BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 26 to the Operative Waipā District Plan

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OPENING LEGAL SUBMISSIONS OF COUNSEL FOR WAIPĀ DISTRICT COUNCIL FOR SUBSTANTIVE HEARING

Dated 21 April 2023

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1. INTRODUCTION

1.1 These Opening Legal Submissions are submitted on behalf of Waipā District Council (the **Council**) in respect of Proposed Plan Change 26 to the Operative Waipā District Plan (**PC26**). PC26 is an Intensification Planning Instrument (**IPI**) under section 80E of the Resource Management Act 1991 (**the Act**).

1.2 On 15 to 17 February 2023 a Joint Opening Hearing (**Joint Opening Hearing**) was held in respect of PC26, Proposed Plan Change 12 to the Operative Hamilton City District Plan and Variation 3 to the Proposed Waikato District Plan (**Waikato IPIs**). For the purpose of the Joint Opening Hearing, counsel submitted the following legal submissions:

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

(b) Opening legal submissions of counsel for Waipā District Council for Joint Opening Hearing dated 10 February 2023 (**Legal Submissions for the Joint Opening Hearing**).

1.3 The Waikato IPIs Joint Legal Submissions and the Legal Submissions for the Joint Opening Hearing are adopted by the Council in their entirety and will be referred to in these submissions to avoid repetition.

1.4 These Opening Legal Submissions will address:

(a) The Council's position on PC26;

(b) The scope of PC26;

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

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

(e) The existing qualifying matters proposed in PC26 including;

(i) Nationally significant infrastructure including the national grid and state highways;
(ii) Setback from the Te Awa Cycleway;
(iii) Protection of historic heritage; and
(iv) Natural hazards.

(f) The new qualifying matters proposed in PC26 including:
(i) Infrastructure Overlay;
(ii) Stormwater Overlay;
(iii) River / Gully Overlay; and
(iv) Setbacks from Significant Natural Areas (SNAs) and reserves

(g) The other qualifying matters proposed in PC26 including:
(i) Character clusters and character streets.

(h) Requests for new qualifying matters including:
(i) Reverse sensitivity surrounding the Te Awamutu Dairy Factory; and
(ii) The rail corridor.

(i) Specific requests for changes to PC26 including:
(i) Retirement villages; and
(ii) Community corrections facilities.

1.5 In accordance with Direction #10 of the Independent Hearing Panel (Hearing Panel), submissions relating to Financial Contributions (Section 18) of PC26 will not be heard at this hearing but will be the subject of a joint hearing with submissions relating to Financial Contributions (Section 24) of Plan Change 12 to the Operative Hamilton City District Plan scheduled for September 2023.

2. COUNCIL'S POSITION ON PC26

2.1 The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (Amendment Act) required the Council to:

(a) Notify an IPI by 20 August 2022;

(b) Incorporate the MDRS into all relevant residential zones, unless qualifying matters apply; and

(c) Give effect to Policy 3(d) of the NPS-UD.

2.2 As set out in the Legal Submissions for the Joint Opening Hearing and the evidence of Tony Quickfall for the Joint Opening Hearing, the Council has taken a strategically-planned approach to growth since at least 2009.[1] The Council's response to the NPS-UD and the updated Future Proof Strategy 2022 was to be notified as Plan Change 21. Instead, the Amendment Act requires a "one size fits all" approach to residential development which can only be modified in limited circumstances where necessary to accommodate a qualifying matter.

2.3 Our Legal Submissions for the Joint Opening Hearing discussed the tension between giving effect to Policy 3(d) of the NPS-UD which promotes a centres-based approach to planning, and the blanket application of the MDRS required by the Amendment Act.[2] This tension is particularly acute in towns which do not have the hierarchy of centres envisioned in Policy 3 of the NPS-UD. Since the Joint Opening Hearing the Council has had discussions with Kāinga Ora regarding what giving effect to Policy 3(d) looks like within the Waipā District, within the constraints of the MDRS. While agreement has not been reached between the Council and Kāinga Ora, both parties have proposed alternative proposals for consideration by the Hearing Panel.

[1] Paragraphs 12 to 27 of the Statement of Evidence of Tony Quickfall dated 20 December 2022.

[2] Section 6 of the Opening Legal Submissions for Waipa District Council for Joint Opening Hearing dated 10 February 2023.

3. THE SCOPE OF PC26

3.1 Section 4 of the Joint Opening Legal Submissions sets out the mandatory elements and the discretionary elements of an IPI. PC26 contains the following mandatory elements:

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

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

3.2 PC26 contains the following discretionary elements of an IPI:

(a) Modifies the MDRS where necessary to accommodate qualifying matters;

(b) Proposes amendments to related provisions which support or are consequential on the MDRS; and

(c) Proposes changes to the financial contributions provisions in the Operative Waipā District Plan (**District Plan**).

3.3 An IPI can only be used for the mandatory and discretionary elements set out in section 80E of the Act. Accordingly, any submissions seeking relief outside of these matters is considered to be outside of the scope of PC26.

3.4 In addition to the limits in section 80E of the Act, counsel submits that the usual tests in *Clearwater* apply to PC26. This means that whether a submission is "on" PC26 will require consideration of:

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

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

3.5 The Council's approach to scope is set out in the Legal Submissions of counsel for Waipā District Council on scope dated 24 February 2023 (**Scope submissions**).

3.6 The Hearing Panel's Direction #12 has confirmed that the specified rezoning submissions (Triple 3 Farm Limited, submission number 59.1 and CKL NZ Limited, submission number 65.31) are outside the scope of PC26.

3.7 The Hearing Panel's Direction #14 has confirmed that the joint submission by the Waikato Community Lands Trust, Waikato Housing Initiative, Momentum Waikato, Habitat for Humanity Central Region Limited and Bridge Housing Trust (submission number 74) regarding inclusionary zoning is outside the scope of PC26.

3.8 The Themes and Issues Report for the Joint Opening Hearing (Themes and Issues Report) identified additional submissions which are potentially out of scope of the Waikato IPIs but which are more appropriately addressed at the substantive hearings.[3] In respect of these submissions, I propose to address matters of scope as they arise throughout these legal submissions.

4. POLICY 3 OF THE NPS-UD

4.1 One of the mandatory elements of section 80E is to give effect to Policies 3 and 4 of the NPS-UD.[4] Before addressing this particular policy, I wish to review the purpose and process of the NPS-UD.

4.2 The NPS-UD came into force on 20 August 2020. The NPS contains, at Part 2, a number of objectives and policies regarding urban development. It also contains, in Part 3, a number of specific actions

[3] Common Theme 5: Out of Scope Submissions at paragraphs 4.30 to 4.49 of the Themes and Issues Report.
[4] Section 80E(1)(a)(ii)(A), section 77G and section 77N of the Act.

which must be taken by local authorities to implement the NPS. Part 4 sets out the timeframes for implementation. For the purpose of the NPS-UD, local authorities are categorised as Tier 1, 2 or 3 local authorities, and urban environments are categorised as Tier 1, 2, or 3 urban environments.

4.3 In accordance with the Appendix to the NPS-UD, the Council is identified as a Tier 1 local authority. However, as the urban environments within Waipā District are not listed in the Appendix, they are defined to be tier 3 urban environments. Consequently Policy 5 of the NPS-UD applied to Waipā District and required consideration of:[5]

> Regional policy statements and district plans applying to tier 2 and 3 urban environments enable heights and density of urban form commensurate with the greater of:
>
> (a) the level of accessibility by existing or planned active or public transport to a range of commercial activities and community services; or
>
> (b) or relative demand for housing and business use in that location.

4.4 Mr Quickfall's Statement of Evidence dated 20 December 2022 details the Council's plans for implementing the NPS-UD, particularly its draft Plan Change 21 which proposed to give effect to Policy 5 of the NPS-UD.[6]

4.5 The enactment of the Amendment Act made the following changes to the Council's obligations under the NPS-UD:

(a) It identified the Council as a Tier 1 territorial authority;[7]

[5] Policy 3(d) of the NPS-UD was identical to Policy 5 prior to the enactment of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.
[6] Paragraphs 21 to 23 of the Statement of Evidence of Tony Quickfall dated 20 December 2022.
[7] Definition of "tier 1 territorial authority" in section 2 of the Act.

(b) It required all Tier 1 territorial authorities to give effect to Policies 3 and 4 of the NPS-UD (regardless of whether they contained Tier 1 urban environments);[8]and

(c) It amended the wording of Policy 3(d) (but not Policy 5 which continues to apply to Tier 2 and 3 territorial authorities).

4.6 Policy 3(d) of the NPS-UD now provides that:

> 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.

4.7 The issues for determination by the Hearing Panel in relation to giving effect to Policy 3(d) within Waipā District include:

(a) What are the "urban environments" within Waipā District?

(b) What heights and densities are commensurate with the level of commercial activity and community services within those urban environments?

Urban Environments

4.8 In respect of the identification of "urban environments", PC26 identifies the townships of Cambridge, Te Awamutu and Kihikihi as the urban environments within Waipā District. The Council's s42A report considers in detail the other towns and villages within Waipā District, including Ohaupo, Pirongia and Karapiro Village and concludes that these settlements do not meet the definition of "urban environment" within the NPS-UD.[9]

[8] Section 80E(1)(a)(ii)(A) of the Act.
[9] Section 9.3 of the s42A report.

Commensurate heights and densities

4.9 The key issue for consideration by the Hearing Panel is whether the heights and densities within the town centre zones of Cambridge, Te Awamutu and Kihikihi are commensurate with the level of commercial activity and community services within those urban environments. At the time of notification of PC26, the Council determined that:

(a) The Commercial Zones in Cambridge, Te Awamutu and Kihikihi which enable development up to 14m or three storeys in height are already commensurate with the level of commercial activity and community services within those centres and that the capacity in those centres will more than provide for long-term market demand. Consequently no changes were proposed by PC26 within the Commercial Zones.

(b) The incorporation of the MDRS into the Residential Zones (including qualifying matters) which enables development of two dwellings per site up to 11m in height is commensurate with the level of commercial activity and community services within the centres and provides a significant amount of additional capacity within the short, medium and long terms.

4.10 Since submissions were received on PC26, the Council has reviewed the heights and densities provided for within the town centres and the surrounding residentially zoned land, has taken advice from its expert consultants and has had discussions with Kāinga Ora. Mr Quickfall's Rebuttal Statement of Evidence dated 19 April 2023 proposes the following alternative proposal to give effect to Policy 3(d) (**Alternative Proposal**): [10]

[10] Section 5 and Appendix 3 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

(a) Addition of a height overlay to the town centres of Cambridge, Leamington and Te Awamutu which would allow development of up to 18m in height (rather than 14m); and

(b) The removal of the Infrastructure Constraint Qualifying Matter Overlay (Infrastructure Overlay) from a defined area immediately surrounding the town centre of Cambridge which would enable three, three storey dwellings to be constructed as a permitted activity in this area (rather than two, three storey dwellings within the Infrastructure Overlay).

4.11 The Council submits that its Alternative Proposal:

(a) Enables PC26 to give effect to Policy 3(d) and the objectives and policies of the NPS-UD which seek to achieve a compact urban form, within the constraints of the MDRS;

(b) Applies an appropriate time scale to Policy 3(d) which recognises the future roles of Cambridge and Te Awamutu as metropolitan town centres, but reflects that these centres are still decades away from reaching that classification;

(c) Provides for significant additional development capacity, but more importantly better provides for a range of typologies within close proximity of the town centres;[11] and

(d) More appropriately reflects the current level of demand within the town centres, and avoids enabling higher density development which is disconnected with and dilutes the effectiveness of the town centres in the short to medium term.[12]

4.12 The heights and densities sought by Kāinga Ora, which have been modified from its original submission, now seek a height of 24.5m in the town centres of Cambridge and Te Awamutu and a high density

[11] Paragraphs 2.4 and 2.5 of the Rebuttal Evidence of Susan Fairgray dated 19 April 2023.
[12] Paragraph 2.9 of the Rebuttal Evidence of Susan Fairgray dated 19 April 2023.

residential zone with a height of 22m within a walkable catchment of Cambridge town centre.[13] I submit that these heights and densities are not commensurate with the level of services in the town centres and are instead based on a misunderstanding regarding the role of these centres. Mr Quickfall's evidence for the Council is that:[14]

(a) The relief sought by Kāinga Ora is based on a misunderstanding of the policy setting which applies to Waipā District; in particular, it uses the six-storey height required by Policy 3(b) of the NPSUD which applies only to metropolitan centre zones.

(b) While the Future Proof Growth Strategy 2022 identified a potential future role for Cambridge and Te Awamutu as metropolitan centre zones, there are a number of pre-conditions which must be achieved before this transition occurs: it is unlikely those pre-conditions will be met by those centres within the 30 year life of the current Future Proof Strategy.

(c) Accordingly, the appropriate heights and densities for Cambridge and Te Awamutu reflects medium density (not high density) as anticipated by the Future Proof Growth Strategy 2022 and now incorporated into the Waikato Regional Policy Statement (WRPS) by Change 1. This is consistent with the status of Cambridge and Te Awamutu as Tier 3 urban environments (not Tier 1).[15]

4.13 It is acknowledged that in respect of the proposed changes to the Commercial Zones (as proposed in the submission by Kāinga Ora and

[13] Sections 7 and 8 of the Statement of Evidence of Gurvinderpal Singh dated 6 April 2023; Paragraphs 4.19 to 4.30 and Appendix C of the Statement of Evidence of Michael Campbell dated 6 April 2023.

[14] Sections 3 and 4 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

[15] Medium density is expressed in Change 1 to the Waikato RPS as 25-35 in defined intensification areas and 20-35 in greenfield locations; UFD-P12 Density Targets for Future Proof Area.

in the Council's Alternative Proposal) there is a potential scope issue. With reference to the three questions relating to scope:[16]

(a) In respect of the matters in section 80E of the Act: If the Hearing Panel finds that the height uplift in the Commercial Zone is required by Policy 3(d) of the NPSUD, this will fall within the scope of Section 80E(1)(a)(ii)(A).

(b) In respect of the first limb of the *Clearwater* test: The public notice for PC26 did not refer to any changes to the Commercial Zones. While the section 32 report considered Policy 3(d) of the NPS-UD it did not specifically assess a change to the height limit in the Commercial Zone.

(c) In respect of the second limb of the *Clearwater* test: As addressed in Mr Quickfall's rebuttal evidence, the Waipā community has not had an opportunity to consider the proposed changes to the height limits in the Commercial Zone.[17]

4.14 Accordingly, while changes to the heights in the Commercial Zone may fall within the permissible scope of an IPI, a natural justice issue arises as the Waipā community has not had an opportunity to be heard in respect of the proposed changes. If the Hearing Panel considers that a change to the heights in the Commercial Zone is required by Policy 3(d) the Council recommends that further consultation take place with the Waipā community regarding these changes. We consider that this can be achieved within the current Intensification Streamlined Planning Process (ISPP) process.

[16] Paragraphs 7 to 23 of the Scope Submissions.
[17] Section 6 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

5. INCORPORATION OF THE MDRS

5.1 The second mandatory element of section 80E is to incorporate the MDRS into relevant residential zones.[18] The MDRS is set out in Schedule 3A of the Act and consists of:

(a) Objectives and policies;

(b) Activity rules for residential development and subdivision;

(c) Rules regarding notification of applications for resource consent for residential development and subdivision; and

(d) Density standards.

5.2 The MDRS can only be modified to the extent necessary to accommodate a qualifying matter. The qualifying matters are listed in sections 77I and 77O of the Act.

5.3 The issues for determination by the Hearing Panel in relation to the MDRS include:

(a) What are the "relevant residential zones" within Waipā District?

(b) Have the MDRS in Schedule 3A been properly incorporated into those zones?

(c) Do the qualifying matters meet the requirements of sections 77J, 77K and 77L of the Act?

Relevant residential zones

5.4 PC26 applies the MDRS to all Residential Zoned land within Cambridge, Te Awamutu and Kihikihi by the creation of a new Medium Density Residential Zone. The MDRS has not been applied to the Large Lot Residential Zone which is specifically excluded from the definition of "relevant residential zone" by s2(b)(i) of the Act or the Deferred Residential Zone which is not a live residential zone and will require a

[18] Section 80E(1)(a)(i) and section 77G(1) of the Act.

future plan change to apply a live zone.[19] The only part of the current Residential Zone that has been excluded from the new Medium Density Residential Zone is located in Karapiro Village which had a population of 311 in the 2018 census and is thus excluded from the definition by section 2(b)(ii) of the Act.[20]

Incorporation of the MDRS

5.5 PC26 has incorporated the MDRS by inserting the following provisions into the District Plan:[21]

(a) The mandatory objectives and policies[22];

(b) New activity rules for residential units[23];

(c) New rules relating to notification of applications for residential units[24] ;

(d) New performance standards for residential units[25];

(e) New activity rule for subdivision for the purpose of residential units[26];

(f) Exemptions from the minimum lot size and shape provisions for subdivision for residential units[27]; and

(g) New rules relating to notification of applications for subdivision for the purpose of residential units[28].

5.6 A large number of submissions have been received on these detailed provisions of PC26 and these have been addressed in the Council's

[19] The submission by the Retirement Villages Association/Ryman Limited to rezone land zoned Deferred Residential is addressed at paragraphs 5.11 to 5.13 of these submissions.
[20] Section 7.2 of the s42A report.
[21] As required by section 80H of the Act, the objectives and policies and the density standards are shown shaded orange.
[22] Objectives 2A.3.1 and 2A.3.2 and Policies 2A.3.2.1, 2A.3.2.3, 2A.3.2.5, 3A.3.2.6 and 2A.3.2.7.
[23] Rules 2A.4.1(b) and 2A.4.1.3(b).
[24] Rule 2A.4.1A.
[25] Rules 2A.4.2.1 to 2A.4.2.5, 2A.4.2.10 to 4.2.21 and 2A.2A.4.2.23 to 2A.4.2.24.
[26] Rule 15.4.1(l).
[27] Rule 15.4.2.1A.
[28] Rule 15.4.1A.

section 42A report[29] and the Addendum to the section 42A. These reports support a number of amendments to ensure that the MDRS is accurately incorporated in the plan change provisions. These will be shown in the latest version of PC26 to be provided at the commencement of the hearing.

Modification of the MDRS to accommodate qualifying matters

5.7 I submit that the key issue for the Hearing Panel in respect of incorporation of the MDRS is whether, and to what extent, modifications to the MDRS are required to accommodate qualifying matters. This issue is considered in respect of each of the proposed qualifying matters in PC26 in the following sections of these submissions.

6. QUALIFYING MATTERS – INTRODUCTION

6.1 The approach to be taken to the evaluation of qualifying matters is set out in section 8 of the Waikato IPI Joint Legal Submissions. In summary:

(a) Existing qualifying matters within section 77I(a) to (i) must satisfy section 77K of the Act;

(b) New qualifying matters within section 77I(a) to (i) must satisfy section 77J of the Act; and

(c) Other qualifying matters within section 77I(j) must satisfy section 77J and section 77L of the Act.

6.2 The Section 42A report has provided a detailed review of each of the qualifying matters against the relevant provisions of sections 77J, 77K and 77L.[30]

[29] Section 9.11 of the Section 42A report.
[30] Topic 3 Qualifying Matters commencing Section 9.13 of the section 42A report.

7. EXISTING QUALIFYING MATTERS

7.1 As advised at the Joint Opening Hearing, the Waipā District Plan was wholly operative on 19 August 2022 when PC26 was publicly notified. As a result, a large number of the qualifying matters are existing qualifying matters which are subject to the alternative evaluation under section 77K.

Nationally Significant Infrastructure - National Grid

7.2 PC26 identifies the rules relating to the National Grid as a qualifying matter required to ensure the safe or efficient operation of nationally significant infrastructure (s77I(e)), and to give effect to the National Policy Statement for Electricity Transmission 2008 (s77I(b)).

7.3 A submission (submission number 38) was lodged by Transpower New Zealand Limited (Transpower) which sets out the reasons why the National Grid is a qualifying matter under sections 77I(b) and (e). The submission also seeks a number of specific changes to PC26 to clarify the way in which the rules will apply within the Medium Density Residential Zone. These specific changes are generally supported by the Council, as set out in paragraphs 9.14.1 to 9.14.12 of the section 42A report.

7.4 The letter from Transpower dated 3 April 2023 to be tabled at the hearing seeks three additional changes to the provisions which were not accepted in the section 42A report. These are minor matters of clarification or cross referencing which are accepted in the Addendum to the section 42A report.[31]

[31] Section 4.9 of the Addendum to the section 42A report.

Nationally Significant Infrastructure - State Highways

7.5 PC26 identifies a setback of 7.5m from State Highways as a qualifying matter required to ensure the safe or efficient operation of nationally significant infrastructure (s77I(e)). This rule applies alongside a requirement for acoustic insulation of buildings containing noise sensitive activities in Rule 2A.4.2.41.

7.6 Submissions by Waka Kotahi (submission number 63) and Kāinga Ora (submission number 79) question the identification of the State Highways as a qualifying matter. The setback has therefore been reviewed by the Council's section 42A authors.[32] The setback is proposed to be retained to avoid reverse sensitivity effects on State Highways, but is to be amended so that it only applies to dwellings and sleep outs.

Public access to and along lakes and rivers – Te Awa cycleway setback

7.7 PC26 proposes to retain a 5m setback from the Te Awa cycleway to protect public access to the Waikato River and to contribute to the objectives of Te Ture Whaimana o Te Awa o Waikato (Te Ture Whaimana).[33] In response to the evidence of Cameron Wallace for Kāinga Ora, the evidence of Ms McElrea for the Council proposes to amend rule 2A.4.2.6(d) to clarify that the setback will only apply where the cycleway follows the river, rather than the road (as currently occurs in some locations).[34]

7.8 While PC26 contains additional provisions required to protect the values in section 6(a) to (e) of the Act, these have generally not been

[32] Sections 9.14.13 to 9.14.23 of the section 42A report.
[33] Paragraph 6.41 of the Statement of Evidence of Anna McElrea dated 24 March 2023.
[34] Paragraphs 3.1 to 3.5 of the Rebuttal Statement of Evidence of Anna McElrea dated 19 April 2023.

opposed by submitters and are proposed to be retained in their current form.[35]

Protection of historic heritage

7.9 The District Plan contains rules relating to the protection of items of historic heritage in Section 22. These are proposed to be retained in PC26 and no changes are proposed to the scheduled heritage items.[36]

7.10 A number of submissions have been received in support of the retention of the rules protecting historic heritage.[37] In particular, Heritage New Zealand seeks minor amendments to the rules to ensure that the effects of intensification on sites adjoining items of historic heritage are considered as part of any application for resource consent. These changes are supported in the evidence of Carolyn Hill for the Council, and the section 42A authors, and are recorded in the Addendum to the section 42A report.

Natural hazards

7.11 The District Plan contains rules to manage significant risks from natural hazards. These include rule 15.4.2.15 which restricts development within a high risk flood zone, and rule 15.4.2.26 which restricts development within overland flow paths. These rules are proposed to be retained as they are necessary to protect dwellings from flooding. However, the evidence of Tony Coutts on behalf of the Council is that these rules are outdated and will be insufficient to mitigate the effects of intensification without amendment.[38] This will be addressed further in the context of the Stormwater Overlay qualifying matter below.

[35] Paragraphs 9.14.71 to 9.14.77 of the section 42A report.
[36] Section 6 of the Statement of Evidence of Carolyn Hill dated 24 March 2023.
[37] Paragraph 4.18 of the Statement of Evidence of Carolyn Hill dated 24 March 2023.
[38] Paragraphs 6.16 to 6.24 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.

8. NEW QUALIFYING MATTER – INFRASTRUCTURE OVERLAY

8.1 PC26 proposes to apply an Infrastructure Constraint Qualifying Matter Overlay (Infrastructure Overlay) to areas within the Medium Density Residential Zone where development to the density permitted by the MDRS would cause significant overloading of the water and wastewater networks to the extent of causing adverse effects on the rivers and streams. Managing these effects of development on infrastructure is a matter required to give effect to the objectives of Te Ture Whaimana and the National Policy Statement for Freshwater Management.

8.2 The objectives of Te Ture Whaimana and its significance as the primary direction setting document for the Waikato River catchment was addressed in the evidence of Mr Quickfall for the Council and Mr Williams for the Hamilton City Council at the Joint Opening Hearing.[39]

8.3 The evidence of Mr Hardy and Mr Coutts for the Council provides details of the Council's current water and wastewater infrastructure and the planned upgrades to accommodate the current level of development that is plan-enabled through to 2050.[40] The Council's infrastructure planning is based on one dwelling per site in the current urban areas as well as a significant number of growth cells which have been master planned following the approval of Plan Change 13 in 2022.

8.4 The evidence of Mr Coutts, supported by modelling by Mr Hardy, is that development to the extent enabled by the MDRS (an increase to three dwellings per site in both the current urban areas and the

[39] Paragraphs 56 to 65 of the Statement of Evidence of Tony Quickfall dated 20 December 2022; Statement of Evidence of Julian Williams dated 20 December 2022; Section 5 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
[40] Section 5 of the Statement of Evidence of Tony Coutts dated 24 March 2023.

growth cells) will exceed the capacity of the water and wastewater networks resulting in the following adverse effects:[41]

(a) Public health effects if contact is made with raw wastewater on the ground or in receiving waters (eg swimming);

(b) Adverse ecological effects on fresh water due to contamination and oxygen demand;

(c) Cultural effects on the mauri of freshwater and the relationship of mana whenua with freshwater;

(d) Increased demand on the water network can lead to shortages and longer wait times for water; and

(e) Potential effects caused by drawing of water in dry months.

8.5 There are a number of instances of local authorities being prosecuted for wastewater overflows into the Waikato River and its tributaries. The District Court has found that:[42]

> …the discharge of human waste into water is regarded as disrespectful to the mauri of the river by iwi. As well as iwi's view on the matter, I have no doubt that residents of all ethnicities within the region would find such a discharge to be unacceptable.

8.6 While these effects on the water and wastewater networks will, over time, be reduced by upgrades to the infrastructure, the Councils ability to plan for those upgrades is severely limited by the blanket application of the MDRS across the whole of the Residential Zones of Cambridge, Te Awamutu and Kihikihi. Mr Coutts has prepared some preliminary assessments of the cost of infrastructure for this level of development – not only are those costs prohibitive for Council, but the

[41] Paragraph 6.8 of the Statement of Evidence of Chris Hardy dated 24 March 2023; Paragraphs 4.2 to 4.5 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.

[42] *Waikato Regional Council v Hamilton City Council* DC Hamilton CRN-120-195-240, 7 August 2012, 2012 WL 3518381 relating to the sentencing of Hamilton City Council regarding the discharge of treated wastewater sludge at the Pukete Wastewater Treatment Plant, with most of it making its way into the Waikato River, at paragraph [42].

planning, consultation and construction timeframes to implement those upgrades are significant.[43]

8.7 The purpose of the Infrastructure Overlay is to require an application for three dwellings on a site to obtain resource consent as a restricted discretionary activity so that an infrastructure capacity assessment can be carried out. As explained by Mr Coutts, the purpose of the Infrastructure Overlay is not to restrict development, but to provide an opportunity for Council to assess whether spare capacity is available in that location, or whether on-site measures are available to mitigate demand.[44]

8.8 Mr Jaggard for Kāinga Ora agrees that infrastructure capacity is necessary in order to properly service urban development but considers that Council is only required to provide sufficient infrastructure to service current households and reasonably expected growth.[45] I submit that this approach is incorrect for the following key reasons:

(a) The Council has obligations under the Local Government Act 2002 to provide water and wastewater services for development.[46]

(b) The lead times for planning, funding and construction of infrastructure are significant; as a result, infrastructure is typically forward-planned to ensure that it is available at the time that development takes place. For example, for the new growth cells that were enabled by Plan Change 13, each growth cell will be master planned, the infrastructure upgrades

[43] Paragraphs 6.4 to 6.8 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.
[44] Paragraph 5.7 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.
[45] Sections 6 and 7 of the Statement of Evidence of Philip Jaggard dated 6 April 2023.
[46] Section 130 of the Local Government Act 2002.

identified and costed, and included in the Council's Infrastructure Strategy, its Long Term Plan and in its Development Contributions Policy. These plans will ensure the timely construction of infrastructure and the equitable funding between ratepayers and developers.[47]

(c) Infrastructure planning is based on the total capacity enabled but may be staged using triggers to reflect the expected rate of development. As the MDRS has been applied across the whole of the Residential Zones of Cambridge, Te Awamutu and Kihikihi, it is not possible to identify accurately the extent of demand or where that demand will be located.[48]

(d) While Council has a role under the Local Government Act 2002 in providing service connections to properties, the framework and powers under that legislation do not enable a comprehensive network-wide assessment of the infrastructure or the implementation and enforcement of appropriate on-site measures. It would not constitute sound resource management practice for the District Plan to enable a level of development but for that level of development to be prevented by other means.[49]

8.9 In any event, Mr Hardy's evidence shows that modelling of the commercially feasible capacity under PC26 still yielded issues within

[47] Paragraphs 7.12 and 7.13 of the Statement of Evidence of Tony Coutts dated 24 March 2023; Paragraphs 6.1 to 6.8 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.

[48] Paragraphs 8.12 to 8.16 of the Statement of Evidence of Chris Hardy dated 24 March 2023; Paragraphs 5.1 to 5.25 of the Rebuttal Statement of Evidence of Chris Hardy dated 19 April 2023.

[49] In *Foreworld Developments Ltd v Napier City Council* W8/2005 at paragraph 15, the Environment Court stated that: It is bad resource management practice and contrary to the purpose of the Resource Management Act — to promote the sustainable management of natural and physical resources; to zone land for an activity when the infrastructure necessary to allow that activity to occur without adverse effects on the environment does not exist, and there is no commitment to provide it.

the water and wastewater networks that would justify inclusion of the Infrastructure Overlay.[50]

8.10 Kāinga Ora also claims that the overall demand on infrastructure will be the same with only the location of development changing from greenfield to infill or redevelopment in existing urban areas.[51] The evidence of Mr Coutts shows that a change in location of development has significant implications for infrastructure:[52]

(a) For greenfield development, such as the growth cells, servicing for three waters forms part of the development of a structure plan as part of an application for subdivision consent and involves input from the Waikato Regional Council.

(b) For brownfield development the ability to upgrade existing infrastructure to current standards becomes a lot harder to manage by the available land and locked-in topography of adjacent properties. This is coupled with reliance on on-site measures over which Council has no direct control.

8.11 As a result of these factors, the Infrastructure Overlay essentially acts as a trigger for infrastructure assessment. PC26 shows that the Council will plan and fund for infrastructure to support two dwellings per site, but if development is proposed to exceed that level, the Council will review the proposal to determine the infrastructure effects on a site-specific basis. An alternative would be for the Council to require an infrastructure assessment for all development beyond one dwelling per site, and this is the relief sought in the submission by Waikato

[50] Paragraph 2.5 of the Rebuttal Statement of Evidence of Chris Hardy dated 19 April 2023, however note the limitation on modelling commercial feasible capacity noted at paragraph 2.6.

[51] Paragraph 5.3 of the Legal submissions of counsel for Kainga Ora for the Joint Opening Hearing dated 10 February 2023.

[52] Paragraphs 5.30 of the Statement of Evidence of Tony Coutts dated 24 March 2023. Also acknowledged in paragraph 29 of the Statement of Evidence of Craig Shearer for TAPL dated 6 April 2023.

Tainui.[53] However, in order to ensure that the qualifying matter is only applied to the extent necessary to accommodate the qualifying matter, and having regard to the effect of the qualifying matter on development capacity, the Council has elected to place the trigger at the third dwelling.[54]

8.12 Finally, TA Properties Limited has submitted that the Infrastructure Overlay should be removed from the greenfields areas (the growth cells recently rezoned to a live residential zone). The evidence of Mr Hardy and Mr Coutts disagrees with this approach for the following reasons:[55]

(a) The water and wastewater networks are comprehensive linked systems – as a result, an increase in development in any location will have a resulting effect on the system.

(b) While infrastructure for the growth cells has been master planned (as discussed above), the infrastructure was based on the current plan-enabled capacity of one dwelling per site. The increase in development capacity enabled by the MDRS will require those master plans to be revisited in the specific contexts of each growth cell.

[53] Submission number 49; In paragraph 10.5 of the Statement of Evidence of Gurvinderpal Singh on behalf of Kainga Ora, Mr Singh refers to Kainga Ora's understanding following a meeting with Waikato Tainui that the removal of the Infrastructure Overlay would not have adverse effects on Te Ture Whaimana. This view is consistent with Waikato Tainui's submission that an infrastructure assessment should be required for all additional dwellings across the District without the use of a mapped overlay. However, this would remove the ability to update the overlay as infrastructure upgrades are completed, or to remove the overlay where infrastructure investment is planned (such as around the Cambridge town centre).

[54] Paragraph 6.13 of the Statement of Evidence of Chris Hardy dated 24 March 2023 recognises that the PC26 scenario will still result in issues for the infrastructure network but is a level of risk that has been accepted by the Council.

[55] Section 4 of the Rebuttal Statement of Evidence of Chris Hardy dated 19 April 2023; Paragraphs 4.6 to 4.11 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.

(c) As the growth cells will require structure plans and subdivision consents, the Infrastructure Overlay does not impose any additional burden on the developers.

9. NEW QUALIFYING MATTER – STORMWATER OVERLAY

9.1 PC26 proposes to apply a Stormwater Constraint Qualifying Matter Overlay (Stormwater Overlay) to areas within the Medium Density Residential Zone where development to the density permitted by the MDRS would cause significant stormwater effects. The Stormwater Overlay is necessary to accommodate two qualifying matters:

(a) First, it is necessary to restrict the increase of contaminated stormwater to the District's rivers and streams in a manner which is inconsistent with the objectives of Te Ture Whaimana; and

(b) Second, it is necessary to manage the risks of natural hazards, particularly flooding and soil stability.

9.2 The evidence of Michael Chapman for the Council shows that increased development has the potential to adversely affect rivers and streams, particularly in respect of water quality and scour of the downstream environment, and may affect the Council's ability to comply with the requirements of its comprehensive stormwater discharge consents.[56] Mr Chapman recommends that development of greater than 40% site coverage in the areas identified as part of the Stormwater Overlay should require resource consent as a restricted discretionary activity to enable an assessment of the potential effects

[56] Paragraphs 8.4 and 8.5 of the Statement of Evidence of Michael Chapman dated 27 March 2023.

on stormwater management, and to assess whether appropriate on-site measures can be taken to mitigate these effects.[57]

9.3 Mr Jaggard for Kāinga Ora has suggested that stormwater management and flood hazards can be adequately addressed by the existing rules in the District Plan, alongside the Stormwater Bylaw and the Building Code.[58] The evidence of Mr Coutts for the Council is that the existing provisions are insufficient to manage the potential effects of increased intensification for the following reasons:[59]

(a) The existing rules in the District Plan relating to flood risk, while proposed to be retained in PC26, are outdated and based on return periods which are no longer appropriate. It is likely that these provisions will be the subject of a separate plan change in the future.

(b) The Council's Stormwater Bylaw only assists from a monitoring and enforcement level to meet the requirements of the Council's comprehensive stormwater discharge consents at a macro level, rather than requiring specific outcomes to be achieved at a micro level.

(c) The Building Act 2004 provides only bare minimum requirements which are themselves due for reform to respond to climate change effectively.

9.4 The Stormwater Overlay provides an opportunity for the Council to assess the stormwater effects of development which exceeds a site coverage of 40% where development is proposed to be located within the 100-year ARI flood depth layer[60], and to ensure that appropriate

[57] Paragraphs 8.11 to 8.15 of the Statement of Evidence of Michael Chapman dated 27 March 2023.
[58] Section 10 of the Statement of Evidence of Philip Jaggard dated 6 April 2023 [check].
[59] Paragraphs 6.9 to 6.24 of the Rebuttal Statement of Evidence of Tony Coutts dated 20 April 2023.
[60] Paragraph 8.8 of the Statement of Evidence of Michael Chapman dated 27 March 2023.

on-site measures are adopted, where possible, to mitigate these effects.

10. NEW QUALIFYING MATTER – RIVER / GULLY OVERLAY

10.1 PC26 proposes a new River / Gully Proximity Qualifying Matter Overlay (River / Gully Overlay) which applies within 120m of the Waikato River, Karāpiro Stream, Mangapiko Stream, and Mangaohoi Stream. The River / Gully Overlay protects a range of matters of national importance including the natural character of rivers and streams, areas of significant indigenous vegetation and significant habitats of indigenous fauna, public access to rivers and streams, and Te Ture Whaimana.[61]

10.2 The evidence of Anna McElrea for the Council considers that intensification within the proximity of the rivers and streams has the potential for adverse effects on the waterways as well as the biodiversity values of these margins.[62] Ms McElrea recommends that development exceeding a building coverage of 40% is assessed as a restricted discretionary activity to enable consideration of the effects on these values. The River / Gully Proximity Overlay, alongside existing provisions of the District Plan, will provide for development which supports protection and restoration of biodiversity corridors and contribute to giving effect to Te Ture Whaimana.[63]

11. NEW QUALIFYING MATTER – SETBACK FROM SNAS, RESERVES

11.1 PC26 proposes new qualifying matters to preserve open spaces, significant indigenous vegetation and significant habitats of indigenous fauna (sections 6(b), (c) and s77i(f)). To protect these

[61] Sections 77I(a) and 77I(c) of the Act; Paragraph 6.13 of the Statement of Evidence of Anna McElrea dated 24 March 2023.
[62] Paragraph 6.9 of the Statement of Evidence of Anna McElrea dated 24 March 2023.
[63] Paragraph 6.24 of the Statement of Evidence of Anna McElrea dated 24 March 2023.

matters from the effects of intensification, PC26 proposes two additional setbacks:

(a) A 20m setback for sites adjoining SNAs[64]; and

(b) A 4m setback for sites adjoining a reserve.[65]

11.2 The evidence of Ms McElrea for the Council will show that these modifications of the MDRS are necessary to protect reserves and significant natural areas, both of which will become more significant to the urban environment as intensification increases and on-site green spaces are reduced.[66]

12. OTHER QUALIFYING MATTERS – CHARACTER CLUSTERS AND STREETS

12.1 Cambridge, Te Awamutu and Kihikihi all have a unique character which represents the history and growth of the towns and is highly valued by the communities of these towns.

12.2 The District Plan contains an existing framework for the identification of groups of dwellings as character clusters and of identified streets as character streets. As the character clusters and character streets are an "other matter" which makes higher density inappropriate in an area, the Council is required to carry out a site specific evaluation under section 77L of the Act.

12.3 The submission by Kāinga Ora stated that the Council had not carried out a site specific assessment meeting the requirements of section 77L of the Act. As a result, the Council engaged Carolyn Hill of Lifescapes to carry out a comprehensive site specific assessment of the character clusters and character streets within Cambridge, Te Awamutu and

[64] Rule 2A.4.2.6(f).
[65] Rule 2A.4.2.6(c).
[66] Paragraphs 6.27 to 6.40 of the Statement of Evidence of Anna McElrea dated 23 March 2023; paragraphs 3.6 to 3.10 of the Rebuttal Statement of Evidence of Anna McElrea dated 19 April 2023.

Kihikihi.[67] As a result of the Lifescapes report, a number of changes are proposed to the identified character clusters and character streets, as set out in the evidence of Ms Hill.[68]

12.4 As the Lifescapes report identified additional properties not previously forming part of identified character clusters, the Council carried out additional consultation with these landowners and requested directions from the Hearings Panel enabling[69]:

(a) Late submissions by 27 landowners to be accepted; and

(b) Two late further submissions to be accepted.

12.5 Ms Hill's rebuttal evidence addresses each of the late submissions and further submissions and as a result of these submissions has recommended the removal of a small number of properties from the character clusters.[70]

12.6 The evidence of Cameron Wallace and Michael Campbell for Kāinga Ora requests a number of specific changes to the character cluster provisions. These have been assessed by Ms Hill and her recommended changes are set out in the Rebuttal Statement of Evidence of Carolyn Hill dated 19 April 2023 and in the Addendum to the section 42A report.

12.7 The Council acknowledges that the inclusion of additional properties in the character clusters may fall outside the scope of PC26. In this respect the Council submits:

(a) In respect of the matters in section 80E of the Act: The character clusters have been included in PC26 as an "other matter that makes higher density, as provided for by the

[67] Lifescapes Report, Appendix D to the Section 42A report.
[68] Paragraphs 10.4 (character clusters) and 10.12 (character streets) of the Statement of Evidence of Carolyn Hill dated 24 March 2023.
[69] Direction #13.
[70] Paragraphs 2.7 to 2.9 of the Rebuttal Statement of Evidence of Carolyn Hill dated 19 April 2023.

MDRS, inappropriate in an area" which is a qualifying matter under s77I(j).

(b) In respect of the first limb of the *Clearwater* test: The public notice for PC26 included "updates the character cluster overlays to include new properties" and the section 32 report included an assessment of character dwellings in Cambridge, Te Awamutu and Kihikihi.

(c) In respect of the second limb of the *Clearwater* test: Any additional properties proposed to be included in the character clusters as a result of the Lifescapes report were sent a letter and invited to make a submission on PC26. In response, 27 additional submissions were received, and two further submissions.

12.8 Counsel has recently become aware of a decision of the Environment Court which was issued following Direction #13. The Environment Court issued its decision in *Waikanae Land Company Limited v Kapiti Coast District Council*[71] (the *Waikanae* decision) on 30 March 2023. This decision arose in the context of a resource consent application, but considered whether Kapiti Coast District Council's IPI (PC2) could list a new waahi tapu site. The Court determined that:

> [31] For the reasons we have endeavoured to articulate we find that the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A. Changing the status of activities which are permitted on the Site in the manner identified in para 55 of WLC's submissions goes well beyond just making the MDRS and relevant building height or density requirements less enabling as contemplated by s 77I. By including the Site in Schedule 9, PC2 "disenables" or removes the rights which WLC presently has under the District Plan to undertake various activities

[71] [2023] NZEnvC 056.

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 process.

12.9 Unlike the Kapiti Coast District Council in the *Waikanae* decision, the Council was required to carry out a site-specific assessment of its character clusters by section 77L of the Act. However, having carried out that assessment the decision in *Waikanae* appears to prevent the Council from extending the character clusters to include new properties. Those extensions will need to form part of a separate plan change under Schedule 1.

12.10 However, as acknowledged in the *Waikanae* decision, the Council can modify the additional development enabled by the MDRS by requiring construction of more than one dwelling to obtain consent as a restricted discretionary activity so that assessment of any effects on the character clusters can be assessed. The Council is currently assessing how this modification of the MDRS can be reflected in the character cluster provisions.

13. REQUESTS FOR NEW QUALIFYING MATTER

Rail Corridor

13.1 The District Plan requires acoustic insulation for noise sensitive activities within 40m of the rail corridor. However, as this rule does not modify the MDRS or limit development capacity, it was not required to be assessed as a qualifying matter.[72]

[72] Rule 2A.4.2.40 considered at paragraphs 9.14.24 to 9.14.31 of the section 42A report.

13.2 The submission by KiwiRail seeks to:[73]

(a) Apply a setback of 5m from the rail corridor;

(b) Extend the current acoustic insulation requirements from 40m to 100m; and

(c) Apply a new vibration rule for noise sensitive activities within 40m of the rail corridor.

13.3 The Council's section 42A report accepted that the safety and efficiency of the rail corridor is a valid qualifying matter, and invited KiwiRail to provide an evaluation of their proposed provisions against section 77J.

13.4 The Council's section 42A authors have considered the evidence of Michael Brown, Catherine Heppelthwaite and Stephen Chiles on behalf of KiwiRail. While there may be circumstances where a setback from the rail corridor may be required, it appears from the planning maps that there are very few residential properties directly adjoining the North Island Main Trunk Line as it passes through Te Awamutu. Instead, the rail corridor is bordered by roads, reserves, or the industrial zone. Accordingly the Addendum to the section 42A report does not support an additional setback.[74]

13.5 In respect of the request by KiwiRail for extended noise and vibration corridors, I submit that these provisions do not fall within the scope of PC26. With reference to the three questions regarding scope, I submit that:

(a) In respect of the matters in section 80E of the Act: The requested amendments do not fall within one of the mandatory or discretionary elements of section 80E. In particular, the provisions are not modifications of the density standards forming part of the MDRS, but instead impose

[73] Section 5 of the Statement of Evidence of Catherine Heppelthwaite dated 6 April 2023.
[74] Section 4.6 of the Addendum to the section 42A report.

additional restrictions on landowners within the vicinity of the rail corridor. These additional restrictions fall outside the scope of an IPI as confirmed in the *Waikanae* decision.

(b) In respect of the first limb of *Clearwater*: No changes to the acoustic insulation rules, and no vibration rules, were proposed as part of PC26. The section 32 report did not consider changes to the existing rules as they do not modify the density standards of the MDRS.

(c) In respect of the second limb of *Clearwater*: There is a real risk that landowners within 100m of the rail corridor would not have been aware that additional restrictions could be imposed on them as a result of PC26. These landowners have not had an opportunity to participate in the plan change process. Neither the Council nor other parties have had an opportunity to engage their own technical noise and vibration experts to review the technical information provided by KiwiRail.

13.6 If the Hearing Panel considers that amendments to the noise and vibration rules are within the scope of PC26, the Council submits that an opportunity should be provided for further consultation and assessment regarding the extent of noise and vibration corridors required in the specific circumstances applying in Te Awamutu.

Reverse sensitivity

13.7 A submission by Fonterra Limited requested a new Reverse Sensitivity Qualifying Matter to apply in the vicinity of its Te Awamutu and Hautapu Dairy Factories. The Council's section 42A report accepted reverse sensitivity as a valid qualifying matter under section 77I(j) and requested Fonterra to provide a site specific evaluation as required by sections 77J and 77L of the Act.

13.8 Fonterra has provided the requested evaluation in the evidence of Suzanne O'Rourke and Mark Chrisp. Having considered the evaluation, the Council's Addendum to the section 42A report supports the addition of a new Reverse Sensitivity Qualifying Matter Overlay.[75] The Overlay is proposed:

(a) To apply within the existing noise control boundary applying to the Te Awamutu Dairy Factory; and

(b) To allow two dwellings as a permitted activity, but to require a third dwelling to obtain resource consent as a restricted discretionary activity with the matters of discretion being limited to reverse sensitivity effects on the adjoining dairy factory.

14. EFFECT OF QUALIFYING MATTERS ON DEVELOPMENT CAPACITY

14.1 As noted in submissions at the Joint Opening Hearing, the Amendment Act does not include a purpose statement. Nor does the MDRS specify a target density or require the Hearing Panel to specifically consider the increase in development capacity enabled by a Council's IPI.

14.2 However, Policy 2 of the NPS-UD requires that:

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

14.3 Subpart 1 of the NPS-UD provides details for implementation of Policy 2 including:

> 3.2 Sufficient development capacity for housing
>
> (1) Every tier 1, 2, and 3 local authority must provide at least sufficient development capacity in its region or district to meet expected demand for housing:
>
> (a) in existing and new urban areas; and
>
> (b) for both standalone dwellings and attached dwellings; and
>
> (c) in the short term, medium term, and long term.

[75] Section 4.4 of the Addendum to the section 42A report.

(2) In order to be sufficient to meet expected demand for housing, the development capacity must be:
   (a) plan-enabled (see clause 3.4(1)); and
   (b) infrastructure-ready (see clause 3.4(3)); and
   (c) feasible and reasonably expected to be realised (see clause 3.26); and
   (d) for tier 1 and 2 local authorities only, meet the expected demand plus the appropriate competitiveness margin (see clause 3.22).

14.4 Clause 3.4 clarifies the meaning of plan-enabled and infrastructure ready. In particular, clause 3.4(2) provides that:

> For the purpose of subclause (1), land is zoned for housing or for business use (as applicable) only if the housing or business use is a permitted, controlled, or restricted discretionary activity on that land.

14.5 In addition, section 77J of the Act requires the territorial authority's evaluation report for proposed qualifying matters to assess the impact that limiting development capacity, building height or density (as relevant) will have on the provision of development capacity.

14.6 The Council has engaged Susan Fairgray of Market Economics to assess the additional development capacity enabled by the MDRS, and the effect on that capacity of the Council's proposed qualifying matters. When having regard to Ms Fairgray's assessment, it is relevant to keep in mind that under clause 3.4 of the NPS-UD land is zoned for housing if the housing is a permitted, controlled or restricted discretionary activity on that land. Ms Fairgray has taken a more conservative approach in her assessment and has assessed development capacity based on housing that is permitted in PC26.[76]

14.7 The 2021 Housing and Business Capacity Assessment (HBA) found that there was sufficient capacity within the District's main urban centres

[76] Consistent with the approach taken in the Housing and Business Capacity Assessment 2021.

to meet short and medium term demand, with a projected surplus in capacity in the long-term.[77]

14.8 Modelling carried out by Ms Fairgray for PC26 shows that under PC26 there is a plan enabled capacity for an additional 37,000 dwellings, nearly three times (2.83) the amount of capacity than that enabled under the current District Plan provisions.[78] The proposed qualifying matters reduce that total by 38% with the largest effect a result of the Infrastructure Overlay.[79] The other qualifying matters, including the character clusters, have only a minor effect on development capacity.[80] However, Ms Fairgray has acknowledged that the Infrastructure Overlay can play a positive role from an economic perspective, by directing development to more appropriate areas for intensification, such as around centres.[81]

15. SPECIFIC REQUESTS

15.1 The following submissions do not fall within any of the sections of these legal submissions relating to mandatory or discretionary elements of an IPI. I submit that these submissions are out of scope of PC26.

15.2 The Retirement Villages Association and Ryman Limited (RVA/Ryman) have requested specific activity rules relating to retirement villages and the Department of Corrections has requested specific activity rules for community corrections facilities. I submit that these submissions are out of scope of PC26 for the following reasons:

[77] Paragraph 6.10 and Figure 1 of the Statement of Evidence of Susan Fairgray dated 24 March 2023.
[78] Paragraphs 8.6 and 8.9 of the Statement of Evidence of Susan Fairgray dated 24 March 2023.
[79] Paragraph 4.4 of the Statement of Evidence of Susan Fairgray dated 24 March 2023.
[80] Section 9 of the Statement of Evidence of Susan Fairgray dated 24 March 2023.
[81] Paragraph 10.8 of the Statement of Evidence of Susan Fairgray dated 24 March 2023; Paragraph 6.1 of the Rebuttal Statement of Evidence of Susan Fairgray dated 19 April 2023.

(a) In respect of the matters in section 80E of the Act: The inclusion of activity specific provisions and/or policies for activities such as retirement villages or community corrections facilities are not related matters which support or are consequential on the MDRS or Policy 3 of the NPSUD.

(b) In respect of the first limb of *Clearwater*: The public notice for PC26 and the section 32 report did not consider changes to the policy/rule framework for retirement villages or community corrections facilities.

(c) In respect of the second limb of *Clearwater*: There is a real risk that there may be affected parties directly affected by any change in the policy/rule framework for retirement villages or community corrections facilities who have not had an opportunity to participate in the PC26 process.

15.3 In the event that the Hearings Panel finds the submissions are within the scope of PC26, the Council's evidence responds to the substance of these submissions.

Retirement villages

15.4 RVA/Ryman seek an activity specific policy and rule framework for retirement villages.[82] In particular they seek:

(a) That retirement villages be recognised as a residential activity and are identified as a permitted activity;

(b) That the construction of retirement villages be provided for as a restricted discretionary activity with a tailored set of criteria; and

(c) That the rules be supported by a range of objectives and policies which specially refer to the needs of aged persons.

[82] Paragraphs 47 to 56 of the Statement of Evidence of Nicola Williams dated 6 April 2023.

15.5 The incorporation of the MDRS will be more enabling of retirement villages in the following ways:[83]

(a) The Medium Density Residential Zone provides for greater heights and densities of development than the current Residential Zone;

(b) These changes will enable the construction of a range of housing typologies not previously provided for within the District;[84]

(c) The objectives and policies provide for a range of housing typologies which already recognise the varying needs of the population without the need to single out any particular sector of the population.

15.6 The evidence of Mr Quickfall for the Council and the Council's section 42A authors is that it is appropriate for retirement villages to be assessed as a restricted discretionary activity as they often include a range of activities and potential effects which are different to standard residential units.[85] Mr Quickfall's evidence is that the restricted discretionary activity status has not proved to be a barrier to the development of retirement villages within Waipā District.

15.7 Accordingly I submit that, should the Hearings Panel consider that changes to retirement villages fall within the scope of PC26, the current provisions are sufficiently enabling of retirement villages while ensuring that potential adverse effects are appropriately managed.

[83] Reference to s42A report.
[84] Paragraph x of the Statement of Evidence of Susan Fairgray dated 24 March 2023.
[85] Paragraphs 8.1 to 8.5 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

Community corrections facilities

15.8 The Department of Corrections has requested that "community corrections facilities" be provided for as a permitted activity in the commercial zones in Waipā District.

15.9 The section 42A report considers that, while these facilities may be more appropriate in the Commercial Zone than in Residential Zones, the suitability of the activity may be location and scale dependent. The current provisions of the Commercial Zone will provide appropriate management of the potential effects of these activities.[86]

Deferred residential zones

15.10 The submission by RVA/Ryman sought to rezone the land that is currently zoned Deferred Residential to Medium Density Residential as part of PC26. The Council's Scope Submissions claimed that this submission was out of scope of PC26 for the reasons expressed in those submissions.

15.11 The Hearing Panel's Direction #12 determined that:[87]

> Of more concern to us is the question as to whether any (rather than all) of the deferred residential zones might merit being made live in order to better achieve the objective of the legislation. That is an evidential question. While that is a lesser relief than it appears RVA/R seek, it would fall within the compass of their submission. On that basis the Panel is reluctant to strike out the submission point. Having said that we note that it is incumbent upon RVA/R to produce a comprehensive s.32 analysis should they decide to pursue either the breadth of their relief or a more limited option. It should be evident from the above discussion that we have significant doubt as to whether the broader relief itself is within scope.

[86] Section 9.23 of the section 42A report.
[87] Paragraph 24 of Direction #12.

15.12 No evidence has been circulated by RVA/Ryman in support of this part of its submission.

16. EVIDENCE

16.1 Evidence for the Council will be given by:

(a) Tony Quickfall, Manager of District Plan and Growth, Waipā District Council;

(b) Tony Coutts, Principal Engineer for Growth, Waipā District Council;

(c) Chris Hardy, Technical Principal (water and wastewater), WSP Ltd;

(d) Michael Chapman, Director – Stormwater Engineer, Te Miro Water Ltd;

(e) Anna McElrea, Senior Consultant, Xyst Ltd;

(f) Carolyn Hill, Heritage Consultant, Lifescapes;

(g) Susan Fairgray, Associate Director, Market Economics Ltd;

(h) Council's section 42A authors: Damien McGahan, Principal, Aurecon NZ Ltd and Melissa Needham, Senior Planner, Aurecon NZ Ltd.

Signed this 21st day of April 2023

_____

W J Embling
Counsel for Waipā District Council