BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE WAIKATO REGION

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO

UNDER the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Proposed Variation 3 to the Waikato Proposed District Plan (PDP)

LEGAL SUBMISSIONS ON BEHALF OF WAIKATO DISTRICT COUNCIL FOR SUBSTANTIVE HEARING

21 July 2023

TOMPKINS | WAKE

Bridget Parham (bridget.parham@tompkinswake.co.nz)
Jill Gregory (jill.gregory@tompkinswake.co.nz)

Westpac House
Level 8
430 Victoria Street
PO Box 258
DX GP 20031
Hamilton 3240
New Zealand
Ph: (07) 839 4771
tompkinswake.com

INTRODUCTION

1. These legal submissions are presented on behalf of Waikato District Council (Council) in support of Variation 3 to the Waikato Proposed District Plan (Variation 3).

2. On 15 to 17 February 2023 a Joint Opening Hearing (Joint Opening Hearing) was held in respect of Variation 3, Proposed Plan Change 12 to the Operative Hamilton City District Plan and Proposed Plan Change 26 to the Operative Waipā District Plan (Waikato IPIs). At the Joint Opening Hearing, we submitted the following legal submissions:

   (a) Joint opening legal submissions of counsel for the Councils dated 8 February 2023 (Joint Legal Submissions); and

   (b) Opening legal submissions for the Waikato District Council dated 10 February 2023 (Opening Legal Submissions).

3. The Waikato IPIs Joint Legal Submissions and our Opening Legal Submissions are adopted in their entirety for this hearing and will be referred to in these submissions to avoid repetition.

4. These Legal Submissions for the substantive hearing will address:

   (a) The scope of Variation 3;

   (b) Policy 3 of the National Policy Statement on Urban Development (NPS-UD);

   (c) The incorporation of the Medium Density Residential Standards (MDRS);

   (d) Approach to qualifying matters;

   (e) Changes to the notified qualifying matters;

(f) Additional qualifying matters in response to removal of the Urban Fringe;

(g) Submitter requests for new qualifying matters;

(h) The effect of qualifying matters on development capacity;

(i) Specific submitter requests – non-qualifying matters;

(j) Related provisions; and

(k) Rezoning requests.

SCOPE OF VARIATION 3

Resource Management Act (RMA) Section 80E

5. The matters that may be included in an Intensification Planning Instrument (IPI) are described in section 80E of the RMA. Unlike a standard plan change or variation, an IPI:

(a) Must contain the mandatory matters set out in section 80E;

(b) May contain the discretionary matters set out in section 80E; and

(c) Must not be used for any purpose other than the uses specified in section 80E.[1]

6. Section 4 of the Joint Legal Submissions set out the mandatory elements and the discretionary elements of an IPI.

7. In respect of the mandatory elements of an IPI, Variation 3 must:

(a) Incorporate the MDRS into relevant residential zones in the district; and

[1] RMA, s 80G.

(b) Give effect to Policy 3(d) of the NPS-UD in urban environments.

8. In respect of the discretionary elements , Variation 3 as notified included related provisions under section 80E(1)(b)(iii) and (2) as follows:

(a) Added new definitions, including for MDRS and qualifying matters;

(b) Modified the MDRS where necessary to accommodate qualifying matters;

(c) Rezoned two sites from General rural zone (GRUZ) to a relevant residential zone in Pookeno;[2]

(d) Added objectives and policies in addition to those set out in the MDRS to relevant residential zones;[3]

(e) Adds new objectives and policies in addition to those set out in the MDRS to the subdivision chapter;

(f) Adds new rules in relation to subdivision within relevant residential zones; and

(g) Makes consequential modifications to include reference to Medium Density Residential Zone 2 (MRZ2) where relevant.

9. For clarification, Variation 3 does not:

(a) Introduce any financial contributions provisions in the Proposed District Plan (PDP);

(b) Propose any amendments to the papakaainga provisions in the PDP. As explained at the Opening Strategic Hearing, papakaainga

[2] RMA, s 77G(4).
[3] RMA ss 77G(5)(b) and 80E(b)(ii).

housing and development is already provided for in the PDP Decisions Version (PDP-DV) regardless of the zoning;[4]

(c) Rezone any land which was not already zoned residential in Taukau, Huntly and Ngaaruawaahia; or

(d) Enable a greater level of development than provided for by the MDRS.[5]

10. An IPI can only be used for the mandatory and discretionary elements set out in section 80E of the Act. The meaning of "related provisions" are discussed later in relation to specific submission points. Accordingly, any submissions and Panel recommendations must first be within these matters to fall within the scope of an IPI.

'On' Variation 3

11. In addition to the jurisdictional limits in section 80E of the Act, a matter raised in submissions or in the hearing and any recommendation must be "on" Variation 3 as notified as determined by the established tests. The relief sought by submitters and recommendations made by the Panel must still meet the bipartite test in *Clearwater Resort Ltd v Christchurch City Council* (*Clearwater*), as follows:

(a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed variation; and

(b) Whether there is a real risk that people affected by the variation (if modified in response to the submission or recommendation by the Panel) would be denied an effective opportunity to participate in the plan change process.

[4] Evidence-in-Chief Jim Ebenhoh at [56].
[5] RMA, s 77H.

12. Our approach to scope was set out in our legal submissions on the scope to introduce inclusionary zoning into Variation 3, and in relation to zoning requests identified for a preliminary determination.[6] As set out below, the Panel determined that three submissions were out of scope and were struck out.

13. These legal submissions will later address submission points and expert recommendations that the Council submits are also out of scope. Those submission points or recommendations either:

    (a) Do not fall within the scope of section 80E, and are therefore ultra vires; or

    (b) Fail to meet the bipartite *Clearwater* tests for being on Variation 3.

14. The accepted ways of determining whether a submission or recommendation meets the first *Clearwater* test is to:

    (a) Consider the section 32 report and whether the submission/recommendation raises matters that ought to be addressed in that report;[7] or

    (b) Consider whether the management regime for a particular resource is altered by the variation.

15. It is acknowledged that a submission may be on Variation 3, even if the substance of the submission is not addressed in the section 32 report but should have been. For example, there is very limited assessment in the section 32 report for Variation 3 on how Policy 3(d) of the NPS-UD is given

[6] Legal Submissions of Counsel for Waikato District Council on Scope of Submissions Seeking Inclusionary Zoning and Affordable Housing Provisions, dated 24 March 2023.
[7] *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [58] - [60].

effect to, but it is accepted that doing so is a mandatory requirement of section 80E.

16. Even if the Panel concluded that the submission met the first *Clearwater* test, the Panel must consider natural justice matters and whether there is a risk that the Waikato community would not be aware of the potential for changes to arise from a submission or the Panel's recommendations.

17. These approaches will be applied as applicable later in these submissions.

***Waikanae* decision**

18. The scope of an IPI under section 80E has also been considered by the Environment Court in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*[8] (the *Waikanae* decision). In this case, the Court recognised that:

> [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.

19. The Court considered the extent of the Council's powers to introduce qualifying matters under section 77I, and use related provisions which support or are consequential on the MDRS or Policy 3 under section 80E(1)(b). The Court determined that:

> [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 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 commonly associated with residential development from permitted to either restricted discretionary or non complying.

[8] [2023] NZEnvC 056.

> [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 process.

20. In our submission, the *Waikanae* decision shows that:

    (a) The mandatory requirements of section 80E are not open-ended or without limitation, and any proposed rules must be carefully considered to ascertain whether they fall within one of the subsections of section 80E.

    (b) Rules that are proposed as qualifying matters under section 77I or as related provisions under section 80E(1)(b) will be ultra vires if they remove the rights that presently exist under a district plan.

21. The *Waikanae* decision did not consider whether the above principles should equally apply to the mandatory requirement to give effect to Policy 3(d). In our view, it must equally apply to any provisions introduced by a Council to give effect to Policy 3(d) but would remove rights that presently exist in a district plan. However, the Panel does not need to address this question as there are no submission points that have been rejected in reliance on *Waikanae* that relate to giving effect to Policy 3(d).

22. In the Waikato District context, the question that arises from the *Waikanae* decision is whether, and how, the finding applies to the Waikato Proposed District Plan (PDP) where appeals are still outstanding. There is a possibility that 'rights' conferred by the PDP are not certain and may still change. We have carefully considered the limited number of submission points that have been rejected by the Reporting Planners in reliance of the *Waikanae* decision and, in the relevant place in these submissions, we will identify whether there are any relevant PDP appeals and set out how the Panel should approach these submission points.

23. We are aware that the *Waikanae* decision has been appealed to the High Court, but there appears to be no certainty that a High Court decision would be available before the Panel makes its recommendations and the deadline for Council's decisions.

24. Overall, it is our submission, that while not legally binding on the Panel, the Panel should treat the *Waikanae* decision significantly persuasive and make recommendations that would align with its findings. We consider the fundamental principle of *Waikanae* that peoples' established rights should not be removed without an opportunity to participate in that process aligns closely to the second *Clearwater* test related to natural justice. Further, it is arguably even stronger in the case of an IPI where there are no appeal rights.

The Panel's previous decisions on scope

25. In Direction #11 the Panel confirmed that the submission by Waikato Community Lands Trust, Waikato Housing Initiative, Habitat for Humanity, Momentum Waikato and Bridge Housing Trust (submitter 93) seeking inclusionary zoning and affordable housing provisions were out of scope of Variation 3.

26. On 11 April 2023 the Panel's Direction #12 also determined that the following zoning submissions were out of scope, and were struck out:

    (a) Halm Fan Kong (submitter 13); and

    (b) Howard Lovell (submitter 27).

27. The Panel is not required to consider these submissions further.

Submissions deferred to a later date

28. The following submission points have been directed by the Panel to be considered at a hearing later this year:

(a) Horotiu Farms Limited – questions on scope and the merits relating to whether the MDRS should be incorporated into the residential zone at Horotiu, and if so, what are the qualifying matters that should apply.

(b) Waka Kotahi – relating to noise buffers to the state highway network, these provisions are also subject to PDP appeals and significant progress is being made towards the resolution of the appeal, and the parties agreed that additional time would be beneficial to see whether the matter can be agreed.

(c) KiwiRail – relating to a noise and vibration buffer to the main trunk line, in a similar position to the Waka Kotahi appeal.

NPS-Indigenous Biodiversity

29. The National Policy Statement – Indigenous Biodiversity (NPS-IB) was gazetted on 7 July 2023 and comes into force on 4 August, before the Panel will make recommendations on Variation 3.

30. The Panel's Direction #19 invited parties to indicate how they wished to manage this issue, noting that significant natural areas (SNAs) are already a qualifying matter and for Waikato District Council could be addressed in legal submissions and evidence. We advised the Panel that we would address the matter in these legal submissions.

31. We draw the Panel's attention to Appendix A of the Joint Legal Submissions, where counsel set out a comprehensive list of the legal requirements for district plans and in particular for an IPI. Under section 75(3) of the RMA, Variation 3 must give effect to any national policy statement. There are no transitional provisions in the NPS-IB that would allow the Panel to exclude consideration of it, there are however timing

provisions related to when district and regional councils are required to amend their plans and strategies to give effect to the NPS-IB.

32. The NPS-IB requires the Council to identify Significant Natural Areas (SNAs) that meet the criteria in Appendix A. The Council has a duty to do this as soon as reasonably practicable, but at least within five years of the commencement date of the NPS-IB. There are a number of appeals to the PDP chapter on Ecosystems and indigenous biodiversity, and the NPS-IB will be relevant to the resolution of those appeals.

33. In relation to Variation 3, we submit that:

(a) The Panel must give effect to the NPS-IB, where relevant within the scope of Variation 3;

(b) The section 32 report identified 42 residential zoned sites that included a mapped SNA;

(c) SNAs are a qualifying matter and the existing clearance provisions in the PDP will continue to apply. Depending on the size of the SNA on any site, these clearance rules may or may not have an impact on the capacity enabled under the MDRS; and

(d) Through the resolution of the PDP appeals, additional SNAs and rules may be proposed, and if any of these seek to limit heights or densities within relevant residential zone, they will need to be assessed as qualifying matters by the Environment Court.

34. For mapped SNAs in the PDP, in addition to the qualifying matter, any application for resource consent will need to be assessed against clause 3.10 of the NPS-IB, which seeks to avoid particular effects on the indigenous biodiversity values of the SNA.

35. Overall, we submit that Variation 3, when viewed in conjunction with the relevant PDP provisions and the application of clause 3.10, will give effect to the NPS-IB.

36. If there are SNAs in the Waikato District that have not yet been mapped, the clear directive of the NPS-IB is that the mapping be completed through the usual schedule 1 planning process, to enable adequate public participation. There is no scope for this Panel to introduce new SNAs.

37. The Waikato Regional Council (WRC) has suggested that the deferred hearing be considered to address the relationship between the NPS-IB and Variation 3. In our submission that deferral is not required. As set out above the NPS-IB has limited relevance to Variation 3 and is given effect to (within the scope of Variation 3) through the application of a qualifying matter and the requirement to apply clauses of the NPS-IB to specific applications for subdivision, use or development.

NATIONAL POLICY STATEMENT AND POLICY 3(d)

Introduction

38. The Council is required to give effect to NPS-UD Policies 3 and 4 in Variation 3. The only relevant part of policy 3 to Waikato DC is sub-paragraph (d):

> **within and adjacent** to neighbourhood centre zones, local centre zones, and **town centre zones** (or equivalent), **building heights and densities** of urban form **commensurate** with the **level of commercial activity and community services**. [our emphasis]

Requirement to give effect to entirety of NPS-UD

39. The parties to Variation 3 were invited by the Panel to comment on the application of the High Court decision in *Southern Cross Healthcare Limited v Eden Epsom Residential Protection Society Inc*. The Panel's

Minute in response to those submissions notes that parties were agreed that:

> …the decision reinforces the fact that the Panel must give effect to the NPS-UD in its entirety (along with other higher order instruments) to the extent that the matters are in scope of [Variation 3] (as directed by s.80E and NPSUD policies 3 and 4). Submissions were also aligned that NPSUD policies 3 and 4 do not require differential weighting.[9]

40. As set out in our legal submissions on the *Southern Cross* decision[10], the requirement to give effect to the entirety of the NPS-UD does not widen the scope of an IPI beyond section 80E. The requirement to give effect to the entirety of the NPS-UD will be most relevant where the Panel has two different proposals before it that both give effect to Policy 3. In that situation the Panel will need to consider the rest of the NPS-UD, as well as other higher order instruments, to determine which of the proposals is the better option.

Commensurate heights and densities

41. Policy 3(d) requires the Council to assess the level of commercial activity and community services in the four towns and then ensure the PDP enables building heights and densities commensurate to those activities and services within and adjacent to the Town centre zone. The policy is focused on urban form, it is neutral on types of residential use.

42. It is generally accepted that the policy response should consider the future potential of the town centres, looking out 30 years into the future, in accordance with the planning timeframes in the NPS-UD.[11]

43. The original section 32 report supporting Variation 3 at notification did not undertake a thorough analysis of Policy 3(d), and whether any

[9] Paragraph 3 of the Panel's Minute dated 14 June 2023.
[10] Dated 8 June 2023.
[11] Section 42A Report, paragraph 642.

additional buildings heights or densities should be enabled within and adjacent to the town centres.

Response to submissions

44. Kāinga Ora in its submission requested a new high density zone around the town centres of Ngaaruawaahia (out to 400m) and Huntly (out to 800m) with a permitted height level of 22m. The submission also requested a height variation control over the Town centre zone (TCZ) and Commercial Zone (COMZ) to provide for a permitted height of 24.5m.

45. In the section 42A report, Ms Hill identified the commercial activity and community services that were currently available at the four centres.[12] This analysis was adopted by Ms Fairgray, who was of the view that Huntly was the only town in Waikato that could accommodate additional height based on the level of commercial activity and the community services available. Ms Fairgray was however concerned about the physical extent of the high density zone proposed by Kāinga Ora.

46. Ms Fairgray's modelling indicated that even in the long term, there was very little commercially feasible demand for higher density living in Huntly, and that higher density development would most likely be provided by other parts of the market, such as social housing providers.[13]

47. For Ngaaruawaahia, it was Ms Fairgray's view that the level of commercial activity was likely to be limited by the town's location to the primary catchments within Hamilton City. Ngaaruawaahia would likely remain a smaller localised centre with a more limited array of community services. For these reasons, Ms Fairgray did not support either the high

[12] Appendix 4 to the Section 42A report.
[13] Evidence-in-Chief Susan Fairgray, paragraph 82.

density zone or additional height within the town centre at Ngaaruawaahia.[14]

48. In the section 42A report Ms Hill considered that commensurate meant that the building form should be proportional to the commercial activity and community services. Overall, based on Ms Fairgray's modelling and the limited commercial feasibility of high density developments, it was Ms Hill's view in the section 42A report that no additional buildings heights or densities were required within or adjacent to Huntly or the other three town centre zones to give effect to Policy 3(d).

Response to submitter evidence

49. As a result of evidence exchanged between the parties, the only remaining disagreement relates to the appropriate height limits in the Huntly TCZ and COMZ.

50. For the record:

    (a) No party sought any high density zoning or increased heights for the townships of Tuakau and Pookeno;

    (b) Kāinga Ora is no longer pursuing a High density zone or a height variation control for Ngaaruawaahia.[15]

51. In relation to Huntly, Kāinga Ora now seeks:

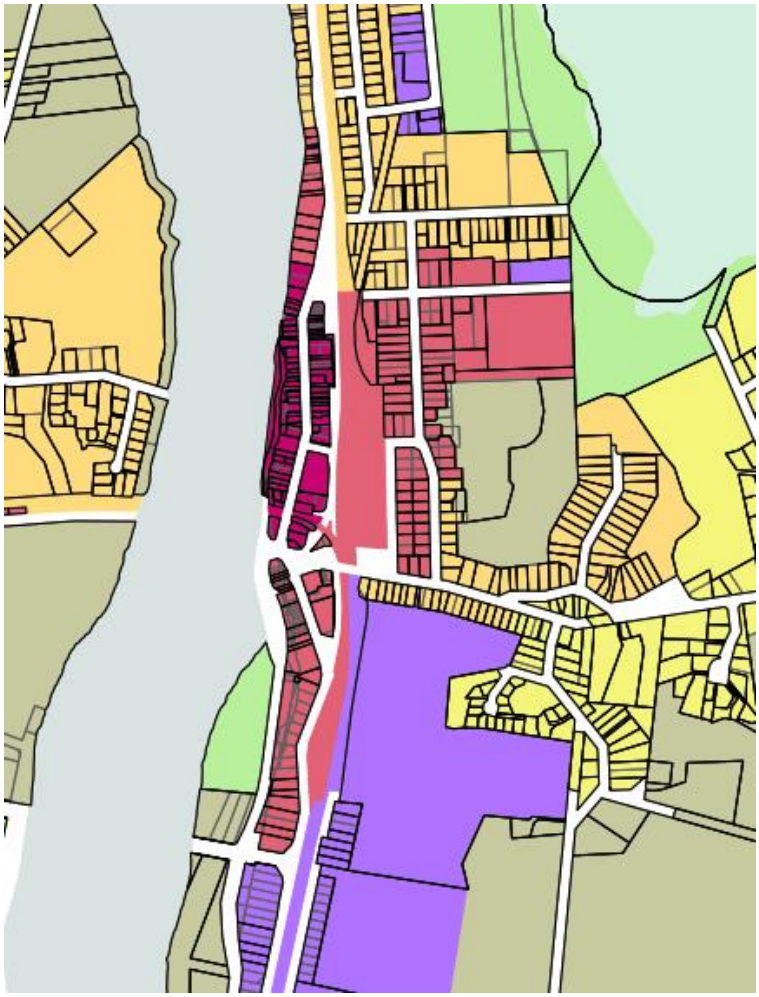
    (a) No High density zone;

    (b) Increase of the permitted height limit to 24.5m in the TCZ; and

    (c) Increase of the permitted height limit to 22m in the COMZ.

[14] Evidence-in-Chief Susan Fairgray, paragraph 77.
[15] As set out if the Evidence-in-Chief of Mr Singh and Mr Campbell.

52. The location of the Town centre zone (darker pink) and the Commercial zone (lighter pink) in Huntly are shown in the map below:



Council's revised position on Huntly

53. Having reviewed the evidence from Kāinga Ora, and acknowledging Ms Fairgray's view that Huntly could accommodate additional heights, the Council obtained further independent advice from Mr David Mead, to consider where within the centre of Huntly additional height would be best located to give effect to Policy 3(d).

54. As a result of this additional work, the Council now supports:

(a) Maintaining the 12m height limit in the Huntly TCZ; and

(b) Enabling buildings up to 22m in height in COMZ.

55. In Mr Mead's assessment, the factors that support maintaining a 12m height limit in the TCZ are:

(a) The narrow physical nature of the Town centre zone, with only one narrow block on either side of the main street;

(b) The Town centre zone is constrained by the Waikato River on the west side and the main truck line on the east;

(c) The town centre is a modest scale, made up of small land holdings, single storey buildings and ownership is likely to be fragmented, therefore a limited ability to absorb effects of high buildings.[16]

56. By comparison, Mr Mead supports enabling buildings up to 22m in the COMZ, aligned to the Kāinga Ora position. In his view, the COMZ could more appropriately accommodate taller buildings and could:

(a) Strengthen the immediate catchment of the Town centre zone;

(b) Be supported by access to open space, Lake Hakanoa and walkways;

(c) Utilise good access to public transport.[17]

57. Overall, it is Mr Mead's view that enabling buildings to 22m in the COMZ will support a sustainable mixed use area. In his rebuttal evidence, Mr Mead has recommended that buildings in the COMZ between 12 and 22 metres be a restricted discretionary activity, where discretion is limited to urban design measures to ensure a quality urban environment.[18]

[16] Rebuttal Evidence David Mead, including paragraphs 10, 30 and 42.
[17] Ibid, paragraph 11.
[18] Paragraph 12.

There would be no discretion to decline an application solely because of height. This approach is supported by Ms Hill.

Scope

58. While additional heights in Huntly were not notified in Variation 3 or discussed in the section 32 report, we consider the Panel can make recommendations to give effect to the Council's position because:

    (a) The additional height gives effect to policy 3(d) of the NPS-UD, as required by section 80E;

    (b) Despite the matter not being addressed in the section 32 report, the Council was required to give effect to Policy 3(d), and the assessment should have been undertaken;

    (c) The additional heights sought by Kāinga Ora were publicly notified in the summary of submissions, and members of the community had the opportunity to lodge a further submission supporting or opposing the relief.

INCORPORATION OF MDRS

Relevant residential zones

59. Council is required to incorporate the MDRS into the following towns which meet the definition of relevant residential zone:

    (a) Ngaaruawaahia, Huntly, and Tuakau as these towns had a resident population of more than 5,000 in the 2018 census;[19] and

    (b) Pookeno as it meets both limbs of the definition of urban environment in that it is already predominantly urban in

[19] RMA, s 2 definition of relevant residential zone, clause (b)(ii).

character, and it forms part of the housing and labour market of Auckland (at least 10,000 people).[20]

60. No submitter has suggested these towns have been incorrectly included.

61. One submitter, Horotiu Farms Limited, seeks rezoning from GRZ to MRZ2 for land between Great South Road and State Highway 1C in Horotiu. The Panel declined to strike out that submission, and there is a separate timetable and hearing scheduled to address the scope and merits of that submission.

62. Kāinga Ora originally sought zoning changes to Raglan and Te Kauwhata and the incorporation of those towns, together with the four towns, into a single medium density zone. Mr Singh has accepted that Raglan and Te Kauwhata currently fall outside of the definition of an 'urban environment' in accordance with the NPS-UD.[21] We will address the matter of a single zone later in submissions.

Provisions incorporated by Variation 3

63. At paragraph 5.7 of our Opening Legal Submissions, we set out the provisions that were included in Variation 3 to incorporate the MDRS. These included:

(a) The mandatory objectives and policies;

(b) New rules relating to notification of applications for residential units;

(c) New permitted activity performance standards for residential units;

[20] RMA, s 77F definition of urban environment.
[21] Evidence-in-Chief Gurvinderpal Singh, at [8.1].

(d) New activity rules for subdivision for the purpose of residential units;

(e) Exemptions from the minimum lot size and shape provisions for subdivision for residential units; and

(f) New rules relating to notification of applications for subdivision for the purpose of residential units.

64. As will be described below these provisions have been amended as the result of the introduction of new qualifying matters and responses to matters raised in submissions. In addition to amendments to the chapters for the MRZ2 and subdivision, amendments are also proposed to the chapters on Natural Hazards and Climate Change and Water, Wastewater and Stormwater, and these were set out in Appendix A to the Section 42A rebuttal report.

65. Further drafting is also being considered for the Commercial zone and the latest version of all the relevant provisions will be provided at the commencement of the hearing.

APPROACH TO QUALIFYING MATTERS

66. The approach taken to the assessment of qualifying matters in Variation 3 is set out from paragraph 5.12 of our Opening Legal Submissions for the joint hearing.

67. As Variation 3 is to a proposed district plan, all of Council's qualifying matters under section 77I are classified as new and therefore subject to the assessments in sections 77J and 77L of the Act. Existing qualifying matters, and the assessment of them under section 77K, is limited to

qualifying matters in an operative district plan at the date the IPI was notified.[22]

68. The Council must evaluate any new qualifying matters listed in section 77I against the considerations in subsection 77J(3) and (4) and "any other" qualifying matters under section 77I(j) must also be assessed against the requirements in section 77L.

69. The section 32 and section 42A reports provide a detailed review of each of the qualifying matters. However, not all of the section 32AA evaluations contained within the section 42A report for new qualifying matters assessed the requirements of sections 77J and 77L. It is submitted this can be addressed following the hearing when the final proposed provisions are submitted to the Panel.

CHANGES TO NOTIFIED QUALIFYING MATTERS

70. Our Opening Legal Submissions provided details of each of the notified qualifying matters and the related controls to modify the MDRS. This section of the submissions addresss the key changes to the notified qualifying matters.

Gas Transmission Line

71. The PDP does not include any setback from the gas transmission line or gas network. As notified, Variation 3 included a 6m setback from the centre of a gas transmission line identified on the planning maps. This applied only to the mapped gas transmission line in the relevant residential zones in Tuakau. First Gas Limited (First Gas) filed a submission seeking relief consistent with their appeal against the PDP

[22] RMA, s 77K(3).

decision not to include setbacks[23], but as it applies to the MRZ2 zone.[24] Its further submission sought to extend the relief to the GRZ. A further submission cannot extend the relief sought in the original submission.

72. A Consent Order resolving the First Gas appeal was issued by the Environment Court on 3 July 2023. The Consent Order requires buildings and alterations in the General industrial zone (GIZ), Heavy industrial Zone (HIZ), GRUZ and Rural lifestyle zone (RLZ) chapters to be set back 6m from the centre of a gas transmission pipeline identified on the planning maps. There was no scope in the appeal to seek the same amendments in the PDP MRZ or GRZ zones.

73. Accordingly, as there is currently no setback from the gas transmission line / network in the PDP MRZ or GRZ zones, the section 42A report author, Ms Lepoutre, rejected the relief on the basis it is more restrictive than the PDP provisions in reliance on the *Waikanae* decision.[25]

74. Ms Lepoutre recommends if the Panel decides not to apply the *Waikanae* decision, the notified 6m setback should be reinstated, along with First Gas' request for an additional matter of restricted discretion.[26]

75. It is submitted the Panel should apply the principle in *Waikanae* and not reinstate the 6m setback for the MRZ and GRZ zones in the four towns because the PDP appeal concerning setbacks from the gas transmission lines / network is resolved by the Consent Order and does not include these two zones. As such, the 6m setback can now be "*treated*" as operative under section 86F of the RMA. In the circumstances, it is not necessary to consider whether the required setback had the effect of

[23] 20m setback from the centre line of a gas transmission line and 60m setback from the gas network.
[24] MRZ2-S14.
[25] Section 42A report, paragraph 567.
[26] Ibid, paragraph 576.

modifying the MDRS or limiting development capacity to be assessed as a qualifying matter.

Historic Heritage

76. The PDP contains rules relating to the protection of items of historic heritage in the district wide Historic Heritage Chapter. The historic heritage items are mapped along with the "*extent of the setting*" of each item. The setting limits development in close proximity to the item or feature.[27] The notified Variation 3 did not make any changes to the 22 scheduled heritage items in the four towns given they had already been reviewed as part of the district plan process. Variation 3 applies qualifying matters to all 22 sites as explained on pages 13 and 14 of our Opening Legal Submissions.

77. Three submissions were received in relation to historic heritage. Heritage New Zealand seeks changes to the objective, policy and rule framework, including the consideration of intensification of sites adjacent to historic heritage items. The section 42A report has supported some of the requested changes. Heritage New Zealand have tabled a letter advising it agrees with the changes.[28]

78. Laura Kellaway and Brian Windeatt requested buffer areas be added to sites adjacent to historic heritage items. The Council engaged Dr Ann McEwan, heritage consultant, to consider the need for buffer areas. Her evidence concludes that with the exception of the area around The Point, Ngaaruawaahia, the mapped "*extent of settings*" for each scheduled item in Variation 3 provides sufficient protection for the heritage items.[29] Accordingly, no additional buffer areas are proposed on sites adjacent to historic heritage items.

[27] Evidence-in-Chief Dr Ann McEwan, paragraph 8.
[28] Letter from Heritage NZ, Pouhere Taonga dated 29 June 2023.
[29] Evidence-in-Chief Dr Ann McEwan, paragraph 22.

79. It is Dr McEwan's view that the blocks around The Point, Ngaaruawaahia should not have been zoned MRZ in the PDP or should have a qualifying matter applied to them to retain the provisions under the GRZ.[30] The section 42A report rejects this recommendation in reliance to the *Waikanae* decision as these areas are already zoned MRZ in the PDP.

80. The Queens Redoubt Trust seeks only single storey housing be allowed on specified properties in the vicinity of the Queens Redoubt site in Pookeno to protect the integrity and viewshafts of the site. The primary site is not a scheduled heritage item in the PDP but it is a recorded archaeological site.[31] The properties in the vicinity of the Queens Redoubt site are zoned MRZ in the PDP. Accordingly, the section 42A report rejects the submission in reliance on the *Waikanae* decision.[32]

81. We have considered whether it is appropriate to reject the above submissions in reliance on the *Waikanae* decision. The relevant PDP provision is MRZ-S3 which permits a height of 11m. The PDP appeals version identifies that the standard is subject to four appeals.[33] The relevant relief in the Noakes appeal was struck out by the Court on 1 May 2023.[34] The remaining three appeals are largely identical. They each seek that certain land in Pookeno that was rezoned from GRUZ to GRZ be further upzoned to medium density residential and be subject to the MDRS. Whilst the appeals are site specific to land in Pookeno and are not in the vicinity of the Queens Redoubt site, the appeals as pleaded relate to the entire MRZ. Therefore, taking a cautious approach, it cannot be said that the standard is beyond challenge. It is therefore arguable on its

[30] Evidence-in-Chief Dr Ann McEwan, paragraph 18.
[31] Ibid, paragraph 32.
[32] Section 42A report, paragraph 446 an 447. It is noted Dr McEwan recommends consideration be given to scheduling the Queen Redout site through a separate planning process.
[33] ENV-AKL-000078 Noakes, ENV-AKL-000058 CSL Trust, EVN-AKL-000084 Pokeno West and ENV-AKL-000059 Top End Properties.
[34] [2023] NZEnvC 076, 1 May 2023.

face that the *Waikanae* decision does not apply to the challenged provision and it is potentially open to Council to accept the relief.

82. However, the *Waikanae* decision is not the only limitation on scope. Any amendments to the plan must also meet the *Clearwater* tests. In our submission, reducing the height limit in the relevant areas around The Point, Ngaaruawaahia and the Queens Redoubt site from the existing 11m in the MRZ to either single storey (5m) or 8m in the GRZ would not meet the second limb of the *Clearwater* test. There is a real risk that affected land owners in these areas have not had an opportunity to participate in the Variation 3 process. There was only one further submitter to the submission by Kellaway and Windeatt and no further submission to the Queens Redoubt Trust submission. This supports our view that affected land owners have not had the opportunity to respond. Regardless of whether or not *Waikanae* applies, we submit there is no scope to accept Dr McEwan's recommendation in relation to The Point, Ngaaruawaahia or the submitter's relief relating to the Queens Redoubt site in reliance on the second *Clearwater* test.

Urban Fringe

83. The effect of the notified Urban Fringe qualifying matter was to limit the spatial extent of the MRZ2 (incorporating the mandatory MDRS) to a 800m walkable catchment of the four town centres. The residential areas beyond that catchment were retained as GRZ.

84. At the Joint Opening Hearing, we advised the Council no longer supported the Urban Fringe qualifying matter[35] and in anticipation that it was unlikely to survive the hearing process, the Council would need to

[35] Legal Submissions for the Joint Opening Hearing dated 10 February 2023, paragraph 5.14.

carefully assess whether any additional qualifying matters were necessary in the GRZ in the four towns.[36]

85. The Panel subsequently issued Interim Guidance #1 on 14 March 2023 in relation to the Urban Fringe qualifying matter and concluded that "the urban fringe is not a qualifying matter under s77I(j) as it does not appear to satisfy the requirements of s77L of the RMA".[37]

ADDITIONAL QUALIFYING MATTERS IN RESPONSE TO REMOVAL OF URBAN FRINGE

Introduction

86. It was acknowledged by Council at the Joint Opening Hearing that at the time of preparing Variation 3, limited consideration had been given to whether any additional qualifying matters would be necessary in the GRZ given the Urban Fringe qualifying matter prevents the incorporation of the MRDS into that zone.[38] Furthermore, with the exception of the Urban Fringe qualifying matter and the proposed 6m setback from the gas transmission line (MRZ2-S14), all other notified qualifying matters had their origins in the PDP-DV. As signalled in the Opening Legal Submissions,[39] due to the Amendment Act coming into force after the completion of the PDP hearings, the PDP Panel did not have the benefit of evidence considering whether the PDP controls were sufficient in relation to a permitted 3x3 development across the GRZ (as opposed to the more limited extent of the MRZ).

87. The Council's subsequent review has identified that the following additional qualifying matters, or amendments to notified qualifying

[36] Legal Submissions for the Joint Opening Hearing dated 10 February 2023, paragraph 5.15.
[37] Interim Guidance 1, paragraph 4.
[38] Ibid, paragraph 5.12(d).
[39] Paragraph 5.8.

matters, are required in response to the removal of the Urban Fringe qualifying matter:[40]

(a) The protection of culturally significant landscapes within the Havelock Precinct (generally referred to as 'Havelock Precinct Cultural Landscapes QM'[41]);

(b) The protection of culturally significant viewshafts from Tuurangawaewae Marae to the Haakarimata Range, Taupiri Maunga and Waikato Awa (Tuurangawaewae Marae Surrounds QM);

(c) The management of significant risks from natural hazards within the slope residential area of the Havelock Precinct (Slope Residential Area QM);

(d) The management of significant risks from natural hazards within the Huntly Mine Subsidence Risk Area ('Mine Subsidence Risk Area QM);

(e) The management of significant risks from stormwater and flood effects related to both natural hazards and giving effect to Te Ture Whaimana (Stormwater Constraints Overlay QM);

(f) Amendments to the existing PDP-DV controls to better minimise reverse sensitivity effects of residential activities on industrial operations within the Havelock Precinct ('Havelock Industry Buffer QM' and '40 dBA Noise Contour QM'); and

(g) The protection of a site and area of significance to Maaori at 5851 Great South Road, Ngaaruawaahia (SASM QM at 5158 Great South Road).

[40] Section 42A report, 19 June 2023, paragraph 22.
[41] Made up of Ridgeline Height Control QM, Hilltop Parks Height Control QM and Industry Buffer Control QM.

88. The Council has engaged extensively with most of the relevant submitters in respect of the above additional qualifying matters.[42] This included formal expert conferencing on the topics relating to all controls within the Havelock Precinct, Stormwater and Tuurangawaewae Marae and Cultural Viewshafts. In many cases the discussions with relevant submitters have been ongoing.

89. The next sections of the submissions address each of these additional or amended qualifying matters in turn. All qualifying matters relating to controls within the Havelock Precinct have been grouped under the topic of "Havelock Precinct" so that they can be considered as one comprehensive package.

Tuurangawaewae Marae Surrounds

90. Five submitters including Tuurangawaewae Marae and Waikato-Tainui[43] sought to either rezone the land surrounding the Tuurangawaewae Marae or apply a qualifying matter to protect the cultural viewshafts from the Marae to the Waikato Awa, Haakarimata Range and Taupiri Maunga from intensive development enabled by Variation 3.

91. In response to the submissions, Dave Mansergh for Council has assessed how the cultural viewshafts from the Tuurangawaewae Marae will be affected by intensive developments enabled by Variation 3 (including the removal of the Urban Fringe qualifying matter) and the submission by Kāinga Ora which sought a High Density Zone of 22m within 400m of the Ngaaruawaahia Town centre zone and a height overlay of 24.5m in both the Ngaaruawaahia Town centre zone and Commercial zone. Kāinga Ora's evidence confirms it is no longer pursuing increased heights in

[42] With the exception of the Huntly Mine Subsidence Area as no submissions were identified.
[43] Other submitters being Estate of Te Puea Herangi, Marae Tukere and Turangawaewae Rugby League Sports and Cultural Club.

Ngaaruawaahia. Therefore these submissions do not address that matter further.

92. Mr Mansergh's evidence concludes that Variation 3 (without the Urban Fringe qualifying matter) will affect the existing open spatial and urban character around Tuurangawaewae Marae.[44] To fully address the effects on the loss of view of the Haakarimata Range and Taupiri Maunga, and to reduce the effects on urban character in and around the Marae, Mr Mansergh recommends[45] that in Area D[46], being the areas closest to the Marae[47], development should be restricted to the levels comparable with the provisions of the Waikato Operative District Plan (ODP) GRZ (generally 7.5m height, 40% building coverage and height control plane of 37 degrees).

93. However, as this outcome would be more restrictive than the standards in the existing PDP MRZ zone applying to Area D, the section 42A report states there is no scope to implement Mr Mansergh's preferred recommendation for Area D if the *Waikanae* decision is applied. We will address scope in paragraph 105 below.

94. Instead, Mr Mansergh recommends retaining the existing PDP MRZ height, height in relation to boundary and building coverage parameters for Area D, rather than the equivalent standards under MDRS (noting the height standard is identical).

95. In reliance on Mr Mansergh's evidence, Ms Hill recommends in the section 42A report:

---

[44] Evidence-in-Chief Dave Mansergh, paragraph 25.
[45] Ibid, paragraph 151.
[46] As shown on the map in Appendix 11 to Mr Mansergh's Evidence-in-Chief.
[47] The neighborhood block bounded by Great South Road, Regent Street and River Road and properties adjoining River Road adjacent to the Marae.

(a) The addition of a new qualifying matter called "Tuurangawaewae Marae Surrounds" be included for Area D to maintain existing PDP MRZ height (11m), height in relation to boundary (3m and 45 degrees) and building coverage (45%) standards; and

(b) A further matter of restricted discretion be added to Rules MRZ2-S2, MRZ2-S3 and MRZ2-S5 to ensure any of the potential effects on the cultural viewshafts from Tuurangawaewae Marae arising from any non-compliance with those standards are assessed.

96. Section 77I(a) allows for a qualifying matter to accommodate a matter of national importance that decision makers are required to recognise and provide for under section 6. Ms Hill relies on section 6(b), (e) and (f) to support the proposed new qualifying matter.[48] In relation to section 6(b), the Haakarimata Range and Taupiri Maunga are both identified as Outstanding Natural Features in Schedule 5 of the PDP. The Waikato River is identified as an Outstanding Natural Landscape in Schedule 5.[49]

97. In relation to Section 6(e), the cultural evidence of Mr Karu Kukutai for Tuurangawaewae Marae addresses the cultural and spiritual significance between the Marae, the Haakarimata Range, Taupiri Maunga and Waikato Awa. In addition, Ms Hill notes that "Schedule 5 also explains the cultural significance of the features and landscapes and identifies the Haakarimata and Taupiri Ranges as having very high cultural values and the Waikato River as being of the utmost importance to Waikato-Tainui."[50] It is submitted this provides the evidential basis for the inclusion of the qualifying matter under section 6(e).

[48] Section 42A report, paragraph 401.
[49] Ibid, paragraph 397.
[50] Paragraph 397.

98. The planning evidence of Giles Boundy for Tuurangawaewae Marae and Waikato-Tainui generally agrees with the section 42A report recommendations, subject to:[51]

(a) The inclusion of the Waikato Awa in the additional matters of restricted discretion to Rules MRZ2-S2, MRZ2-S3 and MRZ2-S5; and

(b) The introduction of additional assessment criteria to ensure that the effects of any application on the cultural viewshafts beyond Area D are assessed.

99. Mr Boundy considers a broader matter of discretion could apply to the three standards, being:[52]

> *"The effects on cultural values as informed by the outlook of the Waikato River, Haakarimata Range and Taupiri Maunga when viewed from Tuurangawaewae Marae."*

100. For the three standards, Mr Boundy also considers the additional matter of discretion could be further supported by reference back to the Maaori Values and Maaturanga Maaori Chapter as follows:[53]

> *"Effects on cultural values identified in Maaori Values and Maaturanga Maaori Chapters."*

101. In response to the submitters' evidence, Ms Hill recommends:

(a) A new policy to provide for the cultural heritage relationship between the Marae, the Haakarimata Range, Taupiri Maunga and Waikato Awa in Ngaaruawaahia;[54]

---

[51] Evidence-in-Chief Giles Boundy, paragraph 10.9.
[52] Ibid, paragraph 10.21.
[53] Paragraph 10.22.
[54] Section 42A rebuttal report, paragraph 77 and MRZ2-PX Outlook from Tuurangawaewae Marae.

(b) Three new standards specific to the Tuurangawaewae Marae Surrounds qualifying matter, being MRZ-S2A (height), MRZ-3A (height in relation to boundary) and MRZ2-5A (building coverage); and

(c) New matter of restricted discretion in the existing MRZ2-S2, S3 and S5 relating to the effects on cultural values.

102. In relation to the last request in paragraph 100 above, Ms Lepoutre considers that widening the application of the objectives and policies in the Maaori Values chapter to encroachment of development standards (as a Restricted Discretionary activity) is not consistent with the framework in that chapter which is intended to be used for assessing discretionary and non-complying activities. Ms Lepoutre has suggested an alternative method of identifying particular areas / scenarios where there is a need to assess cultural effects.[55] Waikato-Tainui have been provided an opportunity to consider further.

103. Finally, Mr Boundy's evidence for Tuurangawaewae Marae and Waikato-Tainui acknowledges that the recommendations in the section 42A report do not fully resolve the concerns due to scope limitations.[56] He requests that the section 42A report author also considers recommending a plan change be investigated to address the matter of reduced heights around the Marae.[57] He also notes "some reflection in the final decision report on what might be seen as a remaining gap in the PDP from the wide range of matters raised through Variation 3 would in my view benefit Council in their forward planning". It is not clear whether the "final decision report" is referring to the Panel's "recommendations on submissions" or the final section 42A report from Council.

[55] Section 42A rebuttal report, paragraph 146.
[56] Evidence-in-Chief Giles Boundy, paragraph 10.2.
[57] Ibid, paragraphs 10.26 and 10.27.

104. Regardless, it is our submission that:

(a) It is not the role of the section 42A report author to make a recommendation that is outside the scope of Variation 3. The role of the author is to make recommendations to accept or reject the submissions and matters raised during the hearing. What Council decides to do going forward is a matter outside of the IPI process;

(b) Even if the section 42A report author were to recommend a future Schedule 1 process, the Panel cannot bind Council to that course of action; and

(c) The request that either the Panel or section 42A report author reflect in the "final decision" on the remaining gaps in the PDP for further schedule 1 processes is outside the limited scope of section 80E and therefore outside the jurisdiction of the Panel.

Scope to implement Mr Mansergh's preferred recommendation

105. Area D identified by Mr Mansergh is zoned MRZ in the PDP. We have reviewed the appeals applying to this zone. The relevant PDP provisions are MRZ-S3, MRZ-S5 and MRZ-S6. The PDP appeals version identifies these standards are subject to the same four appeals discussed in relation to the historic heritage scope matter above.[58] Whilst the appeals are limited to the Pookeno area, as pleaded they relate to the entire MRZ. It is therefore arguable on its face that the *Waikanae* decision does not apply to these challenged provisions and it is potentially open to Council to impose Mr Mansergh's preferred recommendations.

106. However, as discussed above, the *Waikanae* decision is not the only limitation on scope. Any amendments to the plan must also meet the

[58] ENV-AKL-000078 Noakes, ENV-AKL-000058 CSL Trust, EVN-AKL-000084 Pokeno West and ENV-AKL-000059 Top End Properties.

Clearwater tests. In our submission, adopting Mr Mansergh's preferred recommendation would not meet the second limb of the *Clearwater* test. There is a real risk that affected landowners in Area D have not had an opportunity to participate in the Variation 3 process. We have reviewed the notified "*summaries of decision requested*" for the Tuurangawaewae Marae and Waikato-Tainui submissions. The relief sought for the former submission is summarised as "delete the surrounding area of Tuurangawaewae Marae from MDRS zoning maps including River Road, Regent Street, Kent Street, George Street, Edward Street and King and Queen Street". The relief for the later submission is summarised as "amend the definition of QM to include the area surrounding the Tuurangawaewae Marae".

107. In our submission, a person reading these summaries and the submissions would expect the area surrounding the Marae to revert to the existing MRZ zoning. A person would not fairly and reasonably anticipate the development controls relating to this area would revert back to the ODP standards. Across the five submissions, the further submissions were limited to only three different parties, including Waikato-Tainui.[59] This supports our view that affected landowners have been denied the opportunity to respond to Mr Mansergh's preferred recommendation. Regardless of whether or not *Waikanae* applies, we submit there is no scope to adopt Mr Mansergh's preferred recommendation in reliance on the second *Clearwater* test.

Huntly Mine Subsidence Risk Area

108. As a consequence of the removal of the Urban Fringe qualifying matter, Council has reviewed the management of natural hazard risks within the notified mapped mine subsidence risk area at Huntly (shown on figure 31 on page 169 of the section 42A report). No submissions were received

[59] The other further submitters being Kāinga Ora and Pokeno Village Holdings Limited.

on the notified mine subsidence risk area, most likely because it was within the spatial extent of the Urban Fringe. This meant no additional development was enabled in the risk area.

109. Council engaged Doug Johnson, geologist, to assess the implications of MDRS on the Huntly mine subsidence risk area. The section 42A report author, Ms Lepoutre, summarises his advice at paragraph 469:

> *"… if Council is willing to accept an increase in risk, the MDRS can be implemented within the mine subsidence area and if Council is not willing to accept an increase in risk, the existing provisions relating to development within the mine subsidence area should be retained."*

110. Ms Lepoutre does not consider it appropriate to expose further development or people to any increased level of risk, particularly when intensification within the area is not required for Council to meet its development capacity under the NPS-UD.[60]

111. Ms Lepoutre's recommendation is to retain the existing notified provisions (consistent with the section 32 evaluation) in reliance on a qualifying matter under section 77I(a). This results in the GRZ being retained for the Huntly mine subsidence risk area.

112. The Section 32AA evaluation contained within the section 42A report did not support the option of rezoning to MRZ2 and applying a qualifying matter to achieve the controls in the GRZ (one dwelling per site on a minimum lot size of 450m^2). It was considered such development within the MRZ2 would be inconsistent with the objectives and policies of that zone chapter.[61]

113. No evidence has been filed in relation to the retention of the GRZ in the Huntly mine subsidence risk area.

---

[60] Section 42A report, paragraph 470.
[61] Section 42A report, Section 32AA evaluation, paragraphs 475 and 477.

Havelock Precinct Qualifying Matters

Introduction

114. Due to the application of the Urban Fringe qualifying matter, Variation 3 as notified included only one qualifying matter specific to the Havelock Precinct, being the setback from the Havelock Industry Buffer (PREC4-S2) which was introduced by the PDP Hearing Panel when it rezoned most of the land within the Havelock Precinct from GRUZ to GRZ.[62] The removal of the Urban Fringe qualifying matter requires the MDRS to be applied to the land zoned GRZ within the Havelock Precinct, subject to qualifying matters that make MDRS inappropriate.

115. The Havelock Precinct topic was subject to expert conferencing on 17 May 2023 to consider what other qualifying matters may be required for the precinct to support its rezoning from GRZ to MRZ2. Concurrent with the rezoning, the PDP Panel introduced a number of controls to apply within the Havelock Precinct to control development outcomes and manage adverse effects on the environment due to the particular characteristics of the precinct. Those existing controls, and a review of the technical evidence presented at the PDP rezoning hearing, were used by Council to identify the characteristics of the Havelock Precinct that make it inappropriate to apply the MDRS to specific mapped overlays and areas. The proposed new provisions and qualifying matters for the Havelock Precinct formed the basis of the discussion at expert conferencing.[63]

116. Following the circulation of the section 42A report, submitter evidence and Council rebuttal evidence, there remain few outstanding issues relating to Havelock Precinct. These relate to:

[62] District wide qualifying matters relating to SNAs and setback to water ways also applied to the precinct.
[63] Havelock Precinct – Draft Qualifying Matters and Controls dated April 2023, Section 42A Report, Appendix 5.

(a) Whether to extend the Havelock Industry Buffer to the full extent on Area 1 shown on the Havelock Precinct Plan;

(b) Whether to include the Environmental Protection Area (EPA), shown on the Havelock Precinct Plan, as a qualifying matter if it affects density;

(c) Some minor amendments to provisions; and

(d) Clarification regarding qualifying matters within the GRUZ.

117. Three new qualifying matters are proposed for the Havelock Precinct under section 77I:

(a) Slope Residential Area (section 77I(a) applies);

(b) Havelock Industry Buffer and sensitive land uses (section 77I(j) applies); and

(c) Cultural Landscapes (hilltops, ridgelines and the Havelock Industry Buffer Height Restriction Area) (section 77I(j)) applies).

118. These submissions will identify the controls within each qualifying matter that make the MDRS less enabling in the Havelock Precinct. Some restrictions on controls fall into more than one category of qualifying matters under section 77I. For example, the restriction on building height (MRZ2-S2) is both a cultural landscape under section 77I(a) and a reverse sensitivity qualifying matter under section 77I(j). Further, the new qualifying matters are in addition to qualifying matters that Council has identified on a district wide basis (e.g. SNAs) or for Pookeno itself (e.g. SUB-21) that did not affect density outcomes and will continue to apply.

Havelock Slope Residential Area

119. The PDP identifies three areas within the Havelock Precinct as the Havelock slope residential area (Slope Residential Area). This area was identified as a high risk area in the PDP rezoning hearing for the Havelock Precinct and thus included as an overlay.[64] It is agreed by Council, HVL, Hynds and PVHL that the Slope Residential Area is a qualifying matter under section 77I(a).[65]

120. The section 42A report recommends:

(a) Retention of the existing PDP minimum lot size within the Slope Residential Area to 2500m^2 (PREC4-SUB) to manage the slope stability risk (now SUB-R153);

(b) A new standard is included within the MRZ2 to restrict the number of residential dwellings within the Slope Residential Area to one per site as a permitted activity;[66] and

(c) A new standard limiting building coverage within the Slope Residential Area to 40% of the net site area, being equivalent of the GRZ.[67]

121. All parties who have submitted evidence on the Havelock Precinct qualifying matters agreed to the above provisions to give effect to the Havelock Slope Residential Area qualifying matter.

[64] Evidence-in-Chief, Shayne Lander, Topic 25 – Zone Extents, 17 February 2021.
[65] Joint Witness Statement – Havelock Precinct, 17 May 2023, Appendix 5 to Section 42A Report.
[66] PREC4-SX – Residential Unit within the Slope Residential Area, Appendix 2 to Section 42A Report.
[67] PREC4-SX – Building coverage within the Slope Residential Area, Appendix 2 to Section 42A Report.

Havelock Industry Buffer and sensitive land uses

122. The PDP Panel introduced the Havelock Industry Buffer as a mapped overlay into the Havelock Precinct to restrict development of sensitive land uses within the buffer from adjoining industrial operators. The buffer addresses noise and reverse sensitivity from lighting, odour and dust.[68] The buffer relates to existing rules SUB-R19 and PREC4-S2 which makes noise sensitive activities non-complying in the Havelock Industry Buffer. The industry buffer is referred to inconsistently by the parties as either the Havelock Industry Buffer or the Pookeno Industry Buffer. It is described in the PDP APP14 Precinct Plan as the "Havelock Industry Buffer". Therefore, these submissions use the PDP naming convention.

123. Variation 3 applies a Reverse Sensitivity matter to the Havelock Industry Buffer. The PDP also contains an existing mapped 40db LA eq noise contour in the Havelock Precinct. All of the planning experts at the Havelock Precinct conferencing agreed Reverse Sensitivity is a qualifying matter under section 77I(j).

124. The section 42A report recommends the following additional restrictions to make the MDRS less enabling in the Havelock Precinct in reliance on the Reverse Sensitivity qualifying matter:

(a) Non-complying activity status for any new building or alteration for a sensitive land use within the Havelock Precinct that is located inside the Havelock Industry Buffer.[69] This reflects the existing PDP rule, relocated from GRZ to MRZ2.

(b) Height restriction of 8m (two storey) within the existing PDP 40db LA eq noise contour area (outside Havelock Industry Buffer).

[68] Evidence-in-Chief Mark Tollemache, paragraph 5.8.
[69] PREC4-SX – Building setback – Sensitive land use within PREC4-Havelock precinct, Appendix 2 to Section 42A Report.

125. The section 42A report supported recommendation (b) above in principle, subject to acoustic evidence to support the reduction to 8m. Jon Styles for HVL has provided acoustic evidence which supports the retention of the Havelock Industry Buffer and the height restriction to 8m for properties within the 40db LA eq. Mr Styles has undertaken further modeling of the noise contours on three storey buildings and, due to the increased height of three storey dwellings receiving less screening than at two storey height, his evidence supports the restriction of height to 8m.[70] This restriction will ensure the noise level and effects will be consistent with the modeling he prepared for the development of the Havelock Industry Buffer.[71]

126. The text in Appendix 2 in the section 42A report did not include a draft rule to reflect recommendation (b) above. The Council generally agrees with the proposed wording put forward by Mr Tollemache in paragraph 5.26 of his EIC. This is included in Appendix A of the section 42A rebuttal report.[72]

Further amendments sought to Havelock Precinct provisions by submitters

127. The landscape expert for Hynds and PVHL, Rachel de Lambert, supports the new Reverse Sensitivity qualifying matter applied through the Havelock Industry Buffer, but requests two further amendments in respect of Area 1 to address potential reverse sensitivity effects from residential development in Area 1:[73]

    (a) Extend the Havelock Industry Buffer to cover the full extent of Area 1 shown on the Havelock Precinct Plan; and

    (b) Include the EPA as shown in Area 1 as a new qualifying matter.

[70] Evidence-in-Chief Jon Styles, paragraphs 5.6 to 5.9.
[71] Ibid, paragraph 5.9.
[72] Appendix A, Section 42A rebuttal report, PREC4-SX(c) – Building design – sensitive land use with PREC4 – Havelock precinct.
[73] Evidence-in-Chief Rachel de Lambert, paragraph 4.1.

Extension of Havelock Industry Buffer

128. As explained in Ms de Lambert's evidence, the PDP Panel agreed in their decision that residential activity should be excluded from Area 1 due to the reverse sensitivity effects on the adjacent Heavy Industry Zone. However, the Havelock Precinct Plan did not extend the Havelock Industry Buffer to encompass the full extent of Area 1, although the EPA does overlay the full extent of this area.[74] Ms Lambert states *"it is not clear why the EPA has not been introduced as a qualifying matter".*[75] The same comments are made by Ms Nairn, planner for Hynds.

129. The section 42A rebuttal report summarises the appeals by Hynds and HVL relating to Area 1. These appeals are not yet resolved. Ms Lepoutre concludes that if a decision was made to extend the Havelock Industry Buffer across the EPA in Area 1 through Variation 3, there would be no ability for any party to appeal that decision,[76] it would predetermine the suitability of the land for residential development and therefore undermine the existing Environment Court appeal process. The recommendation is therefore not to extend the Havelock Industry Buffer beyond what is identified in the PDP.[77] This matter should be left to the appeal process.

EPA's as a qualifying matter

130. Sara Nairn for Hynds and Melissa McGrath for PVHL consider the EPA directly limits the density of development that can occur within the Havelock Precinct and therefore, should be a qualifying matter. The section 42A rebuttal report partly agrees with this statement.[78]

[74] Evidence-in-Chief Rachel de Lambert, paragraph 8.2.
[75] Ibid, paragraph 9.4.
[76] RMA, Schedule 1 clause 107.
[77] Section 42A rebuttal report, paragraph 117.
[78] Ibid, paragraphs 118 and 119.

131. Mr Tollemache for HVL sets out in section 6 of his EIC why he does not consider the EPA to be a qualifying matter under sections 77I(j) and 77L. The section 42A rebuttal report agrees with Mr Tollemache's assessment that the EPA is a planting requirement identified in the PDP for ongoing management and protection of the planted vegetation[79] and does not meet the matters of national importance under section 6(a) and 6(c).[80] Mr Tollemache states the EPA provides a use for the Havelock Industry Buffer land, but that buffer is identified as a qualifying matter in its own right.[81]

132. Council considers the section 6 matters that required protection on the site were identified as Significant Ecological Areas (SNA) through the PDP process. No evidence has been provided to justify why the land within the SNA's meets the requirements of section 77I(a).[82] Accordingly, Council does not agree it is appropriate to apply a qualifying matter to the EPA in Area 1.

Havelock Precinct Cultural Landscapes

133. The evidence as part of the PDP hearing revealed that the Havelock Precinct has a number of cultural landscape values associated with the hilltops and ridgelines due to the historic use of these features by mana whenua.[83]

134. There was insufficient time at the Havelock Precinct expert conferencing to discuss the protection of landscapes with high cultural values. However, all submitters' evidence supports in principle the protection of cultural landscapes as a qualifying matter under section 77I(a).

---

[79] Section 42A rebuttal report, paragraph 122.
[80] Ibid, paragraph 123.
[81] Evidence-in-Chief Mark Tollemache, paragraph 6.4.
[82] Section 42A rebuttal report, paragraph 124.
[83] Evidence-in-Chief Mark Tollemache, paragraph 5.27 and section 42A Report, paragraphs 414 and 417.

135. The section 42A report recommends the following as methods to give effect to the Cultural Landscapes qualifying matter:

(a) New standard restricting height of buildings to 5m within 50m of the hilltop parks identified on the Havelock Precinct Plan.[84] This reflects existing rule in PREC4-S1.

(b) New standard restricting height of buildings within the Havelock ridgeline height restriction area to 5m.[85]

(c) New standard restricting height of buildings to 5m within 50m of the upper slopes of the Havelock Industry Buffer (Havelock Industry Buffer Height Restriction Area).

136. The landscape expert for HVL, Bridget Gilbert, recommends combining the rules for the Havelock Industry Buffer height restriction area and a small area of land located within 50m of a ridgeline.[86] Mr Tollemache's proposed wording is supported by Council in the section 42A rebuttal report.[87] It further recommends the height restriction area also apply to the area of land within 50m of a hilltop for consistency.[88]

137. The landscape expert for PVHL and Hynds supports the section 42A report recommendations but recommends amendments to the height restriction area to require houses to be single storey (rather than 5m) to prevent buildings being higher than 5m based on the current measurement from "natural ground level".[89] The section 42A rebuttal report recommends the rules be amended to refer to "ground level" rather than single storey as that term is already defined in the PDP.[90]

---

[84] PREC4-SX – building structures adjoining Hilltop small parks within PREC4-Havelock precinct, in Appendix 2 to Section 42A report.
[85] PREC4-SX Height – Havelock industry buffer height restriction area in Appendix 2 to Section 42A report.
[86] Evidence-in-Chief Mark Tollemache, paragraph 5.36.
[87] Section 42A rebuttal report, paragraph 133.
[88] Ibid.
[89] Evidence-in-Chief Rachel de Lambert, paragraph 9.9.
[90] Section 42A rebuttal report, paragraph 129.

138. The proposed controls to address the cultural landscape qualifying matters have been evaluated by Mr Tollemache against sections 77I(j) and section 77L.[91]

Application of Havelock height restriction area to GRUZ

139. The planning experts for PHVL and Hynds do not support any qualifying matters applying to GRUZ (e.g. the height restriction area) as the MDRS does not apply to this zone.

140. The section 42A rebuttal report confirms this was a mapping error. An updated map is included in the section 42A rebuttal report to demonstrate this.[92]

Stormwater Constraints Overlay

141. With the removal of the Urban Fringe qualifying matter, Council determined that it was appropriate to reassess the flood hazard risks that might be present within the Urban Fringe area that would now have the MDRS incorporated to increase permitted densities.

142. One of the key reasons for undertaking this work was the knowledge that the flood hazard areas included in the PDP were limited to riverine flood modelling that was undertaken by the Waikato Regional Council. This modelling had not been comprehensive in considering the full extent of flood risk in the district.

143. The Council engaged Te Miro Water to complete this more comprehensive modelling, and to review the existing provisions in the PDP that address flood hazards. This review looked at the residential zone, the earthworks and subdivision provisions. The Te Miro Water

[91] Evidence-in-Chief Mark Tollemache, paragraph 5.34.
[92] Appendix 1.

Report made a number of recommendations, some directly related to Variation 3 and other more general recommendations. Of particular concern to Mr Boldero was the extent of permitted earthworks provided for within a flood plain area.[93]

144. The Joint Witness Statement from the stormwater conferencing helpfully identifies large areas of agreement between the experts:

(a) The management of significant risks from natural hazards (including flooding) can be a qualifying matter under section 77I(a);[94]

(b) Urban development within an identified flood plain should trigger the need to obtain a resource consent to ensure the adverse effects are appropriately assessed;[95]

(c) Urban development in high risk flood plain areas should be avoided as per the relevant WRPS policy;[96]

(d) Due to scope, a more comprehensive response to the recommendations in the Te Miro Water cannot be achieved through Variation 3 and will require a separate plan change or variation.[97]

145. With the exception of Mr Jaggard for Kāinga Ora, all the experts agreed that it is inappropriate to enable a permitted density of 3 residential units per site within an identified flood plain. Mr Jaggard would prefer a district wide plan change to address appropriate densities, although he accepts that a resource consent process should be required for any urban development within an identified flood plain.

---

[93] Evidence-in-Chief Andrew Boldero, paragraphs 26-29.
[94] Joint Witness Statement 11 July 2023, section 3, paragraph 2 b) iv) A.
[95] Ibid, section 3, paragraph 2 b) iv) C.
[96] Ibid, section 3, paragraph 2 b) iv) D, Waikato Regional Policy Statement HAZ-P1 and HAZ-M6.
[97] Joint Witness Statement 11 July 2023, section 3, paragraph 2 b) iv) F.

146. The remaining principal difference between the experts is whether all urban development within an identified floodplain should be discouraged. The Council is not proposing any changes to the Natural Hazard chapter objectives and policies that:

(a) Seek to 'avoid' subdivision, use and development in areas of high natural hazard risk;

(b) Seek to 'manage' subdivision, use and development in other areas of natural hazard risk.

147. Of particular relevance to flood hazards are:

(a) Policy NH-P7 – Managing natural hazard risk generally;

(b) Policy NH-P13 – Reduce the potential for flood damage to buildings located on the floodplains and flood ponding areas;

(c) Policy NH-P14 – Control filling of land within the 1% AEP floodplain and flood ponding areas;

(d) Policy NH-P15 – Managing flood hazards through integrated catchment management;

(e) Policy NH-P26 – Effects of climate change on new subdivision and development;

(f) Policy NH-28 – Precautionary approach for dealing with uncertainty;

(g) Policy NH-30 – Assess the impact of climate change on the level of natural hazard risks.

148. In our submission, the provisions that the Panel recommends should best give effect to these objectives and policies.

Issues of scope

149. As identified in the Joint Witness Statement, there are a number of scope related matters relating to managing flood risks in the relevant residential zones:

(a) The *Waikanae* decision means the Council cannot disenable existing rights in the PDP:

(i) For the PDP MRZ three units are enabled as a permitted activity. The only current restriction on the three units is where a property is within a mapped High risk flood area, where all new buildings are a non-complying activity.

(ii) For the PDP GRZ one residential unit and one minor residential unit (subject to the overall site size) are permitted. Again, the only restriction is for the mapped High risk area where all new buildings are a non-complying activity.

(b) Even in the absence of the *Waikanae* decision, the *Clearwater* tests for relief being 'on' the Variation limit the ability to comprehensively address flood hazards:

(i) No additional restrictions on residential development because of flood hazard were introduced in the notified version of Variation 3 or addressed in the section 32 report; and

(ii) There is a real risk that members of the community would not be aware that changes were proposed to remove permitted development rights through new rules introduced at this stage of Variation 3.

(c) The existence of PDP appeals as set out below, mean that the PDP provisions are subject to change:

(i) Whether the Flood plain management area rules should also apply to areas at risk of flooding in a 1% AEP flood event but outside the mapped flood hazards in the Planning Maps (Waikato Regional Council v Waikato District Council ENV-2022-AKL-000073); and

(ii) District wide stormwater provisions (Noakes & Fruhling Trust v Waikato District Council ENV-2022-AKL-000076).

150. As a result of the above, we submit that any new flood hazard controls must not:

(a) Disenable three residential units in the PDP MRZ;

(b) Disenable the single residential and minor residential units in the PDP GRZ (which in Pookeno, Huntly and Ngaaruawaahia closely mirrors the Urban Fringe area);

(c) Disenable three residential units on the properties that were rezoned from GRZ to MRZ2 in the notified version of Variation 3, these are primarily in Tuakau; and

(d) Amend district wide provisions (such as earthworks rules) that would have application beyond the relevant residential zones.

<u>The Council's proposal – the Stormwater Constraints Overlay</u>

151. The Council proposes to introduce a Stormwater constraints overlay in Variation 3.[98] Initially this was shown as amendments to the MRZ2

[98] Updated planning maps were provided to the submitters on 20 July 2023.

chapter, but on reflection, Ms Huls now considers the rules would be better located in the Natural Hazards chapter of the PDP.

152. The Stormwater constraints overlay is based on the flood mapping work undertaken by Te Miro Water, the final maps (and modelling reports) are attached to the Rebuttal Evidence of Mr Boldero.

153. The purpose of the Stormwater constraints overlay is to allow the Council to control density, earthworks and subdivision within the flood plain identified by Te Miro Water. The overlay is limited to the area previously covered by the Urban Fringe.

Density

154. Given the limitations identified in the scope section above, the Council's proposal has focused on limiting density within the identified flood plain in the Urban Fringe area to one residential unit and one minor residential unit (maintaining the existing rights of those landowners).

155. The evidence-in-chief of Mr Boldero and Ms Huls originally supported the use of more restrictive standards for building coverage, boundary setbacks and minimum lot size within the overlay. Having considered the evidence from submitters, both have agreed that the MDRS can apply. The only additional standards for buildings within the overlay relate to waterbody setbacks and a requirement for minimum floor levels.

156. Within the Stormwater constraints overlay, a higher risk area is identified, where the modelling shows that an area is subject to flooding that meets the definition of high risk in the PDP and Waikato Regional Policy Statement. The purpose of identifying the higher risk area is to give effect to the objectives and policies to avoid development in a high risk hazard area (within scope).

157. Within the Stormwater constraints overlay:

(a) In the higher risk area one residential unit is permitted and two or more residential units are non-complying;[99]

(b) Outside the higher risk area one residential unit is permitted and two or more residential units are restricted discretionary;[100]

(c) One minor residential unit is permitted.[101]

158. The current default activity status in the GRZ for two or more residential units is discretionary. Council's proposal is to reduce this to restricted discretionary in the Stormwater constraints overlay outside the higher risk area. This reduction ensures that the qualifying matter is only applied to the extent necessary to accommodate natural hazard management.

159. Two or more residential units in the higher risk area are proposed to be non-complying. This is an increase in activity status as compared to the PDP. The non-complying status better gives effect to the natural hazard objectives and policies in the PDP that seek to avoid development in high risk areas. We submit that, in terms of the *Waikanae* decision, this change to activity status is not disenabling. A discretionary consent was already required and therefore requiring a non-complying consent does not remove a person's rights.

Earthworks

160. The current earthworks regime for the flood hazard areas are reasonably permissive, enabling earthworks to create building platforms with limited standards. It is therefore proposed to introduce a new rule for

[99] Rule NH-R26A.
[100] Rule NH-R26B.
[101] Rule NH-26C. The minor residential unit must not exceed 70m² and the net site area must be at least 600m².

earthworks within the Stormwater constraints overlay to require a resource consent for earthworks for two or more residential units.[102]

Subdivision

161. Subdivision of a site that includes the mapped Flood plain management area, Flood ponding area, and High flood risk area is already a discretionary activity. Subdivision in the Defended area is a restricted discretionary activity. A new rule is proposed for subdivision in the Stormwater constraints overlay outside the mapped flood hazard areas.

162. Subdivision would be a restricted discretionary activity where each vacant lot is capable of containing an 8m x 15m building platform, excluding yards, entirely outside the Stormwater constraints overlay. Where this standard cannot be met the activity status will default to discretionary.[103]

Technical agreement

163. Based on the agreed principles in the Joint Witness Statement we understand that from a technical stormwater perspective the proposed rule framework for the Stormwater constraints overlay is acceptable.

Wait for a comprehensive plan change

164. The position of Mr Jaggard and Mr Campbell for Kāinga Ora is that the Stormwater constraints overlay should be removed, and the Council should undertake a comprehensive review of the flood hazards mapping and provisions district wide. The Council accepts that the work undertaken to support Variation 3 has identified concerns with how the PDP manages flood hazard risk, including how the different chapters work together to successfully ensure the overall objects to avoid and manage risk are achieved.

[102] Rule NH-R26E.
[103] Rule NH-R26D.

165. Variation 3 is limited by scope, but the Council is now aware of a natural hazard risk, including high risk areas, and it is therefore incumbent on the Council to ensure that, where it can, the appropriate provisions are put in place to manage or avoid those risks. A plan change at a later date will still be able to comprehensively review all the provisions and make district wide recommendations. Further, the Council is in the process of resolving appeals on the PDP, and resourcing for a new plan change has not been confirmed.

Use of non-statutory flooding information

166. The Council accepts that there is high level of agreement between the experts that the use of a non-statutory flood hazard layer is a better approach than including flood maps in the PDP and allows for the information to be updated without undertaking a full plan change. We understand that ideally the mapping would be updated every 2-3 years.

167. As Ms Huls explains in her rebuttal evidence it is difficult to adopt the non-statutory layer for Variation 3 as the PDP already includes flood hazard maps. It is likely however that a comprehensive plan change to review flood hazards would result in a similar timing of flood plain review from now, being 2-3 years. Therefore, the benefits of the non-statutory layer are reduced.

168. We also understand that the Environment Court will be considering appeals related to the non-statutory approach arising from Tauranga City Council's Plan Change 27, and no decision on those appeals is likely in the coming months.

169. Overall, we submit that using a mapped Stormwater constraints overlay is the most appropriate response at this point in time.

ADDITIONAL QUALIFYING MATTERS REQUESTED BY SUBMITTERS

Ngāti Naho Trust – protection of all sites of cultural significance and a 1.2km buffer along the Waikato River

170. The submission points from Ngāti Naho Trust ask to include additional restrictions into Variation 3 in a way that would disenable current rights under the PDP. For this reason, in reliance on the *Waikanae* decision, these requests are out of scope.

EFFECT OF QUALIFYING MATTERS ON DEVELOPMENT CAPACITY

171. There is no requirement in the Act to consider the *increase* in development capacity enabled by an IPI and the MDRS do not identify a target density. However, section 77J of the Act requires the section 32 evaluation report for proposed qualifying matters to assess the impact that limiting development capacity, building height or density will have on development capacity.

172. Furthermore, Variation 3 must give effect to the NPS-UD in its entirety to the extent that the matters are in scope of Variation 3 as directed by section 80E of the Act[104] and NPS-UD Policy 3. Policy 2 of the NPS-UD requires that:

> Tiers 1, 2 and 3 local authorities, at all times, provide at least sufficient development capacity to meet the expected demand for housing and business land over the short term, medium term and long term.

173. Implementation of Policy 2 is set out in Subpart 1 of the NPS-UD and includes:

[104] Waikato IPI IHP Interim Guidance 2 (Southern Cross Decision) dated 14 June 2021, paragraph 3.

(a) Clause 3.2(1) which requires Council to provide at least sufficient development capacity in its district to meet expected demand for housing.

(b) Clause 3.2(2) which provides that in order to be sufficient to meet expected demand for housing, the development capacity must be plan-enabled, infrastructure ready, feasible and reasonably expected to be realised and, for Waikato district, meet the expected demand plus the appropriate competitive margin. These terms are defined in clause 3.4.

174. The Council has engaged Susan Fairgray of Market Economics to assess the additional development capacity enabled by the MDRS and the effect the proposed qualifying matters will have on that capacity (including the removal of the Urban Fringe qualifying matter).

175. The 2021 Housing and Business Capacity Assessment (HBA Assessment) found there was generally sufficient capacity within the district's main urban centres to meet the medium and long term demand when allowing for gradual continued market growth.[105] Capacity shortfalls were identified in most areas in the short term due to a lack of infrastructure serviced greenfield land.[106] As noted in Ms Fairgray's evidence, the medium term HBA Assessment was based on the notified PDP which does not reflect the significant changes to plan enabled capacity in the district as a result of the decisions released on the PDP in January 2022.[107] While the MRZ was only introduced through the decisions version in response to a Kāinga Ora submission, Market Economics was aware of the potential for a MRZ to be introduced, so conservatively included a small area of MRZ in the assessment, based on the information available at the time.[108]

[105] Evidence-in-Chief Susan Fairgray, paragraph 36 and Figure 1.
[106] Ibid, paragraph 36.
[107] Paragraph 39.
[108] Paragraphs 32 and 38.

176. The 2021 HBA Assessment has been updated in light of the PDP decisions and Variation 3.[109] The modelling of notified Variation 3 without any qualifying matters shows there is a plan enabled capacity in the four towns for an additional 71,700 dwellings, around 12 times the level of long term-demand (or an additional 88,100 dwellings in all urban areas in the district). The commercially feasible capacity without qualifying matters is also large relative to demand.[110]

177. Further, the modelling shows commercially feasible capacity in Pookeno, Tuakau and Ngaaruawaahia substantially exceeds the projected demand under Variation 3.[111] The modelling showed lower rates of feasibility in Huntly making it less likely that intensification options will be taken up by profit-driven developers.[112] However, there is a large amount of zoned opportunity beyond the capacity which is feasible in Huntly.

178. The notified Urban Fringe qualifying matter reduced the plan enabled capacity across the four towns by 43% (less 30,600 dwellings)[113] and the medium to long term feasible capacity by around 50%.[114] Whilst Council is no longer pursuing the Urban Fringe qualifying matter, Ms Fairgray's evidence is that even with the Urban Fringe qualifying matter, demand is still likely to be met.[115]

179. Disregarding the Urban Fringe qualifying matter, the proposed Stormwater qualifying matter has the largest effect on residential capacity and reduces the plan enabled capacity by 11% (- 7,600 dwellings).[116] The largest effect of this qualifying matter is felt within

[109] Evidence-in-Chief Susan Fairgray, paragraph 40.
[110] Ibid, paragraph 48 and Figure 2.
[111] Paragraph 50 and Figure 4.
[112] Paragraph 51 and Figure 4.
[113] Paragraph 54 and Table 3.
[114] Paragraph 55.
[115] Paragraph 56.
[116] Paragraph 59 and Table 4.

Huntly[117] however Ms Fairgray notes that the Stormwater qualifying matter still substantially increases plan enabled capacity from the baseline enabled under the PDP by 69% (+26,3000 dwellings)[118] and considers the Stormwater qualifying matter still enables a significant level of intensification to occur in most locations within the outer residential areas.[119]

180. Ms Fairgray's rebuttal evidence sets out the further modelling undertaken in respect of the effects on residential capacity from the additional qualifying matters relating to SASMs at a particular property, the Huntly mine subsidence area, the Turangawaewae Surrounds and the Havelock Precinct.[120]

181. The SASM applying to 5851 Great South Road does not reduce capacity as the site does not contain planned infrastructure provision within the long-term.[121] The Huntly mine subsidence qualifying matter reduces the plan enabled capacity by 2% across the four towns (- 1,700 dwellings)[122] or 13% at Huntly.[123]

182. The combined Stormwater and mine subsidence modelled qualifying matters reduced total plan enabled capacity by 12% (- 8,400 dwellings).[124]

183. Ms Fairgray's evidence is that the qualifying matters in relation to Area D surrounding Turangawaewae Marae may reduce the potential size of more intensive dwellings in Area D if they were to be developed, but does not reduce capacity in that area.[125]

---

[117] Evidence-in-Chief Susan Fairgray, paragraph 62.
[118] Paragraph 60.
[119] Paragraph 61.
[120] Rebuttal evidence, Susan Fairgray, paragraph 31.
[121] Ibid, paragraph 33.
[122] Paragraph 35.
[123] Paragraph 36.
[124] Paragraph 37.
[125] Paragraph 38.

184. Ms Fairgray considers qualifying matters and the EPA in the Havelock Precinct area largely relates to physical constraints on the site that would limit development irrespective of their status as a qualifying matter.[126]

SPECIFIC SUBMITTER REQUESTS (NON-QUALIFYING MATTERS)

One medium density residential zone approach

185. Kāinga Ora requests that the MRZ1 and MRZ2 be consolidated into one medium density zone to align with the National Planning Standards. The complication is that the existing PDP MRZ applies to Raglan and Te Kauwhata which do not contain any relevant residential zones and the provisions in each zone are different.

186. The section 42A rebuttal report supports the one zone approach and suggests this be achieved by providing two parts within the single MRZ to differentiate the geographical areas within and outside of Variation 3.[127] The redrafting exercise is yet to be undertaken.

Minimum vacant lot size

<u>Schedule 3 RMA</u>

187. Schedule 3A, clause 8 makes it clear there must be no minimum lot size, shape or other size related subdivision requirements:

(a) For subdivision around an existing dwelling if the subdivision does not increase the degree of any non-compliance with the density standards;

(a) Where there is no existing residential unit, where a subdivision and land use application will be determined concurrently and it

[126] Rebuttal evidence, Susan Fairgray, paragraph 39.
[127] Section 42A rebuttal report, paragraphs 39 – 40.

can be demonstrated that it is practicable to construct a permitted residential unit on every allotment (compliance with MDRS).

And in each case no vacant allotments are created.

188. Schedule 3A does not set a minimum lot size where vacant allotments are created in a relevant residential zone. Clause 7 of schedule 3A simply requires that any subdivision provisions (including rules and standards) must be consistent with the development permitted under other clauses of the schedule. Council can therefore determine size related requirements for vacant lot subdivision consistent with clause 7.

Submitter evidence in response to section 42A Report

189. The section 42A report recommends that the vacant minimum lot size in the notified MRZ2 be retained at 200m^2 and that a minimum lot size restriction area (MLSR Area) be introduced to land that was previously in the General residential zone. The vacant minimum lot size in the MLSR Area was proposed to be 450m^2 on the basis it will help create well-functioning urban environments by focusing development in the town centres.[128]

190. The planning evidence for Kāinga Ora and HVL oppose the minimum vacant lot size in both the notified MRZ2 and the MLSR Area. Kāinga Ora seeks to remove the minimum lot size in both areas and apply a shape factor control of 8m by 15m. Mr Tollemache for HVL suggests a 240m^2 to 260m^2 minimum lot size. Mr Oakley for Pookeno West opposes the 450m^2 and seeks the removal of the MLSR Area.[129]

[128] Section 42A report, paragraph 110.
[129] Rebuttal evidence, David Mead, paragraph 77.

191. The parties attended expert conferencing on this topic on 18 July 2023. The JSW records that due to scope of the MRZ which includes a 200m^2 vacant lot, the conferencing focused on the MLSR Area. It also records that the planners for HVL and Pookeno West consider a minimum lot size of 300m^2 in the former urban fringe area was appropriate. Kāinga Ora continues to seek a shape factor.

Council's position in section 42A rebuttal report

192. Mr Mead, urban planner for Council, considers a shape factor of 8m by 15m proposed by Mr Cameron Wallace for Kāinga Ora is too small for a vacant lot as a residential unit may not be able to meet all of the MDRS.[130]

193. In the MLSR Area, Mr Mead supports a 300m^2 vacant lot size provided a building platform is clear of floodplains and other environmental outcomes. Ms Fairgray considers that 300m^2 is more likely than 200m^2 to enable a range of dwelling topologies and sizes.[131] The section 42A author, Ms Hill, recommends a minimum vacant lot size of 300m^2 in the current MSLR Area. In doing so, Ms Hill acknowledges that it may potentially affect future development options for intensification on some sites but considered market demand for apartment living in the Waikato was not large in the short to medium term.[132]

Council's revised position

194. On 20 July, Ms Hill provided an Addendum to the section 42A rebuttal report revising her position on the vacant minimum lot size. She states that in arriving at the 300m^2, she did not fully consider the long term implications of whether 300m^2 would deliver an appropriate range of intensification options in the long term.[133] Ms Hill now proposes a 300m^2

[130] Rebuttal evidence, David Mead, paragraph 81.
[131] Rebuttal evidence, Susan Fairgray, paragraph 97.
[132] Section 42A Report, paragraph 48.
[133] Addendum 1 to section 42A report dated 20 July 2023, paragraph 8.

vacant lot size in the MLSR Area in conjunction with an average net lot area of 450m^2. Ms Hill, in reliance on Ms Fairgray's rebuttal evidence, considers this approach "strikes an appropriate balance of enabling both the short-term benefits of smaller houses on smaller lots and allowing for a better dwelling mix, with a portion of larger lots in subdivisions that could be redeveloped at higher levels of density in time".[134]

195. A draft rule was included in the Addendum. The provision requires further amendment to reflect the intent of the rule. This will be provided at the hearing.

RELATED PROVISIONS

What is a related provision?

196. In section 80E(2) related provisions include, without limitation, district-wide matters, earthworks, fencing, infrastructure, qualifying matters, storm water management, and subdivision. A related provision is defined in section 80E(1)(b)(iii) as:

> "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."

197. Support is not defined in the RMA, but it's usual meaning is 'give assistance to'.

198. The scope for consequential amendments under the RMA more generally have been considered by the High Court. A consequential amendment must be necessary in two ways – that is the consequential changes must be "necessary and desirable" and "foreseen as a direct or otherwise logical consequence of a submission".[135] We submit that this approach is

[134] Addendum 1, paragraph 8.
[135] *Albany North Landowners v Auckland Council* [2017] NZHC 138, [107] and [135].

equally applicable to interpreting section 80E. In order to be a consequential related provision the provision must be:

(a) Necessary and desirable to achieve the incorporation of the MDRS or to give effect to policies 3 and 4; and

(b) Foreseen as a direct or other logical consequence of incorporation of the MDRS or to give effect to policies 3 and 4.

199. To specifically determine whether a provision supports or is consequential on the MDRS or Policy 3(d) as defined above, requires consideration of the purpose of the MDRS and Policy 3(d).

200. The MDRS are a set of objectives, policies, standards and subdivision requirements that enable housing supply. The mandatory objectives and policies refer to "all people and communities" and "a variety of housing types". In our submission it is noteworthy that the MDRS are housing type neutral and do not prioritise a particular type of housing or a particular group of people or communities.

201. Policies 3 and 4 are even more limited in their purpose, focusing on heights and densities of urban form. There is no specific reference to housing or any type of housing in the policies. As will be addressed below in relation to specific submitters, it is our submission that reference to particular types of housing or to particular groups of people or communities is not:

(a) Supporting or giving assistance to the incorporation of the MDRS or Policy 3(d); or

(b) Necessary, desirable or foreseeable as a consequence of incorporating the MDRS or Policy 3(d).

Stormwater quality – related provision proposed by Council

202. As a result of reviewing submitter evidence, Mr Boldero and Ms Huls agreed that a new stormwater quality rule should be introduced as a related provision. Many of the stormwater experts acknowledged the need to manage stormwater in accordance with catchment management plans within the Council stormwater discharge consents, along with the requirements in RITS. Mr Boldero has always been concerned about relying on the existing WWS-R1 to manage stormwater.

203. Given the expected growth in the Waikato towns in likely to be on large greenfield sites, where the experts refer to individual stormwater management plans as best practice, the new rule requires a stormwater management plan to be submitted as a restricted discretionary activity for four or more residential units, or subdivision of four or more lots. The new rule is included as WWS-R1A.

204. The rule proposed by Mr Telfer in his evidence-in-chief relating to services for infill sites has also been included as a related provision as WWS-R1B.

RVA and Ryman

205. While agreement has been reached for amendments to be made to the MRZ2 policies and rules for retirement villages, we understand that the RVA and Ryman still request:

(a) Greater reference to the housing requirements for aging populations in the objectives; and

(b) Inclusion of more enabling provisions for residential development in the COMZ, TCZ, and Local centre zone (LCZ).

206. There are no LCZs within the four towns that form part of Variation 3. Aside from not being related provisions as defined above, amendments to the LCZ fail the *Clearwater* tests as they are not 'on' Variation 3.

207. In relation to the other submission points, the reporting officer Ms Lepoutre's view is that the requirement for more enabling provisions for residential activities does not meet the tests for related provisions,[136] and that the TCZ and COMZ already adequately provide for residential development.[137]

208. Residential use, including in the TCZ and COMZ is already a permitted activity, and therefore, Ms Lepoutre's view is that reference to the requirement of the aging population does not meet the definition of related provisions. In particular, Policy 3(d) is limited in its scope to the heights and densities of urban form, within that form all residential uses should be equally provided for.

Ara Poutama Aotearoa

209. The amendments sought by Ara Poutama Aotearoa have also been assessed as not meeting the definition of a related provision, and Ms Lepoutre is of the view that the amendment proposed would result in the activity status for the establishment of community corrections facilities as permitted activities.

210. The amendments sought by Ara Poutama Aotearoa relate to:

(a) The inclusion of a new definition of "household"; and

(b) Amending the supported residential accommodation definition so that it can only occur in the Corrections Zone.

[136] Section 42A report paragraph 335.
[137] Section 42A Addendum report, section 3.

211. In relation to adding a definition for household, Ms Lepoutre's view is that this is not required, and is not a related provision. It does not support and is not consequential on the MDRS or policy 3(d).

212. In relation to the supported residential accommodation definition, Ms Lepoutre, is of the view that by limiting supported residential accommodation to the Corrections Zone, Council would be required to assess any proposal for a supported residential accommodation proposal within the MRZ2 as a residential activity. She is of the view that there would be no alternative definition that would suit the activity.

WEL Networks

213. WEL Networks have sought the inclusion of a new subdivision rule, and an amendment to the setbacks rule to require compliance with the New Zealand Electrical Code of Practice. Ms Lepoutre, in the Section 42 Rebuttal Report, is sympathetic to the requests, however the provisions as proposed by WEL Networks could be less enabling of development under the MDRS and therefore must be supported by a qualifying matter. The qualifying matter relating to infrastructure can only apply to ensure the safe and efficient operation of nationally significant infrastructure, which as defined does not include WEL Networks assets.

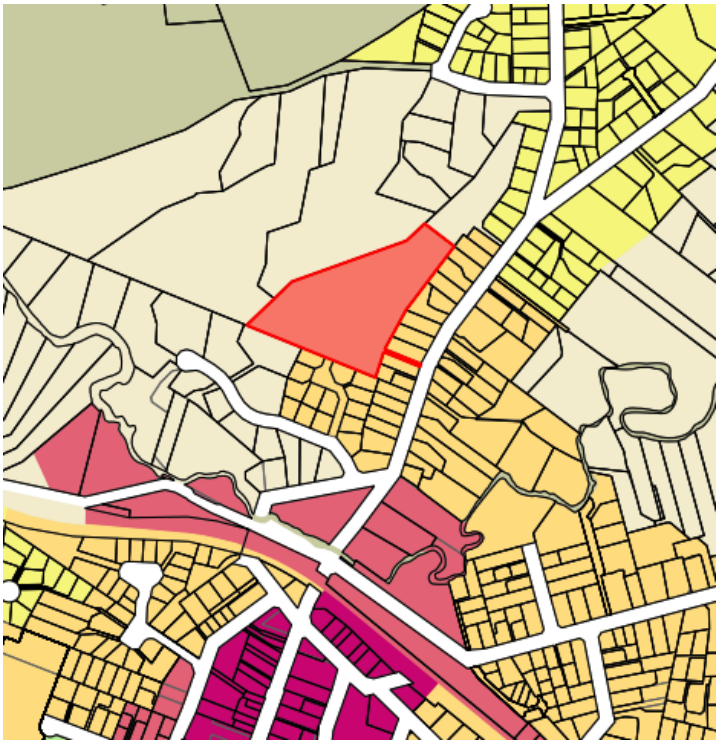
214. For the above reason Ms Lepoutre recommends the provisions cannot be added as a relation matter but alternatively supports the inclusion of an advice note in the MDRS setback standard.[138]

[138] MRZ2-S4.

REZONING REQUESTS

23 Harrisville Road, Tuakau

215. Greig Developments No2 and Harrisville 23 Limited (Harrisville) have sought to rezone the site at 23 Harrisville Road from Large Lot Residential Zone (LLRZ) to MDRZ, shown identified in red below. The properties zoned in the yellow and orange will be zoned MRZ2. The site is therefore immediately adjoining the existing residential zone.



216. As an aside, the submission also asks for two properties on Johnson Street to be rezoned from LLRZ to MRZ2. These two properties are subject to a similar request in an appeal to the PDP. No evidence is provided in relation to these two properties and therefore we submit that the Panel recommend declining the rezoning of those properties through Variation 3.

Question of scope

217. Variation 3 as notified did not rezone any LLRZ properties to MRZ2, and therefore it is appropriate to consider whether this rezoning request is 'on' Variation 3 in accordance with the *Clearwater* tests. As the zoning relates to enabling residential development as compared to the PDP zoning, the *Waikanae* decision is not relevant.

Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed variation

218. As set out above, the established way of determining whether a submission meets this test is by considering whether the section 32 report addressed the matter (or ought to have) or whether the submission relates to the management regime for the particular resource (residential zoned land) altered by the variation. On its face the submission would fail to meet the test, however the High Court in *Palmerston North City Council v Motor Machinists Ltd* acknowledges that:

> Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s32 analysis is required to inform affected persons of the comparative merits of that change.[139]

219. The Council accepts in this case that the zoning can be viewed as an incidental extension to the MRZ2 zone. Incidental meaning that the submission to rezone the Harrisville site is clearly related to the MRZ2 zone and would not have required substantial further analysis in the original section 32 report. We submit therefore that the first Clearwater test is met.

[139] [2013] NZHC 1290, at [81].

Whether there is a real risk that people affected by the variation would be denied an effective opportunity to participate in the process

220. The owner of the property is the submitter, therefore the focus of this test is whether any of the surrounding neighbours could be affected by the submission but have not had a real opportunity to be involved in the Variation 3 process. The submission relief was notified in the summary of submissions for further submissions, however as the High Court acknowledged in *Motor Machinists*, the further submission process may not cure natural justice concerns where persons affected would not have had cause to review a summary of submission document.

221. The majority of the adjoining properties zoned LLRZ are already either directly adjoining or in close vicinity to residential zoned land. We therefore consider that if any of them were concerned about the potential effects on their properties from Variation 3 (from reverse sensitivity or other cross boundary effects) they would have reviewed the notified Variation 3 and checked the summary of submissions.

222. In our view therefore, we consider the second test related to natural justice is met and the submissions point can be considered on its merits.

<u>Merits of rezoning</u>

223. The technical evidence provided on behalf of Harrisville to support the rezoning is the same information that has been submitted in support of an application for the large lot residential subdivision that is currently onhold with the Council. While the evidence discusses the potential yield increase for the site, Ms Hill remains concerned that the assessments provided have not accurately assessed the potential increase is yield and environmental effects associated with the rezoning. Significantly the evidence has been based on an assumption of a total yield of 25 lots but has not considered the possibility of three units being constructed as a permitted activity on each of those lots.

224. Ms Hill acknowledges that the location of the site, within close distance to the town centre is ideal for more intensive housing, she remains concerned about the appropriateness of rezoning the site to MRZ2 based on:

(a) Transport constraints, particularly the limited access from the site to the main roads, and the lack of thorough assessment of the effects of MRDS development on the transport network;

(b) Limited nature of the assessment on ecological effects from an MRZ2 zoning, especially on the wetland, riparian margins and the bat population;

(c) The likelihood of geotechnical risks that have not been fully assessed; and

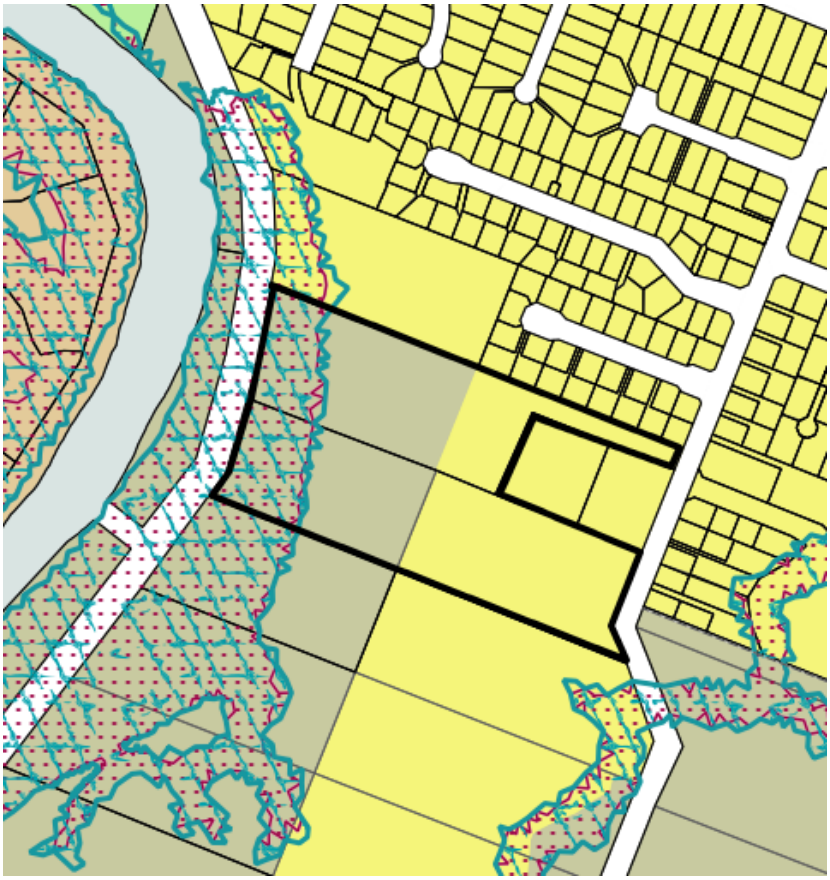
(d) Inconsistencies with the higher order WRPS policy on urban development and development principles in Appendix 11.

225. For these reasons, Ms Hill recommends that the submission be rejected, and the site remain zoned LLRZ.

99a Ngaaruawaahia Road and 18 Rangimarie Road, Ngaaruawaahia

226. The submission from Next Construction and others[140] relates to the zoning of two properties in Ngaaruawaahia. The sites currently have a split zoning, the residential zoned parts will become MRZ2 with the removal of the Urban Fringe and the parts closest to the Waipā River are zoned General rural (GRUZ). The properties are shown outlined in the map below, with the mapped flood hazard:

[140] Next Construction, 61 Old Taupiri Limited, Swordfish Projects Limited, 26 Jackson Limited, 99 Ngaruawahia Limited.



Question of scope

227. For the same reasons as set out above in relation to the Harrisville site, we consider the rezoning of these properties is 'on' Variation 3 and meets the natural justice test. Therefore, the merits of rezoning can be considered by the Panel.

Merits of rezoning

228. The evidence of Mr Woods, on behalf of the submitter, notes that the properties are identified within a number of non-RMA documents as appropriate for urban development. While there is an undisputed flood plain and high risk flood area on the properties, it is Mr Woods' view that the rural zoned portions can be rezoned MRZ2 subject to the existing flood hazard layers and controls. In his review this outcome would allow for a comprehensive medium density development on the land not encumbered by the flood hazards.

229. In her section 42A rebuttal report, Ms Hill acknowledges that the properties are identified in non-RMA growth documents for urban development, but that the site specific technical assessments required to support the rezoning under the RMA have not been completed. Ms Hill therefore has concerns about allowing the GRUZ land to be rezoned to MRZ2. While she acknowledges that the mapped flood hazards will appropriately avoid and manage development in those areas, Ms Hill remains concerned about:

(a) Consultation with mana whenua;

(b) Consideration of the archaeological resources on the properties;

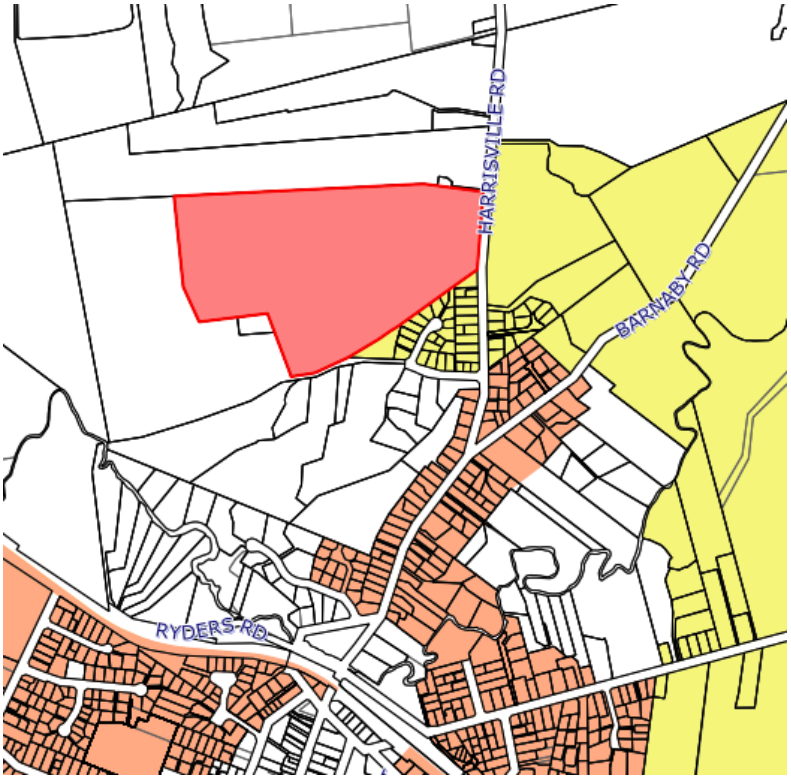
(c) Sufficient assessment of the geotechnical risks associated with MDRS development; and

(d) Relationship with roading connections within the growth cell area.

230. Ms Hill recommends that the submission be rejected, and the split zoning remain in place.

111 Harrisville Road, Tuakau

231. The submission from GDP Developments relates to the property at 111 Harrisville Road Tuakau. The zoning of the site is subject to a PDP appeal in the name of the owners Mr and Mrs Aarts. The site is identified in the map below:



232. The evidence from the planner on behalf of GDP Developments, Ms Nairn, suggests that the decision on whether the site should be rezoned from GRUZ to a residential zone is better placed to be determined through the Environment Court appeal process. If the parties to the appeal agreed to the rezoning, or the Court agreed to the rezoning, the appropriate qualifying matters would be determined at that time.

233. The Council agrees that this is a sensible approach, rezoning of this large site requires a comprehensive consideration of the potential effects of urban development in close vicinity to the established Motocross track, and in light of the information provided to GDP Developments about wastewater capacity constraints.

234. We therefore submit that the Panel reject the submission.

Submissions seeking sites be rezoned from GRZ to MRZ2

235. A number of submissions opposed the Urban Fringe qualifying matter by requesting that individual sites be rezoned from GRZ to MRZ2. These submission points have all been accepted subject to the inclusion of qualifying matters, including the following:

(a) Next construction – in relation to the GRZ zoned parts of the sites;

(b) Pōkeno West, CSL Trust and Top End;

(c) Havelock Village Limited.

Other zoning requests

236. Other submitters sought rezoning relief in their submissions, but these requests have not been supported by any evidence:

(a) Synlait submission seeking the retention of the GRZ within the Havelock Precinct. It is understood that this relief is no longer sought and the submitter accepts that MDRS must be incorporated subject to qualifying matters.

(b) Tuurangawaewae Marae who apart from the cultural views addressed above, opposed the MRZ2 on properties surrounding the Marae because of effects on natural character, historic landscape, heritage and wellbeing; and also because the increased traffic congestion and noise levels may impact on cultural practices and significant events. As we have set out above, the majority of properties surrounding the Tuurangawaewae Marae are zoned MRZ in the PDP, and that zoning is not subject to appeal. We submit that the application of both the *Waikanae* decision and the *Clearwater* tests mean that

this relief is out of scope and the submission points should be rejected.

(c) Kāinga Ora sought a variety of zoning requests in its original submission, to address what it describes as anomalies in the zoning maps for the four towns. In Tuakau, this rezoning request was wide reaching, involving large areas of LLRZ land to the north of the town centre. While not formally withdrawn, Kāinga Ora has not provided any technical evidence in support of the rezoning requests. In addition to not having any evidence to support this rezoning, we also consider that these zoning requests would fail at least the second *Clearwater* test. The rezoning would impact a significant number of properties and there is a real risk that those owners are not aware that the zoning of their sites could be amended through Variation 3. As set out in *Motor Machinists* the fact that a summary of submissions was released does not automatically mean that owners should have been aware of the zoning request and the need to check the summary document, especially when there was no consideration of rezoning rural or LLRZ land in the section 32 report.[141]

EVIDENCE

237. The evidence for the Council will be given by:

(a) Susan Fairgray, Associate Director, Market Economics Limited;

(b) Dr Ann McEwan, Principal at Heritage Consultancy Services;

(c) Dave Mansergh, Director at Mansergh Graham Landscape Architects Limited;

(d) David Mead, Principal at David Mead Urban Planner;

(e) Keith Martin, Three Waters Manager at Council;

[141] With the exception of two GRUZ sites in Pookeno who were completely surrounded by residential zoned land.

(f) Mathew Telfer, Operations Manager – Waikato Contract at Watercare Services Limited;

(g) Andrew Boldero, Principal Stormwater Engineer at Te Miro Water Consultants;

(h) Katja Huls, Senior Planner at Stantec; and

(i) Council section 42A authors: Fiona Hill, Principal Policy Planner at Council; Karin Lepoutre, Planning Consultant at KPL Planning Limited and Bessie Clarke, Policy Planner at Council.

Signed this 21 day of July 2023

B A Parham / J A Gregory
Counsel for Waikato District Council