BEFORE INDEPENDENT HEARING COMMISSIONERS
MAI I NGĀ KAIKOMIHANA MOTUHAKE

UNDER	the Resource Management Act 1991 ("**RMA**")
AND	
IN THE MATTER OF	submissions on Hearing Stream 2: Residential Zones and Design Guides of the Proposed Wellington City District Plan

LEGAL SUBMISSIONS ON BEHALF OF TE TŪĀPAPA KURA KĀINGA - MINISTRY OF HOUSING AND URBAN DEVELOPMENT

Dated 24 March 2023

Solicitor instructing:
Emma Petersen
Te Tūāpapa Kura Kāinga
Ministry of Housing and Urban Development
PO Box 82
Wellington 6140
P: 0800 646 483
E: emma.petersen@hud.govt.nz

Counsel acting:
Aidan Cameron
BANKSIDE CHAMBERS
Level 22, 88 Shortland St
PO Box 1571, Shortland St
P: +64 9 307 9955
E: aidan@bankside.co.nz

LEGAL SUBMISSIONS ON BEHALF OF TE TŪĀPAPA KURA KĀINGA - MINISTRY OF HOUSING AND URBAN DEVELOPMENT

May it please the Commissioners:

Introduction

1. These submissions are filed in support of the relief sought by Te Tūāpapa Kura Kāinga – Ministry of Housing and Urban Development ("**HUD**") in its submission on the Proposed Wellington City District Plan ("**PDP**"), as it relates to Hearing Stream 2 – Residential Zones and Design Guides.

2. Counsel refers to, but does not repeat, earlier submissions in relation to Hearing Stream 1 regarding the role of HUD and its interests in the PDP process.

3. The issue which is raised in HUD's submission, and which is relevant to this Hearing Stream is the status and extent of the notified Character Precincts, as a qualifying matter under ss 77I and 77L of the RMA.

The National Policy Statement on Urban Development 2020 and the need for a change in mindset

4. The Council's analysis to support the inclusion of Character Precincts, and their extent, is influenced by a philosophical approach which, in my submission, does not sit well with the requirements of the National Policy Statement on Urban Development 2020 ("**NPS-UD**") and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (the "**Amendment Act**").

5. At paragraph 41 of the section 42A report, the reporting officer notes that the various analyses undertaken by Council in preparation of the PDP found that the proposed Character Precincts would lead to a reduction of 1.9% of realisable capacity across the development capacity enabled by the PDP. The argument appears to be that, because the PDP will still provide for 61,750 realisable dwellings against a demand of 31,242 dwellings over the 30 year timeframe assessed, the inclusion of Character Precincts is justified.

6. In my submission, that is a non-sequitur or, in non-Latin terms, a logical fallacy; and is insufficient in terms of both the requirements of ss 32, 77I and 77L of the RMA. It also arrives at a destination from a starting point of "protection first", rather than applying the directive approach mandated by the NPS-UD and the Amendment Act, which requires a change in mindset on the part of district councils.

7. The primary focus of these submissions is directed at the analysis (or lack thereof) to support the proposed extent of the Character Precincts.

A related, but separate legal issue regarding the definition of "site-specific" is addressed in an appendix to these submissions.

Origins of the NPS-UD and Policy 3 – the Productivity Commission's 2015 report

8. The NPS-UD and the Amendment Act have their origins in the Productivity Commission's 2015 report, *Using land for housing* ("**Report**"). Among the Report's findings were that planning frameworks were overly restrictive on density, and that density controls were too blunt, having a negative impact on development capacity, affordability, and innovation. The Report also commented that planning rules and provisions lacked adequate underpinning analysis, resulting in unnecessary regulatory costs for housing development, particularly in the case of heritage and "special character" protections.

Policies 3 and 6 of the NPS-UD

9. As a response to that issue, successive Governments have enacted national policy statements to direct district councils to enable greater development capacity within our urban areas, to address the challenges identified above by the Productivity Commission.

10. Policy 3 of the NPS-UD is directive. It requires district councils to enable building heights and density of urban form:

(a) **as much as possible** in city centre zones, to maximise the benefits of intensification;

(b) in metropolitan centre zones, of **at least** six storeys and otherwise reflecting demand;

(c) of **at least** six storeys within a walkable catchment of:

(i) rapid transit stops; and

(ii) the edge of city and metropolitan centre zones; and

(d) commensurate with the level of commercial activity and community services within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones.

11. Policy 6 of the NPS-UD illustrates, in my submission, the mindset shift that is required by this new planning paradigm. It relevantly provides that:

> **Policy 6:** When making planning decisions that affect urban environments, decision-makers **have particular regard to** the following matters
>
> (a) the planned urban build form anticipated by those RMA planning documents that have given effect to [the NPS-UD];

> (b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:
>
> (i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and
>
> (ii) are not, of themselves, an adverse effect;
>
> […]

12. The requirement to "have particular regard" to the matters in Policy 6 signifies the importance attached to those matters, and the need for them to be carefully considered and weighed in coming to a conclusion when considering submissions on, amongst other things, Character Precincts.[1] In short, the changes that may result from implementation of the NPS-UD may improve the amenity of those who have (to date) been poorly served by urban planning, at the expense of existing amenity.

13. It is also worth noting that the heights enabled through Policy 3 are just the floor (ie "at least"), and not the ceiling.

The Amendment Act, Policy 3 of the NPS-UD and the Medium Density Residential Standards

14. The Amendment Act is similarly directive in its approach, towards enabling increased and varied housing densities, types, and, ultimately, choice.

15. Section 77G(1) of the Amendment Act requires territorial authorities to incorporate the Medium Density Residential Standards ("**MDRS**") in "*every relevant residential zone*". Section 77G(2) requires territorial authorities to give effect to the NPS-UD, and in particular, Policy 3, in *"every residential zone in an urban environment"*.

16. The sole basis upon which a territorial authority may alter the application of the MDRS, or the building height and density requirements under Policy 3 of the NPS-UD to make them less enabling of development, is by identifying matters which qualify, through evidence and a robust cost-benefit analysis, under ss 77I through 77L. Restrictions can only apply *to the extent necessary* to accommodate those matters.[2]

The change of mindset required

---

1 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228; approved in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [67]-[68].

2 RMA, s 77I.

17. This has important consequences for the task before you as Commissioners.

18. In district planning processes prior to the promulgation of the NPS-UD, the starting point was the identification of matters that required protection from inappropriate subdivision, use and development. In order to properly give effect to the strong directive objectives and policies in the NPS-UD, a new approach is required which sets intensification as the starting point.

19. From HUD's perspective, it is critical that you apply that mindset when considering submissions on the Character Precincts, in order to ensure that those directives will be implemented properly.

The information requirements under the Amendment Act

20. In addition, there is an important distinction between the information requirements for existing qualifying matters, being those referred to in ss 77I(a) to (i) that are already operative in a relevant district plan when an IPI is notified; new qualifying matters under s 77I(a) to(i); and "any other matters" under s 77I(j).

21. For existing qualifying matters under ss 77I(a) to (i), a territorial authority may use the alternative process in s 77J for evaluating the extent of, and justification for, the restrictions they impose.[3]

22. For all new qualifying matters, the territorial authority must:[4]

    (a) demonstrate why the territorial authority considers:

        (i) that the area is subject to a qualifying matter;

        (ii) that the qualifying matter is incompatible with the level of development enabled by the MDRS or Policy 3 of the NPS-UD for that area;

    (b) assess the impact that limiting development capacity, building height, or density (as relevant) will have on the provision of development capacity; and

    (c) assess the costs and broader impacts of imposing those limits.

23. "Any other matter" proposed under s 77I(j) is **not** a qualifying matter unless the evaluation report under s 32 also:[5]

    (a) identifies the specific characteristic that makes the level of development provided by the MDRS or as provided for by Policy 3 of the NPS-UD inappropriate in that area;

---

3 RMA, s 77K.
4 RMA, s 77J.
5 RMA, s 77L.

(b) justifies why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and

(c) includes a site-specific analysis that–

(i) identifies the site to which the matter relates; and

(ii) evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and

(iii) evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS or as provided for by Policy 3 of the NPS-UD while managing the specific characteristics.

24. Special character is not a qualifying matter under ss 77I(a) to (i). The Council has sought to incorporate the Character Precincts in reliance upon s 77I(j) as ”any other matter” that makes higher density, as provided for by the MRDS or Policy 3 of the NPS-UD, inappropriate in that area. As such, the requirements in paragraphs 22 and 23 above apply to the consideration of the justification for, and extent of, Character Precincts within the PDP.

25. The important distinction lies in the more intensive analysis and justification required for “any other matters”, including special character under s 77I(j), and the directive nature of the language used. For new qualifying matters under s 77J, the information requirements closely mirror what is required under s 32 of the RMA. A territorial authority must “**demonstrate**” certain matters and “**assess**” the impacts (including costs) of the proposed limits, including on the provision of development capacity.

26. For “any other matters”, and in addition to the requirements under s 77J, the evaluation report referred to in s 32 must also identify the “**specific** characteristic” that makes the level of development provided by the MDRS or Policy 3 inappropriate in the area and “**justif[y]** why that characteristic makes that level of development **inappropriate** in light of the national significance of urban development and the objectives of the NPS-UD”.

27. The use of “inappropriate” provides a clear link into s 32 of the RMA, and in particular, s 32(1)(b) and (2), including the need for a robust cost-benefit analysis. By requiring a territorial authority to justify the inappropriateness of the baseline under the MDRS or Policy 3 due to “any other matter”, counsel submits that Parliament intended to apply a heavier burden on those seeking to depart from that baseline.

28. It is open to this Panel to find that there is insufficient evidence from a s 32 perspective, including as to costs and benefits, to support the proposed limits and to decline to implement them on that basis, or to decline to implement them to the extent sought.[6]

29. That is supported, in my submission, by the reference in s 77L to the "national significance of urban development and the objectives of the NPS-UD". Much like the National Policy Statement for Renewable Electricity Generation further particularises the national significance of the benefits of renewable electricity generation[7] and gives those benefits meaning and purpose, the NPS-UD and its objectives and policies is a further particularisation of the national significance of urban development.[8]

30. Those objectives and policies, and the baseline they set, therefore carry significant weight in any assessment of "inappropriateness" under s 77L. There must be a strong evidence base, supported by robust cost-benefit analysis, before that baseline ought to be shifted by reference to "any other matter", including special character.

The analysis provided by the Council to support the Character Precincts is insufficient to meet the tests in ss 77I and 77L

31. Against that background, HUD's position is that not enough has been done by Council to justify the rollover of the existing areas of special character identified in the operative District Plan; let alone to extend them as is proposed through the s 42A report.

32. The Council has been transparent in its acknowledgement that the notification of the proposed Character Precincts is no more than a rollover of the existing areas protected under the operative District Plan. At paragraph 59 of the section 32 report produced to support the notified extent of the proposed Character Precincts, it said:

> This is fundamentally a continuation of the existing approach of the ODP.

33. However, and as noted above, special character values are not included within the criteria for which standard information requirements apply under s 77J; or, in the case of existing qualifying matters, a

---

6 Derek Nolan (ed) *Environmental and Resource Managelment Law Online* (online looseleaf ed, Lexis Nexis) at [3.11], citing *Meridian Energy Ltd v Central Otago District Council* [2010] NZRMA 477 (HC) at [106]; and *Independent Māori Statutory Board v Auckland Council* [2017] NZHC 356, [2017] NZRMA 195 at [98].

7 National Policy Statement for Renewable Electricity Generation, p 4. See also *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [30], and the reference to the hierarchy of documents "with increasing particularity both as to substantive content and locality". See also, in relation to the NPSFM, *Lindis Catchment Group Inc v Otago Regional Council* [2019] NZEnvC at [473].

8 National Policy Statement for Urban Development: Section 32 Evaluation Report dated March 2020 at [2.4.1].

reduced or "rolled-over" s 32 analysis via the alternative evaluation process in s 77K.

34. Much more was required from the Council, in terms of both identification and (if practicable) quantification of the costs and benefits of the proposed limits, viewed against the national significance of urban development and the objectives of the NPS-UD.

35. Mr Wauchop for HUD says that there are a number of material ways in which the Council's analysis falls short of what is required under s 77L. In summary, they include the Council's failure to acknowledge and/or assess:

    (a) the benefits of intensification in existing urban areas, including social, economic, and environmental benefits, as well as the more efficient use of infrastructure;[9]

    (b) the impact that the proposed limits will have on meaningful development within the Character Precincts both as notified and as proposed to be extended, including a reduction in both feasible and realisable capacity of between c. 800-900 dwellings;[10]

    (c) the evidence from other centres, particularly Auckland, which demonstrate the success of similar previous policy directives for intensification within existing urban areas, through changes in plan rules via the Auckland Unitary Plan process, and the useful analogy that provides for Wellington;[11]

    (d) the high costs as a result of restricting development within the proposed Character Precincts, particularly given the benefits identified in (a) above in well-connected areas that are often highly desirable, vibrant and convenient places to live, like Thorndon, Mt Cook, Mt Victoria and Aro Valley;[12]

    (e) the costs of forcing that development outwards to areas that are less well-suited for urban development, and lack the potential for agglomeration benefits and reductions in congestion costs;[13] and

    (f) the increased time and consenting costs (as well as risk) associated with seeking to develop within a proposed Character Precinct that is subject to a restricted discretionary activity status control for the demolition of buildings.[14]

36. Mr Wauchop concludes that because the analysis provided does not consider all of the above costs and benefits, he does not believe that

---

9 Statement of evidence of Benjamin Wauchop on behalf of HUD at [16]-[21].
10 Statement of evidence of Benjamin Wauchop on behalf of HUD at [24]-[26].
11 Statement of evidence of Benjamin Wauchop on behalf of HUD at [27]-[34].
12 Statement of evidence of Benjamin Wauchop on behalf of HUD at [35]-[38].
13 Statement of evidence of Benjamin Wauchop on behalf of HUD at [41]-[46].
14 Statement of evidence of Benjamin Wauchop on behalf of HUD at [47].

the current extent of proposed Character Precincts has been justified under s 77L(b).[15]

37. Counsel notes that this same conclusion is reached by Mr Scott for Waka Kotahi – the New Zealand Transport Agency and Ms Woodbridge for Kāinga Ora – Homes and Communities. HUD supports the conclusions reached by those witnesses, largely for the same reasons that Mr Wauchop relies upon.

38. Mr Wauchop takes further issue with the recommendation in the s 42A report, apparently without any analysis other than the need to "more logically and practically" locate precinct boundaries, to *extend* the proposed extent of these Character Precincts by a total of 58% from what was notified in the PDP.[16]

39. In my submission, if the analysis to support the current extent of the proposed Character Precincts is insufficient to meet the requirements of s 77L, then an extension of 58% on a purely practical basis must equally fail to meet those requirements.

Conclusion

40. It is for those reasons that HUD, in its submission, sought a more careful and exacting analysis of the justification for the extent of proposed Character Precincts.

41. In its submission, HUD said that if that analysis is undertaken, it is likely that the proposed Character Precincts will be smaller than they were in the notified PDP. HUD continues to hold that position.

42. There is certainly no justification whatsoever, from HUD's perspective, for the substantial proposed extension of those areas.

43. HUD encourages the Commissioners to apply that same careful and exacting analysis in arriving at your recommendations, and submits that if you do, the result will be a reduction in the extent of those areas covered by the proposed limits.

Dated 24 March 2023

Aidan Cameron
Counsel for HUD

15 Statement of evidence of Benjamin Wauchop on behalf of HUD at [48].
16 Statement of evidence of Benjamin Wauchop on behalf of HUD at [50]-[53].

APPENDIX – SUBMISSIONS ON "SITE-SPECIFIC"

The need for a site-specific analysis

1. Section 77L(c) of the RMA requires a site-specific analysis that:

   (a) identifies the site to which the matter relates;

   (b) evaluates the specific characteristics on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and

   (c) evaluates a range of options to achieve the greatest heights and densities permitted by the MDRS or as provided for by Policy 3 of the NPS-UD, while managing the specific characteristics.

2. There is no definition of "site" in the RMA.

3. That being the case, the meaning of the term is to be determined by reference to ordinary principles of statutory interpretation, ie from its text and in light of its purpose and context.[17] Regard is to be had to both immediate and general legislative context.[18] Of relevance too may be the social, commercial, or other objective of the enactment.[19]

4. In my submission, the clear answer to that question is that "site" has its ordinary and plain meaning, ie of land held within an individual title or allotment.

The immediate legal context

5. The immediate legislative context for the inclusion of "site-specific" are the amendments introduced via the Act. These include the extensive references to "site" contained in the MDRS to be incorporated under Schedule 1 of the Act (now Schedule 3A of the RMA).[20] These include:

   (a) that there must be no more than three residential units "**per site**";

   (b) that height in relation to boundary requirements do not apply to existing or proposed internal boundaries "**within a site**");

   (c) references to "**site** area", "**site** boundaries", "corner **sites**", access **sites**, a "developed **site**" and "development **site[s]**".

---

17 Legislation Act 2019, s 10.

18 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

19 Ibid.

20 The Select Committee Report on the Resource Management (Enabling Housing Supply and Other Matters) Bill also makes repeated reference to site, in a manner that is consistent with the interpretation supported by HUD.

6. The immediate legal context points towards an interpretation of "site" as land comprised within a single record of title or allotment.[21]

7. Internally within s 77L, it is also relevant that the provision distinguishes between the "site" to which "any other matter" might relate, and the "geographic area" where intensification may need to be moderated to be compatible with the specific matter.

8. A good illustration of this, in the Auckland context, is the Auckland War Memorial Museum Viewshaft Overlay. The specific characteristics of the site, namely the title or titles upon which the Museum sits, may justify a lesser form of development in a broader geographical area, being the area within which views are available through to the Museum.

The general legal context

9. Such an interpretation would also be consistent with the general legislative context.

10. Clause 3.33(3)(b) of the NPS-UD is, in all material respects, identical to the wording of s 77L(c). Under cl 1.4(3) of the NPS-UD, terms defined in the National Planning Standard issued under s 58E of the RMA and used in the NPS-UD have the meanings in that Standard, unless otherwise specified.

11. The National Planning Standard includes a definition of "site" as follows:

site (for district plans and the district plan component of combined plans)	means: (a) an area of **land** comprised in a single record of title under the Land Transfer Act 2017; or (b) an area of **land** which comprises two or more adjoining legally defined **allotments** in such a way that the **allotments** cannot be dealt with separately without the prior consent of the council; or (c) the **land** comprised in a single **allotment** or balance area on an approved survey plan of **subdivision** for which a separate record of title under the Land Transfer Act 2017 could be issued without further consent of the Council; or (d) despite paragraphs (a) to (c), in the case of **land** subdivided under the Unit Titles Act 1972 or the Unit Titles Act 2010 or a cross lease system, is the whole of the **land** subject to the unit development or cross lease.

12. Given the near-identical framing of s 77L(c) to cl 3.33, it appears obvious that Parliament intended the terms to be interpreted consistently when it passed the Act.

13. In addition, the primary method of implementation of the MDRS (and Policy 3 of the NPS-UD) is via district plans, which must be updated to, inter alia, include the above definition of "site" no later than five years after they came into effect, ie by 3 May 2024.[22]

---

21 Or two or more adjoining allotments, where they are required to be held together and cannot be dealt with separately without the prior consent of the relevant territorial authority.

22 National Planning Standards, 17. Implementation Standard at p 69.

14. An interpretation of "site" in s 77L(c) which aligns with the definition of site in the National Planning Standard, and the use of the term within the MDRS, is entirely consistent with the general legislative context, which promotes efficiency in resource management planning through the use of consistent definitions and terms.[23]

Implications for the Council's analysis

15. This interpretation has important consequences for the analysis undertaken by the Council to determine the extent of its proposed Character Precincts.

16. The analysis undertaken by Boffa Miskell to support the inclusion of proposed Character Precincts was completed in January 2019, some three years before the Act was passed.[24] It is unsurprising, therefore, that the assessment undertaken by Boffa Miskell sought to determine the level of integrity and cohesiveness of character within each of the six areas identified, as opposed to a truly site-specific analysis.

17. While counsel accepts that the analysis was based on the assessment of every individual property within those areas, and their contribution to the character of the immediate and surrounding environment, there is **no** evaluation of the options to achieve the greatest heights and densities within the *area* affected by the existence of special character, while managing the specific characteristics under s 77L(c)(iii), which must be interpreted as the specific characteristics "**of that site**".

18. Again, that is not surprising. At the time of the Boffa Miskell review, there was no need for an evaluation of the options to achieve height and density of an area while managing the specific characteristics of the site which justify a reduction from the baseline. However, what the Council has failed to do is to take that extra step, or to require Boffa Miskell to provide that analysis to support its earlier conclusions by reference to the requirements of the NPS-UD and s 77L(c)(iii), in preparation for this IPI process.

19. The Council's analysis is therefore, arguably, inadequate on that front alone as a matter of law. If the Commissioners find that the analysis does not provide the necessary evaluation of options under s 77L(c)(iii), then the answer is clear: the special character matter relied upon by Council is **not** a qualifying matter for the purposes of the MDRS and Policy 3 of the NPS-UD.

---

23 National Planning Standards, 1. Foundation Standard at p 5.
24 Boffa Miskell, *Pre-1930 Character Area Review*, 23 January 2019.