Under the Resource Management Act 1991

In the matter of Hearing of Submissions and Further Submissions on the Proposed Porirua District Plan

Submissions of Kāinga Ora – Homes and Communities

4 February 2022

Hearing Stream 4 – Friday 11 February, 11am

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Submissions of Kāinga Ora – Homes and Communities

1 Outline

1.1 These submissions address part of Kāinga Ora's presentation in Hearing Stream 4. A separate set of submissions by Ellis Gould addresses noise and vibration issues. These submissions address the remaining issues, namely:

(a) Use of notification preclusions;

(b) Earthworks: height of cut/fill;

(c) The appropriate setback from the rail corridor.

2 Notification preclusions

2.1 Kāinga Ora has previously addressed Commissioners on the proposed plan's use of notification preclusions. Its Hearing Stream 1 submissions on the issue are repeated in the Appendix to these submissions for Commissioners' ease of reference.

2.2 The general concerns Kāinga Ora explained in Hearing Stream 1 play out in relation to EW-R1 and TR-R2. EW-R1 provides for a restricted activity resource consent to be required for earthworks where compliance is not achieved with EW-S1 (area), EW-S2 (height, location and slope), EW-S3 (transport of cut or fill) or EW-S4 (site reinstatement).

2.3 The s 42A report writer considers that it is not appropriate to provide for preclusion of public or limited notification in relation to resource consents engaging that EW-R1:[1]

> 247. I consider that it is not appropriate to include a rule precluding public notification. Earthworks which exceed the standards listed in EW-R1 have the potential to have adverse effects on the wider environment. For example, cut or fill greater than EW-S2-1.a may result in adverse effects on natural landforms that are visually prominent from outside of the immediate surrounding area. In these instances, the consideration of public notification of resource consent applications through section 95A of the RMA is appropriate.
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> 248. Similarly, I consider that preclusion of limited notification is not appropriate. Adverse effects may be experienced by owners or occupiers

[1] Section 42A Report: Part B – Earthworks at [3.11.1.2.2].

> of adjoining properties due to non-compliance with the relevant standards. While Kāinga Ora [81.488] states that effects of earthworks can be adequately managed through the imposition of conditions and appropriate site management standards, I consider that this is not always the case. For example, earthworks proposed directly adjacent to a common boundary may compromise the stability of that property. Case law is clear that a consent authority may not impose conditions of consent to avoid, remedy or mitigate effects on an adjacent property so that no one would not be adversely affected, the latter being a section 95 assessment and the former a section 104 assessment, unless that condition is offered by the applicant in the first instance. Accordingly, the consideration of effects on adjacent properties and limited notification of resource consent applications through section 95B of the RMA is appropriate.

2.4 The purpose of notification is for the consent authority to receive any significant additional material relevant to the issues to be determined on the substantive consent application.[2] But Parliament has recognised through s 77D of the RMA that it is appropriate to make rules precluding the consent authority from giving public or limited notification. The s 42A report writer's reference to "case law" seems to suggest that notification preclusions are only appropriate in relation to rules the infringement of which could not adversely affect anyone. That puts the bar way too high. If that were the case there could never be any situation in which a notification preclusion would be appropriate.

2.5 As noted in the evidence of Karen Williams (at [7.6]-[7.12]), the assessments required and conditions imposed in relation to earthworks are typically of a technical nature – involving geotechnical, hydraulic or other engineering experts. Where a consent applicant has not provided adequate supporting evidence of this nature a consent authority has other means of obtaining such advice, including s 92(2).

2.6 The technical nature of the assessment is borne out by the matters of discretion listed in relation to EW-S1 to EW-S4.[3] All, with the exception of visual amenity values of the surrounding area and dust and vibration beyond the site, are *par excellence* matters that a consent authority can assess by reference to expert opinion without public or limited notification. And even for visual amenity values and dust and vibration, it can be expected that it would only be in unusual or exceptional cases that the consent authority may require significant additional material to make the

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2 *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405.

3 Except perhaps EW-S2 – see Ms Williams' evidence at [7.9].

assessment. In such cases ss 95A and 95B provide for notification to occur despite a notification preclusion based on special circumstances.

2.7 Policy 6(b) of the NPS-UD strengthens this argument. Policy 6(b) records that when making planning decisions that affect urban environments, decision-makers keep in mind that changes to an area are not, of themselves, an adverse effect. In light of that it is difficult to see what additional information adjacent landowners are likely to have in relation to visual amenity in particular.

2.8 Nonetheless, if visual amenity values or dust and vibration are to be relied on to justify not precluding notification, then they can realistically only justify not precluding limited notification. Both are matters that could only affect adjacent or nearby landowners. So, at a minimum, public notification should be precluded. The s 42A report writers for the Infrastructure and Transport Chapters have taken a similar approach to this, partially accepting Kāinga Ora's submissions by recommending that public notification be precluded because of the mainly technical nature of the information relevant to the assessments.

2.9 Finally, the s 42A report writer relies on earthworks having an effect on natural landforms that are visually prominent from outside the surrounding area to justify not precluding public notification. But this overstates the likelihood that the Council will need public input on a proposal to undertake significant earthworks that change a natural landform. First, the Council has specifically identified the landforms it wishes to protect through the Natural Features and Landscapes Chapter and they have their own earthworks rule (NFL-R1). Second, the matters of discretion are specific to the visual amenity values of the surrounding area, not *outside* the surrounding areas the s 42A report writer has stated, and the natural landform and extent to which the finished landform will reflect and be sympathetic to the surrounding landform, a matter that is best addressed, with respect, by a landscape architect.

2.10 Similar issues are at play for TR-R2. While the s 42A report writer considers that non compliance with relevant standards may have safety implications for adjacent land uses, Ms Crafer notes in her evidence that safety issues are best determined by the road controlling authority. Safety is a matter best determined by experts, not neighbours.

2.11 Kāinga Ora remains of the view that the PDP misses an opportunity by not using notification preclusions more frequently. The likely outcome of notification preclusions being rejected for EW-R1 and TR-R2 is that, as a result of "bundling", resource consent applications for more intensive housing development will take longer to progress, and where notified, will have the effect of undermining preclusions in pace elsewhere in the plan. This was a point made at length in the evidence of Ms Williams in Hearing Stream 1 (at [5.22]-[5.23]).

3 Earthworks: height of cut and fill

3.1 EW-S2 provides for a vertical cut height and fill depth of 1.5m. This is unduly restrictive. Ms Williams's evidence from [7.13]-[7.22] proposes a more appropriate alternative which permits a cut height or fill depth of up to 2.5m as a permitted activity where it is retained by a structure authorised by a building consent.

3.2 The main issue to be addressed is the stability of earthworks with cuts/fills of more then 1.5m. There can be no question that up to 2.5m stability is not an issue, because another regulatory regime – the Building Act – addresses it. The cut-off at 2.5m appropriately recognizes that at that level, the other matters for discretion may come into play.

4 Rail Corridor

4.1 As noted in the evidence of Ms Williams filed in this Hearing Stream, Kāinga Ora supports a setback of buildings and structures from the boundary of the railway corridor of no more than 2m in residential zones, and 2.5m in mixed-use/commercial zones. It therefore agrees with the s 42A report writer that a 1.5m setback in the General Residential Zone is appropriate.

4.2 This outcome is consistent with recently settled appeals on plan changes in Whangārei.

4.3 On behalf of Kiwirail, Ms Grinlinton-Hancock has given evidence supporting a 5m setback. Her initial evidence based this position on management of safety risks, which she supported by referring to water blasting and using ladders. But it is difficult to see how increasing a setback from 1.5m to 5m will reduce spray drift from water blasting when

people waterblast fences, including boundary fences, as much as buildings and boundary fences are exempt from the setback.

4.4 In her rebuttal evidence, she focused more on the nature of the rail network in the Porirua District, which she distinguished from the Whangārei District.

4.5 Kāinga Ora generally agrees that provisions should be appropriate for the context of the particular district. That has, with respect, been a theme of its submissions on a number of proposed plans, including Porirua's. In particular, it eschews taking a one-size fits all approach to mapping the national grid, for example.

4.6 But it does not agree that Ms Grinlinton-Hancock's reasons for distinguishing the context justify a 5m setback.

4.7 First, the electric trains that run through Porirua may be quieter – though you would hardly call them quiet – but they are also significantly more frequent than the non-electrified trains in Whangārei. People living adjacent to the rail corridor are likely to be acutely aware of how their actions may interfere with the rail network. This is no more speculative an assertion than Ms Grinlinton-Hancock's concern that people may inadvertently interfere because they are unaware of a train approaching.

4.8 Second, no attempt has been made to compare the costs to landowners of the significant additional restriction Kiwirail seeks to impose with the asserted cost of the "Permit to Enter" system.

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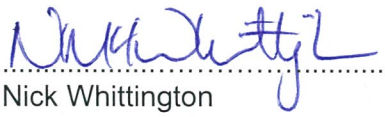

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Appendix 1: Kāinga Ora Submissions dated 23 September 2021 – Hearing Stream 1 – Part 5: Notification

5.1 … Kāinga Ora is concerned that the PDP misses an opportunity by not using notification preclusions more frequently. By contrast the s 42A report writer considers that they have been used judiciously and appropriately. With respect, that is not in doubt. They could be adopted more frequently as a tool and still be both judiciously and appropriately used.

5.2 Kāinga Ora's submission identifies numerous individual rules where a notification preclusion has not been included but where Kāinga Ora considers it ought to be.

5.3 The benefits of notification preclusions are that they make the consenting process more efficient – not only because notification is avoided, but the AEE may be drafted without having to determine whether the effects of the proposal trigger the thresholds for public or limited notification (depending on the relevant preclusion).

5.4 However, because of the application of the doctrine of "bundling", the efficiency of notification preclusions is lost if preclusions are not provided for all rules likely to be triggered in common applications. "Bundling" is the term given to the principle of applying the most restrictive activity status to a resource consent application involving several linked or overlapping activities that have different activity statuses. Its purpose is to ensure that applicants do not divide up applications into smaller applications so as to avoid consent authorities from having the full picture, or only being able to consider certain effects, when determining resource consent applications.

5.5 The text of ss 95A and 95B of the RMA have been drafted with bundling in mind:

(a) For public notification:

(i) at Step Two the council is not permitted to publicly notify an application if the application is for a resource consent for 1 or more activities, and *each activity* is subject to a rule that precludes public notification;

(ii) at Step Three the council must publicly notify an application if the application is for a resource consent for 1 or more activities, and *any of those activities* is subject to a rule or national environmental standard that requires public notification; and

(b) For limited notification, at Step Two the council is not permitted to limited notify an application if the application is for a resource consent for 1 or more activities, and *each activity* is subject to a rule that precludes limited notification.

5.6 The effect of the italicised phrases is that, for notification preclusions to effect their purpose, each and every rule triggered must be subject to a notification preclusion. If they are not, and applying ss 95A and 95B leads to notification of some form, then the entire application is to be notified and any aspect, including those that might otherwise relate to a rule with a notification preclusion, can be the subject of a submission.

5.7 Karen Williams's evidence records her opinion that this tool has not been used to its full potential across the PDP. She considers that where infringements relate purely to development controls that seek to manage design outcomes or on-site amenity, these should be subject to notification preclusions (for example onsite landscaping). She also considers that non-notification clauses can be applied to rules where a "public good" or technical assessment is required.