

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS
IN HAMILTON**

**I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE
KIRIKIROA**

UNDER the Resource Management Act 1991 (**RMA**)

IN THE MATTER of the hearing of submissions on proposed Plan Change 9
(Historic Heritage and Natural Environment) to the Hamilton City
Operative District Plan

HEARING TOPIC: Session 1 – Threshold for HHAs
Session 2 – Built Heritage

**LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA - HOMES
AND COMMUNITIES**

Dated: 3 November 2023

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

Counsel Instructed:
D A Allan / A K Devine
Ellis Gould Lawyers
PO Box 1509
Auckland 1140
dallan@ellisgould.co.nz
adevine@ellisgould.co.nz

/

MAY IT PLEASE THE INDEPENDENT HEARINGS PANEL:

Introduction

1. These legal submissions and the evidence to be called are presented on behalf of Kāinga Ora Homes and Communities (“**Kāinga Ora**”) to the Session 2 hearing on Proposed Plan Change 9 (Historic Heritage and Natural Environment) (“**PC9**”) to the Hamilton City Operative District Plan (“**ODP**”), which also includes a resumption of the Session 1 Historic Heritage Areas topic.
2. These submissions focus on the heritage elements of PC9 being addressed in Session 2, namely:
 - (a) Built Heritage Items – methodology and threshold for scheduling.
 - (b) Historic Heritage Areas (“**HHAs**”) – threshold for scheduling.
3. In summary:
 - a. In relation to **built heritage items**, all experts appear to accept that the methodology utilised in PC9 as notified (and the ODP) would benefit from revision.
 - b. In relation to **HHAs**, the methodology has been largely agreed through expert conferencing, but there remains a question as to whether the methodology utilised for HHAs should be consistent with that utilised for built heritage items.
 - c. In **both topics**, a key question to be resolved is the threshold for scheduling. Specifically, the use of “*moderate*” as the test to reach inclusion as a Category B heritage place or as an HHA. In relation to HHAs the Council continues to support use of a threshold of moderate value. In contrast, for Built Heritage items the Council does not support the use of a threshold of moderate value.
4. Kāinga Ora has exchanged two statements of heritage evidence by John Brown in support of its submissions for the Session 2 hearing topics. One

statement addresses built heritage items (22 September 2023) and one statement addresses HHAs (6 October 2023).

5. The submissions and evidence filed for the Session 2 hearings should be read together with the submissions and evidence filed in the Session 1 hearings on PC9. Kāinga Ora reiterates the concerns set out in those submissions and evidence but does not repeat them here.
6. These submissions will address:
 - a. The methodology and threshold issues relating to built heritage items; and
 - b. The threshold for identification as an HHA.

Built Heritage Items – Methodology and Threshold

7. The Kāinga Ora submission raised a number of issues with the notified version of the built heritage provisions, opposing both the methodology and the areas scheduled. As the hearing on the scheduling of individual built heritage items has been deferred, these submissions address only the methodology (including the threshold for scheduling).

Methodology

8. The Council's own evidence identifies a number of issues with the approach to scheduling in the ODP and in PC9 as notified. In many cases these issues are consistent with those raised by Kāinga Ora in its submission.
9. The Council's heritage expert, Ms Caddigan, considers that the inherent issue is the adoption of a two-tiered categorisation with three separate thresholds (i.e.: Categorisation of A or B; with thresholds of outstanding, high or moderate). Related issues with the notified methodology for identification of scheduled items include:
 - a. Inconsistency across moderate descriptors, and a lack of definition for each threshold level, qualifier or geographic area. This inconsistency of wording and departure of terminology from the rankings of significance

criteria makes it challenging to determine heritage significance and confuses application of the criteria.

b. A lack of direction regarding the sub-categories within each criterion; and whether:

- i. All sub-categories need to be met to meet the threshold overall for the main heritage quality; or
- ii. Meeting one of the sub-categories at the threshold will be sufficient.

c. Conflation of the significance and geographical thresholds. Ms Caddigan suggests that these elements should be disaggregated.

10. Mr Brown agrees in principle with a number of Ms Caddigan's recommendations such as adopting a 'two-tiered' system of heritage classification; establishing a clearer threshold system for inclusion on the schedule; and disaggregating the spatial component of the grading system.
11. These are complex matters in respect of which the witnesses appear aligned in expressing concerns. Given that complexity, however, a contested hearing may not be the most efficient means of identifying the most appropriate response. In that context, Kāinga Ora would be open to a direction for expert conferencing as a first step to resolve these issues. Regardless of the process adopted, however, Council will need to review and update its evaluations of individual items proposed by the Council for inclusion within the Schedule once the methodology is settled.

Threshold for scheduling

12. In the ODP, and PC9 as notified, the two plan rankings are as follows (emphasis added):

Plan Ranking A: Historic places of highly significant heritage value include those assessed as being of outstanding or high value in relation to one or more of the criteria and are considered to be of outstanding or high heritage value locally, regionally or nationally.

Plan Ranking B: *Historic places of significant heritage value include those assessed as being of high or moderate value in relation to one or more of the heritage criteria and are considered to be of value locally or regionally.*

13. Three separate thresholds are specified – ‘Outstanding’, ‘High’ and ‘Moderate’.
14. It is clear from Ms Caddigan’s evidence, and the evidence of the various experts, that the thresholds require revision, and that use of ‘moderate’ as a threshold requires reconsideration. As set out by Ms Caddigan in her evidence on built heritage items (emphasis added):¹

Based on my reading of the 2012 assessments and Appendix 8 of the ODP, I understand the moderate threshold to convey that a built heritage place is of significant heritage value locally or beyond. I agree that the descriptor “moderate” does not sit easily with the concept of significance and that this calls into question whether moderate is the appropriate threshold for inclusion. In my view, to address this issue, the descriptor is a secondary consideration, and the more important factor is the explanation of what it means to be “moderate” and the features of the explanation.

15. Ms Caddigan goes on to recommend that clear (and separate) significance and geographic thresholds be established. In terms of the threshold she proposes two alternative options:
 - a. Utilising the ranking qualifiers in Appendix 8-1.1, being “highly significant” and “significant”; or
 - b. Combining the existing three threshold terms (moderate, high and outstanding) into two. This could be ‘high’ and ‘outstanding’, or synonymous terms, such as ‘considerable’ and ‘exceptional’.

Neither of the options suggested involve adopting ‘moderate’ as a threshold.

16. This means a place would require:

¹ Caddigan EIC, at paragraph 47.

- a. An assessment of heritage significance against the heritage qualities (e.g.: is it of ‘high/considerable’ or ‘outstanding/exceptional’ significance in relation to each of the heritage qualities); and
 - b. A separate assessment to establish the geographic extent of the identified significance (e.g.: is it significant at a local, regional or national level).
17. Kāinga Ora generally supports Ms Caddigan’s proposed methodology and thresholds.

HHAs

Kāinga Ora position

18. The issues Kāinga Ora has with the Council’s approach to the identification of HHAs are set out in detail in its earlier submissions and evidence.
19. Kāinga Ora remains concerned that PC9 identifies and protects areas principally for their character (a matter relevant under section 7 RMA) rather than because they qualify as historic heritage under section 6 RMA. The low threshold for identification as an HHA (i.e.: “*moderate*” value in relation to a single qualifier) contributes to this issue, because, as Mr Brown points out, adopting a lower threshold can lead to places which have a particular character informed by their historical legacy being identified as historic heritage instead of special character.
20. While agreement was reached regarding the general methodology at the expert conferencing in August, there remains disagreement between the experts as to whether “*moderate*” is an appropriate threshold for identification of HHAs.
21. The participants in the conferencing agreed that the following indicators are relevant when evaluating whether an area should be identified as an HHA. The difference of opinion relates to which of the indicators would be an appropriate threshold for such status:

Outstanding – The area has outstanding value in respect of the criterion and has national, regional or local significance.

High - The area has high value in respect of the criterion and has national, regional or local significance.

Moderate – The area has moderate value in respect of the criterion and has national, regional or local significance.

Low – The area has low value in respect of the criterion and may have national, regional or local significance.

None - The area has no value in respect of the criterion, nor does it have national, regional or local significance.

Unknown – The area may have heritage value, but, due to knowledge limitations, the significance of the area is unknown.

22. Kāinga Ora and its heritage expert support the identification of an HHA where it meets the “*outstanding*” or “*high*” indicators, but do not support identification of an HHA where an area simply meets the “*moderate*” threshold. [Nb: the definitions of “*outstanding*” and “*high*” are very similar to those adopted in Plan Ranking A and Plan Ranking B respectively.]

Appropriateness of “moderate” as a threshold

23. The use of “*moderate*” value as a determinant of a matter of national significance under section 6 RMA (historic heritage status) is inappropriate. It is an extremely low bar for a matter of such (national) importance and, as discussed in the Kāinga Ora legal submissions at the opening session of the PC9 hearing, is one that arguably applies to broad swathes of the city, particularly given Council’s inclusion of all periods of development in Hamilton through to 1980. In practice, Council has used this category to identify extensive residential areas that lack distinctive characteristics, high aesthetic values and high construction quality.
24. While the Council’s evidence refers to the broad definition of “*historic heritage*” in the RMA and argues that RMA does not require a resource to be of significant, high or outstanding value to be identified as historic heritage under the RMA, this ignores the context within which section 6(f) RMA sits:
- a. The definition of “*historic heritage*” simply specifies the resources that come within that term. Whether an item that comes within that

category (e.g.: a dwelling that exhibits characteristics of a recognised architectural style such as a villa) warrants consideration in terms of the district plan provision requires an analysis in terms of the other provisions of the RMA and the national, regional and local planning context.

- b. Section 6(f) identifies as a matter of national importance, “*the protection of historic heritage from inappropriate subdivision, use, and development*”. That contains a number of filters that need to be applied in the current context: whether the resources are of sufficient quality to warrant district plan provisions that protect them from inappropriate subdivision, use and development; and whether those qualities are such as to trigger concerns in terms of national importance.
- c. Adopting the RMA definition fails to recognise that historic heritage is only to be protected from “*inappropriate*” subdivision, use and development. As outlined in *King Salmon*² what is inappropriate is determined with reference to what is to be protected. That is, whether subdivision, use and development is inappropriate will necessarily depend on the level of value inherent in that item. That indicates that items or areas should exceed an objectively established threshold as to quality before it can be assumed that use and development will be inappropriate.
- d. Not every piece of historic heritage can (or should) be protected as a matter of national importance. Regional and district planning documents must determine the most appropriate approach to give effect to section 6(f) by identifying the level at which historic heritage justifies protection as a matter of national importance. Each individual item or area need not be of national importance but, in order to warrant scheduling, items or areas should exceed a threshold.

² *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [101].

- e. With reference to the example given above, in many cases there will be no rationale for protecting a villa or its surrounds because its modification or loss will not raise an issue in terms of section 6(f).

25. Kāinga Ora says that:

- a. Utilising a “*moderate*” threshold because it is “*more likely to make a clearer and direct contribution to the understanding and appreciation of [NZ’s] history and culture*”³ or because it is a “*reasonable threshold*” at which it is “*likely*” to make a contribution to an understanding and appreciation of NZ’s history and culture⁴ is not appropriate or justified.
- b. It is appropriate to set thresholds for statutory protection at the level of significant / considerable or higher value, as this is where most “*risk*” of adverse impact occurs and therefore at which subdivision, use and development is likely to be inappropriate.
- c. In practice, a “*moderate*” threshold is likely to result in the identification of places in respect of which subdivision, use or development is unlikely to impact adversely on historic heritage in a way that makes such development inappropriate in terms of section 6(f).
- d. By simply referring back to the definition of historic heritage in the RMA, Council is effectively:
 - i. Eschewing the orthodox approach to plan making in which plan makers must determine the most appropriate approach to give effect to Part 2 of the Act; and
 - ii. Ignoring the qualifiers inherent in section 6.

26. Council further justifies the inclusion of areas of “*moderate*” value because it says that, in time, they could become of “*high*” or “*outstanding*” value.⁵ Kāinga Ora says this is not the appropriate approach. That assertion could arguably

³ Supplementary Statement dated 22 September 2023, Knott at para 24.

⁴ Supplementary Statement dated 22 September 2023, Knott at para 8.

⁵ Supplementary Statement dated 22 September 2023, Knott at para 43(c).

made with regard to any residential area. What matters is whether an area needs to be protected from inappropriate subdivision, use and development in the context of section 6(f) RMA now – not in the future.

27. As the Council’s evidence recognises, PC9 “*appears to move some way off the usual expectation that an area must be of ‘high’ or ‘outstanding’ value (or other similar descriptors)*”.⁶ It goes on to say that this more clearly reflects the RMA than other approaches do. Kāinga Ora says that is incorrect for the reasons outlined above, and that the approach adopted in most District and Regional Plans, and which aligns with the national approach adopted by HNZPT, should be adopted here.

Scoring of Areas

28. There are a number of areas which Mr Brown agrees meet the threshold for identification as an HHA.⁷ However, as outlined in his evidence, there a significant number of areas representative of state housing which have been assessed as “high” with reference purely to the historical criterion. In Mr Brown’s opinion, while these locations are representative or typical in character of broad themes of development exhibited by State House Development, there is no defining aspect that sets them above other, similar places such that they should be included on a historic area schedule.⁸

Conclusion

29. Kāinga Ora submits that the methodology currently proposed for assessing individual historic heritage items needs to be revisited. It has raised significant concern from all experts and warrants careful consideration, ideally in a forum that provide sufficient time and opportunity for alternatives to be considered.
30. With reference to the thresholds, it is difficult to see how the Council’s analysis of the thresholds applying to individual built heritage items is at all consistent with the Council’s evidence in relation to HHAs.⁹

⁶ Supplementary Statement dated 22 September 2023, Knott at para 25.

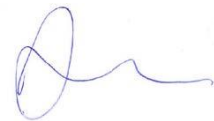
⁷ Rebuttal (HHAs) dated 6 October 2023, Brown at section 3.

⁸ Rebuttal (HHAs) dated 6 October 2023, Brown at section 3.

⁹ Supplementary Statement dated 22 September 2023, Knott at para 8.

- a. There is no statutory difference in terms of section 6(f) RMA between an individual historic heritage item and an area identified because of its collective historic heritage value. In both cases, consideration has to be given to the heritage value of the resource, whether it engages with the national importance addressed in the section, and whether it warrants protection from inappropriate subdivision, use or development.
- b. The enquiry to be undertaken will differ in that an individual historic heritage item will be considered in isolation where is an HHA is by definition assessed as a whole. In both cases, however, the resource needs to pass a threshold before the imperative in section 6 is engaged.
- c. In summary, the “high” or “outstanding” threshold adopted almost universally in New Zealand is equally applicable to Hamilton and appropriately reflects the statutory framework.

Dated this 3rd day of November 2023



D A Allan / A K Devine
Counsel for Kāinga Ora – Homes and Communities