be sought by submission after notification of the proposed district plan. Submitters seeking rezoning in reliance on policy 8 remain free to call evidence on matters of housing demand and capacity, including any that seeks to provide more granularity in terms of location specific demand and capacity.

Must sufficient development capacity be provided in different locations of housing demand?

102. Paragraph 99 of the legal submissions for RIDL asserts that the Council's requirements under policy 2 "*necessarily means that Council must provide sufficient development capacity in different locations of demand within its urban environment*". The implication is that if there is sufficient evidence of demand for housing that is unique or exclusive to a particular location (such as a

particular site or group of sites), then the Council must provide sufficient development capacity at that location. We disagree with RIDL's view for the reasons provided below.

103. Policy 2 contains no express requirement to provide at least sufficient development capacity to meet expected demand for housing at each and every location within the district where demand might exist. Policy 2 is broadly worded, ambiguous as to locational granularity, and thus it is appropriate to consider if other NPS-UD provision shed light on the level of locational granularity for providing sufficient development capacity.

104. Clause 3.2(1)(a) provides relevant context that informs the meaning and intent of policy 2 in terms of the provision of sufficient development capacity by location as follows:

> ***3.2 Sufficient development capacity for housing***
>
> *(1) Every tier 1, 2, and 3 local authority must provide at least sufficient development capacity in its region or district to meet expected demand for housing:*
>
> *(a) in existing and new urban areas;*
>
> [our underlining for emphasis]

105. In our opinion, clause 3.2(1)(a) confirms that the provision of at least sufficient development capacity is not intended to be at provided at a fine level of locational granularity such as a particular site or group of sites. Instead, the provision of at least sufficient development capacity is intended to be at a broad level of locational granularity, which is to meet expected demand *in existing and new urban areas* in the *district*.

106. In our opinion, providing at least sufficient development capacity at a broad level of locational granularity is consistent with the wider context and purpose of the NPS-UD which does not anticipate that capacity is to be provided in each and every location where location specific demand is established. Rather, the wider context and purpose of the NPS-UD anticipates that at a broad level of granularity, at least sufficient development capacity is to be provided in existing and new urban areas in the district, but the actual more particular locations for providing that capacity remains subject to a merits assessment in terms of whether they contributing to a well-functioning urban environment and being most appropriate in terms of section 32.

107. In effect, RIDL's proposition that policy 2 requires Council *to "provide sufficient development capacity in different locations of demand within its urban environment"* would be inconsistent with the need to consider if providing capacity at that location gives effect to other parts of the NPS-UD, including a well-functioning urban environment under objectives 1 and policy 1, as well as a merits assessment under section 32.

108. RIDL's proposition is also inconsistent with policy 8 which does not anticipate that a particular location must be rezoned to provide sufficient development capacity where there is evidence of location-specific demand. Rather, policy 8 only requires responsiveness to a rezoning (not a compulsory rezoning). Furthermore, responsiveness is only for those rezoning proposals that would contribute to a well-functioning urban environment, and add significantly to development capacity (which, as noted above, necessarily includes a need to demonstrate the provision of adequate supporting infrastructure to support the development of the land).

109. In our view, a consideration of whether or not capacity should be provided in a particular location is ultimately a matter for merits evaluation by the Panel of what is most appropriate, having regard to evidence, including any evidence that provides more granularity on dwelling demand and capacity. Amongst other things, the NPS-UD leaves it open for a Panel to evaluate:

    (a) Whether there is sufficient evidence of demand for housing in a particular location that is unique/exclusive to that location (rather than evidence that people demanding housing at that particular location would also demand housing in alternative locations)?

    (b) Whether there is sufficient evidence that the only way identified demand for housing can be met is to provide housing at a particular location (rather than evidence that the identified demand could also be met at other locations)?

    (c) Whether there is sufficient evidence that providing housing capacity at a particular location better satisfies all of the NPS-UD requirements (including WFUE objectives 1 and 2 and Policy 1) than alternative locations of housing supply?

    (d) Whether there is sufficient evidence that providing housing supply at a particular location is most appropriate (in section 32 terms)?

Concluding comments

110. We appreciate our advice covers a broad range of issues and we would be happy to address any further questions that may arise

Yours faithfully
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