Appendix 2

BEFORE THE INDEPENDENT HEARINGS PANEL

IN THE MATTER	of the Resource Management Act 1991 (**the Act**)
AND	
IN THE MATTER	of a proposed change to the Tauranga City Plan under Schedule 1 of the Act

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MEMORANDUM OF COUNSEL IN RELATION TO LEGAL ISSUES ARISING FROM PROPOSED PLAN CHANGE 27

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TO THE INDEPENDENT HEARINGS PANEL

INTRODUCTION

1. We have been instructed by the reporting planner to prepare this memorandum addressing legal issues raised in the evidence on behalf of several submitters on Proposed Plan Change 27 (**PC 27**).

2. We anticipate that this memorandum will be made available to the Hearings Panel and all parties to the hearing.

3. We include in the following section the issues raised and a summary of our opinion for each. This is followed by a more detailed analysis of each of the issues, under separate headings.

SUMMARY

Issue 1: Is it lawful to have the flood hazard maps sitting outside the City Plan?

4. In our view, yes. The key legal requirements are that district plan rules must be certain and capable of objective ascertainment. We consider application of the relevant principles to PC 27 to be relatively straight-forward. Activities which are subject to the proposed rules can be objectively determined by applying the key parameters used in the defined terms. Witnesses that oppose the proposed approach appear to have misconstrued the role of the Council's GIS maps.

Issue 2: What is the relevance of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill?

5. The Bill has no legal status until it has received Royal assent and been brought into force. Even if it is enacted in its current form by the time the Hearings Panel makes its decisions, there is nothing in the Bill which would require (or permit) the Hearings Panel to depart from the statutory framework currently prescribed in the Resource Management Act 1991 (**RMA**) for making and evaluating proposed plan changes.

6. The transitional provisions in the Bill, which may require the withdrawal of proposed plan changes in certain circumstances, could only apply if the hearing is not concluded by 20 February 2022 – which is well after the scheduled completion date. If that does not occur, we prefer the view that the transitional provisions would not require withdrawal of PC 27, but it seems unlikely the issue will need to be tested.

Issue 3: Should the PC 27 rules have been identified as having immediate legal effect?

7. In our view, this issue is not within the Hearings Panel's jurisdiction, because Mr Hextall's complaint relates to the Council's identification of rules in PC 27 as having immediate legal effect from the date of notification under s 86E(1). Section 86E(3) of the RMA goes on to state that identification of a rule under s 86E(1) "does not form part of the proposed plan". It is also inconsistent with the statutory scheme. We therefore do not consider this to be a matter that could be addressed through decisions on submissions on a proposed plan change – rather legal effect occurs by operation of the RMA separate from the hearings process.

Issue 4: What obligations does the Council have to take an "infrastructure led" approach?

8. There is no obligation under the Local Government Act 2002 (or any other Act) for the Council to take an "infrastructure led" approach to the management of flood hazard risk. PC 27 needs to be assessed against the relevant statutory considerations under the RMA, which provide a strong mandate for the management of flood hazard risk through district plans.

9. While s 32 of the RMA requires an assessment of options, which could include relying on an infrastructure led approach as opposed to district plan rules, this is unlikely to be the "most appropriate" way to meet the statutory requirements circumstances where the Council has no obligation, and has made no commitment, to provide infrastructure. The statutory requirement to manage natural hazard risk would not be met.

Issue 5: Does PC 27 allow downstream owners to be burdened with flows from upstream properties?

10. To the extent that the water flows naturally from an upstream property, a downstream owner is bound to accept the water under the common law principle known as "natural servitude". However, a downstream owner may have civil remedies if an upstream owner undertakes an activity which appreciably increases the burden upon the lower land. These remedies exist independently of PC 27 and any other provision in the City Plan.

FLOOD HAZARD MAPS OUTSIDE THE DISTRICT PLAN

11. A number of parties, through submissions and evidence, have raised issues relating to the legality of having flood hazard maps sitting outside the City Plan.

12. We address below the legality of the general approach, followed by a response to some particular matters raised in evidence.

The proposed approach under PC 27

13. The new Section 8D is central to PC 27. It includes objectives, policies and rules to manage flood hazards from intense rainfall. The planning framework differentiates between three types of flood area: floodplains, overland flowpaths (minor or major) and flood prone areas. Each of these has a different approach, reflected in the objectives, policies, activity classifications and standards. Resource consent requirements are determined according to whether a proposed activity is within a floodplain, overland flowpath (minor or major) or flood prone area. Generally speaking, floodplains and overland flowpaths are protected, and development and redevelopment within flood prone areas is managed.

14. These flood areas are not mapped in the proposed plan change. Rather, definitions are proposed in Chapter 3 as follows:

(a) **floodplain** – "Means the land near a stream or river channel, susceptible to flooding in the 1% annual exceedence probability (AEP) rainfall event concurrent with a 5% annual exceedence

probability (AEP) storm-tide event, taking into account the effects of climate change on rainfall and sea level based on the RCP 8.5 median scenario as of the year 2130."

(b) **overland flowpath** – "Means the land overflown by a concentrated flow of water resulting from a 1% annual exceedence probability (AEP) rainfall event concurrent with a 5% annual exceedence probability (AEP) storm-tide event, taking into account the effects of climate change on rainfall and sea level based on the RCP 8.5 median scenario as of the year 2130, as it flows towards the stormwater network, streams, rivers, harbour or the coast. Overland flowpath includes a secondary flowpath which is activated when the primary (often piped) stormwater system gets blocked or when the capacity of the piped system is exceeded. For the purposes of this definition, an overland flowpath includes an artificially designed route using formed or hard surfaces."

(c) **major overland flowpath** – "Means an overland flowpath with a contributing catchment of 2 hectares or more."

(d) **minor overland flowpath** – "Means an overland flowpath with a contributing catchment which is less than 2 hectares in area."

(e) **flood prone area** – "Means the land susceptible to flooding in the 1% annual exceedence probability (AEP) rainfall event concurrent with a 5% annual exceedence probability (AEP) storm-tide event, taking into account the effects of climate change on rainfall and sea level based on the RCP 8.5 median scenario as of the year 2130, but is not within the definition of overland flowpath or floodplain."

15. The "Purpose" of proposed Section 8D states that "Council holds publicly available information showing floodplains, overland flowpaths and flood prone areas, which identifies the locations and extent of these flood types." This information is contained within the Council's publicly searchable GIS system, "Mapi". Mapi includes a flooding from rainfall layer which maps the 1% AEP, year 2130 climate and RCP 8.5 median scenario which corresponds with the parameters specified in the various definitions for flood hazard areas set out above.

16. Because they sit outside the City Plan, the GIS hazard maps do not directly trigger requirements for resource consent. Rather, requirements for resource consent are triggered by activities being proposed in areas which satisfy the parameters specified in the definitions. Although the GIS maps do not have legal force, they may be used by applicants and the Council to inform an assessment against the definitions in the City Plan. However, they are not necessarily determinative of consent requirements in any particular case, and applicants may undertake their own mapping using the parameters in the definitions.

17. The approach taken in PC 27 is conceptually similar to the approach taken in the Auckland Unitary Plan *Chapter E36 Natural hazards and flooding*, which also relies on definitions rather than flood maps.

Legal principles

18. The relevant legal principles are well established. In short, district plan rules which are unclear may be void for uncertainty. The relevant legal principles are as follows:

(a) Rules must be capable of objective ascertainment. On their face they must be clear and certain to plan users. A lack of certainty may render the rule invalid for inherent vagueness.[1]

(b) A rule cannot reserve significant discretion as to whether it applies to a particular activity by subjective formulation. In particular, the Council cannot reserve the right to decide for itself whether an activity satisfies the requirements of the rule.[2]

(c) A rule is not automatically invalid simply because it calls for an element of judgment or evaluation; not all rules can be defined with

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1 *Twisted World Limited v Wellington City Council* W024/2002, at [63], relying on *A R & M C McLeod Holdings Ltd v Countdown Properties Limited* (1990) 14 NZTPA 362.

2 *Twisted World Limited v Wellington City Council* W024/2002, at [63], relying on: *Ruddlesdon v Kapiti Borough* (1986) 11 NZTFA 301 (HC); *Fairmont Holdings v Christchurch Council* (1989) 13 NZTFA 461(HC), and *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.

scientific or mathematical certainty. Some degree of flexibility is permitted.[3]

(d) The permissible extent of any flexibility is a matter of judgment as to whether it is "too wide or too vague to have the element of certainty by which a decision-making body could reach a conclusion after hearing evidence and weighing factors".[4]

19. In *Man O'War Farm Ltd v Auckland Council*[5], the High Court considered the definition of "Land which may be subject to coastal hazards" in the proposed Auckland Unitary Plan. The Court accepted that the reference to "Any land which may be subject to erosion over at least a 100 year time frame" was void for uncertainty as follows:

> [13] I agree with the parties that the highlighted portion of the definition is ambiguous as to its scope and application. For example, the phrase "may be subject to erosion" provides no guidance as to the requisite probability required. Secondly, the second part of the phrase, "over at least a 100 year time frame" envisages a broad evaluative assessment capable of engendering considerable scientific debate.
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> [14] Accordingly, I agree with the parties that this aspect of the definition creates a degree of uncertainty and could make it difficult for the Plan reader to identify whether they need a resource consent for development or subdivision near the coast.

Application of the legal principles to PC 27

20. In our view, the application of the relevant principles to PC 27 is relatively straight-forward.

21. The defined terms, and by extension the rules which use the defined terms, are "capable of objective ascertainment". Activities which are subject to the proposed rules can be readily determined by applying the key parameters used in the defined terms, namely the 1% annual exceedence probability (AEP) rainfall event concurrent with a 5% annual exceedence probability (AEP) storm-tide event, taking into account the effects of climate change on rainfall and sea level based on the RCP 8.5 median scenario as of the year

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3 *Twisted World Limited v Wellington City Council* W024/2002, at [64] and *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.

4 *Twisted World Limited v Wellington City Council* W024/2002, at [64], relying on *A R & M C McLeod Holdings Ltd v Countdown Properties Ltd* (1990) 14 NZTPA 362.

5 [2017] NZHC 1349.

2130. We understand that these matters can be determined using relatively orthodox and commonly accepted methods.

22. Importantly, application of the rules is objectively ascertainable by reference to the proposed plan change itself, as opposed to external information such as the GIS maps.

23. There can be no suggestion that the Council has somehow sought to reserve itself a discretion as to when the rules apply, or that an impermissible level of judgement or evaluation is required so as to make the proposed rules uncertain. In our view, there is no legal impediment to excluding the flood hazard maps from PC 27.

24. Finally, the High Court's decision in *Man O'War Farm Ltd v Auckland Council* should be distinguished from PC 27. In that case, the reference to "Any land which may be subject to erosion over at least a 100 year time frame" was found to be uncertain, particularly in that it provided no guidance as to the requisite probability of erosion, and the timeframe of *at least* 100 years envisaged a broad evaluative assessment capable of engendering considerable scientific debate. Importantly, it was not the absence of maps from the district plan which created the uncertainty in that case.

25. In contrast, PC 27 does not have these legal shortcomings. The defined terms prescribe both the event probability (1% AEP) and the timeframe (year 2130). In addition, the concurrent storm-tide event (5% AEP) and sea level rise scenario (RCP 8.5) is prescribed so as to enable objective ascertainment of flood areas.

26. Clearly, the proposed provisions also need to be assessed against the relevant statutory considerations, in particular the purpose and principles of the RMA[6], the efficiency and effectiveness of the proposed provisions under s 32 (having regard to benefits, costs and the risk of acting or not acting if there is uncertain or insufficient information) and the requirement to give effect to the regional policy statement. These matters are addressed in the s 32 evaluation and s 42A report.

Issues raised in evidence

27. Ms Cowan, on behalf of Aotearoa Park Developments Limited, states that her "specific concerns from a planning perspective lies in the fact that these maps are determinative of the activity status for almost any future development on the Site"[7]. She goes on to outline concerns about the accuracy of the maps. Similarly, Mr Hextall raises issues with "the legal incorrectness of using flood maps held outside of the District Plan for statutory interpretation"[8] and states that "A system where there is no clear statutory ability to challenge the legitimacy of the information being utilised that has a direct relationship to statutory rule interpretation is abhorrent to due process."[9]

28. Both witnesses appear to have misconstrued the role of the Council's GIS maps. As explained above, the GIS maps are not determinative of activity status. Rather, activity status is determined by applying the proposed definitions of floodplain, overland flowpath (minor or major) or flood prone area. These definitions are certain and objectively ascertainable without reliance on the Council's GIS maps. The Council engaged a range of suitably qualified consultancies to model the prescribed flood hazard parameters across the City, which will assist with implementation of the proposed plan change. However, applicants that do not agree with the modelling carried out are not without recourse; they may engage their own suitably qualified expert to model the prescribed parameters, which will be taken into account by the Council when assessing resource consent requirements or applications for resource consent.

29. Mr Batchelar, on behalf of Bluehaven Group, does not oppose the exclusion of flood hazard maps from the district plan, but states that "the issue that needs to be addressed is that non-statutory maps lack the checks and balances that come with statutory plans promulgated under the First Schedule process." Ms Cowan raises similar concerns.[10] Mr Batchelar suggests that a formal policy on the control, management and resourcing of the Council's GIS maps should

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6 Including section 6(h) which requires decision-makers to recognise and provide for the management of significant risks from natural hazards and section 7(i) which requires decision-makers to have particular regard to the effects of climate change.
7 Ms Cowan, 8 November 2021, para 31.
8 Mr Hextall, 4 November 2021, section 4.3.
9 Mr Hextall, 4 November 2021, para 4.3.4
10 Ms Cowan, 8 November 2021, paras 29-35.

be formulated using the special consultative procedure under the Local Government Act 2002.[11]

30. Mr Batchelar's request has been noted by Council officers. However, the request is outside the jurisdiction of the Hearings Panel under Schedule 1 of the RMA, which is confined to determining submissions that are "on" the proposed plan change under clauses 6 and 10 of Schedule 1.

RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT BILL

31. Mr Collier, on behalf of Urban Taskforce and others, addresses in his evidence the interaction between PC 27 and the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill.[12] He refers in particular to transitional provisions in the Bill which require the withdrawal of proposed plan changes in certain circumstances. Mr Collier also states that PC 27 appears to have the effect that the Bill explicitly seeks to avoid because it imposes additional consenting and development costs on the delivery of residential housing.

Relevance of the Bill

32. The starting point is that the Bill has no legal status until it has received Royal assent and been brought into force. The proposed plan change must be determined in accordance with the applicable law at the time of the decision, and it would be an error of law to give any weight to a Bill which has not yet been enacted.

33. However, even if the Bill is enacted as currently drafted and commences before the Hearing Panel has determined the proposed plan change, in its current form it is irrelevant to PC 27.

34. The key changes proposed in the Bill are:

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11 Mr Batchelar, 5 November 2021, section 10.
12 Mr Collier, 5 November 2021, section 6.

(a) To require Tier 1 territorial authorities to incorporate medium density residential standards and other intensification policies into their district plans;

(b) To implement this by notifying an intensification planning instrument by 20 August 2022, which will proceed through a streamlined planning process; and

(c) To give intensification planning instruments immediate legal effect and deemed operative status from the date of notification.

35. These changes do not propose to alter in any way the statutory considerations which apply to PC 27. If enacted in its current form, there is nothing in the Bill which would require (or permit) the Hearings Panel to depart from the statutory framework currently prescribed in the RMA for making and evaluating proposed plans. In particular, the relevant statutory provisions are set out in ss 31, 32 and 72-77D of the RMA. Mr Collier's references to the purpose of the Bill (or Act if that were to be the case) are not a relevant consideration.

36. Mr Collier refers in particular to Schedule 3 of the Bill, which includes transitional provisions requiring Tier 1 territorial authorities to withdraw part or the whole of a proposed plan change if it:

(a) does, in whole or in part, 1 or more of the following things:

(i) gives effect to policy 3 or 4 of the National Policy Statement on Urban Development Capacity:

(ii) proposes changes to a relevant residential zone and those changes do not incorporate the MDRS:

(iii) creates a new residential zone that does not incorporate the MDRS; and

(b) has been notified on or before the commencement of the Act but a hearing under clause 8B of Schedule 1 is not completed on or before 20 February 2022.

37. The first point to note is that the provision has no application to a proposed plan change if the hearing is concluded before 20 February 2022. The PC 27 hearing is scheduled to conclude on 3 December 2021.

38. Secondly, if the transitional provisions were to apply, PC 27 would need to be captured under one or more of the "things" in paragraph (a) above. It clearly does not give effect to policy 3 or 4 of the National Policy Statement on Urban Development Capacity, or create a new residential zone that does not incorporate the MDRS. However, Mr Collier argues that PC 27 qualifies as an instrument which "proposes changes to a relevant residential zone and those changes do not incorporate the MDRS". Our preferred interpretation is that PC 27 does not propose changes to a relevant residential zone *per se* – because it does not alter the underlying zone rules – and would therefore not be captured by the transitional provisions.

39. However, as noted above, this only becomes an issue if the hearing is not concluded by 20 February 2022 – which is well after the scheduled completion date.

40. For completeness, we briefly address two further points implied by Mr Collier:

(a) *That PC 27 is somehow "tied" to Plan Change 26*

This is not correct. The two plan changes were initiated separately and PC 27 can stand on its own without Plan Change 26. It effectively operates *similar to* an overlay and is not reliant on changes to the underlying zones.

(b) *That PC 27 is inconsistent with the MDRS*

This is not something the Hearings Panel can or should consider for the reasons above. The Hearings Panel must decide the proposed plan change in accordance with the statutory framework currently prescribed under the RMA for making and evaluating proposed plans. The MDRS are irrelevant to the statutory considerations (even if the Bill has been enacted (in its current form) at the time of the decision) because they are not incorporated into ss 31, 32 and 72-77D of the RMA.

LEGAL EFFECT OF RULES

41. In his evidence, Mr Hextall states that the Council incorrectly interpreted the rules in PC 27 as having immediate legal effect under s 86B(3) of the RMA – which applies if a rule "protects or relates to water, air, or soil (for soil conservation)". He considers that "the subject plan change is to do with natural hazards and as such if the intent of parliament was to instruct Council to make natural hazard provisions have immediate legal effect they would have done so". He also states that s 86B(3) relates to regional council functions.

42. In our view, this issue is not within the Hearings Panel's jurisdiction, because it relates to the Council's identification of rules in PC 27 as having immediate legal effect from the date of notification under s 86E(1). Section 86E(3) of the RMA goes on to state that identification of a rule under s 86E(1) "does not form part of the proposed plan".

43. Further, if legal effect were to be determined by the Hearings Panel in decisions on submissions, it would be impossible for rules to have immediate legal effect, and it would also be pointless because the "default" position under s 86B(1) is that a rule in a proposed plan has legal effect once a decision on submissions relating to the rule is made and publicly notified under clause 10(4) of Schedule 1.

44. We therefore do not consider the issue raised by Mr Hextall to be a matter that could be addressed through decisions on submissions on a proposed plan change – rather legal effect occurs by operation of the RMA separate from the hearings process (although Mr Hextall prefers a different interpretation of the RMA).

COUNCIL OBLIGATIONS TO TAKE AN INFRASTRUCTURE LED APPROACH

45. In his evidence, Mr Collier prefers an "infrastructure led solution to flooding from intense rainfall events", as opposed to a regulatory approach. He states that the Council has a key role and responsibility to play in terms of managing

stormwater and flooding events under ss 3(d) and 101B of the Local Government Act 2002.[13]

46. The Local Government Act 2002 enables local authorities, rather than mandating a particular approach to the provision of infrastructure to manage flood hazard risk. It provides a framework for planning and funding public infrastructure, with particular decision-making requirements and processes to be followed. There is no obligation under the Local Government Act 2002 (or any other Act) for the Council to take an "infrastructure led" approach to the management of flood hazard risk associated with the development of land.

47. PC 27 needs to be assessed against the relevant statutory considerations, which provide a strong mandate for the management of flood hazard risk through district plans. In particular:

(a) Section 74(1) – a territorial authority must prepare and change its district plan in accordance with:

(i) Its functions under s 31, which include the control of any actual or potential effects of the use, development, or protection of land for the purpose of the avoidance or mitigation of natural hazards – s 31(1)(b);

(ii) The provisions of Part 2, including s 6(e) which requires decision-makers to recognise and provide for the management of significant risks from natural hazards;

(b) Section 75(3)(c) – a district plan must give effect to the regional policy statement, which includes directive provisions relating to the management of natural hazards; and

(c) Sections 32 and 32AA – whether the objectives are the most appropriate way to achieve the purpose of the RMA, and the policies and other provisions that implement or give effect to the objectives are the most appropriate way to achieve the objectives (by assessing efficiency and effectiveness).

13 Mr Collier, 5 November 2021, section 6.

48. These matters have been assessed in the s 32 evaluation and the reporting planner's s 42A report.

49. The s 42A report records consideration given to an infrastructure led solution by the Council.[14] By way of example, this approach was considered unacceptable in respect of a 1% AEP rainfall event due to the long timeframes for implementation (37.5 years) and unreasonable financial burden on the community through high capital costs ($375M) and operational costs ($10.5M per year).

50. While s 32 of the RMA requires an assessment of options, which could include relying on an infrastructure led approach as opposed to district plan rules, this is unlikely to be the "most appropriate" way to meet the statutory requirements in circumstances where the Council has no obligation, and has made no commitment, to provide infrastructure necessary to avoid or manage flood hazard risk. The statutory requirement to manage natural hazard risk would not be met.

51. It should also be noted that the regulatory approach does not preclude the potential for the Council to undertake infrastructure works to address flood hazard.

IMPACTS ON DOWNSTREAM OWNERS

52. Ms Cowan raises issues about downstream landowners being inappropriately burdened with the cost and responsibility of managing overland flows from upstream sources.[15]

53. As a general principle, to the extent that the water flows naturally from an upstream property, a downstream owner is bound to accept the water under the common law principle known as "natural servitude".[16] However, a downstream owner may have civil remedies if an upstream owner undertakes an activity which appreciably increases the burden upon the lower land. These remedies exist independently of PC 27 and any other provision in the City Plan.

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14 At 2.10-2.12.
15 Ms Cowan, 8 November 2021, paras 25-27.

54. PC 27 also proposes to regulate such upstream activities by including provisions which seek to maintain the water storage and conveyance function of floodplains and overland flowpaths. It appears that Ms Cowan supports this approach.

DATED at Auckland this 22nd day of November 2021

G C Lanning / T R Fischer

16 *Gibbons v Lenfestey* (1915) 84 LJPC 158; Bailey v Vile [1930] NZLR 829; *Bailey v Vile* [1930] NZLR 829.