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)

REPLY LEGAL SUBMISSIONS ON BEHALF OF WAIKATO DISTRICT COUNCIL FOR SUBSTANTIVE HEARING HELD BETWEEN 26 JULY AND 2 AUGUST 2023

22 September 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 reply legal submissions are presented on behalf of Waikato District Council (Council) following the first substantive hearing of Variation 3 to the Waikato Proposed District Plan (Variation 3).

2. These submissions will address the legal issues that arose during the hearing in relation to:

   (a) Application of the *Waikanae* decision;

   (b) Stormwater management;

   (c) Cultural outlook from Tuurangawaewae Marae;

   (d) Minimum vacant lot size;

   (e) Huntly Commercial Precinct;

   (f) Havelock Precinct;

   (g) WEL Networks;

   (h) Related provisions; and

   (i) Rezoning requests.

3. Our final reply submissions relating to managing the natural hazard risks associated with flooding will be filed separately.

WAIKANAE DECISION AND SCOPE

4. Our opening legal submissions set out the principles from the Environment Court's decision in *Waikanae*:[1]

[1] *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056.

(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.

5. No party during the hearing disputed the application of the principles in *Waikanae* to Variation 3. While the decision remains subject to an appeal to the High Court, and other IPI Panel recommendations have chosen not to follow the *Waikanae* decision,[2] we submit that this Panel should treat the *Waikanae* decision significantly persuasive and make recommendations that would align with its principles.

6. In addition to specific matters addressed below, we consider that based on *Waikanae* the following submission points cannot be accepted:

(a) The relief sought by the Queen's Redoubt Trust; and

(b) Mr Upton's relief to rezoning residential land on the boundary of Ngaaruawaahia back to rural zones.

STORMWATER MANAGEMENT

7. The management of stormwater, in particular on larger greenfield sites, was raised by a number of parties at the hearing. In response to evidence, prior to the hearing Ms Hill and Ms Boldero proposed the introduction of a new restricted discretionary rule for stormwater management for developments of four or more residential units or subdivision of four or more lots (WWS-R1A).

[2] See for example the recommendations of the Panel on the Kapiti Coast District Council IPI.

8. This new rule was not opposed by any submitter, with all experts agreeing that stormwater management was a critical part of any development. The focus of the hearing was on the wording of the assessment criteria and the additional wording sought by Mr Davis on behalf of Ms Noakes.

9. Mr Davis gave evidence about the hydrological features and recent changes on Ms Noakes property. Ms Noakes claims that the changes on her property are as a result of the recent greenfield developments on neighbouring sites in Pookeno. The Panel correctly acknowledged that it has no role to investigate or comment on Ms Noakes claims.

10. In Mr Davis' evidence in chief, he focused on the increase in volume of regular flows and extended detention, and suggested the addition of the following criteria be added to a number of rules:[3]

> and **avoiding** adverse stormwater effects on downstream properties, including erosion / scour and alteration of run-off frequency, volume and duration.

11. The concerns raised by a number of stormwater experts was that these effects cannot be avoided, especially in a scenario when land is converted from rural uses to urban uses.

12. Mr Davis presented revised provisions at the hearing, adding "remedy and mitigate" to the effects management hierarchy:[4]

> and **avoiding, remedying, or mitigating** adverse stormwater effects on downstream properties including erosion / scour and alteration of run-off frequency, volume and duration.

13. The addition of the words "remedy or mitigate" were a significant change of position, and as Commissioner Mark-Brown noted with a number of the experts,[5] the inclusion of mitigation acknowledged that urban development would result in changes to the frequency, volume and duration of flows, and technical documents such as WRC Stormwater

[3] Evidence of Matthew Davis, 7 July 2023, Annexure 5.
[4] Document titled "Noakes amendments – Hearing Version 28 July 2023."
[5] See for example questions to Mr Patal on 1 August 2023 at approx. 11am.

Guidelines assist applicants and the Council to work out what the appropriate mitigation is for each site.

14. The Panel asked Mr Boldero a series of written questions during the hearing, which are responded to in his second statement of rebuttal evidence. Amended wording for the assessment criteria was suggested by the Panel and agreed in principle by Mr Boldero and Ms Hill. As set out in Mr Boldero's second statement of rebuttal evidence, the suggested reference to RITS has been removed, as the WRC Stormwater Guidelines and are more appropriate reference.[6] The wording now recommended is:

> The potential for adverse effects to the environment in terms of stormwater volume including downstream channel erosion and stormwater quality, taking into account the requirements or recommendations of the relevant Comprehensive Stormwater Discharge Consent, Catchment Management Plan and Waikato Regional Council Stormwater Guidelines.

15. This criteria is recommended by Ms Hill to be included in WWS-R1A, SUB-R152 and SUB-R153.

16. A reference to the rural environment has also been added to appropriate assessment criteria, such as WWS-R1A:

> The effectiveness of the stormwater system to manage flooding (including safe access and egress), nuisance or damage to other infrastructure, buildings and sites, **including the rural environment**.

CULTURAL OUTLOOK FROM TUURANGAWAEWAE MARAE

17. There is no dispute between the parties that:

    (a) Tuurangawaewae Marae and the outlook to the Hakarimata Range, Taupiri Maunga and Waikato Awa are culturally significant and a matter of national importance under section 6;

[6] Andrew Boldero second statement of rebuttal evidence, para 13.

(b) A qualifying matter can be applied to accommodate a matter of national importance under section 77I(a); and

(c) The *Waikanae* and *Clearwater* principles mean there is a limited ability in Variation 3 to protect these significant outlooks.

18. The initial position presented by Ms Hill in the section 42A report, based on the work of Mr Mansergh, was to include a Tuurangawaewae Marae Surrounds QM area only where the building height, height in relation to boundary, and coverage standards would be limited to those already provided for in the PDP, rather than the MDRS standards. No party has disputed the inclusion of the Tuurangawaewae Marae Surrounds QM area, and the original proposal is still recommended by Ms Hill.

Ngaaruawaahia height overlay and high density zone – scope for additional criteria?

19. The work undertaken by Mr Mansergh identified the potential effects on the cultural outlook that would arise from the Kāinga Ora submission for additional height in the Ngaaruawaahia town centre and commercial zones, and the inclusion of a new high density residential zone around the Ngaaruawaahia commercial core. Kāinga Ora did not pursue this relief, although the submission points were not formally withdrawn.

20. The Council had also presented evidence from Ms Fairgray that the Kāinga Ora relief was not justified under Policy 3(d) of the NPS:UD, as it was not commensurate with the commercial activity or community services in Ngaaruawaahia, either now or in the long term.[7] It is not clear whether Kāinga Ora chose not to pursue this relief solely because of the work done by Mr Mansergh or because they agreed with Council that additional heights and densities in Ngaaruawaahia were not required under Policy 3(d).

[7] Susan Fairgray evidence in chief.

21. The Kāinga Ora submission points do however provide scope for the Council to include additional assessment criteria in the TCZ and COMZ to require consideration of the potential adverse effects on the outlook from Tuurangawaewae Marae to Hakarimata Ranges, Taupiri Maunga, and Waikato Awa where certain standards are breached.

22. The Kāinga Ora submission asked for a permitted height limit of 24.5m in the TCZ and COMZ. In part, this submission was not accepted by Ms Hill because of the significant cultural outlooks (a qualifying matter). While a qualifying matter has not been included in the PDP provisions for the TCZ and COMZ, it was a reason for not increasing heights and densities. In our submission, the Council has scope to manage heights in the TCZ and COMZ between the notified position (no change to the PDP standard of 12m) and the Kāinga Ora relief (permitted standard of 24.5m). Ms Hill proposed to manage the height by not increasing the permitted standard and by adding additional criteria where certain standards are breached.

23. In summary Ms Hill proposes:

    (a) The identification of a High Potential Effects Area, where a failure to comply with the height, height in relation to boundary, or building coverage standards would need to be assessed against a new assessment criteria: “the potential to adversely affect the outlook from Tuurangawaewae Marae to Hakarimata Ranges, Taupiri Maunga, and Waikato Awa”; and

    (b) The identification of a Building Height Assessment Overlay where failure to comply with the building height standard would need to be assessed against the same additional assessment criteria: “the potential to adversely affect the outlook from Tuurangawaewae Marae to Hakarimata Ranges, Taupiri Maunga, and Waikato Awa”.

24. In our submission there is scope to add these criteria to the TCZ and COMZ as shown in Appendix 1 to the section 42A closing statement.

25. We have identified an error in the closing statement provisions, MRZ2-S2 is the height in relation to boundary standard. The new wording recommended by Ms Hill is shown as criteria (g). The wording originally recommended by Ms Hill is still included as criteria (i), this criteria should be deleted in its entirety.

MINIMUM VACANT LOT SIZE

26. The minimum vacant lot size was a matter that took up a large part of the hearing, in part because the averaging methodology was included at rebuttal stage. Ms Hill was concerned that a minimum lot size only approach would result in a lack of diversity of lot sizes, an experience that the Council has seen in greenfield development in Pookeno. Ms Hill's initial recommendation was a minimum vacant lot size of 300m² with a 450m² average.

27. An averaging methodology is not unique and is employed by a number of district plans throughout the country. The outcome Ms Hill is trying to achieve from the minimum vacant lot size rule is a diversity of housing types.[8] As set out in the section 42A closing statement under NPS:UD Policy 1(b) a well-functioning urban environment that has or enables as a minimum:

    (a) A variety of homes that meet the needs to different households;

    (b) A variety of sites that are suitable for different business sectors; and

    (c) Supports the competitive operation of the land and property development markets.

[8] Section 42A Closing Statement paras 54-55.

28. Following the hearing, in response to evidence from Kāinga Ora, HVL and Pokeno West, Ms Fairgray interrogated a number of greenfield examples to understand how the original vacant subdivision pattern had influenced the resulting housing pattern. Many of the examples Ms Fairgray reviewed were raised as examples of good outcomes by the experts for submitters. Ms Fairgray's second statement of rebuttal evidence is a comprehensive review of the averaging methodology and testing of different averages.

29. Ms Fairgray's recommendation, adopted by Ms Hill is for a minimum vacant lot size of 300m² with an average of 375m² required when 9 lots or more lots are created.

30. In the section 42A closing statement, Ms Hill summaries the minimum lot sizes proposed by submitter experts:

    (a) Kāinga Ora's experts supported a shape factor only approach, Mr Wallace initially supported 8m x 15m, and later increased this to 10m x 17m;

    (b) Mr Munro for Pōkeno West supported different shape factors depending on whether the site created was a front lot or a rear lot and depending on whether a single or double access driveway was included; and

    (c) Mr Tollemache for HVL originally supported 300m² but proposed an Option 2 adopting the approach taken by Mr Munro with different minimum lot sizes and shape factors depending on whether it was a front or rear lot.[9]

[9] The wording of Option 2 is set out at para 48 of the section 42A closing statement.

Response to Kāinga Ora

31. Kāinga Ora's revised position at the hearing was a minimum vacant lot size of 200m^2 plus a shape factor of 8m x 15m in the former Urban Fringe area (now the Outer Intensification Area).

32. Mr Singh's evidence confirmed that most of Kāinga Ora's developments would involve a concurrent subdivision and land use application so the vacant lot size would not apply in any event. Therefore, it is difficult to see why Kāinga Ora is so invested in this minimum vacant lot size provision.

33. Kāinga Ora did not provide economic evidence in relation to the minimum vacant lot size.

34. Legal counsel for Kāinga Ora, Mr Allen, submitted that Kāinga Ora's revised provision provides a safer set of provisions, and that Mr Wallace's practical experience is more valuable than a theoretical concern that if you set a low number, people will design to that number.

35. The thrust of Mr Wallace's evidence at the hearing was that a minimum lot size is not an issue that needs to be controlled by a rule because good developers want to deliver different ranges and price factors. However, when Commissioner Sargeant put to Mr Wallace that he works in a different market and not all developers might be like that, he acknowledged his experience is likely to be different to others.

36. It is important to understand the context of Mr Wallace's experience in subdivision. He stated that in his experience the minimum lot size is not a major factor in determining lot yield. Rather, developers seek to maximise a lot yield through patterns of market demand with reasonable levels of amenity that produce the maximum return for developers. He said this results in a mixture of lot sizes and dwelling types. Mr Wallace's experiences have a large influence on the resulting development patterns.

37. Ms Fairgray's evidence identified there are different parts of the market that respond to different incentives and have greater benefit from different lot sizes. The market is often characterised by land developers selling off lots as opposed to land developers and the property market working together in larger economies like Auckland to deliver dwellings.[10]

38. Given the markets in which Mr Wallace works, it is understandable that when asked by Commissioner Mark-Brown whether developers simply designed the minimum lot size his response was "I just don't see it bearing out in in reality."

39. In response to questions from the Panel, Mr Wallace's evidence was that:

    (a) A 200m^2 lot size does constrain the design you can do on a site and will result in more speculative developers (question from Commissioner Mark-Brown);

    (b) A minimum and average lot size for greenfield areas will allow for flexibility of housing types (in response to a question from Commissioner Sargeant).

40. When asked about the provision of car parking by Commissioner Sergeant, Mr Wallace replied "it would be quite fair to assume a greenfield subdivision in the Waikato would look to provide a reasonable level of on-site car parking" and it would "not be viable to have lots on the edge of Pookeno without a car space."[11]

41. Yet when asked earlier by Commissioner Morrison-Shaw what his shape factor of 10m x 17 m related to in terms of site size, his response of 210m^2 included the comment "it could probably fit a car park on it." This

[10] Susan Fairgray rebuttal evidence, paras 29, 99 and 100, Summary Statement paras 21, 22, 28, 29.
[11] Day 2 hearing, approx. 3:20pm.

appears to be at odds with his later response on car parking outlined above.

42. Kāinga Ora's planning witness Mr Campbell did not assess the proposed 200m² minimum lot size and shape factor against the objectives and policies under Schedule 3A as required by clause 7.

Response to Havelock Village Limited

43. Counsel for HVL helpfully clarified that it is lawful to have a minimum vacant lot size as a subdivision control. Ms Evitt's issue was that she did not consider the proposed mechanism of a minimum of 300m^2 with an average of 450m^2 complies with clause 7 of Schedule 3A. We addressed this in detail in our opening submissions and submitted the Council has discretion to decide a minimum vacant lot size. Ms Evitt acknowledged it is indeed a discretionary matter for Council. Her complaint is that the proposed subdivision standard is less enabling of development contemplated by the requirements, conditions and permissions in schedule 3A. That is, she does not consider the proposal represents medium density intensification.

44. Her sole reason for this view is that a vacant lot size that is consistent with the minimum lot size notified in the PDP residential zone in 2018 cannot be an uplift in intensification. Many of Ms Evitt's concerns related to the 450m² average, and Council is now however recommending a 375m² average. In response to the concerns raised by Ms Evitt:

(a) Ms Fairgray has illustrated how the averaging now recommended allows for a large portion of lots to be created at 300m^2. This is clearly an uplift from the PDP. Further, the larger lots can then be further subdivided under the MDRS.

(b) Secondly, the minimum and average is not less enabling of, or inconsistent with, permitted MDRS development. Even at 375m^2,

it still provides medium density opportunity at two dwellings per 375m^2. It might be less enabling of *lot yield* but that is not the test under clause 7. This is a fundamental flaw in both the legal submissions and planning evidence for HVL.[12]

(c) Thirdly, HVL and its legal counsel mistakenly equates intensification under MDRS with small lot sizes.

45. As set out in our opening submissions, neither the Amendment Act nor Schedule 3A specifies a minimum lot size. It is silent on lot size. The mandatory Objective 1 in Clause 6 of Schedule 3A refers to a well-functioning environment that enables "all people in communities to provide for their social and economic well-being now and in the future." It is not directed at one class of persons, nor one social economic group. Objective 2 refers to a variety of housing types and sizes that respond to housing needs and demand. Again, housing needs and demand will vary amongst people and communities.

46. Policy 1 in Clause 6 of Schedule 3A requires a variety of housing types with a mix of densities within the zone including three-storey attached and detached dwellings and low rise apartments. As required by clause 7, the minimum vacant lot size must be consistent to achieve these outcomes. Ms Fairgray's evidence is that the 300m^2 lot size alone will not achieve the range of housing types but will predominantly deliver small detached single units on small lots in the short term. This predominate housing type was acknowledged by the witnesses who appeared for HVL and Pokeno West. This housing type will not meet the social and economic well-being of *all* persons either now or in the future.

47. Policy 4 in Schedule 3A enables housing to be designed to meet the day-to-day needs of residents. Ms Fairgray's evidence is that an important aspect of providing for the needs of residents is the initial lot size which

[12] We note that Mr Tollemache's comments about 450m² are no longer relevant with the recommended average of 375m².

determines the resulting patterns of development. Her evidence was that the proposed minimum and average lot mechanism will result in a range of housing types to meet the different needs of communities.

48. Mr Tollemache supports either 300m^2 minimum vacant lot size or Option 2 as presented in his highlight statement dated 30 July 2023 based on Mr Munro's design principles. Option 2 is a minimum lot size of 250m^2 for a front lot subject to road frontages and car parking and 300m2 for a rear lot subject to a shape factor.

49. Mr Tollemache (like the witnesses for Pokeno West) mistakenly considered that the average of 450m^2 originally proposed by Council was to preserve a future infill/redevelopment opportunity.[13] Ms Fairgray did not assume the 450m^2 lots will be developed as individual dwellings and then redeveloped later. Instead, she assumed they will initially be developed as multiple dwellings and then further subdivided. It is therefore not an opportunity cost to landowners to preserve a future opportunity. The proposal does not seek to hold back land for a future infill opportunity in the suburbs. Therefore, Mr Tollemache's concerns about a significant policy shift simply do not eventuate.

50. Contrary to Mr Campbell for Kāinga Ora, Mr Tollemache was firm in his view that 200m^2 is too small for a complying residential unit under MDRS and that a shape factor of 8m x 15m is also too small.[14] Mr Tollemache's evidence is that a vacant lot needs to be larger than what could be achieved under a land-use integrated design for houses.[15]

51. Mr Tollemache supported a different approach between greenfield and infill, noting that greenfield developments are able to avoid rear lots.

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[13] Summary Statement, para 5.16.
[14] Mark Tollemache, summary statement, para 5.7. This view was also supported by Mr Mead on behalf of the Council.
[15] Ibid, para 5.8 (c).

52. Mr Tollemache was concerned with the Kāinga Ora evidence that assumed no car parking was built into the shape factor. He said this would be a compromise.

53. Mr Tollemache misunderstood the proposed rule when he refers to a limit of only two lots at 300m² and the remainder lots requiring to have an average of 450m².[16] As demonstrated in Ms Fairgray's second statement of rebuttal evidence, the majority of lots will be at 300m², even with a 375m² average.

54. Finally, Mr Tollemache's evidence was that Option 2 meets the statutory tests of the Amendment Act, Plan Change 1 to the RPS and Variation 3, Policy SUB-P3(3). Significantly, he does not refer to the Objectives and Policies under the NPS:UD. Variation 3 is required to give effect to the NPS:UD within the scope of Variation 3. Clearly the Objectives and Policies referring to a range of housing types and prices are within the scope of Variation 3.

Council's revised position

55. In our submission, the work undertaken by Ms Fairgray has provided the robust analysis and ground-truthing to support the use of an averaging mechanism to achieve the desired outcomes of the NPS:UD. In collaboration with Ms Fairgray, Ms Hill's recommendations are:

    (a) Retain the 300m² minimum net lot area;

    (b) Decrease the average lot area to 375m²;

    (c) Increase the number of lots required to 9, before the average net lot area rule applies;

    (d) Increase the area of the lot to be excluded from the average calculation to 5,000m²;

[16] Ibid, para 5.24.

(e) Include a building platform requirement for rear lots of a rectangle of at least 200m² with a minimum dimension of 12m excluding setbacks;

(f) Amend assessment criteria (3) to insert the word 'all' to make it clear all lots are required to accommodate a practical building platform including geotechnical stability;

(g) Amend SUB-R158 to increase the minimum frontage area requirement to 11m as recommended by Mr. Mead and to require a single driveway width for lots with a minimum frontage between 11m and 12.5m.

HUNTLY COMMERCIAL PRECINCT

56. At rebuttal stage, prior to commencement of the hearing, the Council agreed with Kāinga Ora, that additional height could be supported within the COMZ in the centre of Huntly. Rebuttal evidence from Mr Mead outlined why additional height within the TCZ was not supported from an urban planning perspective. Mr Mead considered the following factors supported retaining the existing permitted 12m height limit in the TCZ:

(a) The narrow physical nature of the TCZ, being only one narrow block on each side of the main street;

(b) The TCZ is constrained by the Waikato River on one side and the main trunk line on the other;

(c) The TCZ is modest scale, made up of smaller landholdings, single storey buildings and ownership is likely to be fragmented, therefore the TCZ has a limited ability to absorb effects of higher buildings.

57. At the hearing Kāinga Ora continued to request an increase in height limits for the TCZ, although they were happy for this to be as a restricted discretionary activity, as proposed by the Council for the COMZ, with the assessment criteria proposed by Mr Mead and Ms Hill. It is worth noting, that developments over 12m in the TCZ are already a restricted discretionary activity, although as compared to the COMZ proposal height is a reason consent can be declined. Policy 15 in the TCZ is to "Ensure the height of new buildings is complementary to, and promotes, the existing character of the business town centre within each town."

58. The outstanding issues remaining between Kāinga Ora and Council are:

(a) Whether providing for additional height in the COMZ only would undermine the economic viability of the TCZ;

(b) Whether the characteristics of the TCZ that Mr Mead considers support a 12m height limit, actually support additional height; and

(c) The appropriate height in relation to boundary/recession plane standards for the COMZ.

Economic viability of Huntly TCZ

59. Mr Osborne, the economic expert for Kāinga Ora was concerned about the competitive edge that the COMZ would obtain over the TCZ if additional height was provided for only in the COMZ.[17] In her second statement of rebuttal evidence Ms Fairgray does not agree, in her view if higher density was to occur in the COMZ it is "still likely to function together with and support the viability and vitality of Huntly's town centre".[18]

60. Mr Mead, in his second statement of rebuttal evidence also notes that:

[17] Day 2 hearing, approx. 2:20pm
[18] Ms Fairgray, second statement of rebuttal evidence, 25 August 2023, para 96.

(a) Controls in the PDP encourage small-scale retail activity to locate in the TCZ rather than COMZ, permitted retail activity in the COMZ is required to have a GFA of greater than 350m²;

(b) The town centre/ main street area will always be a more attractive location for retail due to the main north-south roading pattern running through the centre; and

(c) In built form terms, having an area of taller buildings beside/near a lower height main street area is not an uncommon outcome.

Characteristics of the TCZ

61. Mr Wallace, Kāinga Ora's urban design expert, considers that the characteristics of the TCZ that Mr Mead considers support the retainment of the 12m height limit actually support higher developments. Mr Wallace noted that river location and river views, the separation from sensitive land uses, good sun lighting, and being closer to amenities and schools (as compared to the COMZ) meant the TCZ was a good location to enable greater heights.

62. Mr Mead does not disagree that these characteristics can support increased height generally, but in relation to Huntly he concludes that:[19]

> Huntly is a small centre in the context of the wider Hamilton urban area. The centre helps support a range of community outcomes. In my view, a 3 storey height limit is commensurate with the current and future role and function of the Huntly town centre.

Response to Kāinga Ora

63. Ms Fairgray's evidence is that there is very low long term demand for high density living in Huntly, and therefore it is submitted that the concerns raised by Kāinga Ora about the economic viability and vitality of the TCZ are overstated. The lack of demand also increases the risk of a "one-off" development in the TCZ that had the potential to create the adverse

[19]David Mead, second statement of rebuttal evidence, para 19.

effects identified by Mr Mead, being the diminishment of the existing values in the TCZ. Overall, we submit that it is appropriate to limit the height in the TCZ to the existing 12m and to provide height in the COMZ.

Height in relation to boundary in the Huntly Commercial Precinct

64. Mr Wallace questioned the inclusion of a height in relation to boundary standard for all developments within the Huntly Commercial Precinct. He was concerned that the originally proposed standard of 4m + 60° would realistically mean that very few sites could achieve the 22m height.[20]

65. In response, Mr Mead has clarified that the appropriate height in relation to boundary standard should be 12m + 60°.[21] Ms Hill supports this amendment in her section 42A closing statement, noting that the control will ensure a greater degree of access to sunlight and daylight for residential and adjoining neighbours that would otherwise be the case.[22]

HAVELOCK PRECINCT

66. The majority of the qualifying matters for the Havelock Precinct were agreed prior to the commencement of the hearing and were described in detail in our opening submissions.

67. The outstanding issue relating to the removal of the Environmental Protection Area (EPA) from Area 1 and the nature and extent of any reverse sensitivity buffers. As Ms Lepoutre explains in the section 42A closing statement, the experts for HVL and Hynds filed joint witness statements and supplementary evidence during the hearing supporting:

(a) The removal of the EPA from Area 1; and

(b) A height restriction of 5m in Area 1.

[20] Cameron Wallace, summary statement from hearing, para 3.2.
[21] David Mead, second statement of rebuttal, para 23(d).
[22] Section 42A closing statement, para 40.

68. Ms Lepoutre supports the agreed position, noting that the "height restriction is suitable to manage reverse sensitivity while at the same time still enabling residential development to occur within that area."[23]

69. The Panel asked Ms Evitt about the jurisdiction to remove the EPA, as it is subject to PDP appeals by HVL and Hynds. We agree with Ms Evitt's analysis, that this Panel is required under the Enabling Act to incorporate the MDRS into Area 1, subject to any qualifying matters. This position is supported by the fact that both PDP appellants have agreed to the deletion of the EPA. In our submission, the Panel can lawfully remove the EPA.

WEL NETWORKS

70. WEL Networks continue to seek the inclusion of setbacks rules to require compliance with the New Zealand Electrical Code of Practice. During the hearing, the Panel asked whether including the Code within the PDP would place a legal burden, and potentially liability, on the Council to enforce the Code. WEL Networks filed supplementary legal submissions[24] to address the point of liability. We agree that section 23 of the RMA, as referred to in the supplementary legal submissions, does not absolve a developer from compliance with the Code. Section 23 does not however specifically address whether the Council could be liable[25] for approving developments that might later be assessed as breaching the Code and where that breach has resulted in damage.

71. In our submission, the question of liability is not however material to assessing the legal requirements of an IPI. Simply put, requiring compliance with the Code has the potential to reduce the development capacity enabled by the MDRS, and therefore must be supported as a qualifying matter. As Ms Lepoutre has set out, regional infrastructure is

[23] Section 42A closing statement, para 8.
[24] Dated 7 August 2023.
[25] In tort or other common law action.

not recognised as a qualifying matter in section 77I(e) and therefore needs to be assessed as any other qualifying matter under sections 77J and the additional matters in section 77L. No such assessment has been provided by WEL Networks.

72. WEL Networks have submitted that the PDP already refers to the Code in relation to the National Grid. It is worth noting however the following in relation to the National Grid:

(a) The National Grid is specifically identified as nationally significant infrastructure in the NPS:UD;[26]

(b) A matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure is a qualifying matter under section 77I(e);

(c) The importance of the National Grid is recognised in the National Policy Statement on Electricity Transmission; and

(d) National Grid infrastructure is easily identifiable and mapped in the PDP.

73. In summary, we submit that a setback as requested by WEL Networks has not been shown to meet the legal requirements of a qualifying matter and therefore should not be included without further assessment. Ms Lepoutre has recommended the inclusion of an advice note in the MDRS setback standard to act as alert to landowners and developers of the existence of the Code.[27]

[26] NPS:UD, Section 1.4 Interpretation, page 7.
[27] MRZ2-S4.

RELATED PROVISIONS

74. In our opening submissions, we set out at paragraphs 196 to 201 our interpretation of "related provisions" in section 80E(2) as:

    (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).

75. Ms Evitt, for HVL, suggested the Panel should be cautious in adopting our legal analysis.[28] Ms Evitt's comments were made in relation to the Council's minimum vacant lot size proposal as a related provision that would, in her opinion, restrict the intent of the Enabling Housing amendments. Ms Evitt suggested a more thorough and robust analysis was required, in addition to our legal analysis, before including related provisions.

76. We do not disagree with Ms Evitt in this regard, we consider that very careful attention needs to be given to whether a proposed amendment is truly a related provision. The legal interpretation we set out, seeks to assist the Panel to carry out that careful and considered analysis.

77. We also submit that when considering whether an amendment is truly a related provision, the Panel should keep in mind that there are no rights of appeal to the Environment Court.

RVA and Ryman

78. In response to the submissions and evidence from RVA/Ryman, Ms Lepoutre has recommended a number of amendments to the MRZ provisions. These amendments recognise that the GRZ retirement village

[28] Day 3 hearing, approximately 10:10am.

policy was not duplicated in the MRZ, and that not all of the MDRS standards are appropriate for retirement villages.

79. The remaining outstanding matters between the Council and Ryman/RVA are:

(a) Wording of the retirement village policy – Ms Lepoutre prefers to adopt the policy wording from the GRZ for consistency within the PDP and because, in her opinion, that wording best reflects the rules that would apply to retirement village developments;

(b) Assessment criteria that apply to a retirement village application that does not meet the permitted activity standards – Ms Lepoutre considers the existing criteria were sufficient and more succinct, although she has recommended adding an additional criteria to ensure that that operational needs of a retirement village proposed can be considered: "Whether the non-compliance with the activity standard is required for the operational needs of the retirement village."

(c) The inclusion of a definition for retirement unit, this definition is not considered necessary by Ms Lepoutre and is not required under the National Planning Standards. The definition proposed by RVA/Ryman would exclude retirement unit from being a residential unit.

(d) Coupled with the new definition, RVA/Ryman are seeking new specific retirement village rules for the TCZ and COMZ. Ms Lepoutre prefers the status quo in the PDP for retirement villages to be treated as residential activities in the TCZ and COMZ. Residential activities in the TCZ and COMZ are permitted where they are located above ground.

80. In our submission, the remaining changes sought to the MRZ2 provisions by RVA/Ryman are unnecessary as explained by Ms Lepoutre and would create internal inconsistency within the PDP.

81. In relation to the changes sought to TCZ and COMZ, we remain of the view that those changes are not related provisions and are therefore outside the scope of the IPI. 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

82. Ms Lepoutre's view remains that the amendments sought by Ara Poutama to the definition of supported residential accommodation would have the consequence of allowing the activity as a permitted activity in all residential zones and above the ground floor in the TCZ and COMZ. While sympathetic to Ara Poutama's concerns, we submit that these consequential outcomes are not related provisions within the scope of the IPI. Establishing a permitted activity regime with appropriate standards for supported residential accommodation should be achieved through a standard Schedule 1 plan change or variation.

REZONING REQUESTS

83. An update on two of the rezoning requests that are subject to PDP appeals will be provided at the later Variation 3 hearing. This includes the GDP Property (Aarts appeal) at 111 Harrisville Road and Grieg Holdings sites on Johnston Street, Tuakau.

99A Ngaaruawaahia Road and 18 Rangimarie Road

84. During the hearing the Panel sought confirmation of the whether the NPS:HPL applied to the rezoning of these sites from General Rural to MRZ2. In presenting to the Panel, Ms Andrews on behalf of the Waikato Regional Council queried whether the sites did fall within "identified for

future urban development" definition to applies now, prior to the WRC undertaking the required plan change to identified HPL.[29]

85. In the section 42A closing statement, Ms Hill has undertaken a closer analysis of whether the NPS:HPL applies to these sites and her conclusion is that the NPS does apply. While the sites are identified for urban development in the 2017 Structure Plan for Ngaaruawaahia, the timing for that development is indicated as 2036-2046, outside the 10-year period provided for.

86. Ms Hill also considers that the requirement for land to be identified at a level of detail that makes the boundaries of the area identifiable in practice, means that the sites are not identified in any Future Proof maps, which do not provide that level of detail.

87. In the absence of any assessment as required under the NPS:HPL, together with Ms Hill's concerns about the areas of cultural significance, flooding and future roading networks, in our submission means the rezoning request must be rejected.

Harrisville 23 Limited

88. The land at 23A Harrisville Road, Tuakau is currently zoned Large Lot Residential. The NPS:HPL does not apply. Ms Hill has reviewed the information provided by the submitter and in principle can support the rezoning request subject to the following matters being addressed:

    (a) Infrastructure capacity;

    (b) A qualifying matter related to the geotechnical constraints; and

    (c) Consultation with Ngata Tamaoho.

[29] Day 6 hearing, from approx. 10:00am.

89. Ms Hill has subsequently had discussions with Ms Addy on behalf of the submitter. We propose to provide an update to the Panel at the resumed hearing later in the year.

Signed this 22nd day of September 2023

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