

**BEFORE INDEPENDENT HEARING COMMISSIONERS  
IN THE WAIKATO REGION**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE  
WAIKATO**

**IN THE MATTER  
AND**

**of the Resource Management Act 1991**

**IN THE MATTER**

**of the hearing of submissions (hearing #2) on  
Variation 3 Enabling Housing Supply ('V3') to  
the Proposed Waikato District Plan ('PWDP')**

---

**LEGAL SUBMISSIONS FOR KĀINGA ORA – HOMES AND COMMUNITIES**

**21 NOVEMBER 2023**

---

---

**Instructing solicitor:**  
C E Kirman  
Special Counsel  
Kāinga Ora - Homes and Communities  
PO Box 14594  
Central Auckland 1051  
E: [claire.kirman@kaingaora.govt.nz](mailto:claire.kirman@kaingaora.govt.nz)

**Counsel Instructed:**  
D A Allan / A K Devine  
Ellis Gould Lawyers  
PO Box 1509  
Auckland 1140  
E: [dallan@ellisgould.co.nz](mailto:dallan@ellisgould.co.nz) /  
[adevine@ellisgould.co.nz](mailto:adevine@ellisgould.co.nz)

**MAY IT PLEASE THE PANEL:**

**1. INTRODUCTION**

1.1 These legal submissions and evidence are filed in support of the submission points of Kāinga Ora-Homes and Communities (“Kāinga Ora”) to be addressed at this session of the hearings on Variation 3 (“V3”) to the Proposed Waikato District Plan (“PDP”).

1.2 This hearing concerns the provisions sought by KiwiRail and Waka Kotahi, namely the introduction of:

(a) Acoustic controls in relation to sites in close proximity to the road and rail network (sought by both parties); and

(b) A setback alongside the rail corridor (sought by KiwiRail).

1.3 Evidence will be presented on behalf of Kāinga Ora by Michael Campbell, consultant planner, who has prepared statements of evidence in chief and rebuttal.

1.4 At the time of filing primary evidence, Kāinga Ora had understood all issues had been resolved. As outlined in the evidence of Mr Campbell and Pamela Butler (for KiwiRail):

(a) Agreement had been reached between the parties to introduce acoustic controls to the PDP pursuant to the Environment Court appeals on the PDP. Accordingly, KiwiRail and Waka Kotahi no longer seek to introduce such controls as part of V3.

(b) Agreement had been reached between the parties with regard to an appropriate setback distance for structures alongside the rail corridor pursuant to the Environment Court appeals on the PDP. In the context of V3, the setback is considered by Council to be a qualifying matter. KiwiRail and Kāinga Ora therefore agreed a standard to be introduced to the MRZ2 as part of V3 (MRZ2-S15).

1.5 It has since become apparent that there is an outstanding issue between Kāinga Ora, KiwiRail and Council - being whether and to what extent the introduction of the new rail setback necessitates specific policy support within the MRZ2. Kāinga Ora has consistently maintained that no additional policy basis is needed for the standards. Kāinga Ora only became aware of the newly proposed provisions on receipt of the Supplementary 42A Report dated 14 November 2023. In that regard, Kāinga Ora disagrees with:

- (a) Newly proposed MRZ2-O10 and MRZ2-P16, which have been agreed between the Council and KiwiRail; and
- (b) The recommended amendments to Policy MRZ2-P11 concerning reverse sensitivity now agreed between the Council and KiwiRail.

## 2. PROPOSED OBJECTIVE MRZ2-O10 AND MRZ2-P16

2.1 Council proposes to introduce the following new zone-specific objective and policy to support the revised rail setback in the MRZ2.

*Objective MRZ2-O10 - Railway Corridors Protect the safe and efficient operation of the railway corridor and minimise risks to public health and safety.*

*Policy MRZ2-P16 - Railway Corridors Maintain appropriate setback distances to the railway corridor to provide for its safe and efficient operation and to minimise any risks to public health and safety.*

2.2 Kāinga Ora opposes the introduction of the proposed objective and policy and considers that their introduction is unnecessary and duplicative.

2.3 The Infrastructure Chapter contains district wide policies, including INF-P27(1) which provides (emphasis added):

*AINF-P27 - Land transport network.*

*(1) Avoid, remedy or mitigate effects of subdivision, use and development that would compromise:*

*(a) The road function, as specified in the road hierarchy;*

*(b) The access by emergency services and their vehicles; and  
or*

*(c) The safety and efficiency, including the maintenance, upgrading, development and operation of the land transport network.*

2.4 As part of the resolution of the PDP appeals, agreement has been reached to introduce a rail setback control into all zones adjoining the rail corridor. In the PDP appeals context, no new objectives or policies are proposed. That is because AINF-P27(1)(c) is (rightly) considered to provide sufficient and appropriate policy support for the rail setback rule within each chapter. The setback control is a direct response to concerns expressed by KiwiRail regarding the public safety and operational efficiency matters addressed in AINF-P27(1).

2.5 Notwithstanding that generally applicable approach and rationale, however, KiwiRail and Council now propose to introduce zone-specific objective and policy provisions for the new MRZ2. Kāinga Ora considers the same rationale applies to the MRZ2 as has been adopted for every other relevant zone in the PDP - that is, zone specific objectives and policies are unnecessary because there is existing policy support in the District Wide chapter.

2.6 In summary:

(a) If the current policy framework is adequate to introduce a setback control into all the relevant existing zones in terms of the PDP process, then it must be adequate to introduce that control into the new zone that has been created through V3. If that were not the case, then it would have been necessary and desirable to introduce site-specific provisions for all other zones through the PDP appeals.

- (b) Introducing a zone specific objective and policy within MRZ2 will inevitably raise plan interpretation issues as it will be unclear why there is no matching objective and policy in respect of all other relevant zones subject to the same (district wide) rule. That is, the omission from other zones of the zone-specific policy framework found in the MRZ2 will invite an argument on resource consent applications that a more lenient approach should be taken in those zones.

### 3. POLICY MRZ2-P11 – REVERSE SENSITIVITY

- 3.1 The Supplementary 42A Report recommends the following addition to Policy MRZ2-P11, which has been agreed with KiwiRail:

*MRZ2-P11 Reverse Sensitivity.*

*(1) Maintain appropriate setback distances between new sensitive land uses and existing lawfully established activities that may result in reverse sensitivity effects.*

*(2) Use of design controls for sensitive activities to minimise reverse sensitivity effects on existing lawfully established activities.*

*(3) Manage potential reverse sensitivity effects by restricting building heights within the Area 1 height restriction area in the Havelock Precinct.*

- 3.2 The changes proposed to MRZ2-P11(2) by KiwiRail and Council are inappropriate:

- (a) It is understood KiwiRail seeks this amendment on the basis of the noise and vibration provisions which have been agreed through the PDP appeals process.<sup>1</sup> The amendments to AINF-P27(2) agreed through the PDP appeals provide sufficient policy support for the noise and vibration provisions, however.

---

<sup>1</sup> EIC, Pam Butler dated 20 October 2023 at para 5.1

- (b) It is inappropriate to introduce through V3 policy support for a provision which is being introduced through a separate Environment Court appeals process. Policy support for the rules that are being amended through the PDP appeals process should be (and is being) considered and addressed as part of resolving the PDP appeals.
- (c) There is no rationale to depart from the otherwise agreed approach. Introducing a specific policy within the MRZ2 which does not apply to any other zone may create plan interpretation issues, in that it may raise questions as to why there is a specific objective and policy in one chapter, but not in another, despite the rule/standard being the same in both chapters.
- (d) To the extent that it is argued that the amendments relate to the rail setback, the purpose of the rail setback control introduced through V3 is to address safety concerns and access for building maintenance. It does not seek to manage reverse sensitivity effects. This is reflected by the agreed matters of discretion. As the purpose of the control does not relate to reverse sensitivity, there is no need to make amendments to MRZ2-P11.

3.3 The proposed changes are also unlawful. Kāinga Ora does not consider there is scope to introduce policy support in the context of V3 which has a tightly defined purpose and is limited to the matters set out in s 80E RMA. The introduction of MRZ2-P11(2) is not a “*related provision*” that supports or is consequential on the MDRS or relevant policies of the NPS-UD. It is therefore beyond the scope of an IPI pursuant to section 80E RMA.

#### 4. **STANDARD MRZ2-S15**

4.1 As a final point it is noted that the Supplementary 42A Report does not show the roading setbacks as being deleted (in contrast to the 42A

Report dated 15 September 2023). It is unclear whether this is intentional, or simply a transcription error.

- 4.2 If it is the former, then Kāinga Ora opposes the retention of the roading setbacks. The State Highway Noise Boundary provisions (i.e. highway noise effects areas with attendant minimum acoustic requirements) replace the need for any setback, and in the PDP appeals these setbacks have been replaced with the State Highway Noise Boundary acoustic controls. There is no basis for adopting a different regime in the MRZ2.

## **5. CONCLUSION**

- 5.1 Kainga Ora asks you grant its relief for the reasons set out in the evidence of Mr Campbell and in these submissions. For ease of reference, the relief sought by Kāinga Ora in this hearing is set out in **Annexure A**.

**DATED** this 21<sup>st</sup> day of November 2023  
**Douglas Allan / Alex Devine - Counsel for Kāinga Ora**

## ANNEXURE A – RELIEF SOUGHT

NB: Recommendations from Supplementary 42A Report (14 November 2023) are shown in plain text. Amendments sought by Kāinga Ora to the recommended text are shown in ~~strikethrough~~ and underline.

### **MRZ2 -O6 Reverse sensitivity.**

Minimise the potential for reverse sensitivity by managing the location and design of sensitive activities through:

- (a) The use of building setbacks; and
- (b) The design of subdivisions and development; and
- (c) The use of building height restrictions in Havelock Precinct (Area 1)

### ~~MRZ2-O10 Railway Corridors.~~

~~Protect the safe and efficient operation of the railway corridor and minimise risks to public health and safety.~~

### **MRZ2 -P11 Reverse Sensitivity.**

- (1) Maintain appropriate setback distances between new sensitive land uses and existing lawfully established activities that may result in reverse sensitivity effects.
- ~~(2) Use of design controls for sensitive activities to minimise reverse sensitivity effects on existing lawfully established activities.~~
- (3) Manage potential reverse sensitivity effects by restricting building heights within the Area 1 height restriction area in the Havelock Precinct.

### ~~MRZ2-P16 Railway Corridors.~~

~~Maintain appropriate setback distances to the railway corridor to provide for its safe and efficient operation and to minimise any risks to public health and safety.~~

<b>MRZ2-S15</b>	<b>Building setback – sensitive land use</b>
<p>(1) Activity status: PER Where:</p> <ul style="list-style-type: none"> <li>(a) Any new building or alteration to an existing building for a sensitive land use shall be set back a minimum of:</li> <li>...</li> <li><del>(ii) 15m from the boundary of a regional arterial;</del></li> <li><del>(iii) 25m from the designated boundary of the Waikato Expressway;</del></li> <li>(iv) 300m from the edge of oxidation ponds that are part of a municipal wastewater treatment facility on an-other site;</li> </ul>	<p>(2) Activity status where compliance not achieved: RDIS Council's discretion is restricted to the following matters:</p> <ul style="list-style-type: none"> <li>(a) Road network safety and efficiency;</li> <li>(b) On-site amenity values;</li> <li>(c) Odour, dust and noise levels received at the notional boundary of the building;</li> <li>(d) Mitigation measures; and</li> <li>(e) Potential for reverse sensitivity effects.</li> </ul>



<p>(v) 30m from a municipal wastewater treatment facility where the treatment process is fully enclosed; and</p> <p>(vi) 300m from the boundary of the Alstra Poultry intensive farming activities located on River Road and Great South Road, Ngaaruawaahia.</p>	
---	--

<b>MRZ2-S15(A)</b>	<b>Building and structure setback – rail corridor</b>	
	<p>(1) Activity status: PER Where:</p> <p>(a) Any new building or structure, or alteration to an existing building or structure, shall be setback a minimum of 2.5m from the designated boundary of the railway corridor.</p> <p>(b) MRZ2-S15(A)(1)(a) does not apply to fences or structures less than 2m in height, retaining walls, poles or aerials.</p> <p>(c) MRZ2-S15(A)(1)(a) does not apply to retaining walls, which must be set back a minimum of 1.5m from the designated boundary of the railway corridor.</p>	<p>(2) Activity status when compliance not achieved: RDIS</p> <p>Council's discretion is restricted to the following matters:</p> <p>(a) The location, size and design of the building as it relates to the ability to safely use, access and maintain the buildings without requiring access on, above or over the rail corridor.</p> <p><i>Notification: Any restricted discretionary activity under XXZ-SX shall not be notified or limited notified unless KiwiRail is determined to be an affected person in accordance with section 98B of the Resource Management Act 1991 or Council decides that special circumstances exist under section 95A(4) of the Resource Management Act 1991.</i></p>