BEFORE THE HEARINGS PANEL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER OF	Plan Change 92 to the Western Bay of Plenty District Plan

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LEGAL SUBMISSIONS ON BEHALF OF
ARA POUTAMA AOTEAROA THE DEPARTMENT OF CORRECTIONS
(Submitter Number 24)

Dated 5 September 2023

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MAY IT PLEASE THE PANEL:

1 INTRODUCTION

1.1 These legal submissions are made on behalf of Ara Poutama Aotearoa, the Department of Corrections (**Ara Poutama**), and should be read in conjunction with the evidence of Ms Andrea Millar (Manager Resource Management, Land Management and Statutory Compliance at Ara Poutama) and Mr Sean Grace (planning) for Ara Poutama.

2 OVERALL OUTCOMES SOUGHT BY ARA POUTAMA THROUGH PROPOSED PLAN CHANGE 92 (PC92)

2.1 Ara Poutama's submission and Ms Millar's evidence outlines in some detail the activities that Ara Poutama undertakes within communities as part of its essential role within the justice system. Of particular relevance to PC92, those activities include the provision of homes for people within Ara Poutama's care who are serving sentences in the community. That provision of accommodation is often accompanied by a level of rehabilitation and reintegration support provided by Ara Poutama staff, or service providers that Ara Poutama works alongside.

2.2 Ara Poutama also undertakes community corrections activities which provide services and support to those within the justice system who are carrying out their sentences within the community and/or meeting parole requirements. Those services include probation or parole officer engagement and meetings, training and education programmes and the like.

2.3 Both the provision of homes and the undertaking of community corrections activities are not only a necessary part of Ara Poutama's statutory mandate[1], these activities also have an essential role in the functioning of the justice system. As described in the evidence of Ms Millar, the effective functioning of that system relies on clear provision for Ara Poutama's activities in district plans.

2.4 As Aotearoa's urban environments evolve through intensification, implementing the objectives of the National Policy Statement on Urban Development 2020 (**NPS-UD**) necessitates that these activities are clearly provided for, if those environments are to be "well-functioning"

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[1] Corrections Act 2004, s5.

in the NPS-UD sense, as well as enabling all people and communities to provide for their well-being.

2.5 Within that context and as noted by Mr Grace, Ara Poutama's submission on PC92 (and on other IPIs throughout the country) seeks to ensure that:

(a) The intensification proposed under PC92 will provide for (and meet the needs of) a variety of different households, including those supported and supervised by Ara Poutama and/or its service providers within the community; and

(b) There is good accessibility between areas proposed for intensification and community corrections activities[2], which are a fundamental component of a well-functioning urban environment.

2.6 In respect of the first outcome, Ara Poutama's relief on PC92 seeks the following:

(a) Retention of the existing definitions of *Residential Activity* and *Residential Unit* which align with the National Planning Standards [3];

(b) Inclusion of a definition of *Household* to make it clear that the *Residential Unit* definition includes households of people who receive support and supervision, including from Ara Poutama or its service providers[4]; and

(c) Reference to "*provid*[ing] *for a range of households*" under the enabling policy for the Ōmokoroa and Te Puke Medium Density Residential Zone to ensure that Ara Poutama's residential activities are enabled within this zone[5].

2.7 (together referred to in these legal submissions as the **Residential Relief**).In respect of the second outcome, Ara Poutama seeks:

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2 "*Community Corrections Activity*" is defined in the National Planning Standards, and means the use of land and buildings for non-custodial services for safety, welfare and community purposes, including probation, rehabilitation and reintegration services, assessments, reporting, workshops and programmes, administration, and a meeting point for community works groups.

3 Submission points 24.3 and 24.4.

4 Submission point 24.2.

5 Submission point 24.5.

(a) Inclusion of a definition of *Community Corrections Activity* to align with the definition of that term in the National Planning Standards[6]; and

(b) Classification of the activity status of Community Corrections Activities in the Commercial Zone as permitted.[7]

(together referred to in these legal submissions as the **Community Corrections Relief**).

2.8 Mr Grace's planning evidence concludes that that both the Residential Relief and the Community Corrections Relief will better give effect to the objectives and policies of the NPS-UD in light of the intensification proposed by PC92.

3 SCOPE

3.1 The Council Reporting Officer recommends that the Community Corrections Relief be rejected on the basis of scope.

3.2 As the Panel will be aware, the orthodox legal approach used to determine whether a submission is within the scope of a (standard process) RMA plan change is well-established, and is as set out in *Palmerston North City Council v Motor Machinists Limited*[8]*.* The two limbs of the test are:

(a) Whether the submission falls within the ambit of the plan change, i.e. does it address the extent of the alteration to the status quo that the plan change proposes to address?

(b) Whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process[9].

3.3 The starting point for an orthodox scope assessment is therefore to establish the ambit of a particular plan change. In the usual course,

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6 Submission point 24.1.

7 Submission points 24.11 and 24.12. After further consideration, Ara Poutama no longer seeks to pursue relief in relation to the Commercial Transition and Industrial Zones.

8 [2013] NZHC 1290.

9 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66]; and *Palmerston North City Council v Motor Machinists Limited* at [81] to [82].

this involves consideration of the objectives of a plan change (as articulated in the notification documents), and identification of what relevant matters are, or should have been, addressed in the s32 report.

3.4 On the latter point, the Environment Court in *Bluehaven Management v Western Bay of Plenty District Council* [10] confirmed that:

(a) The question of whether a submission is 'on' a plan change is not simply related to whether the s32 evaluation report did or did not address the issue raised in the submission.

(b) Rather, it is an inquiry as to what matters should have been included in the s32 evaluation report and whether the issue raised in the submission addresses one of those matters.

(c) That assessment should include consideration of whether there are statutory obligations, national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission[11].

3.5 In our submission, the findings in these decisions are instructive when considering the issue of the scope in the context of an Intensification Streamlined Planning Process (**ISPP**) and an Intensification Planning Instrument such as PC92. However as discussed further below, there are key differences between the ISPP and the standard plan change process which, in our submission, must be borne in mind when considering issues of scope in the context of PC92.

IPI requirements

3.6 In contrast to a standard plan change, as an IPI, the ambit of PC92 is set by s80E of the RMA, which requires PC92 to:

(a) Incorporate the medium density residential standards (**MDRS**) set out in Schedule 3A of the Act; and

(b) Give effect to policies 3 – 5 of the NPS-UD (as applicable) in relevant residential zones and urban non-residential zones.

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10 [2016] NZEnvC 191.
11 At [38] - [39].

3.7 Section 77G(5)(a) of the Act also requires that a territorial authority must include certain objectives and policies set out in clause 6 of Schedule 3A including:

> *Objective 1*
>
> (a) *a well-functioning urban environment that enables all people and communities to provide for their social, economic and cultural wellbeing, and for their health and safety, now and in the future:*
>
> *Objective 2*
>
> (b) *a relevant residential zone provides for a variety of housing types and sizes that respond to:*
>
> i. *housing needs and demand; and*
>
> ii. *the neighbourhood's planned urban built character, including 3-storey buildings.*
>
> (together, the **Mandatory Objectives**).

3.8 In accordance with s80E(1)(b), an IPI may also amend or include:

(a) *"Related provisions",* including objectives, policies, rules, standards, and zones, that support or are consequential on the MDRS or the relevant NPS-UD policies.

(b) Provisions that relate to, without limitation, district-wide matters, earthworks, fencing, infrastructure, qualifying matters, stormwater management and subdivision of land[12].

3.9 Importantly, where the Panel considers that (having regard to the applicable legal framework), alterations to a notified IPI are necessary or appropriate to address the matters in s80E (whether or not those alterations have been requested in submissions), the Panel is authorised to recommend those alterations provided they relate to matters which have at least been raised during the hearing[13].

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12 Resource Management Act 1991, ss80E(1)(b)(iii), (2).
13 Resource Management Act 1991, s1, clause 100(3).

3.10 In our submission, the sum effect of these provisions is to expand the recommending role of the Panel (in terms of the content of an IPI) beyond the orthodox legal approach to scope. Whilst it is clear that a territorial authority has an important function in preparing and notifying an IPI, the notified provisions of an IPI do not limit its scope. Those boundaries are instead defined by the relevant IPI related provisions in the Act including ss80E and 77G(5). Where a submission or a further submission on an IPI addresses matters within those provisions, a submission should be considered to be 'on' the plan change in a *Motor Machinists* sense, whether that matter was included in the notified IPI or not.

3.11 This statutory context for an IPI also has implications for the second limb of the *Motor Machinists* test. In our submission, the relevant natural justice considerations in this context must be viewed in light of:

(a) The prescribed content of an IPI (under ss80E and 77G(5)), which enables significant change across relevant parts of the urban environment; and

(b) The expanded recommending role of the Panel under s99(2)(b) of the Act.

3.12 The effect of both of these factors is to elevate the standard of inquiry that might reasonably be expected by potentially affected parties in relation to how an IPI (and submissions on that IPI) might affect them. In the context of PC92, the further submission process provided an opportunity for an effective response to the changes sought by Ara Poutama in its submission.

Related provisions

3.13 In our submission, Ara Poutama's Community Corrections Relief constitutes *"related provisions which support…the MDRS and policies 3 – 5"* pursuant to s80E(1)(b)(iii), and consequently fall within the ambit of PC92.

3.14 The decision as to what constitutes *"related provisions"* requires an examination not only of the MDRS and specified NPS-UD and Schedule

3A (clause 6) provisions themselves, but also their broader purpose, and the relevant legislative/regulatory context[14].

3.15 The passing of the Enabling Act was intended to accelerate and strengthen implementation of the NPS-UD. Whilst the particular focus of the Enabling Act is on intensification and enabling more people to live and operate in certain areas, achieving that outcome cannot be divorced from the other objectives of the NPS-UD. Neither the RMA (as amended by the Enabling Act) nor the NPS-UD contemplates intensification in isolation from realising well-functioning urban environments. One must support the other.

3.16 That holistic approach has recently been affirmed by the High Court in in *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc*[15] which held that when considering plan changes, decision-makers must:

(d) Give effect to <u>all</u> objectives and policies of the NPS-UD; and

(e) Consider the extent to which the provisions of the plan change give effect to all provisions of the NPS-UD.

3.17 The important connection between the intensification outcomes and the broader objectives of the NPS-UD, including realisation of a well-functioning urban environment that enables <u>all</u> people to provide for their wellbeing now and into the future, is also expressly secured by the Mandatory Objectives (set out in paragraph 3.7 above) which are required to be inserted in district plans through IPIs. In accordance with the guidance in *Bluehaven,* submissions which sought to alter those Objectives would not be "on" PC92 (particularly given the requirement to *"include"* those Objectives (i.e without amendment) in district plans). However, alterations to plans to give effect to those Objectives may be within the scope of the proposal[16].

3.18 In that context, provisions which support the MDRS and policies 3 - 5 of the NPS-UD (as applicable) to achieve those Objectives and the

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14 Refer Legislation Act 2019, s10(1).
15 [2023] NZHC 948.
16 *Bluehaven Management Limited v Western Bay of Plenty District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191, at [37].

other relevant objectives of the NPS-UD should, in our submission, be lawfully considered a *"related provision"* in terms of s80E.

4 COMMUNITY CORRECTIONS RELIEF

4.1 The nature of community corrections activities is described in the evidence of Ms Millar[17] and Mr Grace[18]. The purpose of the Community Corrections Relief is to ensure that:

(a) Community corrections activities are accessible to areas with growing populations (enabled by intensification); and

(b) Increased demand for community corrections activities brought about by that growing population can be adequately catered for by more permissive Plan provisions.

Scope

4.2 With respect to the question of whether the Community Corrections Relief falls within the ambit of PC92:

(a) PC92 (as notified) proposes to alter the status quo in respect of the Commercial Zone by enabling greater development capacity through intensification in identified areas and a more active mixed use zone[19]; and

(b) The s32 report acknowledges the need to provide social and community infrastructure to support residential intensification[20].

4.3 As part of its evaluation of those changes, the s32 report specifically acknowledges that the provisions of PC92 need to give effect to the NPS-UD and, in particular, to achieve a *"well-functioning urban environment"* as defined in Policy 1 of the NPS-UD.

4.4 For the reasons set out above, we consider that a contextual evaluation to the MDRS and the relevant NPS-UD policies is appropriate in terms of establishing the ambit of PC92.

4.5 Of particular relevance to the Community Corrections Relief, as set out in Mr Grace's evidence, a *"well-functioning urban environment"* must

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17 At 51(b).
18 At 5.5 – 5.8.
1919 Section 32 Evaluation Report at page 59.
20 Section 32 Evaluation Report at page 55.

have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport[21]. A '*community corrections activity'* is carried out in a 'community facility' (as defined in the National Planning Standards) and is therefore a 'community service' for the purposes of the NPS-UD[22].

4.6 Ara Poutama's Community Corrections Relief seeks to ensure that:

(a) PC92 will better enable good accessibility to those services, commensurate with the increased level of activity/demand in the relevant zones resulting from intensification; and

(b) Consequently, that the intensification enabled in accordance with policies 3 and 4 will achieve a *"well-functioning urban environment"* (consistent with objective 1 and policy 1(a)(c) of the NPS-UD).

4.7 The Community Corrections Relief therefore constitutes related provisions which support policies 3 and 4, and the manner in which that policy is to be given effect to through PC92.

4.8 With respect to natural justice considerations:

(a) The High Court has previously recognised that the further submission process provides an opportunity for public engagement on a matter, provided that the original submission was not out of "left field"[23].

(b) The fact that better provision for community corrections activities was not contemplated in PC92 as notified is not, in our submission, determinative when it comes to the issue of scope. As noted by the Court in *Bluehaven*, a submission may raise a matter which, on evaluation of the broader statutory/regulatory context, can lawfully be addressed as part of a plan change.

(c) Whilst no change to the activity status of community corrections activities was proposed in PC92 as notified, as noted above, the plan change proposes to alter the status quo in respect of the

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21 National Policy Statement on Urban Development 2020, Policy 1(c).

22 Clause 1.4, NPS-UD which defines "community services" as including "community facilities".

24 Section 32 Evaluation Report at page 59.

Commercial Zone by enabling greater development capacity through intensification within that zones[24] and the s32 report acknowledges the need to provide social and community infrastructure to support residential intensification[25].

(d) The Community Corrections Relief sought by Ara Poutama was clearly identified in its original submission. The further submission process accordingly provided an opportunity for public comment on the relief sought by Ara Poutama.

4.9 Finally, as noted in Mr Grace's evidence, community corrections activities are administered exclusively by Ara Poutama, and are delivered in locations commensurate with identified demand. Permitting these activities will therefore not result in a proliferation of community corrections activity throughout the areas proposed for intensification under PC92[26].

5 CONCLUSION

5.1 For the reasons set out above, there is scope under the RMA for the Panel to consider the merits of Ara Poutama's submission, and to recommend that the relief sought therein be granted.

Monique Thomas / Rachel Murdoch
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5 September 2023

[24] Section 32 Evaluation Report at page 59.
[25] Section 32 Evaluation Report at page 55.
[26] Evidence of Sean Grace at 7.5.