

**IN THE MATTER OF
AND
IN THE MATTER OF**

the Resource Management Act 1991

Waikato DC Variation 3

**Waikato District Council IPI
Interim Guidance #1
PDP Variation 3 - Urban Fringe QM
14 March 2023**

This interim guidance from the Independent Hearing Panel (IHP) is provided in respect of the proposed Urban Fringe qualifying matter (UFQM) included in the Waikato District Council (WDC) PDP Variation 3 – Enabling Housing Supply.

The purpose of this interim guidance is twofold:

- (a) to inform all parties of the Panel’s thinking, having read the submissions, having heard evidence and legal submissions from submitters at the initial strategic hearing on 15-17 February 2023, and having issued Direction #10 inviting further submissions on the matter; and
- (b) to guide parties’ preparations for the substantive hearing on Variation 3 commencing on 26 July 2023.

BACKGROUND

In brief, the proposed Variation 3 UFQM sought to constrain the application of the Medium Density Residential Standard (MDRS) within any General Residential Zone (GRZ) to the area which is within the defined 800m walkable catchment from a town centre zone (or equivalent). The UFQM was proposed as an “other matter” under s.771(j) RMA, subject to satisfying the requirements of s.77L.

The notified UFQM was both supported and opposed in submissions and further submissions.

In evidence and submissions filed in advance of, and given orally at, the strategic hearing the Panel was advised by Mr Ebenhoh (Planning and Policy Manager) and Ms Parham (counsel) that WDC would not be pursuing the UFQM in its notified form, or producing evidence on the matter, as it had concluded that the concept had difficulty meeting the legal requirements of s.77L RMA. That provision stipulates three mandatory conjunctive requirements as follows:

77L Further requirement about application of section 771(j)

A matter is not a qualifying matter under section 771(j) in relation to an area unless the evaluation report referred to in section 32 also—

- (a) identifies the specific characteristic that makes the level of development provided by the MDRS (as specified in Schedule 3A or as provided for by policy 3) inappropriate in the area; and*
- (b) justifies why that characteristic makes that level of development inappropriate in light of the national significance of urban development and the objectives of the NPS-UD; and*
- (c) includes a site-specific analysis that—*

- (i) *identifies the site to which the matter relates; and*
- (ii) *evaluates the specific characteristic on a site-specific basis to determine the geographic area where intensification needs to be compatible with the specific matter; and*
- (iii) *evaluates an appropriate range of options to achieve the greatest heights and densities permitted by the MDRS (as specified in Schedule 3A) or as provided for by policy 3 while managing the specific characteristics.*

The Panel notes that WDC is reviewing the implications of its position for the provisions that apply in the GRZ and will be addressing this matter in its s.42A report and filing evidence on that for the substantive hearing. The Panel confirmed an evidence exchange timetable for the substantive hearing in Direction #10.

Counsel also submitted that the option of withdrawing the UFQM was not open to it under s.80G(1)(c) or cl.95 Part 6 of Schedule 1 (which identifies the clauses of Part 1 of Schedule 1 that apply, and which does not identify the plan withdrawal clause 8D).

Parties opposed to the UFQM, and who indicated agreement with WDC's conclusion, have sought clarification of its status from the Panel in order to avoid the necessity and expense of producing evidence and witnesses on that matter for the substantive hearing.

This interim guidance addresses that request, but before doing so we summarise the two options put forward by Council at the procedural hearing on 24 February 2023.

OPTION 1 - INTERIM GUIDANCE

Issuing interim guidance, which would indicate the Panel's preliminary view on the question but would not be a determination as such.

Council considered this option potentially less attractive because uncertainty may remain about whether any party intends to pursue the UFQM until evidence is exchanged mid-2023. To remedy that, Council proposed a timetable for exchanging submissions from those persons supporting or opposing the UFQM prior to the Panel issuing any guidance.

OPTION 2 – EARLY RECOMMENDATION DECISION

As an alternative option, Part 6 cl.100 of Schedule 1 RMA allows the Panel to provide its recommendation in 1 or more written reports at different times. Council proposed that the Panel make an early recommendation, with a similar timetable for submitters to advise their intent and, as necessary, exchange submissions and evidence.

Council also noted that no legal submissions were made in support of the UFQM at the February Joint Hearing.

Prior to making a decision on the appropriate option, the Panel issued Direction #10 on 3 March 2023 requiring submitters who were seeking to rely upon UFQM to advise whether they wished to pursue the matter and inviting submissions. No advice in support of the UFQM was received by the 10 March 2023 deadline.

Accordingly, per paragraph 23(d) of that Direction, the Panel has moved to consider the matter on the papers.

On the basis of the material currently before the Panel, and in the absence of any opposing submissions, the Panel considers that the UFQM does not meet the s.77L RMA statutory tests for a qualifying matter, and Council's proposal to abandon that mechanism and to consider whether alternative provisions are necessary in the General Residential Zone in the absence of the UFQM and supporting those through the s.42A report and evidence is warranted.

Had Council indicated that it simply sought to delete the UFQM without considering the introduction of alternative provisions, then we might have been minded to issue a recommendation per Option 2. However, as Council is considering alternative provisions and because those provisions remain as-yet unknown to the Panel and submitters, we think it safer to leave the UFQM on the table to avoid any potential scope issues that might arise for those new provisions should we effectively determine the matter. While not determinative of our view, that approach also avoids any judicial review risk associated with the issuing of such a recommendation as well as any delay to proceedings that might result thereby - regardless of the merits (i.e., whether or not the judicial review is upheld).

CONCLUSION

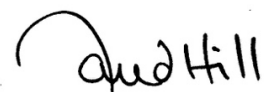
The Panel has, therefore, determined that interim guidance should be issued, making it very clear that at this juncture we are satisfied that the urban fringe issue does not meet the QM requirements of s.77L RMA. Furthermore, the Panel accepts that WDC (or any other party) is under no obligation to “defend” that matter in evidence in light of its stated position on the question.

This interim guidance is not binding on submitters (including the Council) or on the Panel.

The Panel does not invite any further evidence or legal submissions in relation to this topic and will not enter into debate on this interim guidance. However, submitters and their representatives are welcome to raise any questions and seek clarification of this interim guidance.

INTERIM GUIDANCE: URBAN FRINGE

1. Variation 3 to the Proposed Waikato District Plan as notified identified and proposed a qualifying “other matter” related to the urban fringe that applies to the General Residential Zone, restricting the MDRS to an 800m walkable catchment from the four main town centres.
2. Council no longer supports that QM as satisfying the requirements of s.77L RMA but is not persuaded that it can withdraw that provision because of s.80G(1)(c) and cl.95 Part 6 of Schedule 1.
3. No legal submissions following the Joint Hearing in February 2023 contended otherwise.
4. Having provided all parties who supported the urban fringe QM through submissions the opportunity to submit on the matter, but having received no such indication from any party, the Panel has concluded that the urban fringe is a not qualifying matter under s.77L(j) as it does not appear to satisfy the requirements of s.77L RMA.
5. Submitters who contend that the urban fringe QM is not lawful do not need to provide submissions or evidence on that matter. In the event that submitters who supported that QM produce evidence or legal submissions on the matter at the substantive hearing despite this interim guidance, opportunity for rebuttal may be allowed.



David Hill
Chairperson
Independent Hearing Panel

14 March 2023