UNDER	the Resource Management Act 1991 ("**RMA**")
IN THE MATTER	of Hearing of Submissions and Further Submissions on the Proposed Porirua District Plan

LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA-HOMES AND COMMUNITIES

HEARING STREAM 4 - NOISE

4 February 2022

1. Introduction

1.1 These legal submissions are presented on behalf of Kāinga Ora - Homes and Communities ("**Kāinga Ora**") in relation to its submissions[1] on the Proposed Porirua District Plan ("**PDP**") provisions to be addressed in Hearing Stream 4 which relate to noise and vibration, and in particular the management of activities sensitive to noise in proximity to State Highways and the North Island Main Trunk railway line. Legal submissions addressing the balance of Kāinga Ora's submission points on this topic are being presented separately by Mr Whittington.

1.2 Kāinga Ora has appeared before the Hearing Panel on several occasions and has previously provided details of its origin, the statutory framework it operates within and the scope of its role and interest in planning processes.

1.3 In this hearing, Kāinga Ora will address the extent to which the PDP should contain provisions relating to the following infrastructure networks:

(a) Noise and vibration generated by state highways; and

(b) Noise and vibration generated by the trunk railway network.

1.4 In each case the key issue is whether and to what extent owners and occupiers of land adjacent to those networks should be:

(a) Constrained in terms of activities that they may undertake on their land or their ability to subdivide it; or

[1] Submission No. 81 and Further Submission No. FS65.

(b) Required to ensure that any development by them incorporates physical or locational elements that mitigate potential adverse effects generated not by those owners or occupiers but directly or indirectly by use of the infrastructure.

1.5 In the context of Kāinga Ora's wide mandate with respect to urban development, it is concerned to avoid the undue discouragement or restriction of existing and future urban activities by a planning framework that overly emphasises reverse sensitivity effects[2] and that imposes obligations on receivers of effects rather than the generators in the context of these infrastructure networks. Kāinga Ora is concerned that such provisions would compromise the ability to achieve a coherent and compact urban form in the District over time and would impact negatively and unnecessarily on development capacity.

1.6 Kāinga Ora opposes the extent and nature of controls proposed. It considers that the provisions are not supported by sufficient evidence to warrant being upheld and asks that they be deleted.

1.7 Kāinga Ora has filed evidence by the following witnesses in support of its position:

(a) Brendon Liggett, Manager – Development Planning at Kāinga Ora;

(b) Jon Styles, acoustic consultant; and

(c) Karen Williams, consultant planner.

2. KEY PRINCIPLES

2.1 Kāinga Ora's position regarding the interface between infrastructure networks and adjacent privately owned properties can be summarised as follows.

2.2 Major infrastructure networks can generate adverse effects on land in their immediate vicinity and, where appropriate, planning instruments such as the PDP should recognise and address those effects.

2.3 In this case, Council and infrastructure providers are seeking to impose constraints or obligations on neighbouring landowners rather than ensuring

[2] See Objective O2 and Policy P4 in the Noise Chapter.

that the effects generated by or on that infrastructure are addressed within the corridors owned and controlled by the infrastructure providers (e.g.: in the first instance by applying the BPO).

2.4 In those circumstances, any such constraints need to be justified in law and supported by evidence in terms of:

(a) The extent of land that the infrastructure providers say will be adversely affected as a consequence of their infrastructure;

(b) The necessity and desirability of imposing the selected constraints or obligations; and

(c) Why the infrastructure providers cannot or should not address or at least minimise those effects through:

(i) Implementing mitigation measures on their land (e.g.: ensuring that construction and sealing techniques minimise noise and vibration on state highways; or constructing noise barriers in strategic locations alongside transport networks, as has occurred elsewhere in the country);

(ii) Introducing effective management techniques relating to the operation of their infrastructure (e.g.: controls on speed of vehicles and trains, particularly through residential areas);

(iii) Providing compensation to the neighbouring landowners in return for those landowners accepting constraints on their land use; and/or

(iv) Funding the works on the neighbouring properties that the provisions oblige those neighbours to undertake (e.g.: as has occurred in the context of existing dwellings or schools in the vicinity of most airports and ports around the country, including at Auckland International Airport).

2.5 Kāinga Ora considers that in this case neither Council nor any of the infrastructure providers who are supporting these provisions have provided the legal or factual justification necessary to support the provisions proposed

or sought by them. To the contrary, Kāinga Ora considers that these are circumstances in which the infrastructure providers can and should:

(a) Undertake to implement the BPO to minimise effects generated by their infrastructure as a precursor to seeking provisions that impose obligations on landowners who are adversely affected;

(b) Undertake more research to better understand the relationship between their infrastructure and the neighbouring land uses;

(c) Refine the relief sought by them so that it better reflects the area of land potentially affected by their infrastructure; and

(d) Resile from seeking provisions that are not justified by evidence and that will unnecessarily constrain land use on neighbouring properties.

3. EVIDENTIAL BASIS REQUIRED

3.1 The vibration and noise controls seek to apply restrictions on the use of land within a spatially defined area. It is therefore important that there is an evidential basis which supports the imposition of additional controls on that area of land, particularly where there are other competing interests (i.e.: the provision of additional housing supply in close proximity to major transport routes).

Section 32 - RMA

3.2 The need for a strong evidential basis is reflected in the RMA, which sets up a procedural framework, most notably through section 32, for assessing proposed plan provisions and justifying restrictions being imposed.

3.3 Section 32 requires that (emphasis added):

> ***32 Requirements for preparing and publishing evaluation reports***
>
> *(1) An evaluation report required under this Act must—*
>
> *(a) examine the extent to which the objectives of the proposal being evaluated are the <u>most appropriate way to achieve the purpose</u> of this Act; and*
>
> *(b) examine whether the provisions in the proposal are the <u>most appropriate way to achieve the objectives</u> by—*
>
> *(i) identifying other reasonably practicable options for achieving the objectives; and*

> *(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
>
> *(iii) summarising the reasons for deciding on the provisions; and*
>
> *(c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.*
>
> *(2) An assessment under subsection (1)(b)(ii) must—*
>
> *(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—*
>
> *(i) economic growth that are anticipated to be provided or reduced; and*
>
> *(ii) employment that are anticipated to be provided or reduced; and*
>
> *(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and*
>
> *(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.*
>
> *…*

3.4 Collectively, those provisions:

(a) Create an obligation to justify provisions that impose constraints on landowners or occupiers.

(b) Adopt a rigorous "*most appropriate*" test in terms of assessing proposed objectives and lower order provisions. In order to reach a conclusion in terms of that test, the decision-maker needs to identify and assess a range of options for achieving the purpose of the RMA or the objectives. Those options include avoiding having the controls at all and minimising the land area over which they apply.

(c) Explicitly require consideration of costs and benefits and, if practicable, require their quantification. This involves a process of identifying and weighting the costs and benefits that arise from any given regulatory approach.

3.5 It is inherent in those obligations that provisions which impose constraints or restrictions on third parties will be supported by a strong evidential base. In the absence of such an evidential base there is no justification for introducing a regulatory framework.

NPS-UD 2020

3.6 The NPS-UD 2020 reinforces the need for evidence-based planning, particularly when provisions conflict with or have the potential to compromise urban development capacity and the need for a compact urban form.

3.7 For example, clause 3.11 of the NPS-UD requires:

> ***3.11 Using evidence and analysis***
>
> *(1) When making plans, or when changing plans in ways that affect the development of urban environments, local authorities must:*
>
> *(a) clearly identify the resource management issues being managed; and*
>
> *(b) use evidence, particularly any relevant HBAs, about land and development markets, and the results of the monitoring required by this National Policy Statement, to assess the impact of different regulatory and non-regulatory options for urban development and their contribution to:*
>
> *(i) achieving well-functioning urban environments; and*
>
> *(ii) meeting the requirements to provide at least sufficient development capacity.*
>
> *(2) Local authorities must include the matters referred to in subclause (1)(a) and (b) in relevant evaluation reports and further evaluation reports prepared under sections 32 and 32AA of the Act.*

3.8 In that context:

(a) Evidence will be required as to the resource management issue to be managed. At its most fundamental, that involves establishing that there is an issue that requires management (i.e.: in this case that the infrastructure networks generate adverse effects in Porirua District of sufficient scale and importance to warrant regulation through the PDP).

(b) Once it is established that an issue requires regulation, an evidential basis is needed to support the proposed regulatory response. In this case, that involves assessing the impact of the regulatory response on the landowners and occupiers who have not caused the adverse effect being managed, but on whom the rules will impose costs and constraints. Logically, that includes consideration of why those costs and constraints involved in mitigating the effects are not being imposed on the infrastructure providers whose networks are creating the adverse effects.

4. THE PROPOSED NOISE AND VIBRATION CONTROLS

4.1 The notified PDP includes blanket noise and vibration standards for noise sensitive activities within 100m of the rail corridor or 80m / 50m from the state highway carriageway, which are supported by NZ Transport Agency - Waka Kotahi and Kiwi Rail. No such provisions are proposed on the wider road network (i.e.: roads administered by the Council), regardless of the traffic numbers that such roads are catering for.

4.2 Kāinga Ora acknowledges that where significant adverse noise and vibration effects arise, they warrant management under RMA. Where Kāinga Ora diverges from the Council and the transport authorities is with respect to:

(a) Whether there is any evidential basis for imposing such controls in the District;

(b) If so, the type of controls that are necessary and appropriate in this case; and

(c) Who should bear the burden (cost) of managing these effects, particularly in existing residential areas.

Rationale for controls - Reverse sensitivity vs Health and Amenity Effects

4.3 Kāinga Ora considers that the RPS provisions and Council's 42A Report recommendations take an unusual approach, essentially elevating the interests of all noise generating activities above the interests of parties who might be affected by that noise.

4.4 The 42A Report[3] states that the provisions have been formulated to give effect to **Policy 8 of the RPS** which reads (**emphasis** added): "*District and regional plans shall include policies and rules that* ***protect regionally significant infrastructure*** *from incompatible new subdivision, use and development occurring under, over, or adjacent to the infrastructur*e." and that without the provisions the PDP would not give effect to the RPS and would therefore not be in accordance with s75(3)(c) of the RMA. Comment: That statement focuses on the protection of infrastructure, not the amenity of the people who live alongside it. The quoted passage is, however, limited in

[3] At 3.2.1.2 (para 34).

scope to regionally significant infrastructure whereas the proposed District Plan provisions discussed below use broader language.

4.5 **Objective Noise-O1** as proposed in the 42A Report reads (**emphasis** added): "*The **benefits of activities that generate noise** are recognised while any adverse effects from the generation of noise are compatible with the anticipated purpose, character and amenity values of the relevant zone(s) and do not compromise ~~public~~ the health, ~~or~~ safety or wellbeing of people and communities*." Comment: This objective reads as if all "*activities that generate noise*" will necessarily have benefits, which is not the case. Some activities that generate noise do benefit the community (e.g.: roads and rail) but many do not. The policy addresses the health and wellbeing of affected parties but almost as an afterthought. Kāinga Ora considers that a better approach would be to focus primarily on the minimisation of noise and the adverse effects caused by it, ideally through reducing noise at source.

4.6 **Objective Noise-O2** as proposed in the 42A Report reads (**emphasis** added): *The function and operation of **existing and permitted noise generating activities** are not compromised by ~~adverse effects, including~~ reverse sensitivity effects~~,~~ from noise-sensitive activities.* Comment: Again, this objective assumes that all activities that generate noise (regardless of, for example, whether they comply with the duty in section 16 to avoid unreasonable noise) should be protected from noise sensitive activities. Kāinga Ora considers that a better approach would be to limit any such objective to activities that are lawfully established, comply with the duty in section 16 by using BPO, and generate public benefits that warrant constraints on noise-sensitive activities. [Nb: The objective only needs to address regionally significant infrastructure in order to give effect to the parts of RPS Policy 8 referred to above.]

4.7 **Policy Noise-P4** as proposed in the 42A Report reads (**emphasis** added):

> "*Enable noise-sensitive activities and places of worship locating adjacent to existing State Highways and the Rail Network that are designed, constructed and maintained to achieve indoor design noise levels and provide for other habitable rooms when they **minimise the potential for reverse sensitivity effects from noise**, having regard to:*
>
> 1. *The outdoor amenity for occupants of the noise-sensitive activity;*
> 2. *The location of the noise-sensitive activity in relation to the State Highway or Rail Network;*
> 3. *The ability to appropriately locate the activity within the site;*

4. *The ability to meet the appropriate levels of acoustic insulation through screening, alternative technologies or materials;*

5. *The ability to mitigate any effects on buildings from vibration generated by the State Highway or Rail Network;*

6. *Any topographical or other existing features on the site or surrounding area;*

~~5~~7. *Any adverse effects on the State Highway or Rail Network; and*

~~6~~8. *The outcome of any consultation with the Waka Kotahi New Zealand Transport Agency or KiwiRail Holdings Limited."*

Comment: These provisions focus on addressing reverse sensitivity effects rather than adverse effects on health and amenity.

4.8 Kāinga Ora considers that, to the extent that such rules are warranted, they should be sheeted home to health and amenity effects and not reverse sensitivity. It says:

(a) Reverse sensitivity relates to the potential for an incoming activity (e.g.: residential) that is sensitive to effects generated by an existing activity (e.g.: the transport network) to generate complaints which then cause the existing activity to curtail or limit its operations. The presence of adverse effects on neighbours does not necessarily produce reverse sensitivity effects. It is the potential for the presence of those sensitive neighbours to compromise the operation of the activity that generates the effects (i.e.: the state highways and railway in this case) that is important.

(b) Complaints alone do not amount to reverse sensitivity and neither does the implementation of mitigation measures to address direct adverse effects on the environment generated by a land use. In practice, road and rail links are not closed because of noise, and reverse sensitivity effects do not arise. If these controls are warranted it is because of health and amenity effects generated on neighbouring activities by use of the roads and rail themselves.

4.9 Accordingly, to establish that there is a risk of reverse sensitivity, the transport authorities or Council would need to demonstrate that noise and vibration complaints from new land uses will result in restrictions being placed upon network operations. In Kāinga Ora's submission, they have failed to do so:

(a) KiwiRail's evidence makes reference to the possibility of complaints about and attendant constraints on its activities[4] but it does not identify how many (if any) complaints it receives about its activities in the Porirua District, nor give any examples of where complaints about its operations have translated into constraints on its activities.

(b) Nor is there any evidence regarding circumstances where complaints regarding state highways have resulted in restrictions being placed on those operations.

4.10 It is submitted that, if the focus of the controls is to be on addressing potential reverse sensitivity effects, then the controls should only apply to new land uses. Existing residential activities will in many cases have developed prior to the adjoining transport infrastructure or at a time when the effects generated by that infrastructure were less. Furthermore, the presence of those existing residential activities adjacent to the existing transport infrastructure demonstrates that they have not prevented the continued operation of the transport infrastructure. There is, therefore, no basis for concluding that those existing activities will generate reverse sensitivity effects in the sense described by caselaw.

Lack of evidential basis generally

4.11 Kāinga Ora says that the Council and the transport authorities have not discharged the evidential burden upon them and have failed to establish a sufficient basis for this Panel to conclude that provisions are justified in this case.

4.12 The controls will impact on the rights of landowners and occupiers and in practice will both restrict and add cost to the activities that can be undertaken on land. That land has not been designated and the transport authorities are not proposing to mitigate effects at source or through funding improvements to existing dwellings.

4.13 Given that the transport authorities have elected not to acquire the land in proximity to their networks that they say is affected, it is appropriate for any regulation to be applied only where there is an evidential basis that

[4] EIC, Michelle Grinlinton-Hancock for KiwiRail at para 6.3.

establishes a need for that regulation. That is not the approach that has been adopted, however. Instead, a blanket control is proposed over land within a specified distance of the road and rail corridor, where that specified distance is not supported by evidence. Indeed, Waka Kotahi's own section 32 RMA analysis concludes that the preferred approach is a modelled contour.[5]

4.14 Kāinga Ora says the evidence presented by the Council and the transport authorities is not sufficient to demonstrate justification for a land use control of the nature and scope proposed:

(a) While the 42A Report and evidence of Dr Chiles describes the nature of noise and vibration effects generated by transport infrastructure generally, it contains no modelling, empirical or factual data specific to the Porirua context. In the absence of such information, it is not possible to establish that any regulation is required or is appropriate.

(b) There is no evidence of the rail and road networks being constrained as a result of complaints (i.e.: that a reverse sensitivity effect arises).

(c) The material provided regarding the costs of undertaking the required improvements does not adequately account for the cumulative cost to be borne by the receiving environment (i.e.: all the landowners and occupiers who will be adversely affected).

(d) Kāinga Ora considers that there is no evidential basis for a vibration control in terms of the road network and that, to the contrary, roading authorities have the ability to control and effectively avoid vibration issues arising through constructing and (critically) maintaining road surfaces to an appropriate level. Mr Styles' evidence addresses the lack of certainty regarding the frequency and severity of any rail vibration effects.

4.15 In summary, Kāinga Ora says that there is no evidential basis for you to uphold the rules as notified in the PDP and supported in the 42A Report. It is submitted that a great deal of work will be necessary if such rules are ultimately to be justified and introduced into the PDP.

---

[55] Attachment C to EIC, Cath Heppelthwaite (planning) for Waka Kotahi at section 5.

Who should bear the cost burden?

4.16 There are ways in which noise effects from state highways and railways can be reduced (e.g.: changes to the road surface used, the construction of noise bunds, the repair of defects in the road or rail, the construction of noise walls, improvements to rail and rolling stock, or reduced speed limits, particularly through sensitive areas).

4.17 Kāinga Ora considers that those mitigation measures are best and most efficiently carried out by the transport authorities, at least in the first instance:

(a) Some of the mitigation measures are exclusively within the control of the transport authorities (e.g.: the road surface, the quality of the railway, the characteristics of rolling stock and speed limits). It is appropriate that the transport authorities be encouraged to ensure that such measures are undertaken and hence reduce noise at source.

(b) The construction of noise walls and noise bunds is something that can occur on private or public land. Again, however, it is most efficient for those measures to be implemented or at least to be funded by the transport authorities. They are able to:

(i) Develop and implement such measures in a comprehensive manner, using a consistent design;

(ii) Construct extensive lengths of bund or wall as a single project and in an economically efficient manner;

(iii) Maintain bunds or walls to a high standard and presumably in conjunction with the maintenance program on roads or rail;

(iv) Maintain long-term ownership and responsibility for the infrastructure which ensures high amenity and continued functionality over time.

4.18 Kāinga Ora considers that the provisions are inappropriate due to a lack of balance (and indeed equity) between the parties in the management of potential adverse effects arising from unreasonable transport noise levels. The proposed controls pass all costs onto the adjacent landowners, from identifying whether or not the controls actually apply to requiring the

landowners to taking steps to mitigate the effects of the noise. As noted in the 42A Report, the noise of vehicles on roads or trains on railway lines is unable to be directly limited by the PDP.[6] The transport authorities are not, however, exempt from the section 16 RMA requirement to adopt the BPO and nor does Kāinga Ora consider this to be sufficient justification for imposing the costs of mitigating those effects on the landowner.

4.19 The proposed rules impose on landowners the cost of managing an adverse effect which is assumed to exist but which is not established by evidence.

4.20 The vibration and noise controls will apply both to existing residential communities and future greenfield areas. It is inappropriate to impose on occupiers of existing dwellings who want to modify or replace their homes the cost of managing the "*interface effects*" associated with alleged incompatibility between the transport infrastructure effects and their existing land use.

4.21 If the road or rail networks have adverse noise and vibration effects on adjacent landowners such that use of that adjacent land is restricted, a question arises as to whether the transport authorities should provide a mitigation package to those owners in the same way as other noise generators (e.g.: Auckland International Airport Limited) are required to do for landowners within their noise contours. This is because affected landowners cannot access the compensation provisions in the Public Works Act in circumstances where significant restrictions are being placed on their land through district plan rules.

4.22 Alternatively, the transport authorities could designate (but not necessarily purchase) the land over which they want to constrain the activities of owners and occupiers:

(a) KiwiRail's evidence considers whether designation of land is an option for addressing the issue but concludes that this should not be adopted on the basis that it:

(i) "*Effectively sterilises land from use for other activities that would prevent or hinder rail operations to an extent that is not reasonable in order to address effects*";

[6] 42A Report at para 37.

(ii) Could not meet the reasonably necessary test under section 171 RMA; and

(iii) Would not meet the sustainable management purpose of the RMA.[7]

(b) Kāinga Ora disagrees and says:

(i) A landowner is able to seek requiring authority approval to undertake activities or works on designated land under section 176 RMA, which is analogous to seeking consent from the Council for new buildings, alterations or additions under the proposed provisions;

(ii) A landowner can access compensation for any additional restrictions that are placed on the use of their land through a designation (including for injurious affection) through the Public Works Act 1981;

(iii) That obligation to provide compensation would give the requiring authority an incentive to mitigate its effects at source so; and

(iv) If the rail network generates noise and vibration which has adverse effects on human health, and the designation would have the effect of reducing and mitigating those effects, then Kāinga Ora does not foresee a difficulty in meeting the reasonably necessary test in section 171 RMA.

Observations re NZS 6806:2010

4.23 The Waka Kotahi section 32 RMA analysis notes that new or altered State Highway transport projects will continue to be assessed under NZS 6806:2010 (Acoustics – Road traffic noise – New and Altered Roads) ("**the Standard**")[8]. In that regard, there is an apparent difference in the internal

[7] EIC, Michelle Grinlinton-Hancock for KiwiRail at para 6.5(b).
[8] EIC, Cath Hepplethwaite at Attachment C page 14.

noise level to be achieved depending on whether or not a party is the effects generator or effects receiver:

(a) The Standard sets the design criteria which Waka Kotahi must meet where it is establishing a new road or altering an existing road, beyond which it will install mitigation measures. For an altered road this is 64 - 67dB LAeq (24hr) and for a new road (greenfield site) this is 57 – 64 LAeq (24hr).

(b) It is understood that where a new road is constructed, or where an existing road is altered and will result in more noise than would leaving the road unchanged, the internal noise level in a house may reach 42-49dB (for a new road) or 49-52dB (for an altered road) before Waka Kotahi will install any mitigation measures to the house (based on an assumption that the level within the dwelling will be 15dB below the external level with windows open to provide ventilation).

(c) In contrast, the proposed rules would require any landowner to achieve 40dB inside in all circumstances. Accordingly, the provisions proposed by Waka Kotahi would impose much stricter requirements on private landowners than are imposed on Waka Kotahi itself under the Standard.

4.24 For completeness, we record the concerns raised by the Board of Inquiry in the Waterview Tunnel decision[9] regarding Waka Kotahi's reliance on the Standard to justify noise in the receiving environment, and in particular the fact that it only applies where the new or altered road will generate an "*appreciable increase*" in the noise level (approximately 3 dB). In that decision, the Board of Inquiry *inter alia* stated that:

(a) *"[A]s a matter of law we disagree with the view that NZ6806 embodies the requirements of the RMA in proper fashion"* (at [919])*;*

(b) The Standard is, "*not concerned singularly with managing the adverse effects of road noise on recipients"* (at [925])*;*

(c) The Standard, "*inadequately address[es] those parts of s5(2)(c) RMA concerned with avoiding, remedying and mitigating adverse effects*" (at [925]);

[9] Final Report and Decision of the Board of Inquiry into the New Zealand Transport Agency Waterview Connection Proposal, Publication No: EPA 25 (June 2011).

(d) The Standard does, "*not engage those parts of s7 RMA concerned with amenities and the quality of the environment likely to be of concern to impacted persons*" (at [925])

(e) The Standard, "*inadequately address[es] s16 RMA ('duty to adopt…the best practicable option … to ensure that the emission of noise…does not exceed a reasonable level')"* (at [925]).

4.25 Ultimately the Board of Inquiry concluded that, despite meeting the Standard, "t*he noise received at these locations [in the receiving environment from the proposed road] will still be at levels that we have held to be unacceptable*" (at [940]).

5. COMMENTS ON THE SECTION 32 RMA ANALYSES

5.1 Both the Council and Waka Kotahi have undertaken section 32 RMA analyses of the provisions but Kāinga Ora considers that those analyses do not adequately identify the costs and consequences of the proposed provisions. When dealing with rule which has significant implications for a large amount of land, there is a need to understand what costs are, particularly where there is no undertaking from the effects generator that the BPO will be adopted to address effects.

5.2 In that regard:

(a) There is significant uncertainty regarding the potential costs to landowners of mitigating the noise. Whilst the Council's section 32 analysis refers to an estimate (provided in a 2015 Waka Kotahi report relying on 2013 costs and assumptions) that the requirements will add 8-9% to build costs, Waka Kotahi's latest estimate in the section 32 analysis attached to Ms Hepplethwaite's evidence is 0-2%. Jon Styles' estimates of likely additional costs appear to be more aligned with the Council's analysis[10]. Karen Williams' evidence identifies areas of uncertainty regarding the costs estimates[11].

(b) Kāinga Ora is concerned that the analyses do not consider the geographic extent of the areas over which the controls are to be imposed. Thus, the assessments do not identify the cumulative costs that would be imposed on the neighbouring residential communities to

[10] Jon Styles EIC, section 8.
[11] Karen Williams Rebuttal, section 5.

achieve compliance with the rules. While costs have been assessed on an individual landowner basis, they are compared to the benefits which accrue cumulatively to the wider community.

(c) The claimed benefits of the rules include, "*protect occupants of buildings … from higher noise levels … therefore contribute to the health and safety and general wellbeing of those occupants*…."[12] That is a noble goal for a rule, but the problem here is that the cost of mitigation falls entirely on the sensitive receivers. There is no commitment on the part of the transport authorities to minimise or mitigate the effects generated by them. Furthermore, in the absence of a site specific analysis (i.e.: modelled contour) some of the landowners who will bear these costs will be living in areas that are not in fact subject to the asserted adverse effects but will still need to prove that, at their cost.

(d) The social implications (costs) of the rules have not been considered adequately, noting that the rules impose on people alongside these transport routes both the noise effects and the cost of mitigating those noise effects:

(i) Council's section 32 analysis suggests that the protection of residential occupants from the noise effects is a social benefit of the provisions[13]. Again, however, the cost of mitigation of those effects will fall not on the generator of noise but the recipient. This will occur most obviously in the form of additional construction and consenting costs but may also arise in other forms (e.g.: increased rent to compensate for the additional construction cost or reduced quality of other aspects of a dwelling to ensure that total construction costs are kept down).

(ii) Land alongside major transport routes is commonly considered to be a less desirable location in which to live (for a range of reasons including adverse effects on health and amenity). At a

[12] Porirua DC, Section 32 Report at page 40.
[13] Ibid, pages 40-41.

communal level, however, it is recognised that locating (and intensifying) housing along such routes is advantageous (because it enables a more compact, efficient urban form that supports public transport and hence reduces congestion and pollution generally).

(iii) Accordingly, the residents of these areas will incur costs individually while the benefits of both the transport network and of the improved urban form accrue to the wider community and the transport agencies themselves – neither of whom are expected by the provisions to contribute to mitigation of the noise effects on the neighbouring land.

(iv) In summary, the benefits are experienced by the public generally while the mitigation costs are incurred by the adversely affected parties individually.

(e) The claimed economic benefits of the rules will be realised through managing reverse sensitivity effects which, "*may result in constraints on existing activities … and the subsequent effects on the efficient and effective functioning of these activities* [14]". That is, the rule is intended not to reduce the generation of noise or vibration but to impose on receivers of those effects the cost of mitigation, in order to protect the parties who generate the adverse effects. And that is in the context where the receivers are owners and occupiers of disproportionately smaller scale and lower value assets in comparison with the effects generators.

5.3 The 42A report goes on to record that "*Kāinga Ora has not provided any proposed replacement provisions that a thorough evaluation can be made against, nor provided their own Section 32AA assessment of any such replacement provisions*"[15]. This comment represents a reversal of the section 32 RMA test. Rather than the proponent of the rule demonstrating that it is the most appropriate way of giving effect to higher order provisions, the 42A Report asserts (in the absence of evidence) that there is a need for the rule

[14] Porirua DC, Section 32 Report at page 40.
[15] 42A Report at para 35.

and then places an onus on affected parties to prove that the rule is not appropriate.

5.4 Notably, while Waka Kotahi's section 32 analysis[16] concludes that a corridor referring to modelled contours is the preferred approach, its submission and evidence continue to support a blanket (standard) setback.

6. APPROACHES ELSEWHERE IN THE COUNTRY

6.1 In support of including the noise and vibration controls in the PDP, KiwiRail's evidence refers to similar noise and/or vibration standards being included in various second generation operative district plans elsewhere in the country.[17] Whilst this is correct, it is worth noting that in those instances controls were included essentially uncontested. Where such provisions have been contested and the subject of evidence and legal submissions (e.g.: Auckland, Whangarei and Waikato) the controls have been rejected or limited in scope by the relevant hearings panels.

Auckland Unitary Plan

6.2 In the Auckland Unitary Plan, proposals for such provisions were rejected by the Independent Hearings Panel. Appeal rights were severely limited in that case and there was no substantive appeal process on these matters.

6.3 The IHP stated[18]:

> *"The proposed Auckland Unitary Plan proposed this overlay, to apply to the borders of high volume road and rail corridors, to protect the transport corridor from reverse sensitivity effects that can arise from new or altered activities that are sensitive to noise locating near these corridors. The overlay would also protect from unreasonable noise levels sensitive activities within the overlay (e.g. habitable rooms) by requiring such activities to comply with minimum noise insulation standards.*
>
> *In his evidence Mr Leigh Auton pointed out that this overlay would affect a very large group of property owners (Council estimated at least 76,000) and that a cost benefit assessment had not been undertaken of the implications of the overlay, and in particular on the costs that it would impose on affected property owners. Mr Auton considered the overlay would have the effect of shifting all costs associated with it on to property owners, with no obligation on the transport corridor operator to mitigate noise effects or to share costs incurred by property owners to mitigate those effects on-site. He drew parallels with the arrangements in place between Auckland International*

[16] EIC, Cath Hepplethwaite at Attachment C page 13.
[17] EIC Michelle Grinlinton-Hancock for KiwiRail at para 6.5(c).
[18] IHP Report to AC Topics 043 and 044 Transport (22 July 2016) at section 5.2

> *Airport Limited and noise-affected property owners where the Airport shares in the costs of noise mitigation and considered that approach more balanced.*
>
> *The Panel was concerned with proceeding with the extensive application of this overlay in the absence of a rigorous cost benefit assessment, including no assessment of who should appropriately bear the costs involved. In the absence of that assessment the Panel recommends this overlay be deleted*."

Whangārei Urban and Services Plan Changes

6.4 In Whangarei, the Hearings Panel dealing with the Urban and Services Plan Changes concluded that there was an evidential lacuna and a risk that affected landowners would not be aware of the consequences of the provisions:[19]

> "*163. Like Mr Burgoyne we believe that there is too great a risk to include the requested provisions due to the lack of information and any robust s32 analysis to support or justify the provisions . Mr Burgoyne did (in paragraph 32 of his RoR) provide us with some amendments to the provisions requested if we were of a mind to consider including provisions similar to those sought by NZTA and KiwiRail. However, we do not believe that any provisions should be included without a robust analysis which takes into account all issues, including those listed in paragraph 12 of the RoR, and also takes into account the effects on the significant number of properties (estimated in the S42A Report to be approximately 7,500 properties). In relation to this matter, we have concerns about whether the owners of the properties that could be affected being aware of the possible consequences of the proposed provisions and having the right to be heard.*
>
> *164. Mr Burgoyne had also reviewed a number of other district plans throughout the country and as a result of this review (see paragraphs 15, 16 and 17) the provisions are different to varying degrees. This again in our view supports a robust analysis of any provisions being carried out before they are considered.*
>
> *165. Lastly, we note the legal submissions on behalf of Kāinga Ora5 on the requested provisions. In submissions, Mr Sadlier highlighted that in many cases sensitive activities have been lawfully established prior to the establishment of the adjoining infrastructure and the evidence for the submitters is not specific to the Whangārei context. In his submission, any land use control needs to strike an appropriate balance between internalisation of effects by the primary effects-generator and the recognition of the economic and social importance of the infrastructure*."

6.5 These Whangarei decisions are currently on appeal to the Environment Court.

---

[19] Whangarei Urban and Services Plan Changes, Recommendation Report Services, p. 33 – 34 (28 May 2020).

Waikato Proposed District Plan

6.6 More recently in the context of the proposed Waikato District Plan the Panel similarly concluded that the noise and vibration provisions lacked an evidential basis, that it was unfair that the receiving environment bore the burden of mitigating the noise, that alterations to existing uses did not create a new sensitive activity (or new reverse sensitivity effect) and that any control should strike an appropriate balance between internalisation of effects by the primary effects-generator and the recognition of the economic and social importance of the infrastructure. To that end, it adopted the approach of the notified plan which was setbacks for new sensitive land uses of varying distances depending on the infrastructure it adjoined.

6.7 The Panel stated:[20]

> "*203. It seems to us that we have two choices: a spatial setback which would potentially sterilise the land adjoining the rail and state highway; or enable buildings accommodating sensitive activities to be located closer to the transport infrastructure but require them to have significant noise insulation. For both options, it seems to us inherently unfair that the burden of mitigating the noise generated by the railway or state highway would be borne by the adjoining landowners. We are particularly concerned that the evidence presented to us did not assess the costs of either option. It also seems to us that there are variables which affect the noise generation that are entirely beyond the control of the adjoining landowner. These variables include the surface of the road, the frequency and type of traffic (e.g., proportion of heavy vehicles), surrounding topography and the width of the berm between the carriageway and the edge of the designation, all of which requiring acoustic insulation.*
>
> *204. There are also no requirements in the PDP for either Waka Kotahi or KiwiRail to minimise the noise effects from the infrastructure. We remain concerned that Mr Wood applies these rules to alterations to existing buildings as well as new builds. We agree with Mr Grala that this creates a perverse outcome whereby an alteration to a 1940s dwelling that is situated close to a state highway would be required to be designed and constructed with acoustic insulation, regardless of the scale or nature of those alterations. As Mr Lindenberg stated in his evidence on behalf of Kāinga Ora, the extension or alteration of the existing 'sensitive activity' would not create a 'new' sensitive activity, nor a 'new' reverse sensitivity effect – it is merely an alteration of what already exists.*
>
> *205. Mr Styles, Kāinga Ora's noise consultant, explained it well when he said:*
>
> > *In my experience of dealing with rules and standards relating to the management of noise and vibration effects from land transport, there is often a large gap between the simplest rule set and the most effective rule set.*

[20] Report and Decisions of the Waikato District Plan Hearings Panel, Decision Report Hearing 13 Infrastructure, pages 61-62 (17 January 2022).

> *For example, the easiest way to specify the extent of the noise or vibration effects areas would be to assume a 'Standard Distance' from the nearest lane or track along the full length of all road and rail in the district. This approach is simple and easy to map.*
>
> *However, this approach is also likely to extend the effects areas onto land that may not be affected by noise or vibration to the extent that any development control is needed…. On other more open sections of road, the effects area could be larger.*
>
> *[original paragraph references omitted]*
>
> *206. Thus, in our assessment both approaches are flawed. We note that Mr Styles' National Land Transport (Road) Noise Map shows that noise levels from the state highway and regionally significant routes in Hamilton (accepting that this is not the Waikato District) are reduced to acceptable levels well within the 100-metre buffer strip that was being advocated. Neither Waka Kotahi nor KiwiRail provided us with evidence of the actual noise generated by the state highways or the railway. Mr Styles considered there is an option which explores a set of controls that are tailored to the Waikato District, with careful consideration of the actual and reasonably potential adverse noise and vibration effects on the land surrounding the network after the best practicable option has been adopted to minimise the effects at the source. We agree, but are unfortunately left with only two broad options; both of which are somewhat blunt instruments.*
>
> *207. We are aware of the scale of properties potentially affected as set out in Mr Grala's evidence, and it is highly unlikely the landowners that would be affected by the provisions were aware of the possible consequences of the submissions. We consider that any land use control needs to strike an appropriate balance between internalisation of effects by the primary effects-generator and the recognition of the economic and social importance of the infrastructure. With this in mind, and considering the evidence before us, we consider the setbacks as contained in the PDP are a more appropriate approach than that promoted by the transport infrastructure providers. The setback approach provides clarity for the community, provides some degree of protection against potential reverse sensitivity for the regionally significant land transport infrastructure and enables efficient use of the land resource*."

6.8 The appeal period on the Waikato District Plan is currently open.

7. CONCLUSION

7.1 In summary, Kāinga Ora says that the Council and the transport authorities:

(a) Have not objectively quantified and demonstrated the noise and vibration levels experienced within the Porirua District, and instead have relied on assertions and assumptions regarding the presence of adverse effects.

(b) Have not established that application of a standard distance either side of the road/rail network is appropriate, with particular regard to the economic costs of imposing such provisions. As a consequence,

even if some control is appropriate it will be applied over sites that do not warrant it.

(c) Have not established that there is potential for reverse sensitivity effects to be realised in practice (i.e.: that there is evidence of complaints in Porirua or even elsewhere having placed constraints on the operation of the road and rail network);

(d) Have wrongly sought to apply the noise and vibration controls over all residential areas including well-established neighbourhoods near existing transport networks;

(e) Have placed the full burden of managing effects on the noise and vibration receiver.

7.2 For the reasons set out above, Kāinga Ora requests that its relief be accepted, and that the vibration and noise controls be rejected.

Dated this 4th day of February 2022

_____

D A Allan / A K Devine

Counsel for Kāinga Ora-Homes and Communities

-