BEFORE THE INDEPENDENT HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of submissions and further submissions on the Proposed Waimakariri District Plan – Hearing Stream 12E (Residential rezonings)

SPEAKING NOTES
FOR PARTICULAR LEGAL ISSUES ARISING IN HEARING STREAM 12E

Dated: 19 August 2024

BUDDLE FINDLAY

Barristers and Solicitors
Christchurch

Solicitor Acting: **Cedric Carranceja**
Email: cedric.carranceja@buddlefindlay.com
Tel 64 3 371 3532 / 64 3 353 2323 PO Box 322 DX WX11135 Christchurch 8013

MAY IT PLEASE THE HEARINGS PANEL

1. INTRODUCTION

1.1 The Council's section 42A officer (Mr Peter Wilson) has asked me to attend Hearing Stream 12E to assist the Independent Hearings Panel (**IHP**) by speaking to legal issues addressed in two legal opinions Buddle Findlay provided to the Council (and since provided to the IHP) as they are relevant to this hearing stream.

1.2 The Buddle Findlay opinions are:

(a) Opinion on the scope of variation 1 dated 30 May 2023, a copy of which was provided in Appendix D of the s42A officer's report dated 22 July 2024 on Variation 1 Rezonings.[1]

(b) Opinion on the definition of "urban environment" dated 9 May 2024, a copy of which is in Appendix D of the s42A officer's report dated 22 July 2024 on Residential Rezonings.[2] This opinion also comments on how a district plan is to reconcile inconsistencies between the NPS-UD and the CRPS, in circumstances where the RMA requires a district plan to "give effect to" both documents.[3]

2. SCOPE OF VARIATION 1

2.1 The Buddle Findlay opinion on the scope of Variation 1 concludes, based on caselaw authorities on the scope of a plan change (including *Clearwater*[4], *Motor Machinists*[5], *Albany North Landowners*[6] and *Option 5*[7]), that Variation 1 submissions seeking new residential zones:

(a) Will not fall within the scope of Variation 1 if seeking new residential zoning that is separated from (rather than adjacent to) relevant residential zones and proposed new residential zones in Variation 1.

(b) May fall within the scope of Variation 1 if they are seeking new residential zoning that is adjacent to relevant residential zones or proposed new residential zones in Variation 1. However, a

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[1] A pdf is downloadable here. See pages 129 to 139 of the pdf.
[2] A pdf is downloadable here. See pages 350 to 366 of the pdf.
[3] From paragraph 48 of the 22 July 2024 legal opinion.
[4] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
[5] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.
[6] *Albany North Landowners v Auckland Council* [2016] NZHC 138.
[7] *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

determination will be required on a case-by-case basis as to whether a particular rezoning request is permissibly within scope as "*incidental or consequential extensions of zoning changes proposed in a plan change*".[8]

2.2 Some submitters (e.g. Momentum) consider that Variation 1 submissions seeking new residential zones are within the scope of Variation 1 because as an Intensification Planning Instrument (**IPI**), Variation 1 is contextually different from a standard plan change which the case law authorities on scope were concerned about.

2.3 To assist in understanding what impact the IPI contextual differences have on scope, it is helpful to consider how different scope considerations operate at the beginning, in the middle, and at the end of the IPI process. That is, the key scope questions for the IHP to consider are:

(a) What was the Council was **required** (mandatory) and **entitled** (discretionary) to include in the IPI when it was notified?

(b) After notification, what relief could submitters validly seek as being *"on"* the plan change, in the context of an IPI?

(c) What is the Panel able to recommend by way of changes to the IPI as notified?

Key question 1 – What was the Council *required* and *entitled* to include in the IPI as notified?

2.4 Through the IPI the Council:

(a) *must* incorporate the MDRS and give effect to policies 3 and 4 of the NPS-UD; and

(b) *may* also amend or include the provisions described in section 80E(1)(b).

2.5 The distinction between what the Council's IPI must and may do is an important factor that differentiates what the permissible scope of lodging submissions *"on"* an IPI is from the permissible scope of lodging submissions *"on"* an ordinary (non-IPI) plan change.

[8] Buddle Findlay legal opinion on the scope of variation 1 dated 30 May 2023, at paragraph 44(b).

2.6 On their face, sections 80E and 80G provide the Council with a relatively broad scope to include *non-mandatory* changes through the IPI. This broad scope is underscored by other provisions such as:

(a) section 77G(4), which *enables* the Council to create new and amend existing residential zones; and

(b) section 77N(3), which *enables* the Council to create new and amend existing urban non-residential zones.

Key question 2 – What relief could submitters validly seek?

Clearwater / Motor Machinists

2.7 Case law has confirmed a council generally has no jurisdiction to consider a submission point if it falls outside the scope of the plan change due to it not being *"on"* the plan change.[9] As mentioned in the Buddle Findlay opinion:

(a) For a submission to be *"on"* a plan change, the Courts have required that it satisfies the two limbs of what has been referred to as the *"Clearwater test"*.

(b) *Motor Machinists* provided useful observations to assist in identifying whether a submission is *"on"* a plan change, including in relation to incidental and consequential extensions of zoning changes.

Clearwater / Motor Machinists in unique context of an IPI

2.8 However, the *Clearwater / Motor Machinist* scope tests outlined in the Buddle Findlay opinion (including for incidental and consequential extensions of zoning changes) must be modified in the unique context of an IPI, but not in the way suggested by submitters.

2.9 As noted above, an IPI is distinguishable from an ordinary plan change because the former has both mandatory and discretionary elements, while the latter is entirely discretionary. In particular, with an ordinary plan change, a local authority has full discretion to define the scope of a plan change. A local authority could, for example, **choose** to notify a plan change seeking to rezone a single parcel of land, or change a setback rule for one particular type of zone – that choice defines the scope of a plan

[9] *Paterson Pitts Limited Partnership v Dunedin City Council* [2022] NZEnvC 234 at [66] to [68].

change. By contrast, an IPI compels the Council to notify a plan change the scope of which **must** address two mandatory elements, while affording Council an entitlement to choose to include other changes in an IPI (such as rezonings). For reasons given below, it is submitted that *Clearwater / Motor Machinists* scope principles:

(a) do not restrict scope of submissions alleging Council has failed to implement the two mandatory elements of an IPI; but

(b) will otherwise apply to all other aspects of an IPI.

2.10 It is mandatory for an IPI is to incorporate the MDRS into relevant residential zones and to give effect to policy 3 of the NPS-UD in an urban environment (subject to any QMs).[10] Hypothetically, if the Council had elected, for example, to exclude all relevant residential zones from Variation 1 so that MDRS would not apply, then it would have been permissible for submissions to request compliance with the RMA so that relevant residential zones were included in Variation 1, notwithstanding that such submissions would ordinarily fail the *Clearwater / Motor Machinists* tests (on the basis that Variation 1 had not sought to alter the *status quo* in relevant residential zones).

2.11 Therefore, in summary, in the present unique context of an IPI, there is scope for submissions to include relief based on an assertion that the Council has not properly complied with the mandatory requirements of the RMA in terms of:

(a) incorporating the MDRS: a submitter can assert that Council has failed to incorporate all elements of the MDRS into all relevant residential zones, or that a QM should not be recognised in an area so that MDRS applies instead of the lower intensification proposed in the notified IPI;

(b) giving effect to NPS-UD policy 3, for example to assert that building heights and densities in and around centres are not set as they should be, for greater or smaller, for example in terms of whether those heights/densities are commensurate with the level of commercial activity and community services within and adjacent to specified types of centre zones.

[10] Sections 77G(1), 77G(6) and 80E(1)(a)(i).

2.12 However, beyond those mandatory statutory matters compelling the scope of an IPI, the scope of relief that submitters can seek must be subject to *Clearwater / Motor Machinists* principles. That is because ordinary natural justice and fairness considerations continue to apply to the discretionary elements of Variation 1 in the same way such considerations apply to an ordinary plan change.

2.13 To hold otherwise would be contrary to, and unravel, years of case law concerned about fairness and natural justice, not just for IPIs, but plan changes in general.

Key question 3 – What changes can the Panel recommend?

2.14 By virtue of clauses 99(2) and 101(5) of Schedule 1 to the RMA, the Panel can recommend any change that a submitter could have sought, even if no submitter actually sought that change.

2.15 However, the Panel cannot make recommendations broader in scope than that, because the same natural justice considerations would apply that would disqualify a submission as not being *"on"* a plan change.

Recent IHP recommendation addressing scope

2.16 The Panel can obtain useful guidance (albeit non-binding) from the recently released IHP recommendations on Christchurch City Council Plan Change 14 (**PC14**), noting that the IHP has utilised similar reasoning to that outlined above.[11] After considering contextual differences between an IPI and a standard plan change, the PC14 IHP concluded (amongst other things) that it is outside of scope for submitters to request to rezone land that is not a relevant residential zone or urban non-residential zone.[12]

Implications for hearing stream 12E submissions

2.17 Consistent with the above, the s42A report for Variation 1 adopts a view that if land was not proposed for rezoning in notified Variation 1, then a submission seeking to rezone that land will be out of scope (unless it is an incidental or consequential rezoning extension). For example, the s42A report notes that the land that Momentum seeks to rezone:

(a) Is zoned rural in the Operative Plan.

[11] IHP Recommendations Report, Part 1 (here), particularly at paragraphs 152, and 182 to 212.
[12] Ibid, at paragraph 204.

(b) Is zoned rural lifestyle in the Proposed Plan.

(c) Is not proposed for rezoning under Variation 1 as notified.[13]

2.18 On the basis of the reporting officer's opinion that Momentum's proposed rezoning is for a large area of land that is not an incidental and consequential extension of a zoning change, this rezoning will not be "on" Variation 1.

3. DEFINITION OF URBAN ENVIRONMENT

Urban environment for policy 8 purposes

3.1 Numerous submitters seek to rely on NPS-UD policy 8 to support their rezoning proposals.

3.2 The Buddle Findlay opinion on the NPSUD definition of "urban environment" contains the following conclusions which are of particular relevance to the application of NPS-UD policy 8:

(a) The person who determines what is "*intended to be*" predominantly urban in character and part of a housing and labour market of 10,000 people for the purposes of defining an "urban environment" under the NPS-UD is dependent on the particular purpose and context that the phrase "urban environment" is used in the NPS-UD.

(b) That intention could be held by any person for the purposes of policy 8 of the NPS-UD, which anticipates such person having the opportunity to demonstrate, through a submission or private plan change, with associated evidence, their intention for an area of land to be predominantly urban in character and part of a housing and labour market of 10,000 people.

Does the CRPS identify the tier 1 urban environment?

3.3 Carter Group and Rolleston Industrial Developments Limited suggest that the CRPS conclusively defines the NPS-UD Tier 1 urban environment as the Greater Christchurch Area shown in Map A, particularly by reference to CRPS objective 6.2.1a – Principal reasons and explanations.[14]

[13] Section 42A report on Variation 1 (here) at paragraphs 254 to 291.
[14] See legal submissions for Carter Group and Rolleston Industrial Developments Limited dated 9 August 2024 (here).

3.4 This issue is discussed in the Buddle Findlay opinion on the NPSUD definition of "urban environment", particular at paragraphs 53 to 58 which considers the various CRPS provisions, and concludes that the CRPS does not define what an "urban environment" is for the purposes of the NPS-UD.

3.5 While the principal reasons and explanation for Objective 6.2.1a states:

> *"The Greater Christchurch Tier 1 urban environment is the area shown on Map A."*

neither the legend for Map A, nor Map A itself, indicates what the "*Greater Christchurch Tier 1 urban environment*" is. There is uncertainty and ambiguity as to what line (if any) on Map A refers to an "urban environment", leaving room for differences of opinion.

3.6 Accordingly, the issue of whether an area of land (including any land identified in any part of Map A of the CRPS) constitutes an "urban environment" for NPSUD policy 8 purposes is ultimately dependent on evidence provided to the panel that is sufficient to demonstrate that the criteria in the NPSUD definition of "urban environment" are met.

4. RECONCILING INCONSISTENCIES BETWEEN THE NPS-UD AND THE CRPS

4.1 The Buddle Findlay opinion on the definition of "urban environment" comments on the issue of how a district plan is to reconcile inconsistencies between the NPS-UD and the CRPS, in circumstances where the RMA requires a district plan to "give effect to" both documents.[15]

4.2 The applicable principles to apply from the Supreme Court decisions in *King Salmon*[16] and *Port of Otago*[17] are outlined in paragraph 48 of the Buddle Findlay opinion.

4.3 In the absence of inconsistency between the NPSUD and the CRPS, a district plan must give effect to both documents.

4.4 With regards to inconsistency, there appears to be general acceptance by the parties that NPSUD responsiveness policy 8 provides a way around those CRPS provisions that seek to avoid any urban development beyond identified urban limits.

[15] At paragraphs 48 to 50.
[16] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38; 1 NZLR 593.
[17] *Port Otago Limited v Environmental Defence Society* [2023] NZSC 112.

4.5 However, that does not mean all CRPS provisions can then be ignored. Section 75(3) still requires all other CRPS provisions (i.e. those that do not impose urban limits) to be given effect to in a district plan. Thus, and by way of non-exhaustive examples, CRPS provisions that must still be given effect to under section 75(3) of the RMA include:

(a) matters of urban form and settlement including those that promote an urban form that achieves consolidation and intensification of urban areas;[18]

(b) any provisions that elaborate, expand or add to what constitutes a well-functioning urban environment (noting that objective 1 and policy 1 of the NPSUD only provide minimum criteria of what constitutes a well-functioning urban environment).

4.6 The s42A report for Residential Rezonings identifies 4 alternative "interpretation approaches" for applying the NPSUD and CRPS together.[19] Interpretation approaches 2 and 3 appear to be variations that seek to achieve the same outcome outlined above, which is that the CRPS provisions cannot be ignored and must still be given effect to, except for those CRPS provisions that conflict with NPSUD provisions (in this case, CRPS prohibitive urban limits provisions would conflict with being responsive to proposals that meet the NPSUD policy 8 criteria). By contrast, interpretation approaches 1 and 4 do not achieve the outcome outlined above.

4.7 The s42A reporting officer has adopted interpretation pathway 2, but has observed that interpretation pathway 3, or any other policy pathway that ultimately still considers relevant CRPS provisions, would be consistent with the approach adopted.[20]

DATED 19 August 2024

C O Carranceja
Counsel for Waimakariri District Council (in its section 42A reporting capacity)

[18] E.g CRPS objective 6.2.2.
[19] Section 42A report on Residential Rezonings (here) at paragraphs 114 to 139.
[20] Ibid at paragraph 139.