Before the Independent Hearings Panel

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

And

In the matter of Plan Change 78: Intensification (**PC78**) to the Auckland Unitary Plan Operative in Part (**AUP**)

Memorandum of counsel on behalf of Auckland Council regarding High Court judgment in *Kāpiti Coast District Council v Waikanae Land Company Limited*

Date: 3 July 2024

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MAY IT PLEASE THE PANEL

1 The Panel has held hearings on a number of PC78 hearing topics, where the ambit of section 80E of the RMA concerning the meaning of an intensification planning instrument has been discussed.

2 On 21 June 2024, the High Court released the reserved judgment of His Honour Justice Johnstone in *Kāpiti Coast District Council v Waikanae Land Company Limited* [2024] NZHC 1654.

3 Counsel for Auckland Council provide this judgment to the Panel as it would to a Court pursuant to Rule 13.11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Date: 3 July 2024

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D K Hartley / A F Buchanan
Counsel for Auckland Council for PC78

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-227
[2024] NZHC 1654

UNDER	The Resource Management Act 1991
IN THE MATTER OF	An appeal against a decision of the Environment Court under s 299 of the Resource Management Act 1991
BETWEEN	KĀPITI COAST DISTRICT COUNCIL Appellant
AND	WAIKANAE LAND COMPANY LIMITED Respondent
AND	ĀTIAWA KI WHAKARONGOTAI CHARITABLE TRUST Section 301 Party
	Cont:/

Hearing:	12 and 13 February 2024
Appearances:	M G Conway, K E Viskovic and S B Hart for Kāpiti Coast District Council M J Slyfield and M R G van Alphen Fyfe for Waikanae Land Company Limited H K Irwin-Easthope and A J Samuels for Ātiawa ki Whakarongotai Charitable Trust
Judgment:	21 June 2024

JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 21 June 2024 at 12.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Simpson Grierson, Wellington
FitzherbertRowe, Palmerston North
Whāia Legal, Wellington

CIV-2023-485-333

UNDER	Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER OF	An application for judicial review
BETWEEN	WAIKANAE LAND COMPANY LIMITED Applicant
AND	KĀPITI COAST DISTRICT COUNCIL Respondent
AND	ĀTIAWA KI WHAKARONGOTAI CHARITABLE TRUST Interested Party

[1] The Resource Management (Enabling Housing Supply and Other Matters) Act 2021 came into force on 21 December 2021. It amended the Resource Management Act 1991. I will refer to the former as the Housing Amendment, and to the latter as the Act.

[2] The Housing Amendment sought "to rapidly accelerate the supply of housing in urban areas where demand for housing is high".[1]

[3] One way in which it sought to do this was by requiring tier 1 territorial authorities, such as the Kāpiti Coast District Council,[2] to undertake plan changes by notifying an "intensification planning instrument" incorporating "medium density residential standards", for consideration in the course of a bespoke "intensification streamlined planning process".[3] While the Act uses the acronyms IPI and MDRS, I will use the terms "Intensification Instrument" and "Density Standards" to aid comprehension.

[4] The Kāpiti Coast District Council notified its Intensification Instrument in August 2022. At the time, two proceedings were before the Environment Court:

(a) an appeal by Waikanae Land Company Limited against the decision of Heritage New Zealand Pouhere Taonga to decline its application for an archaeological authority; and

(b) a direct referral from the Council of the Company's application for a subdivision and land use consent.

[5] The Company's archaeological appeal, and its subdivision and land use consent application, relate to land in its registered ownership at Waikanae (the Subject Land).

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1 Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill (83–1) (select committee report) at 2 [Select Committee report].
2 Resource Management Act 1991, s 2 [the Act].
3 Select Committee report, above n 1, at 3.

[6] The Ātiawa ki Whakarongotai Charitable Trust represents the interests of the Ātiawa ki Whakarongotai iwi. As a proposition of fact, it claims, and the Council accepts, that the Subject Land is a wāhi tapu, forming part of the Kārewarewa urupā.[4]

[7] In light of the Council's stance on that factual proposition, its Intensification Instrument purported to add the Subject Land to the list of wāhi tapu sites set out in sch 9 of its district plan, headed "Sites and Areas of Significance to Māori". If effective in that regard, the Intensification Instrument would not disapply the Density Standards to the Subject Land by preserving the status quo. It would go further, limiting the extent of the Company's previous ability to develop the Subject Land by altering some previously permitted activities to restricted discretionary activities, and others to non-complying activities.

[8] The Environment Court resolved to consider, as a preliminary issue in the proceedings before it, whether the Council was empowered to list the Subject Land as a sch 9 wāhi tapu by way of the Intensification Instrument. The Court found that, in purporting to do so, the Council had acted beyond its powers.[5]

[9] The Council appeals to this Court under s 299 of the Act. The Ātiawa ki Whakarongotai Charitable Trust supports the Council's appeal. The Company says that the Environment Court did not err. And in case the Environment Court should not have adopted the procedure of deciding the matter as a preliminary issue, the Company has brought judicial review proceedings asking this Court to grant relief based on the proposition that the substance of the Environment Court's decision is correct.

A preliminary issue in Environment Court proceedings

[10] Under s 269(1) of the Act, except as expressly provided in the Act, the Environment Court may regulate its own proceedings in such manner as it sees fit.

[11] In the present case, if the Council was empowered to list the Subject Land as a sch 9 wāhi tapu by way of its Intensification Instrument, the merits of the Company's

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4 Waitangi Tribunal *The Kārewarewa Urupā Report* (Wai 2200, 2020).

5 *Waikanae Land Company Ltd v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 56 [Environment Court decision].

subdivision and land use consent application would have changed while the application was before the Environment Court. This is because s 86B(3)(d) of the Act provides that upon its notification, a rule in a proposed plan protecting historic heritage has immediate legal effect. Accordingly, determination of the efficacy of the Council's Intensification Instrument was part and parcel of the Environment Court's task of determining the application before that Court.

[12] However, for the Council, Mr Conway submitted to the effect that because determination of the issue would amount to a finding on the extent to which Intensification Instruments may incorporate new qualifying matters, and because that finding would likely affect other parties and in particular other territorial authorities, it should have been left for determination in proceedings in the Environment Court's declaratory jurisdiction.

[13] In my view, there is no principled basis upon which the Environment Court might have refused to determine the substantive issue now raised on appeal, leaving it for determination in proceedings that might not be brought for some time. It is not unusual that a court of competent jurisdiction is required to determine discrete questions of law relevant to the proceeding of which it is seized. If in doing so the court clarifies the rights and obligations of others, that is generally regarded as assisting the common good. Further, it would likely assist the parties to know in advance the efficacy of the Subject Land's listing as a sch 9 wāhi tapu when arguing the Company's subdivision and land use consent application. On that basis, I consider it well within the Environment Court's jurisdiction to deal with the matter as a preliminary issue arising in the course of the proceedings before it.

The issue on appeal

[14] To explain the more substantive issue for determination, I need to address the provisions introduced by the Housing Amendment in greater detail.

The requirement to incorporate the Density Standards, and to use an Intensification Instrument the first time

[15] Amongst other provisions, the Housing Amendment introduced ss 77G to 77M, headed "Intensification requirements in residential zones". Section 77G(1) required that every relevant residential zone have the Density Standards incorporated into that zone. And s 77G(3) required the Council, when changing its district plan for that purpose for the first time, to use an Intensification Instrument.

[16] "[M]edium density residential standards or MDRS" are defined to mean the requirements, conditions, and permissions set out in sch 3A of the Act.[6] Schedule 3A contains two parts:

(a) pt 1, headed "General", setting out matters of general application; and

(b) pt 2, headed "Density standards", setting out density standards on nine topics: number of residential units per site, building height, height in relation to boundary, setbacks, building coverage, outdoor living space, outlook space, windows to street, and landscaped area.

[17] Clause 6 in pt 1 of sch 3A, headed "Objectives and policies", requires territorial authorities to include certain objectives and policies in their district plans, including:

> *Objective 1*
>
> (a) a well-functioning urban environment that enables all people and communities to provide for their social, economic, and cultural wellbeing, and for their health and safety, now and into the future:
>
> …
>
> *Policy 2*
>
> (b) apply the [Density Standards] across all relevant residential zones in the district plan except in circumstances where a qualifying matter is relevant (including matters of significance such as historic heritage and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga):

6 The Act, s 2.

[18] Section 77H(1), following the Housing Amendment, provided that authorities such as the Council might "enable a greater level of development than provided for by the [Density Standards]":

(a) by "omitting 1 or more of the density standards set out in Part 2 of Schedule 3A"; or

(b) by "including rules that regulate the same effect as a density standard set out in [that Part], but that are more lenient than provided for by the [Density Standards]".

[19] To avoid doubt, s 77H(2) defines "more lenient" to mean that the included rule would permit an activity that the Density Standards would otherwise restrict.

Intensification planning instruments (Intensification Instruments)

[20] Section 73(1A) of the Act provides generally that district plans may be changed in the manner set out in the relevant Part of sch 1. Thus, regular plan changes under pt 1 are prepared, consulted upon, publicly notified and made the subject of submissions, which may require hearing by the local authority concerned, and full inquisitorial hearing upon appeal to the Environment Court.[7]

[21] The Housing Amendment introduced sub-pt 5A of the Act, headed "Intensification planning instruments and intensification streamlined planning process", and pt 6 of sch 1. Section 80D of the Act describes sub-pt 5A and pt 6 of sch 1 as providing "a process for the preparation of an [Intensification Instrument] by a specified territorial authority in order to achieve an expeditious planning process". Amongst other differences, the "intensification streamlined planning process" (ISPP) set out at pt 6 of sch 1 provides for an independent hearings panel to make recommendations on Intensification Instruments.[8] Recommendations that the territorial authority accepts are incorporated into the district plan. Those it rejects are

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7 Refer, sch 1, pt 1 of the Act.
8 Part 6, cls 96–100.

referred to the Minister for the Environment.[9] There is no right of appeal against district plan changes made under pt 6.[10]

[22] Within sub-pt 5A, s 80E relevantly describes Intensification Instruments as follows:

> **80E Meaning of intensification planning instrument**
>
> (1) In this Act, **intensification planning instrument** or **IPI** means a change to a district plan or a variation to a proposed district plan—
>
> (a) that *must*—
>
> (i) *incorporate the MDRS*; and
>
> …
>
> (b) that *may also* amend or *include* the following provisions:
>
> …
>
> (iii) *related provisions*, including objectives, policies, rules, standards, and zones, *that support or are consequential on*—
>
> (A) *the MDRS*; or
>
> … .
>
> (2) In subsection (1)(b)(iii), **related provisions** also includes provisions that relate to any of the following, without limitation:
>
> (a) district-wide matters:
>
> (b) earthworks:
>
> (c) fencing:
>
> (d) infrastructure:
>
> (e) qualifying matters identified in accordance with section 77I … :
>
> (f) storm water management (including permeability and hydraulic neutrality):
>
> (g) subdivision of land.
>
> (emphasis added)

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9 Part 6, cls 101–106.
10 Part 6, cl 107.

[23] As the above emphasis indicates, Intensification Instruments as defined by s 80E(1) are district plan changes, or proposed district plan variations, that:

(a) must incorporate the Density Standards; and

(b) may also include "related provisions" that support or are consequential upon the Density Standards.

[24] To the extent an Intensification Instrument does not do this, it is not an Intensification Instrument. Further, since the "related provisions" referred to in s 80E(1)(b)(iii) also include "qualifying matters identified in accordance with" s 77I, such qualifying matters may also be included within Intensification Instruments, but only so long as they amount to plan changes or variations that support or are consequential upon the Density Standards.

[25] Amongst other things, s 80F imposed time limits for authorities such as the Council to notify their Intensification Instruments. The Council was required to notify its Intensification Instrument on or before 20 August 2022.

Qualifying matters

[26] Section 77I indeed identifies "qualifying matters". It does so, permitting authorities to "qualify" the incorporation of the Density Standards into their plans, by providing as follows:

> **77I Qualifying matters in applying medium density residential standards and policy 3 to relevant residential zones**
>
> A specified territorial authority may make the [Density Standards] and the relevant building height or density requirements under policy 3 less enabling of development in relation to an area within a relevant residential zone only to the extent necessary to accommodate 1 or more of the following qualifying matters that are present:
>
> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:
>
> (b) a matter required in order to give effect to a national policy statement (other than the NPS-UD) or the New Zealand Coastal Policy Statement 2010:

(c) a matter required to give effect to Te Ture Whaimana o Te Awa o Waikato—the Vision and Strategy for the Waikato River:

(d) a matter required to give effect to the Hauraki Gulf Marine Park Act 2000 or the Waitakere Ranges Heritage Area Act 2008:

(e) a matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure:

(f) open space provided for public use, but only in relation to land that is open space:

(g) the need to give effect to a designation or heritage order, but only in relation to land that is subject to the designation or heritage order:

(h) a matter necessary to implement, or to ensure consistency with, iwi participation legislation:

(i) the requirement in the NPS-UD to provide sufficient business land suitable for low density uses to meet expected demand:

(j) any other matter that makes higher density, as provided for by the MDRS or policy 3, inappropriate in an area, but only if section 77L is satisfied.

[27] Referring to s 77I(a), persons such as the Council are required under s 6, when exercising functions and powers under the Act and in relation to managing the use, development, and protection of natural and physical resources, to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga, as one of a number of matters of national importance.

[28] The Company does not dispute that the Council is required when exercising its functions and powers to recognise and provide for the relationship of Māori with wāhi tapu such as an urupā. And in the context of this appeal on a question of law, the Company does not dispute the evidential material available to the Council indicating that the Subject Land forms part of the Kārewarewa urupā.

Summary of issue

[29] In summary, provisions introduced by the Housing Amendment required the Council, by 20 August 2022, to incorporate the Density Standards set out in sch 3A of

the Act, by notifying an Intensification Instrument. The Intensification Instrument had to incorporate the Density Standards, and might also amend the Council's district plan by including "related provisions" such as "qualifying matters" that "support or are consequential on" the Density Standards.

[30] In light of the above, the issue I must determine is this:

> To the extent the Council's Intensification Instrument purported, not merely to preserve the status quo by disapplying the Density Standards to the Subject Land, but to list Subject Land as sch 9 wāhi tapu and in that way to make some previously permitted activities on the Subject Land restricted discretionary activities, and others non-complying activities, was the Council amending its district plan by including a provision that was "consequential on … the [Density Standards]"?

[31] If so, the Council was empowered by s 80E to notify the Intensification Instrument in the form it did. If not, the Intensification Instrument was not within the Council's power. The Intensification Instrument could be effective to disapply the Density Standards in respect of the Subject Land only insofar as it preserved the status quo.

The Environment Court's decision

[32] The Environment Court's decision was that listing the Subject Land as sch 9 wāhi tapu was not "consequential on the [Density Standards]".[11] The Court explained that it found:[12]

> … the purpose of the [Intensification Instrument] process inserted into [the Act] by the [Housing Amendment] was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site [to make permitted activities restricted discretionary, nor non-complying, activities) goes well beyond just making the [Density Standards] and relevant building height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, [the Council's Intensification Instrument] "disenables" or removes the rights which [the Company] presently has under the District Plan

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11 Environment Court decision, above n 5, at [30].
12 At [31].

> to undertake various activities … as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.

[33] As mentioned above, the Court found that the Council amending its district plan in the manner it had purported to do was beyond its powers. The Court concluded by observing that the "Council is, of course, entitled to make a change to the District Plan to include the new Schedule 9 area, using the usual RMA Schedule 1 processes".[13]

The Council's position

[34] For the Council, Mr Conway submitted that the provisions of the Intensification Instrument which listed the Subject Land as sch 9 wāhi tapu are consequential on the Council's obligation to incorporate the Density Standards, because they follow naturally from the Council's obligation to prepare its Intensification Instrument in accordance with pt 2 of the Act, and in particular its obligation under s 6 to recognise and provide for matters of national importance, including wāhi tapu.

[35] Mr Conway noted that:

(a) The Council was required, when changing its district plan, to prepare an evaluation report in accordance with ss 32 and 77J of the Act. Section 32 is the general provision relating to evaluation report requirements, applicable when a district plan change is contemplated.[14] And s 77J sets out additional requirements applicable when a district plan is being changed in response to the duty under s 77G(1) to incorporate the Density Standards into residential zones.

(b) The Council's evaluation report identified Kārewarewa urupā as wāhi tapu situated within a relevant residential zone, for which the district plan afforded no specific protection. The report proceeded to address three options:

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13 At [32].
14 The Act, s 74.

(i) Option 1 — apply the Density Standards but add the urupā (including the Subject Land) to sch 9.

(ii) Option 2 — apply the Density Standards without recognising or providing for the urupā.

(iii) Option 3 — take the urupā into account by providing for lower density development, for example, by maintaining the status quo level of development.

(c) The Council's evaluation report favoured option 1, concluding that "the existence of the urupā is a matter [of national importance] that the Council must recognise and provide for under s 6(e)" as well as s 6(f) of the Act. Whereas neither option 2 nor option 3 would be consistent with the Council's s 6 obligations.

(d) The independent hearings panel appointed in respect of the Council's Intensification Instrument delivered its recommendation report to the Council on 20 July 2023. With one minor difference to the sch 9 wāhi tapu listing of the wāhi tapu site's boundaries, the panel recommended that it be added to the Council's district plan. The Council accepted the panel's recommendation.

[36] Mr Conway submitted that the Environment Court incorrectly interpreted and applied the provisions introduced by the Housing Amendment, treating the latter's purpose as overwriting or constraining the purpose of the Act itself. Further, the Court failed to consider parts of the select committee's report which support a broad interpretation of the qualifying matters that might be included in an Intensification Instrument.

[37] In particular, Mr Conway submitted that:

(a) The Environment Court misinterpreted the effect of s 77I, failing to interpret that provision in a manner consistent with the purpose and

principles of the Act and s 6 in particular, and consistent with s 77J(4)(b), which anticipates new qualifying matters being included in Intensification Instruments.

(b) The Environment Court took too narrow an interpretation of the scope of an Intensification Instrument set out in s 80E. Amendment of a district plan to account for "related provisions" would qualify as "consequential on" the Density Standards "if it follows or is required because of the Council's obligation to incorporate the [Density Standards]". To interpret the phrase "consequential on" the Density Standards more generously than the Court did is the logical result of:

(i) s 80E(2) including qualifying matters as related provisions;

(ii) s 77I; and

(iii) Objective 1 and Policy 2 of the Density Standards, which recognise qualifying matters and incorporate them as part of the Density Standards.

(c) At least one other territorial authority — the Hutt City Council — has approved an Intensification Instrument which restricted previously plan-enabled development, in that case upon identifying flood-prone land. If the Environment Court's approach were correct, the Hutt City Council would be required either to maintain existing permissive rules or to allow intensification under the Density Standards, despite the clear failure of such a step to achieve the purpose of the Act.

(d) The Environment Court failed to consider the Council's ongoing obligation under s 77G(1) to implement the Density Standards, and the potential for an unduly restrictive interpretation of s 77I to constrain future plan changes that would otherwise include new qualifying matters.

[38] As to relief, Mr Conway accepted that, because of the Company's judicial review proceeding, his point about the exercise of the Environment Court's decision to address the efficacy of the Intensification Instrument as a preliminary issue is moot. He submitted it was open to this Court to determine the efficacy issue and to issue declaratory relief.

The Ātiawa ki Whakarongotai Charitable Trust's position

[39] For the Trust, Ms Irwin-Easthope supported the Council's position. In particular, she:

(a) provided an account of the early and more recent history of the Kārewarewa urupā, confirming the iwi's opposition to the Company's proposal to develop the Subject Land;

(b) relied upon on Lord Cooke's judgment in the Privy Council in *McGuire v Hastings District Council*[15], submitting that ss 6 to 8 of the Act amount to "strong directions, to be borne in mind at every stage of the planning process";[16] and

(c) submitted that the Company's interpretation of the Act and the Intensification Instrument process cannot, in the absence of clear Parliamentary intent, be correct, because it would require the Council to ignore the weight of evidence regarding the urupā when engaging with the Intensification Instrument process.

Was the Intensification Instrument's listing of the Subject Land as sch 9 wāhi tapu "consequential on" the Density Standards"?

[40] The first step is to determine the meaning of the phrase "consequential on … the [Density Standards]", as it appears in s 80E(1). Its meaning must be ascertained from the text of s 80E(1) and in light of its purpose and context.[17]

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15 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577.
16 At [21].
17 Legislation Act 2019, s 10.

The text of s 80E

[41] The text of s 80E(1) is at odds with the Council's submission that amendment of a district plan to account for related provisions is consequential on the Density Standards "if it follows or is required because of the Council's obligation to incorporate the [Density Standards]". As Mr Slyfield submitted on behalf of the Company, the Council's submission, in essence, is that the phrase means "consequential on the Council's obligation to incorporate the [Density Standards]", rather than "consequential on the [Density Standards]".

[42] The distinction is subtle. The mere existence of the Density Standards has no effect. The phrase "consequential on the [Density Standards]" implicitly refers to the effect of incorporation of the Density Standards into district plans. Therefore, the appropriate comparison for the purpose of considering Mr Slyfield's point is between:

(a) amendment or inclusion of related provisions consequential on incorporation of the Density Standards; and

(b) amendment or inclusion of related provisions consequential on the Council's obligation to incorporate the Density Standards.

[43] Put in those terms, the distinction may be subtle, but it is has at least some substance. It tends to support interpretation of s 80E(1) so as to favour amendments to district plans which arise directly as a consequence of incorporation of the Density Standards, not indirectly, because the authority considers itself obliged to amend the Density Standards.

[44] As that point shows, the key dispute in this case is about how broadly to interpret the word "consequential". Does s 80E(1) empower territorial authorities to make any residential zone plan change, whether to related provisions such as s 77I or to an unlimited range of "objectives, policies, rules, standards, and zones", that they happen to consider appropriate *while* incorporating the Density Standards? Such changes would be "consequential on" the Density Standards, in the sense of resulting from the obligation to incorporate the Density Standards by notifying an Intensification Instrument. Or does s 80E(1) empower territorial authorities to make

changes to related provisions only so as to moderate the effect of the Density Standards upon the status quo, and not to limit the level of housing development previously permitted? Such changes would be "consequential on" the Density Standards, in the sense of resulting from the impact the Density Standards would otherwise have if incorporated by way of Intensification Instrument.

[45] Resolving that dispute requires recourse to the purpose and context of s 80E.

The context of s 80E

[46] As outlined above, the Act, following its amendment pursuant to the Housing Amendment, provides for the incorporation of Density Standards into district plans in two ways:

(a) first, via the use of Intensification Instruments; and

(b) second, as a matter of ongoing obligation.

[47] The provisions at sub-pt 5A of the Act and at pt 6 of its sch 1, of which s 80E forms part, establish and provide for the first mode of incorporation. Notably:

(a) Under s 80F, territorial authorities such as the Council were required to notify an Intensification Instrument on or before 20 August 2022.

(b) Under s 80G(1), territorial authorities were prohibited from notifying more than one Intensification Instrument, or from "us[ing] the [Intensification Instrument] for any purpose other than the uses specified in section 80E".

(c) And under pt 6 of sch 1, the usual process for plan changes via first instance hearings by authorities and full inquisitorial appeals to the Environment Court was replaced by independent hearing without appeal.

[48] The Intensification Instrument process was accordingly a compulsory, single-use process, which authorities were prohibited from using for purposes other than those specified in s 80E. And it featured the removal of a layer of entitlement on the part of affected persons to appeal.

[49] By contrast, the ongoing obligation to incorporate Density Standards arises under more general provisions appearing elsewhere in the Act: at ss 77G to 77M, under the heading "Intensification requirements in residential zones", and at sch 3A, headed "[Density Standards] to be incorporated by specified territorial authorities". Notably:

(a) Under s 77I, the full text of which is set out at [26] above, authorities may "make the [Density Standards] … less enabling of development in relation to an area … only to the extent necessary to accommodate … qualifying matters" such as:

(i) matters of national importance that decision makers are required to recognise and provide for under s 6; and

(ii) other matters that make higher density, as provided for by the Density Standards, inappropriate in an area, but only if s 77L is satisfied.

(b) And, s 77L limits the scope of those "other matters" by expressly requiring the evaluation report that is required in the course of a plan change to substantiate the basis upon which the level of development under the Density Standards is inappropriate.

[50] Accordingly, under these more general provisions which form part of the context in which s 80E(1) appears, permitted plan changes are not required to be "consequential on … the [Density Standards]". Rather, they are changes that simply "make the [Density Standards] … less enabling of development". And the process for making such changes, in order to fulfil authorities' ongoing obligations in respect of Density Standards, requires implementation via the pt 1, sch 1 process, including full inquisitorial appeal.

The purpose of s 80E

[51] I accept the thrust of Mr Conway's submission that the purpose of the provisions introduced by the Housing Amendment require to be assessed on the basis that they now form part of a larger statutory instrument with its own purpose, expressly stated at s 5, of promoting the sustainable management of natural and physical resources.

[52] However, the intention of the new provisions is clear. As stated at [2] above, it was "to rapidly accelerate the supply of housing in urban areas where demand for housing is high". The provisions were designed to result, promptly and permanently, in the incorporation of a generally more permissive set of density standards applicable to residential zones, subject to recognition by territorial authorities that such standards might require amendment so as to protect natural and physical resources in accordance with the Act's broader purposes.

[53] In line with the above discussion of the two modes of incorporation:

(a) Prompt incorporation would be assured by requiring authorities to notify Intensification Instruments incorporating prescribed Density Standards, subject only to amendments for relevant matters, including qualifying matters, that support or are "consequential on" the Density Standards, using a process for incorporation that avoided the usual degree of appellate oversight.

(b) And permanent incorporation would be assured by requiring authorities to incorporate prescribed Density Standards, albeit those Density Standards might be less enabling of development in relation to an area within a residential zone where qualifying matters justify limiting the effect the Density Standards would otherwise have.

[54] In this way, the new provisions were clearly intended to override the implicit, historic inclination of territorial authorities not to establish district plans which provide sufficiently, in Parliament's view, for more intensive residential housing development. A narrow interpretation of the phrase "consequential on" is consistent with the

intention of the new provisions to effect prompt and discernible change. A broad interpretation of the phrase would have reserved for territorial authorities a discretion to amend the Density Standards being incorporated simply "in response" to the incorporation of the Density Standards.

[55] On this basis, it is apparent that Parliament, if not the individual territorial authorities, considered the purpose of the new provisions to coincide with, rather than override or constrain, the Act's purpose.

Conclusion on meaning of s 80E(1)

[56] In my view, it is appropriate in light of the relevant text of s 80E(1), its purpose and context, to interpret it to mean that territorial authorities were required to notify Intensification Instruments which changed district plans:

(a) by incorporating the Density Standards; and

(b) by amending existing provisions or including new provisions that:

(i) support the Density Standards; or

(ii) are "consequential on" the Density Standards — using that phrase in the sense that requires such amendments or inclusions strictly to be such as to moderate the effect upon the status quo that the Density Standards would otherwise have, not to limit the level of development previously permitted.

[57] To interpret s 80E(1) otherwise would undermine its purpose, by permitting territorial authorities to take the opportunity of notifying Intensification Instruments which not only did not incorporate the Density Standards in certain respects, but which were intended to undermine housing intensification.

[58] In forming this view, I do not accept Mr Conway's submission that a generous interpretation of "consequential on" is the required result of ss 80E(2) and 77I, and

Objective 1 and Policy 2, which form part of the Density Standards set out in cl 6, sch 3A of the Act:

(a) The inclusion via s 80E(2) of a broad range of matters as "related provisions" which may be amended or included, so long as they "support or are consequential on" the Density Standards, only serves to confirm the importance of the latter phrase being interpreted so as to give effect to the apparent purpose of s 80E(1).

(b) Section 77I assists to establish a broad entitlement to amend the Density Standards, by way of regular pt 1, sch 1 district plan change, following their incorporation via Intensification Instrument. Making the Density Standards "less enabling" under s 77I may extend, depending on the force of the consideration in question, to post-Intensification Instrument changes that make the Density Standards not enabling at all. And further, s 77I lends to the definition of related provisions that may be amended or included by Intensification Instrument. But it does not address the issue of what amendments or inclusions are "consequential on" the Density Standards, except to the extent its positioning as part of ss 77G to 77M supports the subtle distinction described at [41] to [44] above.

(c) Including Objective 1 and (in particular) Policy 2, as part of the Density Standards for incorporation by way of an Intensification Instrument under s 80E(1)(a)(i) does serve to confirm that authorities may decline to apply Density Standards where a qualifying matter is relevant. But it does not go further, to empower authorities to amend or include provisions that limit the level of development previously permitted prior to incorporation of the Density Standards.

[59] And I do not accept that the Environment Court failed to consider the Council's ongoing obligation under s 77G(1) to implement the Density Standards. As indicated above, proper interpretation of s 80E(1) does not require a narrow interpretation of s 77I. Indeed, the Environment Court expressly contemplated the possibility of

regular plan change under pt 1 of sch 1, implicitly approving a broad interpretation of s 77I.

[60] I note that my interpretation of s 80E(1) overcomes Mr Conway's concern that other territorial authorities might have been required to allow intensification, by incorporating the Density Standards, despite that being inappropriate in light of a qualifying matter. Those authorities were not required to allow intensification: like the Council, they could instead have maintained the status quo. And further, the ongoing obligation under s 77G(1) to implement the Density Standards subject to a broadly interpreted s 77I overcomes the concern that territorial authorities might be required to maintain permissive rules despite identifying new qualifying matters.

The listing of the Subject Land as sch 9 wāhi tapu

[61] It follows from the meaning of s 80E(1), as I interpret it, that the Council's use of its Intensification Instrument to list the Subject Land in sch 9 involved the inclusion of a related provision that, in terms of s 80E(1), neither supported nor was "consequential on" the Density Standards. The Council's approach was instead a consequence of its view of its wider obligations under s 6. As the Company accepts, those obligations are matters the Council may seek to address by way of regular plan change under pt 1 of sch 1 of the Act.

[62] I note in this connection that I do not consider there to be particular significance for present purposes in the Council's evaluation report and the independent hearing panel's report, and their conclusions that listing the Subject Land as sch 9 wāhi tapu would be consistent with the Council's obligations under s 6, whereas maintaining the status quo would not. Neither report grapples adequately with the meaning of the phrase "consequential on" the Density Standards as it appears in s 80E(1), as illustrated by the context and purpose of that provision and the Act as a whole.

[63] Finally, I observe that I disagree with Ms Irwin-Easthope's submission that the interpretation I am adopting would have required the Council to ignore the weight of evidence regarding the urupā when engaging with the Intensification Instrument process. To the contrary, the Council was required to take its view of the evidence regarding the urupā into account when engaging with the Intensification Instrument

process. Had it done so, staying within the bounds of its powers to include provisions consequential upon the Density Standards, it would have notified provisions that disapplied the Density Standards in respect of the Subject Land, leaving the status quo to be addressed when reasonably practicable by way of pt 1, sch 1 plan change.

Result

[64] Accordingly, I restate and answer the questions of law stated in the Council's notice of appeal, as follows:

(a) Could the provisions in the Council's Intensification Instrument that provided for the Subject Land to be added to sch 9 "Sites and Areas of Significance to Māori" of its District Plan lawfully be included in an Intensification Instrument under the Act?

No.

(b) Could such provisions lawfully be included in a proposed plan change under pt 1 of sch 1 of the Act?

Yes, leaving the merits of the plan change for determination in accordance with the process, including of appellate review, set out in pt1 of sch 1.

(c) Did the Environment Court err procedurally, by considering the lawfulness of the Council's decision to add the Subject Land to sch 9 by way of its Intensification Instrument as a preliminary question of law in the context of an application for resource consent, rather than requiring that this question be raised in an application for a declaration?

No.

[65] The appeal is dismissed.

[66] Despite the Environment Court's decision of 30 March 2023, finding the Council's Intensification Instrument in respect of the Subject Land to be beyond the Council's powers, the Council's independent hearings panel proceeded on 20 July 2023 to recommend adoption of that aspect of the Intensification Instrument, and the Council purported to do so.

[67] In those circumstances, I consider remedies in judicial review to be justified, notwithstanding the above questions on appeal being answered in line with the Environment Court's decision.

[68] Accordingly, I declare that the listing of the Subject Land in sch 9 of the Council's district plan by way of its Intensification Instrument was beyond the Council's powers under s 80E(1). I make an order quashing the listing.

[69] The Council is to meet the Company's costs in respect of the appeal and the judicial review proceedings, assessed on a 2B basis, with the appearance of second counsel certified.

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Johnstone J