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

Dated 19 May 2023

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1. INTRODUCTION AND PRINCIPAL SUBMISSION

1.1 These Closing 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**) following the hearing before the Independent Hearing Panel (**Hearing Panel**) on 26 to 28 April 2023, and 2 May 2023. PC26 is an Intensification Planning Instrument (**IPI**) under section 80E of the Resource Management Act 1991 (**the Act**).

1.2 The Council's principal submission, as set out in detail in the Opening Legal Submissions of Counsel for Waipā District Council for the substantive hearing dated 21 April 2023 (**Opening Legal Submissions**), is that PC26 complies with the provisions of sections 77G and 77N of the Act for the following reasons:

(a) PC26 provides building heights and densities of urban form within and adjacent to the town centres of Cambridge, Te Awamutu and Leamington which are commensurate with the level of commercial activity and community services, and therefore gives effect to Policy 3(d) of the National Policy Statement on Urban Development 2020 (**NPS-UD**).

(b) PC26 incorporates the Medium Density Residential Standards (**MDRS**) into the relevant residential zones by the creation of the Medium Density Residential Zone in Cambridge, Te Awamutu and Kihikihi.

(c) PC26 retains existing rules in the Operative Waipā District Plan (**District Plan**) where these are necessary to accommodate one or more of the qualifying matters in subsections 77I(a) to (i) of the Act. These existing rules include rules relating to nationally significant infrastructure, a setback from the Te Awa Cycleway, protection of historic heritage and natural hazards. These rules

have been reviewed and amended to ensure that they are less enabling of development than the MDRS only to the extent necessary to accommodate the qualifying matter.

(d) PC26 proposes new rules which make the MDRS less enabling of development where these are necessary to accommodate one or more of the qualifying matters in subsections 77I(a) to (i) of the Act. These new rules include:

(i) An Infrastructure Constraint Qualifying Matter Overlay (**Infrastructure Overlay**) which requires resource consent as a restricted discretionary activity for development of three dwellings on a site where the Infrastructure Overlay applies.

(ii) A Stormwater Constraint Qualifying Matter Overlay (**Stormwater Overlay**) which requires resource consent as a restricted discretionary activity for development which exceeds a building coverage of 40% where the Stormwater Overlay applies.

(iii) A River / Gully Proximity Qualifying Matter Overlay (**River / Gully Overlay**) which requires resource consent as a restricted discretionary activity for development which exceeds a building coverage of 40% where the River / Gully Overlay applies.

(iv) A setback of 20m from Significant Natural Areas (**SNAs**) where two or more dwelling are proposed on a site.

(v) A setback of 4m from reserves where two or more dwellings are proposed on a site.

(e) PC26 proposes to retain existing character clusters and to introduce a new Character Cluster Qualifying Matter Overlay (**Character Cluster Overlay**) where higher density is inappropriate in an area as a result of the potential effects on

small coherent character clusters which represent themes from the past for Cambridge and Te Awamutu, in accordance with subsection 77I(j) of the Act.

1.3 These submissions will address the issues raised by submitters, and the Hearing Panel, with a particular focus on matters that arose during the hearing. Responses to the primary evidence of the witnesses for the submitters is also addressed in the Opening Legal Submissions and in Rebuttal and Supplementary Evidence presented on behalf of the Council.

2. SCOPE AND THE *WAIKANAE* DECISION

2.1 As matters of scope have permeated the hearing, I propose to address these up-front.

2.2 As a result of the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**), there are two features of the PC26 process which are different to the standard Schedule 1 process:

(a) First, sections 80E and 80F of the Act create a mandatory obligation on Tier 1 territorial authorities to incorporate the MDRS and give effect to Policy 3(d) of the NPS-UD.

(b) Second, section 80F and Part 6 of Schedule 1 create a new Intensification Streamlined Planning Process (**ISPP**) to enable IPIs to progress more quickly than would be the case with a standard Schedule 1 process. A significant feature of the ISPP is the absence of appeals to the Environment Court.

2.3 When considering issues of scope, I submit that these two features of the PC26 process pull in different directions. On the one hand, you have received legal submissions from submitters that Policy 3(d) of the NPS-UD is broad reaching and gives the Hearing Panel discretion to

make significant changes to PC26 regardless of whether these changes were included in the notified plan change or considered in the section 32 report.[1] These include matters such as:

(a) Increasing the height in the town centres of Cambridge and Te Awamutu from 14m to 24.5m as requested by Kāinga Ora;[2]

(b) Inserting a new management regime for retirement villages as requested by the Retirement Villages Association and Ryman Healthcare Limited (**RVA/Ryman**);

(c) Inserting new activity rules for community corrections facilities in the Commercial Zones as requested by the Department of Corrections; and

(d) Creating or extending noise and vibration requirements alongside the rail corridor as requested by KiwiRail.

2.4 On the other hand, section 80G provides that a Council must not use the IPI for any purpose other than the uses specified in section 80E. In my submission this limitation should be interpreted very carefully where the ISPP process removes public rights of participation.[3]

2.5 To date, the only judicial consideration of the Hearing Panel's scope under section 80E of the Act is by the Environment Court in *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga*[4] (**the *Waikanae* decision**). In this case, the Court recognised that:

> [23] As wide as territorial authorities' powers may seem to be in undertaking the IPI process it is apparent that they are not

[1] Section 5 (particularly paragraphs 5.7 and 5.11) of the Legal Submissions on behalf of Kāinga Ora dated 21 April 2023. Paragraphs 84 to 89 of the Legal Submissions on behalf of RVA/Ryman dated 21 April 2023.
[2] Paragraph 5.9 of the Legal Submissions on behalf of Kāinga Ora dated 21 April 2023.
[3] In *Waikanae Land Company Limited v Heritage New Zealand Pouhere Taonga* [2023] NZEnvC 056, the Court considered at paragraph 21 that: "*In undertaking that interpretation we consider that the draconian consequences of listing the site in the Schedule on WLC's existing development rights… when combined with the absence of any right of appeal on the Council's factual determination require there to be a very careful interpretation of the statutory provisions in light of their text and purpose*."
[4] [2023] NZEnvC 056.

> open ended. They are confined to the matters identified in a number of relevant provisions.

2.6 The Court considered the extent of the Council's powers in respect of qualifying matters under section 77I, and in respect of related provisions which support or are consequential on the MDRS or Policy 3 under section 80E(1)(b). 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 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.

2.7 In our submission, the *Waikanae* decision shows that:

(a) The mandatory requirements of section 80E are not open-ended or without limitation, and any proposed rules must be carefully considered to ascertain whether they fall within one of the subsections of section 80E.

(b) Rules that are proposed as qualifying matters under section 77I or as related provisions under section 80E(1)(b) will be ultra vires if they remove the rights that presently exist under the district plan.

Submission by RVA/Ryman

2.8 As set out in our Opening Legal Submissions, the Council submits that the submission by RVA/Ryman which seeks to introduce a new management regime for retirement villages does not fall within one of the subsections of section 80E and is therefore prevented, by section 80G(1)(b), from being included in PC26.[5]

2.9 While the Legal Submissions on behalf of RVA/Ryman refer the Hearing Panel to the purposes of the Amendment Act (as expressed in various cabinet papers and reports), and the objectives and policies of the NPS-UD, the submissions do not clearly identify the subsection of section 80E under which the submitters' relief is sought. From the submitters' legal submissions[6] the submitter appears to be claiming that Policy 3(d) of the NPS-UD goes beyond enabling heights and densities that are commensurate with the level of commercial activity and community services, and instead requires that "*any intensification enabled under Policy 3(c) or (d) requires specifically responding to the need to provide suitable and diverse housing choices and options for our ageing population at a level that is commensurate to the existing and anticipated demand in these areas*."[7]

2.10 The Council's response to Policy 3(d) of the NPS-UD is set out in section 3 of these legal submissions. The proposed amendments to the heights and densities proposed by PC26 within the Commercial and the Medium Density Residential Zones will:

(a) Provide for greater heights and densities of development across both zones which will significantly increase the development capacity in the District; and

[5] The Legal Submissions on behalf of Kāinga Ora, at paragraph 3.8(b), agree that the introduction of a district-wide regime for dealing with a matter, including changes to a definition that have broad application, would be out of scope.
[6] Particularly paragraphs 95 to 98.
[7] Paragraph 97 of the Legal Submissions on behalf of RVA/Ryman dated 21 April 2023.

(b) Provide for a range of housing typologies which will better respond to demand across a range of sectors, including the retirement sector.

2.11 It is the Council's submission that Policy 3(d) does not require specific management regimes for particular activities, or for particular sectors of the community, and that the submission by RVA/Ryman is therefore outside the scope of PC26.

2.12 In addition, for the reasons set out in paragraph 15.2 of the Opening Legal Submissions, the submission by RVA/Ryman which seeks to introduce a new management regime for retirement villages fails to meet the *Clearwater* tests.

Submission by Department of Corrections

2.13 As set out in our Opening Legal Submissions, the Council submits that the submission by the Department of Corrections which seeks to introduce a new definition and activity status for community corrections facilities does not fall within one of the subsections of section 80E and is therefore prevented, by section 80G(1)(b), from being included in PC26. No legal submissions have been made on behalf of the Department of Corrections to rebut Council's position.

2.14 In addition, for the reasons set out in paragraph 15.2 of the Opening Legal Submissions, the submission by the Department of Corrections fails to meet the *Clearwater* tests.

Submission by KiwiRail

2.15 The Council submits that the submissions by KiwiRail which seek a new setback from the rail corridor, as well as creating or extending the noise and vibration requirements alongside the rail corridor, do not fall within one of the subsections of section 80E and are therefore

prevented, by section 80G(1)(b), from being included in PC26.[8] In particular, the requested relief seeks to impose restrictions on landowners in the vicinity of the rail corridor that are more restrictive than currently apply in the District Plan and is therefore ultra vires for the reasons set out in the *Waikanae* decision.

2.16 The Further Legal Submissions on behalf of KiwiRail Holdings Limited in respect of scope, that were lodged following the hearing, claim that the extended noise and vibration corridors sought by KiwiRail are not frustrated by the *Waikanae* decision, as they do not directly amend the MDRS, but instead manage the intensification which flows from the MDRS.[9] The Council agrees that, while the proposed 5m setback is a qualifying matter as it modifies the MDRS, the noise and vibration corridor can only be categorised as related provisions, as they do not directly modify the MDRS. However, the *Waikanae* case specifically considered whether "related provisions which support or are consequential on the MDRS" under section 80E of the Act are also limited in scope, and concluded that:

> [30] We concur with that submission. Inclusion of the Site in Schedule 9 does not support the MDRS. It actively precludes operation of the MDRS on the Site. Nor do we consider that inclusion of the Site in the Schedule is consequential on the MDRS which sets out to impose more permissive standards relating to the nine defined matters.

2.17 I submit that the noise and acoustic corridors sought by KiwiRail are not related provisions which "support or are consequential" on the MDRS as they impose more restrictive standards than would apply under the District Plan and are therefore ultra vires.

[8] This submission is supported in Legal Submissions on behalf of Kāinga Ora at paragraph 3.8(b), (c) and 3.11.

[9] Paragraph 24 of the Further Legal Submissions on behalf of KiwiRail Holdings Limited in respect of scope dated 8 May 2023.

2.18 In addition, for the reasons set out in paragraph 13.5 of the Opening Legal Submissions, the submission by KiwiRail fails to meet the *Clearwater* tests.

Amendments to PC26

2.19 As a result of the *Waikanae* decision, amendments were made to some of the proposed qualifying matters in PC26 to ensure that they did not remove the rights that presently exist under the District Plan.[10]

2.20 Counsel understands that the *Waikanae* decision has been appealed to the High Court, and that a priority fixture has been requested. As it is possible that the High Court's decision will be issued before recommendations are made by the Hearing Panel on PC26, these submissions will address the position both with and without the *Waikanae* decision in the relevant parts of these submissions. However, the Council reserves its position in respect of whether further submissions are required regarding the application of the decision of the High Court to PC26, when the decision is released.

3. POLICY 3 OF THE NPS-UD

3.1 All parties are agreed that the Amendment Act requires all Tier 1 territorial authorities to give effect to Policy 3 of the NPS-UD, and that the only subsection of Policy 3 that is relevant within the Waipā District is Policy 3(d) which requires district plans to enable:

> 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.

3.2 While no time frame is provided in Policy 3, the Council submits that it is not appropriate to take a short-term approach to planning for urban

[10] Addendum 2 and 2A to the Section 42A report.

growth (such as the ten-year life of the District Plan) and that a more appropriate time frame is 30 years.[11] That a 30 year timeframe was appropriate was agreed in legal submissions on behalf of Kāinga Ora.[12]

3.3 The Council submits that PC26, as amended by its Alternative Proposal,[13] enables heights and densities of urban form that are commensurate with the level of commercial activity and community services in the town centres of Cambridge, Leamington and Te Awamutu for the next 30 years. In particular, the updated PC26 provisions provide for:

(a) An increased height limit of 18m (rather than the current 14m) in the town centres of Cambridge and Te Awamutu, which will enable the construction of four or five storey buildings within those centres.

(b) An increased height limit of 16m (rather than the current 14m) in the town centre of Leamington, which will enable the construction of four storey buildings while recognising that the Leamington centre fulfils a subordinate role to the Cambridge town centre.

(c) A density of three dwellings per site immediately surrounding the Cambridge Commercial Zone which gives effect to the objectives and policies of the NPS-UD which seek to promote a compact urban form and which will enable the Council to plan for future infrastructure upgrades.

3.4 The Council submits that the updated PC26 provisions are consistent with the medium density that is proposed for Cambridge and Te Awamutu within the Future Proof Strategy 2022 (**Future Proof Strategy**). In particular, the Future Proof Strategy:

[11] Paragraph 3.6 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.
[12] Questions of Mr Allan on behalf of Kāinga Ora, Day 2 of the Hearing (Hearing Recording Day 2, Session 1 at 1:30).
[13] Section 5 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

(a) Identifies Cambridge and Te Awamutu as Tier 3 urban environments.[14]

(b) Contains residential density targets of 25-35 dwellings per hectare in defined intensification areas of Cambridge and Te Awamutu, and 20-35 in greenfield areas.[15]

(c) Recognises that Cambridge and Te Awamutu may become metropolitan centres in the long term (30 years plus) but identifies a number of significant pre-conditions that would need to occur for a centre to transition to a metro centre.[16]

3.5 While the Future Proof Strategy is a non-statutory document, we submit that it is a relevant consideration and the weight to be given to it is increased as a result of:

(a) Its preparation by the Future Proof Partnership which is made up of representatives of the local authorities in the Waikato Region, as well as representatives of Central Government (the Ministry of Housing and Urban Development; Ministry for the Environment; Kāinga Ora);[17]

(b) A public consultation, submission and hearing process using the special consultative procedure under the Local Government Act 2002;[18]

(c) Following the consultation and hearing process, the final Future Proof Strategy was unanimously adopted by the Future Proof Partnership, and by the partner Councils;

[14] Table 6 of the Future Proof Strategy; paragraph 3.9 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.
[15] Table 6 of the Future Proof Strategy; Paragraph 3.9 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023..
[16] Table 1 and accompanying text of the Future Proof Strategy; Paragraphs 3.3 and 3.4 (Figures 1 and 2) to the Rebuttal evidence of Mr Quickfall dated 19 April 2023.
[17] Paragraph 24 of the Statement of Evidence of Dr Mark Davey dated 20 December 2022.
[18] Paragraph 29 of the Statement of Evidence of Dr Mark Davey dated 20 December 2022.

(d) The Future Proof Strategy forms part of the Future Development Strategy required under clauses 3.12 to 3.18 of the NPS-UD.[19]

3.6 In addition, in October 2022, the key provisions of Future Proof (including the residential density targets) were notified as part of Change 1 to the Waikato Regional Policy Statement.[20]

3.7 The submissions and evidence for Kāinga Ora seek:

(a) an increase in the height limit in the town centres of Cambridge and Te Awamutu to 24.5m;

(b) the creation of a High Density Residential Zone around the Cambridge Commercial Zone which enables a density of three dwellings with a height limit of 22m; and

(c) the removal of the Infrastructure Overlay to provide a density of three dwellings per site within the Medium Density Residential Zone (including both the existing urban area and greenfields).

3.8 The Council submits that these heights and densities do not reflect levels which can be considered to be commensurate within the next 30 years and represent a spatial application of development capacity so far in excess of demand that it has the potential to undermine the well-functioning urban environment that is the objective of the NPS-UD. In particular:

(a) The evidence of Ms Fairgray is that any provision for higher density development surrounding the centres needs to be

[19] Questions of Mr Quickfall, Day 1 of the Hearing (Hearing Recording, Day 1, Session 2 at 0:47).

[20] While Change 1 to the Waikato Regional Policy Statement is at an early stage of the Schedule 1 process, it deserves substantial weight as it reflects the Future Proof Strategy which has been developed through a consultation process (as set out in Paragraph 3.5): *Mapara Valley Preservation Society Inc v Taupo District Council* A083/07 at paragraph [49].

appropriately scaled to market demand, both in terms of the amount of capacity and its spatial extent.[21]

(b) The evidence of both Ms Fairgray and Mr Osborne is that there is a very small demand (in the order of 1 to 2%) for high density dwellings, and that most will occur as medium density dwellings such as townhouses and terraced housing.[22]

(c) The provision of development capacity to the extent proposed by Kāinga Ora is too large within the context of the local market and the level of long-term projected demand for higher density dwellings.[23]

(d) The spatial extent of capacity proposed by Kāinga Ora may undermine intensification within the centres and could result in isolated developments in outer areas that do not function together with the centre and are inconsistent with the surrounding suburban area.[24]

3.9 Kāinga Ora has not provided any evidence in support of the proposed height of 24.5m in the town centres, other than a six-storey development having a greater economic profit margin. The Council submits that its proposed height limit of 18m in the town centres of Cambridge and Te Awamutu will increase the commercial feasibility of higher density development while ensuring that heights and densities are commensurate with the role of the town centres over the next 30 years.

[21] Paragraphs 1.11 and 1.12 of the Summary Statement of Susan Fairgray dated 26 April 2023; Paragraphs 2.9 and 2.10 of the Rebuttal Statement of Evidence of Susan Fairgray dated 19 April 2023.
[22] Paragraph 2.10 of the Rebuttal Statement of Evidence of Susan Fairgray; Table 3 of the Statement of Evidence of Philip Osborne dated 6 April 2023.
[23] Paragraph 1.13 of the Summary Statement of Susan Fairgray dated 26 April 2023.
[24] Paragraph 1.12 of the Summary Statement of Susan Fairgray dated 26 April 2023.

4. MDRS

4.1 Section 77G of the Act requires the Council to incorporate the MDRS into its relevant residential zones. While there have been some amendments to matters of detail during the evidence exchange and hearing process, there has been no significant challenge to the Council's identification of its relevant residential zones, or to the incorporation of Schedule 3A into the new Medium Density Residential Zone.

4.2 The evidence of Ms Fairgray is that enabling three dwellings per site across the Medium Density Residential Zone would increase the development capacity within Cambridge, Te Awamutu and Kihikihi by 4.5 times (or 450%) of the existing level of development.[25]

4.3 Both the Amendment Act and the NPS-UD recognise, by making provision for qualifying matters, that there may be locations within relevant residential zones where the MDRS should be modified to protect matters of national significance or site-specific matters which make development to the level enabled by the MDRS inappropriate.[26] PC26 proposes a number of modifications of the MDRS which are necessary to accommodate these qualifying matters and these are addressed in the following sections of these submissions.

4.4 The Council's principal submission is that the rules that are proposed to accommodate qualifying matters only do so to the extent necessary to accommodate the qualifying matter. In particular, the rules do not prevent the additional development enabled by the MDRS; instead the rules identify those areas of Cambridge, Te Awamutu and Kihikihi where more intensive development could have significant adverse effects that need to be carefully managed as part of a restricted

[25] Paragraph 1.2 and Table A of the Summary Statement of Susan Fairgray dated 26 April 2023.
[26] This "element of flexibility" is recognised in paragraph 13 of the *Waikanae* decision.

discretionary activity consent application. In each case, the matters of discretion have been carefully tailored to the specific effect of concern in that location. As submitted in our Legal Submissions for the Joint Opening Hearing, the application of the MDRS across Waipā's towns without the use of qualifying matters, would not achieve the purpose of the Act, or recognise and provide for the matters of national importance in section 6 of the Act.[27]

4.5 The evidence of Susan Fairgray has considered the effect of the proposed qualifying matters on development capacity. Her evidence is that most of the qualifying matters, including the character clusters, have a very small effect on development capacity. While the Infrastructure Overlay reduces the amount of development capacity by 37%, the removal of the Infrastructure Overlay around the Cambridge town centre encourages more intensive development in the most efficient location.[28]

5. INFRASTRUCTURE OVERLAY

5.1 I submit that the Council's evidence shows that the level of development that is enabled by the MDRS cannot be accommodated by the existing water and wastewater infrastructure and will lead to adverse effects on the rivers and streams, which will fail to give effect to Te Ture Whaimana o Te Awa o Waikato (**Te Ture Whaimana**). In particular:

(a) The evidence of Ms Fairgray is that implementation of the MDRS across the whole of the Medium Density Residential

[27] Paragraph 8.2 of the Legal Submissions for the Joint Opening Hearing dated 10 February 2023.

[28] Paragraph 1.3 (and Table A) and paragraph 1.8 of the Summary Statement of Susan Fairgray dated 26 April 2023; Paragraph 3.7 of the Rebuttal Statement of Evidence of Susan Fairgray dated 19 April 2023.

Zone will enable an additional development capacity of 4.5 times (or 450%) of the existing level of development.[29]

(b) The evidence of Mr Coutts is that the Council's existing Infrastructure Strategy and Long Term Plan provide for infrastructure upgrades designed to support one dwelling per site in the existing urban areas, as well as the new growth cells which were recently rezoned from Deferred Residential to a live Residential Zone by Plan Change 13. Preliminary estimates suggest that the infrastructure required to support the additional development capacity enabled by the MDRS would cost in the order of $600m above existing commitments, which is beyond the reach of the Council.[30]

(c) The evidence of Mr Coutts and Mr Hardy is that enabling development without the required upgrades to infrastructure would result in health and cultural effects, and ecological effects on the rivers and streams.[31]

(d) The evidence of Mr Quickfall and Mr Williams is that these potential adverse effects are inconsistent with the objectives of Te Ture Whaimana.[32]

5.2 The Council submits that it can only avoid these adverse effects, and give effect to Te Ture Whaimana, by the provision of infrastructure in an integrated, forward-planned manner which involves:

(a) Focusing infrastructure investment on areas that best achieve the objectives of the NPS-UD and which will, over time, provide for more efficient use of three waters and roading infrastructure.

[29] Paragraph 1.1 and Table A of the Summary Statement of Susan Fairgray dated 26 April 2023.
[30] Paragraph 6.5 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.
[31] Paragraphs 5.14 to 5.16 and 5.22 of the Statement of Evidence of Tony Coutts dated 24 March 2023; Paragraph 6.8 of the Statement of Evidence of Chris Hardy dated 24 March 2023.
[32] 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.

(b) Planning for two dwellings per site across the wider residential zone (including greenfields), with infrastructure investment planned to achieve this.

(c) Requiring development which exceeds two dwellings per site to provide an infrastructure capacity assessment to satisfy the Council that there is sufficient capacity in that location, that local upgrades can be provided, or that on-site measures can be taken to mitigate demand.

5.3 The evidence for Kāinga Ora suggested that the Council can respond to development in a "reactive" way by providing for infrastructure in response to demand. The evidence for Cogswell Surveys appeared to suggest that the Council could provide infrastructure in between consent being approved and development taking place.[33] I submit that neither of these approaches represent the integrated management of the effects of use and development and associated natural and physical resources as required by section 31 of the Act. These approaches would potentially result in local upgrades which are "tacked on" to existing systems, without providing the core infrastructure upgrades which are needed to support the level of intensification which is planned in the long term.

5.4 I submit that Kāinga Ora's evidence proceeds from assumptions that the amount of growth will not change and that a change in the location of that growth will not alter the effects on the water and wastewater networks.[34] I submit that these assumptions are not correct in the Waipā context as:

(a) Cambridge has experienced growth exceeding predicted demand for a number of years; Kāinga Ora's own evidence is that it has a waitlist for 100 dwellings in the Waipā District.[35]

[33] Paragraph 5 of the Summary Statement of Rebecca Steenstra dated 28 April 2023.
[34] Paragraph 6.3(b) of the Legal Submissions on behalf of Kāinga Ora dated 21 April 2023.
[35] Evidence of Gurvinderpal Singh, Day 2 of Hearing (Hearing Record, Day 2, Session 2 at 0:04).

(b) A substantial increase in the proportion of infill or brownfield development will have significant effects on the infrastructure in the existing urban areas, as 90% of development has occurred in greenfields areas in recent years. Infrastructure can be more easily designed, constructed and funded in greenfields areas. [36]

5.5 I submit that the Infrastructure Overlay does not impose onerous obligations on developers and only modifies the MDRS to the extent necessary to accommodate the qualifying matter, for the following reasons:

(a) The Infrastructure Overlay requires a restricted discretionary activity consent application to be made where three dwellings are proposed on a site. The sole focus of the application is the provision of an Infrastructure Capacity Assessment and the rules, matters of discretion and assessment criteria have been carefully drafted to reflect this focus.

(b) The evidence of Mr Coutts for the Council is that, while the District Plan identifies the purpose and parameters of the Infrastructure Capacity Assessment, the Council will also produce practice guidelines to assist applicants.[37]

(c) The Council envisions a collaborative process between developers and the Council to ensure that development occurs alongside appropriate infrastructure upgrades, so that potential adverse effects are avoided.[38]

5.6 The submission by TA Properties Limited requests an exemption from the Infrastructure Overlay for greenfield subdivisions. As stated by Mr Coutts in his Supplementary Evidence, this exemption is not supported as the water and wastewater infrastructure for the growth cells has

[36] Paragraph 5.30 of the Statement of Evidence of Tony Coutts dated 24 March 2023.
[37] Paragraph 4 of the Supplementary Statement of Evidence of Tony Coutts dated 2 May 2023.
[38] Paragraph 4 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.

been planned based on a density of 12-15 dwellings per hectare. An increase in density would not only require additional infrastructure within the growth cell (which could be addressed by conditions of the subdivision consent), but also downstream of the growth cell as the existing infrastructure will not be adequately sized for the increased density.[39] Accordingly, it is necessary for the Infrastructure Overlay to apply to greenfields areas.

6. STORMWATER OVERLAY

6.1 PC26 proposes to apply a Stormwater Overlay to areas within the Medium Density Residential Zone where development to the density permitted by the MDRS would be affected by overland flows, or would potentially exacerbate upstream or downstream stormwater effects. The Council submits that the rules are necessary to accommodate two qualifying matters:

(a) First, the rules are necessary to manage the risks of natural hazards, particularly flood risk, on sites that fall within the 1 in 100 year flood layer; and

(b) Second, by reducing the stormwater effects, the rules contribute to giving effect to Te Ture Whaimana.

6.2 The evidence for Kāinga Ora suggests that these matters are adequately addressed by current provisions in the District Plan, the Council's Stormwater Bylaw and the Building Act 2004.[40] The Council's principal submission is that the current collection of provisions have, at times, proven insufficient to manage the risk of natural hazards for the existing level of development (one dwelling per site). The Council's evidence is that the current rules have not been

[39] Paragraphs 15 to 18 of the Supplementary Statement of Evidence of Tony Coutts dated 2 May 2023.
[40] Paragraph 11.16 of the Statement of Evidence of Philip Jaggard dated 6 April 2023.

designed to manage the risk of natural hazards arising from the additional development capacity enabled by the MDRS as permitted activities, and that the proposed Stormwater Overlay is necessary to manage this risk.

6.3 In particular, the evidence of Mr Coutts regarding the current provisions is that:

(a) The provisions in the District Plan which seek to manage flood risk are outdated, and based on return periods which are no longer appropriate.[41]

(b) The Council's Stormwater Bylaw has a limited role in assisting the Council to achieve the water quality parameters required by its Comprehensive Stormwater Discharge Permits.[42]

(c) The Building Act 2004 provides only bare minimum requirements which are themselves due for reform to respond to climate change effectively.[43]

6.4 Like many local authorities, the Council has recognised the need to prepare and notify a plan change regarding natural hazards to respond to the additional development capacity enabled by the MDRS, as well as the need to respond to climate change. This separate plan change will address a number of issues that have been identified in the course of the PC26 hearing including:

(a) Whether high risk flood zones or overland flow paths should be mapped within the district plan or outside of the District Plan; and

(b) Whether the appropriate return period for flood mapping should now be updated.

[41] Paragraphs 6.16 to 6.24 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.
[42] Paragraph 6.15 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.
[43] Paragraph 6.11 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023.

6.5 In particular, Mr Coutts has agreed that the definition of "secondary flow path" in the District Plan should be amended to refer to a 1 in a 100-year return period rainfall event (rather than a 1 in 50-year return period rain event). [44] While this change could be considered to be a related provision that is consequential on the MDRS, it may be prevented by the *Waikanae* decision as it is more restrictive than the current District Plan.[45] For this reason, the Council proposes to update the definition as part of the separate plan change referred to in paragraph 6.4.

6.6 In the interim, it is submitted that the Stormwater Overlay rules modify the MDRS only to the extent necessary to accommodate the qualifying matters. In particular:

(a) The Stormwater Overlay only applies to sites that fall within the 1 in 100 year flood layer, using the most up to date information available to Council.

(b) The Stormwater Overlay requires an application for a restricted discretionary activity where building coverage exceeds 40%.

(c) The matters of discretion and the assessment criteria are restricted to the assessment of the effects of the development on stormwater.

6.7 The limited effect of the Stormwater Overlay exactly reflects the request by Cogswell Surveys that:[46]

> I comment that if the site is outside of a high-risk flood area, are not obstructing an overland flow path and are not within the modelled 100-year flood event, then the buildings are not filling in a flood plain and can therefore tolerate a higher building coverage of 50% as per the MDRS provisions.

[44] Paragraphs 6.20 and 6.21 of the Rebuttal Statement of Evidence of Tony Coutts dated 19 April 2023

[45] . The Council may wish to make further submissions on this issue, if the *Waikanae* decision is overturned or clarified by the High Court.

[46] Paragraph 7 (first dash) of the Summary Statement of Rebecca Steenstra dated 28 April 2023.

6.8 The Commissioners have questioned whether the appropriate modification of the MDRS is to amend the building coverage limit from 50% to 40% within the Stormwater Overlay, and requested an example of the difference in stormwater effects. The Supplementary Evidence of Mr Chapman shows a measurable difference in stormwater effects as a result of the increase in building coverage from 40% to 50%.[47] However, in practice, the building coverage arising from low density development of one dwelling per site is likely to be much lower than 40% (and in the example modelled by Mr Chapman was 25%).[48] Therefore the increase in building coverage enabled by the MDRS could be significantly higher than 10%. However, the "trigger" of 40% building coverage has been adopted by the Council as it reflects the current building coverage rule in the Residential Zone and is therefore not more restrictive than the current District Plan (and is therefore consistent with the *Waikanae* decision).

6.9 Mr Allan for Kāinga Ora has submitted that the redevelopment of sites to a multi-storey configuration may provide an opportunity to reduce the building coverage[49] – if this is the case either the 40% building coverage won't be infringed and no consent will be required, or a restricted discretionary consent will be able to be obtained as a result of proposed on-site measures. The 40% building coverage control will also play a role in encouraging developers to reduce their building coverage, as well as provide the Council with an opportunity to record any proposed on-site measures as conditions of consent, to ensure that these are maintained in the long term.

[47] Supplementary Statement of Evidence of Michael Chapman dated 2 May 2023.
[48] Paragraph 13 of the Supplementary Statement of Evidence of Michael Chapman dated 2 May 2023.
[49] Paragraph 6.3(b)(iii) of the Legal Submissions on behalf of Kāinga Ora dated 21 April 2023.

6.10 The submission by TA Properties Limited requests an exemption from the Stormwater Overlay for greenfields sites. The Supplementary Evidence of Mr Coutts recognises that stringent requirements apply in respect of stormwater discharge consents required by the Regional Council, which can be recorded as consent notices on the titles. In these circumstances, an exemption from the Stormwater Overlay may be appropriate.[50]

6.11 While an exemption in the limited circumstances described by Mr Coutts is supported in principle, the Council submits that it may be difficult to accurately provide such an exemption, and it would be more efficient and effective to require a restricted discretionary activity application, as currently proposed. This is because:

(a) The Regional Council discharge permit may be obtained many years in advance of the development of individual sites within the growth cell; this means that any rule will not apply to "greenfields" subdivision, but will apply to any site within the Medium Density Residential Zone.

(b) While the Regional Council discharge permit may be designed to accommodate 50% building coverage (rather than 40%), this factor may not be recorded on the relevant titles in a way that is meaningful when the site is developed, potentially many years later. In particular, the use of consent notices is a tool only available in respect of a subdivision consent.

(c) Given the potential for a long delay between the Regional Council discharge permit and the development of a site, it may be necessary to include a "long-stop" on the proposed rule, to ensure that Council is not required to consider discharge permits that were obtained many years, or decades, previously. In these circumstances the stormwater effects, or

[50] Paragraph 19 of the Supplementary Statement of Evidence of Tony Coutts dated 2 May 2023.

the current approach to the management of stormwater, may have changed.

6.12 For these reasons, the Council considers that no exemption from the Stormwater Overlay should be provided for greenfields sites. However, should the Hearing Panel be minded to include such an exemption, the Council's section 42A authors have proposed the following amendment to Rule 2A.4.2.8:

> **2A.4.2.8**
> On sites located within the Stormwater Qualifying Matter Overlay, the maximum building coverage must not exceed 40% of the net site area except for sites that meet the following criteria:
> (i) Where a subdivision consent has been approved by Council that includes stormwater management designed for 50% building coverage over the entire site or on specified lots on the site; and
> (ii) Any regional discharge consents that are required have been approved and consent notices are in place, where applicable.
> Sites that meet the criteria outlined in 2A.4.2.8 (i) and (ii) will have maximum building coverage as specified under Rule 2A.4.2.7 which will apply either over the entire site or on specified lots on the site.

7. RIVERS, STREAMS, SIGNIFICANT NATURAL AREAS AND RESERVES

7.1 The significant values of the Waipā District's rivers, streams, significant natural areas and reserves are recognised in the objectives and policies of the District Plan and are protected by a range of rules which are proposed to be retained in PC26. These rules are necessary to accommodate a number of qualifying matters including the protection and enhancement of the natural character of Waipā's waterways, significant indigenous vegetation and significant habitats of indigenous fauna, as well as enabling public access to rivers and streams and giving effect to Te Ture Whaimana.[51]

[51] Paragraphs 2.1 and 2.2 of the Supplementary Statement of Evidence of Anna McElrea dated 2 May 2023.

7.2 However, these provisions were designed in the context of low density residential development. The significant increase in development capacity will:

(a) Result in medium density development in close proximity to the District's waterways, significant natural areas and reserves with the potential for adverse effects on the values of these environments; and

(b) As housing becomes more intensive and housing typologies change, result in a loss of trees, vegetation and open space on private land, and an increase in demand for public green spaces.[52]

7.3 In addition, the significance of Waipā's biodiversity corridors has increased as a result of:

(a) The recognition of these corridors not only for significant indigenous vegetation, but as the habitat of significant indigenous fauna, such as the pekapeka tou roa;[53]

(b) The objectives of Te Ture Whaimana which go beyond a requirement to avoid, remedy or mitigate adverse effects, to achieving betterment of the river and its catchments;[54] and

(c) The anticipated obligations in the draft National Policy Statement for Indigenous Biodiversity.

7.4 PC26 therefore proposes to manage residential intensification in close proximity to rivers, streams, SNAs and reserves, to ensure that development is designed and located in a manner that reduces effects on these public green spaces, and retains the values of the spaces for future generations.

[52] Paragraphs 6.9, 6.27 and 6.28 of the Statement of Evidence of Anna McElrea dated 24 March 2023.
[53] Recently recognised by the Environment Court in *Weston Lea v Hamilton City Council* [2020] NZEnvC 189 at paragraphs [34] and [38] to [42].
[54] Paragraph 80 of the Statement of Evidence of Julian Williams dated 20 December 2022.

River / Gully Overlay

7.5 The River / Gully Overlay enables low density residential development within close proximity to the river, by retaining a 40% building coverage within the Overlay. Requiring a restricted discretionary activity consent for development above 40% building coverage will enable assessment of the design and location of the development to mitigate the potential effects on the significant values of the river margins.

7.6 As indicated in the evidence of Anna McElrea, there is a degree of pragmatism involved in the identification of the extent of the Overlay, at 120m. However, the extent has been determined taking into account the following factors:

(a) The District Plan identifies biodiversity corridors within 750m of the Waikato River, 500m of the Mangapiko and Karapiro Streams, and 250m of the Mangaohoi Stream;

(b) Building within 23m of the rivers and streams in Cambridge and Te Awamutu is a non-complying activity.[55]

7.7 While Ms McElrea would support a greater extent than 120m, particularly having regard to the objectives of Te Ture Whaimana, the Council submits that the proposed 120m Overlay represents an appropriate extent, having regard to the requirement that modifications of the MDRS be limited to the extent necessary to accommodate the qualifying matters.

SNA setback

7.8 PC26 also proposes a setback of 20m from SNAs. This rule would require a restricted discretionary activity consent for development of

[55] Paragraphs 2.12 and 2.13 of the Supplementary Statement of Evidence of Anna McElrea dated 2 May 2023.

two or more dwellings in close proximity to an SNA. The purpose of the rule is not to prevent development but to:

(a) Enable the Council to assess the potential effects of development on the values of the SNA; and

(b) To encourage landowners to design and locate residential intensification in a way that mitigates effects on the values of the SNA. [56]

7.9 As noted by the Hearing Panel, there may be some sites which are affected by the River / Gully Overlay as well as the setback from SNAs. However, the Overlay is directed at the density of development, and seeks to manage the effects of more intensive development. The SNA setback focuses on the location of development in close proximity to SNAs (which only occur in Cambridge). Without the SNA setback, these sites could be developed by locating the 40% building coverage within one metre of the SNA (or 50% without the Overlay).

Reserve setback

7.10 As discussed in the evidence of Ms McElrea, medium density development is often located close to public reserves and can be designed to "borrow" amenity values from the adjoining reserve rather than having to provide open space and landscaping on-site. However, as residential intensification increases, public reserves and open spaces will become more significant to urban amenity. PC26 proposes a 4m setback from reserves which will:

(a) Enable the Council to assess the effects of residential activity in close proximity to public reserves and open spaces; the potential effects and the appropriate management of these will vary depending on the type and purpose of the reserve;

[56] Paragraphs 3.1 to 3.4 of the Supplementary Statement of Evidence of Anna McElrea dated 2 May 2023.

(b) Encourage landowners to design and locate residential activities in a way that mitigates effects on the adjoining reserve.[57]

7.11 The evidence on behalf of Kāinga Ora suggests that a 4m reserve setback would be inconsistent with the principles of CPTED. The Council submits that the 4m setback is not inconsistent with the CPTED principles, and that rules relating to the orientation of dwellings, glazing, landscaping and fencing alongside reserves will ensure that an appropriate level of surveillance is achieved.[58]

Alternative submission

7.12 As discussed in paragraph 2.20, in the event that the *Waikanae* decision is overturned or clarified on appeal, the Council seeks that the proposed setback from SNAs and reserves apply to all development on a site, in the same way as the other setbacks in Rule 2A.4.2.6, for the reasons set out in the evidence of Ms McElrea.

8. CHARACTER CLUSTERS

8.1 The District Plan contains existing provisions which protect items of historic heritage within the meaning of section 6(f) of the Act. These items are scheduled individually in Appendix N1 of the District Plan, and are subject to specific rules in Section 22 of the District Plan. PC26 proposes to retain these rules as existing qualifying matters and there are no submissions seeking otherwise.

8.2 The District Plan also contains provisions which seek to manage development in areas of historically-derived significance, by identifying these as character clusters. The rules relating to character

[57] Paragraphs 3.6 to 3.10 of the Rebuttal Statement of Evidence of Anna McElrea dated 19 April 2023.
[58] Paragraph 6.37 of the Statement of Evidence of Anna McElrea dated 24 March 2023.

clusters are different to the rules relating to historic heritage in the following key ways:

(a) The rules have particular regard to sections 7(c) and 7(f) of the Act, the maintenance and enhancement of amenity values and the quality of the environment, rather than section 6(f).[59]

(b) The rules do not identify specific dwellings as having historic significance, but instead identify an area, or cluster, of dwellings as having an identified character; this means that within the cluster there will be a variety of dwellings which contribute, to varying degrees, to the identified character of the cluster.

(c) The purpose of the rules is not to prevent development of the sites, but to enable assessment of whether the proposed development complements the identified character of the cluster.

(d) Consequently, the rules provide for a range of activities as permitted activities, where they will not affect the cluster, such as where development occurs to the rear of sites.[60]

(e) Where development has the potential to have adverse effects on the cluster, a restricted discretionary activity consent is required to ensure, and to encourage, development to be designed in a way that complements the identified character of the cluster.[61]

8.3 As the matters in section 7(c) of the Act are not identified as qualifying matters in subsections 77I(a) to (i), the Council was required to carry out a site-specific assessment meeting the requirements of section 77L of the Act. The Council accepts that the PAUA review, prepared in a

[59] The difference between historic heritage and special character has been considered by the Courts in a number of cases. See for example paragraphs [64] to [69] of *Auckland Council v Dalal* [2022] NZDC 24249.
[60] Rules 2A.4.1.1(q) and (r).
[61] Rules 2A.4.1.3(d) and (dA).

short time frame to enable notification of PC26 by 20 August 2022, did not meet the requirements of section 77L and was essentially a "drive by" review of the existing character clusters.

8.4 However, in response to submissions by Kāinga Ora, the Council engaged Carolyn Hill to undertake a comprehensive site-specific review of the character clusters which included:

(a) Developing a methodology which is consistent with methodologies used elsewhere in New Zealand, with appropriate amendments to reflect the smaller scale of Waipā's towns; and

(b) Carrying out a physical inspection of the towns of Cambridge, Te Awamutu and Kihikihi to assess the dwellings against the methodology.

8.5 As a result of Ms Hill's report, the Council proposed to amend its character clusters to remove and add character clusters, as recommended in her report.

8.6 The Legal Submissions on behalf of Kāinga Ora accept that the Council has correctly recognised the distinction between heritage and character in PC26.[62] Mr Wallace on behalf of Kāinga Ora confirmed that he has no specific issue with the methodology.[63] The specific amendments requested by Mr Wallace to the criteria for character statements have been reviewed and, in many cases, accepted by Ms Hill.

8.7 The Council's preference, as confirmed in its section 42A report and Ms Hill's Statement of Evidence[64] is for the new character clusters to be subject to the same rules as existing character clusters, with the

[62] Paragraph 6.4 of the Legal Submission on behalf of Kāinga Ora dated 21 April 2023.
[63] Questions of Mr Wallace on Day 2 of Hearing (Hearing Record, Day 2, Session 3 at 0:09).
[64] Statement of Evidence of Carolyn Hill dated 24 March 2023.

amendments proposed by Ms Hill (including those matters recommended by Mr Wallace which have been accepted by Ms Hill). The advantage of this approach is that the character cluster provisions have been part of the District Plan since 2012, they are well known to the Waipā community and to the Council officers, and they have been "field tested" by being used in practice over that time. It is the Council's submission that the character cluster provisions modify the MDRS only to the extent necessary to accommodate the qualifying matter; in particular, they require a restricted discretionary assessment where proposed development has the potential to have adverse effects on the identified character of the cluster. The character statements, and the matters of discretion, have been carefully reviewed and amended by Ms Hill.

8.8 However, as addressed in our Opening Legal Submissions, and in Addendums 2 and 2A to the section 42A report, the Council accepts that the *Waikanae* decision currently prevents the Council from creating new character clusters as part of its IPI, as the character cluster rules are more restrictive than the rules which currently apply to those sites in the District Plan. As a result, the Council's alternative submission is that the Character Cluster Qualifying Matter Overlay is necessary to enable the Council to assess, by a restricted discretionary activity application, whether development of two or more dwellings will complement the identified character of the clusters.

8.9 While the Council has identified its intention to "regularise" the position in respect of character clusters in a standard Schedule 1 plan change in the future, I submit that it is important for the Character Cluster Qualifying Matter Overlay to be confirmed as part of PC26. This is because matters of character will not have immediate legal effect when notified, and it may be some years before the character clusters can be confirmed as operative. PC26 enables a significant

increase in intensification within Cambridge and Te Awamutu which will, over time, change the character of the towns. PC26 is the best opportunity to recognise and protect small, coherent clusters that represent themes from the past for Waipā towns.[65]

9. SUBMITTER QUALIFYING MATTERS

Regionally Significant Industry Qualifying Matter Overlay

9.2 The submissions and evidence for Fonterra requested a site-specific qualifying matter to manage reverse sensitivity effects on the Te Awamutu Dairy Factory. This qualifying matter is supported by the section 77J and 77L assessment in the evidence of Mr Chrisp and was accepted in the Addendum to the section 42A report. The Council submits that the proposed rules modify the MDRS only to the extent necessary to accommodate the qualifying matter for the following reasons:

(a) The rule applies only to the development of three or more dwellings on the sites within the existing noise control boundary[66];

(b) Amendments were made during the course of the hearing to ensure that the matters of discretion and assessment criteria for three dwellings are focussed on reverse sensitivity effects on the Dairy Factory.[67]

Rail corridor setback, noise and vibration controls

9.3 The submissions and evidence for KiwiRail seek to:

[65] Paragraph 11 of the Supplementary Statement of Evidence of Ms Hill dated 2 May 2023.
[66] By applying to three or more dwellings, the rule does not restrict existing development rights and is consistent with the *Waikanae* decision.
[67] Changes recorded in Addendum 3 to the section 42A report.

(a) Require a 5m setback along the rail corridor as a modification of the MDRS to address potential reverse sensitivity effects on national significant infrastructure; and

(b) Extend the existing rule requiring acoustic insulation from distance of 40m from the rail corridor, to a distance of 100m as a related provision which is consequential on the MDRS; and

(c) Apply a new vibration corridor for a distance of 40m of the rail corridor as a related provision which is consequential on the MDRS.

9.4 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 5m setback against section 77J.

9.5 However, the evidence that has been presented shows that the North Island Main Trunk Railway (NIMT) passes through Te Awamutu and does not directly adjoin any properties within the Medium Density Residential Zone.[68] Accordingly, the Council submits that no modification of the MDRS is required in this regard.

9.6 In any event, the *Waikanae* decision has clarified that PC26 cannot impose qualifying matters which are more restrictive than the existing provisions in the District Plan. As the District Plan currently requires a setback of 2m from internal site boundaries, the 5m setback proposed by KiwiRail would be more restrictive.[69]

[68] Section 4.6 of the Addendum to the section 42A report.

[69] Paragraph 2(c) of the Further legal submissions on behalf of KiwiRail suggest that the 5m setback is within scope as it aligns with the 7.5m setback to state highways, the 5m setback to the Te Awa Cycleway and the 4m setback to arterial roads. However all of these setbacks are existing rules in the District Plan and therefore are not rules which are more restrictive than the District Plan.

9.7 Section 2 of these submissions sets out Council's submission that the relief sought by KiwiRail in respect of noise and vibration requirements falls outside the scope of PC26.

9.8 However, in the event that the *Waikanae* decision is overturned or clarified on appeal, we submit that insufficient evidence has been provided by KiwiRail to support the imposition of additional building requirements on development within 100m of the NIMT. In particular:

(a) No modelling of the extent of corridor that is required in Te Awamutu has been carried out, and no account has been taken of the topography or the surrounding land use.

(b) KiwiRail referred to modelling that has been carried out for Whangārei District and Waikato Districts; in both cases this work relates to a full district plan review, rather than an IPI process.

(c) No cost/benefit analysis has been provided of the effect of the additional building requirements on landowners within the proposed corridors.

10. SPECIFIC REQUESTS

Corrections Facilities

10.2 For the reasons given in section 2 of these submissions, the Council submits that the relief sought by the Department of Corrections is not a matter which falls within section 80E of the Act and is therefore outside the scope of PC26. While the evidence of Sean Grace for the Department of Corrections refers to other district plans which make specific provision for community corrections facilities, we understand that none of those changes have been made through an IPI.

10.3 In any event, the Council submits that community corrections facilities are already appropriately provided for in the District Plan, for the following reasons:[70]

(a) The submitter's evidence is that community corrections facilities can vary significantly, from a probation office through to a more comprehensive "hub" providing both offices and training facilities.[71]

(b) Office activities are already permitted in the Commercial zones in the District Plan;[72]

(c) Where a wider range of activities is proposed, it is appropriate for a resource consent to be obtained to enable management of the potential effects of these activities;

(d) It is the submitter's evidence that only one facility is required in each town, and that the need for a further facility in Waipā District has not yet been determined.[73]

Retirement Villages

10.4 For the reasons given in section 2 of these submissions, the Council submits that the relief sought by RVA/Ryman is not a matter which falls within section 80E of the Act, and is therefore outside the scope of PC26.

10.5 The Legal Submissions for RVA/Ryman, while claiming that retirement villages fall within the definition of "residential activities", nevertheless acknowledge that there are some notable differences to other residential activities which justify a separate policy and rule framework.[74]

[70] It is also noted that the Department of Corrections, as a requiring authority, can choose to designate its sites.
[71] Paragraph 7.2 of the Statement of Evidence of Sean Grace dated 6 April 2023.
[72] Rule 6.4.1.0(f).
[73] Questions of Ms Millar, day 2 of the Hearing (Hearing Record, Day 2, session 3 at 1:18).
[74] Paragraph 54.2 of the Legal Submissions on behalf of RVA/Ryman dated 21 April 2023.

10.6 In respect of the definition of "retirement villages" in the National Planning Standards, the submitter acknowledged that neither the Council, nor the Hearing Panel, is obliged to amend the definition to reflect the National Planning Standards as part of PC26.[75] It is the Council's submission that PC26 does not provide sufficient scope for the definition to be amended as it applies across the whole of the District Plan, and it would be unnecessary and unworkable to adopt a different definition for the purposes of the particular zones the subject of PC26.

10.7 The Council agrees that a separate rule framework is appropriate given the differences between retirement villages and other residential activities. However, the Council submits that retirement villages are already appropriately provided for in the District Plan by the following rules:

(a) The definitions of "retirement village accommodation and associated care facilities" and "rest homes" in Part B – Definitions of the District Plan;

(b) Rule 2A.4.1.3(e) which specifically provides for retirement villages and rest homes as Restricted Discretionary Activities in the Medium Density Residential Zone; and

(c) The assessment criteria in Rule 21.1.2A.3.[76]

10.8 As noted in our Opening Legal Submissions, retirement villages will also obtain the benefit of the more permissive height and density standards enabled by the MDRS.[77]

10.9 While the submitter has suggested that the current provisions are "onerous"[78] the example provided to the Hearing Panel related to a

[75] Questions of Mr Hinchey on behalf of RVA/Ryman, Day 4 of the Hearing (Hearing Recording, Day 4, Session 1 at 1:11).
[76] Paragraph 8.2 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.
[77] Paragraph 15.5 of the Opening Legal Submissions.
[78] Paragraph 6 of the Legal Submissions on behalf of RVA/Ryman dated 21 April 2023.

non-complying application to establish a retirement village within a Deferred Residential Zone.[79]

10.10 The submitter has not requested any specific amendments to the current rules or assessment criteria for retirement villages or rest homes within the District Plan.

10.11 For completeness we record that the submitter confirmed, in questioning from the Hearing Panel, that it no longer seeks to rezone the Deferred Residential Zones as part of PC26.

11. UPDATED PC26 PROVISIONS

11.1 At the conclusion of the hearing on 2 May 2023, the Council's section 42A authors submitted an Addendum (3) to the section 42A report which identified a number of amendments to PC26 that had arisen during the hearing. The proposed amendments were set out in Appendix A to the Addendum.

11.2 The section 42A authors have now updated the PC26 provisions and a copy is attached as Appendix A to these submissions.

11.3 The updated PC26 provisions also include the following additional amendments:

(a) Proposed introduction, objectives and policies to better explain the purpose of the Infrastructure Overlay and the Stormwater Overlay, as suggested by the Hearing Panel;

(b) Amendment of new policy 2A.3.12.1 to replace "Support" with "Enable", as discussed at the hearing; and

(c) Proposed amendments to Rule 6.4.2.2 and new Rule 6.4.2.2A of the Commercial Zone to reflect the increased heights

[79] Paragraph 8.4 of the Rebuttal Statement of Evidence of Tony Quickfall dated 19 April 2023.

proposed for the town centres of Cambridge, Leamington and Te Awamutu.

11.4 Consideration was also given to whether specific clarification was required regarding whether a "secondary dwelling" is considered to be a second dwelling. However, it is considered that the definition of "dwelling" in the District Plan clearly provides that a dwelling includes a secondary dwelling, so that no further clarification is required.

11.5 The proposed amendments discussed in paragraphs 6.5 and 6.10 to 6.11 are not included in the updated PC26 provisions, for the reasons given in those paragraphs.

12. PROCEDURAL MATTERS

Hearings on PC26

12.2 To date, two hearings have been held on PC26:

(a) A Joint Opening Hearing was held on 15 to 17 February 2023; and

(b) A substantive hearing was held on 26 to 28 April and 2 May 2023.

12.3 A further hearing is to be held in respect of submissions relating to Financial Contributions. This hearing is to be held jointly with submissions on Plan Change 12 to the Hamilton City District Plan (**PC12**) between 4 and 22 September 2023. Timetabling directions have been issued by the Hearing Panel in Direction #9.

12.4 Following the further hearing on Financial Contributions, clause 99 of Schedule 1 to the Act requires the Hearing Panel to issue recommendations on PC26. While there is no specific timeframe for the issue of recommendations, the Minister has directed that decisions on PC26 be notified by 31 March 2024.

12.5 The Council acknowledges the benefits to the Hearing Panel of hearing submissions on PC12 (currently scheduled for 4 to 22 September 2023) and Variation 3 to the Proposed Waikato District Plan (**V3**) (currently scheduled for 26 July to 3 August 2023) prior to issuing its recommendations on PC26. However, the Council respectfully requests that any delay in the completion of the hearing and recommendation processes on PC12 and V3 does not delay the issue of recommendations on PC26.

Consultation on amendments to the Commercial Zone

12.6 As indicated in Opening Legal Submissions, the Council proposes to carry out consultation with the Waipā community regarding the proposed changes to the Commercial Zone proposed as part of PC26.

12.7 Council staff have discussed the proposed consultation with elected members and the following process is proposed:

(a) An information campaign will be conducted through various channels over two weeks in June 2023.

(b) The purpose is to inform the public of Council's centres intensification proposal and the increase in permitted heights and densities proposed in Cambridge, Te Awamutu and Leamington town centres as part of the PC26 process.

(c) While feedback will not be formally requested, any feedback received will be collated and reported to the Hearing Panel by August 2023.

Signed this 19th day of May 2023

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W J Embling
Counsel for Waipā District Council

APPENDIX A: Updated PC26 provisions