

**IN THE MATTER OF
AND**

the Resource Management Act 1991

IN THE MATTER OF

Waikato IPIs – Hamilton CC PC12,
Waipā DC PC26 and **Waikato DC
Variation 3.**

RESOURCE MANAGEMENT ACT 1991

DIRECTION #11

INDEPENDENT HEARING PANEL

Purpose: The purpose of Direction #11 is to provide direction on the scope for inclusionary zoning and affordable housing under the Waikato IPIs.

Introduction

1. In submissions, Waikato Community Lands Trust, Waikato Housing Initiative, Habitat for Humanity, Momentum Waikato and Bridge Housing Trust (the Joint Submitters) sought new provisions relating to *Inclusionary Zoning* in the three Waikato plan changes through this IPI process.
2. Waikato Housing Initiative (WHI) also sought the inclusion of provisions relating to *Affordable Housing*.
3. Scope for those matters was challenged by various parties – including the three councils, Kāinga Ora, The Adare Company Limited and Rangitahi Limited (together, the Respondents).
4. Directions for making submissions and responding to those have been set through previous IHP directions and are not repeated here.
5. Mr Gibbons, trustee for Waikato Community Lands Trust and WHI, submitted that separate directions are required on these two matters.

Relevant law

6. For the record we note that there was general agreement that the relevant case authorities on scope are those short-handed as *Clearwater* and *Motor Machinists Ltd.*¹
7. The dual tests set out in these cases were succinctly summarised by counsel for The Adare Company Limited as follows:²

Under the bipartite test in those cases, analysis is required as to whether:

- (a) The submission addresses the change to the status quo advanced by the proposed plan change; and
- (b) There is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

¹ *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003; and *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

² Legal submissions of The Adare Company Limited, 17 March 2023, at [32].

8. Mr Gibbons submitted that *Albany North Landowners*³ provides authority for a less strict adherence to the scope tests established by those two cases. However, having reviewed the *Albany North Landowners* case we agree with the Respondents' legal submissions that the nature of the present plan changes under the IPI process – having a quite specific and narrow purpose - do not support that proposition.
9. The Panel confirms that it intends to apply the 2-limb *Clearwater* test (as summarised at paragraph 7 above) to questions of scope, adopting what Justice Whata characterised in *Albany North Landowners* as taking a realistic workable approach to what was reasonably and fairly raised in submissions.

Scope: Inclusionary Zoning

10. In the interest of brevity we have only summarised the issue in this Direction following comprehensive legal submissions on the question. Those submissions should be consulted for the substantive legal argument.
11. The Joint Submitters contend that inclusionary zoning is “on” the plan changes because, among other reasons:
 - (a) it assists in giving effect to NPSUD Policy 1- well-functioning urban environments – and the IPIs are required to give effect to the NPSUD in its entirety;
 - (b) financial contributions (the implementation objective) are on the table for both PC12 and PC26 (and could be but have not yet been introduced into Variation 3 at this point);
 - (c) the parent plans variously contain objectives promoting housing choice and options; and
 - (d) s.80E(2) of the RMA allows for “related provisions” which include, without limitation, “district-wide matters”.
12. It was also the Joint Submitters' position that cl.99(2) of Schedule 1 of the RMA provides ground for consideration of matters that go beyond submissions and, therefore, it would be untimely to disregard submissions at this early stage.
13. The contrary position, submitted by the Respondents, was that inclusionary zoning was neither “on” the plan changes nor could it be said to satisfy limb 2 of *Clearwater* since not all potentially affected persons would have been aware of the proposal from the notified material and would not have an opportunity to submit on the detail of what might emerge.
14. In short, the Respondents contend that the bespoke and narrow purpose of the IPI, as set out in the RMA Amendment Act, needs to be given substantial weight. It neither invites nor requires giving effect to the entire NPSUD but is specific to implementing the MDRS and policies 3 and 4 of the NPSUD – in addition to the discretion to consider financial contributions and papakāinga housing. Other plan initiatives of the respective councils, either planned or in progress, will address the broader NPSUD issues. In that narrow context, inclusionary zoning is not a related provision under s.80E(1)(b)(iii) RMA. Inclusionary zoning neither directly supports nor is consequential upon the MDRS or NPSUD policies 3 or 4. For similar reason it is submitted that an

³ *Albany North Landowners v Auckland Council* [2016] NZHC 138.

inclusionary zoning financial contribution is unrelated to the purpose and focus of an IPI.

15. The Respondents also noted that the compressed timeframe for the present exercise and the removal of the standard merit appeal step to the Environment Court further supports the need for careful oversight of the scope boundaries. Finally, none of the plan changes or their companion s.32 assessments introduce the option of inclusionary zoning. The Panel was also told that the three councils either have that matter (including affordability) under review or, in Waipā's case, have a plan change 21 in development.
16. The Panel also notes that Objective 2 of cl.6 Schedule 3A RMA (which a territorial authority *must* include in its district plan) appears to have subtly reframed NPSUD Pol 1 - omitting specific reference to price (among other things), and the subordinate policies also make no reference to that matter. For completeness, Objective 2 states:
Objective 2
 - (a) ...
 - (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.

Determination

17. Having carefully considered the wording of the submissions the Joint Submitters made on the plan changes, and the legal submissions filed for the Joint Submitters and Respondents we find that inclusionary zoning financial contributions fails both limbs of *Clearwater*. It falls outside the ambit of the plan changes and their respective s.32 evaluations, and it is not reasonably and fairly raised by or in those notified documents. All potentially affected persons would not have appreciated the prospect and would not have had the opportunity to make submissions on inclusionary zoning.

Scope: Affordable Housing

18. WHI filed a separate submission in relation to PC12 seeking amendments to residential zone objectives, policies and rules relating to integrated affordable housing for those plan changes. It was not a separate submitter on PC 26 or Variation 3.
19. Counsel for WHI points to a number of operative objectives or s.32 report passages referring to "*housing options*", "*housing choice*" or "*housing variety*" that are relied upon for the contention that affordable housing is "on" the respective plan changes.
20. The Respondents disagree and maintain that *affordable housing* is not "on" the respective plan changes for similar reasons to those included in the discussion above in paragraphs 13 -15. In short, the implications of any such policy inclusion were not intended, have not been evaluated, and lie outside of the narrow purpose and requirements of the IPI. The purpose of the RMA Amendment Act is housing supply, and NPSUD policy 1 (which refers to the needs of different households in terms of type, price, and location) is not its prime focus. Instead the focus is on building heights

and densities. We have noted the mandatory Objective 2 in paragraph 16 above.

21. As also noted above, the councils have this matter on their respective plan change radars and will make decisions on that in due course.

Determination

22. Having carefully considered the wording of the submissions the Joint Submitters made on the plan changes and the legal submissions for WHI and the Respondents, we find that affordable housing fails both limbs of *Clearwater*. It falls outside the ambit of the plan changes and their respective s.32 evaluations and is not reasonably and fairly raised by or in those notified documents. All potentially affected persons would not have appreciated the prospect and would not have had the opportunity to make submissions on affordable housing.

Directions:

23. The Panel makes the following directions:
 - [1] The amendments sought by Waikato Community Lands Trust, Waikato Housing Initiative, Habitat for Humanity, Momentum Waikato and Bridge Housing Trust (the Joint Submitters) relating to inclusionary zoning are not in scope of PC12, PC26 and Var 3 and are struck out under s.41D(1)(b) RMA.
 - [2] The amendments sought by Waikato Housing Initiative relating to affordable housing are not in scope of PC12 and are struck out under s.41D(1)(b) RMA.
 - [3] To the extent that the Joint Submitters are also seeking amendments relating to affordable housing, those submissions are not in scope of PC12, PC26 and Var 3 and are struck out under s.41D(1)(b) RMA.
24. Any queries or correspondence related to this Direction should be sent through to the Hearing Coordinator, Steve Rice at steve@riceres.co.nz .



David Hill (Chairperson)
Independent Hearing Panel

11 April 2023