

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE  
WAIKATO REGION**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO**

**UNDER** the Resource Management Act 1991 (RMA)

**AND**

**IN THE MATTER** of Proposed Variation 3 to the Waikato Proposed  
District Plan (PDP)

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**LEGAL SUBMISSIONS OF COUNSEL FOR WAIKATO DISTRICT COUNCIL  
ON SCOPE OF SUBMISSION SEEKING INCLUSIONARY ZONING AND  
AFFORDABLE HOUSING PROVISIONS**

**Dated 24 March 2023**

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## INTRODUCTION

1. These legal submissions on behalf of Waikato District Council (**Council**) respond to the question of whether the submission seeking to introduce inclusionary zoning and affordable housing methods into Variation 3 to the Waikato Proposed District Plan (**PDP**) is within the scope of Variation 3. We submit that it is not.
2. The Council's position on the scope of inclusionary zoning does not represent the Council's views on the merits of inclusionary zoning and other affordable housing district planning methods. These submissions only relate to the Council's position on the scope of Variation 3. In the fullness of time, the Council may resolve to introduce inclusionary zoning or other affordable housing mechanisms to the PDP, either through a variation or future plan change depending on timing. Council has undertaken preliminary investigations into the potential for inclusionary zoning but has not yet formed a view on whether to proceed with it.
3. We have had the opportunity to review the legal submissions opposing scope from Adare Company Ltd (**Adare**), Kāinga Ora and Rangitahi Ltd. To the extent those submissions relate to all three Waikato councils or specifically to Waikato District Council, we agree with and adopt the comprehensive legal analysis in those legal submissions. We do not intend to repeat that analysis, instead these submissions will cover the following matters:
  - (a) Clarification of the Council's current consideration of financial contributions and response to the memorandum filed on behalf of Pokeno West Ltd & Ors dated 28 February 2023;

- (b) Why the submission seeking inclusionary zoning does not meet the bipartite tests in *Clearwater*<sup>1</sup> and *Motor Machinists*<sup>2</sup> as within the scope of Variation 3,<sup>3</sup>
- (c) The applicability of *Albany North Landowners & Ors v Auckland Council*<sup>4</sup> decision.

## BACKGROUND

- 4. Waikato Community Lands Trust, Bridge Housing Charitable Trust, Waikato Housing Initiative, Habitat for Humanity Central Region Limited and Momentum Waikato lodged a joint submission<sup>5</sup> to Variation 3 seeking the addition of inclusionary zoning provisions (hereafter referred to as the **Requestors**). The Requestors proposal for inclusionary zoning is primarily based on a financial contribution regime, and includes:<sup>6</sup>
  - (a) The introduction of provisions like those developed by Queenstown Lakes District Council as a variation to its Proposed Plan, but with changes suggested by the Requestors.
  - (b) Provisions requiring that people subdividing land or undertaking residential development would contribute land or money to the council or affordable housing trusts as follows:
    - (i) For subdivision of between 1-19 residential lots, a contribution of 5-10% of the sale value of serviced lots.
    - (ii) For subdivision of 21 or more residential lots, the transfer of 5-10% of serviced lots to the Council without compensation.

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<sup>1</sup> *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

<sup>2</sup> *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

<sup>3</sup> Noting that the legal submissions on behalf of Adare primarily address Hamilton City Council's Plan Change 12.

<sup>4</sup> *Albany North Landowners & Ors v Auckland Council* [2017] NZHC 138.

<sup>5</sup> Submitter number 93.

<sup>6</sup> As set out at paragraph 5 of legal submission on behalf of Adare.

- (iii) For subdivision in settlement, rural-residential, resort or special zones, a contribution of 1-4% of the sale value of lots;
  - (iv) For residential development, a contribution of 2% of the sales value of units or \$150/m<sup>2</sup> of the net increase in residential floorspace.
  - (v) A “top up contribution” for development where a contribution was also paid for subdivision.
- (c) If an applicant refuses to make a contribution of land or money, resource consent is required as a discretionary activity.
5. For clarification, we note that the Waikato Housing Initiative is not a separate submitter to Variation 3.
6. The Panel has directed a timetable for the exchange of legal submissions on whether the Requestors proposal is within scope of Variation 3. The Requestors filed submissions in support, and submissions in opposition have been filed by Adare, Kāinga Ora and Rangitahi. The next step in the timetable is for Council to respond.

#### **WAIKATO DISTRICT COUNCIL AND FINANCIAL CONTRIBUTIONS**

7. Unlike Hamilton City Council and Waipā District Council, the Waikato PDP does not include financial contributions and Variation 3 does not introduce financial contributions. Two submitters to Variation 3 have expressly sought the introduction of financial contributions:
- (a) The Requestors to achieve affordable housing outcomes; and
  - (b) Waikato Regional Council who seeks clarification about whether additional provisions are required to protect the health and wellbeing of the Waikato River, including the potential for

financial contributions to address increased infrastructure costs or betterment activities to give effect to Te Ture Whaimana.<sup>7</sup>

8. At the procedural hearing on 24 February 2023, we indicated that Council was considering these submissions and that if any decision was made to include financial contributions as a result of the submissions, that the Council would seek directions from the Hearing Panel to be joined to the joint hearing on financial contributions for Hamilton City Council and Waipā District Council.
9. A memorandum on behalf of Pokeno West Limited & Ors, was subsequently filed with the Hearing Panel on 28 February 2023 asking for an early determination on the scope of submissions to include any financial contributions in Variation 3 (essentially challenging the scope of the Waikato Regional Council submission point given the inclusionary zoning topic was already subject to a timetable). The memorandum stated that the Council was “investigating introducing a financial contribution regime”.<sup>8</sup> With respect, while the Council is legitimately required to respond to the two submissions outlined above, this statement does not accurately reflect the Council’s position. The Council is not investigating a financial contribution regime to be added to the PDP via Variation 3 to give effect to inclusionary zoning/housing affordability.
10. The Council’s response to the two submissions is:
  - (a) Seeking an early determination on the scope of the Requestors’ submission for financial contributions for inclusionary zoning; and
  - (b) Meeting with the Waikato Regional Council and other submitters concerned about whether Variation 3 contains sufficient

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<sup>7</sup> Submitter 42, submission point 11 (page 4). WRC refers to a consistent approach between the three Waikato Councils.

<sup>8</sup> Para 3.

provisions to protect the health and wellbeing of the Waikato River.

11. In relation to the Waikato Regional Council submission, we acknowledge that similar issues of scope may arise if financial contribution provisions were introduced by Council at the section 42A stage. While some scope issues have been identified for early determination, there are a number of remaining scope issues that will be addressed through the substantive hearing process. At this stage the Council proposes to address the Waikato Regional Council submission point through the substantive hearing.<sup>9</sup>
12. Pokeno West Ltd & Ors have not participated in the exchange of submissions on the scope of inclusionary zoning, however we wished to respond to the memorandum and clarify the Council's position on financial contributions. To the extent its memorandum opposes the introduction of financial contributions to give effect to the Requestors' relief, it should be considered by the Hearing Panel along with the other legal submissions in opposition.

**APPLICATION OF THE BIPARTITE TESTS IN *CLEARWATER AND MOTOR MACHINISTS* TO VARIATION 3**

13. Before addressing the question of whether the Requestors submission is 'on' Variation 3, we first adopt the legal submissions on behalf of Adare at paragraphs 6 – 30, that inclusionary zoning provisions are not within the RMA's statutory scheme for an Intensification Planning Instrument (IPI). We agree that Section 80E directs the matters that must and may be included within an IPI and inclusionary zoning and housing affordability provisions are not within those matters.

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<sup>9</sup> Reserving the right to seek further directions on matters of scope or the joint hearing on financial contributions.

**First test – submission addresses the change to the status quo proposed by the Variation**

14. The accepted ways of determining whether a submission meets the first *Clearwater* test is to:
  - (a) consider the section 32 report and whether the submission raises matters that ought to be addressed in that report; or
  - (b) consider whether the management regime for a particular resource is altered by the variation.
  
15. Variation 3 as notified does not include inclusionary zoning or affordable housing provisions or any financial contribution regime. The PDP does not contain a financial contribution 'management regime' that could be altered by Variation 3.
  
16. The section 32 report for Variation 3 does not assess and was not required under the RMA to assess inclusionary zoning or housing affordability for an IPI. The only mention of housing affordability is where the section 32 report refers to other regulatory and non-regulatory documents:
  - (a) Listing the objectives of the NPS-UD – Objective 2 relates to housing affordability;<sup>10</sup>
  - (b) Listing the seven transformational moves for change in the Future Proof Strategy 2022 – move 7 relates to increased housing affordability;<sup>11</sup> and
  - (c) Describing feedback on Tuakau Local Area Blueprint document – feedback included the issue of affordability of housing.<sup>12</sup>

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<sup>10</sup> Section 2.3, page 8.

<sup>11</sup> Section 2.13.1, page 13

<sup>12</sup> Section 2.13.3, page 16

17. When assessing the economic benefits of the changes to the subdivision rules, the section 32 report assessed those changes as “may contribute to housing affordability if it results in an increase in housing supply.”<sup>13</sup>
18. There is no further assessment of affordability in the section 32 report.
19. The submissions on behalf of the Requestors do not identify any references in the section 32 report that support their position that the first *Clearwater* test is met. Instead, they refer to Objectives SD-O4, GRZ-O4, and MRZ1-O1 of the PDP. These three objectives relate to housing choice and typology and are already part of the PDP. They are not proposed to be included or amended by Variation 3. As existing provisions in the PDP, these objectives have (subject to appeals) already been determined to be the most appropriate way to give effect to the purpose of the RMA, and the PDP contains policies and methods to implement and give effect to them.
20. The section 32 report includes no references to financial contributions.
21. In our submission, Variation 3 does not contemplate any provisions, including financial contribution provisions, for inclusionary zoning or housing affordability. The first *Clearwater* test is very clearly not met. At paragraph 37 of the Requestors submissions on scope, it is noted that “the submitters are clear in their view that their submissions are “on” the plan change.” With respect, there is no analysis to support that conclusion.

**Second test – a real risk that people potentially affected by the submission would be denied an effective opportunity to participate**

22. The introduction of a financial contributions regime for inclusionary zoning through the Requestors’ submission would, in our submission, catch people ‘off guard’, and deny effective public participation on the

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<sup>13</sup> Section 7.1, page 47.



matter. Even if the Panel concluded that the submission met the first *Clearwater* test, there is a very real risk that the Waikato community would not be aware of the potential for financial contributions to be added to subdivision and developments within the district, for the purpose of affordable housing.

23. This lack of public awareness is evidenced by only four further submissions received on the Requestors' submission.<sup>14</sup> As set out in the legal submissions on behalf of Adare, by comparison there has been a significant number of submissions and public debate on the introduction of the inclusionary zoning plan change in Queenstown Lakes District.
24. Of the four further submissions received, only one is from a private residential land developer (Rangitahi Limited). We consider it very likely that other land developers, as well as individuals, would wish to have an opportunity to participate in the plan making process for such a significant topic. As set out above, there is nothing in the IPI provisions of the RMA, Variation 3 itself, or the section 32 report that would indicate to a member of the community that inclusionary zoning was 'up for grabs' in Variation 3.
25. The more appropriate way to address inclusionary zoning is through a Council initiated variation or plan change, or alternatively once the PDP is operative (or operative in part) the Requestors will have the opportunity to lodge a private plan change request.

#### **APPLICATION OF ALBANY NORTH LANDOWNERS TO AN IPI**

26. Submissions for the Requestors suggest that *Albany North Landowners* may allow a departure from the strict reading of the *Clearwater* tests. That case related to the bespoke planning process adopted for the Auckland Unitary Plan (**AUP**).

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<sup>14</sup> Rangitahi Limited, Kāinga Ora, Ryman Healthcare Limited, and Retirement Villages Association.

27. We agree with and adopt the submissions on behalf of Adare at paragraphs 35-38. Rather, that departing from the *Clearwater* approach the High Court in *Albany North Landowners* distinguished between a full plan review and a plan change with limited areal reach and found that, in relation to the first *Clearwater* test, the breadth of the AUP's purview meant that every aspect of the status quo in planning terms was 'up for grabs'.
28. The scope of Variation 3 cannot be compared to either a full district plan review or the AUP which comprised a full review of a regional policy statement, regional plan and district plan into one plan. Furthermore, the scope of Variation 3 is limited by the requirements of section 80E of the RMA. It is further limited in terms of its areal reach in the Waikato district to areas that meet the definition of a 'relevant residential zone' under the RMA.
29. We agree with counsel for Adare and Kāinga Ora that the *Clearwater* and *Motor Machinists* tests remain the leading decisions when answering the question of whether the submission is 'on' the notified variation.

#### **CONCLUSIONS AND DIRECTIONS SOUGHT**

30. As we have set out above, the submission from the Requestors is not within the scope of Variation 3. While the Council is not taking a view in these proceedings on the merit of inclusionary zoning, it does consider:
  - (a) Inclusionary zoning was not part of Variation 3, was not contemplated in the section 32 report and is not part of the management regime addressed by Variation 3;
  - (b) Variation 3 has a narrow scope incorporating the MDRS and giving effect to Policy 3 and 4 of the NPS-UD in accordance with section 80E of the RMA, and is coupled with a significant restriction in appeal rights;

- (c) Fairness to other parties and members of the community strongly indicates that the Requestors submission fails to meet the *Clearwater* tests; and
  - (d) The distinction made in *Albany North Landowners* for the bespoke AUP process is not analogous to Variation 3.
31. We respectfully request that the Requestors submission be struck out under section 41D(1)(c).

Signed this 24<sup>th</sup> day of March 2023

Handwritten signatures in blue ink. The signature on the left is 'B A Parham' and the signature on the right is 'J A Gregory'. A horizontal line is drawn across the page, passing through the bottom of the signatures.

B A Parham / J A Gregory  
Counsel for Waikato District Council