BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991 (**RMA**)

AND

IN THE MATTER of Variation 3 to the Proposed Waikato District Plan

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OPENING LEGAL SUBMISSIONS OF COUNSEL FOR WAIKATO DISTRICT COUNCIL FOR THE JOINT OPENING HEARING

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1. INTRODUCTION

1.1 These legal submissions are submitted on behalf of Waikato District Council (**Waikato DC**) for the Joint Opening Hearing and should be read in conjunction with the Joint Opening Legal Submissions for the three councils (**Joint Submissions**) in support of the Waikato Intensification Planning Instruments (**IPI**) under section 80E of the Resource Management Act 1991 (the **Act**).

1.2 The purpose of these legal submissions is to provide a high-level overview of the approach Waikato DC has taken to Variation 3 to the Proposed Waikato District Plan (**PDP**), being its IPI under the Act (**Variation 3**).

1.3 These submissions will cover:

(a) A brief introduction to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**);

(b) A summary of Waikato DC's planning for growth and recent district plan review process;

(c) The scope of Variation 3;

(d) How Waikato DC has incorporated the Medium Density Residential Standards (**MDRS**) into Variation 3;

(e) The identification and application of qualifying matters in Variation 3;

(f) Waikato specific themes raised in the Waikato Region IPI Themes and Issues Report (the **Themes and Issues Report**);

(g) Response to submitter evidence; and

(h) The relationship between unresolved appeals on the PDP that are impacted by Variation 3 and the respective jurisdiction of the Environment Court and Independent Hearing Panel for the IPI (**IPI Panel**) in relation to such matters.

2. RESOURCE MANAGEMENT (ENABLING HOUSING SUPPLY AND OTHER MATTERS) AMENDMENT ACT 2021

2.1 The Amendment Act came into force on 21 December 2021. The Amendment Act required Waikato DC as a Tier 1 territorial authority to notify an IPI. As Waikato DC currently has a PDP (subject to appeals), the Amendment Act required a variation to be notified and the provisions in Clause 33 of Schedule 12 apply to the variation.[1]

2.2 As set out in the Joint Submissions, Variation 3 must incorporate into all relevant residential zones in the district the MDRS set out in the Amendment Act, and must give effect to policy 3 of the National Policy Statement for Urban Capacity 2020 (**NPS-UD**).

2.3 As the Amendment Act has now been incorporated into the Act, all subsequent references in these submissions will be to the sections in the Act.

3. WAIKATO DISTRICT COUNCIL'S GROWTH AND PLAN REVIEW

3.1 As explained by Mr Ebenhoh, Waikato DC was disappointed by the introduction of the Amendment Act without any consultation with local authorities, and with little regard to the fact that Waikato DC was significantly through a full district plan review which provided for growth in the district.[2] As the IPI Panel is aware, decisions on the PDP were released less than a month after the Amendment Act came into force.

[1] RMA, Schedule 12, Clause 33.
[2] Ebenhoh, evidence-in-chief at [62]-[63].

3.2 Waikato DC's growth story and the development of the PDP are set out in detail in the evidence of Mr Ebenhoh. In summary:

(a) After many decades of stagnant and sometimes declining growth, the last 10 years have seen the Waikato District experience significant urban growth;[3]

(b) Since 2007 Waikato DC has been a member of Future Proof, a collaborative project with local government and Waikato-Tainui to consider how the Waikato sub-region should develop over a 30-year period.[4] The most recent update to Future Proof (2022) currently forms part of Plan Change 1 to the Waikato Regional Policy Statement (**WRPS**);

(c) A full review of the Operative District Plan (**ODP**) commenced in 2014, and Waikato DC acknowledged that the OPD did not provide sufficient capacity for the forecast urban growth. Growth modelling and reporting carried out in 2017 under the NPS-Urban Development Capacity (as it then was), indicated a shortfall of over 6,000 dwellings in the long term;[5]

(d) When it was notified in 2018, the Proposed District Plan (**PDP- NV**) zoned greenfield areas for urban development. Hundreds of submissions were received seeking additional land be rezoned; significantly Kāinga Ora sought a new medium density residential zone be added to the PDP for the towns of Ngaaruawaahia, Huntly, Pookeno, Taukau, Te Kauwhata and Raglan;[6]

(e) An early decision of the PDP Panel related to urban development at Ohinewai, and following the resolution of appeals, now

[3] Ibid., at [17].
[4] Ibid., at [23].
[5] Ibid., at [35].
[6] Ibid., at [41]-[42].

provides for urban development capacity in Ohinewai along with employment opportunities;

(f) In the main PDP decisions, released in January 2022, the PDP Panel accepted the Kāinga Ora submission along with other rezoning submissions, ensuring that the Decisions Version of the PDP (**PDP-DV**) provided sufficient capacity under the NPS-Urban Development (as it now is)[7]; and

(g) 67 appeals on the PDP-DV were lodged, many of these seeking additional rezoning from rural zones to urban zones, or upzoning.[8]

3.3 In addition to increasing development capacity, the PDP-DV provides for a range of housing choices in the district from larger lot developments and rural lifestyle living, to single units and terraced housing.

3.4 An important part of the Waikato District growth story is the aspirations of Waikato-Tainui and the many hapu and whanau within the district. The PDP-DV Maaori Land Chapter (ML) provides for papakaainga housing and development in any zone (on Maaori land), and at the same time protects sites and areas of cultural significance. As the IPI Panel is aware, Te Ture Whaimana o Te Awa o Waikato ("Te Ture Whaimana" or "Vision and Strategy") is an important guiding policy document for the Waikato sub-region.

4. SCOPE OF VARIATION 3

4.1 Section 4 of the Joint Submissions sets out the mandatory elements and the discretionary elements in an IPI. In respect of Waikato DC, Variation 3 must:

[7] Ibid., at [53].
[8] Ibid., at [54].

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

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

4.2 In respect of the discretionary elements of the IPI, Variation 3:

(a) Adds new definitions, including for MDRS and qualifying matters;

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

(c) Rezones two sites from General Rural to a relevant residential zone in Pookeno;[9]

(d) Adds objectives and policies in addition to those set out in the MDRS to relevant residential zones;[10]

(e) Adds new objectives and policies in addition to those set out in the MDRS to the subdivision chapter;

(f) Adds new rules in relation to subdivision within relevant residential zones; and

(g) Makes consequential modifications to include reference to Medium Density Residential Zone 2 (**MRZ2**) where relevant.

4.3 For clarification, Variation 3 does not:

(a) Introduce any financial contributions provisions in the PDP;

(b) Propose any amendments to the papakaainga provisions in the PDP. As explained by Mr Ebenhoh, papakaainga housing and

[9] RMA, s 77G(4).
[10] RMA ss 77G(5)(b) and 80E(b)(ii).

development is already provided for in the PDP-DV regardless of the zoning;[11]

(c) Rezone any land which was not already zoned residential in Taukau, Huntly and Ngaaruawaahia; or

(d) Enable a greater level of development than provided for by the MDRS.[12]

5. INCORPORATION OF THE MDRS INTO VARIATION 3

Relevant Residential Zones

5.1 The Amendment Act requires the introduction of the MDRS into every relevant residential zone in the district. Relevant residential zones are explained in paragraphs 6.10-6.16 of the Joint Submissions.

5.2 Waikato DC's PDP was modified at the decision stage to adopt the National Planning Standards (the **NPS**) and therefore the relevant residential zones include the General Residential Zone (**GRZ**) and the Medium Density Residential Zone (**MRZ**).[13]

5.3 In the PDP-DV the GRZ is used in Tuakau, Pookeno, Te Kauwhata, Raglan, Huntly, Ngaaruawaahia, Meremere, Taupiri, Gordonton, Horotiu, Te Kowhai, Whatawhata, Matangi, and Rangiriri. The MRZ is used in the town centres of Tuakau, Pookeno, Ngaaruawaahia, Huntly, Te Kauwhata and Raglan.

5.4 Waikato DC is required to incorporate the MDRS into the following towns which meet the definition of relevant residential zone:

[11] Ebenhoh, evidence-in-chief at [56].
[12] RMA, s 77H.
[13] The PDP-DV does not include a High-Density Residential Zone.

(a) Ngaaruawaahia, Huntly, and Tuakau as these towns had a resident population of more than 5,000 in the 2018 census;[14]

(b) Pookeno as it meets both limbs of the definition of urban environment in that it is already predominantly urban in character, and it forms part of the housing and labour market of Auckland (at least 10,000 people).[15]

5.5 The submission from Kāinga Ora asks for the MDRS to be partially incorporated into the towns of Raglan and Te Kauwhata. By contrast, the submission by the Ministry for Housing and Urban Development confirms the MDRS has been applied to the correct relevant residential zones in the district. Raglan and Te Kauwhata were excluded because both had populations of less than 5000 in the 2018 census, with 3279 and 1617 respectively.[16] While parts of Raglan and Te Kauwhata may be predominantly urban in character, they are not intended to be part of a housing or labour market of at least 10,000.

5.6 As the existing GRZ and MRZ in the PDP-DV apply beyond the four towns, it was necessary for Waikato DC to introduce a new zone – the **MRZ2**, to incorporate the MDRS. The existing MRZ has been renamed MRZ1. This naming convention complies with the NPS-UD to the greatest extent.

5.7 As required by Section 80H of the Act, the provisions that incorporate the MDRS have been identified (by grey shading) in Variation 3. These include:

(a) The mandatory objectives and policies (SD-O14, MRZ2-O1, MRZ2-P1, SD-P2, MRZ2-P2, MRZ2-P3, MRZ2-P4);

[14] RMA, s 2 definition of relevant residential zone, clause (b)(ii).
[15] Ibid., RMA, s 77F definition of urban environment.
[16] *Section 32 Report Prepared for Variation 3 to the Proposed Waikato District Plan: Enabling Housing Supply - Volume 1,* September 2022, at [4.1].

(b) New rules relating to notification of applications for residential units (MRZ2-S1(2) to MRZ2-S6(2));

(c) New permitted activity performance standards for residential units (MRZ2-S1 to MRZ2-S9);

(d) New activity rules for subdivision for the purpose of residential units (SUB-R154);

(e) Exemptions from the minimum lot size and shape provisions for subdivision for residential units (SUB-R153); and

(f) New rules relating to notification of applications for subdivision for the purpose of residential units (SUB-R154).

5.8 Section 80H(1)(b) also requires that the IPI show how any operative district plan provisions are replaced by the required standards, objectives and policies. Although none of the PDP-DV provisions have been made operative under Schedule 1, clause 20, Variation 3 nevertheless shows the MRZ provisions of the PDP-DV intended to be replaced as strikethrough text.

5.9 What is obvious from the Variation 3 planning maps and the Section 32 Report is that the MRZ2 has not been applied to all the GRZ in the four towns. Whilst the GRZ in these towns is a relevant residential zone, the MDRS have not been incorporated into this zone due to the operation of the Urban Fringe qualifying matter (**Urban Fringe QM**) that will be discussed later in these submissions. For the avoidance of doubt, Waikato DC accepts that the GRZ in the four towns is a relevant residential zone.

Policy 3(d) NPS-UD

5.10 The mandatory requirement to give effect to Policy 3(d) of the NPS-UD,[17] is not addressed in detail in the Section 32 Report. Building heights and densities of urban form under the MDRS are considered to be commensurate to the level of commercial activity and community services within and adjacent to the four towns. Both the height and densities in the town centres of the four towns can best be described as low, not exceeding two storeys.[18]

5.11 The submission from Kāinga Ora seeks a High Density Residential Zone and a new height overlay be added to the town centres of Ngaaruawaahia and Huntly (up to 22m high), in order to give effect to Policy 3(d). The Council will respond to this submission in its Section 42A report and evidence for the substantive hearing. Waikato DC acknowledges that further evidence will be required to address this submission.

APPROACH TO QUALIFYING MATTERS

New qualifying matters

5.12 All of Waikato DC's qualifying matters under section 77I are classified as new and thus subject to the assessments in sections 77J and 77L of the Act. Existing qualifying matters, and the assessment of them under section 77K, is limited to qualifying matters in an operative district plan at the date the IPI was notified.[19]

5.13 As set out in the Joint Submissions, the Council must evaluate any new qualifying matters listed in section 77I against the considerations in subsections 77J (3) and (4). Any other qualifying matter under section 77I(j) must also be assessed against the requirements in section 77L.

[17] RMA, s 80E(1)(a)(ii)(A).
[18] Ebenhoh, evidence-in-chief at [79]-[80].
[19] RMA, s 77K(3).

5.14 The following section of these legal submissions summarises the qualifying matters in Variation 3. The first section addresses qualifying matters that have their origins in the PD-DVP, and in many cases, the district-wide rules in the PDP-DV will still apply to development in the MRZ2. The list of qualifying matters in section 77I creates an overlap of a subject matter, so the summary below has pulled together the relevant qualifying matters where they rely on the same rules.

Qualifying matters incorporated from PDP-DV

Te Ture Whaimana, the Waikato River, other waterbodies and margins.

5.15 A number of the qualifying matters that overlap fundamentally relate to protecting both the Waikato River and other waterbodies in the district. The Waikato River and its margins are recognised in the PDP-DV and Variation 3 as having outstanding natural character and features. These qualifying matters include:

(a) Section 77I(a) – the natural character of waterbodies and their margins and public access along the lakes and rivers (zone rules GRZ-S22, MRZ2-S13, GRZ-R15);

(b) Section 77I(a) – outstanding natural features and landscapes (district wide rules NFL-R2 and R3, zone rules GRZ-S22, MRZ2-S13); and

(c) Section 77I(b) and Section 77I(c) – Te Ture Whaimana and National Policy Statement - Freshwater Management (zone rules GRZ-S22, MRZ2-S13).

5.16 The applicable rules provide:

(a) To be a permitted activity in the GRZ, buildings must be set back:[20]

(i) 23m from the margin of any lake, wetland or bank of any river (excluding the Waikato and Waipā Rivers), or mean high water springs; and

(ii) 28m from the margin of the Waikato River and Waipā River.

(b) To be a permitted activity in the MRZ2, buildings must be set back:[21]

(i) 20m from the margin of any lake, or wetland;

(ii) 21.5m from the bank of any river (excluding the Waikato and Waipā Rivers); and

(iii) 25.5m from the margin of the Waikato River and Waipā River.

(c) It is a non-complying activity to have a building within the Huntly North Wetland specific control.[22]

(d) Limiting and managing earthworks within an ONF or ONL.[23] While this rule is listed as a qualifying matter in Variation 3, the Act does not prevent the use of earthworks controls,[24] it is therefore questionable whether this rule is less enabling of development.

[20] *Variation 3 to the Proposed Waikato District Plan Amendments to Proposed Waikato District Plan – Decisions Version*, Notified 19 September 2022, GRZ-S22.
[21] Ibid., MRZ2-S13.
[22] Ibid., GRZ-R15.
[23] Ibid., NFL-R2.
[24] RMA, s 88E.

(e) Subdivision in an ONF or ONL is a discretionary activity, which is less enabling than the MDRS permitted activity.

5.17 The Council's Section 32 Report explains how these rules will impact on the density enabled by Variation 3. In many cases the rules will still provide for the permitted three residential units but will control where those units are located on the site. There may be locations however where the setback would result in only one or two residential units being enabled. The extent of setback necessary to adequately protect these features is the subject of submissions to be addressed at the substantive hearing.[25]

Areas of significant indigenous vegetation and significant habitat of indigenous fauna

5.18 Section 77I(a) allows for qualifying matters to accommodate areas of significant indigenous vegetation and significant habitat of indigenous fauna. Variation 3 seeks to do this through district wide rules ECO-R3, R8, and R11. These rules require resource consent for earthworks and indigenous vegetation clearance both inside an SNA and outside an SNA. It is questionable whether these rules are less enabling of development, to require the support of a qualifying matter, as the underlying zoning will still enable the residential development subject to district-wide rules. Earthworks and other district-wide rules are identified in section 80E(2) as related provisions separate from qualifying matters.

5.19 In Variation 3 as notified, the application of these rules impacts less than 20 sites in the MRZ2. If the Urban Fringe is deleted, the Council is currently reviewing whether any additional rules, which may be less enabling than the MDRS, are required to protect significant indigenous vegetation and habitat in the areas currently zoned GRZ.

[25] The Section 32 Report also identifies Rules MRZ2-S10 impervious surfaces and WWS-R1 stormwater subdivision rules as relevant to these qualifying matters. It is questionable whether these rules are less enabling of development under the MDRS. The Council will confirm its position on the rules that require assessment as a qualifying matter for the substantive hearing.

Sites and areas of significance to Maaori

5.20 Section 77I(a) allows for qualifying matters to accommodate the protection of sites and areas of significance to Maaori. The PDP-DV includes specific rules to protect these sites under section 6(e) of the Act. A related qualifying matter has been included in Variation 3 to apply the district-wide rules in SASM-R4 and R5 to residential development in the MRZ2.

5.21 SASM-R4 relates to earthworks within a site or area of significance to Maaori and requires a restricted discretionary consent. As above, it is questionable whether the application of the rule is required to be supported by a qualifying matter. If consent cannot be obtained for the earthworks, then ultimately the development capacity of the site will be impacted.

5.22 SASM-R5 is a subdivision rule and is less enabling than the MDRS as it requires a restricted discretionary consent to be obtained for subdivisions involving sites or areas of significance to Maaori. Council's discretion is limited to the effects on the site or areas of significance, and it is foreseeable that subdivision may be declined, or conditions imposed that would mean the development is less enabling that the MDRS.

Historic heritage

5.1 Section 77I(a) allows for qualifying matters to accommodate the protection of historic heritage from inappropriate subdivision, use, and development. Variation 3 seeks to achieve this through district-wide rules HH-R2, R4, R5, R7, R8, and R9 as follows:

(a) HH-R1 permits the maintenance and repair of scheduled historic heritage items using the same or similar materials as the original.

(b) HH-R2 permits development in a site containing a scheduled item, but only if the development does not occur within the extent of the setting of that item.

(c) HH- R4 makes the alteration or addition to a historic heritage item a restricted discretionary activity.

(d) HH-R7 and R8 make the demolition, removal or relocation of a category B building discretionary, and the same activities in relation to a category A building non-complying.

(e) HH-R9 makes the subdivision of land containing a schedule item a restricted discretionary activity.

Natural hazards

5.2 Section 77I(a) allows for qualifying matters to accommodate the management of significant risks from natural hazards, including flooding risk and mine subsidence risk. Variation 3 seeks to do this through district wide rules NH-R10, R19, R20, R24, R25, R72, R73 and R74 as follows:

(a) NH-R10 makes it a fully discretionary activity to create additional allotments (other than utility allotments) within Flood plain management areas and Flood ponding areas across all zones;

(b) NH-R19 and R20 make it a fully discretionary activity to create additional allotments (other than utility allotments) within a high-risk flood area across all zones, and a non-complying activity to construct a new building or addition in the same area;

(c) NH-R24 and R25 make it a restricted discretionary activity to create additional allotments (other than utility allotments) within a defended area across all zones area, and a fully discretionary activity to construct a new building or addition in the same area;

(d) NH-R72 makes it a controlled activity to construct or alter a building within a mine subsidence risk area across all zones if:

(i) that construction or alteration is not otherwise permitted by certain rules; and

(ii) if a consent notice confirms that a geotechnical assessment has been approved at the time of subdivision and confirms that the ground is suitable for that building development;

(e) NH-R73 makes such construction in a mine subsidence risk area a restricted discretionary activity in the absence of that consent notice; and

(f) NH-R74 makes it a discretionary activity to create additional allotments (other than utility allotments) in the mine subsidence risk area.

Infrastructure

5.3 Section 77I(e) allows a qualifying matter to ensure the safe or efficient operation of nationally significant infrastructure. Variation 3 includes the following qualifying matters under this subsection:

(a) National Grid Yard (district wide rule EW-R2, zone rules GRZ-R14, MRZ2-R10, MRZ2-R11 and Subdivision rules SUB-R26, R162)[26];

(b) Setback from roads – national routes and regional arterials (zone rules GRZ-S20, MRZ2-S14);

(c) Setback from the designated boundary of the Waikato Expressway (zone rules GRZ-S20, MRZ2-S14); and

[26] These rules are also required in order to give effect to the National Policy Statement on Electricity Transmission and are a qualifying matter under s 77I(b) also.

(d) Setback from the designated boundary of the railway corridor (zone rules GRZ-S20, MRZ2-S14).

5.4 The applicable rules provide:

(a) National Grid Yard: EW-R2 sets out exempt activities and permitted standards for earthworks within the National Grid Yard. The rules make new sensitive activities within the National Grid Yard a non-complying activity in the GRZ and MRZ2, and subdivision within the National Grid Corridor a restricted discretionary activity in the two zones;

(b) Setback from roads – national routes and regional arterials: For sensitive land uses the permitted standard requires a 15m building setback in the GRZ and MRZ2;

(c) Setback from the designated boundary of the Waikato Expressway: The rules require a 25m setback in the two GRZ and MRZ2; and

(d) Setback from the designated boundary of the railway corridor: The permitted standard requires a 5m setback in the GRZ and MRZ2.

<u>Reverse sensitivity</u>

5.5 Variation 3 includes rules that may be less enabling of development in the vicinity of particular activities that give rise to reverse sensitivity concerns. These qualifying matters fall to be considered as 'any other matters' and are required to be assessed against sections 77J and 77L. The specific 'any other' qualifying matters that relate to reverse sensitivity are:

(a) Set back from oxidation ponds as part of municipal wastewater treatment plant, and enclosed municipal wastewater treatment plants (zone rules GRZ-S20, MRZ2-S14);

(b) Setback from Alstra Poultry intensive farming activities in Ngaaruawaahia (zone rules GRZ-S20, MRZ2-S14);

(c) Setback from Tuakau Industrial area (zone rule GRZ-S21); and

(d) Setback from Pookeno Industry Buffer (zone rule PREC4-S2).

5.6 The applicable rules provide:

(a) Set back from oxidation ponds and encloses treatment plants: The permitted standards require a 300m setback from the edge of oxidation ponds, and a 30m setback from fully enclosed treatment plants;

(b) Setback from Alstra Poultry intensive farming activities: The permitted standard requires a 300m setback from the boundary of the Alstra Poultry intensive farming activities in both the GRZ and MRZ2;

(c) Setback from Tuakau Industrial area: The permitted standards require new buildings or alterations for sensitive land uses to be located outside the Amenity Setback specific control; and

(d) Setback from Pookeno Industry Buffer: The permitted standards require new buildings or alterations for sensitive land uses within PREC4 to be located outside the Industry Buffer.

Notable Trees

5.7 Variation 3 includes rules that are aimed at protecting notable trees. These qualifying matters fall to be considered as 'any other matters' and

are required to be assessed against sections 77J and 77L. The specific 'any other' qualifying matters that relate to notable trees are:

(a) Removal or destruction of notable trees: TREE-R1 allows the removal of a dead, dying, diseased or unsafe notable tree as a permitted activity, but makes it a restricted discretionary activity in other circumstances;

(b) Activities within the dripline: TREE-R3 allows for activities within the dripline of a notable tree as a permitted activity, so long as it does not involve excavation, compaction, sealing or soil disturbance or placement of fill, parking or storage, discharge of eco-toxic substances, or construction. In those circumstances the activities within the dripline are restricted-discretionary; and

(c) Subdivision of land containing a notable tree: TREE-R4 makes the subdivision of land containing a notable tree a restricted discretionary activity in circumstances where the notable tree is wholly retained within one Record of Title and a non-complying activity in all other circumstances.

<u>Comment on qualifying matters incorporated from the PDP-DV</u>

5.8 The qualifying matters set out above, and the appropriateness of them limiting residential development in particular circumstances, were considered as part of the very recent PDP process. Given the timing of the PDP-DV, the Council's Section 32 Report adopts the PDP Panel's reasoning and carried out the assessments under sections 77J and 77L. It is acknowledged that due to the timing of the Amendment Act after the PDP hearings, the PDP Panel did not have the benefit of evidence specifically considering whether these controls were sufficient in relation to a permitted 3x3 development across the GRZ (as opposed to the more limited spatial extent of the MRZ requested by Kāinga Ora in its submission) or the new considerations in sections 77J and 77L. Evidence

supporting these qualifying matters will be provided by the Council for the substantive hearing.

Qualifying matters not currently provided for in the PDP-DV

5.9 The following qualifying matters do not currently form part of the PDP-DV and were introduced by Variation 3:

(a) Section 77I(e) – set back from the gas transmission line (zone rule MRZ2-S14); and

(b) Section 77I(j) – Urban Fringe (this qualifying matter is applied through zoning rather than specific rules).

5.10 The rules for gas transmission lines require buildings to be set back a minimum of 6m from the centre of a gas transmission line identified on the planning maps. While this setback does not form part of the PDP-DV, Firstgas has lodged an appeal seeking the introduction of setbacks throughout the district for transmission lines and the gas network. The relationship between the Firstgas PDP appeal and Variation 3 will be addressed later in our submission.

5.11 The Urban Fringe QM is addressed in detail below.

Urban Fringe QM

5.12 Variation 3 as notified includes an Urban Fringe QM. The purpose of the Urban Fringe QM was to limit the application of the MDRS to the areas within an approximately 800mwalkable catchment of the four towns, reflecting established planning and urban design principles of compact town centres and lower density further out.[27] To give effect to this approach Variation 3:

[27] Ebenhoh, above n 2 at [90]. *Section 32 Report Prepared for Variation 3 to the Proposed Waikato District Plan: Enabling Housing Supply - Volume 2,* September 2022, at [11.4].

(a) Rezones areas within walkable catchments of the four town centres MRZ2 incorporating the mandatory MDRS – this includes rezoning sites that are MRZ under the PDP-DV, as well as an additional 444 GRZ sites to better refine the walkable catchment area;[28]

(b) Leaves residential areas outside the 800m walkable catchments in the four towns as GRZ, and the MDRS is not incorporated in this zone;

(c) Renames the MRZ zone for Raglan and Te Kauwhata as MRZ1 to distinguish it from MRZ2; and

(d) Includes a limited number of site-specific qualifying matters that apply to the remaining GRZ. Given the Urban Fringe QM prevents the incorporation of the MDRS into the GRZ, limited consideration was given to whether any additional qualifying matters would be necessary in the areas zoned GRZ in the four towns.

5.13 The Urban Fringe QM has understandably attracted the greatest number of submissions, both in support and in opposition. Generally, submitters fundamentally opposed to the Amendment Act support the Urban Fringe QM.

5.14 As explained in Mr Ebenhoh's evidence, since notifying Variation 3, Waikato DC has acknowledged that it is difficult for the Urban Fringe QM to meet the legal requirements in section 77L. While ultimately a matter for the IPI Panel to determine, the Council will not be bringing evidence at the substantive hearing to support the Urban Fringe QM. In correspondence to the PDP appellants, the Council inadvertently referred to 'removing' the Urban Fringe QM from Variation 3.[29] However, the

[28] *Section 32 Report - Volume 1,* above n 16, Appendix 1, p 71.
[29] Liggett, Statement of Primary Evidence on behalf of Kāinga Ora, 1 February 2023, at [7.12]

Council has no legal ability to withdraw part of an IPI.[30] We note that other parties may wish to provide evidence at the substantive hearing in support or opposition of the Urban Fringe QM and the IPI Panel will need to determine whether the Urban Fringe QM should remain, and if so, in what form. Havelock Village Limited (**HVL**) has provided planning evidence for the strategic hearing opposing the Urban Fringe QM.[31]

Consequences if the Urban Fringe QM is deleted from Variation 3

5.15 Given the legal constraints to the Urban Fringe QM, Waikato DC has started assessing what the PDP would look like if the MRZ2 is extended to apply to the GRZ in the four towns, including whether any additional qualifying matters are necessary. The planning witness for HVL acknowledges that amendments to Variation 3 will be required if the IPI Panel recommends the removal of the Urban Fringe QM. For example, in the Havelock Precinct in Pookeno, the Council is considering whether the current controls in the PDP relating to subdivision in the Slope Residential Area, and height limits of buildings adjoining the Hilltop Park, should be carried forward as qualifying matters to reflect some of the controls imposed by the PDP Panel when it rezoned the area from General Rural to GRZ.

5.16 The Council is also considering whether the additional capacity enabled by any deletion of the Urban Fringe QM has an impact on infrastructure capacity and delivery within the district. The figures in Mr Ebenhoh's evidence calculated capacity without the Urban Fringe QM with the underlying GRZ minimum lot size. However, an extension of the MRZ2 with the requirement for no minimum lot size under the MDRS (except for vacant lot subdivision) means the capacity assessment needs updating, along with the subsequent assessment of infrastructure.

[30] RMA, s 80G(1)(c).
[31] Tollemache, Evidence on Behalf of Havelock Village Ltd, 1 February 2023, at [6.1]-[6.7].

5.17 There are also qualifying matter rules that currently sit in the GRZ chapter, for example the Tuakau industrial setback and the Havelock Industry Buffer, that will need to be moved or duplicated into the MRZ2 chapter if the Urban Fringe QM is deleted.

5.18 Amendments to the Variation 3 text, any additional qualifying matters, and updated capacity and infrastructure information will be provided prior to the substantive hearing through the Council's Section 42A Report and evidence.

6. MATTERS RAISED IN SUBMISSIONS AND THE THEMES AND ISSUES REPORT

6.1 The joint Themes and Issues Report identifies the following Waikato specific themes and issues:

(a) Scope of Variation 3 within the Waikato District – whether the MDRS can and should be applied within the towns of Raglan and Te Kauwhata. Waikato DC has applied the MDRS to the towns mandated under the Amendment Act. In our submission there is no scope for the IPI Panel to include the MDRS in Raglan or Te Kauwhata. Both Raglan and Te Kowhata have MRZ1 zoning as a result of the PDP Panel accepting the submission from Kāinga Ora.[32]

(b) Urban Fringe QM – we have addressed this matter above.

(c) New additional qualifying matters – including the request to consider Tuurangawaewae Marae as a qualifying matter to both protect the Marae itself and the viewshafts to Taupiri Maunga and the Hakarimata Ranges. Waikato DC is considering these requests and will continue to engage with these submitters before the

[32] We note that the Panel will establish a timetable to address scope matters related to V3 at the conclusion of the Joint Waikato Strategy Hearing.

substantive hearing. The Council's position will be set out in the Section 42A Report and evidence.

(d) Application and interpretation of Policy 3 of NPS-UD – Kāinga Ora has requested a high-density zone be added to the centre of Huntly and Ngaaruawaahia, and commensurate height overlay added to the town and commercial centre zones. Mr Ebenhoh has indicated that Waikato DC does not support this zoning and considers high density zoning to be out of character with the towns and not supported by the Future Proof strategy. Council will present additional analysis and evidence on this matter prior to the substantive hearing but acknowledges Kāinga Ora's offer in its evidence to work collaboratively with Council.

(e) Te Ture Whaimana and betterment of the Waikato River – Submissions have been received to both increase and decrease the setback from the Waikato River imposed in Variation 3 to give effect to Te Ture Whaimana and protect the Waikato River. Waikato DC acknowledges the importance of the Waikato River to Waikato-Tainui and will work with these submitters in the coming months to seek to find an agreed outcome that provides for both the betterment of the Waikato River and the housing imperatives required under the Amendment Act.

(f) Restrictive covenants – Much of the recent development in Pookeno is subject to private land covenants imposed by developers. We respond to this issue in detail below so that submitters who have raised this issue have the benefit of the legal position prior to the substantive hearing.

(g) Infrastructure capacity – Additional work is currently underway to better understand the impact of Variation 3 on the infrastructure capacity in the district. This additional work will also consider the

infrastructure capacity if the Urban Fringe QM is no longer part of Variation 3, and the MRZ2 is applied throughout the existing GRZ areas of the four towns. If this additional work identifies concerns with infrastructure capacity in the three waters systems roading or electricity, the Council's Section 42A Report for the substantive hearing may include additional qualifying matters to address these concerns.

Restrictive Covenants

6.2 As mentioned, a high proportion of the residential sites developed at Pookeno in recent times are subject to private land covenants. The covenants were imposed by developers to create high quality subdivisions and, amongst other matters, prevent further subdivision of the land and restrict dwellings in terms of the size and height (single level only). A number of landowners in Pookeno are concerned that the application of the MRZ2 and MDRS to these existing residential areas will undermine the character protected by the private covenants and, in turn, their expectations in terms of amenity and built form. Developers such as HVL and CSL Trust are concerned that the application of the Urban Fringe QM on greenfield areas outside the covenanted areas at Pookeno South and Pookeno West limits the very areas that are available for intensification.

6.3 The legal issues arising from the private covenants in the context of Variation 3 are:

(a) Are the private covenants relevant to the IPI Panels decision-making (recommendations) on Variation 3?; and

(b) If relevant, do the characteristics protected under the private covenants meet the statutory test for a qualifying matter under section 77I of the Act?

Relevance of private covenants

6.4 The relevance of private covenants in the context of the Act was considered by Judge Sheppard in *Cornerstone Group Limited v North shore City Council* A042/2007 where he held:

> [127] In short, we hold that a planning authority may properly have regard to restrictive covenants to the extent that they are relevant to and reasonably necessary to decide an issue under the Resource Management Act.

6.5 The land covenants in Pookeno are private agreements imposed under the Property Law Act. They are not imposed as part of the subdivision consent to address adverse environmental effects. The directive under the Amendment Act is clear. It directs all tier 1 Councils to incorporate the MDRS into all relevant residential zones in its district, subject only to any qualifying matter. Therefore, the private covenants are only relevant in the context of Variation 3 if the characteristics sought to be protected under the covenants constitute a qualifying matter under section 77I.

6.6 That is not to say that development opportunities under an IPI override registered private convents. This was acknowledged by the Government when announcing the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill had multi-party support. In response to concerns that private covenants could be used by developers to hinder intensification in relevant residential zones, the Government said it would move to change the law if there was sufficient evidence that such a practice was occurring.[33]

6.7 The existence of these covenants does not prevent Council from applying the MRZ2, subject to any qualifying matters. There is no requirement that a district plan be amended to reflect the terms of a private covenant and

[33] See for example paras 122-124 of the Regulatory Impact Statement: Bringing Forward the Upzoning of Land for Housing: Regulatory Impact Statement: Bringing Forward the Upzoning of Land for Housing - 20 May 2021 - Regulatory Impact Assessment - Ministry of Housing and Urban Development (treasury.govt.nz), and media reports: Govt could intervene if property owners use covenants to stymie intensification | interest.co.nz

s 23 of the Act specifically provides that compliance does not remove the need to comply with all other applicable Acts, regulations, rules, bylaws and other rules of law. Permitted activities and resource consents do not nullify the need to comply with private covenants.

6.8 Enforcement of a private covenant is a matter between the parties subject to the covenant and is not a matter to be addressed through processes under the Act. The Amendment Act does not change this orthodox position.

Do the covenants constitute a qualifying matter?

6.9 The nature of the Pookeno private covenants (limits on dwelling size, height, further subdivision, landscaping, and fencing) do not satisfy any of the qualifying matters prescribed by section 77I(a) to (i), being matters of national importance. The characteristics must therefore satisfy the requirements of section 77I(j) as a potential 'other matter,' and the additional requirements under section 77L, to be a qualifying matter. The characteristics protected by the private covenants are not sufficiently special to justify a limit on intensification.

6.10 In any event, it is not necessary at law for the matters protected under the covenants to constitute a qualifying matter under section 77I in order for the covenants to have ongoing legal effect at Pookeno. As set out above, regardless of the planning regime enabled under Variation 3, landowners subject to such covenants are required to comply with their terms or risk liquidated damages for breach.

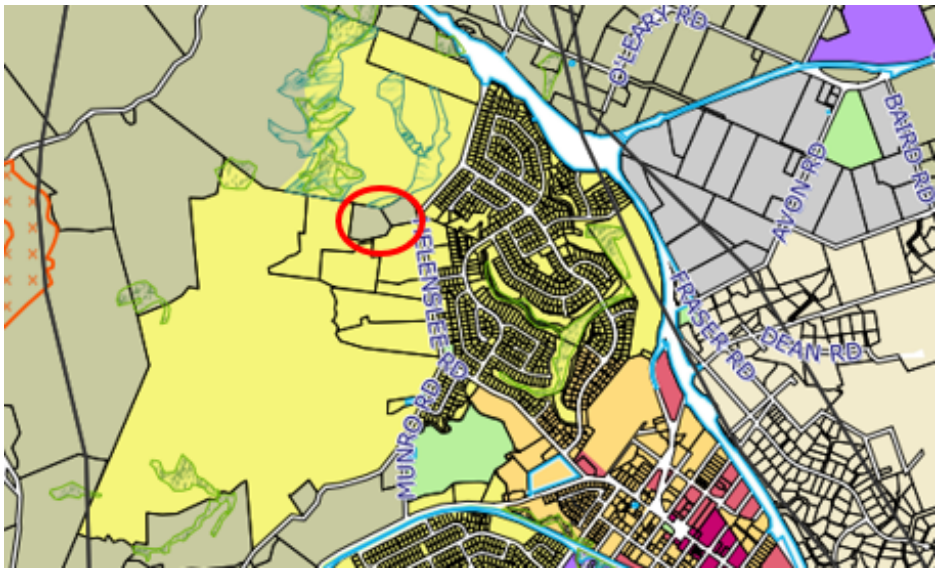
7. RESPONSE TO SUBMITTERS' EVIDENCE

7.1 This section addresses issues not already raised in the Themes and Issues Report.

Waikato Regional Council

7.2 Evidence from Waikato Regional Council (**WRC**) is that any additional urban rezoning of rural land not identified for future urban development in the Future Proof Strategy is potentially out of scope and would have to meet the out-of-sequence and unanticipated development criteria in Proposed Plan Change 1 to the WRPS.[34] This argument is relevant to the many Variation 3 submitters who have requested to be rezoned to a relevant residential zone and will form part of the substantive hearing, if the submissions are determined to be in scope prior to that hearing.

7.3 Variation 3 itself only proposes the rezoning of two rural properties in Pookeno to GRZ (145 and 149 Helenslee Road). These two properties have a total area of 3.621 ha and are surrounded by GRZ that was introduced by the PDP Panel in response to submissions on the PDP. The properties rezoned by Variation 3 are shown in the map:



7.4 These properties are both within the 'urban enabled area' indicated in Future Proof 2022 and adjoin land that is identified for short-medium term development in Proposed Plan Change 1 to the WRPS.

[34] Andrews, Statement of Evidence for the Waikato Regional Council, 31 January 2023, at [75].

7.5 Evidence provided by WRC also states that any 'highly productive land' rezoned to urban by Variation 3 would have to be assessed against the National Policy Statement on Highly Productive Land (**NPL-HPL**) criteria for rezoning.[35] Waikato DC does not consider that the two rural properties at Pookeno rezoned to urban by Variation 3 as notified meets the transitional definition of highly productive land set out in clause 3.5(7) of the NPL-HPL, and so an assessment of rezoning against the other clauses is not required.

7.6 Until WRC completes the mapping exercise required by the NPL-HPL, land that is zoned rural and LUC 1-3 is required to be treated as highly productive, unless it has been identified for future urban development or is subject to a Council-initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle at the commencement date of 17 October 2022. An IPI is defined as including a variation. Variation 3 was notified on 19 September so land it seeks to rezone from rural to urban is therefore subject to the exception set out in clause 3.5(7)(b)(ii) and does not need to be treated as highly productive from the commencement of the NPS-HPL.

Ryman and Retirement Village Association

7.7 The evidence by Ryman Healthcare Limited and Retirement Villages Association of NZ Incorp (**Ryman and RVA**) seeks to ensure that Variation 3 makes adequate provision for retirement villages in the district and seeks to adapt the MDRs to ensure it appropriately accounts for the unique needs of retirement villages.[36]

7.8 Retirement Villages are a permitted activity in the MRZ2, where the standards in MRZ2-R2 are complied with. These standards reflect the usual operating requirements of retirement villages. By comparison,

[35] Ibid., at [75].
[36] Kyle evidence paras 11.3.

retirement villages would generally not comply with the density standards in the MDRS.

8. RELATIONSHIP BETWEEN PDP APPEALS AND VARIATION 3

Status of PDP appeals and District Plan

8.1 With the exception of two topics, all decisions on the PDP were issued by Waikato DC on 17 January 2022,[37] only weeks after the Amendment Act came into force on 21 December 2021. The appeal period closed on 1 March 2022. While the PDP Panel did refer to the Amendment Act in its decision to introduce the MRZ, it did not have scope to incorporate the requirements of the Amendment Act. Regardless, the Council was required to introduce a variation as an IPI.[38]

8.2 In order to understand the overlap between the PDP appeals and the ISPP process, it is first helpful to understand the relationship between the plans in existence. Three planning instruments currently exist in the Waikato DC:

(a) The ODP which consists of the Waikato Section and Franklin Section of the plan (all provisions are operative);[39]

(b) The PDP-DV which consists of:

(i) The Raglan Navigation Beacon provisions and Ohinewai Chapter which are *treated* as operative under section 86F of the Act as all appeals on those provisions are resolved; and

[37] With the exception of the site-specific decisions on the Raglan Beacon (which were issued on 18 July 2018) and the Ohinewai rezoning and development (issued on 27 July 2020).
[38] RMA Schedule 12, clause 33(2)(b).
[39] RMA Schedule 12, clause 33(2)(a) – Waikato DC is not required to introduce a plan change to its ODP.

(ii) The balance of the PDP decisions issued on 17 January 2022. With the exception of a small number of appeal points, all remaining appeals remain unresolved (but all have *legal effect*).

8.3 Variation 3 is to the PDP-DV. Unlike the orthodox position with Schedule 1 planning processes, Clause 16B of Schedule 1 does not apply to an IPI.[40] This means the PDP-DV is *not* varied upon notification of Variation 3.[41] Part 5 of Schedule 12 of the Amendment Act contains the transitional and savings provisions relating to the Amendment Act. Clause 33 applies where a specified territorial authority has notified a proposed plan before 21 December 2021 and the proposed plan is not operative as at that date. Clause 33(5) specifically states "To avoid doubt, section 86B applies to rules notified in the variation." This is the general section that sets out when rules have legal effect. None of the rules (including zoning) in Variation 3 have legal effect until decisions are notified under Schedule 1 clause 102(1) by the Council or under clause 106(1) by the Minister.

8.4 As a side, we note the notified version of Variation 3 identifies provisions that have legal effect with a gavel. This was done in reliance on section 86BA(1) which sets out when a rule in a notified IPI has immediate legal effect. However, we submit Part 5 of Schedule 12 applies to a variation rather than section 86BA. The inclusion of the gavel is an error.

Parallel Processes

8.5 While the Amendment Act specifically provides for the MDRS to be incorporated by way of a variation to a proposed plan, with respect to the legislation drafters, the Amendment Act is then largely silent as to how the separate Schedule 1 and ISPP processes are intended to work alongside each other when the relief sought in an unresolved appeal overlaps with the IPI.

[40] Section 95(2) of the Act does not list clause 16B.
[41] Clause 16B(2) of Schedule 1.

8.6 The memorandum lodged by Synlait Milk Limited (**Synlait**) seeks clarification on how these parallel processes will work together and what evidence and issues fall under the jurisdiction of the IPI Panel as compared to the Environment Court.

8.7 Both processes can continue in parallel for the bulk of the PDP appeals, as there is no overlap between the relief sought in the PDP appeal and the content of Variation 3.

8.8 Of the 67 appeals lodged, we consider 19 are impacted or potentially impacted by Variation 3, regardless of whether or not the appellant is a submitter on the variation. Not all appellants impacted by Variation 3 have lodged a submission. All of these 19 appeals remain outstanding.

8.9 The appeals impacted by Variation 3 fall into the following broad categories:

(a) Appeals that seek to rezone to or from a relevant residential zone;

(b) Appeals seeking to incorporate higher density residential rules into an existing residential zone (no zone change requested);

(c) Appeals that seek to amend the provisions relevant to qualifying matter areas; and

(d) An appeal that seeks to delete a qualifying matter area.

8.10 The PDP appellants impacted by Variation 3 were asked to advise the Council and Environment Court whether they wished to place their appeals on-hold until decisions are released on Variation 3 in March 2024. Only one appellant has elected this option – Mr Upton. We will discuss Mr Upton's appeal below. It is likely however that PDP appellants, at the time of responding to the Council and Court, had not yet considered in detail how their appeals would be impacted by Variation 3. Our analysis

below suggests that other appeals would benefit from being placed on-hold.[42]

Principles related to jurisdiction

8.11 Before we address the specific appeals generally, the following paragraphs set out our interpretation of the respective jurisdiction of the IPI Panel and the Environment Court in relation to the four categories of appeals outlined above.

8.12 We have had the opportunity to discuss our analysis with counsel for some of the PDP appellants and Variation 3 submitters, and it appears that there are divergent views on this matter, although we understand these may be limited to the jurisdiction of the Environment Court to re-open and reconsider qualifying matters. If those divergent views cannot be resolved during the strategic hearing, we suggest the prudent course of action may be for the IPI Panel to obtain independent legal advice prior to the evidence exchange for the substantive hearing.

8.13 We appreciate the concerns that have been raised by other parties. We invite the IPI Panel to indicate to the parties in sufficient time before the substantive hearing, their understanding of the IPI Panel's jurisdiction and what matters should be the subject of evidence at the substantive hearing. It will be important for the IPI Panel to bear in mind that there are no appeal rights arising from the Council or the Minister's decisions on Variation 3.

<u>PDP appeals to rezone to or from a relevant residential zone</u>

8.14 For this category of appeal, we submit that the IPI Panel does not have jurisdiction to consider the rezoning request in the appeal. The Environment Court will determine the appropriate zoning of the land in

[42] Or at least not progressed until after March 2024. Counsel for the Waikato DC will discuss this separately with the PDP appellants.

those circumstances. We note counsel for Synlait shares this view. In response to the Synlait memorandum, it is not necessary for Variation 3 submitters to present evidence at the substantive hearing in support of the suitability of the zoning subject to a PDP appeal.

8.15 If the Environment Court later decides to rezone the land from a rural zone to a relevant residential zone, the Court must apply the MRZ2 with the district-wide and zone-specific qualifying matters. As the rezoning request for the land was outside the scope of the IPI hearing, the Environment Court will also have scope to determine whether any additional site-specific qualifying matters should be added.

8.16 We submit this view is supported by the enduring obligation under the Amendment Act to incorporate the MDRS, subject to qualifying matters, into relevant residential zones.[43] It is only on the first occasion of incorporating the MDRS, that a Council must use an IPI and the ISPP.[44] Subsequent rezoning of land to a relevant residential zone through another Schedule 1 process must also incorporate the MDRS. In other words, for the Waikato District, any future residential rezoning in the four towns requires the MDRS to be incorporated, subject to any qualifying matters. It is also worth noting that if any other towns in the Waikato subsequently meet the test of being an 'urban environment' the Council will also be obligated to notify a plan change to incorporate the MDRS.[45]

8.17 For appeals seeking a return to rural zoning from a relevant residential zone, if the Environment Court decides to accept those appeals, the MRZ2 and the incorporated MDRS will fall away from the land.

8.18 For the PDP appeals relating to land within the Urban Fringe QM and therefore subject to the GRZ and related standards (in the notified

[43] RMA section 77G(1).
[44] RMA section 77G (3).
[45] As per the definition of 'relevant residential zone' in RMA section 2 and the definition of 'urban environment' in RMA section 77F.

version of Variation 3), but where PDP appellants are seeking rezoning back to rural or the imposition of more restrictive rules, the IPI Panel must in our submission:

(a) Determine whether the GRZ in the four towns is a relevant residential zone – we submit that it is;

(b) Incorporate the MDRS into that zone – we submit that this will be achieved by rezoning the land MRZ2;

(c) Apply rules that are less enabling of the development in the MDRS to the extent necessary to accommodate a qualifying matter.

8.19 The Environment Court will then determine the appropriate underlying zoning and whether any additional, non-density related controls or rules are necessary.

<u>Appeals seeking to incorporate higher density residential rules into existing residential zones</u>

8.20 The IPI Panel has jurisdiction to consider whether the areas zoned GRZ in Variation 3 should have the MDRS incorporated subject to qualifying matters. In other words, the IPI Panel can consider whether the MRZ2 should be applied to this zone in the four towns.

8.21 As section 77G(3) requires the first incorporation of the MDRS to be via the ISPP process, the incorporation of the MDRS cannot be achieved by way of an appeal to the PDP. The Council has advised the Court and appellants that such appeals need to be placed on hold pending decisions on Variation 3.

8.22 Where a PDP appellant is seeking a High Density Zone or a commercial zone (not in reliance of Policy 3 of the NPS-UD), this relief is within the jurisdiction of the Environment Court and not the IPI Panel.

Appeals that seek to amend provisions relevant to qualifying matters

8.23 All qualifying matters in Variation 3 are classified as new qualifying matters and are subject to the evaluations under sections 77J and 77L.[46] The alternative process for existing qualifying matters under section 77K does not apply to Variation 3.

8.24 The IPI Panel has jurisdiction to determine to what extent a rule can be less enabling of development in the relevant residential zones to accommodate a qualifying matter. The IPI Panel's jurisdiction is however limited to the relevant residential zones in the district.

8.25 Where a PDP appeal relates to an infrastructure setback, for example, the Environment Court will have jurisdiction to consider the appropriateness of that setback in the remaining areas of the district not covered by the relevant residential zones.

8.26 We do not consider that the Environment Court will have jurisdiction under the PDP appeals to re-open and reconsider the application of qualifying matters to the relevant residential zones in Variation 3.

Appeals seeking to delete a new qualifying matter

8.27 There is one appeal seeking to delete a Site and Area of Significance to Maaori (**SASM**) from the planning maps. In our submissions, the existence of a site or area to be protected should be determined by the Environment Court, not the IPI Panel.

8.28 The IPI Panel is limited to considering whether the rules that make development in the vicinity of a SASM less enabling are appropriately justified under sections 77J.

[46] RMA s 77L only relates to 'any other' qualifying matters – the reverse sensitivity and notable trees qualifying matters.

Application of the principles to the PDP appeals

8.29 To be of assistance to the IPI Panel, and the appellants/submitters in each appeal category, we have carefully considered the relief sought in each appeal and how that relief is impacted by Variation 3. We have then set out what parts of the relief we consider to be within the scope of the IPI Panel and what parts remain to be considered by the Environment Court (either prior to or after the release of decisions on the variation). This information is contained in the tables 1-4 in **Appendix 1** to these submissions.

Table 1: PDP appeals to rezone to or from a relevant residential zone

8.30 The bulk of the appeals listed in Table 1 are self-explanatory and do not require any further explanation. We will however comment on the Havelock Precinct and the Simon Upton appeals. The geographical location and extent of all of the appeals in Table 1 is in shown in the series of maps at **Appendix 2** to these submissions.

Havelock Precinct

8.31 The appeals relating to the Havelock Precinct are complex. The relief ranges from rezoning the land back to a rural zone, through to providing more enabling development and rezoning additional land from General Rural to residential. Our interpretation of the IPI Panel's jurisdiction on these appeals is:

(a) The underlying zoning from the PDP-DV cannot be amended by the IPI Panel;

(b) The land zoned GRZ in Variation 3, must have the MDRS incorporated, through the MRZ2 zone;

(c) The IPI Panel must consider whether any rules or controls are necessary that would be less enabling of the MDRS should be included to accommodate a qualifying matter.

8.32 Variation 3 already includes the Pookeno Industrial Buffer as a qualifying matter, but with the removal of the Urban Fringe QM, there are likely to be other rules and controls that could be included. We submit that parties (including the Council) should present evidence at the substantive hearing to support any additional rules that are less enabling than the MDRS.

8.33 Synlait suggests in its memorandum[47] that if the Panel considers that the Urban Fringe QM is not appropriate, it could reserve its judgment on the extent of the MDRS boundary with respect to the Havelock Precinct land until its rezoning is resolved by the Environment Court process. There is however no ability under the Amendment Act for the Panel to reserve any aspect of its recommendations on an IPI. Further, the Minister's direction requires all decisions on Variation 3 to be made by 31 March 2024. Any Court determination on the zoning of the Havelock Precinct will not be available before that date. The appeal parties are still at the negotiation stage.

8.34 In any event, based on our interpretation of the inter-relationship of the two processes, we submit it is not necessary for the IPI Panel to reserve its recommendations on the application of the MDRS to the Havelock Precinct land or any other variation land subject to a zoning appeal. If the Court decides to rezone the land to General Rural, the MDRS and any qualifying matters over that land will fall away.

Simon Upton

8.35 The appeal by Mr Upton asks the Court to rezone properties from GRZ back to General Rural. As set out in the table, his submission on Variation 3 asks for a review of the extent of greenfield residential zoning in the PDP in southern Ngaaruawaahia, as a result of intensification in the town centre through Variation 3. Mr Upton refers to the IPI Panel's ability to

[47] At paragraph 17

make recommendations outside the scope of submissions, however as set out in the Joint Submissions, the recommendations of the IPI Panel still need to be 'on' the variation. We do not consider the IPI Panel has scope to reconsider the residential boundary in southern Ngaaruawaahia. We will address this appeal in detail in the submissions on scope relating to Variation 3 in due course.

Table 2: Appeals seeking to incorporate higher density residential rules into existing residential zones

8.36 In Table 2 we have identified the appeals seeking more lenient controls be added to the GRZ to provide for medium or higher densities. To the extent that these appellants are interested in the four towns, it is likely that the decisions on Variation 3 will resolve these appeal points. The Environment Court will maintain jurisdiction to consider whether more lenient development should be provided for in the GRZ as it applies to the remainder of the district.

Table 3: Appeals that seek to amend provisions relevant to qualifying matters

8.37 These PDP appeals relate to the infrastructure qualifying matters. The primary issue relating to jurisdiction is whether the IPI Panel can consider the inclusion of acoustic, ventilation and vibration controls as sought by KiwiRail and Waka Kotahi. In our submission these matters are not less enabling than the MDRS and therefore are not within the scope of the IPI Panel to consider.

8.38 The appeal by Firstgas, seeks the introduction of a setback from the gas pipeline and network that is not currently provided for in the PDP-DV. Variation 3 includes a 6 metre setback, which is a very minor number of sites could impact on the ability to achieve 3x3 residential development. Firstgas is not a submitter on Variation 3, but we submit that its relief in the PDP appeal (to the extent that the gas pipeline is within the relevant residential zones) is within the jurisdiction of the IPI Panel. The Council is in the process of engaging with Firstgas on its appeal and to advise them

that their relief will be partially determined by the IPI process. The Council is unlikely to oppose a late submission from Firstgas if it wishes to be involved in the Variation 3 process, given the overlap with its PDP appeal.

Table 4: Appeals seeking to delete a new qualifying matter

8.39 Table 4 sets out the appeal by Blue Wallace to delete the SASM from a property zoned GRZ in Ngaaruawaahia. We submit that the IPI Panel has no jurisdiction to consider whether the SASM should be deleted, but it can determine whether the qualifying matter to accommodate the SASM is appropriate.

9. CONCLUSION

9.1 Aside from scope issues, which will be addressed in the context of procedural matters at the conclusion of this hearing, the key issues to be determined at the Variation 3 substantive hearing are:

(a) Whether Variation 3 incorporates the MDRS into all relevant residential zones in the district. In particular, whether there are relevant residential zones in Raglan and Te Kauwhata;

(b) Whether a High Density Residential Zone and new height overlay should be applied to the town centres of Huntly and Ngaaruawahia to give effect to Policy 3(d) of NPS-UD;

(c) Does the Urban Fringe QM meet the statutory tests for a qualifying matter under sections 77I, 77J and 77L of the Act? If so, in what form should it take?;

(d) If the Urban Fringe QM is removed, or reduced in extent, what additional qualifying matters may be required in the four towns?;

(e) Are the remaining qualifying matters appropriate and justified? In particular, do the rules aimed at protecting certain features,

including the district-wide rules, actually limit the density of development to accommodate those features? Examples include notable trees, extent of setbacks and earthwork rules; and

(f) Are new rules and/or new qualifying matters required to:

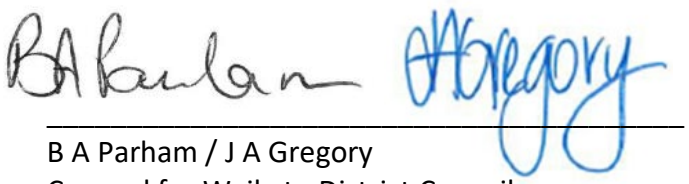
(i) Give better protection to Te Ture Whaimana;

(ii) Protect the Tuurangawaewae Marae and the cultural viewshafts to Taupiri Maunga and the Hakarimata Ranges; and

(iii) Address any infrastructure constraints in the district that may have adverse effects on Te Ture Whaimana.

9.2 Waikato DC intends to meet with those submitters who wish to engage, prior to the substantive hearing. At this stage, no pre-hearing meetings are required to be scheduled.

Signed this 10 day of February 2023



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