BEFORE INDEPENDENT HEARINGS PANEL FOR THE WESTERN BAY OF PLENTY DISTRICT COUNCIL

IN THE MATTER OF RESOURCE MANAGEMENT ACT 1991

RE: PROPOSED PLAN CHANGE 92 FOR ŌMOKOROA AND TE PUKE ENABLING HOUSING SUPPLY AND OTHER SUPPORTING MATTERS TO WESTERN BAY OF PLENTY DISTRICT PLAN

LEGAL SUBMISSIONS ON BEHALF OF SUBMITTER TO PPC 92
N and M BRUNING

7 SEPTEMBER 2023

Kate Barry Piceno
Legal Counsel
Mauao Law Chambers
9 Prince Ave
Mount Maunganui
Tauranga 3116
kate@kbplawyer.co.nz

TO THE INDEPENDENT HEARINGS PANEL:

INTRODUCTION

1. These submissions are on behalf of N & M Bruning. Norm and Maureen Bruning and Bruning Farms Limited are the registered owners of land at Omokoroa, being that land held in records of title 26D/746, 713/54, 65A/272 and 10D/397) which is affected by Plan Change 92.

2. The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (Amendment Act) amended the Resource Management Act 1991 (RMA) on 21 December 2021.

3. The Amendment Act requires Tier 1 local authorities to make amendments to District Plans to accelerate the implementation of the National Policy Statement on Urban Development 2020 (NPS-UD) and increase housing supply through the implementation of the Medium Density Residential Standards (MDRS). The Independent Hearings Panel will be familiar with the statutory framework enacted by the Amendment Act. The Amendment Act inserted new provisions into Part 5, Subpart 3 of the RMA which sets out requirements for local authority policy statements and plans. Section 80E of the RMA provides clear direction that the IPI process must give effect to Policy 3 and may include related provisions that support or are consequential on the MDRS and Policy 3 of the NPSUD.

4. Tier 1 local authorities were required to implement these plan changes by notifying an Intensification Planning Instrument (IPI). Instead of the usual public process under Part 1 of Schedule 1 to the RMA, IPIs are developed through a new Intensification Streamlined Planning Process (ISPP), which is based on the streamlined planning process.

IPI PLAN CHANGE 92 AND THE BRUNING LAND

5. The differences in the IPI process and its limitations in consultation and hearing timeframes and rights of appeal are critical to understand in the context of how

Western Bay of Plenty Council has chosen to include non-residential land for rezoning into other types of zones through this IPI plan change.

6. As covered in the planning evidence of Mr. Collier, the Council proposed rezoning of the Bruning's land that is shown as Future Urban zone in the operative plan is not supported from either a planning or legal perspective.

7. The key reason for this is that the Rural Residential and Open Space zoning is not a related is not a relevant residential urban zone and is not consequential on a MDRS.

8. In the case of Section 77G, every relevant residential zone is defined in Section 2 of the Amendment Act as:
   relevant residential zone—
   (a)means all residential zones; but
   (b)does not include—
   (i)a large lot residential zone:
   (ii)an area predominantly urban in character that the 2018 census recorded as having a resident population of less than 5,000, unless a local authority intends the area to become part of an urban environment:
   (iii)an offshore island:
   (iv)to avoid doubt, a settlement zone;

9. Whilst the WBOPDC Rural Residential zone is not one included in the National Planning Standards, its closest equivalent zone is the Large Lot zone, which is specifically excluded in section 77G(b)(i).

10. A territorial authority may create new residential or non-residential urban zones or amend existing zones ss 77G(4) and 77N(3) but new residential zone is limited to mean residential zones listed in or equivalent to those listed in the national planning standards, with the exclusions listed above. "Urban environment", "new residential zone" and "urban non-residential zone" are also defined in the RMA (ss 2 and 77F).

11. Mr. Hextall's reply evidence seems to suggest that as the rezoning is included as part of an urbanisation plan change, that the spirit of intention of urbanisation of the Plan

change somehow overcomes the deliberately narrow legal framework of the Enabling Housing legislation. There are strong and well-established natural justice reasons why Parliament only rarely and narrowly passes legislation that includes removal of appeal rights such as in this legislation. The legislative intention is specific and narrowly focussed.

12. In my submission it does not allow a Council to use an ISSP process to tidy up a range of other urban plan change matters that are still clearly meant to go through a Schedule 1 process which includes broader obligations and opportunities for public consultation processes, and importantly, rights of appeal to the Environment Court.

13. The anomalous approach to the use of the IPI plan change in this manner by WBOPDC is highlighted by the fact that few or no other Council in NZ has, to my knowledge, applied the IPI plan change process in this manner to include new rural residential zones or open space zoning in this manner. In my involvement with 3 Waikato plan changes, and Tauranga City Council IPI process. In reviewing Christchurch, Wellington and Auckland plan changes, the legal advice from various national law-firms to the Hearings Panel also appears to be consistent, that if zone changes to non-residential zones is sought by Council or submitters, that it is outside of scope of an IPI and needs to go through a subsequent and separate Schedule 1 plan change.

14. The 'unique' approach of Western Bay District Council (WBOPDC)to bundle a range of other long planned Schedule 1 plan changes into the IPI is acknowledged in legal advice provided to WBOPDC by way of a memorandum of advice prepared from Cooney Lees and Morgan, dated April 18, 2023. It appears there may have been earlier legal advice on this issue but this has not been provided. A redacted copy of the 2023 advice was provided to me for the Brunings following my request for it and is **attached**.[1]

15. At paragraphs 11-13, the memorandum seeks to provide an expansive interpretative reading of the Amendment Act from the Select Committee Report. With respect to Counsel, there are common law and legislative rules that generally govern how legislation (both Acts and Secondary Legislation) are interpreted and applied by the

[1] Annexure 1, CLM legal memorandum to WBOPDC 18 April 2023(redacted in part)

Court. Select Committee Reports as a secondary interpretation document is only if there is ambiguity within the legislative text[2]. In this case it is submitted there is not.

16. At paragraphs 17-20 of the CLM legal memo, Counsel have also acknowledged that no other Councils they know of have used an IPI to notify proposed new zones in the manner WBOPDC has, but seem to suggest that this could be viewed as justified, based on previous consultation with the Omokoroa Community on the long planned future Schedule 1 plan changes WBOPDC was going to notify to urbanise Omokoroa, and expediency reasons. There is no reference to the significant differences between the two legislative processes in terms of timeframes or loss of Environment Court appeal rights both of which adversely affect public input to those plan changes. There is no reference in the purpose of the Amendment Act that the IPI process should or can be used by Councils in those circumstances.

17. The limits of an IPI and how that impacts what effects can be imposed on existing property is covered in the recent Environment Court decision *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga.*[3] The Court started by noting that whether a power to include a new heritage site as part of the IPI process was a matter of statutory interpretation. *"In undertaking that interpretation, we consider that the draconian consequences of listing the Site in the Schedule on WLC's existing development rights … when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose*."[4]

18. As a matter of strict legal principle, a decision of the Environment Court is only binding in respect of a particular case and is therefore not strictly binding on the Panel's consideration of Council's IPI. It is also noted the Environment Court case has been appealed. However, the Council's appeal against the Decision does not operate as a stay;[5] It is submitted the same general principles of interpretation of an IPI by Judge Newhook in Waikanae should be applied by the IHP in regard to the proposed new zoning including on the Bruning Land through this IPI.

---

[2] Legislation Act 2019
[3] *Waikanae Land Company v Kāpiti Coast District Council* [2023] NZ EnvC 056. It is noted this decision has been appealed to the High Court.
[4] EC Decision, at [14]
[5] High Court Rules, 2016, r 20.10

19. As the Court stated at para 27 of the decision "*On its face section 80E is very wide* "(presumably with reference to the amendments that can be made to planning documents using an IPI). Section 80E prescribes what an IPI *must* include, and what it *may* include. No other uses of the IPI are permissible[6]. However, there is a limitation in the matters that fall within the "related matters category" and what is 'consequential' to an MDRZ zoning. As noted by Mr. Collier in his evidence, there is no MDRZ zoning on or adjacent to the Bruning land and there can be no nexus drawn to broader Omokoroa MDRZ zoning applied to existing relevant residential zones as defined in the Amendment Act. The Brunings land is currently zoned Industrial and Future Urban. No zones proposed as part of Plan Change 92, which the Council seeks to apply to their land or surrounding land are relevant residential zones.

20. Under the current Future Urban zoning of the land, the Brunings are able to establish a dwelling and accessory buildings on their land as a permitted activity. The proposed open space zone removes this current right and does not provide for dwellings and ancillary buildings.

21. The Open Space Zone disenables or removes these property development rights from the Brunings. It is submitted that the *Waikanae* case is also relevant in this regard in that the IPI leads to a more restrictive outcome for the Brunings. Again, such changes are outside the scope of an IPI. Judge Newhook in *Waikanae* noted:

For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the [Amendment Act] was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential

[6] Section 87G

development from permitted to either restricted discretionary or non-complying. We find that amending the District Plan in the manner which the Council has purported to do is ultra vires. The Council is, of course, entitled to make a change to the District Plan to include the new Schedule 9 area, using the usual RMA Schedule 1 processes."[7]

22. The Court noted that there is an "element of flexibility" in the form of qualifying matters.[8] Section 77G(6) provides that a territorial authority may make the MDRS or policy 3 less enabling of development than provided for if authorised under s 77I. Section 77I provides that "*A specified territorial authority may make the MDRS and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area <u>within a relevant residential zone only to the extent necessary to accommodate [a qualifying matter]</u>. Qualifying matters are also referred to, importantly, in policy 4 of the NPS-UD which provides that*:
… district plans applying to tier 1 urban environments modify the relevant building height or density requirements under Policy 3 only to the extent necessary (as specified in subpart 6) to accommodate a qualifying matter in that area.

23. However, the proposed Open Space and Rural Residential zone is not being applied as a qualifying matter to a relevant residential zone. Rather the introduction of these non-residential zones is limiting the potential for Bruning Land through its Future Urban Zones through future Schedule 1 plan changes, to be undevelopable as Open Space or a large lot form of residential housing. Neither is contemplated to be covered by the IPI legislation nor are they consequential changes. This is distinct from qualifying matters related to natural hazards, for example, if flooding, geotechnical or stormwater constraints affecting a proposed new MDRS residential zoned area was proposed, which is what the Open Space Zone purported primary purpose.

24. A further example which may be relevant to the promulgation of planning controls which affect private property is in the case *Capital Coast Health v Wellington City Council*[9]. In that case, the Court was required to consider whether the Council could impose an Open Space Zone on privately owned land and, in particular, whether the Open Space zone was the best way to achieve the statutory purpose of the RMA (as

[7] EC decision at 31
[8] EC decision at 22-23
[9] W029/06

was then required by section 32). The Council admitted that it had not considered whether it could impose an Open Space zone on private land and, in response, the Court said: "*We find that admission surprising for without proper identification of how the land was held, the council was in no position to analyse some of the threshold tests under its s 32 evaluation and consequently in no position to establish the effects of its Open Space proposal on the landowner*."

25. While the Court recognised the difficulty associated with undertaking a section 32 analysis on a macro scale in terms of the application of the assessment on specific sites, it nevertheless held that: "…*the imposition of such inhibiting development controls (as required by the Open Space B zoning) on private land is a decision which requires particular consideration of the site-specific factors involved.*"

26. In that regard, in its final decision, the Court agreed with submissions of counsel that the council's duty under section 32 is to carry out an assessment with respect to the district as a whole, but where the controls particularly affect an individual property, a site-specific assessment may be required. While the Court recognised the difficulty associated with undertaking a section 32 analysis on a macro scale in terms of the application of the assessment on specific sites, it nevertheless held that: "…*the imposition of such inhibiting development controls (as required by the Open Space B zoning) on private land is a decision which requires particular consideration of the site-specific factors involved*." In that regard, in its final decision, the Court agreed with submissions of counsel that the council's duty under section 32 is to carry out an assessment with respect to the district, but where the controls particularly affect an individual property, a site-specific assessment may be required. No site-specific assessment has been completed and in particular one which has assessed the presence and impact on the lands existing designations.

Councils use of Open Space Zoning rather than a Designation

27. Open Space Zoning does not enable land to be acquired and developed for a reserve. A Public Works Requirement process for a reserve designation will be required.

28. A Public Works Requirement is not a form of relief that is within the scope of proposed

Plan Change 92. A Public Works Requirement is subject to a separate process to be initiated by a Requiring Authority under the RMA.

29. The "Requirement" process requires alternatives to be considered if the requiring authority "does not have an interest in the land sufficient for undertaking the work". There could be no expectation that the subject land would necessarily be identified as the preferred alternative.

30. If the NOR RMA process were to be successful (including any appeal) a land acquisition process would then follow under the Public Works Act 1981.

31. Landowner compensation is determined at the time of the land being taken and is based on the likely land use should the taking not occur, which in this case should be quantified as future urban use not as future open space which provides no feasible or reasonable use for a landowner.

Conclusion

32. It is argued or inferred Council through Mr. Hextall's evidence and presumably Council legal submissions that have not yet been sighted, that an MDRS IPI process and Objective 1 of the NPSUD provides expansive scope for "related provisions" that "support or are consequential on" MDRS. In effect, the premise it that any provisions which are intended to achieve "a well-functioning urban environment" are within the scope of s 80E and Objective 1 of the NPS-UD, which also refers to "well-functioning urban environments".

33. The meaning of legislation must be ascertained from its text and in the light of its purpose and its context. This applies whether or not the legislation's purpose is stated in the legislation. Whilst the Housing Enabling Amendment Act changes the RMA and does not have its own purpose section, the name of the Amendment Act (i.e., "Enabling Housing Supply and Other Matters") is a key indicator of its purpose.

34. Parliament provided IPIs with a streamlined planning process and limits of appeal rights for two "core" purposes only: to incorporate the MDRS and give effect to

policies 3 and 4 of the NPSUD. "Related provisions" are only provided for if they "support or are consequential on" an MDRS or policies 3 and 4 under s 80E(1)(b), or are provided for under s 80E(2).

35. The reference to "a well-functioning urban environment" in Objective 1 of the MDRS could be interpreted in a manner that is so broad as to bring almost any plan provisions applicable within an urban environment within the scope of an IPI. But the overall purpose of ss 80E and 80G confines the permissible scope of an IPI, and therefore confines the scope of provisions that can use the streamlined planning process. Objective 1, with reference to "a well-functioning urban environment", should be interpreted as having a similar purpose as the other MDRS provisions, which are to provide for the establishment of buildings and appropriate urban form, most specifically in relation to "residential units". Objective 1 should not be used to expand an IPI considerably beyond those key purposes intended by the MDRS. None of the changes proposed to the zoning of the Brunings land in any way relate to these key residential purposes.

36. Based on these principles, only the retention of Industrial is supported for the Bruning Land, with Rural Residential and Open Space Zoning as proposed considered to be both ultra vires and unsupportable on planning grounds.

Signed

Kate Barry-Piceno

Barrister for N and M Bruning

Dated 7 September 2023