

UNDER the the Resource Mangement Act 1991 ("RMA")
IN THE MATTER of Proposed Waikato District Plan (Stage 2): Hearings 27A
– 27F

**LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA-HOMES AND
COMMUNITIES**

HEARINGS 27A - 27F NATURAL HAZARDS AND CLIMATE CHANGE

5 May 2020

**ELLIS GOULD
LAWYERS
AUCKLAND**

REF: Douglas Allan / Alex Devine

**Level 17 Vero Centre
48 Shortland Street, Auckland
Tel: 09 307 2172 / Fax: 09 358 5215
PO Box 1509
DX CP22003
AUCKLAND**

MAY IT PLEASE THE HEARINGS PANEL:

1. Introduction and Summary

- 1.1 These legal submissions are presented on behalf of Kāinga Ora-Homes and Communities (“**Kāinga Ora**”) in relation to its submissions¹ on the Stage 2 and Variation 1 to the Proposed Waikato District Plan (“**the Plan**”).
- 1.2 Kāinga Ora has appeared before the Hearing Panel on several occasions and has previously provided details of its origin, the statutory framework it operates within and the scope of its role and interest in planning processes. A summary of that information is set out in **Annexure A** to these legal submissions.
- 1.3 Kāinga Ora has 115 properties within the Waikato District that are directly impacted by one or more natural hazard overlay.
- 1.4 In the context of Kāinga Ora’s wide mandate with respect to urban development, it is concerned to avoid the undue discouragement or restriction of existing and future urban activities by a planning framework that adopts an overly onerous and conservative approach without due regard for the fact that works may be undertaken as part of development proposals as a means of reducing the level of existing risk in relation to hazards. Indeed, comprehensive development is often well placed to undertake improvements or mitigations which reduce the existing level of risk. If an overly onerous approach is adopted, then Kāinga Ora says this will compromise the ability to achieve a coherent and compact urban form in the District’s townships over time and would impact negatively and unnecessarily on development capacity.
- 1.5 Kāinga Ora generally supports the approach proposed by the Council with respect to Natural Hazards which generally enables development provided risk can be avoided or mitigated. However, the following three key issues remain outstanding:

¹ Submission No. 2094, Further Submission No. FS3033

- (a) Whether a restricted discretionary or discretionary activity framework should be adopted as the default activity status where a permitted activity standard is not complied with (see Section 2).
- (b) Whether the provisions should make a distinction between:
 - (i) New development or uses; and
 - (ii) Redevelopment of existing sites or uses (of the same or similar scale).(see Section 3)
- (c) Whether the onus should be placed on plan users to identify whether their property is subject to a liquefaction area, and if not, how these issues should be addressed pending the Council introducing a mapped layer at a future (undefined) date (see Section 4).

1.6 Kāinga Ora has filed planning evidence by Mr Craig Sharman, consultant planner, in support of its position.

2. What is the appropriate assessment framework where a permitted activity standard is not complied with?

2.1 Kāinga Ora seeks a restricted discretionary activity framework as the default activity status for non-compliance with permitted activity standards. The notified Plan currently provides for such activities to be discretionary.

2.2 As outlined in the evidence of Mr Sharman²:

- (a) There is a certainty as to the nature of effects to be considered in respect of the activities which Kāinga Ora are seeking default to Restricted Discretionary;
- (b) The potential consequences of these effects are well understood;

² EIC, Craig Sharman (Planning) for Kāinga Ora dated 16 April 2021 at paragraph 10.7 and 10.9

- (c) In those circumstances, it is possible to identify appropriate matters of discretion which provide for a robust assessment of any proposal which cannot satisfy permitted activity controls.

2.3 Identifying matters of discretion provides direction and certainty to plan users as well as council planners regarding what effects should be considered, resulting in a more focused assessment that deals with the key effects likely to be generated by any given development. As discussed in Mr Sharman's evidence³, in circumstances where the nature of potential effects is well understood, there is no marginal benefit to retaining a full discretionary activity status over a restricted discretionary status. There is, however, a likely cost in doing so, being the perceived 'consenting risk' which may lead to:

- (a) a predominant built form driven by a desire to stay within permitted standards (i.e.: developers will adopt a low risk built form, but one that does not take advantage of site characteristics or opportunities). This has potential consequences in terms of the ability to achieve a coherent and compact urban form, and for the development capacity able to be achieved within the District; or
- (b) no development at all.

2.4 Kāinga Ora disagrees with the Council's position that an "avoid" policy framework necessitates the application of a discretionary activity status.

- (a) In Kāinga Ora's submission, the presence of an avoid policy does not lead automatically to a default discretionary activity status for applications which cannot meet the required thresholds for permitted activity status. It is only when an assessment is undertaken that a determination can be made as to whether a particular proposal creates an effect that should be avoided. That assessment can occur as effectively in a restricted discretionary context as for a full discretionary activity. The key issue is to ensure that the restricted discretionary activity matters of

³ EIC, Craig Sharman (Planning) for Kāinga Ora dated 16 April 2021 at paragraph 10.10.

discretion and criteria identify and enable assessment of the potential effect of concern.

- (b) In any event, Kāinga Ora says that the policy framework is more nuanced than that. For example, in the High Risk Hazard Areas the directive is to avoid increasing risk to people's safety, well-being and property. That is not a prohibition on activities occurring but instead invites an assessment of the likelihood of risk increasing. This is a matter which can be assessed through a restricted discretionary activity framework.
- (c) Further, many of the standards to which Kāinga Ora is seeking a change in default activity status do not even flow from these "avoidance" policies (e.g. activities within the flood plain management area).

2.5 Ultimately, and as noted in the *Rangitata Diversion Race Management Ltd v Canterbury RC* [2015] NZHC 2174 decision, it is a factual assessment which considers *inter alia* whether a given activity status is the most appropriate way to achieve the purpose of the Act and to achieve the objectives of the Plan:⁴

[36] At this point, I note the observations of the Court of Appeal in Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development, where it was stated:

[28] The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

[37] As with s 77B, the role of the [Council] under s 77A is to determine "the most appropriate way to achieve the purpose of the Act" and "examine whether the provisions in the proposal are the most appropriate way to achieve the objectives". This further supports the need for a factual assessment of the activity, as set against the [Plan], the RMA and other relevant standards and policies. (footnotes omitted)

⁴ *Rangitata Diversion Race Management Ltd v Canterbury RC* [2015] NZHC 2174.

2.6 To that end, Kāinga Ora says:

- (a) There is no evidence before you that establishes that a particular category of activity will have a character, intensity and scale of environmental effects that are so variable that it is not possible to prescribe standards to control them in advance.
- (b) Rather, as identified by Mr Sharman⁵, the range of potential adverse effects generated by non-compliance with permitted standards for the following activities are able to be identified in the Plan, so that restricted discretionary activity status is appropriate as it can encompass and require consideration of all relevant potential adverse effects:
 - (i) Construction of new buildings and additions to existing building within the Flood Plan Management Area;
 - (ii) Vacant lot subdivision within the Flood Plain Management Area;
 - (iii) Vacant lot subdivision within the High Risk Flood Area or Coastal Sensitivity (Inundation) Area where additional lots are located outside that area or are able to contain a complying building platform outside that area;
 - (iv) Construction of a building or a new accessory building or earthworks within 50m of a stop bank.
- (c) The matters of discretion can be drafted to capture all relevant adverse effects and enable a robust assessment in terms of those effects of any proposal which cannot satisfy permitted activity controls. If an activity has an adverse effect that is required to be avoided in terms of the policy, a restricted discretionary status will still allow the Council to decline or require changes to it.

⁵ EIC, Craig Sharman (Planning) for Kāinga Ora dated 16 April 2021 at paragraph 10.7.

3. Should the Plan distinguish between new development and redevelopment within High-Risk Areas?

3.1 Within High-Risk Flood Areas, Kāinga Ora considers it appropriate to distinguish between new development (or uses) and redevelopment of existing sites or uses, particularly where such areas are located in existing urban areas in which development or a variety of land uses has already been established.

3.2 The way in which the Plan is currently drafted significantly limits your ability to add to or reconstruct an existing building where you are located within a High-Risk Flood Area. Kāinga Ora says that adding to or reconstructing existing building is a very different prospect to new development or the introduction of a new activity, and it is appropriate for the Plan to recognise the presence of an existing use and manage these in different ways.

3.3 Adopting the approach proposed by Kāinga Ora would still see additions to or reconstruction of existing buildings assessed as a restricted discretionary activity with matters of discretion that enable a consideration of risk to people and property, and for consent to be declined should that risk not able to be avoided. New buildings would remain as non-complying activity.

3.4 This would enable people within those areas to have flexibility to deal with their land in a manner which recognises their existing location within a High-Risk Flood area, while enabling the Council to undertake a robust assessment of the risk generated by any particular proposal.

3.5 The Council does not recommend introducing a distinction on the basis that existing use rights would apply. Kāinga Ora agrees and says that if this is the case then the explicit inclusion of this reference within the relevant standards should not be an issue from a consenting perspective but will make the distinction clear to plan users.

4. Who should be responsible for identifying areas subject to liquefaction hazards, and when?

4.1 The proposed approach to liquefaction places the onus of identifying areas subject to liquefaction risk onto applicants.

- 4.2 Liquefaction is a phenomenon that does not respect property boundaries. To that end, there is a clear inefficiency in an ad hoc approach which requires each individual property owner to replicate work each time an application for a subdivision or other relevant consent⁶ is made. That may result in the same technical work occurring multiple times by virtue of the area subject to the hazard being significantly greater than any individual site for which a separate assessment would be required.
- 4.3 Through evidence, the Council and its technical advisors have accepted that the approach proposed in the notified Plan is not best practice, and that the Council should identify whether or not there is potential for the hazard in the first place (as is the case with other natural hazards in the Plan). Despite this, Council's response is to maintain the status quo and instead recommend that a district wide mapping of liquefaction hazards take place through some later process.
- 4.4 Kāinga Ora says this is unsatisfactory for a number of reasons:
- (a) Not determining the issue and relying on a later process is inappropriate because it is not time bound and there is no guarantee that Council will undertake that process promptly (or at all).
 - (b) In the interim, landowners will be subject to a process which is inefficient and which will place unjustified costs on them, in circumstances where Council accepts that there are issues with doing so.
 - (c) If a subsequent schedule 1 process is adopted, there will be time and financial costs to both submitters and the Council.
 - (d) Council's primary focus appears to be on issuing decisions on the Plan in a "timely and coordinated manner" rather than adopting an approach which appropriately balances the burden on the respective parties. While Kāinga Ora accepts that it is desirable to

⁶ Being, subdivision creating a vacant lot, any other discretionary or non-complying consent, or any standard where potential liquefaction risk has been identified as a matter over which Council has reserved its discretion.

have decisions on the Plan in a timely manner, clause 10(4)(a) of Schedule 1 to the RMA provides that decisions must be given within 2 years of notification of a proposed policy statement or plan. Stage 2 was notified on 22 July 2020. It is therefore well within the 2 year period for a decision. While the Council may have sought (and been granted) an extension of time from the Minister's on the basis that it would release decisions on Stage 1 and 2 concurrently, there is no statutory requirement for them to do this.

4.5 Kāinga Ora's submission sought that the Council either:⁷

- (a) Introduce a mapped 'Liquefaction Management Area' or similar with a suite of provisions relevant to subdivision and development within this area (based on what is currently proposed); or
- (b) Incorporate a non-statutory interactive set of mapped 'Liquefaction Management Areas' held as a geographic information system which provides information as to hazard risk, and a related policy framework for assessment but no associated rules.

If option (b) is adopted, Kāinga Ora reiterates that the Council will need to be careful in drafting provisions so as to ensure that the non-statutory map does not determine (directly or indirectly):

- (c) Whether a consent is required for an activity; or
- (d) The activity status of the particular activity.

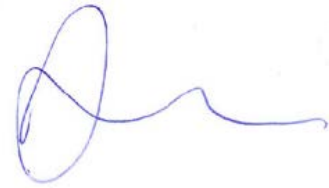
4.6 In the circumstances, Kāinga Ora says that whatever option is adopted, it should be adopted as part of this Plan review process to avoid placing onus on members of the public to do the Council's work in the interim. If a mapped layer is not introduced through this process and the Council's proposed approach is not adopted, then there will be an incentive on the Council to undertake the required work promptly.

⁷ 2094.51, 2094.69. Submission ID 50-52 and 69

5. Relief Sought

5.1 Kāinga Ora requests that the Panel grant the relief sought by Kāinga Ora as set out in the set of consolidated provisions to be provided to the Panel.

DATED this 5th day of May 2021

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line that tapers to the right.

Douglas Allan / Alex Devine
Counsel for Kāinga Ora-Homes and
Communities

Annexure A – Background to Kāinga Ora (Summary)

- 5.2 Kāinga Ora was established in 2019 as a statutory entity established under the Kāinga Ora - Home and Communities Act 2019, and brings together Housing New Zealand Corporation, HLC (2017) Ltd and parts of the KiwiBuild Unit. Under the Crown Entities Act 2004, Kāinga Ora is listed as a Crown agent and is required to give effect to Government policies.
- 5.3 Kāinga Ora is now the Government's delivery agency for housing and urban development. Kāinga Ora therefore works across the entire housing spectrum to build complete, diverse communities that enable New Zealanders from all backgrounds to have similar opportunities in life. As a result, Kāinga Ora has two core roles:
- (a) being a world class public housing landlord; and
 - (b) leading and coordinating urban development projects.
- 5.4 Kāinga Ora's statutory objective requires it to contribute to sustainable, inclusive, and thriving communities that:
- (a) provide people with good quality, affordable housing choices that meet diverse needs; and
 - (b) support good access to jobs, amenities and services; and
 - (c) otherwise sustain or enhance the overall economic, social, environmental and cultural well-being of current and future generations
- 5.5 Kāinga Ora owns or manages approximately 63,800 rental properties throughout New Zealand. In addition, Kāinga Ora owns or manages approximately 2,400 properties for Community Group and Transitional Housing. Within Waikato, Kāinga Ora manages a portfolio of approximately 390 dwellings.⁸
- 5.6 Kāinga Ora's tenants are people who face barriers (for a number of reasons) to housing in the wider rental and housing market.

⁸ As at 30 June 2020.

- 5.7 In recent years the growth in future demand for public housing has changed markedly from the 2-3 bedroom houses, to smaller one bedroom dwellings for single occupants or couples without children and 4-5 bedroom houses for larger families. This demand contrasts with Kāinga Ora's existing housing portfolio of which a significant proportion comprises 2-3 bedroom houses on larger lots.
- 5.8 Kāinga Ora's focus in recent times has been to provide public housing that matches the requirements of those most in need. To achieve this, it has largely focused on redeveloping its existing landholdings. Kāinga Ora will continue this approach of redeveloping existing sites by using them more efficiently and effectively, so as to improve the quality and quantity of public and affordable housing that is available.
- 5.9 In addition, Kāinga Ora will play a greater role in urban development more generally. The legislative functions of Kāinga Ora illustrate this broadened mandate and outline two key roles of Kāinga Ora in that regard:
- (a) initiating, facilitating and/or undertaking development not just for itself, but in partnership or on behalf of others; and
 - (b) providing a leadership or coordination role more generally.
- 5.10 Notably, Kāinga Ora's statutory functions in relation to urban development extend beyond the development of housing (which includes public housing, affordable housing, homes for first home buyers, and market housing) to the development and renewal of urban environments, as well as the development of related commercial, industrial, community, or other amenities, infrastructure, facilities, services or works.
- 5.11 In addition, the Urban Development Act 2020 affords Kāinga Ora additional statutory obligations and powers to undertake urban development functions, including facilitating the delivery of complex and strategically important urban development projects throughout New Zealand. As such, the Urban Development Act provides Kāinga Ora with a toolkit of powers and a new, streamlined process to enable complex, transformational development in the country's urban areas. The Urban Development Act does not negate, however, the need for Kāinga Ora to continue to be actively involved in plan-making throughout the country. Indeed, Kāinga Ora's new statutory mandate regarding urban

development means that involvement in plan development for urban areas becomes even more critical.

- 5.12 In that regard, Kāinga Ora collectively is to play a pivotal role in delivering on the government's plans for reform of the housing sector, by facilitating a step change in the housing crisis. Kāinga Ora will consequently be tasked by statute to provide whānau and families with world class public housing, as well as to partner and undertake urban development of all sizes to deliver homes where need.
- 5.13 As such, Kāinga Ora takes on the additional statutory role of facilitating sustainable, inclusive and thriving communities that provide people with a mix of good quality, affordable housing choices and access to transport links, facilities and services, as well as to green spaces. Ministerial direction provided to Kāinga Ora requires it to build partnerships and collaborate with others in order to define and deliver on housing and urban development opportunities. This will include working with private developers, iwi, Māori landowners and community housing providers to enable and catalyse the delivery of outcomes, through partnerships and the use of new powers to leverage private, public and third sector capital and capacity. Engaging and partnering with local government will also be critical to achieving Kāinga Ora objectives.