

**BEFORE HEARING COMMISSIONERS  
FOR THE MANAWATŪ-WHANGANUI REGIONAL COUNCIL**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ  
MO TE KAUNIHERA Ā ROHE O MANAWATŪ-WHANGANUI**

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**IN THE MATTER** of the Resource Management Act 1991 (“**the Act**”)

**AND**

**IN THE MATTER** of the hearing of Submissions and Further Submissions on Proposed Plan Change 3 (Urban Form & Development) to the Manawatū-Whanganui Regional Plan (Horizons One Plan)

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**REPLY SUBMISSIONS TO QUESTIONS ARISING FROM MINUTE 3**

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Dated: 8 March 2024



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**MAY IT PLEASE THE COMMISSIONERS:****Introduction**

[1] These are reply submissions on points of law arising from the hearing. They respond to questions asked by the Panel in Minute 3: Follow up Following Hearing, where legal input was considered appropriate or requested.

**Question (a): should the NPSFM and NPSIB be given effect through amended provisions?**

[2] This question is primarily answered by Ms Shirley from a planning perspective.

[3] To summarise the legal advice in respect of the question “*how should the hearing panel give effect to other National Policy Statements in this process*”, the answer was the panel ‘could’ give effect to other national policy statements. However what was required in any particular case depended on the directions given in those policy statements, including as to timing of implementation, and what is required to reconcile those policy statements with the issues before the Panel here.

[4] Ms Shirley has set out her analysis and reconciliation of the NPS-FM and NPS-IB and concluded that no change is required to give effect to the NPS-IB, and that minor further modification is appropriate to give effect to the NPS-FM. Should the panel accept Ms Shirley’s advice on this point, the conclusion is that Plan Change 3 does give effect to those policy statements, to the extent that is necessary here.

[5] A further qualification identified by Ms Shirley is that of ‘scope’. In Ms Shirley’s opinion, that is a relevant issue on how to ‘give effect’ the NPS-IB, as in her view there are no submissions fairly and reasonably seeking relief on this point.

[6] Counsel’s opening submissions also identified that “*the bulk of Fish and Game’s submission*” was not ‘on PC3’ because of its focus on aligning PC3 with the NPS-FM. In discussion between counsel and the Panel at the hearing, it was accepted that matters related to urban development under the NPS-UD should be read together and reconciled with the NPS-FM. This would better align with counsel’s advice at paragraph [25] of those submissions (reproduced here for ease of reference):

As observed in *Re Otago Regional Council*, national policy statements may have different focuses, but this should not lead to a false dichotomy. There, the Environment Court held that the NPS-FM and NPS-UD provisions should be read together and reconciled under the regional policy statement and regional plan. The question then, is whether there is any reason that this should not be done here?

- [7] Ms Shirley's reconciliation identified that only a modest intervention was necessary to give effect to the NPS-FM in this process. By reference to the timing provisions in the NPS-FM, and the importance of the Oranga Wai process carrying out a full clause by clause assessment of the NPS-FM, she considers that in these circumstances giving effect to the NPS-FM should be limited to her recommended interventions.
- [8] In other words, and on reflection, counsel does not submit that the Fish and Game submission should be excluded for scope reasons. However, in Ms Shirley's view her recommendations are appropriate to give effect to the NPS-FM to the extent required here, and further modifications to PC3 could interfere with the important work being undertaken through Oranga Wai.

**Question (b): how altering reference to versatile soils in the provisions amended by PC3 to refer to "*highly productive land*" will alter the effect of those provisions?**

- [9] This is another question where Ms Shirley has led the analysis.
- [10] It is observed that Ms Shirley has been left somewhat adrift by the territorial authority submitters here, as it was their submissions and pre-hearing agreements which led to Ms Shirley's recommendation, yet they are now changing their views. On the other hand, Fonterra maintains that the incorporated definition is appropriate.
- [11] Overall, Ms Shirley's maintains her opinion that moving from "*versatile soils*" to "*highly productive land*" is on balance the preferred approach.
- [12] It should be noted that this issue is one in which there are arguably slim margins in terms of the relative benefits and costs of implementing the provision under s 32. This is because no matter what happens, the NPS-HPL will continue to apply as a higher order document of significant weight in any RMA decision making until such time as it can be fully given effect to.

[13] Ultimately, Ms. Shirley does not anticipate the realisation of potential downsides or risks associated with her recommendation, despite the territorial authorities expressing concerns.

[14] Should the panel not accept her recommendation, it is relevant to note that Ms Shirley would prefer to retain the status quo, as she has been unable to develop a suitable 'half-way house' that provides only for the beneficial aspects of the interim definition of highly productive land under cl 3.5(7).

**Question (d): is there a valid basis to qualify provisions giving effect to the NPSUD to require consideration of nationally significant infrastructure other than the National Grid (and by extension, nationally and regionally significant industry)?**

[15] There are subsidiary questions here, in which Counsel has been asked to comment on two specific questions:

- (a) whether it is appropriate to rely on MfE Guidance documents to modify the meaning and effect of the NPS-UD; and
- (b) whether a purposive approach is appropriate to interpreting the NPS-UD to justify such a qualification.

[16] In relation to both questions, the relevant context is discussion between the panel and Counsel for Fonterra, regarding its submission that 'regionally important industry' should be provided for in PC3 and subject to regional direction regarding reverse sensitivity. In that discussion, counsel made references to the overarching purpose of the NPS-UD (without specification of a particular Objective) and sought to draw support from MfE guidance documents – but did not identify support in the form of direct wording in the NPS-UD.

[17] The questions above, therefore, are both premised on there being an absence of direction in the NPS-UD on this point. Addressing the legal questions asked by the Panel, the answer to both is “no”, with reasons given below. While these questions are addressed directly, I wish to respectfully highlight that there are alternate perspectives on whether the NPS-UD allows the regional council to provide direction concerning reverse sensitivity in giving effect to the NPS-UD. Accordingly, we also examine the premise that assumed a lack of such explicit wording within the NPS-UD, to contribute a more comprehensive understanding.

- [18] As to the direct questions – first – secondary sources or non-statutory guides such as MfE’s guidance documents can be valuable in providing context, background, and insights into legislative intent. However, in terms of statutory interpretation exercises where the purpose or intent behind a law is unclear or ambiguous, guidance documents which is published contemporaneously with a statutory document under the same authorship is more likely to be persuasive as to the original intent of provisions, while a guidance document provided in the aftermath of commencement would be less persuasive (such as NPS-HPL guidance) as it would not provide contemporaneous record of the legislative history of provisions.
- [19] In practice, the Environment Court has repeatedly held that MfE guidance documents have little value as guides to interpretation. There are various examples but two will suffice: in *Greater Wellington Regional Council v Adams*, the Environment Court held that the definition in a MfE Guidance document could not alter a definition of the NPS-FM, which is a statutory document under Part 5 of the RMA.<sup>1</sup> The Environment Court has also recently determined that it was “*not prepared to give any weight to the discussion of the NPS-HPL in the MfE guidelines*”, given they have no statutory basis, and while helpful, are not legally binding on the Court.<sup>2</sup>
- [20] The NPS-UD commenced along with published “*factsheets*”, under the same authorship (MfE) as the NPS-UD. They are subject to the following disclaimer:
- Disclaimer** The information in this publication is, according to the Ministry for the Environment’s best efforts, accurate at the time of publication. **The information provided does not alter the laws of New Zealand and other official guidelines or requirements.** Users should take specific advice from qualified professional people before undertaking any action as a result of information obtained from this publication.
- [21] These are information or guidance documents that are intended to be helpful. There are no examples of MfE guidance being relied upon to ‘modify’ the meaning or effect of the NPS-UD.
- [22] Second, the ‘purposive’ interpretation of the NPS-UD was used loosely in the discussion at the hearing. The principles governing the interpretation of RMA

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<sup>1</sup> *Greater Wellington Regional Council v Adams* [2022] NZEnvC 25.

<sup>2</sup> *G S Gray and K M Sinclair-Gray v Dunedin City Council* [2023] NZEnvC 45.

planning instruments are well-established. In *Powell v Dunedin City Council*, the Court of Appeal held that seeking the plain meaning of a rule from its words should be done in its immediate context.<sup>3</sup> In *Auckland Council v Budden*, the Environment Court held that if examining the immediate context raises uncertainty, consideration of provisions in light of the purpose they serve in the authorising legislation (in this case, the RMA) may assist.<sup>4</sup>

[23] This was not the context in which the purposive approach was raised. As noted above, Counsel understood this to be a general reference to a 'purposive' approach to interpreting the NPS-UD as a whole, without particular focus on a defined statutory interpretation issue, or textual ambiguity.

*What does the NPS-UD say?*

[24] Despite both answers being "no", it is submitted that there is direction within the NPS-UD which, properly interpreted, entitles the council to provide appropriately framed regional direction as to reverse sensitivity, beyond just that required to respond to the NPS-ET.

[25] NPS-UD Policy 1 mandates that planning decisions must contribute to "well-functioning urban environments". The policy then describes what "well-functioning urban environments" are. Importantly, it describes them as urban environments that "as a minimum" have the attributes set out in (a)-(f):

**Policy 1:** Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:

- (a) have or enable a variety of homes that:
  - (i) meet the needs, in terms of type, price, and location, of different households; and
  - (ii) enable Māori to express their cultural traditions and norms; and
- (b) have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and

<sup>3</sup> *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA).

<sup>4</sup> *Auckland Council v Budden* [2017] NZEnvC 209.

- (a) have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and
  - (b) support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
  - (c) support reductions in greenhouse gas emissions; and
  - (d) are resilient to the likely current and future effects of climate change.
- [26] The significance of the words “*as a minimum*” at the beginning of this list is that means that the list of factors are not exhaustive, and additional elements or considerations may be necessary beyond what is listed as to what constitutes a “*well-functioning urban environment*”.
- [27] As the list is non-exhaustive, it suggests that local authorities have the flexibility to supplement it in appropriate circumstances – providing greater specificity about the features of a well-functioning environment that are of importance generally or to the region (in this case) or territory.
- [28] The MfE “*factsheet*” (see Appendix 1) supports the textual interpretation of Policy 1, published by MfE upon commencement of the NPS-UD. Note that the factsheet is not being relied upon to change meaning, rather, as helpful corroboration. It says:
- The NPS-UD does not provide an exhaustive list of factors that contribute to well-functioning urban environments. There are other factors that contribute to the outcomes that councils and other decision-makers may wish to consider alongside those of the NPS-UD, such as principles of urban design.
- [29] Within the framework outlined by Policy 1, it can be argued that a well-functioning urban environment is one that actively addresses conflicts between incompatible land uses. This approach aims to create more harmonious residential environments spaces while respecting the essential operations of critical infrastructure.
- [30] Consequently, it is submitted that a well-functioning urban environment can be characterised by compatibility with neighbouring land uses. Considering reverse sensitivity effects on adjacent land uses within the provisions of PC3

offers a plausible foundation for introducing regional directives to effectively manage these interfaces.

[31] Determining the criteria for prioritising specific assets, industries, or infrastructure in the context of a well-functioning urban environment is a matter best left for resolution based on planning opinions. It is important to note that such considerations need not be exclusively confined to national grid considerations as outlined in the NPS-ET.

**8 March 2024**

A handwritten signature in blue ink, appearing to read 'N. Jessen', is written over a solid black horizontal line.

**N. Jessen**

Counsel for Manawatū-Whanganui Regional Council





## National Policy Statement on Urban Development 2020

# Well-functioning urban environments

This is one of a series of seven factsheets that give an overview of the National Policy Statement on Urban Development (NPS-UD). This fact sheet provides information on objective 1 and policy 1.

These provisions come into force on commencement of the NPS-UD.

## Purpose

The purpose is to establish a non-exhaustive list of important and nationally consistent matters that contribute to good urban outcomes, but do not consistently receive adequate consideration in planning practice. Emphasising these factors in planning and decision-making will help ensure our cities work for the benefit of all people, communities and future generations, enabling access to opportunities and thereby maximising social benefits and minimising social costs.

## Requirements

Policy 1 on well-functioning urban environments articulates a set of outcomes for local authorities to use when preparing plans and making decisions, and sets direction for the intended outcomes of the NPS-UD. Policy 1 is reproduced below:

Policy 1: Planning decisions contribute to well-functioning urban environments, which are urban environments that, as a minimum:

- a. have or enable a variety of homes that:
  - i. meet the needs, in terms of type, price and location of different households; and
  - ii. enable Māori to express their cultural traditions and norms; and
- b. have or enable a variety of sites that are suitable for different business sectors in terms of location and site size; and
- c. have good accessibility for all people between housing, jobs, community services, natural spaces, and open spaces, including by way of public or active transport; and
- d. support, and limit as much as possible adverse impacts on, the competitive operation of land and development markets; and
- e. support reductions in greenhouse gas emissions; and

f. are resilient to the likely current and future effects of climate change.

Local authorities should be able to demonstrate how their plans, resource consents and other Resource Management Act 1991 (RMA) decisions contribute to the outcomes outlined in policy 1, and should be proactive in removing barriers that create social costs or limit social benefits.

## What has changed from the National Policy Statement on Urban Development Capacity?

The National Policy Statement on Urban Development Capacity 2016 (NPS-UDC) contained direction on 'effective and efficient' urban environments. The NPS-UD builds on this direction by including factors important to consider in achieving good urban outcomes, such as enabling good accessibility to employment, amenity and services.

### Things to be aware of

The NPS-UD does not provide an exhaustive list of factors that contribute to well-functioning urban environments. There are other factors that contribute to the outcomes that councils and other decision-makers may wish to consider alongside those of the NPS-UD, such as principles of urban design.

The term 'accessibility' in policy 1 refers to the ease and cost of accessing opportunities (eg, amenity, employment) across an urban area. The term is not intended to refer to accessibility at a site-specific level. However, to enable *all* people and communities to provide for their wellbeing, councils should ensure that activities such as housing jobs and services are readily accessible within urban environments. This means there should be places where, for example, disabled people, older people and the very young are able to fully participate, interact and move about with ease and dignity. The Office of Disability Issues has produced [guidance on accessibility for the disabled](#) that is useful in considering these matters.

The outcomes referenced in the well-functioning urban environments policy are interrelated and need to be considered together. For example, housing and transport choices that relate to Policies 1(a) and 1(c) have an impact on greenhouse gas emissions, policy 1(e).

The well-functioning urban environments policy is central to the NPS-UD and is to be read alongside other key policies, such as the intensification and responsive planning policies.

## Fact sheets in this series

This is one of a series of seven fact sheets providing an overview of the National Policy Statement on Urban Development.

The full set of fact sheets is available on our website: [www.mfe.govt.nz/about-national-policy-statement-urban-development](http://www.mfe.govt.nz/about-national-policy-statement-urban-development).

## Find out more

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Published in July 2020 by the  
Ministry for the Environment  
Publication number: INFO 961



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**MINISTRY OF HOUSING  
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