BEFORE INDEPENDENT HEARING COMMISSIONERS
AT RANGIORA / WAIMAKARIRI

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHAKE
KI RANGIORA / WAIMAKARIRI

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the hearing of submissions and further submissions on the **Proposed Waimakariri District Plan**
	and
	of the hearing of submissions and further submissions on **Variation 1** to the Proposed Waimakariri District Plan

HEARING TOPIC: Stream 3 - Contaminated Land and Natural Hazards

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LEGAL SUBMISSIONS ON BEHALF OF KĀINGA ORA – HOMES AND COMMUNITIES

13 JULY 2023

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

Counsel instructed:
B J Matheson
Richmond Chambers
PO Box 1008
Shortland Street
Auckland 1140
E: matheson@richmondchambers.co.nz

1. INTRODUCTION AND SUMMARY

1.1 These submissions are filed by Kāinga Ora – Homes and Communities ("**Kāinga Ora**") in support of the relief sought in its submissions and further submissions on the Proposed Waimakariri District Plan ("**PDP**") and on Variation 1 ("**Variation 1**") to the PDP.

1.2 These submissions relate to Hearing Stream 3, and in particular:

(a) Contaminated Land; and

(b) Natural Hazards.

1.3 These submissions address several specific legal aspects of the matters addressed in the planning evidence filed by Kāinga Ora, and should be considered in conjunction with that evidence.

2. CONTAMINATED LAND

Scope of provision

2.1 We agree with Ms Dale's opinion that while the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health Regulations 2011 applies to the protection of human health, the obligations on a territorial authority under s 31(1)(b)(iia) is broader and relates to adverse effects "on the environment". The meaning of "environment" under the RMA is very broad, and obviously extends beyond human health. The wider application of these provisions is also consistent with Objective 17.2.1 of the Canterbury Regional Policy Statement.

2.2 Accordingly, in our submission, the proposed wording supported by Ms Dale and by the s 42A Report is appropriate from a legal perspective.

Objective relating to the benefits of remediation

2.3 In its submission, Kāinga Ora requested the addition of a new objective, focussing on the benefits of remediation of contaminated land.

2.4 In our opinion, there is no legal impediment to the inclusion of such an objective and to do so would be entirely consistent with broader planning principles, and with s 32, RMA.

2.5 More specifically, we submit as follows:

(a) The sustainable management purpose of the RMA incorporates both an enablement of development, while protecting the environment from the effects of that development.

(b) Plan-making is outcome-led: it starts with the identification of objectives and then identifies policies and methods to achieve those objectives.

(c) Those objectives, and the policies to achieve those objectives, need to focus on all of the components of sustainable management. While objectives can be read together in a horizontally-integrated manner, they do, collectively, need to "cover the field".

(d) While the benefits of remediation beyond simply managing adverse effects might be self-evident, many existing provisions (and the NESCS itself) focus more on managing adverse effects, rather than any corresponding positive effects. This can be problematic, particularly when, as is the case for some contaminated land, the adverse effects were caused by historical actions that pre-date the RMA and where the contamination is already "in the environment" and simply dispersing more broadly. In those cases there are arguably no further adverse effects from discharges (as that term is applied in the RMA context), but there is undoubted benefit from the remediation of land that is contaminated.

(e) As well as the physical benefits from remediation (such as improving groundwater quality, and increasing the range of potential future land uses), there would certainly be positive cultural outcomes arising from the remediation of the whenua.

(f) While an objective might not be directly relevant to more straightforward consent applications, they are obviously relevant in a discretionary application and very relevant (in particular as regards the s 104D(1)(b) threshold test) for non-complying activities. They are also useful statements of position in terms of overall desired outcomes that can help inform the contents of future plan changes, including private plan changes that may involve the large-scale remediation of land.

(g) In terms of s 32, and in particular s 32AA, it is difficult to understand what "cost" might arise from the inclusion of an objective in the form requested by Kāinga Ora. There are, however, considerable benefits of including such a provision, including for the reasons above.

3. NATURAL HAZARDS

3.1 The submissions and evidence for Kāinga Ora on the natural hazards topics focus on whether or not land that is at risk of flooding is identified in the District Plan's planning maps (Section 42A Report's position) or in a separate, non-statutory layer such as a GIS Viewer (the position of Kāinga Ora).

3.2 Because exactly the same issue arose in respect of the Proposed Porirua District Plan, Ms Dale carefully reviewed the planning evidence given in that case and ultimately agreed with and endorsed the evidence given by that planner, Ms Williams. In the interests of succinctness, Ms Dale appended Ms Williams' evidence to her evidence and in so doing she has effectively adopted that reasoning.

3.3 From a legal perspective, the following questions arise:

(a) Is there any fundamental impediment to the use of a non-statutory information layer outside of the District Plan, such as a GIS viewer, that can be updated from time to time without using the Schedule 1 one process?

(b) If not, are there any other safeguards (such as certain provisions) that should, as a matter of good practise, be adopted in order to address questions of "useability" or to avoid natural justice type concerns?

(c) Assuming (a) and (b) are satisfactorily addressed, is there jurisdiction in this case to include the rule (ie was it sufficiently directly raised in the submission by Kāinga Ora)?

(d) Finally, assuming there is jurisdiction, is such a rule the most appropriate provisions in terms of s 32, RMA, and in light of the broader range of matters against which any planning provision should be assessed.

3.4 Now we turn each of the above matters.

Use of non-statutory layers

3.5 The use of non-statutory layers is a lawful approach that has been adopted elsewhere, particularly in the context of information that requires frequent updating (or where the information is somewhat "fluid"). For example, the Auckland Unitary Plan (**AUP**) has the flood mapping shown as a non-statutory layer, also in its GIS Viewer.

3.6 Under the definition of "Floodplain" in the AUP is the following notation:

> Note: The Council holds publicly available information showing the modelled extent of floodplains affecting specific properties in its GIS viewer for the one per cent annual exceedance probability (AEP) rainfall event (the floodplain maps). The floodplain map is indicative only although Council accepts its accuracy with regard to land shown on the floodplain map as being outside the floodplain. A party may provide the Council with a site specific technical report prepared by a suitably qualified and experienced person to establish the extent, depth and flow characteristics of the floodplain. When taking account of impervious areas that would arise from changes in land use enabled by the policies and zonings of the Plan, recognition should be given to any existing or planned flood attenuation works either exiting or planned in an integrated catchment management plan. Council will continually update the floodplain map to reflect the best information available.

3.7 That is essentially the same approach sought to be applied in this case.

3.8 The relative benefits of a non-statutory layer as opposed to a fixed planning map is significantly more pronounced when the resource or risk at issue is less well understood, or is subject to change. In this case, some hazards are sufficiently well understood or certain as to be identified in planning maps, whereas others, and we say flood risk, fits into this category, are not.

3.9 Finally, as Ms Dale points out:

> … the Council's proposed approach to high flood hazards and overland flow paths is consistent with the Kāinga Ora submission as these hazard areas are not proposed to be mapped in the Plan and are only identified via the Interactive Waimakariri GIS viewer and an application for a Flood Assessment Certificate. (Ms Dale, Natural Hazards statement, at [5.4])

Other safeguards

3.10 A primary concern often raised is the lack of natural justice if the flood layer is in a non-statutory layer that can be changed without public involvement or rights of appeal.

3.11 While this is understood and in some circumstances is a valid concern, in the case of a flood alert layer and in the context of this particular rule framework, that concern is more apparent than real. This is because, in this case, the flood risk exists (that risk – and any restriction flowing from it - is not created by the non-statutory layer). The only question is how to alert people to that risk. A legally valid alternative would be simply to state that "areas subject to [an identified flood risk] is required to go through a [certification process]" without identifying how or when those areas might be identified. It would then be up to the plan user to identify whether their property was subject to a certain identified flood risk (ie 1% AEP). Whether or not any particular property was subject to that risk would not be known until that analysis was done, and over time whether or not that risk remained would be subject to change because of other measures undertaken in the catchment to mitigate that risk, or a better understanding of the catchment hydrology.

3.12 It is better, in this case, to direct a plan user to where they might be able to identify where that flood risk might be shown – this provides a simple and cost-effective alternative to a plan user needing to commission their

own expert report identifying the particular flood risk on their property. The identification of this risk on a GIS layer is transparent; it can (and should) be clearly cross referred to in the rules, together with a clear statement that it might be updated from time to time. This will ensure that any purchaser of land would be aware of whether it is (currently) subject to an identified flood risk but also, importantly, that any prospective purchaser is aware that this level of risk might change from time to time as further modelling is done, or other stormwater management/flood mitigation is undertaken in the catchment.

3.13 We also absolutely agree that some form of geographical identification of the area subject to a flood risk is a more efficient and effective planning method than simply recording that the entire district is subject to a flood risk, and requiring every applicant to apply for a Flood Assessment Certificate (Ms Dale, para 53; Mr Willis, para 56).

Jurisdiction in this case

3.14 There is clear jurisdiction for this change to be made. The relief was clearly sought in the submission by Kāinga Ora (refer pp 33-36 of primary submission).

Overall assessment

3.15 Ms Dale explains why, in her opinion, this form of provision is more appropriate, in terms of s 32, RMA, than that proposed in the s 42A Report.

4. WITNESSES

4.1 Kāinga Ora is calling one witness for this hearing stream: Ms Clare Dale, Senior Planner at Novo Group. She will present two statements of evidence, one for each of the listed topics.

5. CONCLUSION

5.1 Kāinga Ora respectfully requests the amendments to the provisions set out in Appendix 1 to each of the statements of evidence of Ms Dale, dated 10 July 2023.

Dated 13 July 2023

Bal Matheson | Aidan Cameron
Counsel for Kāinga Ora