BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE WAIKATO DISTRICT

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER	of the hearing of submissions on Variation 3 Enabling Housing Supply (**V3**) to the Proposed Waikato District Plan (**PDP**)

LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA - HOMES AND COMMUNITIES

Dated: 21 July 2023

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MAY IT PLEASE THE COMMISSIONERS:

1. INTRODUCTION

1.1 These submissions and the evidence to be called are presented on behalf of Kāinga Ora - Homes and Communities (**Kāinga Ora**) to the Panel's hearing on Waikato District Council's Variation 3 ("**V3**") to the Proposed Waikato District Plan ("**PDP**")

1.2 V3 has been notified in accordance with the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("**Amendment Act**"). The Amendment Act requires Council to use the intensification streamlined planning processes ("**ISP**") process to:

(a) Give effect to Policies 3 and 4 of the National Policy Statement for Urban Development ("**NPS-UD**"); and to

(b) Incorporate the medium density residential standards ("**MDRS**") into all relevant residential zones.

1.3 These legal submissions will address:

(a) The relief now sought by Kāinga Ora.

(b) The statutory bounds (obligations, discretions and constraints) applying to V3.

(c) What giving effect to Policies 3 and 4 of the NPS-UD entails, given that section 75 RMA requires the District Plan to give effect to the NPS-UD as a whole.

(d) Rezoning issues – Scope.

(e) Infrastructure.

(f) Heritage issues – Huntly.

1.4 Evidence by the following witnesses has been exchanged in support of submissions by Kāinga Ora for this hearing topic:

(a) Gurv Singh – Corporate evidence and Kāinga Ora representative;

(b) Phil Osborne – economics;

(c) Phil Jaggard – infrastructure;

(d) Cam Wallace - urban design; and

(e) Michael Campbell – planning.

2. RELIEF SOUGHT BY KAINGA ORA

2.1 Following further analysis, Kāinga Ora has revised its position somewhat from that set out in its primary submission on V3. Key elements of and refinements to the relief include:

(a) Kāinga Ora still seeks to apply a targeted height variation control (overlay) over the Huntly Town Centre and Commercial Centre zones. This has been refined to a 24.5m standard in the core of the Town Centre zone and a 22m standard in the Commercial zone east of the Town Centre zone. This will enable a height of buildings (24.5m and 22m) within the commercial core that is proportionate and complementary to that sought in the surrounding areas.

(b) Deletion of relief seeking the targeted height variation control (overlay) over the Ngaaruawaahia Town Centre zone in recognition of the cultural values relating to the Tuurangawaewae Marae.

(c) Deletion of relief seeking a High Density Residential Zone ("**HDRZ**") in the District. This applies to both Huntly and Ngaaruawaahia.

(d) Refinement of the relief sought regarding the application of the MDRS and MRZ zone to Raglan and Te Kauwhata.

2.2 The key remaining points in contention between Council and Kāinga Ora therefore relate to the appropriate height standards in Huntly and in particular whether there should be a targeted height variation control in the Huntly Town Centre and Commercial zones. Michael Campbell's planning evidence identifies other areas where Kāinga Ora is continuing to seek changes beyond the position recommended in the Council's section 42A RMA report ("**42A Report**")[1].

[1] EIC, Michael Campbell (Planning) at: section 6 (MDRZ1 and MDRZ2); section 7 (PDP provisions); and section 8 (qualifying matters).

3. STATUTORY BOUNDS APPLYING TO V3

3.1 The key parts of the statutory framework governing the content of V3 are sections 77N, 77G, 80E and 80G RMA.

Sections 77G and 77N RMA

3.2 Section 77G RMA requires Council, through the ISP, to ensure that the District Plan provisions:

(a) Incorporate the MDRS into "*every relevant residential zone*"; and

(b) Give effect to Policy 3 of the NPS-UD in "*every residential zone*" in an urban environment.

3.3 Section 77N RMA requires Council, through the ISP, to ensure that the District Plan provisions for each urban non-residential zone give effect to the changes required by Policy 3 of the NPS-UD.

3.4 Collectively, those provisions specify obligations on the Council. They do not contain any constraints or limitations on what else might be done through the ISP.

Section 80E RMA

3.5 Section 80E RMA specifies matters that must be included in an Intensification Planning Instrument ("**IPI**") and that may be included in an IPI. Again, it contains no constraints or limitations on what else might be done through an IPI.

3.6 By way of illustration:

(a) Section 80E(1)(a) provides that the IPI *must* incorporate the MDRS and give effect to, in this case, Policies 3 and 4 of the NPS-UD.

(b) Section 80E(1)(b)(iii) provides that Council *may* amend "*related provisions, <u>including</u> objectives, policies, rules, standards and zones, that <u>support or are consequential on</u> – (A) the MDRS; or (B) policies 3,4 and 5 of the NPSUD*".

(c) In that context, "*including*" signals that this is not an exhaustive list (although the list of items essentially covers all active provisions found in district plans). For clarity, changing the zoning of land (e.g.: to HDRZ) falls within the description as an amendment to a

zone, rule or both. It is also available as a means of "*supporting*" Policies 3 and 4.

(d) In that regard, the term "*support*" is broad in application. It covers any step that will help the policies be given effect.

Section 80G RMA

3.7 Section 80G RMA is the only provision that constrains the extent to which an IPI can be used to enable intensification.

3.8 The most important aspect in terms of the scope of an IPI is section 80G(1)(b) which provides that Council may not, "*use the IPI for any purpose other than the uses specified in section 80E*". In that regard:

(a) Whilst the word "*uses*" is an odd choice, presumably Parliament is seeking to ensure that the IPI is used for purposes related to (or which "*support or are consequential on*"[2]) the incorporation of the MDRS and giving effect to Policy 3 and 4 of the NPS-UD.

(b) The following section of these submissions explains that Policies 3 and 4 need to be read in the context of the balance of the NPS-UD. In practice, section 80G(1)(b) constrains the ability of council to use the IPI to introduce provisions that are independent of the matters addressed in the NPS-UD. An example might be the introduction of a district-wide regime for dealing with a matter, including for example changes to definitions that have broad application.

(c) Put simply:

(i) A provision that gives effect to the NPS-UD and promotes intensification in a manner that supports Policies 3 and 4 can be addressed through an IPI.

(ii) A provision that limits the extent to which *additional* intensification may occur may be introduced under the IPI, provided the obligations applying to qualifying matters are complied with.

[2] Section 80E(1)(b)(iii) RMA

(iii) A provision that constrains or removes *existing* development rights is likely to fall foul of this section. This is the situation addressed in the *Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council*[3] decision referred to below.

Implications

3.9 In the circumstances, Kāinga Ora considers that the IPI and submissions may appropriately and lawfully promote relief that enables additional intensification provided:

(a) It is in support of or consequential on the MDRS or Policies 3-5 of the NPS-UD; and

(b) It is within the scope of the plan change (discussed below).

3.10 That interpretation is consistent with the recent Environment Court decision in *Waikanae*[4]. That decision concerned an application for subdivision of a General Residential zoned site. Through its IPI, the council had added the site to its schedule of Areas of Significance to Māori. The applicant sought and obtained a determination from the Court that such a step was outside the scope of the IPI, essentially because it produced "*a change in status of a number of activities which might previously be permitted on the Site under Residential zone"*. The Court concluded as follows:

> "*[31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the [Amendment Act] 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 identified in para 55 as permitted activities at all, by changing the status of activities commonly associated with residential development from permitted to either restricted discretionary or non-complying.*

[3] *Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council* [2023] NZEnvC 056

[4] *Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council* [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 processes*."

4. "GIVING EFFECT" TO POLICIES 3 AND 4 OF THE NPS-UD

Context

4.1 Policies 3 and 4 of the NPS-UD do not exist in a vacuum.

(a) The NPS-UD predated the Amendment Act.

(b) Its key provisions are the objectives and policies. Policies 3 and 4 form part of a series of provisions that were drafted to enable those objectives to be realised.

(c) Thus, Policies 3 and 4 cannot be understood fully, let alone given effect, in isolation from the objectives that lie behind them.

(d) As noted above, nothing in the Amendment Act prevents the IPI being used to incorporate changes that "*support*" Policies 3 and 4 and give better effect to them.

4.2 Section 75(3)(a) provides that the District Plan must give effect to any national policy statement. That includes the whole of the NPS-UD. That obligation applies through the V3 process. Thus, the Council and the Panel are required by RMA to give effect to the whole of the NPS-UD through V3 to the extent you are able (i.e.: that the changes are within the bounds of the plan change).

4.3 In that context, while V3 was initiated (in part) to give effect to Policies 3 and 4 NPS-UD, the following provisions are both relevant to your understanding of Policies 3 and 4 and to be given effect through the plan change: Objectives 1, 2, 3, 4, 5, 6, and 8; Polices 1, 2, 6, 8 and 9.

Meaning of Policy 3(d)

4.4 The relief sought by Kāinga Ora with regard to the Huntly centre is related to Policy 3(d) NPS-UD which reads:

> "*In relation to tier 1 urban environments, regional policy statements and district plans enable: … (d) <u>within and adjacent to</u> neighbourhood centre zones, local centre zones, and <u>town centre zones</u> (or equivalent), building heights and densities of urban form*

<u>commensurate with</u> the level of commercial activity and community services."

4.5 Huntly Centre is a town centre or equivalent. Kāinga Ora's revised relief (set out in its evidence) seeks additional height (up to 24.5m and 22m in place of the current 12m height standard) and consequential density in the town centre and commercial zone.

4.6 The wording raises an issue as to whether the words, "*commensurate with the level of commercial activity and community services*" refer to current levels or to the levels that are anticipated in the future. This issue is relevant to all submissions that seek to increase intensification within and around town, local and neighbourhood centre zones. It is submitted that the only feasible reading of the provision relates to anticipated future levels of commercial activity and community services:

(a) Current levels of commercial activity and community services are, by definition, already accommodated in each centre. If that is the relevant metric under Policy 3(d), then there is no rationale for increasing the extent or intensity of activity enabled in any centre.

(b) The NPS-UD has, however, been drafted to "*enable more people to live in, and more businesses and community services to be located in, areas of an urban environment … in or near a centre*".[5] That objective can only be met if the provisions in town, local and neighbourhood centres are drafted in a way that enables increased development and intensity in the future.

(c) Accordingly, the phrase, "*commensurate with the level of commercial activity and community services*" in Policy 3(d) must be read as referring to levels of such activity and services that are anticipated in the future, having regard to the density and extent of development in the vicinity of each centre that will be enabled following the upzoning of land enabled by V3.

4.7 The policy addresses two quite separate things – "*building heights and densities of urban form*" and "*the level of commercial activity and community services*". In that regard:

[5] NPS-UD Objective 3(a).

(a) "*Building heights and densities*" relate to all buildings in and around the centres, regardless of the activities that are occurring inside them. Thus, it enables residential activities in addition to commercial activities and community services. In practice, as centres increase in height, different activities become prevalent (e.g.: retail and community services at ground floor, commercial and residential activities above).

(b) "*The level of commercial activity and community services*" addresses only part of the activities that occur in centres. Most importantly, it does not include residential activity (which is promoted in Objective 3 and is consistent with Objectives 1, 2, 4, 6 and 8 of the NPS-UD).

4.8 The use of the word "*commensurate*" suggests a relationship between those two different matters but not a simple mathematical function:

(a) As the level of commercial activity and community services increases, so the heights and densities enabled should increase.

(b) The additional height and density will need to cater for a full range of activities so cannot be limited to the quantum required to accommodate only the anticipated future commercial and community activity.

(c) The District Plan also needs to provide a development envelope that is well beyond that required to accommodate all activities anticipated for the centre, noting that:

(i) Not all sites are developed to the maximum building envelope enabled by plan provisions.

(ii) If the supply of development space enabled is constrained to match demand, prices will inevitably increase as the demand comes closer to taking up the full demand (contrary to Objectives 2 and 6 and Policies 1 and 2).

5. REZONING ISSUES – SCOPE

5.1 The Kāinga Ora submission sought a number of rezonings. While some of that relief is no longer being sought, there are a number of extant

submission points (addressed in the evidence of Gurvinderpal Singh) which the 42A Report opposes[6].

5.2 To the extent that the 42A Report is suggesting that the relief sought is beyond scope, Kāinga Ora disagrees. Kāinga Ora also considers appropriate to record its position on scope in light of the conclusions in the Panel's Direction #11 dated 23 May 2023 regarding Hamilton Plan Change 12. Kāinga Ora had no interest in the matters discussed in Direction #11 and for that reason did not make submissions on them. The findings in Direction #11 that, "*submissions seeking rezoning of non-residential zones to MDRS*" fail both limbs of *Clearwater Resorts Limited v Christchurch City Council*[7] ("***Clearwater***") and fall outside the ambit of the plan change are, however, directly relevant to relief sought by Kāinga Ora on V3. For that reason, we address below the principles governing scope.

5.3 In summary, Kāinga Ora submits that the zoning relief sought by it is legitimately within the bounds of V3[8].

Preliminary comment - Legal tests regarding scope

5.4 The leading authorities on whether a submission is "*on*" a plan change is *Clearwater Resorts Limited v Christchurch City Council*[9] ("***Clearwater***") and *Palmerston North City Council v Motor Machinists*.[10] The test upheld in those cases involves the consideration of two inter-connected factors:

(a) Whether the submission addresses the change to the status quo advanced by the plan change;[11] and

(b) Whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.[12]

[6] 42A Report paras 125, 126, 127 (re Pookeno); para 131 (re Tuakau); para 148 (Huntly).
[7] *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [66].
[8] For completeness, it is noted that the analysis adopted in Direction #11 differs from interim guidance issued by the Auckland PC12 IHP which held that submissions changing the zoning of non-residential zones (e.g. from industrial to mixed use), enlarging the physical extent of non-residential zones (e.g. a town centre zone), or changing a non-residential zone to a residential zone should not be ruled out due to scope and should be set down for hearing on the merits.
[9] *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [66].
[10] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.
[11] "*A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo*" at [66] of *Clearwater*.
[12] "*If the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be amended without real opportunity for participation by those affected, this is a powerful consideration against any argument that the submission is truly "on" the variation*" at [66] of *Clearwater*.

5.5 There is an overriding issue as to the extent to which that caselaw is applicable to the unique legislative context that applies under the Amendment Act. Put simply, the legislation requires councils to initiate certain plan changes, rather than providing a discretion to do so; and enables decision makers to recommend changes that go beyond those that are within the relief sought in submissions. Notwithstanding that circumstance, these submissions will address V3 with reference to those tests.

Limb 1: Extent to which the status quo is altered

5.6 The following principles apply to consideration of the scope of a plan change:

(a) A determination as to scope is context dependent and must be analysed in a way that is not unduly narrow.[13] In considering whether a submission reasonably falls within the ambit of a plan change, two things must be considered: the breadth of alteration to the status quo entailed in the plan change; and whether the submission addressed that alteration.[14]

(b) For relatively discrete plan changes, the ambit of the plan change (and therefore the scope for submissions to be "*on*" the plan change) is limited compared to a full plan review (i.e., the proposed AUP process in *Albany Landowners*) which will have very wide scope.[15]

(c) The purpose of a plan change must be apprehended from its provisions, and not the content of its public notification.

5.7 In this case, V3 is very broad in scope (as it relates to increasing housing supply and enabling greater housing intensification).

(a) Uniquely, in this case, the bounds of the plan change have effectively been set by Parliament. As discussed above, the statutory purpose of V3 is to incorporate the MDRS into relevant residential zones and to give effect to policies 3 and 4 of the NPS-

[13] *Bezar v Marlborough District Council EnvC* 031/09 at [49]; *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [36].
[14] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 at [80]; *Albany Landowners v Auckland Council* [2017] NZHC 138 at [127].
[15] *Albany Landowners v Auckland Council* [2017] NZHC 138 at [129].

UD.[16]

(b) With regard to the NPS-UD:

(i) Policies 3 and 4 refer to: city centre zones; metropolitan centre zones; areas within a walkable catchment of rapid transit stops, city centre zones and metropolitan centre zones; and land within and adjacent to neighbourhood centre zones, local centre zones and town centre zones (or equivalent). That list applies to all of the land in Pookeno, Tuakau, Ngaaruawaahia and Huntly Centres and extensive areas in the immediate vicinity of those centres.

(ii) The RMA requires the District Plan to "*give effect to*" any NPS including the NPS-UD.[17] Accordingly, while the RMA requires the IPI to give effect to Policies 3 and 4 NPS-UD, V3 must also be assessed and implemented in a way that gives effect to the balance of the NPS-UD (subject to scope).

(c) The obligation to "*incorporate the MDRS into relevant residential zones*" requires consideration of all urban residential areas within the Pookeno, Tuakau, Huntly and Ngaaruawaahia townships.

(d) In response, V3 appropriately involves significant changes to the form and intensity of development enabled in the residential areas of the townships. Policy 3(d) also raises issues with regard to the form and intensity of development that might occur in the town centres. The adequacy of Council's response to Policy 3(d) in those centres goes to the core of whether Council has appropriately "*given effect*" to those provisions.

(e) In summary, V3 is not a narrow plan change. It necessarily encompasses most of the townships and by definition concerns both the residential and commercial areas.

5.8 As recorded above, the IPI and submissions on it may appropriately and lawfully promote relief that enables additional intensification provided that is in support of or consequential on the MDRS or Policies 3-5 (which for

[16] See section 80E RMA.
[17] Section 62(3) RMA for regional policy statements and section 75(3)(a) RMA for district plans.

the reasons discussed above are broad terms). That intensification may be enabled through changes to existing zone provisions or by rezoning land to a zone that enables more intensive development. There is no reason why that rezoning process should exclude the application of more intensive residential zones to existing non-residential areas or lower density zones, if that outcome is consistent with and gives effect to the NPS-UD. That is the purpose of the rezonings proposed by Kāinga Ora.

Limb 2: Fairness to other parties

5.9 The second *Clearwater* limb requires an assessment of whether a planning instrument may be appreciably amended without real opportunity for participation by those potentially affected. In that regard:

(a) V3 makes extensive changes to the level of intensification enabled under the District Plan. A landowner who is impacted by (or excluded from) these changes can fairly and reasonably seek relief that seeks to alter this position.[18] That, in essence, is the purpose of Clause 6, Schedule 1 RMA.

(b) While a council typically sets the parameters of a plan change, there may come a point where it is procedurally unfair and substantively inappropriate (e.g.: because the council's proposal may not accomplish the purpose of the Act) for a council to try to limit the ambit of submissions.[19]

5.10 V3 is unique in the Waikato District Plan context:

(a) Whereas councils generally have a discretion regarding the scope of plan changes that they introduce, Council had no discretion in this case – it was required by the Amendment Act to introduce an IPI in order to incorporate the MDRS and to give effect to Policy 3 NPS-UD.[20] That has implications for the validity of relief that may be sought in submissions that clearly falls within the statutory requirements for the IPI but which Council failed to address adequately in V3.

(b) Given the wide scope of V3 (as it relates to increasing housing supply and enabling greater housing intensification) and the extent

[18] *Sloan v Christchurch City Council [2008] NZRMA 556 (EnvC)* at [44].
[19] *Sloan v Christchurch City Council* [2008] NZRMA 556 (EnvC).
[20] Section 77G RMA.

and breadth of changes proposed, potentially interested or affected parties should have been alive to the possibility of submissions seeking additional changes to provisions governing intensification.

(c) The appropriateness of the IPI process has been the subject of extensive public discussion and debate. That is a contextual factor that increases the likelihood that interested parties and potential further submitters would be aware of the relevant issues and the possibility that submissions may be filed seeking changes with broad application.

5.11 While the caselaw remains relevant, its application to V3 needs to be considered in the context of the Amendment Act and the ISP. Most notably, the potential for a "*submissional sidewind*"[21] to arise as alluded to in the caselaw is effectively overridden in the case of an IPI because the Panel has the ability to make recommendations that go beyond the relief sought in submissions. Given that submitters may find that the IPI Panel makes recommendations that they could not anticipate or counter, the possibility of a non-submitter being surprised by relief sought in a submission cannot carry the same weight as applies in the case of a standard Schedule 1 plan change.

Consideration of the Relief Sought by Kāinga Ora

5.12 The 42A Report opposes the rezonings sought by Kāinga Ora on the following grounds:

(a) In the case of the proposed rezoning of General Rural land at Pookeno to MDRZ, that the land was not rezoned as part of V3 and that consultation may not have been undertaken with the affected landowners.

(b) In the case of the proposed rezoning of Large Lot Residential land at Tuakau to MDRZ, that the zone that the submitter proposes to change is not a "*relevant residential zone*".

(c) In the case of the proposed rezoning of the Huntly College land at Huntly to MDRZ, that the (General Rural) operative zone that the submitter proposes to change is not a "*relevant residential zone*",

[21] *Motor Machinists* at [85].

that the rezoning sought is not a logical extension of a rezoning proposed in V3, that consultation may not have been undertaken with the Ministry of Education as an affected landowner, that consultation may not have been undertaken with Waikato Tainui, and that Waikato Tainui lodged a submission in opposition.

5.13 The following observations are made with regard to those assertions:

(a) For the reasons set out above, the fact that Kāinga Ora is seeking in all three centres to apply a residential zone to land that is currently subject to non-residential zoning does not render the relief out of scope of V3.

(b) There is no obligation on a submitter to consult with third parties regarding relief sought by them on a plan change or variation. It is only the Council that is subject to such obligations. In this case consultation undertaken by the Council should have made it very clear to members the public that V3 would have wide practical implications, affecting both centre zones and residential zones in the townships.

(c) The rezoning sought by Kāinga Ora at Tuakau applies to land that is very close to the centre and that is a logical location for intensive residential development.

(d) The rezoning of Huntly College to a residential zone will not affect the operation of the school (which can be guaranteed through a designation). Importantly, the zoning proposed by Kāinga Ora is consistent with the approach adopted by the Minister of Education in Auckland, where public schools are not subject to an underlying educational zone but are instead subject to a zoning that reflects the adjacent land. That ensures that, in the unlikely event that the school ceases to operate, the land will be able to be used for an appropriate activity. In the circumstances, it is unsurprising that the rezoning proposed by Kāinga Ora is not opposed by Education interests.

6. INFRASTRUCTURE

6.1 The Council has correctly decided to delete the urban fringe qualifying matter initially proposed in V3. In response, however, it has identified

areas of land within the 'urban fringe' as being subject to a flooding and stormwater overlay, within which the number of dwellings permitted on each site as of right has been reduced from three to two.

6.2 This replacement qualifying matter has been considered in the evidence of Mr Jaggard, who explains why the proposed mechanism is problematic, most notably because the stormwater and flooding implications of development are related to the extent of impermeable surface, not the number of units on a site.

6.3 It is also problematic because, while potential stormwater or flood hazards do not follow zone boundaries, the Council's approach (by virtue of the *Waikanae* decision) is to only apply controls within the former 'urban fringe' qualifying matter area, meaning an inconsistent approach is taken to addressing potential flooding and stormwater hazards across the district. Leaving aside those practical difficulties, the proposal raises procedural issues. Whilst the IPI process affects extensive areas of land within townships, it is not and cannot be of universal relevance throughout the district. Nor, for the reasons articulated in *Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council*[22]*,* can an IPI be used to constrain existing development rights and opportunities under the operative District Plan provisions. As a consequence, the issues identified by Council and that it is endeavouring to address through the new overlay can only be introduced to a very limited extent through V3.

6.4 It is far more logical and satisfactory from a legal and practical perspective for Council to address these matters through a separate, subsequent plan change. That is the approach that Hamilton City is to adopt (notwithstanding its efforts to rely on that separate process as a reason for delaying its IPI - PC12). It is also the approach that Auckland City will need to adopt, notwithstanding that the hearings on its IPI – PC78 have been delayed for a year. It is simply not feasible to resolve these issues through the current IPI process and it makes no sense to try.

7. HERITAGE ISSUES – HUNTLY

7.1 The evidence in chief of Council's heritage expert, Dr Ann McEwan, invited Kāinga Ora to provide an assessment of allowing additional height and

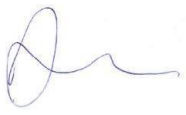
[22] *Waikanae Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council* [2023] NZEnvC 056

whether any additional qualifying matters were required for effects on the heritage buildings in Huntly town centre in light of the additional height sought by Kāinga Ora for that area.

7.2 As noted in para 440 of the 42A Report, the position of Kāinga Ora is that zone outcomes (height standards) should be addressed separately from the application of qualifying matters. That is, any site-specific provisions relating to heritage (addressing, typically, consenting obligations and processes for activities involve alterations to or removal of heritage features) can coexist with bulk and location controls of broader application. In those circumstances, any proposal to develop a site that is subject to a heritage feature would require consideration in terms of both the policy and rule framework in respect of heritage and the parallel policy and rule framework with respect to bulk and location. It is entirely feasible that a landowner will be unable to obtain consent for a development that would comply with the underlying organ location provisions, because of inconsistency or incompatibility with the relevant heritage provisions.

7.3 None of this is radical. It is, for example, the planning framework that applies within the Auckland City Centre zone where heritage buildings (e.g.: the former Post Office (now Railway Station) and the former Customhouse) are located in areas with no maximum height standard. Reliance is placed, instead, on the heritage provisions in the Plan.

Dated this 21st day of July 2023



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