ADDENDUM TO THE S42A REPORT FOR VARIATION HEARING: "DISTRICT WIDE, AREA SPECIFIC AND QUALIFYING MATTERS"

DATE:	28 April 2023
HEARING:	District Wide, Area Specific and Qualifying Matters
HEARING DATE:	9-11 May 2023
PREPARED BY:	**Jessica Tuilaepa – Senior Policy Planner**

Introduction

The purpose of this report is to provide a written update of changes made to the section 42A report for the District Wide, Area Specific and Qualifying Matters since it was published on 6 April 2023.

Changes, Reasons and Submitters Affected

Section 10 of the s42A report published on 6 April 2023 discussed submissions received in relation to Historic Heritage and Notable Trees.

Submitters Cheryl Morrall, and Sam and Denise Carrick requested that the historic heritage of 18 Edward Street, Prebbleton and 14 William Street, Lincoln (respectively) be recognised in the PDP and have sought amendments to the Heritage Item Overlay, Heritage Setting Overlay and HHSCHED2, thus resulting in the application of a qualifying matter over these. In the original s42a report I recommended the relevant submission points[1] be accepted as I agreed with the conclusion of Dr McEwan that both properties meet the historic heritage criteria of HH-SCHED1.

To date, I still consider that both properties are worthy of heritage protection. However, due to recent case law and a subsequent legal opinion (**Appendix A** to this addendum), it appears that accepting the submission points would not be legal as it would be ultra vires to utilise the IPI process to apply a qualifying matter to these sites. Such a change should instead be undertaken by via Schedule 1 process. I therefore recommend these submission points be rejected and I have amended the s42a report accordingly.

Changes are reflected using an underline or a strikethrough.

[1] V1-0016.001, 002, 003 Cheryl Morrall V1-0063.001 and 002 Sam and Denise Carrick

The affected pages are:

- pages 38,39, 41, 45, 54, 71-73 of the s42A report as published on 6 April 2023.
- Insert new Appendix 4 Case Law and Legal Opinion.

Analysis

10.3 Cheryl Morrall[73] requests that the historic heritage of 18 Edward Street, Prebbleton be recognised in the PDP and seeks amendments to the Heritage item Overlay, Heritage Setting overlay and HH-SCHED2. The submitter seeks to protect the dwelling which is of historical significance to Prebbleton due to its age and architectural style.

Figure 1 Former Kane/Hazelhurst Cottage 2022

10.4 ~~I recommend these submission points are accepted for the following reasons~~ I consider this property would be a suitable candidate to be listed in the District Plan for the following reason:

10.4.1 Heritage expert, Dr Ann McEwan advises that the building likely dates c1876 and that the dwelling is a well-preserved example of the architectural style described as 'colonial vernacular'(**Appendix 3**).

10.4.2 Dr McEwan concludes she is in general agreement with the submitter that the house is an early Canterbury settler house, retaining an interesting character entirely of its own and meets the historic heritage criteria of HH-SCHED1.

10.5 Sam and Denise Carrick[74] request that the historic heritage of 14 William Street, Lincoln be recognised in the PDP and seeks amendments to the Heritage item Overlay, Heritage Setting overlay and HH-SCHED2. The submitter seeks to protect the dwelling which is of historical significance to Lincoln due to its age and architectural style.

Figure 2 Former Watson/McPherson House - 18 William Street Lincoln circa 2022

[73] V1-0016.001, 002, 003 Cheryl Morrall
[74] V1-0063.001 and 002 Sam and Denise Carrick

10.6 ~~I recommend these submission points are accepted for the following reasons~~ I consider this property would be a suitable candidate to be listed in the District Plan for the following reason:

10.6.1 Heritage expert, Dr McEwan advises the building likely dates c1865/66 and that the dwelling is an example of the architectural style described as 'mid-Victorian vernacular that retains a good level of authenticity'.

10.6.2 Dr McEwan concludes she is in general agreement with the submitter that the house is an early Canterbury settler house, retaining an interesting character entirely of its own and meets the historic heritage criteria of HH-SCHED1.

10.7 Whilst I consider that both properties have historical heritage value worthy of plan protection, due to recent case law (**Appendix D**) regarding the application of existing qualifying matters over new sites to restrict medium density development, the question of if the Variation process can be used to amend the heritage provisions in the plan by including additional heritage items. In response Council has obtained a legal opinion from Counsel to determine the legality in applying a heritage protection to these sites through Variation 1. The legal opinion (**Appendix D**) advises that it would be ultra vires to utilise the ISPP to restrict MDRS from applying to the sites.

10.8 A report has been prepared by Dr Ann McEwan, commissioned by Council, to assess the risk to heritage values in Lincoln, Prebbleton and Rolleston if the intensification of sites provided for by the MDRS takes place on properties adjacent to scheduled heritage items. The report addresses sites that are adjacent to 19 specified heritage items that are scheduled in the PDP (**Appendix 3**). Dr McEwan concluded the MDRS appears to pose little risk to the heritage values of the specified heritage items in Prebbleton, Lincoln and Rolleston. The setting of each scheduled item has been mapped to protect the specified historic heritage resource from inappropriate subdivision, use and development; therefore activity beyond the extent of setting should have minimal heritage impacts, notwithstanding that it will alter the appearance of the wider context.

10.9 In addition to requesting 14 Williams Street become a listed heritage item in the PDP, Sam and Denise Carrick[75] seek additional protection to limit the height of buildings adjoining the property to be 8m and additional provisions to ensure development on adjacent parcels is sympathetic to 14 William Street's setting. LDHS[76] seek non-specific amendments to provisions to prevent intensive development on sites bordering listed heritage properties, in order to preserve their aspects and outlook. As a Tier 1 Council, SDC must apply the MDRS to those townships that meet the specified criteria and that includes the mandated height for properties in the MRZ, except where a qualifying matter applies. I recommend these submission points[77] be rejected.

[75] V1-0063.003 and 004 Sam and Denise Carrick
[76] V1-0062.001 LDHS
[77] V1-0063.003 and 004 Sam and Denise Carrick and V1-0062.001 LDHS

Recommendation ~~and amendments~~

10.14 I recommend, for the reasons given above, that the Hearings Panel retain the heritage overlays and schedules as notified

~~a) Amend the Heritage Item overlay, Heritage Setting Overlay and HH-SCHED2 to include 14 William Street, Lincoln and 18 Edward Street, Prebbleton as new Historic Heritage Items.~~

~~10.15 The amendments recommended for new Heritage Items are set out in a consolidated manner in **Appendix 2**.~~

10.16 It is recommended that submissions and further submissions are either accepted, are accepted in part or rejected as shown in **Appendix 1**.

11. Area Specific Matters

Introduction

11.1 This section responds to the submission points relating to Area Specific Matters in MRZ and GRUZ.

Matters of Discretion

Submissions

11.2 Five submission points were received in relation to this subtopic.

Submitter ID	Submitter Name	Submission Point	Plan Reference	Position	Decision Requested
V1-0051	HNZ	005	RESZ-MAT1	Support	Not specified
V1-0051	HNZ	007	RESZ-MAT3	Support	Not specified
V1-0051	HNZ	008	RESZ-MAT5	Support	Not specified
V1-0051	HNZ	009	RESZ-MAT6	Support	Not specified
V1-0051	HNZ	006	RESZ-MAT8	Support	Not specified

Analysis

11.3 HNZ[82] supports the matters of discretion that are applicable when compliance with MRZ-REQ2, MRZ-REQ2, MRZ-REQ4 and MRZ-REQ6 is not achieved. These matters require consideration of the effects on, and/or seek to protect identified heritage items and settings, and sites and areas of significance to Māori. I recommend these submission points be accepted.

Recommendation

11.4 I recommend, for the reasons given above, that the Hearings Panel retain RESZ-MAT1, RESZ-MAT3, RESZ-MAT5, RESZ-MAT6 and RESZ-MAT8 as notified.

11.5 It is recommended that submissions and further submissions are either accepted, are accepted in part or rejected as shown in **Appendix 1**.

[82] V1-0051.005, 006, 007, 008 and 009 HNZ

Appendix 1: Table of Submission Points

Submitter ID	Submitter Name	Submission Point	Plan Reference	Position	Decision Requested	Recommendation	Section of Report
V1-0010	Woolworths	001	SD-UFD-O1	Support	Retain as notified	Accept	8
V1-0011	Helen and Tom Fraser	002	GRUZ-P2	Support	Retain as notified.	Reject	11
V1-0011	Helen and Tom Fraser	003	GRUZ-P7	Support	Retain as notified	Reject	11
V1-0016	Cheryl Morrall	001	HH-SCHED2	Oppose In Part	Amend HH-SCHED2, Mapping-Heritage Item Overlay and Mapping-Heritage Setting, to include 18 Edward Street, Prebbleton	~~Accept~~Reject	10
V1-0016	Cheryl Morrall	002	HPW30	Support In Part	Retain Heritage Item Overlay/setting as qualifying matters	Accept	10
V1-0016	Cheryl Morrall	003	Heritage Item Overlay	Support In Part	Insert 18 Edwards Street, Prebbleton HH item Overlay/Setting in the Plan, including consequential amendments (including HH-SCHED2 and mapping.	~~Accept~~Reject	10
V1-0016	Cheryl Morrall	004	Heritage Setting Overlay	Support In Part	Insert 18 Edwards Street, Prebbleton HH item Overlay/Setting in the Plan, including consequential amendments (including HH-SCHED2 and mapping.	~~Accept~~Reject	10
V1-0018	Aaron McGlinchy	003	HPW30	Oppose	That additional qualifying matters be included to limit the extent of medium density development in Selwyn, such as excluding houses over 100 years old	Reject	7
V1-0077	*Ryman*	*FS017*	*HPW30*	*Oppose*	*Disallow the submission*	*Accept*	*7*
V1-0079	*RVA*	*FS017*	*HPW30*	*Oppose*	*Disallow the submission*	*Accept*	*7*
V1-0102	*CSI*	*FS362*	*HPW30*	*Oppose*	*Reject*	*Accept*	*7*
V1-0103	*CGPL*	*FS362*	*HPW30*	*Oppose*	*Reject*	*Accept*	*7*
V1-0114	*CSI and RWRL*	*FS362*	*HPW30*	*Oppose*	*Reject*	*Accept*	*7*
V1-0115	*RIDL*	*FS362*	*HPW30*	*Oppose*	*Reject*	*Accept*	*7*
V1-0018	Aaron McGlinchy	005	HPW30	Oppose	That additional qualifying matters be included to limit the extent of medium density development	Reject	7

Submitter ID	Submitter Name	Submission Point	Plan Reference	Position	Decision Requested	Recommendation	Section of Report
V1-0079	*RVA*	*FS012*	*Heritage Setting Overlay*	*Oppose*	*Disallow the submission*	*Accept*	*10*
V1-0113	*Kāinga Ora*	*FS012*	*Heritage Setting Overlay*	*Oppose*	*Disallow*	*Accept*	*10*
V1-0063	Sam & Denise Carrick	001	HH-SCHED2	Support In Part	Add 14 William Street Lincoln to Historic Heritage Schedule and any consequential changes.	~~Accept~~Reject	10
V1-0063	Sam & Denise Carrick	002	Heritage Setting Overlay	Support In Part	Add 14 William Street Lincoln to Historic Heritage Schedule and any consequential changes.	~~Accept~~Reject	10
V1-0063	Sam & Denise Carrick	003	New	Support	Add a provision to limit the height of buildings on land parcels adjacent to 14 William Street Lincoln to 8m (2 stories).	Reject	10
V1-0063	Sam & Denise Carrick	004	New	Support	Add a provision to ensure development on adjacent land parcels are sympathetic to the heritage setting in terms of visual appearance and location on the site to maximise the sun available year-round to dry the exterior of 14 William Street Lincoln.	Reject	10
V1-0063	Sam & Denise Carrick	005	Heritage Item Overlay	Support In Part	Add 14 William Street Lincoln to Historic Heritage Schedule and any consequential changes.	~~Accept~~Reject	10
V1-0065	CIAL	001	HPW30	Support	Retain the noise contour as a qualifying matter.	Accept	7
V1-0053	*Four Stars and Gould*	*FS002*	*HPW30*	*Oppose*	*Removal of the 50 DBA Ldn Contour as a qualifying matter from the Proposed District Plan; and* *Any other relief that is consistent with, and gives effect to the relief sought by Gould Developments in its original submission.*	*Reject*	*7*
V1-0100	*NZDF*	*FS006*	*HPW30*	*Support*	*Retain the noise contour as a qualifying matter.*	*Accept*	*7*
V1-0113	*Kāinga Ora*	*FS001*	*HPW30*	*Oppose*	*Disallow*	*Reject*	*7*
V1-0065	CIAL	002	HPW30	Support In Part	Explicitly recognise the noise contour as a qualifying matter.	Accept	7
V1-0053	*Four Stars and Gould*	*FS003*	*HPW30*	*Oppose*	*Removal of the 50 DBA Ldn Contour as a qualifying matter from the Proposed District Plan; and*	*Reject*	*7*

Planning Maps

~~Planning Map Amendments~~	
~~Heritage Setting Overlay~~	~~Amend Heritage Setting Overlay to include all of:~~ ~~H432 14 William Street Lincoln (Lot 2 DP 29468)~~[101] ~~H433 18 Edward Street, Prebbleton (Lot 1 Deposited Plan 24134)~~[102]
~~Heritage item Overlay~~	~~Amend Heritage Item Overlay to include:~~ ~~H432 14 William Street Lincoln (Lot 2 DP 29468)~~[103] ~~H433 18 Edward Street, Prebbleton (Lot 1 Deposited Plan 24134)~~[104]

[101] ~~V1-0063.001 and 002 Sam and Denise Carrick~~
[102] ~~V1-0016.001, 002, 003 Cheryl Morrall~~
[103] ~~V1-0063.001 and 002 Sam and Denise Carrick~~
[104] ~~V1-0016.001, 002, 003 Cheryl Morrall~~

Appendix 3: Supporting Technical Reports

Appendix 4

Case Law and Legal Opinion

IN THE ENVIRONMENT COURT
AT WELLINGTON

I TE KŌTI TAIAO O AOTEAROA
KI TE WHANGANUI-A-TARA

Decision No. [2023] NZEnvC 056

IN THE MATTER	of an appeal under s 58 of the Heritage New Zealand Pouhere Taonga Act 2014 and an application under s 87G of the Resource Management Act 1991
BETWEEN	WAIKANAE LAND COMPANY LIMITED (ENV-2021-WLG-000034) (ENV-2022-WLG-000014) Appellant/ Applicant
AND	HERITAGE NEW ZEALAND POUHERE TAONGA Respondent
AND	KAPITI COAST DISTRICT COUNCIL Consent Authority
AND	ĀTIAWA KI WHAKARONGOTAI CHARITABLE TRUST Section 274 Party

Court:	Environment Judge B P Dwyer Environment Commissioner D J Bunting
Hearing:	In Wellington on 30 January 2023
Last case event:	Memorandum received 8 March 2023
Appearances:	M Slyfield and M van Alphen Fyfe for Waikanae Land Company Ltd Appearance by Heritage New Zealand Pouhere Taonga excused M Conway and S Hart for Kapiti Coast District Council H Irwin-Easthope and A Samuels for Ātiawa ki Whakarongotai Charitable Trust

Date of Decision: 30 March 2023

Date of Issue: 30 March 2023

DECISION OF THE ENVIRONMENT COURT ON PRELIMINARY QUESTION OF LAW

A: Inclusion of Site in Schedule 9 of District Plan pursuant to PC2 determined to be ultra vires

B: Costs reserved

REASONS

Introduction

[1] This decision arises out of two proceedings before the Court relating to a proposal by Waikanae Land Company Limited (WLC) which seeks to develop five new residential lots on a 3,902m^2 parcel of land on the southwestern side of Barrett Drive, Waikanae Beach (the Site). The proposal requires two different statutory consents:

- Firstly, an archaeological authority. An application for an authority was declined by Heritage New Zealand Pouhere Taonga (HNZ) and appealed by WLC to the Court on 14 October 2021. HNZ took no position on the question at issue in this preliminary matter, agreed to abide the Court's decision and its participation was excused;

- Secondly, a subdivision and land use consent (non-complying activity) for various aspects of the proposal. The application for this consent has come before the Court by way of direct referral from Kapiti Coast District Council (the Council) enabling it to "catch up" with the appeal

on the Heritage matter and have the two determined together. The direct referral application was filed on 13 June 2022.

[2] It is immediately apparent on reading the various documents filed in the Court in connection with both proceedings that there is a substantive and seemingly determinative factual matter at issue between WLC and the other parties, namely whether or not the Site is wāhi tapu being part of an urupa known as Karewarewa. HNZ, the Council and s 274 party Ātiawa Ki Whakarongotai Charitable Trust (Ātiawa) all contend that the Site is wāhi tapu. WLC contends that it is not a part of the urupa. Who is correct in that regard will be decided by the Court in due course after hearing all the relevant evidence.

The Legal Issue

[3] On 15 December 2022 counsel for WLC filed a memorandum regarding a legal issue arising in these proceedings concerning what is known as Plan Change 2 (PC2) to the Council's Operative District Plan 2021 (the District Plan) and how PC2 might impact on the direct referral. The memorandum identified the issue in the following terms:

> **The factual and evidential context**
>
> 3. The legal issue concerns proposed Plan Change 2 (**PC2**) by the Kapiti Coast District Council (**Council**).
>
> 4. PC2 is an intensification planning instrument (**IPI**), notified in August 2022. It includes a proposal to list the site that is the subject of these proceedings (and an area of land around the site) as a new wāhi tapu area. Council has included this in PC2 as a new qualifying matter.
>
> ...
>
> 5. The new wāhi tapu listing ostensibly protects historic heritage, and therefore has immediate legal effect for the purposes of WLC's consent application. It does not change the activity status of WLC's proposal, but it triggers the application of additional policies that relate to protection of historic heritage. These policies have been addressed in the planning evidence already filed.
>
> 6. WLC's planner, Mr Thomas, and Council's planner, Ms Rydon, reach different conclusions regarding the application of the relevant heritage policies: in blunt terms Mr Thomas does not consider WLC's proposal is contrary to the policies, and Ms Rydon considers WLC's proposal is

contrary to the policies.

The legal issue WLC will pursue

7. WLC will contend that the new wāhi tapu listing cannot be introduced under an IPI. There is a limited statutory power to introduce 'new qualifying matters': the power can only be used to make medium density residential standards (MDRS) "less enabling of development". WLC will submit the new wāhi tapu listing goes far beyond making MDRS less enabling. The listing disables the underlying residential zoning of the land. WLC will submit that the correct process for introducing a change of this sort would be a regular plan change, rather than an IPI.

8. Given the Court's broad declaratory jurisdiction, WLC will seek a ruling that this aspect of PC2 exceeds Council's statutory power. WLC respectfully submits it is open to the Court to make a ruling of this sort within the context of the consent application; and furthermore that this is necessary, as it will determine whether the Court does or does not need to resolve the contested planning evidence described above. (If the Court concludes this aspect of PC2 exceeds Council's power, it will become unnecessary for the Court to determine which of Mr Thomas or Ms Rydon has correctly applied the heritage policies that are triggered by the PC2 listing.)

(footnotes omitted)

[4] There was some debate between counsel as to the Court's capacity to determine this legal issue. These proceedings are validly before the Court through (insofar as Resource Management Act 1991 (RMA) issues are concerned) the direct referral procedure. Counsel for WLC has identified what he contends to be a legal issue relating to the potential impact of PC2 on the direct referral and has suggested to the Court that it might determine that issue on a preliminary basis rather than at the time of hearing the merits of the case. It is clearly within the Court's power pursuant to s 269(1) to decide when it might consider that legal issue.

[5] A suggestion was made by counsel that the appropriate vehicle to consider the issue was by way of declaration pursuant to ss 310 and 311 RMA. We do not consider that process to be necessary. Sections 310 and 311 create an originating jurisdiction where a range of matters can be brought before the Court for declaration. The matter under consideration in this case is already before the Court through the direct referral process and is typical of any number of "legal" issues which might come before the Court during any hearing on any topic. There is no need to start from scratch under the declaration procedure.

[6] Further matters of disagreement between counsel arise from memoranda filed by WLC on 21 February 2023 and Ātiawa on 8 March 2023. We make no comment regarding those matters. To the extent that they might require future resolution, they can be determined by the hearing panel.

Background

[7] The Site is in the General Residential Zone (the Residential Zone) of the District Plan. The Residential Zone provisions contain the range of objectives, policies and rules commonly found in such zones in district plans formulated under the RMA. Inter alia, the Zone rules provide (unsurprisingly) that residential activities and new buildings are permitted activities in the Zone subject to compliance with a series of Standards generally described as criteria in the rules. By way of example these Standards address the maximum number of residential units which can be erected on an allotment, maximum building coverage on an allotment, maximum permitted height of buildings and similar matters.

[8] In addition to creating zones the District Plan contains a series of Schedules which identify particular features of value present in the District. These include ecological sites, key/notable trees, significant landscapes and the like. Of specific relevance to these proceedings is Schedule 9 which presently identifies 43 Sites and Areas of Significance to Māori. The matters of significance are wide ranging and include urupa, pa, kainga, marae and a range of other features. A consequence of being identified in a Schedule is that a particular site or area may become subject to additional objectives, policies and rules over and above those normally applying in the zone where such sites or areas are contained. The Site is not presently identified in Schedule 9.

MDRS

[9] The Council notified PC2 on 18 August 2022 as an Intensification Planning Instrument (IPI) described in s 80E RMA. The purpose of IPIs is to incorporate Medium Density Residential Standards (MDRS) into "every relevant residential

zone"[1] of district plans. MDRS were incorporated into RMA in 2021 by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (the EHAA) which sought to address housing unaffordability and supply by (inter alia) setting more permissive land use regulations to enable intensification of housing development. Medium density residential standards are defined in s 2 RMA in these terms:

> **medium density residential standards** or **MDRS** means the requirements, conditions, and permissions set out in Schedule 3A

[10] Schedule 3A requires the Council to include in the District Plan two objectives and five policies relating to housing needs and provisions, subdivision requirements and nine density standards. Density standards are defined in cl 1 of Schedule 3A as meaning:

> **density standard** means a standard setting out requirements relating to building height, height in relation to boundary, building setbacks, building coverage, outdoor living space, outlook space, windows to streets, or landscaped area for the construction of a building

[11] Part 2 of Schedule 3A, identifies the matters which are the subject of the density standards to be incorporated into residential zone standards through an IPI. Those matters are:

- Number of residential units per site;
- Building height;
- Height in relation to boundary;
- Setbacks;
- Building coverage;
- Outdoor living space (per unit);

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1 RMA, s 77G(1).

- Outlook space (per unit);
- Windows to street; and
- Landscaped area.

It will be seen that the Schedule includes the number of residential units which may be constructed on a site in the MDRS as well as the eight matters identified in the definition of density standard.

[12] The MDRS contained in Schedule 3A allow greater intensity of development than the Standards in the Residential Zone presently contained in the District Plan. By way of example, under the District Plan in its present form[2] new buildings are permitted activities in the Residential zone subject to (with some exceptions and qualifications) there being no more than one building per allotment, a maximum of 40% site coverage and a maximum building height of 8 metres. The corresponding figures under the MDRS are no more than three new buildings, 50% site coverage and 11 metres building height. What the MDRS does is liberalise the density standards which a proposal must meet in order to be a permitted activity under the District Plan. However, if a proposal does not meet the new more liberal standards for permitted activities then it still remains a restricted discretionary activity as it is under the District Plan at present.[3]

[13] Section 77G(1) imposes a duty on the Council to incorporate the MDRS into every relevant residential zone and s 80F required the Council (being what is known as a tier 1 authority) to do so by notifying the IPI by 20 August 2022, as it has done. There is however an element of flexibility in that regard. Relevant in this instance is s 77I which relevantly provides 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 MDRS and the relevant building height or density requirements under policy 3 less enabling of

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2 Rule GRZ-R6.

3 E.g. new proposed rule GRZ-Rx5.

> 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:
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> (a) a matter of national importance that decision makers are required to recognise and provide for under section 6:
>
> (b) – (j) [not relevant]

[14] In notifying the IPI the Council introduced a definition of qualifying matter area which included… "a place and area of significance to Māori listed in Schedule 9". We understood it to be common ground between the parties that the practical effect of the inclusion of Schedule 9 in the IPI was that the density standards contained in the MDRS would not apply in the scheduled sites and areas. Mr Slyfield initially submitted that this went further than just making the MDRS "less enabling of development" in the Schedule 9 areas but effectively prevented any development at all due to the restrictive rules applying in those areas. However during the course of the hearing he conceded that the term less enabling could mean not enabling development at all. In his supplementary submissions[4] Mr Slyfield acknowledged that… "it is within the statutory powers conferred on the Council to include these existing matters within PC2". We proceed on the basis of that acknowledgement.

[15] The heart of the dispute in these proceedings arises because of a second step taken by the Council as part of PC2. Not only did the Council include existing Schedule 9 Sites and Areas as qualifying matter areas in the IPI but it purported to amend Schedule 9 itself by listing a new qualifying matter area in the Schedule, namely Karewarewa Urupa. The contended spatial extent of the urupa may be found in Fig 8 of the s 32 report on PC2 and was to be identified in the District Plan maps. The urupa was given two classifications under PC2 depending on whether or not land within the contended urupa had been developed (as much of it had previously been) or not. The Site was shown as being in the undeveloped part of the urupa categorised as Wāhanga Tahi. Listing the Site in Schedule 9 had three consequences identified by Mr Slyfield.

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4 Para [17].

[16] The first related to the application of additional policies to consideration of any applications (including the current direct referral) that might be made in respect of the Site. This consequence was described in these terms in paras [28] and [29] of Mr Slyfield's submissions:

> 28. As stated above the proposal was non-complying when the application was lodged. Therefore all of the proposal's effects were required to be considered, as were all Plan policies on relevant subject-matter. This meant general objectives and policies concerning historic heritage might be relevant (if it was determined that the Site triggered the definition of historic heritage in the RMA).
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> 29. However, the Plan contained—prior to PC2—specific guidance for assessing proposals to develop sites listed in the Plan for their significance to Māori. This guidance is in paragraph 5 of Policy HH-P6 and the second part of Policy HH-P9.[5] Prior to PC2 this guidance did not apply to the Site, due [to] the lack of listing.[6] PC2's introduction of a listing invokes the application of the guidance in these policies.

[17] The second was that there was a change in status of a number of activities which might previously be permitted on the Site under Residential zone rules. This consequence was described in these terms in para [55] of Mr Slyfield's submissions:

> 55. The effect of the Wāhanga Tahi rules on the Applicant's land is that:
>
> 55.1 Activities that were previously permitted activities are now restricted discretionary activities. This includes, for instance: land disturbance or earthworks in relation to gardening, cultivation, and planting or removing trees; and fencing not on the perimeter of the land.[7]
>
> 55.2 Activities that were previously permitted activities are now non-complying activities. This includes, for instance: undertaking earthworks to lay driveways, cabling, or building foundations; building a residential dwelling; and installing fenceposts other than on the perimeter of the land that do not comply with the relevant standards.[8]

[18] The third consequence is that under the IPI process there is no right of appeal to the Environment Court against the Council's determination on WLC's

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5 Historic Heritage chapter [CB vol 2, tab 19, **CB 0586–0587, 0588**].

6 Paragraph 5 of HH-P6 could only be triggered in this instance if the site is a "scheduled historic site", i.e. listed in Schedule 9; and the second part of Policy HH-P9 could only apply in this instance if the site contains "historic heritage features" (i.e. is listed in Schedule 9).

7 SASM-R10 [CB vol 2, tab 19, **CB 0597–0598**].

8 SASM-R16 and SASM R-18 [CB vol 2, tab 19, **CB 0600**].

submission opposing PC2 as it impacts on the Site.[9]

[19] WLC contends that the Council had no statutory power to list the Site in Schedule 9 through the IPI process and that the appropriate way for it to do so was through the usual plan change processes contained in Schedule 1 RMA.

[20] To some extent the arguments advanced by the Council, Ātiawa and by WLC in response appeared to veer into the reasons for and merits of the listing as part of the Council's obligation under s 6(e) to recognise and provide for the relationship of Māori with the urupa. We do not address that issue. The Court has not yet heard any evidence in these proceedings but it seems to be fundamental that in order to list the Site in Schedule 9 the Council must first make a factual determination as to whether or not it falls within the urupa. Its opening position in that regard (as indicated by listing the Site in the Schedule through PC2) is that it does lie within the urupa but that position is subject to challenge by WLC. Who is right or wrong in that regard will be determined by the Council's PC2 hearing process with its factual determination unassailable through the usual appeal process to this Court. Exactly the same issue is of course before the Court in this direct referral. The unsatisfactory consequences of the Court and the Council reaching different conclusions are abundantly apparent.

[21] Turning to the Council's statutory power to list the Site in Schedule 9 as part of the IPI process, we note that unsurprisingly there is no specific reference in the statutory provisions imported into RMA by the EHAA directly addressing this issue. Whether or not the power exists must be gleaned by interpretation of the legislation. In undertaking that interpretation we consider that the draconian consequences of listing the Site in the Schedule on WLC's existing development rights (particularly those identified in para [17] above) when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose.

[22] The purpose of the EHAA was to enable housing development in residential

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9 Schedule 1, cl 107.

zones. However counter balancing that purpose is that the EHAA also provides for the accommodation of qualifying matters which might make MDRS less enabling and those qualifying matters extend to s 6(e) matters. Further to that it is apparent that provisions inserted into RMA by the EHAA give very wide powers to territorial authorities undertaking the IPI process. They go so far as to enable territorial authorities to create new residential zones or amend existing residential zones.[10]

[23] As wide as territorial authorities' powers may seem to be in undertaking the IPI process it is apparent that they are not open ended. They are confined to the matters identified in a number of relevant provisions.

[24] We refer firstly in that regard to the definition of MDRS and density standards set out in paras [9] and [10] (above). Those provisions identify and limit the matters which may be the subject of MDRS requirements introduced through the IPI process. Those are the nine matters either listed in the definition or identified in cls 10-18 of Schedule 3A.

[25] That finding is consistent with the provisions of s 77I cited in para [13] (above) which enable a territorial authority to "...make the **MDRS and the relevant building height or density requirements** ... less enabling..."[11] through the IPI process to accommodate qualifying matters. We consider that on its face the consequence of that provision is to require qualifying matters introduced through the IPI process to relate to the standards identified in the definition and cls 10-18 of Schedule 3A and to make those standards less enabling.

[26] Those observations lead to consideration of the provisions of s 80E RMA which relevantly provide:

> **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—

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10 RMA, s 77G(4).

11 Our emphasis.

(i) incorporate the MDRS; and

(ii) give effect to,—

(A) in the case of a tier 1 territorial authority, policies 3 and 4 of the NPS-UD; or

...

(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

(B) policies 3, 4, and 5 of the NPS-UD, as applicable.

(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 or 77O:

(f) storm water management (including permeability and hydraulic neutrality):

(g) subdivision of land.

[27] On their face these provisions are extremely wide. The Sites and Areas of Significance to Māori identified in Schedule 9 are both district-wide matters and qualifying matters identified in s 77I(a). Section 80E(2) provides that provisions relating to those matters may be included… "without limitation". Notwithstanding that apparently unlimited description, it appears to us that the term "without limitation" is used to identify matters which may fall within the related provisions category. The effect of prefacing s 80E(2) with the term without limitation is that related provisions may extend beyond the matters identified in ss 2(a)-(g) to include other matters as well as those identified.

[28] In our view however there is in fact an inherent limitation in the matters which fall within the related matters category that is apparent on reading s 80E(1)(b)(iii) set out in para [26] (above).

[29] Section 80E(1)(b)(iii)(B) is not relevant in this case. What is relevant is whether or not the change of permitted activity status identified in para 55 of WLC's submissions[12] is a change which supports or is consequential upon the MDRS. Mr Slyfield made the following submission in that regard:

> 71. Whether the new wāhi tapu listing may be said to be a "related provision" in that it is "consequential" on the MDRS is less obvious. Prior to notifying PC2, Council received legal advice that concluded it would "arguably be consequential" to an IPI to schedule a previously unscheduled wāhi tapu site in an area subject to the IPI. The advice considered that an inability to notify new wāhi tapu sites would be an "illogical outcome" on the basis of Parliament's "clear intentions" that such sites would be qualifying matters. Council appears to have adopted this advice.
>
> 72. The issue with that approach is its apparent focus on whether a new wāhi tapu listing (and the operative rules that accompany such a listing) are "related to" that qualifying matter—that is, the focus is on the statutory language in the specific definition of "related provisions" in s 80E(2)(e). What that approach fails to do is refer back to the overarching gateway in s 80E(1)(b): that the related provision may only be included in an IPI if it is consequential on the MDRS.
>
> (original emphasis, footnotes omitted)

[30] We concur with that submission. Inclusion of the Site in Schedule 9 does not support the MDRS. It actively precludes operation of the MDRS on the Site. Nor do we consider that inclusion of the Site in the Schedule is consequential on the MDRS which sets out to impose more permissive standards relating to the nine defined matters.

[31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA 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 in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building

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12 C.f. para [17] (above).

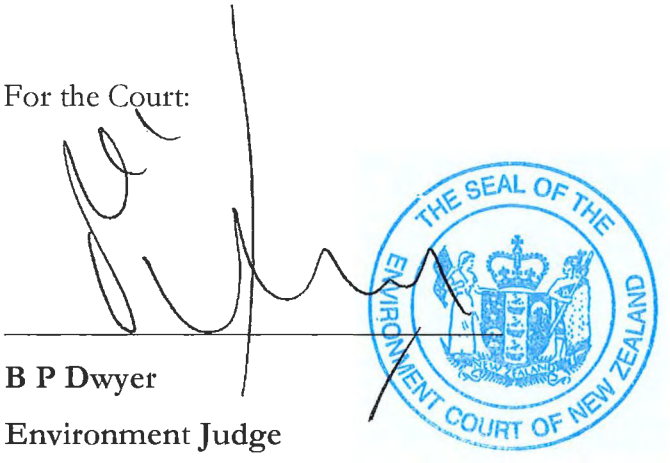
height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non complying.

[32] We find that amending the District Plan in the manner which the Council has purported to do is ultra vires. 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.

Costs

[33] Costs are reserved to be resolved at completion of the hearing process.

For the Court:



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cc: Jessica Tuilaepa
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Your reference

Our reference
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Dear Justine

Subject to legal professional privilege

Introduction of new heritage items as qualifying matters through the IPI process

1 You have asked us for advice on the inclusion of the following new heritage items in the Selwyn District Council (**SDC**) Intensification Planning Instrument (**IPI**), as a result of submissions on the IPI seeking their inclusion:

1.1 14 William Street, Lincoln Street (owned by Sam and Denise Carrick), and

1.2 18 Edward Street, Prebbleton (owned by Cheryl Morrall) (**Sites**).

2 You have sought advice in relation to these additions in light of the recent case *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* (**the Kāpiti case**).[1]

Overview

3 In summary, our views are that:

3.1 The inclusion of the Sites as Heritage items in HH-SCHED2 through the IPI is a very similar approach to that taken by Kāpiti Coast District Council in the Kāpiti case (which related to listing a new wāhi tapu site in its IPI as a new qualifying matter in a manner that did not relate to the Medium Density Residential Standards (**MDRS**)).

3.2 Given this, if the Independent Hearings Panel (**IHP**) determining the IPI decides to apply this Environment Court case, there is a real risk that the inclusion of the Sites in HH-SCHED2 is ultra vires the Council's powers in relation to amending its District Plan by way of an IPI (ie, a new listing of this type would need to be done by way of the usual Schedule 1 process). This is because listing the Sites results in changing the status of activities that are permitted on the Site in a way that is beyond making the MDRS and relevant building height or density requirements less enabling (eg, demolition will now require resource consent).

3.3 If the Council considers there are merits to including the Sites in HH-SCHED2 and it wants to pursue this, then we have addressed the potential options available to SDC. These include adding the Sites to the Heritage Schedule in the Proposed District Plan (**PDP)** (as opposed to the IPI), rejecting the submissions on the basis they are outside

[1] *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnv 056.

Council's powers, or choosing not to follow the Environment Court decision. We are happy to advise further on these options if Council wishes to pursue any of them.

4 The reasons for our views are set out below.

Planning Context

5 Under the Operative District Plan (**ODP**), the Sites are not listed as historic heritage buildings, structures or items and are zoned Living 1. Residential activities are permitted, with the ability to have 1 dwelling and 1 family flat.[2] We understand that demolition is not subject to any controls, and therefore is a permitted activity. Chapter E3 sets out the Schedule of Heritage Items in both the Township and Rural Volumes. Chapter C3 of the Township Volume sets out the heritage rules, which provides for removal or demolition as a discretionary activity, except for Category I buildings or structures, where the activity is non-complying.[3] Similar rules apply in the Rural Volume.[4]

6 Under the Proposed District Plan (**PDP**), both Sites are zoned General Residential Zone, with one residential unit and one minor residential unit permitted. We understand that given the age of the houses, development on site would also likely trigger the need for an archaeological authority. Under the PDP, HH-Schedule 2 (**HH-SCHED2)** lists heritage buildings, structures and items. Demolition or partial demolition of heritage items listed in HH-SCHED2 is a non-complying activity.[5] Neither of the Sites are listed in the PDP.

7 Council have identified that the owners of both Sites have requested these buildings be identified as heritage items in the PDP. It is not clear to us whether this was through a separate submission on the PDP. We have not located any record of any such submission. If one does exist, please advise as it could alter the assessment of options below.

8 The IPI provides for the MDRS through the Medium Density Residential Zone (**MRZ**), which permits residential activity,[6] subject to rule requirements which generally reflect the density standards in Schedule 3A of the RMA (but include additional requirements for outdoor storage,[7] development areas,[8] and servicing).[9] Under the IPI, both Sites are zoned MRZ.

9 Chapter HPW-30 (in Part 1 – How the Plan Works) lists 'Heritage Item Overlay' and 'Heritage Item Settings' as qualifying matters. The Section 32 Report confirms that historic heritage is intended to be a qualifying matter, through the list of heritage items and settings in HH-SCHED2 and the associated rules HH-R1 to HH-R8, through the application of those rules. Given this, it seems that there are no specific rules to provide for historic heritage in the IPI – the intention is to provide for this protection through the existing PDP HH rules.

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[2] Home based activities may also be permitted subject to hours of operation, scale and vehicle movements etc. but that's probably not relevant at this time. The average lot size in the L1 not being less than 800m^2 in Prebbleton and 650m^2 in Lincoln. The sites had no subdivision potential, subdivision of the site would be NC (except if the resource consent was obtain to erect a second dwelling and once it was built they could subdivide down to half the average lot size for the zone).

[3] Rule 3.1.4 and 3.1.5.

[4] RUle 3.16.4 and 3.16.5

[5] HH-R7, HHr8.

[6] MRZ-R1.

[7] MRZ-REQ11.

[8] MRZ-REQ12.

[9] NRZ-REQ1.

10 On 15 September 2022, the Carricks made a submission on the IPI, which sought:

> Blacksmith Cottage at 14 Williams Street, Lincoln is added to HH-SCHED2 of the proposed Selwyn District Plan, subject to Selwyn District Council also recognising and protecting the value of the heritage setting with the provisions requested in submission topic 3.

11 Cheryl Morrall's submission sought that the heritage item overlay be put in place and that 18 Edward Street be inserted into the plan as a heritage item overlay/setting. Each submission provides supporting technical evidence.

12 The Council circulated its section 42A report addressing submissions on 'District Wide, Area Specific and Qualifying Matters' relating to the IPI (dated 6 April 2023). The section 42A report records that:[10]

12.1 The Carricks requested the historic heritage of 14 William Street, Lincoln be recognised in the PDP and seeks amendments to the heritage item overlay, heritage setting overlay and HH-SCHED2.

12.2 Cheryl Morrall requests that the historic heritage of 18 Edward Street, Prebbleton be recognised in the PDP and seeks amendments to the heritage item overlay, heritage setting overlay and HH-SCHED2.[11]

13 The section 42A report recommends the submission points are accepted and recommends that the Sites (and their associated settings) be included in the historic heritage HH-SCHED2, with a site type of 'Heritage Building and its setting'.

Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga

14 On 30 March 2023, the Environment Court issued the decision of *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*[12]. The matter before the Court was a direct referral and a legal issue arose that might impact on that, being that additional policies in the IPI that relate to the protection of historic heritage would apply to the non-complying activity the Court was considering.

15 In this case, the Council had decided that for its IPI wāhi tapu sites (listed in an existing Schedule 9 of the District Plan) were a qualifying matter and it included a proposal to list one new wāhi tapu site as a new qualifying matter in the existing Schedule 9, which affected the site that was subject to the direct referral.

16 While this new qualifying matter prevented the MDRS applying to the site, it also changed the status of activities commonly associated with residential development (including earthworks, building a residential dwelling, and fencing)[13] from permitted to either restricted discretionary or non-complying.

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[10] At [10.5].

[11] At [10.3].

[12] [2023] NZEnv 056.

[13] At [17]

17 Accordingly, the Court considered whether the Council had the statutory power to list a new wāhi tapu site in Schedule 9 as part of the IPI process.[14] The Court commented that Councils were given very wide powers undertaking the IPI process, but these powers are not open-ended.[15] In this case, the Court found that the insertion of a new wāhi tapu site in Schedule 9 was ultra vires as part of the IPI (noting that the Council could have done it by way of a Schedule 1 process instead).

18 The findings by the Court include that:

18.1 Section 77I of the RMA enabled a territory authority to make the MDRS and relevant building heights or density requirements less enabling through the IPI by way of qualifying matters. The Court suggests that this means that qualifying matters introduced through the IPI process are required to relate to the density standards identified in the definition of MDRS and clauses 10 to 18 of Schedule 3A and to make those standards less enabling,[16] suggesting that restrictions which go beyond those density standards are outside the power of the Council in the IPI process.

18.2 Section 80E of the RMA requires that the changes made by an IPI must 'support' or be 'consequential on' the MDRS.[17] The purpose of the IPI process was to impose on residential zoned land more permissive standards and permitted activities addressing the nine matters identified in the Schedule 3A and inclusion of the site in Schedule 9 did not support the MDRS, because it actively precludes operation of the MDRS on the site.

18.3 Ultimately it stated:

> For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into the RMA by the EHAA was to impose on residential zoned land more permissive standards and permitted activities addressing the nine matters identified in the definitions section and Schedule 3A. Changing the status of activities which are permitted on the site in the manner identified…goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by section 77I. By including the site in Schedule 9, PC2 disenables or removes the rights which WLC presently has under the District Plan to undertake various activities identified in para 55 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.

19 Given this, the Court found that the amendment in the District Plan the Council had proposed through its IPI was ultra vires.

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[14] At [21]. The Court also noted that the 'draconian consequences' of listing the site in the Schedule on existing development rights, combined with the absence of the right of any appeal, required there to be a very careful interpretation of the statutory provisions in light of their text and purpose

[15] At [22] and [23].

[16] At [25].

[17] At [29].

Application to the Sites scenario in Selwyn

20 There are some similarities between the Council recommendation for the Sites (to be included in HH-SCHED2) and the issues the Court commented on in the Kāpiti case. This includes:

20.1 Both Councils have qualifying matters (heritage and wāhi tapu sites) which involve listing properties in a Schedule which already exists in a Plan, prior to the notification of an IPI.

20.2 Both involve inclusion of new sites within those Schedules through an IPI (heritage listings in Selwyn's case versus a wāhi tapu site in the Kāpiti case).

20.3 For both, additional policies would apply to the consideration of any application. In Selwyn's case, this would be the policies in the Heritage Chapter and in the Kāpiti case, general policies concerning historic heritage were likely to be relevant.

20.4 For both, the inclusion of the sites in the Schedule as a qualifying matter 'disenabled' development on the basis of matters that did not relate to one the nine MDRS matters. For example, for SDC, the inclusion of the Sites on the heritage list makes demolition, or partial demolition, a non-complying activity (rather than permitted). In the Kāpiti case, certain earthworks changed from permitted to restricted discretionary and some changed from permitted to non-complying.

21 In other words, the inclusion of the Sites for SDC (and in the Kāpiti case) creates a development restriction which sits outside the MDRS density standards or being in support or consequential on them. For SDC this is again demolition of the buildings, which is not covered in the MDRS density standards.

22 It is this aspect that the Environment Court found contrary to section 77I of the RMA in the Kāpiti case (at 25):

> We consider that on its face the consequence of that provision is to require qualifying matters introduced through the IPI process to relate to the standards identified in the definition and cls 10-18 of Schedule 3A and to make those standards less enabling.

23 It then also went on to find that the change in activity status that occurred in that case, was not a change that 'supports' or is 'consequential on' the MDRS as required by section 80E of the RMA (at 29 and 30):

> Inclusion of the Site in Schedule 9 does not support the MDRS. It actively precludes operation of the MDRS on the Site. Nor do we consider that inclusion of the Site in the Schedule is consequential on the MDRS which sets out to impose more permissive standards relating to the nine defined matters.

24 Given this, we consider that there is a real risk that if the issue of including the Sites in the SDC IPI was before the Court, it would result in a similar outcome as the decision discussed above, ie, that the Court would find that the inclusion of the Sites in the HH-SCHED2 list is ultra vires through the IPI process.

25 There is also potentially an issue of scope in terms of whether the submissions are 'on' the IPI, ie whether it is within the scope of the IPI itself to include new heritage items in HH-SCHED2. The scope of persons who can make submissions *on* the IPI is the same as that under the standard plan change process. SDC may wish to consider whether this raises any additional

issues with these submissions. We can provide further comment on this point if that would be useful.

Options

26 If SDC considers there is merit for the Sites to be identified as heritage items and it wants to pursue that, we have considered what options may be available to address this issue. We have not done a thorough analysis at this stage because you did not ask for advice on options, but we thought it was useful to set the potential options out and we can advise further on them if SDC wishes to consider any of them further:

26.1 Option 1: Amend the PDP (not the IPI) to list the Sites in HH-SCHED2. The advantage of this option is that it is a Schedule 1 process which does not have the same constraints as an IPI process. However, it may be too late for this option, or it may take more Council resource than appropriate. The mechanisms that are available could be:

(a) Reliance on any submissions on the PDP which provide scope for those amendments (albeit we have not been able to locate these),

(b) Allow a late submission (noting that it appears the hearings on the heritage chapter of the PDP occurred in October 2021 so this creates some logistics issues), or

(c) Vary the PDP, perhaps as part of a 'wrap up' variation to the PDP, if other similar minor changes have been noted or as a standalone variation.

26.2 Option 2: Not list the Sites as heritage items and reject the submissions on the basis they are not within Council's powers on an IPI. This would mean that the MDRS is enabled on the Sites, and the heritage values are not protected. However, given the owners of the sites are seeking heritage protection, it seems unlikely that there is serious risk to the heritage values on site while the remain in ownership. Of course, the owners could challenge (by way of judicial review) the Council's decision on this. A future plan change could then address the issue.

26.3 Option 3: Take the position that the Environment Court decision is distinguishable and list the sites in HH-SCHED2 using the IPI anyway and see if it is challenged by way of judicial review. Reasons to distinguish could include that this was in the context of a direct referral on an application for resource consent rather than a plan change, or the IPI directly. As the owners of the Sites have sought they are listed it seems unlikely they will challenge any decision to include the Sites in the Schedule 2 list. However, this is not an option we recommend, because we consider the approach by the Environment Court is legally correct and that if challenged further, the approach of adding new qualifying matters that do not relate to limiting the development enabled by the MDRS will still be found to be ultra vires.

27 We are happy to discuss these options further.

Yours sincerely

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