BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE WAIPĀ DISTRICT

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIPĀ

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER	of the hearing of submissions on proposed Plan Change 26 (residential intensification) to the Operative Waipā District Plan
HEARING TOPIC:	Waipā DC PC26

LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA - HOMES AND COMMUNITIES

Dated: 21 April 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 Waipā District Council's Plan Change 26 ("**PC26**").

1.2 PC26 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 PC26.

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

(d) Scope issues.

(e) Qualifying matters relating to infrastructure and special character.

(f) Additional legal issues raised by PC26, including the appropriateness of provisions that refer to design guides that do not currently exist.

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.

1.5 Council has filed extensive rebuttal evidence, some of which addresses issues raised in the Kāinga Ora submissions but which were not addressed in the section 42A report or the Council's evidence in chief. Kāinga Ora reserves the right to respond to that evidence at the hearing.

2. RELIEF SOUGHT BY KĀINGA ORA

2.1 Following further analysis, Kāinga Ora has revised its position somewhat from that set out in its primary submission on PC26. Key refinements to the relief include:

(a) Amendments to Kāinga Ora's proposed High Density Residential Zone ("**HDRZ**") (which enables buildings up to 22m plus 1m for roof form) to better align the HDRZ provisions with the MDRZ provisions (e.g.: reducing permitted number of dwellings per site from six to three and reduced building coverage). A number of additional controls are also proposed to manage the interface with heritage or character cluster sites.

(b) A reduction in the extent of the proposed HDRZ within a walkable catchment of the Cambridge town centre[1]. The extent of this has been reduced from within 400m – 800m of the town centre to within 400m – 600m of the town centre.

(c) The application of the HDRZ within a walkable catchment of the Te Awamutu town centre is no longer pursued. The submission sought it be applied within a 400m walkable catchment.

2.2 Kāinga Ora still seeks to apply a targeted height variation control (overlay) over the Commercial Zone within the Te Awamutu and Cambridge Town centres[2]. This would enable a height of buildings (24.5m) within the

[1] As the Commercial Zone encompasses an area much greater than what would be considered a town centre for the purposes of the NPS-UD, the boundaries of the town centre for the purposes of the Kāinga Ora submission were derived from the "Town Centre Zone" set out in Figure 18 of the Cambridge Town Concept Plan 2010.
[2] Ibid.

Commercial Zone that is proportionate to that sought within the HDRZ (22m).

2.3 Michael Campbell's planning evidence identifies other areas of relief where there is agreement between Council and Kāinga Ora or where relief is no longer pursued (refer: paragraphs 2.13 – 2.14).

3. STATUTORY BOUNDS APPLYING TO PC26

3.1 The key parts of the statutory framework governing the content of PC26 are sections 77N, 77G, 80E and 80G RMA.

Sections 77G and 77N RMA

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

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

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

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

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, Policy 3 and 4 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 support or are consequential on – (A) the MDRS; or (B) policies 3,4 and 5 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) The word "*uses*" is an odd choice (and perhaps illustrative of the haste with which the legislation was prepared and passed). Presumably, however, Parliament is seeking to ensure that the IPI is used for purposes related to (or which "*support or are consequential on*"[3]) the incorporation of the MDRS and giving effect to Policy 3 and 4.

(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:

(i) Changes to definitions that have broad application.

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

(ii) The relief sought by KiwiRail which involves the introduction of standards applying to all sensitive activities alongside a rail corridor.

(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.

(iii) A provision that constrains or removes *existing* development rights (e.g.: the KiwiRail relief) is likely to fall foul of this section.

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; 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 Land Company Limited v Heritage NZ Pouhere Taonga and Kapiti District Council*[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:

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

> "*[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.*
>
> *[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*."

3.11 The Kiwi Rail relief is *ultra vires* the ISPP for this reason – it will reduce existing development opportunities through imposing additional obligations on residential activities that are currently permitted. As in the *Waikanae* case, the relief sought by KiwiRail could be promoted through a separate plan change using the Schedule 1 process.

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

Context

4.1 Policies 3 and 4 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 PC26 process. Thus, the Council and the Panel are required by RMA to give effect to the whole of the NPS-UD through PC26 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 PC26 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 Cambridge and Te Awamutu centres and surrounds 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) 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*."

4.5 Cambridge and Te Awamutu are town centres or equivalent. Kāinga Ora's revised relief (set out in its evidence) seeks additional height (up to 24.5m in place of the current 14m height standard) and density in the two town centres[5] and a new HDRZ (with a 22m height standard) around the Cambridge centre.

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.

[5] Ibid, fn 1 above.

(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*".[6] 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 PC26.

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:

(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

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

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).

4.9 Mr Campbell's evidence considers what heights and densities are "*commensurate*" with the levels of commercial activities and community services anticipated for the Cambridge and Te Awamutu centres.

5. SCOPE ISSUES

5.1 Council section 42A report has rejected a number of Kāinga Ora submission points on the basis that PC26 does not amend provisions affected by the submission or the Kāinga Ora submission goes beyond what PC26 has proposed, the implication being that the relief sought is not within scope.[7] Council's rebuttal evidence has since also raised a concern regarding the scope for the amendments proposed by Kāinga Ora to the permitted height within town centres and the introduction of the HDRZ on the basis that it: goes "significantly beyond" what could be considered a consequential amendment; is one that should be introduced into the district plan by way of submission; and may raise natural justice considerations.

5.2 Kāinga Ora submits that Council has taken an overly restrictive view of scope in that context and that the relief sought by it is legitimately within the bounds of PC26.

[7] For example Submission Points 79.284; 79.254; 79.79; 79.190 - 79.193; 79.276; 79.279 - 79.282; 79.4; 79.76; 79.79 – 79.81; 79.22; 79.47 – 79.50. See Appendix B to s42A Report.

Preliminary comment - Legal tests regarding scope

5.3 With reference to Council's rebuttal evidence, the test is not whether or not the relief sought by Kāinga Ora is a "*consequential amendment*" or whether it is one that "*should*" be introduced into the plan by way of submission.[8] Rather, there is scope to make submissions on a proposed plan / plan change provided the submissions are "*on*" the plan change.[9]

5.4 The leading authorities on whether a submission is "*on*" a plan change is *Clearwater Resorts Limited v Christchurch City Council*[10] ("***Clearwater***") and *Palmerston North City Council v Motor Machinists*.[11] 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;[12] 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.[13]

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 PC26 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:

[8] Quickfall Rebuttal at para 6.3.
[9] Cl 6(1), Schedule 1 RMA.
[10] *Clearwater Resorts Limited v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003 at [66].
[11] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.
[12] "*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*.
[13] "*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*.

(a) A determination as to scope is context dependent and must be analysed in a way that is not unduly narrow.[14] 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.[15]

(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.[16]

(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, PC26 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 PC26 is to incorporate the MDRS into relevant residential zones and to give effect to policies 3 and 4 of the NPS-UD.[17]

(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 <u>within and adjacent to</u> neighbourhood centre zones, local centre zones and <u>town centre zones</u> (or equivalent). That list applies to <u>all</u> of the land in Waipā's centre zones and extensive areas in the immediate vicinity of those centres.

[14] *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].
[15] *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 at [80]; *Albany Landowners v Auckland Council* [2017] NZHC 138 at [127].
[16] *Albany Landowners v Auckland Council* [2017] NZHC 138 at [129].
[17] See section 80E RMA.

(ii) The RMA requires the Waipā District Plan to "*give effect to*" any NPS including the NPS-UD.[18] Accordingly, while the RMA requires the IPI to give effect to Policies 3 and 4 NPS-UD, PC26 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 Waipā townships.

(d) In response, PC26 appropriately involves significant changes to the form and intensity of development enabled in the residential areas of both 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, PC26 is not a narrow plan change. It necessarily encompasses most of Cambridge and Te Awamutu 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 the reasons discussed above are broad terms). The relief sought by Kāinga Ora is consistent with the legislative direction given to the Council, as summarised in **Appendix A.**

5.9 The scope issues raised in the Council's rebuttal evidence relate to the application of a height overlay over the key town centres and the application of the HDRZ. All of that relief relates to land areas that by definition are to be included with in the scope of the IPI. The fact that Council has decided not to change rules on some of that land does not prevent submitters from seeking the relief that they say is essential if Policy 3 is to be given effect.

[18] Section 62(3) RMA for regional policy statements and section 75(3)(a) RMA for district plans.

Limb 2: Fairness to other parties

5.10 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) PC26 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.[19] 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.[20]

5.11 PC26 is a unique plan change in the Waipā 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.[21] 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 PC26.

(b) Given the wide scope of PC26 and the extent and breadth of changes proposed throughout the urban area, 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 PC26 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

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

possibility that submissions may be filed seeking changes with broad application.

5.12 While the caselaw remains relevant, its application to PC26 needs to be considered in the context of the Amendment Act and the ISPP. Most notably, the potential for a "*submissional sidewind*"[22] 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.

6. CONSIDERATION OF QUALIFYING MATTERS

6.1 For completeness, we record the following with regard to the basis on which you may impose a qualifying matter:

(a) For the reasons noted above, qualifying matters can only be used to reduce the extent to which PC26 enables additional intensification. They cannot be used to justify a reduction in existing development rights.

(b) Any party may propose a new or extended qualifying matter by way of submission or through the IPI hearing process. Further, the Panel may identify, consider and recommend a potential qualifying matter regardless of whether it has been identified within a submission.

(c) Such a qualifying matter can only be confirmed in your recommendation, however, if it has been the subject of an evaluation report complying with section 32 RMA which also includes the additional matters listed in section 77L RMA. That evaluation report may be provided through the hearing process or may be incorporated into your recommendation.

(d) There are no constraints that govern the source of the evidential basis for such a qualifying matter. That is, a submitter is not required to provide supporting evidence for a suggested qualifying

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

matter, although a failure to do so may well result in the submission being dismissed. An evidential basis for a qualifying matter may be provided solely or collectively by a submitter, the Council, a separate entity, or any independent expert retained by the Panel.

6.2 Kāinga Ora's legal submissions to the opening session on the Waikato IPIs discussed the qualifying matters adopted by the Council for Te Ture Whaimana and special character and heritage. Those submissions are reiterated in the Waipā context, subject to the following comments.

6.3 Phil Jaggard has addressed infrastructure issues relating to Cambridge and Te Awamutu and both he and Michael Campbell have considered those matters in the context of Te Ture Whaimana. In that regard:

(a) The witnesses conclude that these issues can and will be addressed over time as development occurs and that there is no need to add constraints on development in reliance on this as a qualifying matter.

(b) Kāinga Ora remains of the view that accommodating population and activity growth through intensification is:

(i) Likely to generate similar demand for water supply as would a more dispersed form of development.

(ii) Likely to generate similar demand for wastewater services as would a more dispersed form of development. The wastewater treatment plants will need upgrading regardless of where the growth is located.

(iii) Likely to reduce the total impermeable surfaces in comparison with a more dispersed form of development – Multi-storey developments allow many dwellings to benefit from a single roof. Intensification also reduces the area of land that is set aside for roading. That suggests that accommodating growth through (well managed) intensification should generate reduced adverse stormwater effects in comparison with a more dispersed urban form.

6.4 With regard to special character issues, Kāinga Ora's submissions critique the approach adopted by the Council and the evidence of Cam Wallace

and Michael Campbell support changes to the District Plan provisions. The Waipā approach does recognise the distinction between section 6 RMA heritage and section 7 RMA character issues.

7. ADDITIONAL LEGAL ISSUES

7.1 In considering proposals for four or more dwellings within the MDRZ, discretion has been restricted over "*alignment with <u>any relevant Urban Design Guidelines approved by Council</u>*" (emphasis added).[23] That is, PC26 refers to design guides that do not currently exist.

7.2 Putting aside the merits of referencing design guides as matters of discretion (which is addressed in detail in the evidence of Cam Wallace[24] and Michael Campbell[25]), referencing design guidelines which do not currently exist is problematic. It is submitted that:

(a) When incorporating documents by reference, the document to be incorporated should exist at the time of incorporation and be clearly identified in the Act or delegated legislation concerned. That is not the case here.

(b) Obligations imposed under regulations must be certain and enforceable. That cannot be the case where the document referred to does not yet exist.

(c) In an RMA context, Part 3 of Schedule 1 deals with incorporation of documents by reference in plans and proposed plans:

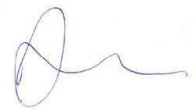
(i) Clause 30(1) of Schedule 1 specifies what written material *may* be incorporated by reference. Documents that contain standards, requirements, or the recommended practices of international and national organisations, or prescribed in any country or jurisdiction, may be incorporated. Any other written material that deals with technical matters and is too large or impractical to include in or print as part of the plan may also be incorporated by reference. **<u>Comment</u>**: It is implicit that the written material referred to in cl 30(1) must exist (e.g. if a document did not exist, it could not be

[23] 2A.4.1.3(b)
[24] At paras 6.6 – 6.14
[25] At paras 9.1-9.10.

included on the basis that it is too large or impractical to include as part of the plan).

(ii) Clause 31 of Schedule 1 provides that amendments to material incorporated by reference only have legal effect where a variation or plan change has amended the Plan reference to that document. That is, amendments to documents incorporated by reference must be accompanied by a Schedule 1 process if they are to have legal effect. **Comment**: This clause further reinforces the position that written material must exist in order to be incorporated by reference. It would be inconsistent with the RMA if a non-existent document could be incorporated by reference, but any change to a document that has been incorporated by reference, needs to be made introduced through the Schedule 1 process.

Dated this 21st day of April 2023



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Appendix A

Submission Point	Summary of Submission Point	Comment
Submission Nos. 79.284, 79.274, 79.276, 79.279 - 79.282	Introduce shape factor requirements for vacant lot subdivision which enable creation of lots that can accommodate a permitted level of development within the HDRZ and MDRZ.	Subdivision requirements are an "*related provision*" under section 80E(2) RMA, and the changes support the MDRS.
Submission No. 79.254	Seeks changes to the permitted activity earthworks threshold in the MDRZ to enable up to three dwellings to be built on a site without requiring consent for earthworks.	Earthworks standards are a "*related provision*" under section 80E(2) RMA and the changes support the MDRS.
Submission No. 79.193	Seeks changes to a policy concerning effects of earthworks on neighbouring properties and waterbodies to qualify the reference to "avoiding" adverse effects.	
Submission No. 79.79	Seeks changes to a residential zone policy regarding maintenance and enhancement of the existing character of the zone. The submission seeks to add reference to the planned outcomes of the zone.	The relief supports and is consequential on the MDRS and is required in light of the likely extent of change implementation of the MDRS will generate to the character of the residential zone.
Submission Nos. 79.190 - 79.19s	Seeks changes to the policies concerning signage rules in the Medium Density Residential zone, including adding reference to planned urban character of the zone and qualification of the reference to "avoiding" adverse effects.	The relief supports and is consequential on the MDRS and is required in light of the likely extent of change implementation of the MDRS will generate to the character of the residential zone.
Submission No. 79.4	Amendments are sought to ensure consistency across the Kāinga Ora submission in relation to relocated building activities and papakāinga and marae development	Section 80E(1)(b)(ii) RMA provides that an IPI may amend provisions relating to papakāinga housing in the district.
Submission Nos. 79.79 – 79.81	Amendments to the objectives and policies of the residential zone regarding maintenance and enhancement of existing character to add reference to the planned outcomes of the zone.	The relief supports and is consequential on the MDRS and is required in light of the likely extent of change implementation of the MDRS will generate to the character of the residential zone.
Submission Nos. 79.22; 79.47 – 79.50	Delete references to design guides from the plan and replace with specified outcomes sought.	The relief supports and is consequential on the MDRS and is required in light of the likely extent of change implementation of the MDRS will generate to the character of the residential zone.