

BEFORE THE INDEPENDENT HEARINGS PANEL

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

And

In the matter of Intensification Planning Instrument (**IP**) Proposed Plan Change (**PC**) 78: Intensification to the Auckland Unitary Plan Operative in Part (**AUP**)

And

In the matter of Hearing Topic 001A Plan making and procedural – Consultation and Engagement

And

In the matter of Hearing Topic 001D Plan making and procedural – Central Government process

And

In the matter of Hearing Topic 002 Medium Density Residential Standards (**MDRS**) response

Legal Submissions on behalf of Auckland Council

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Level 15, PwC Tower
15 Customs Street West, Auckland 1010
PO Box 160, Auckland 1140
Tel +64 9 303 2019

Solicitor on the Record Diana Hartley diana.hartley@dlapiper.com +64 9 300 3826
Contact solicitor Anne Buchanan anne.buchanan@dlapiper.com +64 9 300 3807

MAY IT PLEASE THE PANEL

Introduction

- 1 These opening legal submissions on behalf of Auckland Council (**Council**) have been prepared for the purpose of the hearing of Plan Change 78 (**PC 78**) to the Auckland Unitary Plan Operative in Part (**AUP**) in relation to the following Hearing Topics:
 - 1.1 Hearing Topic 001A Plan making and procedural – Consultation and Engagement (**Topic 001A**);
 - 1.2 Hearing Topic 001D Plan making and procedural – Central Government process (**Topic 001D**); and
 - 1.3 Hearing Topic 002 Medium Density Residential Standards (**MDRS**) response (**Topic 002**).

- 2 Broadly, all of these topics relate to the Council's response to the intensification requirements for an intensification planning instrument (**IPI**) in the Resource Management Act 1991 (**RMA**) as amended by the Resource Management (Enabling Housing and Other Matters) Amendment Act 2021 (**Amendment Act**). In particular, the requirements for the IPI to give effect to Policies 3 and 4 of the National Policy Statement on Urban Development 2020 (**NPS-UD**), and to incorporate MDRS into relevant residential zones.

- 3 There are:
 - 3.1 43 primary submission points and 321 further submission points that have been allocated to Topic 001A;
 - 3.2 77 primary submission points and 318 further submission points that have been allocated to Topic 001D; and

- 3.3 77 primary submission points and 27 further submissions points that have been allocated to Topic 002.
- 4 The submission points raise several consistent themes, and these submissions along with the Council's evidence respond in a thematic way to provide a concise response to these submission points.
- 5 The Council is calling evidence from three witnesses in relation to Topic 001A, Topic 001D and Topic 002:
- 5.1 **Mr Ross Moffatt**, Senior Policy Planner at the Council, who will provide planning evidence in response to the submissions allocated to Topic 001A, setting out the Council's approach to consultation and engagement during the preparation of PC 78 and how the public, stakeholder and mana whenua feedback from that process was considered in its preparation.
- 5.2 **Ms Rebecca Greaves**, Lead Planner at the Council, who will provide planning evidence in response to the submission allocated to Topic 001D, acknowledging the hierarchical relationship between planning documents requiring district plans to give effect to national policy statements, and the statutory requirements for an IPI required by the RMA (as amended by the Amendment Act).
- 5.3 **Mr David Mead**, consultant planner, who will provide planning evidence in response to the submission allocated to Hearing Topic 002 and considers the mandatory obligation for the Council to incorporate the MDRS into relevant residential zones, and to only make the MDRS less enabling of development where one or more qualifying matters are being accommodated.

Summary of the Council's position

6 In summary, the Council's position in relation to the submission points allocated to Topic 001A, Topic 001D and Topic 002 is that they should (for the most-part) be rejected because:

6.1 Concerns about and criticisms of the consultation and engagement process are misplaced in this context (as they are outside the scope of the IPI process), with there being no scope to grant the relief sought in the context of Topic 001A;

6.2 Concerns about and criticism of the Council's overall response to the central government's intensification requirements are also misplaced, with there being very limited discretion to grant the relief sought in the context of Topic 001D; and

6.3 The ability of the Council to not incorporate the MDRS into relevant residential zones or to modify the MDRS is significantly constrained by the RMA, with there being no scope to grant the relief sought in the context of Topic 002.

7 Mr Moffatt, Ms Greaves and Mr Mead have however identified a number of submission points that have been allocated to Topic 001A, Topic 001D and Topic 002 that may be more appropriately considered in other hearing topics.

Topic 001A

8 Topic 001A concerns the consultation and engagement process around the preparation of PC 78, submitters' criticisms of this process, and submitters seeking ongoing consultation and engagement with the Council through the process of PC 78 and beyond.

- 9 Topic 001A does not relate to any proposed district plan provisions, and when assessing the matters at issue in Topic 001A sections 31-32 and clause 95 Part 6 Schedule 1 of the RMA are particularly relevant.
- 10 Clause 95 of Part 6 of Schedule 1 of the RMA sets out the process by which the Council must prepare, notify and progress its IPI. The consultation requirements in clause 3(1), (2) and (4), clause 3B and clause 3C of Part 1 of Schedule 1 of the RMA apply.¹
- 11 Under these clauses, the Council is required to consult certain government departments, affected local authorities and iwi authorities when preparing plan changes including PC 78.² Further, the Council may consult with anyone else,³ and in this context has a discretion to adopt its own process for consultation in accordance with section 82 of the Local Government Act 2002 (LGA).⁴

Consultation and ongoing engagement

- 12 Mr Moffatt's primary statement of evidence explains the Council's overall approach to consultation, with the focus of consultation being on those aspects of the NPS-UD policies where the Council has some discretion as to how and where to implement them.
- 13 As explained by Mr Moffatt, consulting with Aucklanders and stakeholders on key discretionary matters that were for Council decision-making before formal plan change notification was considered to be best practice, given the Council's assessment of the significance of the matters involved.

¹ RMA, Part 6 Schedule 1, clause 95(2)(d)-(f).

² RMA, Part 1 Schedule 1, clause 3(1).

³ RMA, Part 1 Schedule 1, clause 3(2).

⁴ RMA, Part 1 Schedule 1, clause 3(4).

- 14 The phases of consultation are described in more detail in Mr Moffatt's primary evidence, as well as how the feedback that was received was considered by the Council.
- 15 As explained above, consultation under clause 3(2) of Part 1 of Schedule 1 of the RMA was discretionary, but the consultation that did occur needed to be in accordance with the LGA.
- 16 The Council's position is that it carried out all consultation required by clause 3(1) of Schedule 1 of the RMA, and went beyond those requirements with additional consultation and engagement with the community under clause 3(2). The Council's position is also that the consultation undertaken by the Council was sufficient to enable the public to understand the issues and options involved, and to enable feedback to be provided that informed the preparation of the Council's IPI that was notified on 18 August 2022.
- 17 Whether that process is regarded as adequate by submitters in particular respects is not relevant to the hearings phase of the IPI process. There is no obligation under the RMA for a local authority to consult with any party once a planning document has been notified, and no power to require a plan change to be withdrawn to allow further consultation. Further, the Council has no ability to withdraw the IPI.⁵ The submission and hearing process provides further opportunities for submitters to be heard on the content of the IPI after notification.
- 18 Further, the procedure for challenging an alleged breach of the Council's obligation to consult (or the adequacy of any consultation undertaken by the Council) would be by way of an application for judicial review in the High Court.⁶ An alternative procedure may also be available in terms of seeking an

⁵ RMA, section 80G(1)(c).

⁶ For example, see *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 (HC).

enforcement order under section 314(1)(f) of the RMA where it is alleged that one or more of the requirements of Schedule 1 of the RMA have not been observed by the Council. Either way, the procedure is outside the scope of the IPI process and would need to be pursued in the High Court (in the case of an application for judicial review) and in the Environment Court (in the case of an application for an enforcement order).

- 19 For the reasons discussed, the Council considers that the submission points regarding consultation and ongoing engagement are outside the scope of the IPI process and should be the subject of recommendations to reject by the Panel.
- 20 The Council acknowledges the statements of evidence of Dianne Giles, Brian Putt on behalf of Freemans Bay Residents Association and St Marys Bay Association and Amanda Coats on behalf of North Eastern Investments Limited, in which aspects of the Council's overall approach to consultation (as explained by Mr Moffatt) are criticised. Mr Moffatt responds to specific issues raised by Mr Putt and Ms Coates in his rebuttal evidence, noting his disagreement with Mr Putt's view that the consultation process was seriously flawed and Ms Coates' suggestion that specific feedback was not considered. However, for the reasons discussed, the Council considers that while the relevant submitters are entitled to express concerns and be critical of the Council's overall approach to consultation, the issues raised in evidence by the submitters are also outside the scope of the IPI process.

Other

- 21 Mr Moffatt's primary statement of evidence identifies a number of submission points allocated to Topic 001A covering a range of matters that are not directed towards issues relating to consultation, and the Council agrees with Mr Moffatt that the Panel may wish to consider these submission points together with other submissions in other hearing topics.

Topic 001D

- 22 Topic 001D concerns submission points on central government's intensification requirements, and the Council's overall response to these mandatory requirements. Topic 001D does not relate to any particular proposed district plan provisions, and when assessing the matters at issue in Topic 001D sections 77G, 77H, 77I, 77N 77O, 80E and 80G of the RMA are particularly relevant.
- 23 These provisions and their implications for PC 78 are explained in the Council's legal submissions dated 20 February 2023 in relation to the strategic overview and are not repeated here.
- 24 However:
- 24.1 the summarised section 32 objectives of PC 78 are to incorporate the MDRS into relevant residential zones and to give effect to Policy 3 and Policy 4 of the NPS-UD in the requisite locations within Auckland's urban environment;
- 24.2 in the context of the relevant RMA provisions there is very limited discretion to grant relief sought across Topic 001D as the Council must incorporate the MDRS into relevant residential zones in the AUP,⁷ and give effect to Policy 3 and Policy 4 of the NPS-UD within Auckland's urban environment;⁸ and
- 24.3 in the context of the relevant RMA provisions there is only scope to make the requirements of the MDRS and Policy 3 of the NPS-UD less enabling of development to

⁷ RMA, section 77G.

⁸ RMA, section 80E.

the extent necessary to accommodate one or more qualifying matter.⁹

Opposition to government-required intensification / reject PC 78 / no decision requested to PC 78

- 25 Ms Greaves' primary statement of evidence identifies a number of submission points expressing dissatisfaction with the Council having prepared and notified an IPI.
- 26 Ms Greaves also identifies a number of submission points seeking that PC 78 be rejected on the basis of concerns regarding the philosophy underpinning intensification requirements, procedural unfairness and potential built form outcomes.
- 27 Ms Greaves also identifies submission points that express broad concerns in relation to the Council's general response to intensification requirements but do not seek specific changes to PC 78, or seek changes beyond the scope of PC 78.
- 28 While Ms Greaves acknowledges submitters' concerns in relation to these matters, she identifies the fundamental issue that the 'RMA provides for implementation of national policy direction at the local level.'
- 29 As already noted, in the context of the relevant RMA provisions, there is very limited discretion to grant relief sought by relevant submitters as the Council must incorporate the MDRS into relevant residential zones in the AUP, and must give effect to Policy 3 and Policy 4 of the NPS-UD in the urban environment. These are mandatory requirements, and therefore in the Council's

⁹ RMA, sections 77I and 77O.

respectful submission Ms Greave's recommendation to reject these submission points is appropriate.

Other

- 30 Ms Greaves identifies three submission points that fall outside of the above themes.
- 31 In light of Ms Greaves' evidence, the Council submits that North Eastern Investments Limited's submission point 836.6 would be better considered with other submissions in Hearing Topic 014 Height as it appears to relate to the Council's proposed response to enabling six-storey building height in locations where Policy 3(b) or 3(c) of the NPS-UD applies.
- 32 Similarly, given Ms Greaves' evidence, the Council suggests that Civic Trust Auckland's submission point 2286.8 would be better considered with other submissions in Hearing Topic 011 Qualifying Matters – Special Character as it appears to seek amendments to PC 78 that accommodate the government's intensification requirements as far as possible while recognising and providing for special character.
- 33 The Council acknowledges the statement of evidence of Peter Onneweer, in which he expresses his support for special character as a qualifying matter. Again, this evidence is likely to be more appropriately considered in Hearing Topic 011 Qualifying Matters – Special Character.
- 34 Finally, Ms Greaves recommends that Fluker Surveying Limited submission point 1115.2 be rejected as it is unrelated to any PC 78 provision but is related to resource consenting matters under section 86BA of the RMA. The Council respectfully requests that this submission point is rejected on this basis.

Topic 002

- 35 Topic 002 concerns submission points that broadly seek the rejection of the MDRS, their modification, or that they are not applied to specific areas of Auckland's urban environment (in the absence of a qualifying matter).
- 36 When assessing the matters at issue in Topic 002, the Council recognises the mandatory obligation to incorporate the MDRS into relevant residential zones, and the limitations on modifying the MDRS in that:
- 36.1 Section 77G imposes a duty on the Council to incorporate the MDRS into every relevant residential zone of the AUP;
 - 36.2 Section 77I provides for the MDRS to be made less enabling of development to the extent necessary to accommodate one or more qualifying matters; and
 - 36.3 Sections 77J, 77K and 77L set out the matters that must be considered if a qualifying matter is to apply.
- 37 Given the nature of the matters at issue in Topic 002, submitters are typically seeking relief which in the Council's submission cannot be granted in respect of an IPI.

Reject PC 78

- 38 Mr Mead's primary statement of evidence identifies a number of submission points seeking rejection of PC 78 in its entirety for a range of reasons relating to incorporating the MDRS into relevant residential zones.
- 39 The short response to these submission points is that incorporation of the MDRS into relevant residential zones is mandatory, with the Council's scope to modify the MDRS to make

them less enabling of development limited to qualifying matters. As the relevant submission points are seeking rejection of PC 78 rather than making the MDRS less enabling of development in the context of qualifying matters, the submission points are seeking relief that in the Council's submission cannot be granted, and therefore should be rejected.

- 40 The Council acknowledges the statement of evidence of Kathryn Davies. Ms Davies' submission point 305.4 seeks rejection of the use of the Residential - Mixed Housing Urban zone as a response to the MDRS. As explained by Mr Mead, in the context of the AUP, the Council has proposed rezoning most Residential - Single House zoned sites and Residential - Mixed Housing Suburban zoned sites within the urban environment to Residential - Mixed Housing Urban (with the standards in the Residential - Mixed Housing Urban zone modified to accord with the MDRS). While Ms Davies is entitled to her views, incorporation of the MDRS into relevant residential zones is mandatory.

Amend / modify MDRS

- 41 Mr Mead's primary statement of evidence identifies a number of submission points seeking 'across-the-board' amendments or modifications to the MDRS to be less enabling of development.
- 42 As previously discussed, the MDRS can only be made less enabling of development if one or more qualifying matters applies. In the Council's submission the 'across-the-board' amendments or modifications to the MDRS sought by submitters will not meet the statutory tests set out in section 77L of the RMA (in the absence of evidence sufficient to meet these statutory tests). This includes the need for site-specific analysis to justify a qualifying matter that is 'any other matter makes higher density, as provided for by the MDRS or policy 3 [of the NPS-UD], inappropriate in an area'.¹⁰

¹⁰ RMA, sections 77I(j) and 77L.

The Council's position is that submission points seeking 'across-the-board' amendments or modifications to the MDRS should therefore be rejected.

- 43 The Council also acknowledges the statement of evidence of Michael Lowe, in which he states his personal views on a range of matters as an urban design professional. Michael Lowe's submission points 811.5 and 811.6 are seeking modifications to the MDRS to avoid tree loss / enable room for trees in the absence of a qualifying matter and should, in the Council's submission, be rejected on this basis. However, the Council considers that Mr Lowe's statement of evidence provides observations relating to a number of other matters, including onsite amenity, that the Panel may wish to consider further in relation to other more appropriate topics.

Do not provide for MDRS in specific locations

- 44 Mr Mead's primary statement of evidence identifies a number of submission points seeking rejection of the MDRS in a particular location or area but in the absence of a qualifying matter.
- 45 The short response to these submission points is again that the MDRS must be incorporated into relevant residential zones, and the MDRS can only be made less enabling of development if one or more qualifying matters applies. In the absence of a qualifying matter being applicable, in the Council's submission, the submission points should be rejected.
- 46 Mr Mead identifies that Channel Terminal Services Limited's submission point 1071.4 seeks to remove the MDRS from all properties within 40m of the nominal centreline of the high-pressure fuel Marsden Point to Auckland pipeline. Mr Mead's opinion is that this submission point should be considered as part of a hearing topic that considers the assessment of qualifying matters as it appears that the submission point relates to a

qualifying matter that may apply to properties in the vicinity of the high-pressure pipeline.

Other

- 47 Mr Mead identifies one submission point that falls outside of the above themes.
- 48 Mr Mead recommends that Victoria and Philip Lowe's submission point 1120.9 should be rejected as it seeks relief that is not available in the context of the IPI (an assessment of the effects of the MDRS and investigation into alternatives).

Mount St John Residents Group Incorporated

- 49 The Council acknowledges the statement of evidence of Aaron Beer on behalf of Mount St John Residents Group Incorporated. The Residents Group's further submission 308 has been allocated to Topic 001A and Topic 001D. The statement of evidence does not however address matters relating to these hearing topics, and instead appears to be directed at various qualifying matters (height sensitive areas and volcanic viewshafts, special character and the adequacy of infrastructure). In the Council's submission, the statement of evidence should be considered as part of a hearing topic that considers the assessment of qualifying matters.

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D K Hartley / W M C Randal
Counsel for Auckland Council for
Proposed Plan Change 78