

**BEFORE THE IHP**

**Proposed Plan Change 92 Enabling housing supply to the Western Bay of Plenty District Plan**

<b>UNDER</b>	the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (Enabling Housing Act)
<b>IN THE MATTER OF</b>	submissions and further submissions
<b>BETWEEN</b>	Bay of Plenty Regional Council <b>Submitter</b>
<b>AND</b>	Western Bay of Plenty District Council <b>Proponent</b>

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**MEMORANDUM OF COUNSEL**

**ON BEHALF OF THE BAY OF PLENTY REGIONAL COUNCIL TOI MOANA**

**SUBMITTER NO: 196**

**29 September 2023**

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## **MAY IT PLEASE THE PANEL:**

1. The Panel issued a direction on 20 September 2023 that:
  - a. Invited the planning experts for the District and Regional Council to see if further agreement could be reached in relation to the matters outstanding as between them, with the District Council to report back on the form of those discussions in the form of a joint statement; and
  - b. Invited the Regional Council to provide comments on the matters raised by Ms Julie Shephard on behalf of Pirirakau in writing.
2. This memorandum addresses those directions.
3. A brief supplementary statement from Ms Thiel-Lardon is also filed contemporaneously with this memorandum and provides a response to a query from the Panel regarding the reasonableness of the assessment sought in light of the level of development that has already occurred. This confirms her view that it remains a reasonable request.

## **FURTHER AGREEMENT**

4. The expert planners for the councils have met and discussed the few remaining outstanding issues as between them. The outcome of that conferencing is set out in the joint statement filed by the District Council. As will be apparent, not all matters have been able to be agreed and it will be for the Panel to reach a view on these.

## **COMMENTS ON MATTERS RAISED BY PIRIRAKAU**

5. Regional Council acknowledges Ms Shepard and the issues she raised on behalf of Pirirakau in both her verbal and written presentation to the Panel.
6. We understand that specific relief sought relates to ecological corridor protection, a cultural plan, and a comprehensive stormwater management plan that protects and enshrines mahinga kai. We also understand that planning provisions are sought to guide development in Ōmokoroa Stage 3 over reliance on other non-RMA methods. There was some discussion at the hearing about the cultural landscape(s) of Ōmokoroa and the impacts of development.

6. Regional Council also recognises that it is only tāngata whenua that can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga (RPS Policy IW 2B).

### Legal requirements

7. The Enabling Housing Act provides for the inclusion of related provisions, “including objectives, policies, rules, standards, and zones, that support or are consequential on” the MDRS or policies 3, 4, and 5 of the NPS-UD, as applicable. A subset of these related provisions are qualifying matters.
8. Some of the matters raised by Pirirakau could be considered qualifying matters under section 6(e) of the RMA and as they relate to important directions in the National Policy Statement for Freshwater Management and in the National Policy Statement for Urban Development itself (refer Objective 5 and Policy 9).
9. The line between qualifying matters and more general “related provisions” is a blurred one. Qualifying matters are one type of the listed examples of related provision. This is not a closed list and other related provisions are possible under s 80E. However, qualifying matters have safeguards over-and-above the other listed examples in s 80E (see for instance ss 77J and 77K).
10. It is submitted that the reason qualifying matters have additional requirements from other related provisions is because they are more directed at provisions which are likely to potentially impede or limit intensification. However, other related provisions could also similarly impede or limit intensification. For example, s80E(2)(f) allows for “storm water management (including permeability and hydraulic neutrality)” as a related provision and the management of this may limit intensification.
11. The fact Parliament has put in place related provisions over and above qualifying matters that may impede or limit intensification cannot be ignored. Given both qualifying matters and other related provisions could have this effect, the key determinant is submitted to be the *extent* to which the provision will impede intensification. If it does have the effect of substantially impeding or limiting intensification, it is suggested it would be better treated as a qualifying matter and the relevant statutory criteria apply. If there is less potential impact on intensification, it could appropriately be assessed as a related provision. Note in either case, the Panel needs to be satisfied that the related provision in question supported or was

consequential on the MDRS or NPS-UD policies (ie linked to the intensification enabled by the proposed change).

12. At this stage there is limited information before the Panel to be able to evaluate the extent to which some of the relief sought will impact on intensification. This creates some challenges. There are also potential scope constraints, which counsel for the District Council has discussed with the Panel. Regional Council's position, explained at the hearing, is that scope in the context of an Intensification Planning Instrument, should not be construed too narrowly.
13. I address these points further below in relation to what can be done in the PC92 process.
14. With the above matters in mind, Regional Council has considered what RMA mechanisms might be available, both in PC92 and wider, to ensure that Pirirakau is able to influence resource management decisions in Ōmokoroa.

## Outside PC92

### *Comprehensive Stormwater Management Plan*

15. Regional Council has strongly advocated through the PC92 process for comprehensive stormwater management plans to be linked to planning provisions ensure that cumulative effects of development can be managed in an integrated way that gives effect to Te Mana o Te Wai.
16. The District Council has lodged an application to replace the soon to expire Comprehensive Stormwater Consent (**CSC**) for the Ōmokoroa Peninsula. As part of that process, they have developed a comprehensive management plan (**CMP**), which, importantly, is now referred to in PC92.
17. The CMP identifies the need for consultation and engagement with tāngata whenua (refer Section 10). It states:<sup>1</sup>

*One desired outcome of the engagement [with Tāngata Whenua] will be that key Mātauranga Māori principles are imbedded into the CMP and/or their associated Monitoring Plans, which reflect Te Mana o Te Wai. WBOPDC and Tāngata Whenua have agreed to wānanga where they will work collaboratively on these issues, with the first of these occurring in July 2022.*

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<sup>1</sup> At page 16

18. The CSC application will be publicly notified at the request of the District Council. Pirirakau will be expected to be engaged with as part of the consent process. The NPS-FM directions, including those requiring active involvement of tāngata whenua in freshwater management (including decision making processes), and the identification and provision for Māori freshwater values (including the compulsory value of mahinga kai) will need to be considered and addressed.
19. The CMP will be able to be updated (with certification from the Regional Council) to adapt to new information, including from tāngata whenua such as Pirirakau. This could include methods to protect cultural landscapes.

#### *Earthworks and subdivision*

20. Where regional resource consents are required, Regional Council will continue to expect to see developers engage with Pirirakau and obtain an assessment of the potential impact of their activities on Pirirakau relationships and values. Capacity constraints are acknowledged, and Regional Council is continuing to consider and progress options to assist with these.

#### *NPS-FM regional implementation*

21. There is a process currently underway to amend the Regional Policy Statement and Regional Natural Resources Plan to implement the directions in the NPSFM, including those relating to Māori freshwater values and tāngata whenua involvement in freshwater management. Regional Council would welcome continued engagement with Pirirakau on these matters so that Pirirakau's mahinga kai values can be identified and protected through that future regional planning framework.

### **In PC 92**

#### *Natural Open Space Zone*

22. It appears that, at least to some extent, Regional Council's position on the extent of the proposed Natural Open Space zone (**NOS**)<sup>2</sup> and the importance of it to protect ecological corridors and gully systems are broadly consistent with Pirirakau's relief in relation to ecological corridors. It is unclear as to whether the structure plan has

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<sup>2</sup> Chapter 24 PC92.

responded to her concerns regarding the awakeri by the identification of the NOS in the Plan.

23. The appropriate extent of the NOS and how Pirirakau values could be incorporated into the NOS provisions is something that could be further explored with Pirirakau. Counsel understands that the District Council has identified that a policy response to the issues raised could sit in the NOS section of the plan.
24. For completeness, despite the late introduction of the indicative Waka Kotahi proposal, Regional Council continues to support the proposed NOS zone and does not consider that to be a reason to retain the area as Future Urban. If Waka Kotahi were to lodge a formal notice of requirement in future, that would then go through a process. Retaining the proposed Natural Open Space zoning would be consistent with and respond to at least some of Pirirakau's concerns.

#### *Other provisions*

25. The Panel could consider recommending the insertion of provisions to require development and subdivision at Ōmokoroa to take into consideration or be designed in a manner sensitive to cultural landscapes and values.
26. This could be at a policy level and/or inclusion as a matter of discretion in, for example, 14A.7.1. If the Panel considers that it has sufficient information before it to reach conclusions on the statutory tests that apply to qualifying matters, provisions could be framed so as to prevent or impede intensification. If the Panel did not consider it had sufficient information, it would need to frame any provisions carefully so as to ensure that intensification was not substantially impeded. This could occur if, for example, applying a cultural matter of discretion could result in applications being declined.
27. If the Panel did not think that it had sufficient information, depending on timeframes, it could ask for further information.
28. Regional Council supports the development of a cultural plan for Ōmokoroa, and acknowledges that this may take some time. This could lead to further changes to planning provisions in future to better respond to the matters raised by Pirirakau.

**Rachel Boyte**

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