Before the Independent Hearings Panel
at Waimakariri District Council

under: the Resource Management Act 1991

in the matter of: Submissions and further submissions to the Proposed Waimakariri District Plan and submissions and further submissions on Variations 1 and 2 to the Proposed Waimakariri District Plan

and: **Various submitters represented by Chapman Tripp**

Memorandum of counsel in response to Minute 1: Procedural issues

Dated: 24 March 2023

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MEMORANDUM OF COUNSEL IN RESPONSE TO MINUTE 1: PROCEDURAL ISSUES

INTRODUCTION

1 This memorandum is filed on behalf of a number of submitters represented by Chapman Tripp in respect of the Proposed Waimakariri District Plan (the *Proposed Plan*) and Variations 1 and 2 to the Proposed Plan.

2 This memorandum raises some potential procedural issues arising out of the Panel's Minute 1 as directed by paragraph 130 of that Minute.

EXPERT WITNESS BRIEFS OF EVIDENCE

3 At paragraph 70, Minute 1 provides:

> "*Each expert witness can only present one brief of evidence in each hearing. Where that expert witness is giving evidence for multiple submitters at a hearing, their evidence may be subdivided into appropriate sections to enable the different submitters' cases to be presented appropriately.*"

4 While we see the merits of such an approach, we have some reservations and therefore suggestions.

5 Firstly, we have assumed that 'each hearing' refers to the Hearing Streams (of which there are 12).

6 Secondly, we foresee logistical difficulties where witnesses are appearing for multiple submitters represented by different legal counsel and the coordination of expert evidence reviews. We also see issues arising (including in respect of confidentiality) around drafts of evidence being circulated to other submitters prior to their final lodgement.

7 This is particularly the case, in our view, with experts on the likes of planning and economics.

8 Where we ourselves are acting for more than one submitter who is using the same expert for evidence, we will include these all in the same briefs.

SCOPE OF VARIATION 1 PROCESS

9 At paragraph 106, Minute 1 provides:

> "*The Hearing Panel is able to make recommendations to the Council that fall outside the scope of submissions. This is*

provided the point concerned has been raised either by a person at the hearing or by the Panel itself. The same restrictions therefore do not apply, and submitters are able to raise matters outside of the scope of their submission."

10 We understand this statement will have derived from:

10.1 Clause 99, Schedule 1 of the Resource Management Act 1991 (*RMA*) which provides that the Panel must make recommendations to a specified territorial authority on the Variation, and that:

(1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.

(2) The recommendations made by the independent hearings panel –

(a) must be related to a matter identified by the panel or any other person during the hearing; but

(b) are not limited to being within the scope of submissions made on the IPI.

11 We agree that prima facie these clauses give the Panel the ability to consider and make recommendations that fall outside the scope of submissions made on Variation 1.

12 However, clause 99(2)(b) does not provide an unfettered discretion. It must necessarily be limited to the scope of the decisions they have been delegated to make on Variation 1. This is clear from clause 99(1) which states that Panel must make recommendations "on the IPI".

13 A similar example of such a discretion in the RMA is contained in section 293 which gives the Court a general discretion to direct the Council to prepare changes to a plan to address any matters identified by the Court. Case law on this has made it clear that this discretion is not an unfettered one either and that the power to make those directions still had to be "on" the particular plan change to which the appeal relates.[1]

14 In the present case, we say that the scope of the Panel's recommendations must still be limited to the scope of Variation 1. We set out at **Appendix 1** what we understand the scope of Variation 1 to be. The overall scheme of the RMA does not envisage changes being made to district plans which are outside the scope of

[1] *High Country Rosehip Orchards Ltd v Mackenzie DC* [2011] NZEnvC 387.

publicly notified proposed changes, as that would undermine the right of the public to be heard on such changes. This is an issue of jurisdiction and natural justice, not discretion.

15 We do not consider that clause 99(2)(a) gives submitters the ability to appear at the Variation 1 hearing and raise matters that fall outside the scope of Variation 1. If anything, it might give the Panel discretion to allow submitters to speak to points outside the scope of their own submission, but must still remain within the scope of the Variation.

16 It would be wholly inappropriate for the Panel to leave the hearing open to submitters to talk about anything they want and not be limited to the scope of their submission, as might be interpreted by some to be the approach in Minute 1, even if this was still within the scope of Variation 1. This would make for a potentially lengthy and inefficient hearing process.

MERGER OF PROCESSES NOT POSSIBLE

17 At paragraph 17, the Panel has indicated that it will be issuing a separate Minute inviting responses regarding the application of clause 16B(1), Part 1, Schedule 1 to the RMA regarding the merger of variations and proposed plans.

18 At this stage we make some preliminary comments as this issues has already arisen in the context of the Selwyn District who are similarly dealing with their Proposed Plan at the same time as their Variation.

19 Clause 16B(1), Part 1, Schedule 1 to the RMA provides:

> *Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.*

20 However, there is no practical ability for the Proposed Plan process and the Variation 1 process to merge or be substituted. This is because:

20.1 Part 6 of Schedule 1 of the RMA governs the intensification streamlined planning process (*ISPP*) the Council must follow to incorporate the medium density standards. Clause 95(2), Part 6, Schedule 1 of the RMA lists the clauses of Part 1,

Schedule 1 that apply to the ISPP. Clause 16B is not listed as one that would apply to the ISPP. It is therefore not possible under the RMA to merge the Proposed Plan and Variation 1, even if they were at the same procedural stage.

20.2 This must be correct, as:

(a) Variation 1 is not a carte blanche rezoning exercise with a substitution of zoning across the board. The extent of rezoning through Variation 1 is confined to incorporating the MDRS and NPS-UD intensification policies. Original submissions on the Proposed Plan seeking rezoning cannot, and will not, therefore be deemed to be submissions on Variation 1.

(b) It would be inappropriate to merge the two processes given the inherent differences in the procedure (e.g. cross examination) and appeal rights of both processes and the express exclusion of the merger clause from application to the ISPP.

Dated: 24 March 2023

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Jo Appleyard / Lucy Forrester
Counsel for various submitters

APPENDIX 1 – SCOPE OF VARIATION 1

What is Variation 1?

1 As the Panel will be aware, the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (the *Amendment Act*) came into force on 21 December 2021.

2 The Amendment Act requires specified territorial authorities, which includes the Council, to apply the Medium Density Residential Standards (*MDRS*) to existing residential areas and implement Policies 3, 4 and 5 of the NPS-UD (the intensification policies), and prescribes a new streamlined planning process to incorporate the MDRS and the intensification policies into their district plans.

3 Specific to the Waimakariri context:

3.1 every relevant residential zone of a specified territorial authority must have the MDRS incorporated into that zone;[2]

3.2 a "relevant residential zone" is defined as any residential zone (excluding large lot residential zones and areas predominantly urban in character but with a resident population of less than 5,000);[3]

3.3 every residential zone in an urban environment of a specified territorial authority must give effect to Policy 3 or 5 of the NPS-UD, as the case requires, in that zone;[4]

3.4 specified territorial authorities, when changing their district plans for the first time to incorporate the MDRS and give effect to Policy 3 or 5 of the NPS-UD, must use an Intensification Planning Instrument (*IPI*) and the Intensification Streamlined Planning Process (*ISPP*);[5]

3.5 an IPI must incorporate the MDRS and give effect to the NPS-UD intensification policies, and may amend or include related provisions that support or are consequential on the MDRS or the NPS-UD intensification policies;[6]

3.6 the ISPP is contained in Part 6 of Schedule 1 to the RMA and adopts various aspects of the standard plan-making process in Part 1 of Schedule 1, however modifies the hearings and

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2 RMA, section 77G(1), as inserted by the Amendment Act.

3 RMA, section 2, as inserted by the Amendment Act.

4 RMA, section 77G(2), as inserted by the Amendment Act.

5 RMA, section 77G(3), as inserted by the Amendment Act.

6 RMA, section 80E, as inserted by the Amendment Act.

recommendations/decision-making process and removes appeal rights in relation to the IPI;[7]

3.7 where a specified territorial authority has notified a proposed district plan before the Amendment Act came into force, it must notify a single variation to its proposed district plan to incorporate the MDRS;[8]

3.8 the variation is the specified territorial authority's IPI and must use the ISPP to incorporate the MDRS and give effect to the NPS-UD intensification policies;[9] and

3.9 there are no appeal rights in relation to a variation to a proposed plan that is the specified territorial authority's IPI, but appeal rights on the underlying proposed district plan remain unaffected.[10]

4 As required by the Amendment Act, WDC notified Variation 1 on 5 November 2022. Variation 1 is, accordingly, WDC's IPI and uses the ISPP to incorporate the MDRS and give effect to the NPS-UD intensification policies.

What is the ambit of Variation 1?

5 In the Waimakariri District, "relevant residential zones" are located in Kaiapoi, Woodend, Rangiora, and Pegasus. Variation 1 introduces the MDRS into the areas zoned GRZ in the Proposed Plan by replacing that zoning with a new Medium Density Residential Zone (*MRZ*) which incorporates the MDRS.

6 The replacement MRZ is not a requirement of the Amendment Act. The Amendment Act simply requires the inclusion of the MDRS in "relevant residential zones". In other words, under Variation 1, the MDRS could have been incorporated into the GRZ, rather than through the introduction of the MRZ. While this is perhaps semantics, it illustrates that the intent of ISPP under the Amendment Act is an *intensification* exercise, rather than a *rezoning* exercise (which is the domain of the Proposed Plan).

7 Under Variation 1, the incorporation of the MDRS for all relevant residential zones implements the mandatory requirements of the Amendment Act, namely section 77G(1) and clause 33(2)(b) of Part 5 of Schedule 12 to the RMA.

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7 RMA, schedule 1, part 6, as inserted by the Amendment Act.

8 RMA, schedule 12, clause 33(2), as inserted by the Amendment Act.

9 RMA, schedule 12, clause 33(3), as inserted by the Amendment Act.

10 RMA, schedule 12, clause 36, as inserted by the Amendment Act.

8 The Amendment Act (under section 77G(4) of the RMA) further gives the Council a discretion to create "new residential zones" when carrying out its functions under section 77G. It is our understanding from reviewing the notified documents that the Council under Variation 1 has not created any "new residential zones." This limits the scope of Variation 1 in geographical terms.

9 Variation 1 also includes consequential amendments to other parts of the Proposed Plan, for example, to the Strategic Directions and Transport Chapters. As per the Amendment Act, any consequential amendments must relate only to the incorporation of the MDRS and giving effect to the NPS-UD intensification policies.[11]

What is the permissible scope of submissions on Variation 1?

10 The usual requirement under clause 6 of Schedule 1 to the RMA applies to the making of submissions in the ISPP process.[12] That is, submissions were required to be "on" (or within the ambit of) Variation 1.

11 There is a considerable line of cases setting out the permissible scope of submissions on a variation to a Proposed Plan:[13]

11.1 the general test, contained in *Clearwater* and endorsed in *Motor Machinists*, is:[14]

(a) can the submission reasonably be said to fall within the ambit of the variation / does the submission address the change to the status quo advanced by the variation; and

(b) is there a real risk that persons potentially affected by the submission would be denied an effective opportunity to respond in the variation process.

11.2 whether a submission is "on" a variation will be a question of scale and degree in the particular circumstances;[15]

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[11] RMA, section 80E, as inserted by the Amendment Act.

[12] RMA, clause 95, part 6, schedule 1, as inserted by the Amendment Act.

[13] See *Clearwater Resort Ltd v Christchurch City Council,* High Court Christchurch AP34/02 (14 March 2003); *IHG Queenstown Ltd v Queenstown Lakes District Council,* Environment Court Christchurch C078/08; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290; *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214; *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187; *Patterson Pitts Limited Partnership v Dunedin City Council* [2022] NZEnvC 234.

[14] *Clearwater Resort Ltd v Christchurch City Council,* High Court Christchurch AP34/02 (14 March 2003); *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

[15] *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

11.3 *Option 5 Inc v Marlborough District Council*[16] involved a variation to a district plan to establish a tiered system concentrating commercial activities in certain locations, but did not have the broader purpose of reviewing the boundaries of the relevant commercial zone. The Environment Court, and High Court on appeal, held that a submission seeking to rezone over 50 properties was insufficiently connected to the purpose of the proposed variation, making it impossible for members of the public to anticipate the changes sought and participate in the process;[17]

11.4 similarly, *Re Palmerston North Industrial and Residential Developments Ltd*[18] involved a plan change which rezoned an area for residential development. The plan change land did not include or adjoin the applicant's land, and the applicant's submission sought the rezoning of its land and a rule change. The Environment Court held that no person reading the section 32 analysis of the plan change would have any idea that it was being considered in support of a rezoning or rule change affecting the applicant's land. This emphasised both the limited extent and breadth of the plan change, and the extent to which the applicant's submission went beyond it.[19]

12 Applying this case law to Variation 1, as outlined above, the ambit of Variation 1 encompasses:

12.1 the incorporation of the MDRS into relevant residential zones (i.e. the GRZ in the Proposed Plan as notified); and

12.2 consequential changes to other parts of the Proposed Plan relating to the incorporation of the MDRS and giving effect to the NPS-UD intensification policies.

13 Had the Council also created "new residential zones" then the incorporation of the MDRS into these new areas through the rezoning of those areas to MRZ, at the Council's discretion, would have formed part of the (geographical) scope of Variation 1. It did not.

14 Submissions on Variation 1 may only address the changes advanced by Variation 1. As per the cases cited above, a submission seeking the rezoning of other land to MRZ cannot be considered to be on Variation 1. Such a submission would be out of scope. For this

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16 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

17 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

18 *Re Palmerston North Industrial and Residential Developments Ltd* [2014] NZEnvC 17.

19 *Re Palmerston North Industrial and Residential Developments Ltd* [2014] NZEnvC 17.

reason, the Proposed Plan process is necessarily the vehicle for the hearing of any rezoning requests made by submissions (i.e. provided these submissions were made on the Proposed Plan), rather than Variation 1.

15 There are numerous issues why rezoning requests outside the notified bounds of Variation 1 should not be considered as being within scope of Variation 1:

15.1 natural justice and unfairness issues arise because Variation 1 addresses the intensification of existing residential areas;

15.2 affected parties would be unlikely to have appreciated that additional land might be rezoned MRZ through Variation 1;

15.3 there are no appeal rights in respect of Variation 1, which is logical given the policy intent of the Amendment Act, however the substantive rezoning of land from rural (or other) to residential is not one where appeal rights may be removed without the express direction of Parliament. The retention of appeal rights for the underlying Proposed Plan is in fact clear from clause 36 of schedule 12 to the RMA, as inserted by the Amendment Act.[20]

[20] Which reads:

(1) To avoid doubt, clause 107 of Schedule 1 (which states that there is no right of appeal against decisions made under Part 6 of Schedule 1) only applies to—

(a) the variation to the proposed district plan notified in accordance with clause 33(2)(b) and not the underlying proposed district plan:

(b) the variation to the plan change notified in accordance with clause 34(2) and not the underlying plan change.

(2) Subclause (1) does not affect any other right of appeal.