BEFORE INDEPENDENT HEARING COMMISSIONERS
AT UPPER HUTT

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
TE AWA KAIRANGI KI UTA

IN THE MATTER	**of the Resource Management Act 1991**
AND	
IN THE MATTER	**of the hearing of submissions on the Upper Hutt City Council's Intensification Planning Instrument Plan Change**

HEARING TOPIC: Upper Hutt City Council's Intensification Planning Instrument Plan Change

---

LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA – HOMES AND COMMUNITIES

19 APRIL 2023

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

Counsel Instructed:
N M H Whittington
Hawkestone Chambers
PO Box 12091
Thorndon
Wellington 6140
E. nick.whittington@hawkestone.co.nz

1. KĀINGA ORA – HOMES AND COMMUNITIES

1.1 Kāinga Ora is a participant in various intensification streamlined planning processes (**ISPP**) across the region and country, which are designed to give effect to the National Policy Statement on Urban Development 2020 (**NPS-UD**") as required by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 ("**HSEA")**. The extent and tenor of Kāinga Ora participation in these processes reflects its commitment both to achieving its statutory mandate and to supporting territorial authorities to take a strategic and enabling approach to the provision of housing and the establishment of sustainable, inclusive and thriving communities.

1.2 Kāinga Ora and its predecessor agencies have a long history of building homes and creating sustainable, inclusive and thriving communities and it remains the holder and manager of a significant portfolio of Crown housing assets. More recently, however, the breadth of the Kāinga Ora development mandate has expanded and enhanced with a range of powers and functions under both the Kāinga Ora – Homes and Communities Act 2019 and the Urban Development Act 2020.

1.3 The detailed submissions lodged by Kāinga Ora on the Upper Hutt City Council's IPI are intended to:

(a) Support the Council to give effect to national policy direction, and in particular, the NPS-UD;

(b) Encourage the Council to utilise the important opportunity provided by the IPI to enable much-needed housing development utilising a place-based approach that respects the diverse and unique needs, priorities, and values of local communities;

(c) Test the quality of reasoning and evidence relied on to reduce height, density or development capacity against the legal requirements for qualifying matters; and

(d) Optimise the ability of the IPI to support both Kāinga Ora and the wider development community to achieve government housing objectives within those communities experiencing growth pressure or historic underinvestment in housing.

1.4 Kāinga Ora also seeks to offer a national perspective to facilitate cross-boundary consistency in the implementation of the Act, which it hopes is of assistance to the Council.

1.5 These legal submissions will:

(a) Briefly summarise the statutory framework within which Kāinga Ora operates;

(b) Describe the step-change that the NPS-UD and HSEA require when establishing the planning framework;

(c) Address specific issues raised by the evidence which have a legal dimension, including:

(i) Consultation around rezoning requests;

(ii) Inclusion of reverse sensitivity as a matter of discretion;

(iii) The Council's approach to determining walkable catchments;

(iv) Correcting references to financial contributions.

2. KĀINGA ORA AND ITS STATUTORY MANDATE

2.1 The corporate evidence of Mr Singh sets out the key statutory provisions from which Kāinga Ora derives its mandate. In short, Kāinga Ora was formed in 2019 as a statutory entity under the Kāinga Ora-Homes and Communities Act 2019, which brought together Housing New Zealand Corporation, HLC (2017) Ltd and parts of the KiwiBuild Unit.

2.2 As the Government's delivery agency for housing and urban development, Kāinga Ora works across the entire housing development spectrum with a focus on contribution to sustainable, inclusive and thriving communities that enable New Zealanders from all backgrounds to have similar opportunities in life.[1] It has two distinct roles: the provision of housing to those who need it, including urban development, and the ongoing management and maintenance of the housing portfolio.

2.3 In relation to urban development, there are specific functions set out in the Kāinga Ora–Homes and Communities Act 2019. These include:

(a) to initiate, facilitate, or undertake any urban development, whether on its own account, in partnership, or on behalf of other persons, including:[2]

(b) development of housing, including public housing and community housing, affordable housing, homes for first-home buyers, and market housing:[3]

(c) development and renewal of urban developments, whether or not this includes housing development;[4]

(d) development of related commercial, industrial, community, or other amenities, infrastructure, facilities, services or works;[5]

(e) to provide a leadership or co-ordination role in relation to urban development, including by-[6]

(i) supporting innovation, capability, and scale within the wider urban development and construction sectors;[7]

---

1 Kāinga Ora–Homes and Communities Act 2019, s 12.
2 Kāinga Ora–Homes and Communities Act 2019, s 13(1)(f).
3 Kāinga Ora–Homes and Communities Act 2019, s 13(1)((f)(i).
4 Kāinga Ora–Homes and Communities Act 2019, s 13(1)(f)(ii).
5 Kāinga Ora–Homes and Communities Act 2019, s 13(1)(f)(iii).
6 Kāinga Ora – Homes and Communities Act 2019, s 13(1)(g).
7 Kāinga Ora – Homes and Communities Act 2019, s 13(1)(g)(i).

(ii) leading and promoting good urban design and efficient, integrated, mixed-use urban development:[8]

(f) to understand, support, and enable the aspirations of communities in relation to urban development;[9]

(g) to understand, support, and enable the aspirations of Māori in relation to urban development.[10]

2.4 Further, Kāinga Ora considers that the compact urban form promoted by the HSEA and to be implemented through the IPI is clearly aligned with its functions:

(a) A compact urban form enables residents to live closer to places of employment, education, healthcare, and services such as retail. That reduces the need for travel and supports the use of public transport and active transport modes.

(b) The intensification around centres promoted by Policy 3 of the NPS-UD further supports those outcomes while enabling the centres to increase in scale, economic activity and viability, diversity of economic, social and cultural activities, and vibrancy.

(c) A compact urban form enables the sharing of key infrastructure such as urban roading, three water networks and reduces the marginal cost of construction for such infrastructure.

(d) Intensification, particularly through multi-storey development, reduces the total extent of impermeable surfaces (having regard to roading as well as building coverage) and, consequently, reduces the total stormwater runoff from urban development.

---

8 Kāinga Ora – Homes and Communities Act 2019, s 13(1)(g)(ii).
9 Kāinga Ora – Homes and Communities Act 2019, s 13(1)(h).
10 Kāinga Ora – Homes and Communities Act 2019, s 13(1)(i).

(e) Intensification enables an urban form that, overall, is more efficient, connected and supportive of residents while reducing or avoiding the adverse effects and inefficiencies that can arise from less compact forms of development.

2.5 In recent years, Kāinga Ora has had a particular focus on redeveloping its existing landholdings, using sites more efficiently and effectively so as to improve the quality and quantity of public and affordable housing available for those most in need of it.

2.6 The direction contained in the NPS-UD (coupled with the Medium Density Residential Standards (MDRS) required by the HSEA) provides an opportunity to address that issue for the future. The Kāinga Ora submissions have therefore focused on ensuring the planning framework supports critical drivers of successful urban development including density, height, proximity to transport and other infrastructure services and social amenities, as well as those factors that can constrain development in areas that need it, either now or as growth forecasts may project. It has thought critically about attempts to pull back from intensification in areas with identified qualifying matters and tested the evidence and reasoning used to justify this.

2.7 If planning frameworks are sufficiently well crafted, benefits will flow to the wider development community. With the evolution of the Kāinga Ora mandate, via its 2019 establishing legislation and the UDA in 2020, the government is increasingly looking to Kāinga Ora to build partnerships and collaborate with others in order to deliver on housing and urban development objectives. This will include partnering with private developers, iwi, Māori landowners, and community housing providers to enable and catalyse efficient delivery of outcomes, using new powers to leverage private, public and third sector capital and capacity.

3. NPS-UD AND HSEA – CHANGE OF MINDSET REQUIRED

3.1 The NPS-UD was approved on 20 July 2020. Section 55 of the RMA governs local authority recognition of national policy statements but in this case implementation of the NPS-UD has been accelerated by the subsequent passage of the HSEA.

3.2 Together these documents require those making recommendations and decisions on proposed plans to change their mindset in a fundamental way.

3.3 The NPS-UD and HSEA have their origins in the Productivity Commission's report *Using land for housing*.[11] Among the Report's findings were that planning frameworks were overly restrictive on density, and that density controls were too blunt, having a negative impact on development capacity, affordability, and innovation. The Report also commented that planning rules and provisions lacked adequate underpinning analysis, resulting in unnecessary regulatory costs for housing development.

3.4 Policy 3 of the NPS-UD is directive. It requires district plans to enable building heights and density of urban form:

(a) As much as possible in city centre zones to maximise the benefits of intensification;

(b) In all cases at least six storeys and otherwise reflecting demand in metropolitan centre zones;

(c) At least six storeys within at least a walkable catchment of rapid transit stops, and the edge of city and metropolitan centre zones; and

(d) Commensurate with the level of commercial activity and community services within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones.

3.5 Notably:

---

[11] Productivity Commission *Using land for housing* (September 2015).

(a) Six storeys is a floor, not a ceiling. *At least* six storeys must be enabled in metropolitan centre zones, walkable catchments etc.

(b) In policy 3(c), six storey building heights are to be enabled *at least* within the referenced walkable catchments. In other words, even beyond the walkable catchments territorial authorities must be considering enabling at least six storeys. Despite this, it appears most territorial authorities have limited themselves to strict walkable catchments, thereby potentially failing to give effect to the NPS-UD. This is specifically addressed further below.

3.6 Perhaps the most significant policy in terms of the approach decision-makers must take is policy 6(b). It provides:

> **Policy 6**: When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:
>
> …
>
> (b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:
>
> (i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and
>
> (ii) are not, of themselves, an adverse effect.

3.7 The requirement to have particular regard to a matter "is an injunction to take the matter into account, recognising it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion."[12] This policy accordingly requires decision-makers to recognise as important that the amenity values associated with a more intensified housing environment are appreciated by people, communities and future generations. This gives significant scope for decision-makers to prioritise the development of amenity values to be appreciated by future

---

12 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228; approved in *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991 at [67]-[68].

generations, and those currently struggling to find housing in the highly constrained housing and rental markets, over the amenity values appreciated in existing low density residential neighbourhoods.

3.8 Section 77G(1) of the HSEA imposes on territorial authorities a duty to incorporate the MDRS in "*every relevant residential zone*", which is defined as meaning all residential zones (with some irrelevant exclusions). Section 77G(2) imposes a duty to give effect to the NPS-UD in "*every residential zone in an urban environment*".

3.9 The sole basis on which a territorial authority may reduce the application of the MDRS or the building heights and density of urban form required by policy 3 is by identifying a matter that qualifies, through evidence and cost-benefit analysis, to reduce the otherwise strict application of the MDRS and policy 3.

3.10 Policy 4 of the NPS-UD and section 77I provide that a district plan may be less enabling than the MDRS and policy 3 require *only to the extent necessary to accommodate* a qualifying matter.

3.11 The italicised words are significant and important. They mean that when evidence establishes that a less-enabling provision is appropriate, the starting point is the MDRS or policy 3 requirements, and the reduction from those standards or requirements must be to the least extent necessary to accommodate the matter.

3.12 The Productivity Commission Report findings about weak cost-benefit analysis have led to ss 77I-77L and cls 3.32-3.33 of the NPS-UD which seek to strengthen the level of rigour in evidence and analysis required to establish restrictions on development through qualifying matters.

4. REZONING AROUND THE CCZ

4.1 Kāinga Ora has sought that some land currently zoned City Centre Zone under the Operative District Plan, but rezoned HRZ under the IPI, revert to the existing CCZ.

4.2 The s 42A report writer gives these reasons for rejecting Kāinga Ora's submission:[13]

> I have considered the requested changes to the spatial extent of the CCZ as requested by S58.374 - Kāinga Ora: Homes and Communities. The submitter requests the rezoning of multiple residential zoned sites adjacent to the CCZ be rezoned to CCZ. I have the following concerns regarding the requested expansion of the CCZ:
>
> a. None of the residential zoned property owners have been directly consulted with regarding a proposed change in zoning from High Density Residential Zone to City Centre Zone. I do not consider it appropriate to rezone private property to another zone via a submission on a plan change, unless all affected property owners have been directly consulted with (prior to notification of a plan change) and been given the opportunity to provide feedback on a draft plan change and make a submission on a proposed plan change.
>
> b. None of the affected property owners will have an opportunity to appeal the change in zoning from residential to CCZ. I note clause 107 of Schedule 1 of the RMA prevents appeals to the Environment Court on decisions on the IPI.
>
> c. The NPS-UD does not require the Council to enlarge the spatial extent of any centres.
>
> d. The submission does not include any evidence to demonstrate the requested extension of the spatial extent of the CCZ is a more appropriate method to achieve the IPI objectives compared to the notified IPI.
>
> e. The HBA does not identify the need for the Council to expand the spatial extent of the CCZ into adjacent residential zoned land. I note the HBA identifies a shortage of sufficient housing capacity to meet the modelled demand, and I consider the requested rezoning could exacerbate this by removing residential zoned land that is appropriate for high density residential subdivision and development.

4.3 These reasons are problematic:

(a) If the reason expressed at (a) were correct, then no person other than the land owner could ever seek rezoning by way of submission on a proposed plan change. Even if that were the correct approach to "scope" under the *Clearwater* and *Motor Machinist* tests (and it is not), it is certainly not an appropriate approach to take to the question of scope under an IPI. Fundamentally, the Kāinga Ora submission seeks that the zoning of land achieves a well-functioning urban

---

[13] At [593].

environment, and in doing so seeks to achieve Objective 1 and policy 3 of the NPS-UD. Nor can it be suggested that it is unfair to landowners in respect of whose land the submission seeks to revert to the ODP zoning.

(b) The reason at (b), that landowners would not be able to appeal, if relied on, would defeat the purpose of the HSEA and the NPS-UD. The rezoning request is plainly within scope and Parliament has decided not to permit appeals on decisions on an IPI. It cannot therefore be a legitimate reason to reject Kāinga Ora's submission if it is otherwise a meritorious planning outcome.

(c) The reason at (c) is unclear. If it means that the NPS-UD does not mandate the specific expansion of the spatial extent of centres, then this is true, but it could only be a legitimate reason to reject Kāinga Ora's submission if it expressly precluded the spatial expansion of centres. In fact, expanding zones, including centres, is most certainly within the anticipated scope of an IPI under the HSEA and NPS-UD.[14] And as Ms Blackwell notes, the NPS-UD requires territorial authorities to take an analytical approach to the appropriate spatial extent of zones, including centres, so as to provide a planning framework that will produce well-functioning urban environments. It can and should be a matter of legitimate debate whether that is best achieved by the Council's proposed zoning pattern around the CCZ, or Kāinga Ora's, but the issue must be engaged with directly on the merits rather than seeking to put procedural barriers in the way.

(d) The reason at (d) makes little sense. The role of a submission is not to provide evidence. Evidence supporting the submission can be found in the evidence of Mr Rae, Mr Cullen, and Ms Blackwell.[15]

---

14 See Resource Management Act 1991, ss 77G(4) and 77N(3).
15 See Evidence of Alice Blackwell at [6.1]-[6.7].

(e) The reason at (e) also makes little sense because the CCZ provisions are intended to be enabling of residential development.

4.4 Kāinga Ora requests that the Panel engage with the submission on a planning level and reject the reasons preferred by the s 42A report writer for not accepting the submission.

5. REVERSE SENSITIVITY

5.1 The s 42A report writer has recommended including "reverse sensitivity" as a matter of discretion for restricted discretionary activities in both the GRZ (which Kāinga Ora seeks be renamed the MRZ) and HRZ. In the GRZ this is because the writer "agree[s] the consideration of reverse sensitivity effects is appropriate within the GRZ due to the greatly enabled heights and densities enabled by the IPI, and the corresponding increased likelihood of reverse sensitivity effects as more people and households live in closer proximity to non-residential activities".[16] In respect of the HRZ this is because the report writer "agree[s] reverse sensitivity effects in general should be within the Council's matters of discretion for the consideration of resource consents where the maximum building height standard of HRZ-S2 is not met. I consider that residential buildings that breach the permitted height standard in the High Density Residential Zone are likely, in some scenarios, to place additional people in closer proximity to adjacent non-residential activities compared to permitted activity development. In my opinion, this can increase the likelihood of reverse sensitivity effects arising."[17]

5.2 This reasoning is not compliant with the legislative framework. Under s 77G(5)(b) a territorial authority may include objectives and policies in addition to those set out in cl 6 of sch 3A, to provide for matters of discretion to support the MDRS; and link to the incorporated density standards to reflect how the territorial authority has chosen to modify the MDRS in accordance with s 77H.

---

16 At [266].
17 At [450].

5.3 Section 77G(5)(b) cannot support adding additional matters of discretion such as reverse sensitivity:

(a) First, it permits adding objectives and policies, not standalone matters of discretion unrelated to the objectives and policies associated with the MDRS.

(b) Further, in any event, the proposed inclusion of reverse sensitivity as a matter of discretion is necessary less enabling of development. It also therefore does not "support" the MDRS but makes them less likely to be given effect to in full and therefore detracts from those standards.

(c) Next, s 77G(5) does not authorise additional matters of discretion to support giving effect to policy 3.

(d) And finally, as s 77H provides for making the MDRS more enabling, reverse sensitivity cannot be included as a matter of discretion on that basis either.

5.4 Under s 77I a territorial authority may make the MDRS or relevant building height under policy 3 less enabling of development (which including additional matters of discretion aimed at protecting existing uses necessarily does) by identifying a qualifying matter and considering the stringent evidence base necessary to establish it. Then, the reasoning process must engage with the extent to which it is necessary to change the implementation of the MDRS or policy 3 to accommodate the qualifying matter.

5.5 No qualifying matter listed in s 77I could apply to protect the Fuel Companies' position. Nor has any evidence been produced that is capable of supporting any qualifying matter. The evidence of Jarrod Dixon lodged on behalf of the fuel companies simply supports the report writer's approach and does not engage with the question of qualifying matters.

5.6 Adopting the submission would for these reasons be unlawful. But even if not, the point made by Ms Blackwell in her evidence, that in a

residential zone it is not appropriate to protect non-residential activities from reverse sensitivity is sensible and rational. It may (subject to following the reasoning process mandated by the legislation in relation to qualifying matters) be more appropriate in a non-residential zone, but it is inappropriate in a residential zone.

6. WALKABLE CATCHMENTS

6.1 The difference of opinion between the Council's s 42A report writer and Kāinga Ora witnesses about walkable catchments is one that can be resolved on a planning level, though it also raises a legal issue about how policy 3 of the NPS-UD has been implemented.

6.2 Ms Blackwell makes a fair criticism of the Council's position that how the Council has delineated walkable catchments is unclear, and comes across as a little random. It may be that there is a more analysis sitting behind it but this has not been made apparent to submitters which limits the extent to which they can engage on the appropriateness of that methodology and leaves them, as Kāinga Ora has through the evidence of Mr Rae, formulating their own alternative walkable catchments.

6.3 The legal issue that arises, however, is that policy 3(c) of the NPS-UD requires territorial authorities to adopt building heights of at least six storeys within *at least* a walkable catchment of rapid transit stops and centre zones.

6.4 Accordingly, the required process is to delineate the walkable catchment, and then consider whether to increase building heights even beyond that catchment. There is no evidence that the Council has done this. It follows that even if, therefore, the Council's walkable catchments are adopted, it would still be open to the Panel to recommend intensification as proposed by Kāinga Ora on the basis that it was appropriate to increase building heights and densities beyond the proposed walkable catchments.

7. FINANCIAL CONTRIBUTIONS

7.1 The s 42A report states, in relation to amendments sought to the financial contribution provisions:

> 1071. I agree with submission S58.69 that it is appropriate to amend the chapter to refer to 'financial contributions' rather than 'development contributions', and to make consequential amendments throughout the chapter where appropriate. This is a legacy issue with the District Plan that I consider should be amended so the legislative basis is for the provisions is clear – i.e., financial contributions are prepared under the RMA, whist development contributions are prepared under the Local Government Act 2002. I note some references to 'development contributions' are explanatory and are present to assist in plan implementation, and I recommend in some instances these remain in the provisions.
>
> 1072. The submission also requests amendments to assist in explaining how financial contributions are assessed, calculated and what they are for. I agree the requested text will provide assistance for plan users. However, I do not recommend making amendments to provide specific calculation in the District Plan, as I note the development contributions policy is subject to more regular change and is currently being rewritten at the time of preparing this report.

7.2 Plainly Kāinga Ora supports the position in relation to para [1071], but the explanation in para [1072] is confusing in respect of its reference to the Council's development contributions policy. Development contributions and financial contributions have different purposes. It is not therefore clear why the rewriting of the development contributions policy has any relevance. More importantly, the Council's district plan must set out how financial contributions are to be assessed, calculated and explain the purpose they are collected for. With respect, Kāinga Ora's submission must be engaged with more directly, and it is requested that it be accepted by the Panel.

8. EVIDENCE

8.1 Evidence by the following witnesses has been filed in support of Kāinga Ora's position:

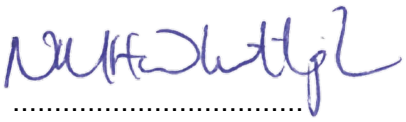
(a) Gurv Singh – Corporate evidence and Kāinga Ora representative;

(b) Alice Blackwell – planning;

(c) Nick Rae – urban design;

(d) Michael Cullen – urban economics.

Date: 19 April 2023



.....
Nick Whittington