

Before the Independent Hearings Panels

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of Proposed Change 1 to the Wellington Regional Policy Statement (**RPS**) (being both a freshwater planning instrument, and a non-freshwater planning instrument)

And

In the matter of Hearing Stream 4 (Urban Development)

**Legal submissions in reply on behalf of Wellington Regional Council
– Hearing Stream 4**

Date: 26 September 2023



Solicitor on the Record
Contact solicitor

Kerry Anderson
Emma Manohar

kerry.anderson@dlapiper.com
emma.manohar@dlapiper.com

+64 4 474 3255
+64 4 918 3016

Level 4, 20 Customhouse Quay, Wellington 6011
PO Box 2791, Wellington 6140
Tel +64 4 472 6289

MAY IT PLEASE THE PANEL:

INTRODUCTION

- 1 These legal submissions in reply on behalf of the Wellington Regional Council (**GWRC**) have been prepared for the purpose of Hearing Stream 4 (Urban Development) on Proposed Change 1 to the Operative Regional Policy Statement (**Change 1**).
- 2 The legal framework and plan change tests that apply to Change 1 were set out in our submissions of 8 June 2023, for Hearing Stream 1. That framework and those tests apply equally to this hearing stream.
- 3 These submissions address whether the hierarchy of urban development proposed in Policy UD.4 is in accordance with the National Policy Statement on Urban Development 2020 (**NPS-UD**).
- 4 GWRC has filed 2 section 42A reports for this topic and reply evidence from both authors, being:
 - 4.1 Mika Zöllner, and
 - 4.2 Owen Jeffreys.

POLICY UD.4

- 5 The Council proposed a new Policy UD.4 as part of the section 42A report, with further suggested amendments in Ms Zöllner's rebuttal evidence. It includes a prioritisation for urban development within:
 - 5.1 firstly, existing urban zones (with a preference for higher densities) in and adjacent to centres with a range of commercial activities and along existing or planned public transport corridors,

- 5.2 secondly, beyond existing urban zones, where sequenced and planned,
- 5.3 thirdly, unsequenced and unplanned greenfield urban development, where it is well connected with existing urban areas, along existing or planned transport areas, and adding significantly to development capacity, then
- 5.4 finally, in rural areas.

6 For the second and third option, it must be demonstrated that the additional urban zoned land is necessary and the most appropriate option to meet housing and business demand and consideration of existing realisable development capacity within existing urban zones is required (clause (c)).

7 The section 42A report states that:¹

I consider this hierarchy of prioritisation addresses those submissions seeking a clearer and more direct preference for intensification in centres and along transport corridors, and those seeking planned and sequenced development to clearly be preferred over out-of-sequence and rural development. It is also consistent with the NPS-UD, NPS-HPL and NPS-FM, and in fact better demonstrates how the RPS is implementing the NPS-UD in my opinion. Greenfield development can be done compactly and efficiently and is appropriate for some areas, however if there is feasible capacity to meet housing or business demand through intensification this should be explored first.

8 The planning evidence for Somerset raises the following concern with Policy UD.4:²

As proposed, Policy UD.4 (with particular reference to clauses (a) and (b)) is fundamentally flawed. It

¹ Section 42A Hearing Report Hearing Stream 4 dated 4 September 2023– Urban Development at 570]

² Statement of Evidence of Maciej Wiktor Lewandowski on behalf of Somerset Group Holdings Ltd (Submitter 119) at [5.63]

seeks to direct district and regional plans to prioritise urban development based on a proposed hierarchy, with urban development within existing urban areas being the most preferred option, including over urban expansion that is otherwise sequenced and planned, and urban expansion that is unanticipated or out of sequence. Such an approach fails to properly acknowledge, let alone give effect to, the NPS-UD which in my reading seeks to achieve an 'all of the above' approach to providing for development capacity.

- 9 Under section 62(3) of the RMA, a RPS must 'give effect' to the NPS-UD. 'Give effect to' means 'implement'. On the face of it, it is a strong directive, creating a firm obligation on those subject to it. However, the implementation of such a direction will be affected by what it relates to.³ That is, what must be given effect to (e.g. a requirement to give effect to a NPS which is framed in a specific and unqualified way (i.e. which creates an 'environmental bottom line') may, in a practical sense, be more prescriptive than a requirement to give effect to a NPS which is worded at a higher level of abstraction). Given this, the Council is required to ensure that the RPS implements the NPS-UD.
- 10 The suggestion appears to be that Policy UD.4 does not give effect to the NPS-UD, because it is not sufficiently responsive to out of sequence or unanticipated urban development.
- 11 It is accepted that the RPS is required to make some provision for considering unanticipated or out of sequence urban development, as Objective 6(c) of the NPS-UD requires decisions on urban development that affect urban environments to be 'responsive', particularly in relation to proposals that would supply significant development capacity.
- 12 In addition, Policy 8 of the NPS-UD states that:

³ *King Salmon* [2014] NZSC 38, at [77].

Policy 8: Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well-functioning urban environments, even if the development capacity is:

(a) unanticipated by RMA planning documents; or

(b) out-of-sequence with planned land release.

13 Clause 3.8 of the NPS-UD sits in the part of the NPS which sets out a 'non-exhaustive list of things that local authorities must do to give effect to the objectives and policies' of the NPS. It clearly states that nothing in this implementation part of the NPS-UD 'limits the general obligation under the Act to give effect to those objectives and policies'. This suggests that the NPS-UD anticipates that the objectives and policies are key, and the implementation clauses set out ways those objectives and policies can be met. However, the Regional Council is not limited to only doing those things.

14 Clause 3.8 of the NPS-UD states:

3.8 Unanticipated or out-of-sequence developments

(1) This clause applies to a plan change that provides significant development capacity that is not otherwise enabled in a plan or is not in sequence with planned land release.

(2) Every local authority must have particular regard to the development capacity provided by the plan change if that development capacity:

(a) would contribute to a well-functioning urban environment; and

(b) is well-connected along transport corridors; and

(c) meets the criteria set under subclause (3).

(3) Every regional council must include criteria in its regional policy statement for determining what plan changes will be treated, for the purpose of implementing Policy 8, as adding significantly to development capacity.

- 15 To give effect to the NPS-UD, the RPS needs to be 'responsive to' unanticipated or out of sequence urban development 'plan changes that would add significantly to development capacity and contribute to well-functioning urban environments'. It is submitted that to be responsive in the context of the RPS means such development can be responded to and that a possible pathway is provided for such development where it is appropriate – it does not require it to be provided for in all situations or as the first or most appropriate option.
- 16 Given this, it is submitted that Policy UD.4 is responsive to out of sequence or unanticipated urban development – it provides for it as part of the hierarchy, but suggests that such development is 'prioritised' in existing urban zones. Most importantly, it does not prevent it in areas outside of existing urban zones.
- 17 Further, there are wider considerations in the NPS-UD the RPS must be in accordance with. Other provisions of the NPS-UD seek other outcomes than simply being responsive to out of sequence and unanticipated development. For example:
- 17.1 Objective 3 of the NPS-UD seeks that regional policy statements enable people to live in areas of an urban environment which are near centres zones or areas with many employment opportunities, well-served by existing or planned public transport, or where there is high demand for housing.
- 17.2 Objective 6 of the NPS—UD seeks decisions on urban development which are integrated, strategic (and responsive).

17.3 Policy 1 of the NPS-UD seeks planning decisions which contribute to well-functioning urban environments, and Policy 2 seeks that sufficient development capacity is provided.

18 It is submitted that the hierarchy proposed in Policy UD.4 is consistent with these requirements, being integrated and strategic with current and planned urban form, and infrastructure provision, and which will result in a well-functioning urban environment, whilst providing for sufficient development capacity.

CONCLUSION

19 Counsel for Wellington Regional Council will appear at the commencement of Hearing Stream 4 to speak to these submissions if necessary and are available to address any specific legal issues that arise in Hearing Stream 4.

Date: 26 September 2023



.....
K M Anderson / E L Manohar / K H Rogers
Counsel for Wellington Regional Council